IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29823

ESTATE OF ROBERT T. LYNCH, Deceased

Appellant,

vs.

KEVIN LYNCH,

Appellee.

Appeal from Circuit Court
First Judicial Circuit, Clay County, South Dakota
Honorable Tami Bern, Circuit Court Judge

BRIEF OF APPELLANT

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Notice of Appeal Filed November 9, 2021

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PRELIMINARY STATEMENT

Reference to the record pages as paginated by the Clerk of Court will be referred to as "R" with the appropriate page citation. Reference to the hearing transcripts will be referred to as "HT" with the date of the hearing and appropriate page citation; and the transcripts from the September 28-October 1, 2021, jury trial will be referred to as "TT" with the appropriate page citation. Appellant will be referred to as the Estate and Appellee will be referred to as Kevin Lynch or Defendant.

JURISDICTIONAL STATEMENT

Estate appeals from the Order Denying its Motion for Partial Summary Judgment signed and filed on July 29, 2020 (R 935-36), with Notice of Entry being served on July 30, 2020. (R 937) Estate also appeals from evidentiary rulings made by the Court before and during jury trial, which was held from September 28 through October 1, 2021, the Court's Order Granting Kevin Lynch's Motion for Judgment as a Matter of Law on the Joint Account Claim, as well as error in jury instructions. The final Judgment and Order was signed and filed on October 18, 2021. (R 3878-79) Notice of Entry of Judgment and Order was served on October 25, 2021. (R 3892-93) Estate filed its Notice of Appeal on November 9, 2021. (R 3902-03) This Court has jurisdiction pursuant to SDCL 15-26-3, 7 and 8.

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in ignoring the "bright-line rule" of *Bienash v. Moller* by considering oral extrinsic evidence presented by the attorney-in-fact to deny the estate's motion for partial summary judgment.

Citations:
Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431
Studt v. Black Hills Federal Credit Union, 2015 S.D. 33, 864 N.W.2d 513
Estate of Stoebner v. Huether, 2019 S.D. 58, 935 N.W.2d 262

2. Whether the Trial Court erred by ignoring the "bright-line rule" of *Bienash v. Moller* and its progeny by allowing the Defendant to introduce oral extrinsic evidence at trial to justify his acts of self-dealing when the power of attorney did not authorize self-dealing in clear and unmistakable terms.

   Citations:
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431
   Estate of Stoebner v. Huether, 2019 S.D. 58, 935 N.W.2d 262

3. Whether the Trial Court erred in instructing he jury that, despite the fiduciary duty established by the power of attorney, the jury could determine that a fiduciary relationship between the Defendant and his father did not exist.

   Citations:
   Wyman v. Bruckner, 2018 S.D. 17, 908 N.W.2d 170
   Hein v. Zoss, 2016 S.D. 73, 887 N.W.2d 62
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4. Whether the Trial Court erred in its jury instructions which allowed the jury to consider oral extrinsic evidence contrary to *Bienash v. Moller* as defenses to the Estate's breach of fiduciary duty claims.

   Citations:
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431
   Kaarup v. Schmitz, Kalda & Associates, 436 N.W.2d 845 (S.D. 1989)

5. Whether the Trial Court erred in refusing to instruct the jury that a fiduciary breached his fiduciary duty when he used his position to enrich the value of property that will eventually devolve to him.

   Citations:
   Ward v. Lange, 1996 S.D. 113, 553 N.W.2d 246
   Crosby v. Luehrs, 669 N.W.2d 635 (Neb. 2003)
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431

6. Whether the Trial Court erred in granting Defendant's motion for judgment as a matter of law regarding ownership of a joint checking

account when the Defendant admitted that the joint account was set up for convenience to pay his father's bills.

Citations:
Estate of Card v. Card, 2016 S.D. 4, 874 N.W.2d 86
Roth v. Pier, 309 N.W.2d 815 (S.D. 1981)
Magner v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74

STATEMENT OF THE CASE

This case involves a son's breach of fiduciary duty under a power of attorney he held for his father. The Trial Court refused to follow the bright-line rule adopted in *Bienash v. Moller*, 2006 S.D. 78, ¶¶24 and 27, 721 N.W.2d 431, 437, and its progeny, and permitted the son, Kevin Lynch, to offer oral extrinsic evidence to justify his self-dealing at both the summary judgment stage and at trial.

Robert Lynch died on March 13, 2018. He was survived by three children, Carleen Lynch, LaCarla Annette "Ann" Lynch, and Kevin Lynch. Kevin Lynch became his father's attorney-in-fact under a power of attorney dated December 5, 2007. (R 11-19) Kevin Lynch was also listed by his father on a joint checking account in 2008. (R 193) Robert Lynch went into a nursing home in Vermillion, South Dakota in September 2011. (R 115)

Between 2011 and the date of his father's death, Kevin Lynch liquidated all of his father's CD's, IRA's, and money market accounts. (TT 236-242) He wrote checks to himself on the joint account from his father's funds, totaling $398,000.00. (R 207) Kevin Lynch admitted that the funds in the joint account

belonged to his father before his father's death. (R 123, Kevin Lynch Depo. at 72). Kevin Lynch admitted the checks he wrote to himself were used to pay off his own loans and his own bills and expenses. (R 135-137, Kevin Lynch Depo. at 118-125; TT 165-68) He built two Morton buildings on his own land using his father's funds for a total cost of $106,774.60. (R 225, 2216) He cashed in two CD's belonging to his father, using his power of attorney, in the amount of $44,592.22 and used the funds to buy himself a new pickup. (Ex. 233; R 2211-2215) Also, between 2011 and his father's death he purchased $104,514.00 worth of farm equipment which he would ultimately inherit under his father's will. (R 2277; Ex. 233) Between 2012 and his father's death, Kevin Lynch wrote $143,401.00 in checks from his father's funds to finance a cattle operation from which he received 100% of the income. (R 2485; Ex. 246(c))

On May 22, 2020, the Estate filed a Motion for Partial Summary Judgment. (R 64) The Estate contended it was entitled to partial summary judgment on the $398,000.00 of checks Kevin Lynch had written to himself, the $106,774.60 of his father's funds that Kevin Lynch used to erect two Morton buildings on his own property, and the $44,592.22 in CD's that Kevin Lynch cashed using his power of attorney to purchase a pickup for himself. (R 81-82) The Estate also requested prejudgment interest from the dates of each of the transactions. (R 83)

On May 27, 2020, Kevin Lynch filed his own Motion for Partial Summary Judgment. (R 258) Kevin Lynch's motion was predicated, in part, on his claim to

the approximately $112,000.00 in funds in the joint account that existed at his father's death.

The Court held a hearing on the Motions for Partial Summary Judgment on June 10, 2020. (HT June 10, 2020) The Court orally issued its ruling on July 22, 2020. (R 943) The Court denied both motions by Order dated July 29, 2020. (R 935)

The Court considered oral extrinsic evidence offered by Kevin Lynch to justify his conduct and concluded that there was a genuine issue of fact as to whether Kevin Lynch breached his fiduciary duty to his father. (R 945) The Court also acknowledged that the power of attorney did not expressly authorize self-dealing, other than gifts not in excess of the annual federal gift tax exclusion, and that "it is undisputed that Kevin Lynch made no such gifts to himself pursuant to this provision." (R 948) The Trial Court, however, made the following unusual statement to justify her ruling: "it does not necessarily follow that any act of self-dealing is also a breach of fiduciary duty." (R 948) The Court also denied Kevin Lynch's Motion for Partial Summary Judgment on the joint account claim because of evidence presented that the account was established for convenience so that Kevin Lynch could pay his father's bills. (R 949-50)

On July 27, 2021, the Estate filed its Motions in Limine. (R 1038-1050) One of those Motions in Limine, No. 8, specifically moved to exclude:

> Any evidence, argument, inference, claim, or contention that Robert Lynch orally authorized the transactions in question in this case such as Kevin Lynch's claim that he had discussed them with his father and was authorized to take the money for his own use.

(R 1046) This motion was predicated upon *Bienash*, *supra*, 2006 S.D. 78, 721 N.W.2d 431 and its progeny. (R 1046-48) A pretrial hearing was held on August 25, 2021, at which the Motions in Limine were argued to the Court and during which the Court orally ruled on those motions. (HT August 25, 2021) The Court denied this Motion in Limine holding that oral extrinsic evidence is admissible to determine whether there was a breach of the fiduciary duty. (HT August 25, 2021, p. 22)

At trial, Kevin Lynch was permitted to testify that his father orally agreed to all of the transactions that were the subject of the suit. (TT 530-547) He admits that he and his father never had anything in writing. It was all verbal. (TT 546-47) Interestingly, Kevin Lynch claimed that no one else was ever present to hear the alleged conversations, because he and his father had an agreement not to discuss business in front of anybody.[1] (TT 546)

At the close of the evidence, the Estate moved for Judgment as a Matter of Law on all of its claims. (TT 870-879) The Court denied the Estate's Motion for Judgment as a Matter of Law. (TT 887) Kevin Lynch moved for Judgment as a Matter of Law on the joint checking account claim. (TT 884-886) The Court granted that motion as to the joint checking account in favor of Kevin Lynch. (TT 886)

[1] During the trial, the Court held a hearing and ruled on a hearsay objection that Kevin Lynch was entitled to testify as to oral statements from his father to justify his self-dealing pursuant to SDCL 19-19-804(b)(5). (TT 479-502) The Court issued a written Order after the trial over the Estate's objection. (R 3873-75; R 3876-3877)

The jury returned a verdict in favor of Kevin Lynch on all counts on October 1, 2021. (R 3868-3872)

The Estate has filed this appeal from the Court's Order Denying its Motion for Partial Summary Judgment, along with rulings made before and during trial and from the Final Judgment and Order entered in this case. Kevin Lynch has filed a Notice of Review on an issue regarding a jury instruction concerning his authorization under the power of attorney to make gifts up to the annual gift tax exclusion.

STATEMENT OF FACTS

Robert T. Lynch was a farmer in the Vermillion area. He died on March 13, 2018, at the age of 86. He was survived by three children, Carleen Lynch, LaCarla Annette (Ann) Lynch, and Kevin Lynch.

Under the terms of his Last Will and Testament dated March 1, 2010. (R 338) Robert Lynch left his real estate 51% to Kevin Lynch and 24.5% each to Carleen and Ann Lynch. (R 335) His will indicated that he favored Kevin, because Kevin "stayed home to help him on the farm," and "helped me considerably in my problems in daily living as I have aged." (R 337) His Last Will and Testament also left his farm machinery, farm equipment, grain, farm pickup, farm truck and livestock to his son Kevin Lynch. (R 334) The remainder of his estate including his cash assets, certificates of deposit, savings account, and checking account were left to his three surviving children share and share alike. (R 337)

Robert Lynch's real estate at the time of his death, consisted of a set of farm buildings and acreage, which had previously been his farm home, approximately 583 acres of tillable ground and approximately 90 acres of pasture and grass, all totaling approximately 675 acres. (R 107-08, Kevin Lynch Depo. 8-9) Aside from farm machinery, farm equipment and some cattle, the only other substantial asset left at the time of Robert Lynch's death was a joint checking account containing approximately $112,000.00. Kevin Lynch had liquidated all of Robert Lynch's CD's, money market accounts, and IRA's using his power of attorney.

On December 5, 2007, Robert T. Lynch executed a Power of Attorney, naming Kevin Lynch as his attorney-in-fact. (R 184-192) (Depo. Ex. 13) The Power of Attorney contained general provisions, but contained no specific provision authorizing self-dealing. (R 948) The Power of Attorney contained a gifting provision, which reads as follows:

> 14. Make Gifts. To make gifts of my real or personal property or my interest in such property (including, but not limited to, outright gifts, gifts in trust, gifts to a Qualified State Tuition Payment Plan as described in Section 529 of the Internal Revenue Code of 1986, as from time to time amended, or gifts to a custodian under a uniform gifts or transfers to minors act) to such persons (including my attorney) or institutions, in such amounts or proportions, as my attorney, in his, her, or its sole discretion and judgment, may deem appropriate for tax or other reasons; provided, however, the total value of gifts to any one donee in any calendar year shall not exceed (i) the amount specified for the federal gift tax annual exclusion (including such additional amount of any gift tax annual exclusion attributable to the consent of my spouse under Section 2513 of the Internal Revenue Code of 1986, as from time to time amended, or (ii) the amount excluded from the gift tax under the provisions of Section 2503(e) of the Internal Revenue Code of

> 1986, as from time to time amended, relating to the payment of educational and medical expenses.

(R 187) Kevin Lynch admitted he never made any gifts using this provision. (R 120-21, Kevin Lynch Depo. 60-61; TT 128-29)

Robert Lynch was admitted to a nursing home in Vermillion, South Dakota on September 5, 2011. (R 2487; Ex. 247) Prior to his admission to the nursing home he was evaluated by his physician on September 2, 2011, who observed:

> He is really reaching a point where he's just not able to care for himself and is needing a great deal of assistance and is reaching a time where his family realizes that it is time for him to consider a nursing home and Robert is also beginning to realize that he just simply is unable to care for himself.

(R 231)

Robert Lynch had set up a joint checking account at Bank of the West in Vermillion, South Dakota in 2008. (R 193-198) The account listed Robert Lynch and Kevin Lynch on it. Funds in Robert Lynch's checking account belonged to Robert Lynch before his death and came from assets belonging to Robert Lynch. (R 123, Kevin Lynch Depo. 72; TT 137)[2] The joint account was set up for

[2] Kevin Lynch wrote two checks from his own account to the joint account. He wrote a $10,000.00 check in December 2016; and a $2,000.00 in February 2018. (R 143-44, Kevin Lynch Depo. 151-53) He deposited these funds because the funds in the joint account were depleted and these two deposits were made to make sure there were sufficient funds to pay his father's monthly nursing home bill. *Id.* The source of the funds Kevin Lynch used to make these deposits was money he had previously taken out of the joint account for "compensation." (R 144, Kevin Lynch Depo. 153; TT 183-186; Ex. 236 and 237)

convenience to make sure Robert's bills were paid. (R 121, Kevin Lynch Depo. 64; TT 134-36)

The Will named Ann Lynch and Kevin Lynch as Co-Personal Representatives of the Estate of Robert T. Lynch. (R 237) Following her father's death, Ann Lynch inquired into her father's financial affairs and was able to obtain copies of bank statements and cancelled checks from her father's checking account from some time after December of 2010 until the time of his death in 2018. (R 88)

Ann Lynch was also able to obtain from her brother, Kevin Lynch, his own bank statements from 2011 until approximately March of 2018. (R 89)

Ann Lynch learned for the first time after her father's death that her father's farm ground had been leased to the Solomon family for cash rent beginning in 2012 through the time of his death. (R 89)

Ann Lynch further learned for the first time that her brother, Kevin Lynch, as Power of Attorney for Robert T. Lynch, had cashed her father's CD's, IRA's, and money market accounts after Robert Lynch went into the nursing home. (R 89, 199-206, Depo. Ex. 26)

In addition, Ann Lynch learned based on bank statements and checks, from and after 2011, that Kevin Lynch had issued checks from his father's funds in the joint account and signed checks to himself totaling $398,000.00, while he was acting as his father's Power of Attorney. (R 207-219, Depo. Ex. 30) Those checks and the date of issue are listed as follows:

Date of check	Amount	Check Payable To	Check #	Check Signed By	Bates Stamp
3/14/11	$15,000.00	Kevin Lynch	2229	Kevin	SLO 404
5/1/12	$80,000.00	Kevin Lynch	2293	Kevin	SLO 349
8/13/12	$50,000.00	Kevin Lynch	2372	Kevin	SLO 365
3/8/13	$60,000.00	Kevin J. Lynch	2433	Kevin	SLO 276
2/24/14	$3,000.00	Kevin Lynch	2520	Kevin	SLO 199
2/28/14	$30,000.00	Kevin J. Lynch	2525	Kevin	SLO 199
6/27/14	$10,000.00	Kevin J. Lynch	2557	Kevin	SLO 203
5/28/15	$20,000.00	Kevin J. Lynch	2634	Kevin	SLO 127
3/21/16	$30,000.00	Kevin J. Lynch	2682	Kevin	SLO 65
6/10/16	$40,000.00	Kevin J. Lynch	2699	Kevin	SLO 77
2/28/17	$30,000.00	Kevin J. Lynch	2748	Kevin	SLO 24
2/27/18	$30,000.00	Kevin Lynch	2812	Kevin	SLO 6
TOTAL	$398,000.00				

(R 207)

Kevin Lynch, while acting as his father's Power of Attorney, issued and signed checks from his father's checking account for the construction of two Morton buildings on land owned by Kevin Lynch, the total cost of the Morton buildings amounted to $106,774.60. (R 225-230, Kevin Lynch Depo. 130-33; Depo. Ex. 32; R 138) Those checks and the dates of issue are as follows:

Date	Amount	Payable to	Signed by	Check #	Bates Stamp
12/13/11	$ 1,209.52	Midwest Ready Mix	Kevin	2346	SLO 334
10/1/12	$ 29,609.00	Morton Building	Kevin	2392	SLO 373
10/29/12	$ 29,609.00	Morton Buildings, Inc.	Kevin	2397	SLO 378
12/28/12	$ 39,479.00	Morton Buildings	Kevin	2417	SLO 261
11/3/13	$ 6,868.10	M & S Irrigation and Trenching	Kevin	2494	SLO 323
TOTAL	2 $ 106,774.6				

(R 225)

Kevin Lynch, using his father's Power of Attorney, cashed in two CD's from CorTrust Bank belonging to Robert Lynch in the amount of $44,592.22,

deposited the funds into his own personal checking account and then shortly thereafter wrote a check on those funds for the purchase of his own personal pickup. (R 137; R 220-224, Depo. Ex. 31; Kevin Lynch Depo. 126-129) These transactions occurred in September of 2012. *Id.*

Kevin Lynch also purchased $104,514.20 worth of farm equipment and machinery from his father's funds between 2011 and his father's death. (R 2227-2240; Ex. 235) This, despite his father having quit farming in 1996 and having gone into the nursing home in 2011.

Further, the evidence established that Kevin Lynch accessed his father's safe deposit box after his father had his will executed on March 1, 2010. (TT 143) He removed all of the contents from the safe deposit box, took them to his house and went through them. (TT 145) Kevin Lynch never produced his father's original will and claims he did not know what happened to it. (TT 146) He told his sister before the reading of the will that he had seen his father's will. (TT 748) The Estate's attorney, Michael McGill, acknowledged the he used a duplicate original will from his office for probate, and that the original will had not been produced. (TT 632)

Under the terms of the will, Kevin Lynch received all of the farm machinery and equipment that he had purchased with his father's funds.

After Robert Lynch went into the nursing home in September 2011, Kevin Lynch claimed that he had an oral agreement with his father whereby he received all of the proceeds in the cattle operation and that his father orally agreed to finance the operation with his own funds. (TT 542-43) His father owned 20 cows

and Kevin Lynch owned 10 cows. (TT 197) The cattle were run on his father's land. *Id.* An expert, accountant Michael Snyder, testified concerning his evaluation of the cattle operation and concluded that Kevin Lynch received 100% of the income and Robert Lynch's funds in the amount of $143,401.00 were used to pay expenses in the cattle operation from 2012 until Robert's death. (Ex. 246; TT 411-12, 437-38)

In addition to those items for which the Estate sought summary judgment, at trial the Estate also sought the recovery of $104,514.20 in money that Kevin Lynch spent to purchase equipment allegedly for his father, when Kevin Lynch was to receive the equipment under the terms of his father's will. (Ex. 235; R 2227) The Estate also asserted a claim at trial for $143,401.00 in funds that Kevin Lynch took of his father's money from the joint account to finance a cattle operation from which Kevin Lynch received 100% of the proceeds. (Ex. 246; R 2485; TT 411-412)

While Kevin Lynch contends that he had his father's "oral agreement" or "oral approval" to justify his acts of self-dealing, a serious question exists as to his father's mental capacity. After Robert Lynch was admitted to the nursing home in September of 2011, the nursing home records reveal that he suffered from moderate to severe cognitive impairment. (Ex. 247, pp. 73, 89, 101, 111, 125, 139, 147, 154, 158, 163, 176, 185, 191, 197, 205, 212, 220, 229, 242, 248, 274, 287, 298, 304, 311) On November 26, 2011, a CNA reported that she "had to help him get dressed, because he just didn't know what he needed to do." (TT 2011; Ex. 247, p. 80) On February 27, 2012, the notes reflect he "cannot read the

menu board at the table due to non-understanding it and needs staff to tell him the menu options when taking his order." (TT 2013; Ex. 247, p. 88) On May 29, 2012, "resident was unable to tell this recorder who he was or where he was and his date of birth." (TT 2014; Ex. 247, p. 102) Robert Lynch suffered dementia which was progressing as noted by his doctor on August 17, 2012. (TT 2015; Ex. 247, p. 117)

The parties stipulated that Kevin Lynch would resign as Co-Personal Representative, leaving Ann Lynch as the sole Personal Representative of the Estate of Robert T. Lynch on approximately August 1, 2018. Thereafter, in August 2018, the Estate of Robert Lynch commenced a separate lawsuit against Kevin Lynch, asserting claims for fiduciary fraud, breach of fiduciary duty, conversion, elder exploitation, and seeking compensatory, prejudgment interest, and punitive damages. (R 2-10)

STANDARD OF REVIEW

This Court reviews the Circuit Court's ruling on summary judgment under the *de novo* standard of review. *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶16, 935 N.W.2d 262, 267; *Wyman v. Bruckner*, 2018 S.D. 17, ¶9, 908 N.W.2d 170, 174. When conducting a *de novo* review, this Court gives no deference to the Circuit Court's decision. *Estate of Stoebner, supra*, ¶16, 935 N.W.2d at 267; *Oxton v. Rudland*, 2017 S.D. 35, ¶12, 897 N.W.2d 356, 360.

As this Court indicated in the *Estate of Stoebner*: "Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the

law was correctly applied." ¶16, 935 N.W.2d at 267 (quoting *Brandt v. County of Pennington*, 2013 S.D. 22, ¶7, 827 N.W.2d 871, 874). "Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one." *Wyman, supra*, ¶9, 908 N.W.2d at 174 (quoting *Estate of Lien v. Pete Lien & Sons, Inc.*, 2007 S.D. 100, ¶10, 740 N.W.2d 115, 119).

This Court reviews the Trial Court's decision to grant or deny a motion for judgment as a matter of law *de novo*. *Magner v. Brinkman*, 2016 S.D. 50, ¶14, 883 N.W.2d 74, 81. Under SDCL 15-6-50(a) the question is whether there is "no legally sufficient evidentiary basis for a reasonable jury to find" for the opponent of the motion.

LEGAL ARGUMENT

1. Whether the Trial Court erred in ignoring the "bright-line rule" of *Bienash v. Moller* by considering oral extrinsic evidence presented by the attorney-in-fact to deny the estate's motion for partial summary judgment.

In *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431, this Court affirmed the Trial Court's ruling that the Mollers had breached their fiduciary duty to their principal as a matter of law under a power of attorney by changing the principal's POD designation of his bank accounts to benefit themselves. *Id.* at ¶¶12, 27, 721 N.W.2d at 434, 437. In doing so, this Court adopted "a bright-line rule that no oral extrinsic evidence will be admitted to raise a factual issue to defeat summary judgment." *Id.* at ¶24, 721 N.W.2d at 437 (emphasis in original).

This Court held "that an attorney-in-fact may not self-deal unless the power of attorney from which his or her authority is derived expressly provides in clear and unmistakable language authorization for self-dealing acts." *Id.* at ¶27, 721 N.W.2d at 437. In its rationale for its ruling, this Court held that a power of attorney must be strictly construed and strictly pursued. *Id.* at ¶13, 721 N.W.2d at 435. "Only those powers specified in the document are granted to the attorney-in-fact." *Id.* A "fiduciary must act with utmost good faith and avoid any act of self-dealing[.]". *Id.* at ¶14, 721 N.W.2d at 435 (quoting *Estate of Stevenson*, 2000 S.D. 24, ¶9, 605 N.W.2d 818, 821). "In order for self-dealing to be authorized the instrument creating the fiduciary duty must provide 'clear and unmistakable language' to authorize self-dealing acts. Thus, if the power to self-deal is not specifically articulated in the power of attorney that power does not exist." *Id.*

In discussing the rationale for a bright-line rule prohibiting the use of oral extrinsic evidence to create a fact question on whether a fiduciary duty was breached, the Court quoted with approval from *Kunewa v. Joshua*, 83 HI 65, 924 P.2d 559, 565 (1996), as follows:

> When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney-of which outright transfers for less than value to the attorney-in-fact [himself or] herself are the most obvious-the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen.

Bienash supra at ¶21, 721 N.W.2d at 436.

In this case, the Trial Court acknowledged in its ruling on the Motion for Partial Summary Judgment, that the power of attorney did "not expressly

authorize self-dealing." (R 948) The Court noted that it authorized a gift to the attorney-in-fact up to the federal annual gift tax exclusion, but pointed out that "it is undisputed that Kevin Lynch made no such gifts to himself pursuant to that provision." (R 948; R 121,Kevin Lynch Depo. 60-61; TT 128-29) Thus, to the extent that there is a claim in this case that the power of attorney authorized the kind of self-dealing that Kevin Lynch engaged in here, there is no support in the power of attorney for that claim.

This Court has consistently adhered to the bright-line rule it had adopted in *Bienash*. *See, Studt v. Black Hills Federal Credit Union*, 2015 S.D. 33, 864 N.W.2d 513, 517. *Wyman, supra,* at ¶18, 908 N.W.2d at 176 (holding that transfers made during the principal's lifetime from a joint account to herself and her family violated the agent's fiduciary duty.) *Estate of Stoebner, supra,*¶23, 935 N.W.2d at 268-69 ("regardless of Huether's intentions and even if Stoebner approved of the transaction, there is no admissible written evidence supporting Huether's ability to self-deal."); *Smith Angus Ranch v. Hurst*, 2021 S.D. 40, ¶22, 962 N.W.2d 626, 631 (acknowledging the bright-line rule from *Bienash* as applied to acts of self-dealing by an attorney-in-fact under a written power of attorney).

Kevin Lynch sought to distinguish this Court's decisions applying the bright-line rule prohibiting oral extrinsic evidence to justify his acts of self-dealing, by relying on *Hein v. Zoss*, 2016 S.D. 73, 887 N.W.2d 62 (2016). The Trial Court apparently bought into that argument, but went far beyond what this Court held was permissible in *Hein*. The Trial Court not only permitted Kevin

Lynch to testify about his prior farming relationship with his father, but allowed him to testify that his father orally agreed and approved of every one of his self-dealing transactions.

In *Hein*, this Court noted that the order on a motion in limine in that case precluding oral extrinsic evidence under *Bienash*, appropriately excluded evidence that Zoss's mother intended for him to self-deal. *Hein, supra,* ¶11, 887 N.W.2d at 66. This Court, however, ruled that with respect to the claim that Mr. Zoss breached his fiduciary duty by not paying his mother rent, Mr. Zoss should have been permitted to explain that for many years prior to his mother's death and prior to the execution of the power of attorney he and his brothers farmed his mother's land rent free. *Id.* at ¶13, 887 N.W.2d at 67.

That is not remotely close to what happened in this case. In this case, Kevin Lynch testified that he farmed with his father Robert Lynch from some time in the 1970's on a partnership basis with his father until his father retired in 1995. (R 112-113; Kevin Lynch Depo. 25-30; TT 103) From 1996 until the end of 2011, Kevin Lynch rented his father's farmland as a tenant on a 60/40 crop share basis. (R 112-113; Kevin Lynch Depo. 28-29; TT 104-05) From 2012 until his father's death the farmland was rented to the Solomons on a cash basis. (TT 152-54; Ex. 241-244)

The power of attorney that is the subject of this case was dated December 5, 2007. All of the evidence that Kevin Lynch offered at trial and used to avoid summary judgment was evidence of alleged oral discussions that he had with his father beginning in late 2011 and continuing thereafter. He asserts that his father

orally agreed to every one of his transactions that are the subject of this lawsuit. This is not evidence of a course of conduct prior to the power of attorney being executed such as existed in *Zoss* and which Mr. Zoss sought to introduce and explain to the jury to justify why he never paid his mother rent. The evidence that the Court considered at the summary judgment stage and that Kevin Lynch was allowed to present at trial was "oral extrinsic evidence" barred by the bright-line rule established by this Court in 2006 in *Bienash* and adhered to consistently by this Court up to the present.

Kevin Lynch claimed that some of the funds that he took was for his compensation to manage his father's property, based on an oral agreement with his father in 2011. (R 121, 136; Kevin Lynch Depo. 102, 124; TT 536-541; TT 397; TT 306-314) While the power of attorney authorized him to manage and exercise in all respects general control and supervision over his father's property (R 185) the power of attorney specifically provided that the attorney-in-fact "shall serve without bond and without compensation." (R 190) (emphasis added). No written authorization existed for this "compensation." Furthermore, Kevin Lynch never declared any of the funds that he took as income on his federal income tax returns, before his father's death. (Ex. 240; R146, Kevin Lynch Depo. 162; TT 158-59)[3]

[3] It is significant to note Robert Lynch never saw any of his bank statements or cancelled checks after approximately 2010. (R 122, Kevin Lynch Depo. 67) Robert Lynch never was involved in the preparation of his own tax returns from even earlier than that. (R 116, Kevin Lynch Depo. 41) Kevin Lynch submitted all the tax information for both himself and his father to his accountant, now deceased, by a longhand sheet of paper for each of them. No backup documents,

The Trial Court fundamentally misunderstood this Court's precedence in *Bienash*, *Studt*, *Wyman*, and *Stoebner*. The Trial Court essentially held that oral extrinsic evidence was admissible to determine whether there was a breach of a fiduciary duty. Under this approach, oral extrinsic evidence would always be admissible to create a fact question. The Trial Court, in effect, ruled contrary to this Court's unbroken line of precedence since 2006. The bright-line rule established in *Bienash* holds "that no oral extrinsic evidence will be admitted to raise a factual issue." *Bienash, supra*, ¶24, 721 N.W.2d at 437. In other words, this Court concluded that such evidence cannot be used to defeat a motion for summary judgment.

The Estate should have received summary judgment on its claims for the $398,000.00 in funds taken by Kevin Lynch, $106,774.60 for the Morton buildings and the $44,592.00 for the CD's that Kevin Lynch cashed to purchase a pickup for himself, together with prejudgment interest. No oral extrinsic evidence should have been permitted to create a fact question to defeat that motion for summary judgment. This Court should direct entry of judgment in the Estate's favor on those sums, with prejudgment interest from the date of each expenditure.

2. Whether the Trial Court erred by ignoring the "bright-line rule" of *Bienash v. Moller* and its progeny by allowing the Defendant to introduce oral extrinsic evidence at trial to justify his acts of self-dealing when the power of attorney did not authorize self-dealing in clear and unmistakable terms.

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such as cancelled checks or bank statements were ever submitted to the accountant. (R 116, Kevin Lynch Depo. 212-213; TT 107-109)

This Court's decisions make clear that the bright-line rule in *Bienash* and followed in *Studt, Wyman,* and *Stoebner*, was adopted by this Court to prevent the attorney-in-fact from justifying self-dealing by offering oral extrinsic evidence to raise a fact question to defeat summary judgment. The bright-line rule is a rule of substantive law. In that sense, it is akin to parol evidence. Parol evidence is a rule of substantive law. *Auto-Owners Ins. Co. v. Hansen Housing, Inc.*, 2000 S.D. 13, ¶14, 604 N.W.2d 504, 510.

In this case, the Estate filed a Motion in Limine to exclude any oral extrinsic evidence under *Bienash* and its progeny. (R 1046-1048) The Court denied that Motion in Limine, thus preserving the issue without the necessity of objection at trial. (R 1558) South Dakota Rule of Evidence, SDCL 19-19-103(b), provides:

> Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

Liebig v. Kirchoff, 2014 S.D. 53, ¶19-20, 851 N.W.2d 743, 749; *State v. Johnson*, 2009 S.D. 67, ¶14, 771 N.W.2d 360, 366.

Nonetheless, the Estate consistently objected throughout the trial to any oral extrinsic evidence and requested continuing objections to those lines of questioning. (TT 281-82, 285, 321-22, 324, 351, 392, 396, 500, 530) The Estate moved for judgment as a matter of law on all of its claims against Kevin Lynch at the close of the evidence. (TT 870-879) The Trial Court denied the Estate's motion. (TT 887)

Here, Kevin Lynch engaged in impermissible self-dealing with his father's funds from 2011 until his father's death on March 13, 2018. He admitted at trial that when he was dealing with his father's property he was acting as his father's power of attorney. (TT 124) He admitted he was acting as his father's power of attorney when he cashed in his father's CD's, IRA's and money market accounts. (TT 125) Most importantly he admitted as follows:

> Q: When you disbursed money from his checking account you were acting as his power of attorney, correct?
>
> A: Correct.

(TT 125) The power of attorney contained no provision authorizing the self-dealing in which he had engaged. (TT 122) He had no written documentation of any kind indicating that his father authorized him to take money out of the joint account. (TT 558) His father could have actually signed the checks, but that never happened. *Id.* Instead, Kevin Lynch sought to justify his self-dealing by claiming that his father orally approved or authorized it. (TT 530-47)

Oral extrinsic evidence was improperly admitted at trial. This evidence was prejudicial to the Estate and affected "a substantial right" of the Estate. SDCL 19-19-103(a). As such, it constituted error. The Estate requests that judgment be reversed in this case and remanded for further proceedings.

3. Whether the Trial Court erred in instructing he jury that, despite the fiduciary duty established by the power of attorney, the jury could determine that a fiduciary relationship between the Defendant and his father did not exist.

The Trial Court compounded its error in allowing oral extrinsic evidence contrary to *Bienash, supra* and its progeny, by instructing the jury that it could find that a fiduciary relationship did not even exist between Kevin Lynch and his father with respect to certain acts.

The Court instructed the jury as follows:

Instruction No. 15

> A fiduciary is defined as a person who is required to act for the benefit of another person on all matters within the scope of their relationship. When a fiduciary relationship exists, the party who owes this legal duty to another is called a fiduciary, and the legal duty the fiduciary owes is called a fiduciary duty.
>
> The court has determined as a matter of law that the defendant was acting as a fiduciary for Robert Lynch by virtue of the power of attorney. The power of attorney document defines the scope of the fiduciary relationship you are directed to accept as having been proved.
>
> For any act outside of the scope of the power of attorney, you must determine whether a further fiduciary relationship exists. To establish a fiduciary relationship for acts outside of the power of attorney, the plaintiff must prove:
>
> (1) That Robert Lynch placed faith, confidence, and trust in the defendant;
> (2) That Robert Lynch was in a position of inequality, dependence, or weakness, or possessed a lack of knowledge; and
> (3) That the defendant exercised dominion, control, or influence over Robert Lynch's affairs.
>
> If you find that all of these elements have been established, then the defendant owed Robert Lynch a fiduciary duty for any act outside of the scope of the power of attorney.

(R 3840, Instruction No. 15) (emphasis added) The Estate properly objected to this instruction. (TT 891-92)

This Court generally reviews the wording of jury instructions based on an abuse of discretion standard, but "no court has discretion to give incorrect, misleading, conflicting, or confusing instructions." *Papke v. Harbert*, 2007 S.D. 87, ¶13, 738 N.W.2d 510, 515. "Accordingly, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable *de novo.*" *Id.*

Kevin Lynch admitted that all of his father's funds he disbursed from the joint account during Robert Lynch's lifetime was done pursuant to the power of attorney. (TT 125) He claimed that the oral compensation agreement he had with his father in 2011, justified the checks he wrote to himself from his father's funds. (TT 537-38) He claimed at trial that the compensation he received from his father was something separate from his duties under the power of attorney. (TT 395) Instruction. No. 15 suggested to the jury with respect to the claims in this lawsuit, that Kevin Lynch may have been acting outside the scope of the authority under the power of attorney and, therefore, the jury would have to determine whether a fiduciary relationship existed with respect to such actions. (R 3840) This is a clear error of law.

A similar argument was raised in *Wyman, supra,* ¶13, 908 N.W.2d at 175. There, Bruckner argued that checks she wrote to herself and her family from the joint account were not written pursuant to the power of attorney. This Court held that "the transfers made during Morris's lifetime violated Bruckner's fiduciary duties irrespective of her status as a joint account owner[.]". *Id.* at ¶18, 908 N.W.2d at 176. This Court held that Bruckner's transfers to herself and her

family were impermissible self-dealing and involved Morris's property during her lifetime and directly benefited Bruckner. *Id.* at ¶24, 908 N.W.2d at 177. This Court concluded that Bruckner breached her fiduciary duty as a matter of law in transferring money from the joint account. *Id.* "[I]n South Dakota, as a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Hein, supra,* ¶8, 887 N.W.2d at 65 (quoting *Estate of Duebendorfer*, 2006 S.D. 79, ¶26, 721 N.W.2d 438, 445). It was clear error for the Court to give Instruction No. 15, which permitted the jury to determine that a fiduciary relationship did not exist between Kevin Lynch and his father. Furthermore, the "compensation agreement" asserted by Kevin Lynch is based solely on Kevin Lynch's word, - oral extrinsic evidence that is inadmissible under *Bienash* and its progeny.

Instruction No. 15 was erroneous and prejudicial, because in all probability it produced some effect on the jury and was harmful to the substantial rights of the Estate. *Papke, supra,* ¶13, 738 N.W.2d at 515.

4. Whether the Trial Court erred in its jury instructions which allowed the jury to consider oral extrinsic evidence contrary to *Bienash v. Moller* as defenses to the Estate's breach of fiduciary duty claims

The Court gave numerous instructions predicated on the oral extrinsic evidence it admitted at trial. The Court instructed the jury that Robert Lynch's consent, release or ratification of the transactions may bar the Estate's claims. (R 3848, Instruction No. 23) The Court also instructed the jury on the defense of

quasi-estoppel (R 3856; Instruction No. 30)[4] and estoppel based on "an oral agreement between Robert Lynch and Defendant[.]" (R 3855, Instruction No. 29) The Court also permitted a defense of recoupment, (R 3857-58, Instruction No. 31) under the theory that Kevin Lynch was entitled to recover his personal expenses that he claims he incurred in taking care of his father's property. Proper objections were made to these instructions by the Estate. (TT 895-899) In essence, the Court permitted Kevin Lynch to use the oral extrinsic evidence (the alleged oral agreements with his father) to serve as legal defenses to the Estate's claims. [5]

[4] With respect to the quasi-estoppel instruction, the Estate objected to that instruction additionally on the ground that under *Bailey v. Duling*, 2013 S.D. 15, ¶33, 827 N.W.2d 351, 363, there was never any record of any court or agency that adopted the position, and the instruction was, therefore, improper. (TT 899)

[5] Kevin Lynch asserted the defense of set-off. He was allowed to recast this as a defense of recoupment. In essence, Kevin Lynch was permitted to argue that if he was found liable to the Estate, he should be permitted to recoup or set-off against the Estate's recovery, any expenses he incurred or services he rendered to zero out the Estate's claims. (TT 509-510) To that end he offered, over objection, (TT 452-53, 454-55, 461, 463, 465) his own expenses for the cattle operation, (R 3005; Ex. 417B), water for the cattle operation (R 3254; Ex. 422), his own fuel expenses (R 3329; Ex. 423), his own vehicle maintenance expenses (R 3520; Ex. 427), and miscellaneous farm expenses. (R 3712; Ex. 428) Instruction 31 allowed Kevin Lynch to recoup these "expenses" as a set-off of any recovery to the Estate under a *quantum meruit* theory. The Estate properly objected to the giving of this instruction on the grounds that there was no benefit received by Robert Lynch and that this was simply a back door attempt to get around the bright-line rule of *Bienash.* (TT 899) Furthermore, the Estate pointed out that the "recoupment" claim did not arise out of the same transaction as the Estate's claim and recoupment, therefore, did not apply. (TT 511-13) *See, Hoaas v. Griffiths*, 2006 S.D. 27, ¶22, n.1, 714 N.W.2d 61, 68 n.1; *In Re Peterson Distributing, Inc.*, 82 F.3d 956, 959-60 (10th Cir. 1996).

"The Trial Court should present only those instructions which are supported by competent evidence in the record." *Kaarup v. Schmitz, Kalda & Associates,* 436 N.W.2d 845, 849 (S.D. 1989) (emphasis added). Erroneously admitted evidence cannot be considered "competent" evidence to support a jury instruction. See *Weisgram v. Marley Co.,* 528 U.S. 440, 454, 120 S.Ct. 1011, 1020 (2000)(holding that inadmissible evidence does not constitute legally sufficient evidence under Rule 50). Erroneous instructions are prejudicial when in all probability they produce some effect upon the verdict and were harmful to the substantial rights of a party. *Papke, supra,* ¶13, 738 N.W.2d at 515. Moreover, incorrect, misleading, conflicting, or confusing jury instructions are improper. *Id.*

Instructions 23, 29, 30, and 31 are incorrect, confusing and misleading, but more importantly, all of the defenses (consent, release, ratification, and estoppel) are based upon the oral extrinsic evidence which the Trial Court improperly admitted under *Bienash* and its progeny.

If the bright-line rule of *Bienash* precludes oral extrinsic evidence to create a fact question on a summary judgment motion, it defies logic to suggest that oral extrinsic evidence may be introduced to serve as defenses to a claim for breach of fiduciary duty. After all, whether the evidence is offered on the elements of the claim or as a defense to the claim, the result should be the same. Oral extrinsic evidence should not have been permitted to negate the elements of the claim or to create a defense to the claim.

Instructions 23, 29, 30 and 31 being predicated on inadmissible oral extrinsic evidence were not supported by "competent" evidence. *Kaarup, supra*, 436 N.W.2d at 849. In all probability they produced some effect on the verdict and were, therefore, prejudicial. *Papke, supra*, ¶13, 738 N.W.2d at 515. The giving of these instructions was error.

5. Whether the Trial Court erred in refusing to instruct the jury that a fiduciary breached his fiduciary duty when he used his position to enrich the value of property that will eventually devolve to him.

The Estate proposed a jury instruction, proposed Jury Instruction No. 31, which read as follows:

> A fiduciary breaches his fiduciary duty when he uses his position by enriching the value of property that would eventually devolve to him.

(R 1444, Plaintiff's Proposed Instruction No. 31) (TT 905). The Court denied the giving of that instruction. (TT 906)

While serving as attorney-in-fact for his father, Kevin Lynch purchased $104,514.20 in equipment and machinery beginning in 2011 and before his father's death. Under the terms of his father's will, Kevin stood to inherit all of his father's farm machinery and equipment. Kevin Lynch denied that he saw his father's will before its reading, yet, he admitted to his sister Ann Lynch before the reading of the will that he <u>had</u> seen the will. (TT 748-50) Furthermore, he had access to and removed all of the contents of his father's safe deposit box shortly after his father executed his will in March 2010. The original will never surfaced and Mike McGill, then attorney for the Estate used his duplicate original to probate the will. Thus, a fair inference exists that Kevin Lynch knew the contents

of his father's will and was able to liquidate Robert Lynch's CD's, IRA's, and money market accounts along with his other cash assets to purchase things that would end up on Kevin Lynch's side of the ledger under the will. Interestingly enough, the only significant cash asset that remained on Robert Lynch's death was approximately $112,000.00 in the joint checking account. All of the CD's and savings accounts that were referred to in the residuary clause to be shared equally between the three children were gone. (Ex. 202; R 1668; TT 241-42)

In *Ward v. Lange*, 1996 S.D. 113, ¶3, 553 N.W.2d 246, 248, the Langes, two brothers, entered into a transaction whereby they purchased irrigation equipment on a portion of the land for which Walter O'Keefe held a life estate. Mr. O'Keefe was to receive $10.00 an acre in cash rent which he continued to receive after the irrigation equipment was installed, but the Lange's collected $54,870.00 in net profit due to the increased rentals for the irrigated land and used those funds to pay the loan to purchase the irrigation equipment. *Id.* at ¶3, 553 N.W.2d at 248. This Court held that the Lange's breached their fiduciary duty to Mr. O'Keefe by managing the life estate of their uncle so that he got the same rent he was previously receiving but using the increased rental payments to pay off their investment, "thus enriching the value of property that would eventually devolve to them." *Id.* at ¶14, 553 N.W.2d at 250.

That authority set forth in *Ward, supra,* was cited to the Trial Court in connection with the Motion for Partial Summary Judgment filed by the Estate. In its ruling denying the Motion for Partial Summary Judgment, the Trial Court found *Ward* persuasive. (R 951) Yet, in settling the jury instructions, the Estate

proposed an instruction based on the language from *Ward* and the Trial Court, without discussion, denied it. (TT 905-06)

In this case, Kevin Lynch used his position as a fiduciary to his father to feather his own nest at the expense of his sisters. Similar to *Ward*, in *Crosby v. Luehrs*, 669 N.W.2d 635, 644-45, 648-49 (Neb. 2003), a case cited with approval by this Court in *Bienash*, the Nebraska Supreme Court ruled that an attorney-in-fact engaged in impermissible self-dealing when he transferred funds out of POD account because the ultimate effect was to increase his inheritance. Proposed Jury Instruction No. 31 was a correct statement of the law and should have been given.

It matters not that Kevin Lynch's purchase of farm machinery and equipment did not constitute an immediate transfer of property to himself, when the actual transfer occurred at the time of Robert Lynch's death by operation of his will. In *Bienash*, *supra*, ¶17, 721 N.W.2d at 435, the Mollers, acting under a power of attorney, changed the POD beneficiaries on a number of Mr. Duebendorfer's CD's to themselves. Although the Mollers had to wait for the death of Mr. Duebendorfer to receive the money, this Court held the change of POD designation on the CD's to themselves, was a breach of the Mollers' fiduciary duty as a matter of law. *Id.* at ¶12, 721 N.W.2d at 435.

The Trial Court erred as a matter of law in failing to give Estate's proposed Instruction No. 31.

6. Whether the Trial Court erred in granting Defendant's motion for judgment as a matter of law regarding ownership of a joint checking account when the Defendant admitted that the joint account was set up for convenience to pay his father's bill.

Kevin Lynch asserted a counterclaim for conversion based on the fact that he and his sister Ann agreed that $110,000.00 in a joint account should be transferred to an estate checking account to pay bills after Robert Lynch's death. (TT 525) Kevin Lynch later contended that these funds belonged to him under the theory that as a joint account holder he had a right of survivorship. (TT 527-28) The Estate claimed that the joint account was set up for convenience so that Kevin Lynch could pay his father's bills. (TT 134-36)

Robert Lynch's checking account at Bank of the West in Vermillion was originally a joint account with his wife. (TT 518) When his wife died in 1999, it became his sole checking account. *Id.* On December 5, 2007, Robert Lynch executed his Durable Power of Attorney naming Kevin Lynch as his attorney-in-fact. In February 2008, Robert Lynch executed documents at Bank of the West listing Kevin Lynch as power of attorney on three accounts including his checking account. (Ex. 204, 25) In May 2008, Robert Lynch changed the checking account to a joint account with Kevin Lynch. (Ex. 204, 25) The bank employee who completed the paperwork and had both Robert and Kevin Lynch sign the signature cards and documents, had no specific recollection of these transactions. (TT 856) She was permitted to testify as to her usual practice in setting up such accounts. *Id.* She also testified she was not privy to any conversations between Robert and Kevin Lynch as to the reason for the joint account being set up. (TT 857)

In his deposition and at trial, Kevin Lynch was provided with the bank documents for the transactions in February and May, 2008. (Ex. 204, Ex. 25) The first page of those documents was the joint account signature card listing Kevin Lynch as a joint account holder with rights of survivorship. *Id.* In his deposition and at trial, Kevin Lynch admitted that the joint account was set up for convenience so that he could pay his father's bills. (TT 134-36)

When Robert Lynch died on March 13, 2018, the joint checking account had $112,296.13 in it. (Ex. 205, R 1679) The joint account had been nearly depleted in February, when Kevin Lynch added $2,000.00 to it so that there was sufficient funds to pay his father's monthly nursing home bill. (Ex. 205, R 1678) On February 27, 2018, a deposit of $148,886.85 was made consisting of the annual cash rent Mr. Solomon paid for crop year 2018 for the lease of Robert Lynch's farm ground. (Ex. 205, R 1679) Kevin Lynch immediately wrote a check to himself for $30,000.00 from those funds, based on his alleged "oral compensation agreement" with his father. (Ex. 205, R 1682) $2,502.50 was taken out by Kevin Lynch on March 1, 2018, to pay for cattle feed for the cattle operation from which Kevin Lynch received 100% of the income. (Ex. 205, R 1682)

The funds left in the joint checking account represented the only significant source of funds[6] for the Estate to pay Robert Lynch's funeral expenses,

[6] At the time of his death, Robert Lynch owned approximately $17,000.00 in a Stifel investment. Those funds did not become available for some months and were not available for his immediate bills, such as funeral expenses. (TT 765-66)

real estate taxes Robert Lynch owed for tax year 2017, the year before his death, and income taxes that were come due on the $148,886.85 rental income received in 2018. Kevin Lynch admitted that his dad would have expected the money in that joint account to be used to pay his funeral expenses, income taxes, and real estate taxes. (TT 204)

SDCL 29A-6-104 provides in pertinent part:

> (1) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties 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.

This Court has held:

> Whether the joint accounts in question were created by decedent for her 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 of 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)).

Here, the funds in the account belonged to Robert Lynch. Deposits to the account at the time of his death came from the proceeds of rental income for his farm ground. The disbursements from this account were intended to pay for Robert Lynch's bills, particularly his nursing home bills. Kevin Lynch admitted that the joint account was set up for convenience to pay those bills. Further, Kevin Lynch admitted that his father would have expected the money in that

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Kevin Lynch sold Robert Lynch's cattle after his death and kept the money. (TT 200)

account to be used to pay his funeral expenses, income taxes and real estate taxes. In *Roth v. Pier,* 309 N.W.2d 815, 816 (S.D. 1981), this Court held that the trial court did not error in treating the joint account as having been set up for convenience "when it concluded that decedent did not intend to divest himself at death of the only available asset to pay his final debts."

Under South Dakota law, funds remaining in a joint account go to the survivor upon the death of one of the joint account holders. This Court, and the statute in South Dakota, however, make clear that if the account was set up for convenience, as is alleged here, a fact question is presented. *Estate of Card*, *supra*, ¶15, 874 N.W.2d at 91. In this case, the Trial Court denied Kevin Lynch's Motion for Partial Summary Judgment on his conversion claim on the joint account, holding that a fact question existed.

At the close of the evidence, Kevin Lynch made a Motion for Judgment as a Matter of Law on his conversion claim on the joint account for the $110,000.00. The Court granted the Motion for Judgment as a Matter of Law, taking the issue away from the jury.

This Court has made clear it will review a Trial Court's ruling on a motion for judgment as a matter of law *de novo*. *Magner*, *supra,* ¶¶13-14, 883 N.W.2d at 80-81. "Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the non-moving party." *Klingenberg v. Vulcan Ladder USA, LLC,* 936 F.3d 824, 830 (8th Cir. 2019), quoting *Allstate Imdem. Co. v. Dixon*, 932 F.3d 696, 702 (8th Cir. 2018).

In this case, the evidence did not all point one way, and there was evidence, i.e., Kevin Lynch's admission that the account was set up for convenience to pay his father's bills, thus a reasonable inference existed to sustain the position of the Estate. It is extremely rare for a court to grant a motion for judgment as a matter of law without submitting the matter to the jury.

Here, the trial court erred in taking this matter from the jury when a fact question was presented. Accordingly, the Estate requests that the judgment be reversed and the matter remanded for further proceedings consistent with this Court's ruling.

CONCLUSION

In many instances a relative or close friend is appointed as attorney-in-fact under a power of attorney over the financial affairs of an elderly and infirm principal. This Court adopted a bright-line rule to prevent the use of oral extrinsic evidence to justify self-dealing by the attorney-in-fact when the power of attorney does not authorize self-dealing in clear terms. This bright-line rule makes sense. It prevents someone from claiming the principal orally agreed or approved of the transfer of money to himself. It is impossible to refute an oral statement attributed to a dead man. To approve what happened in this case by permitting such evidence, will create a road map for elder exploitation.

The Estate respectfully requests that this Court reverse the Order Denying the Estate's Motion for Partial Summary Judgment and direct entry of Judgment and prejudgment interest on those items sought. The Estate further respectfully

requests that this Court reverse the Judgment entered and remand this case for further proceedings, based on adherence to the bright-line rule established in *Bienash*, and reverse the entry of judgment as a matter of law on the joint account claim by Kevin Lynch.

Dated this 22nd day of February, 2022.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that it be granted the privilege of appearing before this Court for an oral argument in this appeal.

/s/ Michael J. Schaffer

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Brief of Appellant* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellant* contains 9157 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare *Brief of Appellant.* The original *Brief of Appellant* and all copies are in compliance with this rule.

/s/ Michael J. Schaffer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "Brief of Appellant" was served by email service to the following attorneys in PDF format on February 22, 2022, before 11:59 p.m. on that date:

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APPENDIX

STATE OF SOUTH DAKOTA):SS	IN CIRCUIT COURT
COUNTY OF CLAY)	FIRST JUDICIAL CIRCUIT

ESTATE OF ROBERT T. LYNCH,

Plaintiff,

vs.

KEVIN LYNCH,

Defendant.

File No. 13CIV18-90

RULING

BEFORE: THE HONORABLE TAMI BERN, Circuit Court Judge, at Vermillion, South Dakota, on July 22, 2020.

APPEARANCES

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(In open court at 2:00 p.m., 7-22-20:)

THE COURT: Let the record reflect it's 2 o'clock p.m. on Wednesday, the 22nd of July, 2020. This is the time and place set for hearing in the matter of *The Estate of Robert T. Lynch vs. Kevin John Lynch,* being a Clay County Civil File 18-90. The Estate is appearing telephonically through its counsel, Mike Schaffer. Mr. Lynch is appearing telephonically through his counsel, Pamela Reiter. This matter is before the Court for the Court's oral decision pursuant a number of motions for summary judgment or partial summary judgment that were made by both the Estate and Kevin.

The Court having received the pleadings in this matter, having considered those pleadings, exhibits, affidavits, as well as the arguments and recommendations of counsel in their briefs, and for good cause appearing, enters its decision as follows:

In this case, the Estate of Robert Lynch commenced action against Kevin Lynch, an heir and son of the decedent, alleging fiduciary fraud, breach of fiduciary duty, conversion, and elder exploitation, requesting both actual and punitive damages.

Kevin denies and counterclaims for conversion as well as setoff, unjust enrichment, and quantum meruit for labor provided to the decedent and the Estate, as well as for

expenses on behalf of the decedent. Kevin later commenced action against Ann Lynch, the personal representative, as a third-party defendant, asserting claims of breach of fiduciary duty and negligence. Both the Estate and Kevin seek partial summary judgment.

Because there is a genuine issue of fact as to whether Kevin breached his fiduciary duty to Robert, the Estate's motions for summary judgment are denied.

As to Kevin's motions for summary judgment, because Robert's intent at the time of the creation of the joint account is a genuine issue of material fact, his motion for summary judgment as to his counterclaim of conversion is denied.

Likewise, Kevin's assertion that he is entitled to judgment as a matter of law because the Estate can assert no damages and have no standing are likewise denied -- his motion for summary judgment on those grounds are denied.

The motion for summary judgment on the grounds of statute of limitations has been withdrawn and is accordingly denied.

Because the civil cause of action for elder exploitation did not exist prior to July 1st, 2016, Kevin's motion for summary judgment as to all actions alleged in Count IV and V that predate July 1st, 2016, is granted.

The standard for summary judgment: It's "authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." The Supreme Court affirms "only when there are no genuine issues of material fact and the legal questions have been correctly decided. All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. Summary judgment will be affirmed if there exists any basis which would support the trial court's ruling," which is the *Schwaiger vs. Avera Iowa Queen of Peace*.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law," which is the statutory recitation.

As set forth in the *Citibank vs. Schmidt* case, summary judgment is an extreme remedy and should be awarded only when the truth is clear. As set forth in

Wilson vs. Great Northern Railway Company, where no genuine issue of material fact exists, summary judgment is looked upon with favor.

"The party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment." *Greene vs. Morgan, Theeler, Cogley & Peterson*, 575 N.W.2d at 459.

Summary judgment should not be viewed as "a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action,'" which is the *Accounts Management vs. Litchfield*.

In regard to the Estate's motion for partial summary judgment, Count I is an allegation of fiduciary fraud. The elements for a fiduciary fraud are as follows:

To recover for breach of fiduciary fraud, a plaintiff must prove, one, the defendant was acting as plaintiff's fiduciary; two, the defendant breached a fiduciary duty to plaintiff; three, the plaintiff incurred damages; and, four, the defendant's breach of the fiduciary duty was a cause of plaintiff's damages. That's *Grand State Property, Inc. vs. Woods, Fuller, Schultz & Smith*, 556 N.W.2d at 88.

Kevin concedes he was appointed as Robert's attorney in fact pursuant to a power of attorney dated December 5th, 2007. This creates a fiduciary duty as a matter of law. The issue then, for the summary judgment, is whether the undisputed material facts established that Kevin breached that duty imposed by the fiduciary relationship.

The POA does not expressly authorize self-dealing. While it authorizes a gift to the attorney in fact pursuant to an amount not in excess of the federal gift tax annual exclusion, it is undisputed that Kevin made no such gifts to himself pursuant to this provision. However, it does not necessarily follow that any act of self-dealing is also breach of fiduciary duty.

The Court agrees with Kevin that *Bienash* is materially distinguishable from the facts here, as the self-dealing in that case exclusively involved the attorney issuing himself gifts. Here, Kevin asserts that the expenditures were for the benefit of Robert.

In *Hein vs. Zoss*, the trial court prohibited Zoss from introducing evidence that even though he leased land to himself, he did not breach his fiduciary duty of loyalty created pursuant to the POA. The Supreme Court reversed, finding the proffered evidence was relevant to show whether Zoss acted with the utmost good faith and for

the benefit of the beneficiary.

Whether Kevin breached his fiduciary duty to Robert by virtue of the expenditures and cashing in the CD are issues of fact for the jury.

As to Kevin's motion for partial summary judgment, as to the conversions of the funds in the joint checking account, in order to prove conversion, the plaintiff must show that the plaintiff owned or possessed an interest in the property; the plaintiff's interest in the property was greater than the defendant's; the defendant exercised dominion or control over or seriously interfered with plaintiff's interest in the property; and such conduct deprived plaintiff of its interest in the property. *Western Consolidated Co-op vs. Pew*, 795 N.W.2d 390.

SDCL 29A-6-104 addresses rights of survivorship upon death of joint accounts as follows: "Sums remaining on deposit on the death of a party to the joint account belong to the surviving party or parties 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."

The Estate asserts that because the account was created for the convenience of Kevin being able to pay Bob's bills, that it is the property of the Estate. As set forth in *Estate of Card vs. Card*, 874 N.W.2d at 91,

"As the party challenging the presumption, the Estate must present clear and convincing evidence that Jacquelyn 'did not intend the usual rights of survivorship to attach to the joint asset, but instead intended the arrangement for her own convenience. Whether the joint accounts in question were created by decedent for her own convenience or for the benefit of the nondepositing joint payees is a question of fact to be determined from all the facts and circumstances in the case.'"

The undisputed facts do not establish Kevin's right to possession of the account as a matter of law. At a minimum, Robert's intent at the time of creation of the account is a genuine issue of material fact for the fact finder, pursuant to SDCL 29A-6-104, and summary judgment is not appropriate.

As to Count II, which addresses the checks issued from Robert's checking account for the Morton buildings on Kevin's land, Kevin seeks summary judgment on the Estate's claim on the grounds of fiduciary fraud, breach of fiduciary duty, conversion, elder exploitation, and request for punitive damages.

Kevin also seeks summary judgment on the Estate's allegation of conversion on the grounds the Estate cannot prove damages because it already owns these properties. The fact that the Estate owns the property does not

necessarily mean that Kevin didn't convert those funds for his own purpose on items completely useless to Robert.

"Conversion is the act of exercising control or dominion over personal property in a manner that repudiates the owner's right in the property or in a manner that is inconsistent with such right." *Scherf vs. Myers*, 258 N.W.2d 831.

As cited by the Estate, 29A-3-703(c) provides the Estate has standing to bring suit in any claim that the decedent has prior to his death. The Court also finds persuasive the *Ward vs. Lange* case cited by the Estate.

Finally, there have been no facts asserted that the current value of a Morton building built on another person's land and used equipment are equal to the amount Kevin expended from the account if they were liquidated.

As to Kevin's allegation that the Estate has no standing as to the CD, the Court finds that same analysis is applicable and that that argument is of no merit.

In regard to the claims being time-barred in seeking summary judgment on statute of limitations grounds, Kevin has withdrawn that request. Accordingly, such is denied.

Finally, Kevin asserts that he is entitled to judgment as a matter of law as to Count IV of the Estate's complaint asserting elder exploitation for all acts occurring before 7-1-2016, the date the statute was

enacted.

The Estate asserts that the statute at issue is remedial in nature and not substantive. The case cited by the Estate, when read in its entirety, fails to support its position.

And this is the *Tischler vs. United Parcel Service*, 552 N.W.2d at 608. "Statutes which fall into the category of 'statutes affecting remedies' are 'ones that describe methods for enforcing, processing, and administering, or determining rights, liabilities or status.' One can argue that 62-4-10.1 is an attempt by the legislature to provide claimants with a means to enforce their rights. However, as in *West vs. John Morrell & Company*, this statute created a new right for the employee to collect the automatic penalty and a new duty on the employer and insurer to pay. 'Statutes affecting substantive rights... are not to be given retroactive effect. The test is whether the change in the statute constitutes a change in substantive law (as opposed to procedural law) and not whether a change in the statute affects the substantive rights of the parties.' 62-4-10.1 created a penalty. Because the statute 'created the obligation in the first place, where there had been none before,' it is substantive and is not entitled to retroactive effect."

The statute creates a change in substantive law and,

in the Court's opinion, creates a new cause of action by its plain language. And then if you reference the 22-46-13, that provides "If a court finds exploitation occurred, the elder or adult with a disability has a cause of action against the perpetrator and may recover actual and punitive damages."

So the Court finds Kevin's argument persuasive to that effect, and his motion for summary judgment on those grounds is granted.

Counsel for Kevin can prepare an order denying the Estate's motion for summary judgment. Counsel for the Estate can prepare an order denying Kevin's motions for summary judgment, except as to the motion for summary judgment on the elder exploitation claims; and Kevin's counsel can prepare an order granting summary judgment as to those grounds.

So, Ms. Reiter, any questions about the Court's rulings?

MS. REITER: Your Honor, that was really fast, so I'm wondering if we could order a transcript just so that we make sure we get that all correct. I mean, I think I got it, but --

THE COURT: Yes.

MR. SCHAFFER: I think we should both -- both parties should get a copy of the transcript.

MS. REITER: Yeah.

THE COURT: And Ms. Meyer will gladly provide that to you.

MS. REITER: Thank you. Perfect.

MR. SCHAFFER: Thank you.

THE COURT: Anything else we need to address today?

MR. SCHAFFER: I can't think of anything.

MS. REITER: I can't either, Your Honor.

THE COURT: Thank you for calling back. Thanks for your time.

MS. REITER: Thank you.

* * *

END OF PROCEEDINGS AT 2:12 P.M., 7-22-20.

* * *

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CLAY)

CERTIFICATE OF REPORTER

I, Mary Anne Meyer, Registered Diplomate Reporter, Notary Public in and for the State of South Dakota, hereby certify that I was present for and reported the proceedings as described on page 1 herein, and that this transcript contains a true and correct record of the proceedings so had.

To all of which I have hereunto set my hand this 23rd day of July, 2020.

/s/ *Mary Anne Meyer*

MARY ANNE MEYER, RDR
Official Court Reporter
211 West Main Street, Suite 300
Vermillion, South Dakota 57069
(605) 677-6757

(1) MR. SCHAFFER: - else

STATE OF SOUTH DAKOTA) :ss COUNTY OF CLAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
ESTATE OF ROBERT T. LYNCH, Deceased Plaintiff and Counter-Defendant, v. KEVIN LYNCH, Defendant, Counter-Claimant, and Third-Party Plaintiff v. LACARLA ANNETTE LYNCH, as Personal Representative of the Estate of Robert T. Lynch, Third-Party Defendant.	13CIV18-000090 **ORDER DENYING THE ESTATE OF ROBERT T. LYNCH'S MOTION FOR SUMMARY JUDGMENT AND GRANTING, IN PART, AND DENYING, IN PART, KEVIN LYNCH'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court, the Honorable Tami Bern presiding, on June 10, 2020, for a telephonic hearing on the Estate of Robert T. Lynch's Motion for Partial Summary Judgment and Kevin Lynch's Motion for Partial Summary Judgment, with the Estate of Robert T. Lynch being represented by its counsel of record, Mike Schaffer; and Kevin Lynch being represented by his counsel of record Pamela Reiter and Sara Show, and the Court having considered the arguments of counsel and the submissions by the parties and being otherwise fully advised of the relevant facts and law, for the reasons expressed by the Court in its Oral Decision stated on the record at a July 22, 2020 telephonic hearing, it is hereby

ORDERED, ADJUDGED, AND DECREED:

That the Estate of Robert Lynch's Motion for Partial Summary Judgment is hereby DENIED in its entirety.

That Kevin Lynch's Motion for Partial Summary Judgment is GRANTED as to Count IV of the Complaint relating to "elder exploitation" under SDCL 22-46-13 for any act that occurred before July 1, 2016 and is GRANTED as to Count V only as it relates to the portion of Count IV dismissed pursuant to the above ruling, and is DENIED as to all other requests for summary judgment.

Dated this _____ day of July, 2020.

Signed: 7/29/2020 4:12:14 PM

BY THE COURT:

TAMI BERN
CIRCUIT COURT JUDGE

ATTEST:

Attest:
Zimmerman, Nadyne
Clerk/Deputy

Clerk of Courts
(SEAL)

STATE OF SOUTH DAKOTA) :ss COUNTY OF CLAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
ESTATE OF ROBERT T. LYNCH, Deceased Plaintiff and Counter-Defendant, v. KEVIN LYNCH, Defendant and Counter-Plaintiff	13CIV18-000090 **JUDGMENT and ORDER**

The above matter having come on for trial before the Court and a jury, with the Honorable Tami A. Bern, Circuit Court Judge, presiding; Plaintiff and Counter-Defendant Estate of Robert T. Lynch, was represented by Michael Schaffer and Paul Linde of Schaffer Law Office, Prof. LLC and Defendant and Counter-Plaintiff Kevin Lynch was represented by Pamela R. Reiter and Sara E. Show of Johnson, Janklow, Abdallah & Reiter, LLP.; a jury having been duly empaneled, and the trial having commenced on September 28, 2021, with the Court having issued on the record on October 1, 2021, a Judgment as a Matter of Law under SDCL 15-6-50(a) in favor of Kevin Lynch on his Counterclaim against the Estate of Robert T. Lynch for Conversion of the joint checking account and Kevin Lynch's claim in the Probate Proceedings, which the parties agreed would be tried in this Civil Action pursuant to a Stipulation filed on October 18, 2018 in 13PRO18-000011; with the jury having duly rendered its verdict on October 1, 2021 for Defendant Kevin Lynch on all claims filed by the Plaintiff Estate of Robert T. Lynch against Defendant Kevin Lynch in the above civil action; it is now HEREBY

ORDERED, ADJUDGED, AND DECREED that Judgment be entered in favor of Defendant Kevin Lynch on all claims asserted against him by Plaintiff Estate of Robert T. Lynch pursuant to the Verdict Form that was filed with the Clay County Clerk in the above-captioned civil matter on October 1, 2021; and

ORDERED, ADJUDGED, AND DECREED that, pursuant to the Court's grant of Judgment as a Matter of Law under SDCL 15-6-50(a) in the above-captioned civil matter on October 1, 2021, Judgment be entered in favor of Counter-Plaintiff Kevin Lynch on his Counterclaim against Counter-Defendant Estate of Robert T. Lynch in the above-captioned civil matter, and in favor of Kevin Lynch on his Additional Statement of Claim Against Estate of Robert T. Lynch, filed in 13PRO18-000011 on August 8, 2018, in the amount of $110,000 plus prejudgment interest under SDCL 21-1-13.1 at the Category B rate of interest of 10% under SDCL 54-3-16(2) from March 22, 2018 to the date of this Judgment; and

ORDERED, ADJUDGED, AND DECREED that Defendant Kevin Lynch will also recover his costs and disbursements in the action in the sum of $_____, with interest to run on said amount from and after the date of the verdict. Such costs will be inserted and/or taxed by the Court pursuant to SDCL 15-6-54(d).

Dated this _____ day of October, 2021.

10/18/2021 11:09:55 AM

BY THE COURT:

TAMI BERN
CIRCUIT COURT JUDGE

ATTEST: Attest:
Zimmerman, Nadyne
Clerk of Court Clerk/Deputy
(SEAL)

This Document Prepared By:
Michael J. McGill
P.O. Box 32
Beresford, SD 57004
(605) 763-2057

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CLAY)

DURABLE POWER OF ATTORNEY
FOR FINANCIAL MANAGEMENT
AND HEALTH CARE

KNOW ALL MEN BY THESE PRESENTS:

That I, Robert T. Lynch, of 46884 317th Street, Burbank, South Dakota 57010, do hereby appoint Kevin John Lynch, of 46852 Burbank Road, Burbank, South Dakota 57010, if living, competent and willing to act, as my true and lawful agent-in-fact (hereinafter my "Attorney") for me and in my name, place, and stead to deal generally and in all respects, without restriction, in and with any property of any nature whatsoever in which I may have any interest and to make healthcare decisions as set forth and described herein.

PART 1 – POWERS

A. Statutory Powers. I hereby grant to my attorney such powers as are permitted and allowed pursuant to South Dakota Codified Law Chapter 59-3.

B. Specific Powers. Without in any way limiting the broad general power given to my attorney above, and in addition to those powers referred to in Paragraph A above, and not in limitation thereof, I specifically authorize my attorney to act for me in the following manner:

1. Demand and Receive Property. To demand, receive, collect, and hold any and all monies, securities, and other personal and real property of any nature whatsoever belonging to me or in which I may have an interest.

2. Open and Maintain Bank Accounts. To open and maintain accounts for me and in my name in such banks, savings and loan associations, and other financial institutions as my attorney may deem best; to make deposits of money belonging to me in such accounts; and to disburse such monies on the signature of my attorney for any purposes in connection with my personal comfort, support, maintenance, health, and general welfare, in such manner

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and amounts, for such purposes, and at such times as my attorney, in his, her, or its sole discretion and judgment, may deem best.

3. Disburse Funds. To make disbursements of monies belonging to me in such manner and amounts, for such purposes, and at such times as my attorney, in his, her, or its sole discretion and judgment, may deem best for maintenance, repair, improvement, management, or any other purposes in connection with any real or personal property or any interest therein owned by me.

4. Deal in Real Estate. To sell, subdivide, improve, operate, manage, control; exchange, convey, assign, mortgage, encumber, or dispose of any real property that I may possess and receive the rents, income and profits derived therefrom; to exercise in all respects general control and supervision over any real estate belonging to me; and to purchase or otherwise acquire additional real estate. The real estate affected by this power of attorney is described as follows:

North 201.24 Feet of Lot A in the Northwest Quarter of the Southwest Quarter (NW ¼ SW ¼) of Section Seventeen (17), Township Ninety-Two North (92N), Range Fifty (50), West of the 5th P.M., Union County, South Dakota;

Southwest Quarter (SW ¼) Of Section Twenty-Six (26), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northeast Quarter of the Southwest Quarter (NE ¼ SW ¼) and the South 22 Feet of the Northwest Quarter of the Southwest Quarter (NW ¼ SW ¼) of Section Thirty-Six (36), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northwest Quarter of the Southwest Quarter (NW ¼ SW ¼) except the South 22 Feet, Section Thirty-Six (36), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

South Half of the Southwest Quarter (S ½ SW ¼) of Section Thirty-Six (36), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Lot A in the Northwest Quarter (NW ¼) of Section Nine (9), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northwest Quarter of the Southeast Quarter (NW ¼ SE ¼) of Section Eleven (11), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northeast Quarter of the Southeast Quarter (NE ¼ SE ¼) of Section Eleven (11), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

South Half of the Southeast Quarter (S ½ SE ¼) of Section Eleven (11), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northwest Quarter of the Northeast Quarter (NW ¼ NE ¼) of Section Fourteen (14), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota; and

West Half of the Northwest Quarter (W ½ NW ¼) except Lynch Tracts 1 and 2 in Section Twenty-Four (24), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota.

5. Supervise Securities and Personal Property. To exercise in all respects general control and supervision over any securities and other personal property, tangible and intangible, of any nature whatsoever belonging to me; to receive the dividends, interest, proceeds, and profits derived therefrom; and to purchase and otherwise acquire additional personal property.

6. Enter Safe Deposit Boxes. To have unrestricted access to and control of the contents of any safe deposit box or vault to which I might have access, to take and remove from such box or vault any or all of the contents thereof, to lease one or more safe deposit boxes for the safekeeping of my assets.

7. Manage Securities. To vote all stocks, bonds, and other securities; to collect the dividends, interest, profits, or accruals therefrom; to invest, buy, sell, reinvest, and manage the same; and to exercise any and all rights and powers in connection therewith, all as my attorney in his, her, or its sole discretion and judgment, may deem best.

8. Demand and Receive Money Due. To demand and receive, sue for and recover any and all monies or rights of any nature whatsoever and from whatever source derived that may now be due to me or which may at any time hereafter come due, and to give in all respects proper receipts, releases, and acquittances therefore, with no liability on the part of any obligor making payments to my attorney to see to the application of the proceeds of such payments or collections.

9. Borrow, Mortgage, and Pledge. To borrow such amounts for such purposes, and at such times as my attorney, in his, her, or its sole discretion and judgment, may deem best, and to pledge or mortgage any of my property, real or personal, as security for any such loans.

10. Maintain Legal Actions. To institute, prosecute, defend, compromise, settle, arbitrate, or dispose of any legal, equitable, or administrative actions or proceedings in my name; to execute and verify petitions and complaints in the Federal and Sate courts, specifically including the United States Tax Court; and to cause me to be represented in such proceedings.

11. Tax Controversies. To represent me and to appoint others to represent me in all tax matters before all officers of the Internal Revenue Service and any Department of Revenue for all years from 1950 to 2050, inclusive, and to prepare, sign and file any power of attorney form (specifically including Internal Revenue Service Form 2848) appointing my attorney or any other suitable person selected by my attorney as my representative before such taxing authority.

12. Tax Returns. To sign and verify all tax, social security, unemployment, insurance, and information returns required by the United States or by any State or subdivision thereof, specifically including joint income tax returns with my spouse, claims for refund, requests for extension of time and consents in my name; to receive, endorse, and receipt for any tax refunds due to me; to exercise any elections that I may have under Federal, State or local tax law; and to pay compromise, or contest any taxes, penalties, or interest for which I am or may be liable.

13. Deal With Existing Trusts. To add any property whatsoever belonging to me to any trust established by me, to be held and managed as though an original part of such trust; to withdraw and/or receive income or principal from any trust regarding which I have a right of withdrawal or receipt; to request and to receive the income or principal of any trust as to which the trustee has discretionary authority to make distributions to me on my behalf, and to execute any release or receipt that may be required by such trustee from me.

14. Make Gifts. To make gifts of my real or personal property or my interest in such property (including, but not limited to, outright gifts, gifts in trust, gifts to a Qualified State Tuition Payment Plan as described in Section 529 of the Internal Revenue Code of 1986, as from time to time amended, or gifts to a custodian under a uniform gifts or transfers to minors act) to such persons (including my attorney) or institutions, in such amounts or proportions, as my attorney, in his, her, or its sole discretion and judgment, may deem appropriate for tax or other reasons; provided, however, the total value of gifts to any one donee in any calendar year shall not exceed (i) the amount specified for the federal gift tax annual exclusion (including such additional amount of any gift tax annual exclusion attributable to the consent of my spouse under Section 2513 of the Internal Revenue Code of 1986, as from time to time amended), or (ii) the amount excluded from the gift tax under the provisions of Section 2503(e) of the Internal Revenue Code of 1986, as from time to time amended, relating to the payment of educational and medical expenses.

15. Insurance Transactions. To exercise any right or obligation in regard to any insurance policy of any kind whatsoever in which I have any incident of ownership; to obtain

additional contracts of insurance for me; and to make or change the beneficiary of such insurance contracts; provided, however, that my attorney cannot be designated as beneficiary unless my attorney is my spouse or an individual among my issue, and that my attorney shall have no power or authority to deal in any manner with insurance policies I may own on his or her life.

16. Retirement Plans. To exercise any right with regard to any retirement plan or individual retirement account I may have or entered into by the attorney on my behalf, or with regard to any retirement plan or individual retirement account as to which I am the beneficiary including, but not limited to, the power (i) to create and contribute to an individual retirement account, an employee benefit plan, or other retirement plans, (ii) to change the form of the plan as may be permitted by law such as to convert a traditional IRA into a Roth IRA; (iii) to "roll over" plan benefits, (iv) to receive distributions from such plan, and to endorse and deposit checks from such plans; (v) to borrow money from any such plan, (vi) to select options with respect to any such plan, and (vii) to make or change the beneficiary designation of any such plan, except that my attorney cannot be designated beneficiary unless my attorney is my spouse or an individual among my issue.

17. Estate and Trust Transactions. To request, demand, sue for, recover, collect, and hold, or to disclaim or renounce as provided by law, any interest that I have or may have in any estate or trust, and to execute and deliver any receipts, releases, or other instruments in connection with any such interest.

18. Business Transactions. To conduct, engage in, and transact any and all lawful business of whatever nature or kind in which I am engaged or interested.

19. Implement Foregoing Powers. To sign any and all contracts, deeds, or other instruments, including additional powers of attorney, necessary to carry out any of the aforementioned powers, hereby giving and granting unto my attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in implementing such powers as fully to all intents and purposes as I might or could do if personally present, with full power to substitute in my place and stead. In particular, I grant to my attorney the power to sign for me and on my behalf any and all other powers of attorney, on whatsoever form, as may be required or appropriate to permit my attorney to carry out the powers and purposes set forth herein, naming himself or another at attorney thereunder.

20. Personal Relationships and Affairs. To do all acts necessary for maintaining my customary standard of living and the customary standard of living of my spouse, my children, and my other dependents; to provide medical, dental and surgical care, hospitalization, custodial care or any other form of health or mental care for me, my spouse, my children, and my other dependents; to continue whatever provision has been made by me for me, my spouse, my children, and my other dependents, with respect to automobiles or other means of transportation; to continue whatever charge accounts have been operated by

me for my convenience, and the convenience of my spouse, my children, and my other dependents, to open such new accounts as my attorney shall think to be desirable for the accomplishment of any of the purposes enumerated in this paragraph, and to pay the items charged on such accounts by any person authorized or permitted by me or my attorney to make such charges; to continue to discharge of any services or duties assumed by me, to any parent, relative, or friend of mine; to continue payments incidental to my membership or affiliation in any church, club, society, order, or other organizations, or to continue contributions thereto.

21. Employ Advisors. To employ or discharge persons, firms and corporations to advise or assist my attorney, including, but not limited to agents, accountants, auditors, brokers, attorney-at-law, custodians, investment counsel, rental agents, realtors, appraisers and tax specialists.

PART II – HEALTH CARE POWERS

I further grant unto my attorney the authority to make such health care decisions as are in my best interest and to the extent provided for under SDCL 59-7-2.5; 59-7-2.6; and 59-7-2.7.

A. General Powers. In connection with health care decisions by my attorney, I hereby grant the following powers to my attorney within the limitations specified in the Part II (B) hereinafter set forth:

1. To authorize or withhold authorization for medical and surgical procedures.

2. To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care.

3. To arrange for my discharge, transfer from, or change in type of care provided.

4. To arrange for and pay for consultation, diagnosis or assessment as may be required for my proper care and treatment.

5. To authorize, withhold or withdraw artificial nutrition or hydration.

6. To commence such legal proceedings as may be necessary and appropriate to recover the cost of any medical and surgical procedures and treatment charged to me but not authorized by my agents-in-fact from the person or persons authorizing or directing that such treatment be provided.

7. I have discussed my wishes concerning medical, nursing and terminal care with my attorney and I trust and rely upon his, her, or its judgment on my behalf.

B. Life Sustaining Treatment. As to decisions related to my health care I hereby state the following instructions to my attorney with respect to decisions to withhold or withdraw life-sustaining treatment which reflects my intent. I specifically direct my attorney to convey these instructions to any physicians, nurses, care-giving organizations including but not limited to hospitals, nursing homes, mental institutions, boarding facilities and others which may carry some responsibility for my care:

1. If I am in a coma which my doctors have reasonably concluded is irreversible, and I become unable to participate in decisions regarding my medical care, I desire that life-sustaining or prolonging treatment be used only if and for as long as it is believed treatment offers a reasonable possibility of restoring to me the ability to think and act for myself.

2. If I have an incurable or terminal condition or illness and no reasonable hope of long term recovery or survival and I become unable to participate in decisions regarding my medical care, I desire that life-sustaining or prolonging treatments be used only if and for as long as it is believed treatment offers a reasonable possibility of restoring to me the ability to think and act for myself.

3. I do not desire treatment to be provided and or continued if the burdens of the treatment outweigh the expected benefits. My agent-in-fact is to consider the relief or suffering, the preservation or restoration of functioning and the quality as well as the extent of the possible extension of my life.

4. With respect to artificial nutrition and hydration, I intend to include this treatment among the "life-sustaining treatments" that may be withheld or withdrawn pursuant to my directive.

5. The contents of Part II (B) of this Power of Attorney must be construed in connection with the terms of applicable South Dakota Law, referring to SDCL 59-7-2.5 through 59-7-2.8, inclusive.

PART III – ADMINISTRATION

A. Compensation. My attorney shall serve without bond and without compensation. My attorney shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by attorney on my behalf under any provision of this Power of Attorney.

B. Right of Revocation. I reserve the right to revoke or amend this Power of Attorney at any time by any method set forth in South Dakota Codified law. Pursuant to that power, all Durable Powers of Attorney for Financial Management and Healthcare heretofore executed by me are hereby revoked.

C. Inventory and Accountings. No inventory or account shall be filed with any court or the clerk, thereof, but an accounting shall be filed with me or my guardian each year and with my personal representative in the year of my death.

D. Ratification. I do hereby ratify and confirm all thins so done by my attorney within the scope of the authority herein given my attorney as fully and to the same extent as if by me personally done.

E. Nomination of Guardian. If at any time following the execution of this Power of Attorney, a court appoints a guardian of my estate or a general guardian, I request that the court making such appointment consider my attorney nominated hereunder to serve as such guardian of my estate or general guardian.

F. Partial Invalidity. If any part of this Power of Attorney is declared invalid or unenforceable under applicable law, such decision shall not affect the validity of the remaining parts.

G. Durable Power of Attorney. This Power of Attorney is to be dominated and known as a "Durable Power of Attorney" and it shall not be affected by my subsequent incapacity or mental incompetence. I specifically direct that this Power of Attorney shall stay in full force and effect between the date of my incompetency and the date of my subsequent death.

H. Successor. In the event that Kevin John Lynch is unable to act in the capacity as my attorney, or in the event of his death, I nominate and appoint as successor attorney, Carleen Marie Lynch. The fact of Kevin John Lynch's death should be made evident by the filing of an Affidavit in the Clay County, South Dakota Register of Deeds Office reflecting the fact of his death with an attached Death Certificate. The fact that Kevin John Lynch is otherwise unable to perform in the capacity as my attorney should be made evident by the filing of an Affidavit by Kevin John Lynch or his duly authorized agent stating the fact with the Clay County, South Dakota Register of Deeds Office.

I. HIPAA. In accordance with the Health Care Insurance Portability and Accountability Act of 1996 (Pub. L 104-191), 45 CFR Sections 160 and 164 ("HIPAA"), my agent may act as my personal representative for the purposes of obtaining and receiving any and all protected health information related to my health care and related to payments in regard to such health care.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14 day of Dec., 2007

Robert T. Lynch

8

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CLAY)

On this the 5th day of December, 2007, before me, Michael A. Nilles the undersigned officer, personally appeared Robert T. Lynch, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I have hereunto set my hand and official seal.

Notary Public
My Commission Expires: 10-20-2010

Instruction No. 15

A fiduciary is defined as a person who is required to act for the benefit of another person on all matters within the scope of their relationship. When a fiduciary relationship exists, the party who owes this legal duty to another is called a fiduciary, and the legal duty the fiduciary owes is called a fiduciary duty.

The court has determined as a matter of law that the defendant was acting as a fiduciary for Robert Lynch by virtue of the power of attorney. The power of attorney document defines the scope of the fiduciary relationship you are directed to accept as having been proved.

For any act outside of the scope of the power of attorney, you must determine whether a further fiduciary relationship exists. To establish a fiduciary relationship for acts outside of the power of attorney, the plaintiff must prove:

(1) That Robert Lynch placed faith, confidence, and trust in the defendant;

(2) That Robert Lynch was in a position of inequality, dependence, or weakness, or possessed a lack of knowledge; and

(3) That the defendant exercised dominion, control, or influence over Robert Lynch's affairs.

If you find that all of these elements have been established, then the defendant owed Robert Lynch a fiduciary duty for any act outside of the scope of the power of attorney.

Instruction No. 23

For a breach of fiduciary duty occurring outside of the scope of the power of attorney or a conversion, defendant is not liable for breach of fiduciary duty or conversion if Robert Lynch consented to the conduct constituting the breach or conversion, released the defendant from liability for the breach or conversion, or ratified the transaction constituting the breach or conversion, unless:

(1) The consent, release, or ratifications of Robert Lynch were induced by improper conduct of the defendant; or

(2) At the time of the consent, release, or ratification, ~~the~~ Robert Lynch did not have knowledge of his rights or of the material facts relating to the breach.

Robert Lynch may release defendant from liability for past breach of his fiduciary duty outside of the power of attorney or conversion. No consideration is required for the consent, release, or ratification to be valid. As a matter of law, Robert Lynch may not release defendant from liability for breach of fiduciary duty created by the power of attorney or theft by exploitation of elder.

Instruction No. 29

An estoppel occurs when there are acts or omissions by the party to be estopped, which have misled the party in whose favor the estoppel is sought and has caused the party seeking the estoppel to part with something of value or do some other act relying upon the conduct of the party to be estopped. This defense does not apply to any breach of fiduciary duty by acts of self-dealing pursuant to the power of attorney or theft by exploitation of elder.

This creates a situation where it would be unfair to allow the misleading party to claim what would otherwise be his or her legal rights.

The burden of proof to establish an estoppel is on the party who seeks to rely on it.

To establish the affirmative defense of estoppel, the defendant must prove:

1) An oral agreement between Robert Lynch and defendant;

2) The defendant relied on the agreement and indicated such reliance by the performance of acts which unequivocally refer to the agreement;

3) The defendant changed his position in reliance on the agreement and to allow plaintiff to change Robert Lynch's position on the agreement would subject defendant to unconscionable hardship or loss.

If you find plaintiff is estopped from asserting a claim, the plaintiff is barred from recovery and your verdict should be for the defendant on that claim.

Instruction No. 30

A quasi-estoppel occurs where a person knows or ought to know that he or she is entitled to enforce his or her right to impeach a transaction and neglects to do so, for such a time as would imply that he or she intended to waive or abandon his or her right. This defense does not apply to any breach of fiduciary duty by acts of self-dealing pursuant to the power of attorney or theft by exploitation of elder.

The burden of proof to establish a quasi-estoppel is on the party who seeks to rely on it.

To establish the affirmative defense of quasi-estoppel, the defendant must prove:

1) Plaintiff is maintaining a position inconsistent with the position previously maintained by Robert Lynch; and

2) A) Robert Lynch gained an advantage or caused a disadvantage to the defendant; or

B) Defendant was induced to change positions; or

C) It would be unconscionable to permit the plaintiff to maintain an inconsistent position from one which Robert Lynch already derived a benefit or acquiesced in.

If you find plaintiff is estopped from asserting a claim, the plaintiff is barred from recovery and your verdict should be for the defendant on that claim.

Instruction No. 31

If you find plaintiff is entitled to damages under these instructions, you must then find whether defendant is entitled to recoup damages or expenses he has sustained arising out of the same transaction. Claims are not part of the same transaction or occurrence if there is no logical relationship between the events or, if they are dissimilar in "time and type". The defendant may be able to recoup expenses or claims he has incurred arising out of the same transaction for which you have determined plaintiff is entitled to damages on the grounds of unjust enrichment or quantum meruit. Unjust enrichment occurs when a party confers a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive that benefit without paying. Where services or materials are furnished by one party for another which are knowingly and voluntarily accepted, it is inferred that they were given and received in the expectation of being paid for and a promise to pay their reasonable worth is implied.

To recoup under unjust enrichment, the defendant must prove for the specific claim to which you have found plaintiff to be entitled to damages:

1) Robert Lynch has received a benefit from defendant in regard to that transaction;

2) Robert Lynch was aware of the benefit received of the result of that transaction; and

3) Robert Lynch's retention of the benefit without reimbursing the defendant would be inequitable in regard to that transaction.

A claim for quantum meruit occurs were services or materials are furnished by one party for another who knowingly and voluntarily accepts them. Under quantum meruit, the law infers that they were given and received in the expectation of being paid for in a reasonable amount.

To recoup under quantum meruit, the defendant must prove for the specific claim to which you have found plaintiff to be entitled to damages:

1) Robert Lynch requested the defendant's services for that transaction; and

2) The defendant reasonably expected to be paid for that transaction.

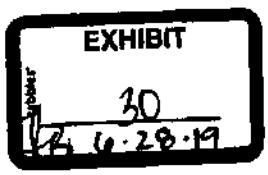
If you find defendant has met his burden of proof on either of these defenses, you must allow defendant to recoup and deduct or set-off the amount to which Robert Lynch was unjustly enriched (unjust enrichment) or which defendant is entitled to receive as compensation or reimbursement (quantum meruit) from the damages you award plaintiff. If you do not find plaintiff is entitled to damages under these instructions, then you will not consider the defendant's recoupment claim for unjust enrichment or quantum meruit. If you find the defendant has not met his burden of set-off for unjust enrichment or quantum meruit, you may not make any deduction in your calculation of damages.

Instruction No. 31

A fiduciary breaches his fiduciary duty when he uses his position by enriching the value of property that would eventually devolve to him.

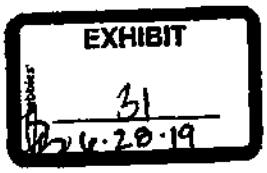
Source: *Ward v. Lange*, 1996 S.D. 113, ¶14, 553 N.W.2d 246, 250.

Date of check	Amount	Check Payable To	Check #	Check Signed By	Bates Stamp
3/14/11	$15,000.00	Kevin Lynch	2229	Kevin	SLO 404
5/1/12	$80,000.00	Kevin Lynch	2293	Kevin	SLO 349
8/13/12	$50,000.00	Kevin Lynch	2372	Kevin	SLO 365
3/8/13	$60,000.00	Kevin J. Lynch	2433	Kevin	SLO 276
2/24/14	$3,000.00	Kevin Lynch	2520	Kevin	SLO 199
2/28/14	$30,000 00	Kevin J. Lynch	2525	Kevin	SLO 199
6/27/14	$10,000.00	Kevin J. Lynch	2557	Kevin	SLO 203
5/28/15	$20,000.00	Kevin J. Lynch	2634	Kevin	SLO 127
3/21/16	$30,000.00	Kevin J. Lynch	2682	Kevin	SLO 65
6/10/16	$40,000.00	Kevin J. Lynch	2699	Kevin	SLO 77
2/28/17	$30,000.00	Kevin J. Lynch	2748	Kevin	SLO 24
2/27/18	$30,000.00	Kevin Lynch	2812	Kevin	SLO 6
TOTAL	$398,000.00				

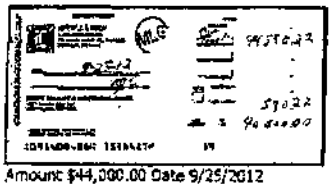


Date	Amount	Payable to	Signed by	Check #	Bates Stamp
12/13/11	$ 1,209.52	Midwest Ready Mix	Kevin	2346	SLO 334
10/1/12	$ 29,609.00	Morton Building	Kevin	2392	SLO 373
10/29/12	$ 29,609.00	Morton Buildings, Inc.	Kevin	2397	SLO 378
12/28/12	$ 39,479.00	Morton Buildings	Kevin	2417	SLO 261
11/3/13	$ 6,868.10	M & S Irrigation and Trenching	Kevin	2494	SLO 323
TOTAL	$ 106,774.62				

Date of check	Amount	Check Payable To	Check Signed By	Check #	Bates Stamp #	Check Memo	Notes
9/26/12	$45,000.00	Billion GMC	Kevin	5540 (KJL-FDNB Acct)	SLO 814	GMC pickup	Pd for with CorTrust Deposit (SLO 814) that did not go through Dad's BoW acct - $44,590 (see deposit slip - this document does not have a Bates Stamp. I have attached it to this email.



Date: 10/23/2012
Account : 3536467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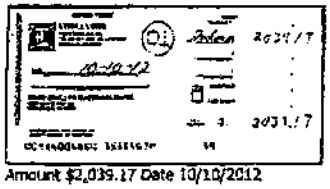
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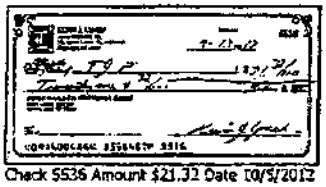
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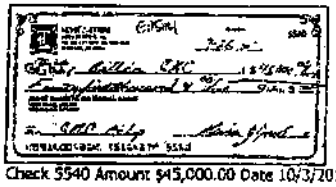
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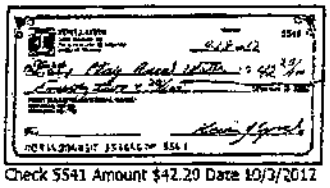
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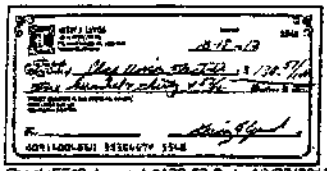
Check 5548 Amount $130.57 Date 10/22/2012

SLO 814

CorTrust Bank, n.a.

221276

ROBERT LYNCH
Remitter

Sep 20, 2012

ROBERT LYNCH OR KEVIN LYNCH POA
PAYABLE TO

$44,590.22

Pay Exactly Forty Four Thousand Five Hundred Ninety and 22/100
X

09/20/2012 10:07 AM
Brn 34 Trn 3 Seq# 9
Account NONNEGOTIABLE
DDA Receipt
DDA COLLECTED
DATE PAID
DAILY TOTAL

REGISTER COPY

OFFICIAL CHECK

"221276" [redacted]

ACCOUNT NO.

[redacted]7012

CD/IRA DEBIT TRANSACTIONS

DATE 9/20 20 17 INITIALS TL

DRAWN BY _____ EFFECTIVE DATE _____

NAME Robert Lynch
Robert T Lynch
By Kerry Lynch POA

TRAN CODE 347

22295.11

347	CD Auto Closing Withdrawal
346	CD Closing Withdrawal
305	Penalty
422	IRA Distribution
423	IRA Total Distribution
408	IRA Transfer Debit
409	Intra IRA Debit

⑆5530⑈400⑆

ACCOUNT NO.

[redacted].7011

CD/IRA DEBIT TRANSACTIONS

347	CD Auto Closing Withdrawal
346	CD Closing Withdrawal
305	Penalty
422	IRA Distribution
423	IRA Total Distribution
408	IRA Transfer Debit
409	Intra IRA Debit

DATE 9/20 _ _ 20 18 INITIALS TE

DRAWN BY _____ EFFECTIVE DATE _____

NAME Robert Lynch

TRAN CODE 347 By Robert T. Lynch Kevin J. Lynch POA

22295.11

⑆5530⑈100⑆

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29823

ESTATE OF ROBERT T. LYNCH,

DECEASED,

Plaintiff and Appellant,

VS.

KEVIN LYNCH,

Defendant and Appellee.

APPEAL FROM THE FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE TAMI BERN
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE

ATTORNEYS FOR APPELLANT:

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Notice of Appeal filed November 9, 2021

Notice of Review filed November 29, 2021

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PRELIMINARY STATEMENT

Citations to the settled record as reflected by the Clerk's Index are designated with "R." and the page number. Citations to the Appendix to this brief are designated as "App." and the page number. The transcripts of the jury trial, pre-trial hearing, summary judgment hearing, and other proceedings held before the circuit court are included and paginated within the record and are cited as "R." and the page number.

JURISDICTIONAL STATEMENT

Appellee agrees that this Court has jurisdiction over this appeal, including his notice of review, under SDCL 15-26A-3(1) and (2), SDCL 15-26A-7, and SDCL 15-26A-22.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests the privilege of appearing for oral argument before this Honorable Court.

STATEMENT OF THE ISSUES

I. Did the trial court commit legal error or abuse its discretion in applying Bienash v. Moller and its progeny to deny summary judgment on the breach of fiduciary trial or in its evidentiary rulings at trial?

The trial court denied the Estate's motion for summary judgment on breach of fiduciary duty and overruled its objections concerning the agreements between Kevin and his father regarding the operation and maintenance of his farm and their business together.

- *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431
- *Hein v. Zoss,* 2016 S.D. 73, 887 N.W.2d 62
- *Estate of Bronson*, 2017 S.D. 9, 892 N.W.2d 604
- *Smith Angus Ranch, Inc. v. Hurst*, 2021 S.D. 40, 962 N.W.2d 626

II. Did the trial court abuse its discretion in settling the jury instructions and thereby prejudice the Estate?

The trial court overruled the Estate's objections to four jury instructions and declined to grant a proposed instruction.

- *Estate of Bronson*, 2017 S.D. 9, 892 N.W.2d 604
- *Hein v. Zoss,* 2016 S.D. 73, 887 N.W.2d 62
- *Garrett v. BankWest, Inc.,* 459 N.W.2d 833 (S.D. 1990)

III. Did the trial court err in granting judgment as a matter of law on Kevin's conversion counterclaim?

At the close of evidence, the trial court granted judgment as a matter of law to Kevin on his conversion counterclaim.

- *Estate of Card v. Card*, 2016 S.D. 4, 874 N.W.2d 86
- SDCL 29A-6-104(1)
- SDCL 15-6-50(a)(1)

IV. By Notice of Review: Did the trial court err in holding that the POA did not expressly authorize self-dealing up to a certain annual amount and in refusing to instruct the jury to deduct such amounts from any award of damages?

- *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431 (*and its progeny*)
- *Wright v. Temple*, 2021 S.D. 15, 956 N.W.2d 436

STATEMENT OF THE CASE

This appeal arrives from a unanimous jury verdict in favor of Appellee Kevin Lynch on various claims lodged against him by one of his two sisters, Ann Lynch, acting in her capacity as Personal Representative of the Estate of Robert T. Lynch ("Ann" or "Estate"), their deceased father. Robert "Bob" Lynch had appointed Kevin and Ann to serve together as Personal Representatives of his Estate, but Kevin voluntarily resigned once Ann made her intention to sue him clear. (R. 5289).

The case began on August 28, 2018, when Ann filed a complaint on behalf of the Estate against Kevin in Clay County alleging breach of fiduciary duty, conversion, and elder exploitation and seeking punitive damages. (R. 2). Ann alleged that Kevin had taken financial advantage of his father concerning their operation of the farm and their business together. (R. 2-9).

On October 23, 2018, Kevin filed his answer and counterclaim. (R. 23). Kevin alleged the Estate converted funds from a joint checking account in which Bob granted him rights of survivorship. (R. 28). Even though it rightfully belonged to Kevin after Bob's death, Ann directed him to transfer $110,000 in the account to the Estate, which Kevin promptly did. (R. 29).

Summary judgment denied

On May 22, 2020, Ann filed a motion for partial summary judgment on breach of fiduciary duty. (R. 64). She contended that this Court's decision in *Bienash v. Moller* and related decisions entitled the Estate to judgment as a

matter of law against Kevin on that claim. (R. 70-83). Kevin opposed the motion and brought his own motion for partial summary judgment on his conversion counterclaim. (R. 258).

A hearing on the competing motions was held before the Honorable Tami Bern on June 10, 2020. (R. 935, 3921). On July 22, 2020, Judge Bern issued her ruling. (R. 943). First, the court denied the Estate's motion:

> Kevin concedes he was appointed as Robert's attorney in fact pursuant to a power of attorney dated December 5th, 2007. This creates a fiduciary duty as a matter of law. The issue then, for the summary judgment, is whether the undisputed material facts established that Kevin breached that duty imposed by the fiduciary relationship.

(R. 948). Judge Bern rejected Ann's *Bienash*-as-a-matter-of-law argument:

> The Court agrees with Kevin that *Bienash* is materially distinguishable from the facts here, as the self-dealing in that case exclusively involved the attorney issuing himself gifts. Here, Kevin asserts that the expenditures were for the benefit of Robert.
>
> In *Hein vs. Zoss*, the trial court prohibited Zoss from introducing evidence that even though he leased land to himself, he did not breach his fiduciary duty of loyalty created pursuant to the POA. The Supreme Court reversed, finding the proferred evidence was relevant to show whether Zoss acted with the utmost good faith and for the benefit of the beneficiary. Whether Kevin breached his fiduciary duty to Robert by virtue of the expenditures and cashing in the CD are issues of fact for the jury.

(R. 948-49). Judge Bern also denied Kevin's motion. (R. 945, 953). On July 29, 2020, the court entered its order reflecting its rulings. (R. 935).

Jury Trial

A twelve-member jury was empaneled to hear and adjudicate the claims in a four-day trial commencing on September 28, 2021. (R. 4145). At the close of evidence, Judge Bern granted the Estate's motion to instruct the jury on punitive damages and denied the Estate's motion for judgment as a matter of law on its three claims, holding that because the evidence was disputed they should be resolved by the jury. (R. 5757, 5774). Judge Bern then granted Kevin's motion for judgment as a matter of law under SDCL 15-6-50(a) on his counterclaim for conversion. (R. 5773-4).

Unanimous Verdict

On October 1, 2021, the jury returned a unanimous verdict for Kevin on the claims brought against him. (App. 46; R. 3868-69). On October 18, 2021, the court entered judgment on the jury verdict in favor of Kevin and on his counterclaim against the Estate in the amount of $110,000. (R. 3878-79).

STATEMENT OF THE FACTS

Bob and his son, Kevin (now 65 years old), farmed together almost their entire lives. For nearly five decades, they raised corn, soybeans, hogs, and cattle on almost 700 family acres in Clay County. (R. 4180-82, 4565, 4568-69; Ex. 443). Bob's wife and Kevin's mother, Mary Imelda, helped with the work and served as the farm's bookkeeper. (R. 4181, 4566-67).

While Kevin spent his life working, partnering with, and then caring for his father, his sisters Ann and Carleen chose to excuse themselves from those responsibilities and live out their lives, as was their perfect right to do,

in Europe and on the east coast. (R. 4180). Both sisters left South Dakota shortly after high school and moved to Switzerland after college, with Ann later deciding in 1996 to return to the United States and live in North Carolina. (R. 4568, 5258, 5683, 5700). Although distance was an obstacle, Ann and Carleen loved their father, spoke with him often on the phone, and tried to return to South Dakota at least once a year. (R. 5259, 5683, 5703). Throughout his life, Bob never chose to discuss with his daughters his finances or his farming partnership and livestock operations with Kevin. (R. 5294-97, 5351, 5703-04).

Over almost half a century, Bob and Kevin's working relationship evolved from Kevin as a young boy doing his chores with Dad, to being paid an hourly wage, then eventually to a 50/50 partnership in 1979, switching to a 60/40 crop-share and cattle-share partnership when Bob's shoulders gave out and he retired in 1995, and finally in 2012 to a landowner/farm manager agreement with a continuing partnership in their cattle business. (R. 4182-83, 4567-68, 4571-73, 4583-86).

Over the years, Kevin and Bob shared the cost of the equipment and machinery needed for their operation. (R. 4574-75, 4579, 4581-82, 4584-85). As father and son, their agreements over the years were based on their word and deep family relationship and were not executed as formalized written contracts. (R. 4183, 5158-59).

After 48 years of marriage, Mary Imelda passed away in 1999. (R.

4181). Bob and Kevin pressed on together alone. Kevin lived on his own small homestead about three miles away, but he continued to work with Bob every day: farming, raising cattle, and maintaining Bob's land. (R. 4587). As Kevin testified, "I checked on him every day, make sure he was okay, make sure he got up, had his breakfast, got dressed for the day." (R. 4596).

In 2006, after his shoulders gave out, Bob moved off the farm to live in Vermillion with a longtime friend who also had lost her spouse. (R. 4190, 4588). Kevin continued to provide all the labor for their farming, crops, and livestock operations and maintained the 700-acre farm, including his father's homestead and house, and all his tillable and non-tillable acres. (R. 3494, 4570-71, 4601-02; Ex. 425).

2007
Durable Power of Attorney

Bob hired Attorney Mike McGill for various matters over the years, including writing wills. (R. 5231-32). In 2007, Bob asked McGill to prepare a durable power of attorney for financial management and health care ("POA") in favor of Kevin. (App. 1; Ex. 201; R. 1656, 4192, 4194, 5234). After discussing his intentions for the POA with Kevin, Bob met with McGill to finalize the documents. (Ex. 201; R. 1656, 4192, 4197). McGill explained the POA and its effect to Bob, but not to Kevin. (R. 5235-36). Bob signed the POA on December 5, 2007. (R. 1663, 5234).

The POA granted Kevin general authority to handle all Bob's affairs, including specific authority to maintain bank accounts, provide compensation

for services, and disburse funds "for maintenance, repair, improvement, management, or any other purposes in connection with any real or personal property or any interest therein owned by me," as well as to make all decisions regarding the management and acquisition of real and personal property such as farm equipment, machinery, and vehicles. (R. 1656-57, 4199-200, 5160-64, 5364).

In addition, the POA included a provision allowing gifts to others on Bob's behalf, expressly including Kevin, in amounts up to the annual IRS gift tax limitation each year, as well as a specific provision allowing Kevin to gift to himself funds for medical expenses. (R. 1659). Even after the POA, Bob continued to handle his financial affairs for several years. (R. 4208-09, 5160).

2008
Joint Account with Rights of Survivorship

Bob only had one checking account. (R. 5308). Shortly after issuing the POA in 2007, Bob signed separate paperwork on February 1, 2008, allowing Kevin to sign checks on his account as power of attorney. (App. 18-19; Exs. 25, 204 at 3-4; R. 1673, 5131-32). At that time, the checking account was listed as "Kevin J. Lynch POA for Robert T. Lynch" and a "POA Designation" account. (Exs. 25, 204 at 3-4; R. 1673, 5132-33). This was done for Bob's convenience to allow Kevin to write checks for Bob's bills. (R. 5133).

Three months later, on May 13, 2008, Bob independently decided to change the account to a joint account with rights of survivorship in Kevin. (App. 16-17; Exs. 25, 204 at 1-2; R. 1671, 5133-34). Without informing or ever

discussing it with Kevin, Bob went down to the bank alone and signed documents to make that change, which redesignated the account as "Robert T. Lynch and Kevin J. Lynch" and "Joint with Rights of Survivorship." (Exs. 25, 204 at 1-2; R. 1671, 4212, 5135-37, 5227-28, 5737-38). Later that same day, the bank contacted Kevin and asked him to sign the document. (R. 5135). Kevin did not understand he had rights of survivorship, or even what that meant, until his attorneys informed him several months after Bob died. (R. 5319-20, 5135-36, 5224-28). No evidence was produced at trial that when Bob made these changes on May 13, 2008, he intended anything other than for the account to belong to Kevin at Bob's death.

2010
Last Will and Testament

Bob's previous wills mostly had divided everything equally between his children, but in 2010 he decided to change that. (App. 22-23; Ex. 36; R. 2990, 5232, 5238-40). He asked Attorney McGill to draft a new will that devised 51 percent of his land to Kevin, and 24.5 percent each to Ann and Carleen. (App. 10; Ex. 202; R. 1665-56, 4218, 4316). The new will also devised "any and all farm machinery, farm equipment, tools, implements, harvested grain in inventory, harvested soybeans, farm pick-up, farm truck, and all livestock that I might own at my death" to Kevin. (App. 10; Ex. 202; R. 1665, 4219).

McGill satisfied himself that Bob was competent, capable of understanding and controlling his financial affairs, and not subject to any undue influence. (Ex. 36; R. 2990, 5251-53). He documented Bob's wishes in

a memorandum. (App. 22; Ex. 36; R. 2990, 5251-53). It was no surprise that Bob favored Kevin in the disposition of his property, as his will explained:

> SEVENTH: In this my Last Will and Testament I have benefitted my son Kevin J. Lynch over my two daughters. I do this because he stayed home to help me on the farm. He has also helped me considerably in my problems in daily living as I have aged. I further have the specific intention of continuing on the farming heritage in the Lynch family. For these reasons, I have provided more to my son Kevin J. Lynch than to the other children.

(App. 13; Ex. 202; Ex. 36; R. 1668, 2990-91, 5240-42).

Kevin understood Bob was going to change his will to grant him 51 percent of the land but did not know Bob was devising him all the farm equipment. (R. 4655-57, 5250). Kevin never saw or had a copy of the will until its official reading after Bob's death with Ann, Carleen, and their husbands immediately after the funeral. (R. 4657, 5249). Because Kevin believed she would make things difficult, he advised Bob not to appoint Ann as a co-personal representative, but Bob rejected that advice and appointed both Kevin and Ann to represent his estate. (Ex. 202; R. 1668, 4217, 4655-56). Bob's 2010 will was admitted to probate without any challenge. (13PRO18-000011).

Although mentally sharp, Bob's physical health continued to gradually decline. After two shoulder surgeries and a stroke, he "went from using a cane to get around to using a walker and eventually he had to go to a wheelchair." (R. 4587-90). In late 2011, Bob and Kevin agreed he should move into the Sanford nursing home in Vermillion, where he lived for the

next six-plus years until his death. (R. 4191, 4589-90). Kevin continued to visit his father nearly every day and attended the overwhelming majority of his medical appointments over the years until his passing. (R, 4597).

After Bob entered the nursing home, he and Kevin decided to purchase a mid-sized pickup truck, because with "being hoisted out of his wheelchair" it was hard for Bob to get into Kevin's heavy-duty truck to visit the farm or go anywhere. (R. 4591, 4596, 5157-58). At trial, Ann admitted that purchasing the smaller truck for Bob's needs was reasonable. (R. 5282).

Bob remained capable of making his own financial decisions and continued to do so. (R. 4597-99). He and Kevin continued to discuss every aspect of their business together and Kevin would regularly take Bob out to inspect and spend time outdoors on the farm: "[I]t made him happy." (R. 4590-91, 4597-601, 5157).

2012
The new farming arrangement

Bob and Kevin agreed that beginning in 2012, rather than exposing Bob's care and security to the financial uncertainty of raising crops themselves, the farm's tillable land (about 583 acres) should be cash rented to the Solomons, a neighboring farm operation. (R. 4231-33, 4603-04, 4634, 4665-66, 5143). This would ensure Bob would have the $80,000 needed each March to pay his nursing home bills. (R. 4231-33, 4603-04, 4630, 4634-36). Bob asked Kevin to negotiate a lease with the Solomons for the tillable acres on Bob's farm. (R. 5143).

From that time until Bob's death, Kevin continued driving to Bob's farm every day, maintaining the house, out-buildings, homestead, and non-tillable land, including tree belts and miles of fencing; performing snow and brush removal; mowing and spraying for weeds; doing road and dirt work; repairing and maintaining the farm equipment, vehicles, and machinery; and running their cattle operations on about 80 acres of pasture. (R. 4234, 4607-28, 4667-68). It was important to Bob that they remain in the livestock business—Bob loved running cattle. (R. 4602, 4605, 5154). And although "[h]e knew it was a big chore for one man," Bob "wanted to keep his only son on the farm." (R. 4605).

As Bob and Kevin discussed, leasing the tillable land to the Solomons would result in a substantial reduction in income for Kevin, but it was in Bob's best interests and necessary to take care of his needs. (R. 4603-04, 4636-37, 4667, 5220). To implement this change for Bob's benefit, Kevin agreed to modify their 60/40 crop-share arrangement that had been in existence since 1995. (R. 4626, 4667). In its place, they agreed Kevin would continue maintaining all the pasture and non-tillable acres, homeplace, and cattle herd, be paid an annual $30,000 fee for his labor and farm management and receive the calves from their cattle. (R. 4235; 4708-10, 4764-65, 5149, 5154). The evidence showed that this $30,000 annual payment from 2012 to 2018 was not even enough to cover Kevin's health insurance—which alone was $10,000 to $12,000 per year—and living

expenses. (R. 4709-12, 4759-63, 5150-51).

Without the 60/40 crop-share arrangement, Kevin would no longer be able to afford making payments on his existing farm-related debt. (R. 4243-47, 4583, 4637-38, 4653-54, 4666-67, 4704-07, 5144). Bob agreed that Kevin needed to be debt-free to continue their cattle operations and maintain Bob's property without income from the tillable land. (R. 5148). As an additional part of their new arrangement, therefore, Bob agreed to pay off Kevin's farm-related obligations, including an operating loan and debt for a John Deere tractor purchased in 2010. (R. 4243-47, 4583, 4637-38, 4653-54, 4666-67, 4704-07, 5144-48). Ann admitted Kevin used these funds from the joint account to pay farm-related and equipment obligations and that Kevin did not live a lavish or extravagant lifestyle. (R. 5348-50).

After renting the tillable acres in 2012, Kevin continued maintaining the cattle herd, managing the farm, maintaining their equipment, maintaining the non-tillable acres including mowing, fixing fences, trimming and removing trees, removing snow, and performing other farm and property-related tasks. (R. 4234, 4607-28, 5378). Kevin satisfied his obligations under his agreement with Bob.

As Kevin and Bob anticipated, Kevin's income plunged after their new arrangement was implemented. (R, 4637-38). In the first year, he went from a net income of $47,000 to a net loss of $16,500—a $65,000 decline. (R. 4639). In the second year, the net difference was more than $100,000 from his

previous income. (R. 4640). The annual payment and debt relief Kevin received as compensation for all the work he continued to do made up for some of those losses. (R. 4630). Meanwhile, Bob's net income increased as predicted and his nearly $550,000 in nursing home expenses from 2011 to his death in 2018 were paid in cash in full. (R. 4603-04, 4636-37, 4647-50).

Farm equipment, pick-up truck, Morton buildings, and CD's

In addition to criticizing the arrangement between Kevin and Bob, Ann took issue with the purchase of various pieces of farm equipment, two Morton buildings for storage of vehicles and equipment, as well as the use of $44,590.22 from Bob's CD's (which Bob had made payable on death to Kevin and were not part of the Estate) to help pay for a mid-sized pick-up truck in which Bob was able to ride. (R. 4592-95, 4554, 5158, 5175-76, 5382).

The farm equipment purchased over the years using funds from the joint account (small tractors, mowers, sprayers, lawn seeder, tree sheerer, Bobcat skid steer, trailers), always with Bob's full knowledge and consent, was necessary and used for the continued maintenance and operation of Bob's farm homestead, pasture and non-tillable acres, and their cattle operation. (R. 2227, 2968, 3747, 4668-99, 4700-01, 5146-47, 5186, 5220, 5364-65, 5381; Exs. 16, 235, 436). Ann admitted Bob would have understood what equipment was needed to maintain his farm and run the cattle. (R. 5355).

At his death, Bob owned all the equipment in question, as well as the Morton buildings in which it was stored, and all those assets were part of

Bob's estate. (R. 4555, 4668-99, 4701-03, 4786-86, 5356-67). As Bob and Kevin agreed, the Morton buildings were erected on land owned by Kevin due to flooding on Bob's land that seeped through the mud floors of Bob's old storage sheds:

> [W]e discussed how many square foot we would need to put the equipment that was setting outside indoors, and we discussed the flooding issues on the farm, and he didn't really have a good spot to put it, so I asked him if he'd be in favor of building them on my property, which we didn't have water issues. And he was all for that.

(R. 3727, 4575-78, 4783-89, 5156-57, 5372; Ex. 429). There had been break-ins at Bob's farm after he moved into Vermillion, and fear of burglary or theft of the equipment was another reason they decided to place the Morton buildings near Kevin's home. (R. 5371). At trial, Ann admitted this was a reasonable decision. (R. 5372).

The Estate's conversion of the joint account

After Bob's death on March 13, 2018, Ann directed Kevin to transfer the funds from the joint account for which Bob, unbeknownst to Kevin, had granted him rights of survivorship. (R. 4283, 4286, 5135-37, 5316). Not understanding that it now belonged solely to him, Kevin obediently wrote a check to the Estate for $110,000 in that account. (Ex. 39; R. 2992, 4286, 5137-38, 5316, 5324). After discovering Kevin had rights of survivorship, his counsel notified Ann about Kevin's right to the funds. (R. 5139, 5321). Ann refused to return the money. (Ex. 7; R. 2956, 5139, 5321-23).

When Bob died, his land was free of debt and appraised at $4,249,648.

(R. 4561, 5377). Under the will, Kevin received about $2.2 million in land, while Ann and Carleen each got more than $1,000,000 in land. (R. 4561).

STANDARD OF REVIEW

Ann has raised six issues challenging the denial of the Estate's motion for partial summary judgment, evidentiary rulings and jury instructions, and the grant of judgment as a matter of law on Kevin's conversion counterclaim.

Summary Judgment. This Court reviews the disposition of a motion for partial summary judgment do novo. *See Patterson v. Plowboy*, 2021 S.D. 25, ¶ 11, 959 N.W.2d 55, 58.

Evidentiary Rulings. This Court will not overturn evidentiary rulings "absent a clear abuse of discretion." *Graff v. Children's Care Hosp.*, 2020 S.D. 26, ¶ 13, 943 N.W.2d 484, 488. This standard looks at: (1) whether the trial court abused its discretion in making an evidentiary ruling; and (2) whether this error was a prejudicial error that "in all probability" affected the jury's verdict. *Frye-Byington v. Rapid City Med. Ctr., LLP*, 2021 S.D. 3, ¶ 10, 954 N.W.2d 314, 317. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Id.*

Jury Instructions. This Court affords a jury verdict "a presumption of validity." *Huether v. Mihm Transp. Co.*, 2014 S.D. 93, ¶ 23, 857 N.W.2d 854, 863. This Court reviews a decision to grant or deny a particular

instruction under an abuse of discretion standard, which requires both error and prejudice. *Wright v. Temple*, 2021 S.D. 15, ¶ 8, 956 N.W.2d 436, 448.

SDCL 15-6-50(a)(1). This Court reviews a decision to grant or deny a motion for judgment as a matter of law de novo. *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, ¶ 26, 946 N.W.2d 1, 8. It is appropriate when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue[.]" *Huether*, 2014 S.D. 93, ¶ 29, 857 N.W.2d at 863.

ARGUMENT

I. THE JURY VERDICT AND JUDGMENT FOR KEVIN SHOULD BE AFFIRMED.

Ann's theory of the case was that Kevin is a thief who stole from their father and robbed his Estate, thereby depriving her and her sister of a greater inheritance. The jury didn't buy that claim. The Estate's appeal is predicated on her argument that the jury was not supposed to hear about Kevin's farming agreements and discussions with his father and business partner. Because most issues are based on Bob's grant of power of attorney to Kevin, it may be helpful to examine this Court's jurisprudence surrounding powers of attorney and agency in general, including *Bienash v. Moller* and later cases clarifying that decision and limiting its scope.

A. Agency and POAs under South Dakota Law

Oral agreements regarding the operation of a family farm are common in South Dakota. As Mom and Dad age, the farm often is passed down to a child or close family member. Rarely is anything put in writing about how

the parents want the farm to run once they are no longer actively working. Often, the person closest to the parents has been farming with them for decades and is the natural choice for a POA when the right time arrives. It would be unusual for such parents to grant a POA to a child who had chosen to move far away and has nothing to do with the farm or helping to care for them as they grow old. And if acceptance of a POA precluded the child who stays to farm with a parent from continuing to engage in that partnership, it would never be accepted or offered.

Fortunately, that is not the law.

Agency is a creature of state law and governed both by statutory and common law. *Dakota Provisions LLC v. Hillshire Brands Co.*, 226 F.Supp.3d 945, 952 (D.S.D. 2016) (applying South Dakota law). "Agency is the representation of one called the principal by another called the agent in dealing with third persons." SDCL 59-1-1; *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988). A power of attorney creates an agency relationship governed by the law of agency. SDCL 59-12-1(7).[1] As explained in one treatise:

> Power of Attorney is merely a relationship between a principal (the property owner) and an agent (the appointed attorney-in-fact). As such, it is subject to all of the traditional legal doctrines dealing with principals and agents, except where modified by statute. A Power of Attorney does not transfer the principal's rights to deal with his or her property, but merely *duplicates* those rights in the attorney.

[1] South Dakota's new Uniform Power of Attorney Act, SDCL §§ 59-12-1 to 43, cited for informational purposes, does not apply to acts before its effective date (July 1, 2020) and does not apply to this case. SDCL 59-12-40(4).

2 Est. Tax & Pers. Fin. Plan § 17:7 (May 2021). A "durable" power of attorney, which remains in effect even when the principal becomes incompetent or incapacitated, is presumed valid under South Dakota law. SDCL 59-6-11; SDCL 59-7-9.

As a matter of law, a fiduciary relationship exists when a power of attorney is created. *Hein v. Zoss*, 2016 S.D. 73, ¶ 8, 887 N.W.2d 62, 65. Fiduciary relationships are built on trust and reliance placed by one in another to act faithfully. A fiduciary owes duties of loyalty and care. As courts have recognized, however, what those duties encompass is fact-specific and varies among types of fiduciary relationships.

Agency differs from a trustee relationship in important ways. For example, while a trustee normally is not subject to the control of the settlor or beneficiaries, an agent or attorney-in-fact must carry out the principal's orders and cannot disobey them, even when contrary to the instrument creating the agency, except "where it is clearly in the interests of his principal that he should do so, and there is not time to communicate with the principal." SDCL 59-3-7. As a result, "[a]n agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency." SDCL 59-4-1; R.2d of Agency §§ 389-90 ("One employed as an agent violates no duty to the principal by acting for his own benefit if he makes a full disclosure of the facts to an acquiescent principal and takes no unfair advantage of him").

Similarly, "a guardian and an attorney-in-fact are two separate and

distinct entities." *Guardianship of Blare*, 1999 S.D. 3, ¶ 15, 589 N.W.2d 211, 214. "A guardian may be appointed without the ward's consent or capacity and is 'substituted by law,'" whereas "an attorney-in-fact is appointed by the individual, not the court, and the individual may modify or abrogate the attorney-in-fact's duties and powers." *Id.* Here, the evidence demonstrated Kevin's fulfillment of his obligations as agent to keep Bob informed, obtain his consent, follow his instructions, and deal with him fairly at all times.

This Court has rejected the notion that once a POA is granted, every subsequent act of the attorney-in-fact involves a fiduciary duty. *Estate of Bronson*, 2017 S.D. 9, ¶ 11, 892 N.W.2d 604, 608-09. Rather, South Dakota law will imply such duties to matters outside of a POA 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.

Thus, this Court held there was no breach of fiduciary duty where a father, who previously granted his son a POA, was independently and competently handling his own financial affairs when he went to the bank to request the creation of a joint account with his son, even though the son actually signed the document creating the account on behalf of his father at his request. *Id.* (explaining that because father/principal could handle his own affairs, "none of the factors necessary for a fiduciary relationship were present in this banking transaction").

Importantly, authority to use a POA to make self-dealing gifts or other

gratuitous transfers exists only if the instrument provides clear and unmistakable language specifically authorizing the acts. *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 19, 935 N.W.2d 262, 267-68. But self-dealing occurs only when an agent actually pits their personal interests against their obligations to the principal in violation of the duty of loyalty. *Id.*; *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 23, 908 N.W.2d 170, 177.

To enforce that limitation, the powers granted by a POA cannot be contradicted by parol evidence. An attorney-in-fact cannot rely on an alleged oral authorization for making a self-dealing gift, or other gratuitous transfer, where the POA agreement itself does not expressly authorize such gifts. In *Bienash*, 2006 S.D. 78, ¶¶ 5-9, 721 N.W.2d 431, 432-33, this Court examined the scope of admissible evidence in a case involving a POA executed by Duebendorfer, an elderly bachelor, in favor of his great niece and her husband, the Mollers. The POA did not contain any language giving the Mollers the power to make self-dealing gifts. Yet the Mollers used it to make themselves beneficiaries of Duebendorfer's bank accounts and CDs. An heir of Duebendorfer filed breach of fiduciary duty claims against the Mollers.

On appeal, this Court held that an attorney-in-fact may not use a POA to self-deal unless it expressly provides authorization for self-dealing acts in clear and unmistakable language. It further held that "oral extrinsic evidence" was not admissible to raise a factual issue on whether the grantor of a POA intended to allow the attorney-in-fact to use it to make gifts to

himself or self-deal. *Id.*, ¶ 27.

Bienash, and each of the cases on which it relied, was aimed at transactions in which an attorney-in-fact used a POA to give himself *gifts* or make other *gratuitous transfers*. (R. 1328 at fn.2, collecting cases). In *Bienash*, the attorneys-in-fact used the POA to change the beneficiary on the principal's bank accounts and CDs to themselves for a total gift of $266,000. *Id.*, ¶¶ 1, 7-8, 15. The attorneys-in-fact never disputed that changing the POD designations resulted in gifts of the principal's funds. The only issue was whether oral extrinsic evidence was admissible to show that the principal granted permission to make these gratuitous transfers using a POA that did not expressly authorize such gifts. *Id.*, ¶¶ 15, 16, 17, 27. As this Court later clarified: "Our cases, including our most recent decision in *Stoebner*, have only applied the rule in *Bienash* to *acts of self-dealing* by an attorney-in-fact acting under a written POA." *Smith Angus Ranch, Inc. v. Hurst*, 2021 S.D. 40, ¶ 22, 962 N.W.2d 626, 631 (emphasis supplied).

In *Studt v. Black Hills Fed. Credit Union*, the attorney-in-fact attempted to use his POA to change the beneficiary on his principal's CD. 2015 S.D. 33, ¶¶ 6-7, 864 N.W.2d 513, 514-15. He argued the POA gave him the power to make gifts to himself and never argued that he had provided any type of labor or services to the principal in exchange for these funds. Given that, this Court found his actions to be self-dealing. *Id.,* ¶¶ 8, 11-13.

In *Wyman*, the attorney-in-fact wrote checks to herself and immediate

family members from a joint account with the principal and admitted that the transfers were gifts. 2018 SD 17, ¶¶ 5-7, 19, 23, 908 N.W.2d at 173-76. The attorney-in-fact argued that the POA granted her authority to make gifts to herself, but never argued that a question of fact existed as to whether the transfers were for value or part of any longstanding business. Given the admission that the transfers were gifts, this Court concluded they constituted "impermissible self-dealing" under that POA. *Id.,* ¶ 24.

In *Stoebner*, the attorney-in-fact used his POA to sign a contract to buy the principal's land for much less than fair market value, an unmistakable act of self-dealing, ultimately resulting in a gift to himself of $700,000. 2019 SD 58, ¶¶ 1-7, 18-21, 935 N.W.2d at 263-67. This Court concluded there were no disputed facts on whether the acts were self-dealing.

Other cases have limited the *Bienash* exclusionary rule. In *Hein*, a mother and her sons had a longstanding arrangement where mother allowed them to farm her land without paying rent. 2016 SD 73, ¶ 13, 887 N.W.2d at 67. After this arrangement had existed for several years, she named one of her sons as her attorney-in-fact. *Id.*, ¶ 2. The POA did not expressly allow her son to self-deal. After their mother died, the sisters who represented mother's estate sued the son for breach of fiduciary duty, bringing claims similar to Ann's against Kevin. *Id.*, ¶¶ 9-13. The trial court excluded all evidence about the son's agreements with his mother and the jury rendered a verdict against him.

This Court reversed, holding the trial court abused its discretion by excluding admissible evidence regarding the mother's intent and long-standing practice of allowing and encouraging her attorney-in-fact son and other sons to farm the family land without paying rent. *Id.*, ¶¶ 12-13. This Court further held that the trial court erred in excluding evidence that "rather than paying rent in the form of money, he paid his mother 'in terms of hard work of [him] taking care of her[.]'" *Id.* This Court held the evidence was admissible and "relevant to show whether [the son] acted with utmost good faith and for the benefit of [his mother], and its omission prejudiced [her son]" at the trial. *Id.*

This Court relied on the Restatement (Third) of Trusts explaining pre- and post-trusteeship transactions in ruling that the son was prejudiced by excluding evidence showing that although he farmed the land without paying rent, he did not breach his duty of loyalty:

> After becoming trustee, however, with a responsibility for protecting the trust estate … the handling of even a preexisting claim of this type will involve conflicting interests, *requiring at least disclosure to beneficiaries and that the trustee act in good faith and in the interest of the beneficiaries*.

R.3d of Trusts § 78 cmt. h. Using similar evidence, the jury concluded here that Kevin acted in good faith, and in Bob's interests, and that their agreement in 2012, and Kevin's actions in reliance on it for over six years, were a continuation of their preexisting farming agreements, modified for the benefit of Bob and his immediate needs, as instructed and approved by Bob.

While it is clear from *Bienash* and its progeny that an attorney-in-fact may not make gifts or other self-dealing transfers to himself absent express written authority in the POA, and may not introduce oral extrinsic evidence to create a factual dispute on that issue, agency law is equally clear that an attorney-in-fact does not breach a fiduciary duty or incur liability by engaging in business transactions with the principal, so long as the principal has full knowledge and the attorney-in-fact deals fairly with the principal:

> The existence of the agency relationship does not of itself forbid transactions between the principal and agent, and since the above rule exists to protect the principal, it has no application to cases in which the agent openly and fairly deals with the principal, without any concealment or deceptions, as in such cases, an agent is as competent to deal with the principal as another.

2A C.J.S. Agency § 287 (June 2021). Thus, where it is demonstrated that one party owes a fiduciary duty to another, as in an agency relationship, there is no breach of that duty where the principal consented, the agent acted in good faith, disclosed all material facts, and otherwise dealt with the principal fairly. R.3d of Agency, § 8.06 and cmts. b-c.

In *Bronson*, this Court also recognized limitations on the *Bienash* ruling where the accused attorney-in-fact "did not seek to admit oral extrinsic evidence to show that he had the power to self-deal" and "did not claim ownership of the money in the account based on a power granted in the power of attorney." 2017 S.D. 9, ¶ 9, 892 N.W.2d 604, 607-08.

The same is true here.

B. Judge Bern applied Bienash correctly in her evidentiary rulings and properly denied the Estate's motions.

As Judge Bern correctly determined both in denying Ann's motion for partial summary judgment and in evidentiary rulings at trial, this case is meaningfully distinguished from cases such as *Bienash* and *Studt*. Here, similar to *Hein* and *Bronson*, evidence of Bob and Kevin's longstanding farming arrangements, their discussions and agreements regarding the maintenance of Bob's property, and their lifelong business together demonstrated that Kevin was not self-dealing, but rather acting in Bob's interests in managing and maintaining the farm. This evidence was relevant and admissible in determining whether Kevin engaged in self-dealing, breached his duty of loyalty, committed conversion or "elder exploitation" against his father, as well as in establishing his affirmative defenses and defending himself against Ann's campaign for punitive damages.

The only claim on which Ann sought partial summary judgment was breach of fiduciary duty. To recover, a plaintiff must prove that: (1) the defendant was acting as plaintiff's fiduciary; (2) defendant breached a fiduciary duty to plaintiff; (3) plaintiff incurred damages; and (4) defendant's breach was a cause of plaintiff's damages. *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 38, 652 N.W.2d 756, 772. This Court long has held that whether one breached a fiduciary duty is a question of fact. *American State Bank v. Adkins*, 458 N.W.2d 807, 811 (S.D. 1990).

Kevin owed a fiduciary duty to Bob as a result of the POA and the jury was so instructed. (R. 3840). At the same time, however, Bob was competent and retained full power to make his own decisions, conduct business, and enter into transactions. In contrast to the POA in *Bienash*, Kevin had authority, expressed in clear and unmistakable language in the POA, to make gifts or other gratuitous transfers to himself up to the IRS gift limitation, as well as for medical expenses, although he did not use that power. (R. 1659, ¶14). In contrast to *Bienash*, as well, whether Kevin engaged in self-dealing at all was a disputed factual issue in this case.

Unlike in *Bienash*, Kevin did not seek to introduce oral extrinsic evidence to create a factual issue on whether he was authorized to use the POA to give himself gifts or self-deal beyond the IRS limitation. *Bronson*, 2017 S.D. 9, ¶ 11 ("But these legal principles do not apply here because Butch did not seek to admit oral extrinsic evidence to show that he had the power to self-deal"). Viewing the evidence in the light most favorable to Kevin, he did not use the POA to make gifts to himself and did not self-deal by pitting his personal obligations against his fiduciary obligations to Bob. He did not use the POA to change ownership or beneficiary designations on anything. Bob made those changes. Instead, the evidence demonstrated that Kevin served his father's interests by reducing his own income and living up to their business arrangement to maintain Bob's land, purchase the equipment necessary to care for his property, operate the farm, and run their cattle

business in the manner Bob wanted and expressly approved.

As the jury readily concluded, Kevin was *not* self-dealing; rather, he continued to be compensated for his work maintaining and operating Bob's farm, as he had been for decades before the POA was signed, and used the express authority granted by the POA to purchase the equipment and other things necessary to do that work for Bob. *See Hein*, 2016 SD 73, ¶¶ 12-13 (trial court abused its discretion in excluding evidence of mother's intent "relevant to show whether [the son] acted with utmost good faith and for the benefit of [his mother]").

The facts of this case are far removed from those in *Bienash*. Instead, this case shares similarities with *Smith Angus Ranch*:

> Travis presented testimony that Dee authorized each one of the transactions at issue. Further, as the circuit court correctly observed, "there may be evidence," apart from Travis' testimony, "tending to support Travis'[ ] contention that Dee not only approved of, but directed Travis to convert assets of SAR to his personal use." Travis was never paid a salary for his work for SAR, but Dee transferred ownership of SAR vehicles to Travis, transferred ownership of ranch land to the Hursts, and then forgave the Hursts' debt on the ranch land in her will. In her will, Dee also acknowledged that her favorable testamentary intent toward the Hursts may upset her sons.
>
> The existence of disputed facts in the record requires that we reverse the circuit court's decision granting partial summary judgment and remand for further proceedings.

2021 S.D. 40, ¶¶ 25-26, 962 N.W.2d at 632; *O-Brien v. R-J Dev. Corp.*, 387 N.W.2d 521, 525-26 (S.D. 1986) (holding that agents did not violate fiduciary responsibilities where principal was kept fully informed and consented to

transactions). Likewise, whether Kevin breached any duty owed to Bob, or otherwise stole from or exploited him, was a matter for the jury to resolve.

Contrary to Ann's argument, *Bienash* did not create a regime of strict liability for breach of fiduciary duty claims, and Judge Bern correctly ruled that Kevin was entitled to introduce the evidence establishing that he did not breach any such duty. Unlike the one-sided presentation in Ann's brief, the jury heard evidence from both sides regarding her criticisms of the farming operation and the specifics of each check and transaction challenged at trial. As set forth above, Kevin produced extensive evidence about how the farming relationship between he and Bob evolved, including Bob's specific instructions and their agreements about how the farm should be handled for decades before and after the POA was signed in 2007, and for more than six years of Kevin carrying out the final iteration of their lifelong partnership.

Kevin did not use the POA to give himself "gifts" of any kind. He was paid for his work under an arrangement negotiated with Bob over the decades they worked together, one that evolved—to Kevin's financial detriment—as Bob's need for cash-flow changed.

The purchases Kevin made using funds from the joint account, always with Bob's approval, were for equipment and other things necessary to maintain Bob's extensive property and their ongoing business. Those assets were always owned by Bob and remained in his estate. Although she would not commit to a dollar amount, Ann agreed Kevin certainly was entitled to

compensation for all the work he performed for his father from 2011 through his death on March 13, 2018. (R. 5304, 5378). It was up to the jury to determine whether Kevin was properly compensated or somehow violated his fiduciary duties in working with his father, maintaining and managing his property, and taking care of all his needs.

As Judge Bern correctly recognized, nothing in *Bienash* or its progeny prevented Kevin from explaining the truth about his discussions and agreements with Bob to best ensure he was properly cared for and honor his wishes regarding the management of his property. The evidence showed that Bob approved their business partnership and every purchase of equipment for the farm, and that Kevin did not defraud Bob, but kept him informed, followed his instructions, secured his agreement for their dealings regarding the farm, acted in good faith, and dealt with him fairly.

Similarly, nothing in *Bienash* or its progeny prevented Kevin from explaining the truth about his discussions and agreements with Bob to prove his affirmative defenses, including setoff, ratification, and estoppel. Finally, nothing in *Bienash* or its progeny prevented Kevin from explaining the truth about his discussions and agreements with Bob to rebut the allegations that his conduct was willful, malicious, or done in the spirit of criminal mischief with reckless disregard of Bob's rights under the standard for punitive damages. *Smizer v. Drey*, 2016 S.D. 3, ¶ 20, 873 N.W.2d 697, 703 (explaining that malice is not presumed simply from doing an unflawful or injurious act).

It would have been impossible for Kevin to defend himself against the punitive damages claim without being able to explain his state of mind and the basis for the actions he took in managing the farm by introducing evidence of his discussions and agreements with his father.

The jury considered all the relevant and admissible evidence and unanimously found in Kevin's favor. Their verdict should be affirmed.

C. There was no error in the jury instructions.

Ann raises three issues on appeal related to the instructions. None has merit. There was no error, let alone prejudicial error, in Judge Bern's comprehensive and legally accurate charge to the jury.

Instruction 15. Ann challenges Instruction 15, which defined the role of a fiduciary, which stated: "The court has determined as a matter of law that the defendant was acting as a fiduciary for Robert Lynch by virtue of the power of attorney. The power of attorney document defines the scope of the fiduciary relationship you are directed to accept as having been proved." (App. 24; R. 3840). The instruction further provided that "[f]or any act *outside of the scope of the power of attorney*, you must determine whether a further fiduciary relationship exists," and set forth this Court's standard for making such determinations. (App. 24; R. 3840).

Instruction 15 was an entirely accurate statement of the law taken straight from *Bronson*:

> Applying 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.
>
> Petitioners cite no law for such a presumption, and we decline to adopt one. After all, "[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." *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.* (quoting *Ward v. Lange*, 1996 S.D. 113, ¶ 12, 553 N.W.2d 246, 250).
>
> But here, none of the factors necessary for a fiduciary relationship were present in this banking transaction. The evidence undisputedly indicates that Lester was independently and competently handling his own financial affairs when he went to the bank to request the creation of the joint account.

2017 S.D. 9, ¶ 11, 892 N.W.2d at 608-09. Unlike *Bronson*, this case does not involve the amanuensis doctrine, but the same principles apply. There is no *per se* fiduciary duty for transactions unconnected to a POA. Bob gave Kevin survivorship rights in their joint account on his own. And the compensation, including debt relief, Kevin was entitled to receive from Bob for all the manual labor and other work performed in managing and taking care of Bob's land and property from 2011 to 2018 was unconnected to, and not governed by, the POA granted in 2007.

This Court's decision in *Wyman*, in which the attorney-in-fact claimed she could gift herself money from a joint account, does not change the

analysis. The issue in *Wyman* was whether the POA permitted self-dealing. 2018 SD 17, ¶¶ 5-7, 19, 23, 908 N.W.2d at 173-76. This Court relied on *Bronson* in remanding with instructions to apply the same standard set forth in Instruction 15 "to determine whether the markers of a fiduciary relationship were present at the time Morris added Bruckner to the Dakotaland account." *Id.*, ¶ 31. Instruction 15 is a complete and accurate statement of the law, and there was no prejudice in giving it.

Instructions 23, 29, 30, and 31. Ann also says it was error for Judge Bern to instruct on Kevin's affirmative defenses. She asserts that "Instructions 23, 29, 30, and 31 are incorrect, confusing and misleading," without explaining how that is so (thus waiving those arguments), but her real complaint is that "more importantly, all of the defenses (consent, release, ratification, and estoppel) are based upon the oral extrinsic evidence which the Trial Court improperly admitted under *Bienash* and its progeny." (Brief at 27). That argument is a rehash of Ann's previous arguments that should be rejected for the same reasons. Nothing in *Bienash* or its progeny prevented Kevin from explaining the truth about his discussions and agreements with his father to prove his affirmative defenses, each supported by competent evidence.

Instruction 23 regarding "consent, release, or ratification" expressly was limited to "a breach of fiduciary duty occurring outside the scope of the power of attorney or a conversion." (App. 32; R. 3848). In that context,

ratification by a principal is a complete defense to claims brought against an agent or attorney-in-fact. *Schelske v. S.D. Poultry Co-op, Inc*., 465 N.W.2d 187, 191 (S.D. 1991); *Defending Attorney-in-Fact from Claims relating to Invalidity of Power of Attorney or Violation of Terms and Duties Thereof*, 140 Am. Jur. Trials 185, § 84 (May 2021).

Similarly, Instructions 29 and 30 correctly stated the affirmative defense of estoppel, each instructing that "[t]his defense does not apply to any breach of fiduciary duty by acts of self-dealing pursuant to the power of attorney or theft by exploitation of elder." (App. 39-40; R. 3855, 3856). Ann admitted that Kevin should be compensated for his work taking care of Bob's farm and property from 2011 to 2018. (R. 5378). It would be wrong and inequitable for Bob's Estate, which stands in his shoes, to claw back the compensation Kevin earned and relied upon under his agreement with Bob for performing all those services he requested and approved, while retaining the benefits for all those years of labor. *Garrett v. BankWest, Inc.,* 459 N.W.2d 833, 848 (S.D. 1990); *Bailey v. Duling*, 2013 S.D. 15, ¶ 31, 827 N.W.2d 351, 362.

Refused instruction. Ann's final criticism on the jury charge is Judge Bern's refusal to instruct that: "A fiduciary breaches his fiduciary duty when he uses his position by enriching the value of property that would eventually devolve to him." (R. 1444, 5792-93). But that is an incorrect statement of law. The refused instruction would require a jury to find a

breach of fiduciary duty any time a child, who is also the beneficiary of his parents' estate plan, used a POA to protect, add to, or increase the value of any land or any other property he might eventually inherit, which often would defeat the very purpose of a POA.

Ann's argument focuses on Kevin's purchase of equipment needed to maintain Bob's property, though her confusing proposed instruction made no such distinction. Although Ann she claimed Kevin must have known Bob's 2010 will devised Kevin the farm equipment, the jury didn't agree.

This Court's decision in *Ward*, 1996 S.D. 113, ¶¶ 2-3, 14, 553 N.W.2d at 248-50, from which the language in the proposed instruction was gleaned, is inapposite: the agents in that case already owned the deeds to the land, while the principal held only a life estate, and the agents, without the principal's knowledge, stole the increased rental payments resulting from improvements to the land that were supposed to go to the principal. Kevin, who had never seen his father's will (which Bob could have changed at any time) and did not know it devised him the equipment, was not "feathering his nest" in following Bob's instructions to purchase equipment and property needed to run Bob's farm—all of which Bob owned—he was ensuring that his father's land was properly maintained. In any event, as Judge Bern held in refusing this legally erroneous instruction, the jury instructions as a whole provided a complete and correct statement of the law. (R. 5793; App. 24-45).

D. Judgment as a matter of law for Kevin was warranted on his conversion counterclaim.

Finally, Ann has appealed from the grant of judgment as a matter of law on Kevin's conversion counterclaim for the $110,000 from the joint account with rights of survivorship. This issue was controlled by the statutory burden of proof concerning joint accounts. SDCL 29A-6-104(1).

Conversion "is the act of exercising control or dominion over personal property in a manner that repudiates the owner's right in the property or in a manner that is inconsistent with such right." *Ward*, 1996 S.D. 113, ¶ 17, 553 N.W.2d at 251. In order to prevail on his counterclaim, Kevin needed to prove: (1) Kevin owned or had a possessory interest in his joint account with rights of survivorship; (2) Kevin's interest in the property was greater than the Estate's; (3) the Estate exercised control over or seriously interfered with Kevin's interest in the property; (4) such conduct deprived Kevin of his interest in the property; and (5) Kevin suffered damages as a result. *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31. The only disputed elements were whether the Estate had any possessory interest in the joint account at Bob's death and whether Kevin's interest in the funds was superior.

Under South Dakota law, as a matter of law, "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties 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 (emphasis supplied). In other words, Ann was required to

produce clear and convincing evidence, rather than relying upon speculation, to overcome the statutory presumption that Bob intended the account to pass by right of survivorship:

> As the party challenging the presumption, the Estate must present clear and convincing evidence that Jacquelyn "did not intend the usual rights of survivorship to attach to the joint asset, but instead intended the arrangement for her own convenience." *See In re Estate of Steed,* 521 N.W.2d 675, 678 (S.D. 1994). "Whether the joint accounts in question were created by decedent for her own convenience or for the benefit of the nondepositing joint payees 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. Judge Bern correctly held that the Estate completely failed to carry that burden.

The time-period that controls in evaluating any evidence regarding Bob's intent is May 2008 when the survivorship rights were created: "The controlling inquiry is [the account holder's] intent at the time she created the account." *Id.*, ¶14. Thus, the issue was whether there was clear and convincing evidence that Bob had a *different* intention when he changed the account in May 2008 than to leave those funds to Kevin at his death. At trial, Ann admitted she had no evidence of Bob's intent when he created the joint account. (R. 5311-13).

Bob never discussed with Kevin why he changed the account to a joint account with rights of survivorship. (R. 5227-28). As Judge Bern recognized, the snippet of Kevin's deposition testimony relied upon by Ann—that the account's purpose was for the convenience of Kevin paying Bob's bills—refers

to February 2008 when Kevin was added as POA to Bob's account, *not* to May 2008 when Bob independently changed the account to one with rights of survivorship in Kevin. (R. 5224-28, 5773-74).

The only witness to the creation of the joint account (other than Bob) was Deb Christensen, Branch Manager for Bank of the West, who has been employed there for 30 years and knew Bob. (R. 5725). She testified that when Bob came in and changed the account in May 2008 to one with rights of survivorship, she would have explained as part of the bank's standard procedure that adding Kevin as a joint owner with rights of survivorship meant that Kevin would then be an equal owner with Bob and would be its sole owner upon Bob's death. (R. 5737-38). She further testified that with Kevin already having had a POA on the account (given by Bob in February 2008), he could do all the same things he could as a joint account holder, *except* become its sole owner when Bob died. (R. 5739). Thus, the only reason for Bob to change the POA designation (established February 2008) to a joint account with rights of survivorship in May 2008 would be so Kevin would legally own the funds in the account upon Bob's death.

In sum, the only evidence admitted at trial indicated that Bob intended Kevin to have rights of survivorship and Ann presented zero evidence that at the time Bob changed the account in May 2008, he had a different intention than leaving the account to Kevin. (R. 271-76, 5311-13, 5737-39). Judge Bern properly granted judgment as a matter of law on Kevin's counterclaim.

E. Notice of Review

None of this Court's prior *Bienash* cases involved a POA that actually *does* authorize the attorney-in-fact to make self-dealing gifts. This case is different. Here, the POA expressly authorized Kevin, in clear and unmistakable terms, to self-deal by making annual gifts to himself up to the annual federal gift tax exclusion, which would total $111,000 over the years in question. (App. 4; R. 1659 at ¶14, 667-68 at p. 30-34, 1250-55). At summary judgment, however, the trial court held that the POA did not expressly authorize self-dealing. (R. 948). That was legal error.

The trial court also erred in refusing Kevin's proposed instruction that, as the result of the express terms of the POA, the amounts of the annual gift tax exclusion should be deducted from any award of damages assessed against him. (R. 1540). Although Instruction 34 provided those annual IRS gift tax exclusion amounts for the jury to consider in determining damages, that did not go far enough. (App. 45; R. 3861). To the extent that the jury would have found that any transactions at issue amounted to self-dealing and assessed damages, it should also have been instructed that Bob expressly authorized Kevin to gift himself up to a minimum of $111,000 over the same time period and to deduct those amounts.

In the event of a verdict against him, Kevin would have been prejudiced by the failure to so instruct because it would have denied him rights expressly granted under the terms of the POA that governed his

conduct. *Wright*, 2021 S.D. 15, ¶ 8, 956 N.W.2d at 448 (standard of review). If those transactions would have been legally deemed self-dealing gifts, they would have been valid, as a matter of law, up to the amount Bob expressly authorized them under the POA. Kevin seeks reversal on these issues raised by notice of review only in the event that there is another trial. Resolution is unnecessary should this Court affirm the judgment as requested.

CONCLUSION

Kevin respectfully requests that the judgment entered on the jury verdict in his favor and on his counterclaim be affirmed.

Respectfully submitted this 25th day of April, 2022.

JOHNSON, JANKLOW, ABDALLAH & REITER, L.L.P.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 9.911 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE and the APPENDIX TO APPELLEE BRIEF were served via email upon the following counsel of record:

Michael J. Schaffer mikes@schafferlawoffice.com

on this 25th day of April, 2022.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29823

ESTATE OF ROBERT T. LYNCH,

DECEASED,

Plaintiff and Appellant,

VS.

KEVIN LYNCH,

Defendant and Appellee.

APPEAL FROM THE FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE TAMI BERN
CIRCUIT COURT JUDGE

APPENDIX OF APPELLEE

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Notice of Review filed November 29, 2021

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STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CLAY)

DURABLE POWER OF ATTORNEY
FOR FINANCIAL MANAGEMENT
AND HEALTH CARE

KNOW ALL MEN BY THESE PRESENTS:

That I, Robert T. Lynch, of 46884 317th Street, Burbank, South Dakota 57010, do hereby appoint Kevin John Lynch, of 46852 Burbank Road, Burbank, South Dakota 57010, if living, competent and willing to act, as my true and lawful agent-in-fact (hereinafter my "Attorney") for me and in my name, place, and stead to deal generally and in all respects, without restriction, in and with any property of any nature whatsoever in which I may have any interest and to make healthcare decisions as set forth and described herein.

PART 1 – POWERS

A. Statutory Powers. I hereby grant to my attorney such powers as are permitted and allowed pursuant to South Dakota Codified Law Chapter 59-3.

B. Specific Powers. Without in any way limiting the broad general power given to my attorney above, and in addition to those powers referred to in Paragraph A above, and not in limitation thereof, I specifically authorize my attorney to act for me in the following manner:

1. Demand and Receive Property. To demand, receive, collect, and hold any and all monies, securities, and other personal and real property of any nature whatsoever belonging to me or in which I may have an interest.

2. Open and Maintain Bank Accounts. To open and maintain accounts for me and in my name in such banks, savings and loan associations, and other financial institutions as my attorney may deem best; to make deposits of money belonging to me in such accounts; and to disburse such monies on the signature of my attorney for any purposes in connection with my personal comfort, support, maintenance, health, and general welfare, in such manner

and amounts, for such purposes, and at such times as my attorney, in his, her, or its sole discretion and judgment, may deem best.

3. Disburse Funds. To make disbursements of monies belonging to me in such manner and amounts, for such purposes, and at such times as my attorney, in his, her, or its sole discretion and judgment, may deem best for maintenance, repair, improvement, management, or any other purposes in connection with any real or personal property or any interest therein owned by me.

4. Deal in Real Estate. To sell, subdivide, improve, operate, manage, control, exchange, convey, assign, mortgage, encumber, or dispose of any real property that I may possess and receive the rents, income and profits derived therefrom; to exercise in all respects general control and supervision over any real estate belonging to me; and to purchase or otherwise acquire additional real estate. The real estate affected by this power of attorney is described as follows:

North 201.24 Feet of Lot A in the Northwest Quarter of the Southwest Quarter (NW ¼ SW ¼) of Section Seventeen (17), Township Ninety-Two North (92N), Range Fifty (50), West of the 5th P.M., Union County, South Dakota;

Southwest Quarter (SW ¼) Of Section Twenty-Six (26), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northeast Quarter of the Southwest Quarter (NE ¼ SW ¼) and the South 22 Feet of the Northwest Quarter of the Southwest Quarter (NW ¼ SW ¼) of Section Thirty-Six (36), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northwest Quarter of the Southwest Quarter (NW ¼ SW ¼) except the South 22 Feet, Section Thirty-Six (36), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

South Half of the Southwest Quarter (S ½ SW ¼) of Section Thirty-Six (36), Township Ninety-Three North (93N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Lot A in the Northwest Quarter (NW ¼) of Section Nine (9), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northwest Quarter of the Southeast Quarter (NW ¼ SE ¼) of Section Eleven (11), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northeast Quarter of the Southeast Quarter (NE ¼ SE ¼) of Section Eleven (11), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

South Half of the Southeast Quarter (S ½ SE ¼) of Section Eleven (11), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota;

Northwest Quarter of the Northeast Quarter (NW ¼ NE ¼) of Section Fourteen (14), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota; and

West Half of the Northwest Quarter (W ½ NW ¼) except Lynch Tracts 1 and 2 in Section Twenty-Four (24), Township Ninety-Two North (92N), Range Fifty-One (51), West of the 5th P.M., Clay County, South Dakota.

5. Supervise Securities and Personal Property. To exercise in all respects general control and supervision over any securities and other personal property, tangible and intangible, of any nature whatsoever belonging to me; to receive the dividends, interest, proceeds, and profits derived therefrom; and to purchase and otherwise acquire additional personal property.

6. Enter Safe Deposit Boxes. To have unrestricted access to and control of the contents of any safe deposit box or vault to which I might have access, to take and remove from such box or vault any or all of the contents thereof, to lease one or more safe deposit boxes for the safekeeping of my assets.

7. Manage Securities. To vote all stocks, bonds, and other securities; to collect the dividends, interest, profits, or accruals therefrom; to invest, buy, sell, reinvest, and manage the same; and to exercise any and all rights and powers in connection therewith, all as my attorney in his, her, or its sole discretion and judgment, may deem best.

8. Demand and Receive Money Due. To demand and receive, sue for and recover any and all monies or rights of any nature whatsoever and from whatever source derived that may now be due to me or which may at any time hereafter come due, and to give in all respects proper receipts, releases, and acquittances therefore, with no liability on the part of any obligor making payments to my attorney to see to the application of the proceeds of such payments or collections.

9. Borrow, Mortgage, and Pledge. To borrow such amounts for such purposes, and at such times as my attorney, in his, her, or its sole discretion and judgment, may deem best, and to pledge or mortgage any of my property, real or personal, as security for any such loans.

10. Maintain Legal Actions. To institute, prosecute, defend, compromise, settle, arbitrate, or dispose of any legal, equitable, or administrative actions or proceedings in my name; to execute and verify petitions and complaints in the Federal and Sate courts, specifically including the United States Tax Court; and to cause me to be represented in such proceedings.

11. Tax Controversies. To represent me and to appoint others to represent me in all tax matters before all officers of the Internal Revenue Service and any Department of Revenue for all years from 1950 to 2050, inclusive, and to prepare, sign and file any power of attorney form (specifically including Internal Revenue Service Form 2848) appointing my attorney or any other suitable person selected by my attorney as my representative before such taxing authority.

12. Tax Returns. To sign and verify all tax, social security, unemployment, insurance, and information returns required by the United States or by any State or subdivision thereof, specifically including joint income tax returns with my spouse, claims for refund, requests for extension of time and consents in my name; to receive, endorse, and receipt for any tax refunds due to me; to exercise any elections that I may have under Federal, State or local tax law; and to pay compromise, or contest any taxes, penalties, or interest for which I am or may be liable.

13. Deal With Existing Trusts. To add any property whatsoever belonging to me to any trust established by me, to be held and managed as though an original part of such trust; to withdraw and/or receive income or principal from any trust regarding which I have a right of withdrawal or receipt; to request and to receive the income or principal of any trust as to which the trustee has discretionary authority to make distributions to me on my behalf, and to execute any release or receipt that may be required by such trustee from me.

14. Make Gifts. To make gifts of my real or personal property or my interest in such property (including, but not limited to, outright gifts, gifts in trust, gifts to a Qualified State Tuition Payment Plan as described in Section 529 of the Internal Revenue Code of 1986, as from time to time amended, or gifts to a custodian under a uniform gifts or transfers to minors act) to such persons (including my attorney) or institutions, in such amounts or proportions, as my attorney, in his, her, or its sole discretion and judgment, may deem appropriate for tax or other reasons; provided, however, the total value of gifts to any one donee in any calendar year shall not exceed (i) the amount specified for the federal gift tax annual exclusion (including such additional amount of any gift tax annual exclusion attributable to the consent of my spouse under Section 2513 of the Internal Revenue Code of 1986, as from time to time amended), or (ii) the amount excluded from the gift tax under the provisions of Section 2503(e) of the Internal Revenue Code of 1986, as from time to time amended, relating to the payment of educational and medical expenses.

15. Insurance Transactions. To exercise any right or obligation in regard to any insurance policy of any kind whatsoever in which I have any incident of ownership; to obtain

additional contracts of insurance for me; and to make or change the beneficiary of such insurance contracts; provided, however, that my attorney cannot be designated as beneficiary unless my attorney is my spouse or an individual among my issue, and that my attorney shall have no power or authority to deal in any manner with insurance policies I may own on his or her life.

16. Retirement Plans. To exercise any right with regard to any retirement plan or individual retirement account I may have or entered into by the attorney on my behalf, or with regard to any retirement plan or individual retirement account as to which I am the beneficiary including, but not limited to, the power (i) to create and contribute to an individual retirement account, an employee benefit plan, or other retirement plans, (ii) to change the form of the plan as may be permitted by law such as to convert a traditional IRA into a Roth IRA; (iii) to "roll over" plan benefits, (iv) to receive distributions from such plan, and to endorse and deposit checks from such plans; (v) to borrow money from any such plan, (vi) to select options with respect to any such plan, and (vii) to make or change the beneficiary designation of any such plan, except that my attorney cannot be designated beneficiary unless my attorney is my spouse or an individual among my issue.

17. Estate and Trust Transactions. To request, demand, sue for, recover, collect, and hold, or to disclaim or renounce as provided by law, any interest that I have or may have in any estate or trust, and to execute and deliver any receipts, releases, or other instruments in connection with any such interest.

18. Business Transactions. To conduct, engage in, and transact any and all lawful business of whatever nature or kind in which I am engaged or interested.

19. Implement Foregoing Powers. To sign any and all contracts, deeds, or other instruments, including additional powers of attorney, necessary to carry out any of the aforementioned powers, hereby giving and granting unto my attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in implementing such powers as fully to all intents and purposes as I might or could do if personally present, with full power to substitute in my place and stead. In particular, I grant to my attorney the power to sign for me and on my behalf any and all other powers of attorney, on whatsoever form, as may be required or appropriate to permit my attorney to carry out the powers and purposes set forth herein, naming himself or another at attorney thereunder.

20. Personal Relationships and Affairs. To do all acts necessary for maintaining my customary standard of living and the customary standard of living of my spouse, my children, and my other dependents; to provide medical, dental and surgical care, hospitalization, custodial care or any other form of health or mental care for me, my spouse, my children, and my other dependents; to continue whatever provision has been made by me for me, my spouse, my children, and my other dependents, with respect to automobiles or other means of transportation; to continue whatever charge accounts have been operated by

me for my convenience, and the convenience of my spouse, my children, and my other dependents, to open such new accounts as my attorney shall think to be desirable for the accomplishment of any of the purposes enumerated in this paragraph, and to pay the items charged on such accounts by any person authorized or permitted by me or my attorney to make such charges; to continue to discharge of any services or duties assumed by me, to any parent, relative, or friend of mine; to continue payments incidental to my membership or affiliation in any church, club, society, order, or other organizations, or to continue contributions thereto.

21. Employ Advisors. To employ or discharge persons, firms and corporations to advise or assist my attorney, including, but not limited to agents, accountants, auditors, brokers, attorney-at-law, custodians, investment counsel, rental agents, realtors, appraisers and tax specialists.

PART II – HEALTH CARE POWERS

I further grant unto my attorney the authority to make such health care decisions as are in my best interest and to the extent provided for under SDCL 59-7-2.5; 59-7-2.6; and 59-7-2.7.

A. General Powers. In connection with health care decisions by my attorney, I hereby grant the following powers to my attorney within the limitations specified in the Part II (B) hereinafter set forth:

1. To authorize or withhold authorization for medical and surgical procedures.

2. To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care.

3. To arrange for my discharge, transfer from, or change in type of care provided.

4. To arrange for and pay for consultation, diagnosis or assessment as may be required for my proper care and treatment.

5. To authorize, withhold or withdraw artificial nutrition or hydration.

6. To commence such legal proceedings as may be necessary and appropriate to recover the cost of any medical and surgical procedures and treatment charged to me but not authorized by my agents-in-fact from the person or persons authorizing or directing that such treatment be provided.

7. I have discussed my wishes concerning medical, nursing and terminal care with my attorney and I trust and rely upon his, her, or its judgment on my behalf.

B. Life Sustaining Treatment. As to decisions related to my health care I hereby state the following instructions to my attorney with respect to decisions to withhold or withdraw life-sustaining treatment which reflects my intent. I specifically direct my attorney to convey these instructions to any physicians, nurses, care-giving organizations including but not limited to hospitals, nursing homes, mental institutions, boarding facilities and others which may carry some responsibility for my care:

1. If I am in a coma which my doctors have reasonably concluded is irreversible, and I become unable to participate in decisions regarding my medical care, I desire that life-sustaining or prolonging treatment be used only if and for as long as it is believed treatment offers a reasonable possibility of restoring to me the ability to think and act for myself.

2. If I have an incurable or terminal condition or illness and no reasonable hope of long term recovery or survival and I become unable to participate in decisions regarding my medical care, I desire that life-sustaining or prolonging treatments be used only if and for as long as it is believed treatment offers a reasonable possibility of restoring to me the ability to think and act for myself.

3. I do not desire treatment to be provided and or continued if the burdens of the treatment outweigh the expected benefits. My agent-in-fact is to consider the relief or suffering, the preservation or restoration of functioning and the quality as well as the extent of the possible extension of my life.

4. With respect to artificial nutrition and hydration, I intend to include this treatment among the "life-sustaining treatments" that may be withheld or withdrawn pursuant to my directive.

5. The contents of Part II (B) of this Power of Attorney must be construed in connection with the terms of applicable South Dakota Law, referring to SDCL 59-7-2.5 through 59-7-2.8, inclusive.

PART III – ADMINISTRATION

A. Compensation. My attorney shall serve without bond and without compensation. My attorney shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by attorney on my behalf under any provision of this Power of Attorney.

B. Right of Revocation. I reserve the right to revoke or amend this Power of Attorney at any time by any method set forth in South Dakota Codified law. Pursuant to that power, all Durable Powers of Attorney for Financial Management and Healthcare heretofore executed by me are hereby revoked.

C. Inventory and Accountings. No inventory or account shall be filed with any court or the clerk, thereof, but an accounting shall be filed with me or my guardian each year and with my personal representative in the year of my death.

D. Ratification. I do hereby ratify and confirm all thins so done by my attorney within the scope of the authority herein given my attorney as fully and to the same extent as if by me personally done.

E. Nomination of Guardian. If at any time following the execution of this Power of Attorney, a court appoints a guardian of my estate or a general guardian, I request that the court making such appointment consider my attorney nominated hereunder to serve as such guardian of my estate or general guardian.

F. Partial Invalidity. If any part of this Power of Attorney is declared invalid or unenforceable under applicable law, such decision shall not affect the validity of the remaining parts.

G. Durable Power of Attorney. This Power of Attorney is to be dominated and known as a "Durable Power of Attorney" and it shall not be affected by my subsequent incapacity or mental incompetence. I specifically direct that this Power of Attorney shall stay in full force and effect between the date of my incompetency and the date of my subsequent death.

H. Successor. In the event that Kevin John Lynch is unable to act in the capacity as my attorney, or in the event of his death, I nominate and appoint as successor attorney, Carleen Marie Lynch. The fact of Kevin John Lynch's death should be made evident by the filing of an Affidavit in the Clay County, South Dakota Register of Deeds Office reflecting the fact of his death with an attached Death Certificate. The fact that Kevin John Lynch is otherwise unable to perform in the capacity as my attorney should be made evident by the filing of an Affidavit by Kevin John Lynch or his duly authorized agent stating the fact with the Clay County, South Dakota Register of Deeds Office.

I. HIPAA. In accordance with the Health Care Insurance Portability and Accountability Act of 1996 (Pub. L 104-191), 45 CFR Sections 160 and 164 ("HIPAA"), my agent may act as my personal representative for the purposes of obtaining and receiving any and all protected health information related to my health care and related to payments in regard to such health care.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of Dec., 2007

Robert T. Lynch

8.

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF CLAY)

On this the 5th day of December, 2007, before me, Michael A. Hill the undersigned officer, personally appeared Robert T. Lynch, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I have hereunto set my hand and official seal.

Michael A. Hill
Notary Public
My Commission Expires: 10-20-2010

LAST WILL AND TESTAMENT

OF

ROBERT T. LYNCH

I, Robert T. Lynch, of 215 Walker Street, Vermillion, South Dakota, 57069, being of legal age, of sound and disposing mind and memory and not under undue influence do hereby utter, declare and make this instrument to be my Last Will and Testament, hereby revoking any and all wills and codicils by me heretofore made:

FIRST: I direct that my personal representative hereinafter named pay all my funeral expenses, expenses of last illness and all of my debts and liabilities as may be approved by my personal representative or allowed by the Court having jurisdiction over my estate. In addition, I direct my personal representative to pay all state and federal estate or inheritance taxes, if any, out of my estate.

SECOND: I gift, devise, and bequeath any and all farm machinery, farm equipment, tools, implements, harvested grain in inventory, harvested soybeans, farm pick-up, farm truck, and all livestock that I might own at my death, to my son Kevin J. Lynch.

THIRD: I gift, devise, and bequeath all household goods, personal effects, household furnishings, antiques, towels, linens, and all other items located in my personal residence unto my all three of my children, share and share alike, to-wit: Kevin J. Lynch, L. Annette Lynch, and Carleen M. Lynch.

FOURTH: I gift, devise, and bequeath all of my farm real estate, 51% unto my Son Kevin J. Lynch and 24.5% each unto my Daughters Carleen M. Lynch and L. Annette Lynch, with the gift to Carleen and Annette subject to a right of first refusal that runs with the land with respect to the land that they will inherit from me in favor of my Son Kevin J. Lynch, the terms of which are set forth in paragraph FIFTH of this my Last Will and Testament.

FIFTH: In the event that any of my children should predecease me I gift, devise, and bequeath the share of property that they would have taken from my estate unto my surviving children, share and share alike, to-wit: Kevin J. Lynch, Carleen M. Lynch, and L. Annette Lynch, as the case may be.

SIXTH: I hereby grant unto my son Kevin J. Lynch a right of first refusal to purchase all of the real property that is inherited by my Daughters Carleen M. Lynch and L. Annette Lynch in the event that Carleen M. Lynch or L. Annette Lynch would decide to sell, convey, gift away, assign or transfer their undivided interest in my farm real property to any third party. In the event that Carleen M. Lynch or L. Annette Lynch wish to sell, convey, gift away, assign or transfer the real estate that they inherit from my estate they must first provide a "written notice of intention to sell" hereinafter referred to as "notice to sell" to Kevin J. Lynch setting forth the terms upon which they would agree to sell the property to Kevin J. Lynch or the terms of any offer to purchase the property submitted by any third party to them. Kevin J. Lynch shall then have 90 days after receipt of "notice to sell" to accept the offer and he must express his acceptance in a "written notice of acceptance" hereinafter referred to as "written acceptance"

within that 90 day time period. In the event Kevin J. Lynch exercises his right to purchase the property within the 90 day period and submit a written "notice of acceptance", the sale shall be closed within 90 days of the receipt of the "notice of acceptance" sent by Kevin J. Lynch. In the event Kevin J. Lynch does not respond to the "notice to sell", Carleen M. Lynch and L. Annette Lynch are free and clear to sell, convey, gift away, assign or transfer the property to any third party non-family member on the same terms and conditions as were offered to Kevin J. Lynch. In the event Carleen M. Lynch and/or L. Annette Lynch fail to close on a sale to a third party non-family member within 180 days of the submission of the "notice to sell" to Kevin J. Lynch, then Carleen M. Lynch and L. Annette Lynch shall remain bound by the terms of the right of first refusal and cannot sell the property without first observing the terms of the right of first refusal set forth in this my Last Will and Testament. This right of first refusal is personal as to Kevin J. Lynch and shall terminate upon his death. This right of first refusal is binding upon my Daughters Carleen M. Lynch and L. Annette Lynch, and their heirs, heirs at law, administrators, personal representatives and assigns or whatsoever nature or character. My daughters Carleen M. Lynch and L. Annette Lynch shall not be able to sell, convey, gift away, assign, or transfer the farm real property without first giving Kevin J. Lynch a first right to purchase the property for its fair market value as determined by a licensed and certified appraiser or upon such other terms as are agreeable to my children. I direct my personal representative to note the terms of the right of first refusal in any deed

of distribution or Personal Representative's Deed to Carleen M. Lynch and L. Annette Lynch with respect to the real estate that they inherit from my estate.

SEVENTH: In this my Last Will and Testament I have benefitted my son Kevin J. Lynch over my two daughters. I do this because he stayed home to help me on the farm. He has also helped me considerably in my problems in daily living as I have aged. I further have the specific intention of continuing on the farming heritage in the Lynch family. For these reasons I have provided more to my son Kevin J. Lynch than to the other children.

EIGHTH: I gift the rest, residue and remainder of my estate unto my three children equally, share and share and alike, by the right of representation, including all of my cash assets including certificates of deposit, savings accounts, and checking accounts. In the event that any of my children should predecease me I gift, devise and bequeath their share of the rest, residue and remainder of my estate unto my surviving children, share and share alike by the right of representation.

NINTH: I nominate and appoint as Co-Personal Representatives of this my Last Will and Testament my children, Kevin J. Lynch and L. Annette Lynch. In the event one of my children predeceases me I fully empower the remaining children to act as Co-Personal Representatives of this my Last Will and Testament. In any and all cases I waive the requirement that a bond be posted in connection with their appointment or in connection with any other matter connected with the administration of my estate. I further empower my Co-

Personal Representatives to administer my estate pursuant to the Informal Administration of Estates Act under South Dakota Codified Law.

IN WITNESS WHEREOF, I have hereunto set my hand to this my Last Will and Testament on the 1st day of March, 2010.

Robert T. Lynch
ROBERT T. LYNCH

On the day and date of the above and foregoing instrument, we the undersigned, at the request of the Testator, Robert T. Lynch, who declared said instrument to be his Last Will and Testament, have subscribed our names and places of residence hereto as attesting witnesses in his presence and in the presence of each other after he first signed the same as Testator in the presence of each of us,

Helen C Brown Residing at 321 Walker - Vermillion SD 57069

Jane Kuglin Residing at 418 S Nicholson Ave. Vermillion S. Dak 57069

STATE OF SOUTH DAKOTA)
:SS AFFIDAVIT
COUNTY OF CLAY)

We, Robert T. Lynch, Helen E. Brown, and Jane Kugler, the Testator and the witnesses, respectively, whose names are signed to the attached and foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed his Last Will and Testament and that he signed willingly, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the Testator, signed the Will as witnesses and that to the best of their knowledge, the Testator was at the time eighteen or more years of age, of sound mind, and under no constraint or undue influence.

Robert T. Lynch

Witness

Witness

Subscribed, sworn to and acknowledged before me by Robert T. Lynch, the Testator, and Helen E. Brown and Jane Kugler, witnesses, this 15 day of March, 2010.

Michael J. McGill
Notary Public – South Dakota
My Commission Expires: 10-20-10

App. 015

PERSONAL/BENEFICIARY SIGNATURE CARD

This account is governed by Federal and State Laws and the Bank's present and future rules and practices. By signing below, the depositor(s) acknowledge(s) receipt of and agrees to the terms, conditions, rates and charges established by the Bank for the type of account being opened, as disclosed in the Bank's Deposit Account Disclosures. These terms may be changed by the Bank at any time and from time to time, upon advance notice to depositor, if such is required by law.
By signing below, depositor(s) acknowledge(s) receipt of the Deposit Account Disclosure as well as the Privacy Policy brochures and agree(s) to:

- Open one or more deposit accounts. All accounts have the same ownership and signers as shown on this card.
- Any one of the depositors may establish additional accounts in the same name(s).
- Authorize the Bank to verify any information provided on this card with any governmental or credit agency.

Account Name(s) and Address: ROBERT T LYNCH
KEVIN J LYNCH
46862 BURBANK RD
BURBANK SD 57010

Ownership: JOINT WITH RIGHTS OF SURVIVORSHIP

ROBERT T LYNCH

Signer One

03/13/1932 | MOCKLER | Social Security #
Date of Birth | Mother's Maiden Name
USDL | SD | 03/13/2009
Identification # | Type | Issuer | Expiration Date
605-624-2591 | 605-624-2591 | SELF/FARMING
Home Phone | Business Phone | Employer
Signature: Robert T Lynch
ROBERT T LYNCH
Chex Systems
Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By
AIR 5-13-08

Signer Two

07/14/1958 | OBRIEN | Social Security #
Date of Birth | Mother's Maiden Name
USDL | SD | 04/12/2012
Identification # | Type | Issuer | Expiration Date
605-624-8732 | 605-624-8732 | SELF/FARMING
Home Phone | Business Phone | Employer
Signature: Kevin J Lynch
KEVIN J LYNCH
Chex Systems
Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By
AIR 5-13-08

Signer Three

Date of Birth | Mother's Maiden Name | Social Security #
Identification # | Type | Issuer | Expiration Date
Home Phone | Business Phone | Employer
Signature
Chex Systems
Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER K. LYNCH 0463

EXHIBIT
holder
204

Election to Create P.O.D. Account

By signing where indicated below, Depositors elect to have this account established as a P.O.D. account. "P.O.D. account" means an account payable on request to one person during lifetime and on the death of one or more P.O.D. payees, or to one or more persons during their lifetime and on the death of all of them to one or more P.O.D. payees.

Depositors agree that any sums remaining in this account at the deaths of all the Depositors named on this account shall be paid to the P.O.D. payee(s) named below(or to the survivor of the named P.O.D. payee(s) if one of the P.O.D. payees is deceased at the time of depositors' deaths). If two or more P.O.D. payees are designated and 2 or more survive the Depositors, the sum remaining on deposit at Depositors' deaths shall be paid to the survivors in equal shares.

P.O.D. Payee		Relationship to Depositor
Date of Birth	Mother's Maiden Name	Social Security #
P.O.D. Payee		Relationship to Depositor
Date of Birth	Mother's Maiden Name	Social Security #
P.O.D. Payee		Relationship to Depositor
Date of Birth	Mother's Maiden Name	Social Security #
Depositor Signature		Date Signed
Depositor Signature		Date Signed
Depositor Signature		Date Signed

TAX CERTIFICATION: By signing below, I authorize the following Taxpayer Identification Number (TIN) to be used for tax reporting purp...

Taxpayer Identification Number: ___-___-___

Under penalties of perjury, I certify that:
(1) The number shown on this form is my correct taxpayer identification number, and
(2) I am not subject to backup withholding either because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the Internal Revenue Service has notified me that I am no longer subject to backup withholding, and
(3) I am a U.S. person (including a U.S. resident alien).

Certification Instructions: You must cross out item (2) above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return.

Robert Thumair (X) Kristi K Lynch
NAME OF U.S. PERSON (PRINT) SIGNATURE OF U.S. PERSON DATE 5-13-08

☐ NON-RESIDENT ALIEN: Signed Certificate(s) of Foreign Status on file. Appropriate Form W-8 received.

DATE _____

ACCOUNT NUMBER	ACCT TYPE	OPENING DEPOSIT	DATE OPENED	OPENED BY	APPROVED BY	DATE CLOSED/ REASON
	270	Update	12-1-53			

Card Received Date 5-13-08 Card Replaced Date _____

FORM 0038-03137 (Rev 1/05)

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER K. LYNCH 0484

PERSONAL/BENEFICIARY SIGNATURE CARD

This account is governed by Federal and State Laws and the Bank's present and future rules and practices. By signing below, the depositor(s) acknowledge(s) receipt of and agrees to the terms, conditions, rates and charges established by the Bank for the type of account being opened, as disclosed in the Bank's Deposit Account Disclosure. These terms may be changed by the Bank at any time and from time to time, upon advance notice to depositor, if such is required by law.

By signing below, depositor(s) acknowledge(s) receipt of the Deposit Account Disclosure as well as the Privacy Policy brochures and agree(s) to:

- *Open one or more deposit accounts. All accounts have the same ownership and signers as* shown on this card.
- Any one of the depositors may establish additional accounts in the same name(s).
- Authorize the Bank to verify any information provided on this card with any governmental or credit agency.

Account Name(s) and Address

KEVIN J LYNCH POA FOR
ROBERT T LYNCH
46852 BURBANK RD
BURBANK SD 57010

Ownership: INDIVIDUAL - POA DESIGNATION

ROBERT T LYNCH

Signer One

07/14/1956 — O'BRIEN — Social Security #
Dr — Mother's Maiden Name

D — USDL — SD — 07/14/2012
Identification # — Type — Issuer — Expiration Date

605-624-8732 — 605-670-2829 — FARMING/USD
Home Phone — Business Phone — Employer

Signature — KEVIN J LYNCH

Chex Systems

Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By

Signer Two

Date of Birth — Mother's Maiden Name — Social Security #

Identification # — Type — Issuer — Expiration Date

Home Phone — Business Phone — Employer

Signature

Chex Systems

Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By

Signer Three

Date of Birth — Mother's Maiden Name — Social Security #

Identification # — Type — Issuer — Expiration Date

Home Phone — Business Phone — Employer

Signature

Chex Systems

Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By | Code/Date/Approved By

Election to Create P.O.D. Account

By signing where indicated below, Depositors elect to have this account established as a P.O.D. account. "P.O.D. account" means an account payable on request to one person during lifetime and on his death to one of more P.O.D. payees, or to one or more persons during their lifetime and on the death of all of them to one or more P.O.D. payees.

Depositors agree that any sums remaining in this account at the deaths of all the Depositors named on this account shall be paid to the P.O.D. payee(s) named below(or to the survivor of the named P.O.D. payee(s) if one of the P.O.D. payees is deceased at the time of depositor's deaths). If two or more P.O.D. payees are designated and 2 or more survive the Depositors, the sum remaining on deposit at Depositors' deaths shall be paid to the survivors in equal shares.

P.O.D. Payee		Relationship to Depositor
Date of Birth	Mother's Maiden Name	Social Security #
P.O.D. Payee		Relationship to Depositor
Date of Birth	Mother's Maiden Name	Social Security #
P.O.D. Payee		Relationship to Depositor
Date of Birth	Mother's Maiden Name	Social Security #
Depositor Signature		Date Signed
Depositor Signature		Date Signed
Depositor Signature		Date Signed

TAX CERTIFICATION: By signing below, I authorize the following Taxpayer Identification Number (TIN) to be used for tax reporting purposes.

Taxpayer Identification Number: _____

Under penalties of perjury, I certify that:
(1) The number shown on this form is my correct taxpayer identification number, and
(2) I am not subject to backup withholding either because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the Internal Revenue Service has notified me that I am no longer subject to backup withholding, and
(3) I am a U.S. person (including a U.S. resident alien).

Certification Instructions: You must cross out item (2) above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return.

Kevin T Lynch Kevin T Lynch 2-1-08
NAME OF U.S. PERSON (PRINT) SIGNATURE OF U.S. PERSON DATE

☐ NON-RESIDENT ALIEN: Signed Certificate(s) of Foreign Status on file.
Appropriate Form W-8 received:

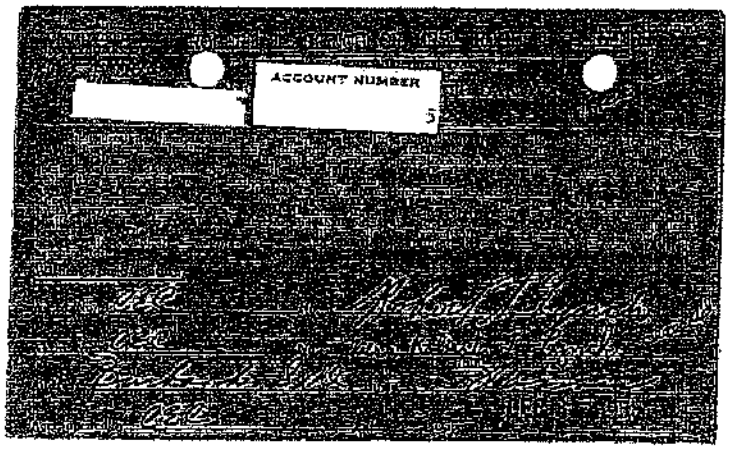
DATE _____

ACCOUNT NUMBER	ACCT TYPE	OPENING DEPOSIT	DATE OPENED	OPENED BY	APPROVED BY	DATE CLOSED/ REASON

Card Received Date 2-1-08 Card Replaced Date _____

FORM #030-95137 (Rev 11/95)

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER K. LYNCH 0466



 K. LYNCH 0467

BANK of the WEST

DURABLE POWER OF ATTORNEY FOR BANK ACCOUNTS ONLY

(CA, CO, ID, IA, MN, NV, NM, ND, OR, SD, UT, WA, WY)

WARNING TO PERSON EXECUTING THIS DOCUMENT: This is an important legal document. It creates a power of attorney that provides the person you designate as your attorney-in-fact with the broad powers it sets forth. You have the right to terminate this power of attorney at any time. If there is any thing about this form that you do not understand, you should ask a lawyer to explain it to you.

THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY-IN-FACT SHALL NOT TERMINATE EVEN IF I LATER BECOME DISABLED OR INCAPACITATED OR IN THE EVENT OF LATER UNCERTAINTY AS TO WHETHER I AM DEAD OR ALIVE, OR BY LAPSE OF TIME.

I, Robert T Lynch, am the owner ["Owner"] of and appoint

Kevin T Lynch as my attorney-in-fact ("Agent") with respect to the following checking account(s), certificate(s) of deposit, savings certificate(s) and/or depository relationship(s) [collectively "Accounts(s)"]

held at the Vermillion SD branch of Bank of the West:

Account # 3370 Account # 1696 Account # 5491

THIS POWER OF ATTORNEY DOES NOT IN ANY WAY RESTRICT THE OWNER'S OWN POWERS AND RIGHTS IN DEALING WITH THE ACCOUNT(S).

IF ANY OF THE ABOVE-DESCRIBED ACCOUNT(S) IS A JOINT TENANCY ACCOUNT, ONLY ONE JOINT TENANT NEED SIGN THIS POWER OF ATTORNEY FOR THE AGENT TO ACT WITH RESPECT TO THE JOINT TENANCY ACCOUNT(S).

IF MORE THAN ONE INDIVIDUAL IS APPOINTED AS THE OWNER'S AGENT, THEN EACH AGENT MAY ACT SEPARATELY AND INDEPENDENTLY WITHOUT THE CONSENT OF THE OTHER AGENT(S).

The named Agent may conduct any and all banking transactions regarding the identified Account(s), including, without limitation, contracting for additional services for any Account(s); closing any Account(s); withdrawing by check, order or otherwise money on deposit; receiving statements, notices, and other information on the Account(s); and endorsing checks, drafts and other instruments; provided, however, that Agent shall not have the authority to open additional accounts in the name of the Owner; to create or change survivorship interests in the Owner's Account(s); and/or designate or change the designation of beneficiaries to receive the funds in the Owner's Account(s) on the Owner's death. Nothing in this Power of Attorney grants the Agent any present or future ownership or right of survivorship in the Account(s).

This Power of Attorney shall continue until the earliest of the following occurs: (1) revocation by the Owner; (2) termination of the Account(s), or (3) death of the Owner. Absent instructions, the termination of any individual Account ["Closed Account"] shall not revoke this Power of Attorney as to any other identified Account which shall continue to remain open at the time of the termination of the Closed Account.

Date: 2-1-08 Signature of Owner: Robert T Lynch

NOTE: IF THE OWNER'S SIGNATURE IS NOT WITNESSED BY TWO BANK EMPLOYEES, ONE OF WHOM MUST BE AN OFFICER, THE OWNER'S SIGNATURE MUST BE NOTARIZED.

Dated: 2-1-08

Deb Christensen
Bank Officer (Print Name)

Deb Christensen
Bank Officer Signature

Dated: 2-1-08

Helene Hanson
Bank Employee (Print Name)

Helene Hanson
Bank Employee Signature

By accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities and liabilities of an agent.

Kevin T Lynch — Kevin T Lynch
Agent's Name (Print) — Agent's Signature

I HEREBY REVOKE THIS DURABLE POWER OF ATTORNEY

Dated: _____ Signature of Owner _____

Original - Branch Legal File Copy Customer 010-03030 (05/06)

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER K. LYNCH 0468

MEMO TO FILE

Date: February 20, 2010

From: Michael J. McGill

To: Robert Lynch Estate Planning File

The purpose of this memorandum is to document office contact I had with Robert Lynch on February 19, 2010. Robert called my office and wanted to have a meeting with me as soon as possible. He asked my secretary to schedule him at 12:00 noon. I was busy doing farm taxes and we squeezed him in at noon between several tax appointments I had that day. I had previously prepared a Will for Robert in 2007. Attached to this memorandum is a copy of the 2007 Will. This Will gave all of Robert's farm related personal property to his son Kevin, it gave all of his household goods and personal effects to his three children, and it divided all the farm real estate between his three children. Robert owns approximately 600 to 650 acres of farmland in Clay County, South Dakota. In the 2007 Will, Robert also granted to Kevin a right of first refusal to purchase the farmland Carleen and Ann would inherit from Robert's estate.

The purpose of the meeting on February 19, 2010 according to Robert was to request I change his Will to give 51% of the farm real estate to Kevin and to give the rest equally to Ann and Carleen. I told him he was greatly preferring Kevin over the other two children because his current Will already gave Kevin all of the farm related personal property. He told me he still wanted to give Kevin all of his farm related personal property, he wanted his personal effects and household goods located in the residence on the farm site to go to his three children equally and he wanted to make sure Kevin was given 51% of the rest of the estate including all of the farm real estate. He said the reason he wanted to do this was to make sure Kevin could purchase the interest of the girls should the girls ever want to sell their property. He told me he thought if Kevin inherited 51% of the land he would have a substantial amount of property to make it very easy for him to get a loan to purchase the rest of the property. We guestimated the value of the real estate was between $3,000.00 to $5,000.00 per acre depending upon market conditions. We also speculated it was possible Ann and Carleen would immediately sell their interest in the farmland upon Robert's death. Robert wanted to make sure Kevin was in complete control of the disposition of the farmland and that Kevin be given the greatest possible chance to purchase Carleen and Ann's interests. We had already established in his prior Will a right of first refusal.

I then asked Robert why he was so insistent on benefitting Kevin over the girls. He told me the girls had established lives of their own, neither of the girls ever intended to return to the farm homestead and make a life in Clay County, South Dakota, and Carleen had decided to move to Switzerland where she would probably live the rest of her life. Further, Robert wanted to make sure Kevin continued the farming heritage in the Lynch family and that Kevin had stayed home and farmed with him while Robert was actively farming. In addition, Kevin has been there to help his as Robert has gotten older Kevin does a lot of things for Robert. Accordingly, at Robert's request, I redrafted the Will to gift 51% of the farm real estate to Kevin. On Saturday, February 20, 2010, as I made the changes on the Will on the computer pattern that my assistant

EXHIBIT
36

McGill000008

App. 022

Jann Jensen had prepared, I noticed he named all three of his children as co-executors and I realized Carleen would probably be living in Europe at the time we probated Robert's Will. Therefore, I called Robert to reconfirm what his estate plan was and I inquired as to what he wanted to do about personal representatives because it was a topic we did not discuss in the office meeting I had on February 19, 2010. I suggested perhaps it would be appropriate to have Kevin and Ann act as personal representatives because Carleen would be in Europe and it would make it very difficult to administer the estate. Robert agreed with my suggestion after I explained to him everything a personal representative would have to do with respect to administering an estate in connection with appraising the property, arranging for the sale of personal property and dealing with appraisers and other matters, etc. Robert directed me to name Kevin and Ann as personal representatives.

Finally, Robert and I discussed on the phone on February 20, 2010, extending the right of first refusal to Carleen's and Ann's heirs, heirs at law, personal representatives and administrators. He agreed with this when I explained the practical impact that has on administration of the right of first refusal.

McGill000007

App. 023

Instruction No. 15

A fiduciary is defined as a person who is required to act for the benefit of another person on all matters within the scope of their relationship. When a fiduciary relationship exists, the party who owes this legal duty to another is called a fiduciary, and the legal duty the fiduciary owes is called a fiduciary duty.

The court has determined as a matter of law that the defendant was acting as a fiduciary for Robert Lynch by virtue of the power of attorney. The power of attorney document defines the scope of the fiduciary relationship you are directed to accept as having been proved.

For any act outside of the scope of the power of attorney, you must determine whether a further fiduciary relationship exists. To establish a fiduciary relationship for acts outside of the power of attorney, the plaintiff must prove:

(1) That Robert Lynch placed faith, confidence, and trust in the defendant;

(2) That Robert Lynch was in a position of inequality, dependence, or weakness, or possessed a lack of knowledge; and

(3) That the defendant exercised dominion, control, or influence over Robert Lynch's affairs.

If you find that all of these elements have been established, then the defendant owed Robert Lynch a fiduciary duty for any act outside of the scope of the power of attorney.

Instruction No. 16

You must determine whether a fiduciary duty, once established, was breached.

A fiduciary duty obligates the fiduciary to act in the utmost good faith for the benefit and in the best interest of the other party in the course of the fiduciary relationship, and to refrain from obtaining any advantage at that person's expense. The fiduciary must refrain from any act of self-dealing not authorized by the power of attorney.

If the plaintiff proves that the defendant breached his fiduciary duty, the defendant is liable to the plaintiff for any damages legally caused by the breach.

Instruction No. 17.

If the power to self-deal is not specifically articulated in the power of attorney, that power does not exist. Self-dealing occurs when an agent pits their personal interests against their obligations to the principal.

Instruction No. 18

To establish breach of fiduciary duty, the plaintiff must prove the following:

1) The defendant had a fiduciary obligation to Robert Lynch;

2) The defendant breached a fiduciary duty to Robert Lynch;

3) The plaintiff incurred damages;

4) The defendant's breach of the fiduciary duty was a legal cause of plaintiff's damages.

Instruction No. 19

Conversion is the unauthorized exercise of control or dominion over personal property in a manner that is unwarranted and seriously interferes with an owner's right in the property or in a manner inconsistent with the owner's right. Intent or purpose to do wrong is not a necessary element of proof to establish conversion. Conversion is not excused by care, good faith, or lack of knowledge.

Instruction No. 20

To establish conversion, the plaintiff must prove the following:

(1) The plaintiff owned or had a possessory interest in the money or property;

(2) The plaintiff's ownership or possessory interest in the money or property was greater than that of the defendant;

(3) The defendant exercised unauthorized control over or seriously interfered with the plaintiff's interest in the money or property;

(4) Such conduct deprived the plaintiff of his interest in the money or property; and

(5) The plaintiff suffered injury as a result.

Instruction No. 21

During the lifetime of the parties, a joint account belongs to the parties in proportion to the net contributions by each to the sums on deposit unless there is clear and convincing evidence of a different intent.

Clear and convincing evidence is more than a mere preponderance of the evidence but need not be beyond a reasonable doubt. It is that measure or degree of proof which will produce in your mind a firm belief or conviction as to the allegation sought to be established. It is evidence that is so clear, direct, weighty, and convincing that it allows you to reach a clear conviction of the precise facts at issue, without hesitancy as to their truth. Evidence need not be voluminous or undisputed to accomplish this.

Instruction No. 32

A certificate of deposit payable on death belongs to the original payee during his lifetime and not to the P.O.D. payee or payees.

Instruction No. 23

For a breach of fiduciary duty occurring outside of the scope of the power of attorney or a conversion, defendant is not liable for breach of fiduciary duty or conversion if Robert Lynch consented to the conduct constituting the breach or conversion, released the defendant from liability for the breach or conversion, or ratified the transaction constituting the breach or conversion, unless:

(1) The consent, release, or ratifications of Robert Lynch were induced by improper conduct of the defendant; or

(2) At the time of the consent, release, or ratification, ~~the~~ Robert Lynch did not have knowledge of his rights or of the material facts relating to the breach.

Robert Lynch may release defendant from liability for past breach of his fiduciary duty outside of the power of attorney or conversion. No consideration is required for the consent, release, or ratification to be valid. As a matter of law, Robert Lynch may not release defendant from liability for breach of fiduciary duty created by the power of attorney or theft by exploitation of elder.

Instruction No. 24

Theft by exploitation of an elder or adult with disability occurs when any person who, having assumed the duty voluntarily, by written contract, by receipt of payment for care, or by order of a court to provide for the support of an elder or an adult with a disability, and having been entrusted with the property of that elder or adult with a disability, with intent to defraud, appropriates such property to a use or purpose not in the due and lawful execution of that person's trust.

For purposes of this cause of action, these terms are defined as follows:

"Elder" *is a person sixty-five years of age or older;*

"Adult with a disability" is a person eighteen years of age or older who has a condition of intellectual disability, infirmities of aging as manifested by organic brain damage, advanced age, or other physical dysfunctioning to the extent that the person is unable to protect himself or herself or provide for his or her own care.

To act with "intent to defraud" means to act willfully and with the specific intent to deceive or cheat, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self. A person does not act with intent to defraud if the act was made under an ignorance or mistake of fact which disproves any intent to defraud. Where a person honestly and reasonably believes certain facts, and acts or fails to act based upon a belief in those facts, which, if true, would negate intent to defraud, the person is not acting with intent to defraud.

Instruction No. 25

To establish theft by exploitation of elder or adult with disability, the plaintiff must prove:

1) Robert Lynch was an elder or adult with disability;

2) Defendant had assumed the duty to provide for the support of Robert Lynch;

3) Defendant had been entrusted with Robert Lynch's property;

4) Defendant appropriated Robert Lynch's property to a use or purpose not in the due and lawful execution of his trust;

5) Defendant misappropriated the property with the intent to defraud Robert Lynch.

An action for exploitation of an elder or adult with a disability may only be brought for acts that are alleged to have occurred after July 1, 2016 which is the effective date of that statute.

Instruction No. 26

Civil actions can only be commenced within the periods prescribed by law. An action for the plaintiff's claims can be commenced only within six years after the cause of action has accrued. A claim accrues when Robert Lynch had actual or constructive notice of a cause of action against Kevin Lynch. Actual notice consists of express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice. One having actual notice of circumstances sufficient to put a prudent person on inquiry about a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

An action is commenced when the summons is served on the defendant.

As an affirmative defense, it is the defendant's burden to prove that plaintiff's claim was not commenced within the period prescribed by law. If you find a claim was not commenced within six years after the cause of action accrued, the plaintiff is barred from recovery and your verdict should be for the defendant on that claim.

This instruction applies to the following transactions claimed by Plaintiff:

3/14/2011	Check	$15,000
5/5/2011	Interstate Auction	$ 5,200
6/10/2011	Campbell Supply	$1406.85
9/18/2011	Road King, Inc.,	$ 500.00
9/9/2011	Mark's Machinery	$45,042.40
10/7/2011	Road King Trailer	$ 5,330.00

Instruction No. 27

In connection with Kevin Lynch's defense of the statute of limitations you are also instructed as follows: If a trust or confidential relationship existed between Kevin Lynch and Robert Lynch, a duty to disclose arises. Therefore, mere silence by Kevin Lynch under that duty constitutes fraudulent concealment. The applicable statute of ~~lamination~~ is then tolled, i.e., does not run during that period of fraudulent concealment. limitation

Instruction No. 28

In certain circumstances, a creditor's claim against an estate which arose before the death of the decedent is barred against the estate unless presented to the personal representative of the estate within four months after the date of the first publication of the notice to creditors or written notice by mail if you find defendant was a known creditor entitled to receive written notice.

It is the plaintiff's burden to prove:

1. That the claim arose before the death of the decedent;

2. That the claim was not made within the period prescribed by law.

If you find a claim was not presented within four months after the date of the first publication of the notice to creditors or by written notice if applicable, the defendant is barred from set-off or reduction of damages for that claim.

A personal representative shall give written notice by mail or other delivery to a creditor of the decedent, who is either known to or reasonably ascertainable by the personal representative, informing the creditor to present the claim within four months after the date of the personal representative's appointment, or within sixty days after the mailing or other delivery of the written notice, whichever is later, or be forever barred.

A personal representative need not give written notice to a creditor if any of the following apply:

(1) The creditor has presented a claim against the estate;

(2) The creditor has been paid in full;

(3) The creditor was neither known to nor reasonably ascertainable by the personal representative within four months after the personal representative's appointment.

Claims against a decedent's estate may be presented by either of the following methods:

(1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and mail or deliver a copy thereof to the personal representative. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the clerk of court.

(2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subject to jurisdiction, to obtain payment of the claim. The claim is deemed presented on the date the proceeding is commenced.

This instruction does not apply to defendant's claims or expenses you find Robert Lynch ratified or is estopped from asserting under these instructions. This instruction does not apply to defendant's claims or expenses you find he is entitled to recoup as unjust enrichment or quantum meruit under these instructions. If you find defendant has met his burden of proof on his claim of ratification, estoppel or recoupment by unjust enrichment or quantum meruit, then those claims are not subject to this four-month time limitation. It is only if you find the defendant did not prevail on these claims that the expense would be considered a creditor's claim subject to being time barred under this instruction.

Instruction No. 29

An estoppel occurs when there are acts or omissions by the party to be estopped, which have misled the party in whose favor the estoppel is sought and has caused the party seeking the estoppel to part with something of value or do some other act relying upon the conduct of the party to be estopped. This defense does not apply to any breach of fiduciary duty by acts of self-dealing pursuant to the power of attorney or theft by exploitation of elder.

This creates a situation where it would be unfair to allow the misleading party to claim what would otherwise be his or her legal rights.

The burden of proof to establish an estoppel is on the party who seeks to rely on it.

To establish the affirmative defense of estoppel, the defendant must prove:

1) An oral agreement between Robert Lynch and defendant;

2) The defendant relied on the agreement and indicated such reliance by the performance of acts which unequivocally refer to the agreement;

3) The defendant changed his position in reliance on the agreement and to allow plaintiff to change Robert Lynch's position on the agreement would subject defendant to unconscionable hardship or loss.

If you find plaintiff is estopped from asserting a claim, the plaintiff is barred from recovery and your verdict should be for the defendant on that claim.

Instruction No. 30

A quasi-estoppel occurs where a person knows or ought to know that he or she is entitled to enforce his or her right to impeach a transaction and neglects to do so, for such a time as would imply that he or she intended to waive or abandon his or her right. This defense does not apply to any breach of fiduciary duty by acts of self-dealing pursuant to the power of attorney or theft by exploitation of elder.

The burden of proof to establish a quasi-estoppel is on the party who seeks to rely on it.

To establish the affirmative defense of quasi-estoppel, the defendant must prove:

1) Plaintiff is maintaining a position inconsistent with the position previously maintained by Robert Lynch; and

2) A) Robert Lynch gained an advantage or caused a disadvantage to the defendant; or

B) Defendant was induced to change positions; or

C) It would be unconscionable to permit the plaintiff to maintain an inconsistent position from one which Robert Lynch already derived a benefit or acquiesced in.

If you find plaintiff is estopped from asserting a claim, the plaintiff is barred from recovery and your verdict should be for the defendant on that claim.

Instruction No. 31

If you find plaintiff is entitled to damages under these instructions, you must then find whether defendant is entitled to recoup damages or expenses he has sustained arising out of the same transaction. Claims are not part of the same transaction or occurrence if there is no logical relationship between the events or, if they are dissimilar in "time and type". The defendant may be able to recoup expenses or claims he has incurred arising out of the same transaction for which you have determined plaintiff is entitled to damages on the grounds of unjust enrichment or quantum meruit. Unjust enrichment occurs when a party confers a benefit upon another party who accepts or acquiesces in that benefit and it is inequitable to receive that benefit without paying. Where services or materials are furnished by one party for another which are knowingly and voluntarily accepted, it is inferred that they were given and received in the expectation of being paid for and a promise to pay their reasonable worth is implied.

To recoup under unjust enrichment, the defendant must prove for the specific claim to which you have found plaintiff to be entitled to damages:

1) Robert Lynch has received a benefit from defendant in regard to that transaction;

2) Robert Lynch was aware of the benefit received of the result of that transaction; and

3) Robert Lynch's retention of the benefit without reimbursing the defendant would be inequitable in regard to that transaction.

A claim for quantum meruit occurs were services or materials are furnished by one party for another who knowingly and voluntarily accepts them. Under quantum meruit, the law infers that they were given and received in the expectation of being paid for in a reasonable amount.

To recoup under quantum meruit, the defendant must prove for the specific claim to which you have found plaintiff to be entitled to damages:

1) Robert Lynch requested the defendant's services for that transaction; and

2) The defendant reasonably expected to be paid for that transaction.

If you find defendant has met his burden of proof on either of these defenses, you must allow defendant to recoup and deduct or set-off the amount to which Robert Lynch was unjustly enriched (unjust enrichment) or which defendant is entitled to receive as compensation or reimbursement (quantum meruit) from the damages you award plaintiff. If you do not find plaintiff is entitled to damages under these instructions, then you will not consider the defendant's recoupment claim for unjust enrichment or quantum meruit. If you find the defendant has not met his burden of set-off for unjust enrichment or quantum meruit, you may not make any deduction in your calculation of damages.

Instruction No. 32

If you decide for a party on the question of liability you must then fix the amount of money which will reasonably and fairly compensate that party for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the other party's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. Value of money or property;

2. Value of services provided.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

Instruction No. 33

You have received evidence of CDs owned by Robert Lynch. Plaintiff's claim for damages are for two CDs in the total sum of $44,590.22. Plaintiff is not seeking to recover damages for any other CDs that were received into evidence and they were not received for that purpose.

Instruction No. 34

If you determine it is appropriate to consider the IRS gift tax exclusion amounts in determining damages, those amounts per year is as follows:

2011 - $13,000

2012 - $13,000

2014 - $14,000

2015 - $14,000

2016 - $14,000

2017 - $14,000

2018 - $15,000

2019 - $15,000

2020 - $15,000

2021 - $15,000

STATE OF SOUTH DAKOTA) :ss COUNTY OF CLAY)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
ESTATE OF ROBERT T. LYNCH, Deceased Plaintiff, v. KEVIN LYNCH, Defendant.	Civ. 18-90 **VERDICT FORM**

FILED
OCT 01 2021
Jessica Bosse
Clay County Clerk of Courts
1st Judicial Circuit Court of South Dakota

We, the jury, duly impaneled in the above-entitled action, and sworn to try the issues herein, do hereby answer the Verdict Form as follows by placing an "X" beside or under the party's name you find in favor of or filling in the blanks:

1. Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim of Breach of Fiduciary Duty?

   Plaintiff the Estate of Robert Lynch ____

   Or

   Defendant Kevin Lynch X

2. Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim of Conversion?

   Plaintiff the Estate of Robert Lynch ____

   Or

   Defendant Kevin Lynch X

3. Do you find in favor of Plaintiff or Defendant on the Plaintiff's claim of Elder Exploitation?

Plaintiff the Estate of Robert Lynch ____

Or

Defendant Kevin Lynch X

Note: If your answers to Questions 1-3 are all "Defendant," do not answer any more questions and sign the verdict form. If your answer to any one or more of Questions 1-3 is "Plaintiff" then you must proceed to answer the following questions.

4. Do you find in favor of Plaintiff or Defendant on Defendant's Statute of Limitations Defense for each of the following transactions (place an "X" in the column for each transaction for which party you find in favor of on each transaction)?

Date	Transaction	Amount	Plaintiff Estate of Robert Lynch	Defendant Kevin Lynch
3/14/2011	Check	$15,000.00		
5/5/2011	Interstate Auction	$5,200.00		
6/10/2011	Campbell Supply	$1,406.85		
9/18/2011	Road King, Inc.	$500.00		
9/9/2011	Mark's Machinery	$45,042.40		
10/7/2011	Road King Trailer	$5,330.00		

Note: In answering Question 5, you must not assess any damages against Defendant Kevin Lynch for any transactions that you find in favor of Defendant Kevin Lynch on his Statute of Limitations Defense.

5. If your answer to any one or more of Questions 1-3 is "Plaintiff," what amount of Damages do you find that Defendant must pay to the Plaintiff. If you award Damages to Plaintiff, you must determine whether such damages are barred by Defendant's affirmative defenses of consent, ratification, estoppel or quasi-estoppel.

Damages	Date Damages Occurred	Whether Damages are Barred by Affirmative Defenses of Consent, Ratification, Estoppel, or Quasi-Estoppel? (please answer "yes" if you find any of these Defenses apply and "no" if none of these Defenses apply.)

6. If you award Damages to Plaintiff and you find that such Damages are not barred by the affirmative defenses listed in Question 5 above, then you must determine whether Defendant is entitled to have those Damages reduced by his defenses of unjust enrichment and quantum meruit. If you find that Defendant is entitled to a reduction in Damages under Question 5 for unjust enrichment or quantum meruit, write the amount of total the reduction on the blank. If you find that Defendant is not entitled to a reduction for any of the Damages in Question 5 for unjust enrichment or quantum meruit, write "0". $_____

7. Do you award Punitive Damages against the Defendant. (Indicate with a mark √ or X in the appropriate space.)

_____ _____

Yes No

8. If you have answered "Yes" to Question No. 7, set forth the amount of Punitive Damages:

$ _____

You have completed the Verdict Form. Please sign the Verdict Form and notify the bailiff.

Dated this 01 day of October, 2021.

Josh Butler

Foreperson

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29823

ESTATE OF ROBERT T. LYNCH, Deceased

Appellant,

vs.

KEVIN LYNCH,

Appellee.

Appeal from Circuit Court
First Judicial Circuit, Clay County, South Dakota
Honorable Tami Bern, Circuit Court Judge

REPLY BRIEF OF APPELLANT

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Notice of Appeal Filed November 9, 2021

Notice of Review Filed November 29, 2021

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PRELIMINARY STATEMENT

Reference to the record pages as paginated by the Clerk of Court will be referred to as "R" with the appropriate page citation. Reference to the hearing transcripts will be referred to as "HT" with the date of the hearing and appropriate page citation; and the transcripts from the September 28-October 1, 2021, jury trial will be referred to as "TT" with the appropriate page citation. Appellant will be referred to as the Estate and Appellee will be referred to as Kevin Lynch or Defendant.

STATEMENT OF THE ISSUES

1. Whether the Trial Court erred in ignoring the "bright-line rule" of *Bienash v. Moller* by considering oral extrinsic evidence presented by the attorney-in-fact to deny the estate's motion for partial summary judgment.

   Citations:
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431
   Studt v. Black Hills Fed. Credit Union, 2015 S.D. 33, 864 N.W.2d 513
   Estate of Stoebner v. Huether, 2019 S.D. 58, 935 N.W.2d 262

2. Whether the Trial Court erred by ignoring the "bright-line rule" of *Bienash v. Moller* and its progeny by allowing the Defendant to introduce oral extrinsic evidence at trial to justify his acts of self-dealing when the power of attorney did not authorize self-dealing in clear and unmistakable terms.

   Citations:
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431
   Estate of Stoebner v. Huether, 2019 S.D. 58, 935 N.W.2d 262

3. Whether the Trial Court erred in instructing he jury that, despite the fiduciary duty established by the power of attorney, the jury could determine that a fiduciary relationship between the Defendant and his father did not exist.

   Citations:
   Wyman v. Bruckner, 2018 S.D. 17, 908 N.W.2d 170
   Hein v. Zoss, 2016 S.D. 73, 887 N.W.2d 62

Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510

4. Whether the Trial Court erred in its jury instructions which allowed the jury to consider oral extrinsic evidence contrary to *Bienash v. Moller* as defenses to the Estate's breach of fiduciary duty claims.

   Citations:
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431
   Kaarup v. Schmitz, Kalda & Associates, 436 N.W.2d 845 (S.D. 1989)

5. Whether the Trial Court erred in refusing to instruct the jury that a fiduciary breached his fiduciary duty when he used his position to enrich the value of property that will eventually devolve to him.

   Citations:
   Ward v. Lange, 1996 S.D. 113, 553 N.W.2d 246
   Crosby v. Luehrs, 669 N.W.2d 635 (Neb. 2003)
   Bienash v. Moller, 2006 S.D. 78, 721 N.W.2d 431

6. Whether the Trial Court erred in granting Defendant's motion for judgment as a matter of law regarding ownership of a joint checking account when the Defendant admitted that the joint account was set up for convenience to pay his father's bills.

   Citations:
   Estate of Card v. Card, 2016 S.D. 4, 874 N.W.2d 86
   Roth v. Pier, 309 N.W.2d 815 (S.D. 1981)
   Magner v. Brinkman, 2016 S.D. 50, 883 N.W.2d 74

REPLY ARGUMENT

1. Overview

This case represents an egregious example of self-dealing by one acting under a power of attorney. Here, Kevin Lynch signed checks to himself totaling $398,000.00 from his father's funds. (R 207) He used that money for his own benefit to pay off his own loans and to pay his own bills and expenses. (R 135-37; Kevin Lynch Depo. at 118-125; TT 165-68) He signed checks from his

father's funds to erect two Morton buildings on his own property to the tune of $106,774.60. (R 225, 2216) He cashed in two of his father's CD's, using his power of attorney, in the amount of $44,592.22, deposited those funds into his own bank account, and used those funds to purchase a pickup for himself. (Ex. 233; R 2211-2215) He purchased $104,514.20 worth of farm equipment and machinery starting in 2011 with his father's funds, despite his father having quit farming in 1996 and having entered the nursing home in September of 2011. (R 2277; Ex. 233) He did this knowing that the machinery would be his when his father died. (TT 145-146; TT 748)

Between 2012 and his father's death, Kevin Lynch wrote checks on his father's funds in the amount of $143,410.00 to pay for cattle expenses. (R 2485; Ex. 244) Kevin Lynch received 100% of the calf crop and all income off the cattle operation including the calves from his father's cows and had free use of his father's pasture and the cattle facilities. (TT 411-12, 423-24, 436) He now claims that this somehow benefited his father, because his father liked to run cattle. (Appellee Brief at 12)

Kevin Lynch cashed in all of his father's CD's, IRA's, and money market accounts using his power of attorney. (R 89, 199-206; Depo. Ex. 26) Those funds were deposited into the checking account where the funds belonged to his father. (R 123; Kevin Lynch Depo. 72; TT 137) By the time of Robert Lynch's death, these funds were completely gone. Kevin Lynch leased his father's 583 acres of tillable ground to the Solomons from 2012 until his death for annual cash rental payments of between $165,483.60 and $148,886.85. (Ex. 243 and 244)

His father's nursing home expenses came to around $80,000.00 per year. (TT 290) Yet, when Robert Lynch died the funds from those cash rent payments were gone with the exception of some of the last cash rent check payment made by the Solomons two weeks before Robert Lynch died on March 12, 2018. (Ex. 205; R 1679)

Robert Lynch's money that benefited Kevin Lynch amounted to:

$398,000.00	Checks written to himself; (R 207)
$106,774.60	Morton Buildings placed on Kevin Lynch's land; (R 225)
$ 44,592.22	Pickup purchased by Kevin Lynch from CD's belonging to Robert Lynch; (R 137)
$104,514.20	Farm machinery that eventually went to Kevin Lynch; (Ex. 235)
$143,410.00	Cattle expenses paid by Robert Lynch between 2012 and his death when he received no income; (Ex. 246)
$797,291.02	**Total.**

At the time of Robert Lynch's death the only money that remained in the checking account was $112,296.13. (Ex. 205; R 1679) Kevin Lynch had taken $30,000.00 for himself from the last rent check from the Solomons and had written checks for the cattle operation out of those funds. (Ex. 205, R 1682)

Under the terms of Robert Lynch's Will, the remainder of Robert Lynch's estate consisting of "all of my cash assets including certificates of deposit, savings accounts, and checking accounts[,]" was to go equally to his three children, Ann Lynch, Carleen Lynch and Kevin Lynch. (Ex. 202, ¶Eighth) Because Kevin

Lynch had already taken his father's funds through a course of self-dealing, none of these funds remained to be distributed[1] under the residuary clause to his sisters.

The Trial Court held as a matter of law that the approximate $112,000.00 in the joint checking account which was set up for convenience to pay his father's bills also went to Kevin Lynch.

2. Reply to arguments raised by Kevin Lynch to justify self-dealing

In *Bienash v. Moller,* 2006 S.D. 78, 721 N.W.2d 431, this Court adopted a bright-line rule that no oral extrinsic evidence will be admitted to raise a factual issue to justify self-dealing by the attorney-in-fact under a power of attorney. *Id.* ¶¶24 and 27. This Court has held "A fiduciary must act with utmost good faith and avoid any act of self-dealing." *Id.* ¶14. "In order for self-dealing to be authorized, the instrument creating the fiduciary duty must provide "clear and unmistakable language" authorizing self-dealing acts. …thus if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist. *Id.*

In adopting the bright-line rule prohibiting the use of oral extrinsic evidence to justify acts of self-dealing, this Court quoted with approval *Kunewa v. Joshua,* 83 HI 65, 924 P.2d 559, 565:

> When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney-of which outright transfers for less than value to the

[1] A Stifel investment of approximately $17,000.00 was located and distributed to the three heirs some months after Robert's death. (TT 765-66)

> attorney-in-fact [himself or] herself are the most obvious-the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen.

This case illustrates the wisdom of the bright-line rule adopted in *Bienash*, because it shows the manifold opportunities and temptations for self-dealing and the justification for that self-dealing by self-serving, unwitnessed, uncorroborated oral statements from the deceased parent claiming that all of the transactions were approved by the deceased parent. As this Court observed in *Bienash*, if such approval was, indeed, given, it should have been documented by some form of writing.

Kevin Lynch suggests that he was authorized to self-deal under the power of attorney, because the power of attorney authorized him to make gifts to himself up to the limits of the federal gift tax exclusion. (Ex. 201, ¶14) But none of these self-dealing transfers made by Kevin Lynch to himself were made pursuant to that provision in the Power of Attorney. Kevin Lynch admitted that he never made any gifts under that provision. (R 120-21; Kevin Lynch Depo. 60-61; TT 128-29)

The power of attorney itself required annual accountings. (Ex. 201, p.8; Appendix 23 to Appellee's Brief) "[A]n accounting shall be filed with me or my guardian each year and with my personal representative in the year of my death." *Id.* Kevin Lynch did neither of these things. He never submitted any annual report or written accounting to his father during the years that he acted as his power of attorney. (TT 126-27) Further, Kevin Lynch admitted that all of the acts that he took with respect to his father's property and the checks that he wrote out

of the checking account were done in his capacity under the power of attorney. (TT 124-25) Kevin Lynch argues in his brief that he did not really engage in self-dealing, because he did not make "gifts" to himself. (Appellee's Brief at 29) It is clear, however, that he made numerous transfers to himself and used the funds to pay his own bills and expenses, thus directly benefiting himself. This was clearly self-dealing, because similar to the Mollers in *Bienash* - he used his position under the power of attorney to benefit himself.

Kevin Lynch also argues that under general principals of agency he was permitted to deal under the power of attorney with his principal so long as his principal was fully informed and as long as he did not take unfair advantage of him.[2] (Appellee's Brief at 19, citing Restatement of Agency 2d §§ 389-90) Significantly, to support this contention, Kevin Lynch must rely on oral extrinsic evidence - his self-serving uncorroborated statements that his father agreed to, approved of, or authorized all of these transactions. This he cannot do,

[2] Kevin Lynch argues in his brief that his father remained capable of making his own financial decisions and continued to do so. (Appellee's Brief at 11). Yet, Robert Lynch's nursing home records reveal that he suffered from severe cognitive impairment. (Ex. 247, p. 101, 111, 139, 147, 154, 158, 176, 185) Shortly after entering the nursing home in September 2011, he didn't know how to dress himself. (Ex. 247, p. 80). He could not read or understand the menus (Ex. 247, p. 88), he did not know who he was, where he was, or his date of birth in May 2012. *Id.* p. 102. Further, Kevin Lynch kept all of Robert Lynch's financial information. Robert Lynch never saw his own bank statements or tax information after 2010. (R 122; Kevin. Lynch Depo. 67; R 116; Kevin Lynch Depo. 41). There is absolutely no evidence to suggest that Robert Lynch was fully informed of Kevin Lynch's self-dealing, outside of the self-serving oral extrinsic evidence offered by Kevin Lynch. Kevin Lynch has offered no evidence that he didn't take unfair advantage of his father. Indeed, he transferred about $800,000.00 of his father's funds to himself or for his own benefit.

because *Bienash* precludes the use of oral extrinsic evidence to justify such acts of self-dealing.

In his brief, Kevin Lynch suggests that the agency relationship established under a power of attorney somehow differs from a trustee relationship and authorizes the agent to deal with the principal for his own benefit. (Appellee Brief pp. 18-19) Significantly, this misstates the fiduciary duty imposed upon one acting under a power of attorney under South Dakota law, and fails to account for the statutes enacted in South Dakota and this Court's common law pronouncements governing powers of attorney in *Bienash* and its progeny. In *Hein v. Zoss*, 2016 S.D. 73, ¶12, 887 N.W.2d 62, 66-67, this Court acknowledged the statutory limitations on an agent's authority. The Court specifically pointed out that SDCL 59-3-11 provides: "An authority expressed in general terms, however broad, does not authorize an agent to do any act which a trustee is forbidden to do by the law on trusts." *Id.* The Court also pointed out that under SDCL 55-2-2 a fiduciary is prohibited from "us[ing] or deal[ing] with the trust property for his own profit or for any other purpose unconnected with the trust." *Id*. As the Court in *Zoss* pointed out, SDCL 55-4-13 governing trusts, prohibited the trustee, unless expressly authorized by the trust instrument, from leasing property to himself. *Id.* ¶12.[3]

South Dakota statutes further limit the authority of an agent.

[3] In *Zoss,* the Court held that the attorney-in-fact should have been permitted to explain that prior to the execution of the power of attorney, Zoss and his brother had farmed his mother's land without paying rent. *Id*. ¶13, 887 N.W.2d at 67.

SDCL §55-2-4 reads as follows:

> A trustee may not use the influence which his position gives him to take any advantage from his beneficiary.

SDCL §55-2-8 reads as follows:

> All transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the later without sufficient consideration and under undue influence.

In his brief, Kevin Lynch also argues that once the power of attorney is granted not every subsequent act by the attorney-in-fact involves a fiduciary duty. He cites *Estate of Bronson*, 2017 S.D. 9, 892 N.W.2d 604 for that proposition. There, this Court applied the *amanuensis* doctrine to hold that the execution of a bank document by the attorney-in-fact was done only as an accommodation to the father given his physical condition and that it was done at the direction of his father who had instituted the transaction himself. *Estate of Bronson*, 2017 S.D. 9 ¶14, 892 at 609-10. Kevin Lynch admitted he was acting as his father's power of attorney with respect to the transactions in question. Accordingly, *Estate of Bronson* is inapposite.

Most importantly, this Court's decisions in *Bienash, Studt, Hein, Wyman,* and *Stoebner* all stand for the proposition that the attorney-in-fact under a power of attorney may not self-deal unless the power of attorney expressly authorizes self-dealing in clear and unmistakable terms and that oral extrinsic evidence may not be used to justify acts of self-dealing. These principles of law in South Dakota contradict Kevin Lynch's claim in his brief to this Court that he, as agent,

had the right self-deal. The oral extrinsic evidence offered by Kevin Lynch is barred by the bright-line rule laid down by this Court in *Bienash* and followed consistently in cases involving breach of fiduciary duty claims under powers of attorney. What Kevin Lynch is asking this Court to do is tantamount to overruling the bright-line rule adopted in *Bienash* and followed for the last 16 years.

Kevin Lynch argues that it is common for parents and their children to enter into oral agreements for farming relationships, and that the acceptance of a POA by a child in that relationship would preclude that child from continuing in that farming partnership. (Appellee Brief at 18) This argument is misplaced. The Estate here, has never asserted a claim that impacted the farming partnership that existed between Kevin Lynch and his father which predated the POA and terminated before the POA was executed. Here, the power of attorney was executed in December of 2007. Kevin Lynch entered into a farming partnership with his father from some time in the late 70's until his father retired from farming in 1995. From 1996 until the end of 2011, Kevin Lynch was not in a farming partnership with his father. He rented the farmland on a crop share 60/40 basis. Beginning in 2012, Robert Lynch's farmland was cash rented to the Solomons who bore the responsibility for the maintenance and upkeep of all that property. This was not, as Kevin Lynch suggested, a continuation of a pre-existing farming agreement. (Appellee Brief p. 24) It was a completely new arrangement.

Moreover, the claim that somehow the relationship beginning in 2012 was a continuation of his partnership with his father in the cattle business is also a clear misstatement of the facts. (Appellee Brief p. 6) For a partnership to exist, it must entail sharing of the profits. *A.P. & Sons Const. v. Johnson*, 2003 S.D. 13 ¶19-20, 657 N.W.2d 292, 297. From 2012 on, Robert Lynch paid most of the expenses, provided the pasture and facilities rent free and got nothing of the profit, let alone any return even from his own cows from 2012 until he died. This was no partnership.

Kevin Lynch contended that some of the money he took of his father's funds from the joint account represented compensation to him. He claimed that in late 2011 he and his father entered into a compensation agreement, whereby he would receive $30,000.00 per year as compensation for taking care of his father's property.[4] He claims that under the power of attorney he had general authority to manage and control his father's property. In his brief, he alleges that the power of attorney granted him general authority to "provide compensation for services[.]" (Appellee Brief at 7) That term, however, appears nowhere in the power of attorney. Moreover, the Power of Attorney expressly provides: "My attorney shall serve without bond and without compensation." (Ex. 201 p. 7, Appellant's Appendix 26) *Bienash* and its progeny make clear that general powers expressed in the power of attorney do not authorize self-dealing unless the right to self-deal

[4] Kevin Lynch was employed at the Dakota Dome until 2010. He was never employed by someone else after that. (TT 102)

is set out in clear and unmistakable terms. *Bienash, supra* ¶14. Here it was not. A similar issue was raised in *Cheloah v. Cheloah*, 582 N.W.2d 291, 299 (Neb. 1998), *disapproved on unrelated grounds*, *Weyh v. Gottsch*, 929 N.W.2d 40, 62-63 (2019). There, the Nebraska Supreme Court held that:

> The attorney-in-fact's claim for compensation was denied, because the record was devoid of satisfactory proof that [the principal] entered into a binding contract to compensate [the attorney-in-fact] for services rendered and because the power of attorney does not contain a provision authorizing the attorney-in-fact to compensate himself from [the principal's] property[.]

Id.

Furthermore, in *Cheloah*, as here, the attorney-in-fact never reported the income he supposedly received as compensation. *Id.* at 298.

3. Partial summary judgment should have been granted to the estate

Bienash and its progeny make clear that summary judgment is the appropriate disposition of claims arising from breach of fiduciary duty under powers of attorney. In *Bienash*, this Court rejected evidence offered by the attorneys-in-fact to defeat summary judgment by stating:

> [W]e conclude that the appropriate rationale for this Court is to adopt a bright-line rule that no <u>oral</u> extrinsic evidence will be admitted to raise a factual issue.

Id. ¶24 (emphasis in original).

The *Bienash* Court observed that the power of attorney granted to the Mollers was general in nature, and although it provided the Mollers with gifting authority, that authority was limited to the annual IRS limit. *Id.* ¶15. "The power

of attorney did not specifically authorize Mollers to engage in acts of self-dealing[.]" *Id.* (emphasis in original) The Court concluded:

> [I]t is apparent, as a matter of law, Mollers breached their fiduciary duty to Duebendorfer when they engaged in the acts of self-dealing articulated above. These acts directly benefited Mollers in the amount of approximately $266,000.00 upon Duebendorfer's death $20,000.00 of which would have gone to Bienash.

Id. ¶15 (emphasis added).

In *Studt v. Black Hills Fed. Credit Union,* 2015 S.D. 33, 864 N.W.2d 515 (2015), this Court affirmed a summary judgment granted against the attorney-in-fact who attempted to change the payable on death beneficiary on a CD owned by the principal. The power of attorney in that case authorized the attorney-in-fact "to make gifts in my name, to any persons or organizations, but only to the extent that my attorney determines that my financial needs can be met and such gifts continue to be prudent estate and tax planning devices." *Id.* ¶4, fn. 1. Studt argued in that case that the power of attorney permitted him to engage in self-dealing. *Id.* ¶11. Because it authorized him to make gifts to any person, Studt claimed that included him. *Id.* ¶8. This Court held, consistent with *Bienash,* that the power of attorney, although broad and general in nature, did not specifically authorize the attorney-in-fact to engage in acts of self-dealing and it could not be construed to allow such acts. *Id.* ¶12. The Court also precluded an affidavit from the attorney that drafted the power of attorney, concluding that it was inadmissible oral extrinsic evidence and could not be used to defeat summary judgment. *Id.* ¶14.

In *Wyman v. Bruckner*, 2018 S.D. 17, 908 N.W.2d 170, this Court reversed a grant of summary judgment to the attorney-in-fact and awarded judgment in favor of the estate based on breach of fiduciary duty by the attorney-in-fact. There, the attorney-in-fact, sought to justify her acts of writing checks to herself and her family members from a joint account with her mother by arguing that she was not acting pursuant to the power of attorney, but as a joint account owner. *Id.* ¶13. This Court held that these transfers violated Bruckner's fiduciary duty irrespective of her status as a joint account owner. *Id.* ¶18. This Court went on to hold that the over $200,000.00 in checks written to herself, her husband, children and grandchildren amounted to impermissible self-dealing. *Id.* ¶24. This Court held:

> These transactions involve Morris's property during her lifetime and directly benefited Bruckner. Given our precedent, it is apparent as a matter of law that Bruckner breached her fiduciary duty.

Id. (Citing *Bienash* and *Studt*; emphasis added).

In *Estate of Stoebner v. Huether*, 2019 S.D. 58, 935 N.W.2d 262, this Court again affirmed summary judgment holding the attorney-in-fact liable for breaching a fiduciary duty. Huether, the attorney-in-fact, prepared a transaction for his principal Stoebner to sell his land to Huether for well below fair market value with conditions to credit payment of Stoebner's expenses by Huether toward the payment under the purchase agreement and with a forgiveness clause upon Stoebner's death. *Id.* ¶7. Stoebner died shortly thereafter. This Court adhered to the bright-line rule prohibiting oral extrinsic evidence to raise a factual issue. This Court specifically rejected affidavits submitted by Huether suggesting

that Stoebner was aware of the transaction because he had discussed the terms of it with Huether and had reviewed the contract, and approved it. *Id.* ¶¶13 and 14. As this Court noted:

> Regardless of Huether's intentions and even if Stoebner approved of the transaction there is no admissible written evidence supporting Huether's ability to self-deal.

Id. ¶23.

That is precisely this case. Here there is no written evidence expressly and unmistakably authorizing Kevin Lynch to self-deal in any of the transactions he claimed that his father orally approved.

4. The Trial Court erred in admitting oral extrinsic evidence at trial

The Trial Court denied the Estate's Motion in Limine to exclude any oral extrinsic evidence offered by Kevin Lynch to justify his acts of self-dealing. (R 1046-48, 1558) The Trial Court also overruled objections to such evidence at trial. (TT 281-82, 285, 321-22, 324, 351, 392, 396, 500, 530) The Trial Court justified its ruling admitting such oral extrinsic evidence, stating: "I still find it relevant for determination of whether there was a breach of the fiduciary duty as I previously ruled." (HT August 25, 2021, p. 22)

This rationale is incorrect. If oral extrinsic evidence were admissible under the bright-line rule of *Bienash* to determine <u>breach</u> of fiduciary duty, then there is no rule at all. The attorney-in-fact could always, then, use oral extrinsic evidence to create a fact question to avoid summary judgment and to support any defense such as consent, ratification or estoppel at trial.

Under *Bienash*, *Studt, Wyman* and *Stoebner*, the trial court committed error in authorizing the use of this oral extrinsic evidence and this error was prejudicial to the Estate and affected the substantial rights of the Estate. SDCL 19-19-103(a).

5. The Trial Court erred in Instruction No. 15, authorizing the jury to find that Kevin Lynch was not acting in a fiduciary capacity

Instruction No. 15, permitted the jury to determine that some of the conduct of Kevin Lynch was outside of the scope of his power of attorney and left the jury to determine whether or not he was acting in a fiduciary capacity with respect to such conduct. Kevin Lynch argues that once a power of attorney is in place, not every act thereafter is governed by it. He cites *Estate of Bronson*, 2017 S.D. 9, 892 N.W.2d 604, where this Court acknowledged that under the *amanuensis* doctrine an attorney-in-fact was not acting under his power of attorney when signing his father's name to a new account form. (*Id.* ¶¶6 and 14)

That is not this case. Here, Kevin Lynch admitted that all of the checks that he wrote to himself were written in his capacity under the power of attorney. (TT 125) He admitted that all of his transactions involving his father's property were done in his capacity acting under the power of attorney. (TT 124)[5]

Furthermore, in his brief, Kevin Lynch now argues that his alleged "compensation", debt relief, and money he took out of his father's account for his

[5] The Estate never contended that in executing the joint account documents Kevin Lynch was acting under the power of attorney. In fact, Robert Lynch executed those documents himself, unlike what had occurred in *Bronson*.

labor in managing and taking care of his father's property was somehow unconnected to and ungoverned by the power of attorney. (Appellee's Brief p. 32) This claim is unsupported by anything in the record or any citation to authority and is belied by his own testimony. Instruction No. 15 is an incorrect statement of the law, because it allowed the jury to conclude that Kevin Lynch was not acting pursuant to the power of attorney with respect to certain conduct. This was contrary to the evidence and the law laid down by this Court. *Wyman, supra* ¶24, 908 N.W.2d at 177-78. *Hein, supra*, ¶8, 887 N.W.2d at 65. ("[I]n South Dakota, as a matter of law, a fiduciary relationship exists whenever a power of attorney is created.")

6. The Court erred in instructing the jury on defenses based on oral extrinsic evidence barred by the bright-line rule of Bienash and its progeny

The Trial Court gave a number of jury instructions predicated on the oral extrinsic evidence admitted at trial. It instructed the jury on defenses of consent, release, and ratification. (R 3848; Instruction No. 23) Instruction No. 30 instructed the jury on the defense of quasi-estoppel. (R 3856) Instruction No. 29 instructed the jury based on an "oral agreement between Robert Lynch and Defendant." (R 3855) The Court also instructed the jury on a claim of recoupment in Instruction No. 31.

These instructions were erroneous because the oral extrinsic evidence upon which they were based, was not competent evidence in the record. *Kaarup v. Schmitz, Kalda & Associates,* 436 N.W.2d 845, 849 (S.D. 1989). Erroneously

admitted evidence is not legally sufficient evidence. See *Weisgram v. Marley Co.,* 528 U.S. 440, 454, 120 S.Ct. 1011, 1020 (2000).

7. The Trial Court erred in refusing the instruction based on Ward v. Lange

The Estate proposed Jury Instruction No. 31 which was refused by the Court. It read:

> A fiduciary breach is his fiduciary duty when he uses his position by enriching the value of property that would eventually devolve to him.

Citing *Ward v. Lange*, 1996 S.D. 113 ¶3, 553 N.W.2d 246, 248. Throughout the trial, Kevin Lynch contended that the purchase of machinery, which he ultimately received under the will, did not deplete the estate, because the machinery was still in the Estate when Robert died. (TT 535, 744)

Yet, like the attorney-in-fact in *Crosby v. Luehrs,* 669 N.W.2d 635, 645-46 (Neb. 2003), Kevin Lynch feathered his own nest by these transactions, and as such, breached his fiduciary duty even though the transfers occurred after death. *Bienash*, *supra*, ¶¶18 and 19, 721 N.W.2d at 435-36, (citing *Crosby* with approval).

8. The Court erred in granting judgment as a matter of law for Kevin Lynch on the joint account claim

Kevin Lynch testified that the joint account with his father was set up for convenience to pay his father's bills. (R 121; Kevin Lynch Depo. 64; TT 134-36) Whether this account was set up for convenience or for the benefit of the non-

depositing joint payee is a fact question for the trier of fact. *Estate of Card,* 2016 S.D. 4 ¶15, 874 N.W.2d 86, 91.

Kevin Lynch admitted that his father would have expected the money in that joint account to be used to pay his funeral expenses, income taxes (on the rent that that money represented), and his real estate taxes. (TT 204) Without those funds, those bills, including his funeral expenses could not have been paid. This Court previously held that the trial court did not err in treating a joint account as having been set up for convenience "when it concluded that decedent did not intend to divest himself at death of the only available asset to pay his final debts." *Roth v. Pier,* 309 N.W.2d 815, 816 (S.D. 1981). Here, the Trial Court erred in granting the motion for judgment as a matter of law. The record evidence was susceptible of sustaining the position of the non-moving party that this account was set up for convenience. *Klingenberg v. Vulcan Ladder USA, LLC,* 936 F.3d 824, 830 (8th Cir. 2019).

9. Notice of Review

Kevin Lynch, in his Notice of Review, alleged that the trial court erred in failing to give his proposed Jury Instruction No. 16. Kevin Lynch attached that proposed instruction to his Docketing Statement, but never provided a copy to this Court in his Appendix or even so much as cited the precise language of it in his brief. A copy is appended to this Reply Brief. In that proposed instruction, Kevin Lynch asked the jury to be directed to deduct from any damages the annual

amount of any yearly gift tax exclusion. (R 1637). ("you must deduct the following amounts for each year in your calculation of damages.")

Paragraph 14 of the Power of Attorney specifically authorized the attorney-in-fact to make gifts up to the Internal Revenue gift tax exclusion amount. That provision provided that those gifts could be made to such persons (including my attorney). Significantly, Kevin Lynch admitted in his deposition and at trial that he never made any gifts pursuant to that provision in the power of attorney. (R 120-21; Kevin Lynch Depo. 60-61; TT 128-29)

Kevin Lynch's proposed jury instruction required the jury to deduct from any damage award the gift tax exclusion amount for each of the respective years.[6] (R1637) The Trial Court properly rejected the proposed instruction. Kevin Lynch admitted he never made any gifts under the provision, let alone gifts in those amounts. To direct the jury to deduct those amounts from damages is tantamount to directing a verdict, authorizing an after the fact, reduction of Kevin Lynch's defalcation. *See Rantapaa v. Black Hills Chair Lift Co.,* 2001 S.D. 11, ¶33, 633 N.W.2d 196, 206 (an instruction that operates as a directed verdict is prejudicial error in the purest sense).

CONCLUSION

The Estate prays for the relief originally requested.

[6] No evidence was admitted as to what those amounts were. The Court was requested to take judicial notice of what those amounts were and the Court actually put those amounts into an instruction that it had given the jury. (Instruction 34; R 3861; TT 900-01)

Dated this 25th day of May, 2022.

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that it be granted the privilege of appearing before this Court for an oral argument in this appeal.

/s/ Michael J. Schaffer

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Reply Brief of Appellant* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellant* contains 4976 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare *Reply Brief of Appellant.* The original *Reply Brief of Appellant* and all copies are in compliance with this rule.

/s/ Michael J. Schaffer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing "Reply Brief of Appellant" was served by email service to the following attorneys in PDF format on May 25, 2022, before 11:59 p.m. on that date:

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REPLY APPENDIX

Source: South Dakota Pattern Jury Instructions (Civil) 30-10-60 (2019) (modified); *Johnson v. Larson*, 2010 S.D. 20, ¶ 14, 779 N.W.2d 412, 417; *Stern Oil Co. v. Border States Paving, Inc.*, 2014 S.D. 28, ¶ 18, 848 N.W.2d 273, 279.

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 16

Damages

If you find that the Plaintiff ~~Estate of Robert Lynch Ann Lynch, as Personal Representative of the Estate of Robert Lynch~~ has not met its burden to prove any of ~~the Estate~~ Plaintiff's claims for breach of fiduciary duty, conversion, or elder exploitation (for conduct after July 1, 2016), then the Plaintiff ~~Estate of Robert Lynch~~ is not entitled to an award of damages. If you find that the Plaintiff ~~Estate of Robert Lynch Ann Lynch, as Personal Representative of the Estate of Robert Lynch,~~ has met its burden to prove one or more of its claims for breach of fiduciary duty, conversion or elder exploitation (for conduct after July 1, 2016), you must then fix the amount of money that will reasonably and fairly compensate the Plaintiff ~~Estate of Robert Lynch~~ for any of the following elements of loss or harm suffered and proved by greater convincing force of the evidence to have been legally caused by the D~~e~~efendant ~~Kevin Lynch~~'s wrongful conduct and that are not barred in whole or in part by one or more of the D~~e~~efendant ~~Kevin~~'s defenses.

Plaintiff ~~Ann~~ alleges that D~~e~~efendant ~~Kevin~~ must pay damages ~~to the Estate of Robert Lynch~~ for the following transactions based upon its claims of breach of fiduciary duty, conversion, and elder exploitation (for entries 11 and 12 below) by defendant ~~Kevin Lynch~~:

1	3/14/2011	Check	$15,000.00
2	5/1/2012	Check	$80,000.00

3	8/13/2012	Check	$50,000.00
4	3/8/2013	Check	$60,000.00
5	2/24/2014	Check	$3,000.00
6	2/28/2014	Check	$30,000.00
7	6/27/2014	Check	$10,000.00
8	5/28/2015	Check	$20,000.00
9	3/21/2016	Check	$30,000.00
10	6/10/2016	Check	$40,000.00
11	2/28/2017	Check	$30,000.00
12	2/27/2018	Check	$30,000.00
13	1/1/2012 to 3/18/2012	Cattle Operation	

The burden of proving the damages in entries 1-13 of the above table rests with the Pplaintiff~~Ann Lynch~~ as the party claiming them and it is for you to determine, based upon the evidence, whether any particular element of damage has been proved by greater convincing force of the evidence. In determining an award of damages, your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

If you find that the Ddefendant~~Kevin Lynch~~ met his burden on any one of the following defenses: Release of Liability by Consent or Release or Ratification, Statute of Limitations, Estoppel, or Quasi-Estoppel on any entry numbers 1-13 in the above table, then you must not award any damages to the Pplaintiff ~~Estate of Robert T. Lynch~~ for that transaction. If you do not find that the Ddefendant~~Kevin Lynch~~ met his burden on any of those defenses ~~the Release of Liability by Consent or Release or Ratification, Statute of Limitations, Estoppel, or Quasi-Estoppel defenses on~~ as to any entry numbers 1-13, then the Pplaintiff~~Ann Lynch~~'s claims ~~as Personal Representative for the Estate of Robert T. Lynch~~ on that specific transaction are not barred by any of those defenses.

~~Kevin Lynch alleges that he received the money in the entry numbers 1-13 in the above table as compensation for his labor on and management of Bob's farm under the agreement he had with Bob Lynch and that he is not liable to pay those funds back to the Estate. You~~

~~may accept or reject this position. If you accept Kevin's position, then you must not award any damages to Ann Lynch as Personal Representative of the Estate of Robert Lynch for the damages claimed in entry numbers 1-13. If you accept Ann's position and award damages to the Estate for any of the entry numbers 1 to 13 in the above table, then you must consider whether Kevin is entitled to deductions from those damages for his work performed for and expenses incurred on behalf of Bob before his death on March 13, 2018, based on his defenses Unjust Enrichment or Quantum Meruit as defined elsewhere in these Instructions.~~

If you find that the Ddefendant ~~Kevin Lynch~~ has proven either his Unjust Enrichment or Quantum Meruit defense or both defenses, you must deduct from your calculation of damages all amounts the Ddefendant ~~Kevin~~ is entitled to receive as compensation for work done for and expenses incurred on behalf of Bob Lynch before Bob's death on March 13, 2018. If you find that the Ddefendant ~~Kevin Lynch~~ has not proven his Unjust Enrichment or Quantum Meruit defenses, you must not make any deduction in your calculation of damages based on these two defenses.

The Plaintiff ~~Ann Lynch~~ also claims that the Ddefendant ~~Kevin Lynch~~ must pay the following amounts ~~to the Estate~~ as damages on her claims for breach of fiduciary duty and conversion:

14	12/28/2012	Morton Buildings	$106,774.62
15	5/5/2011	Interstate Auction	$5,200.00
16	6/10/2011	Campbell Supply	$1,406.85
17	9/18/2011	Road King, Inc.	$500.00
18	9/9/2011	Mark's Machinery	$45,042.40
19	10/7/2011	Road King Trailer	$5,330.00
20	5/28/2012	Don Fergen	$2,000.00
21	6/3/2012	Mockler Farms	$918.35
22	6/14/2012	Mockler Farms	$94.60
23	6/23/2012	Gaylen Smith	$7,500.00
24	8/23/2012	Fred Haan	$6,032.00
25	8/23/2012	Mark's Machinery	$7,020.00

26	9/14/2012	Derald Kloster	$11,250.00
27	11/12/2013	Pederson Machine	$6,240.00
28	10/1/2014	Mark's Machinery	$5,980.00
29	9/20/2012	CorTrust CDs	$44,590.22

The burden of proving the damages in entry numbers 14-29 in the above table rests with the Pplaintiff~~Ann Lynch~~ as the party claiming them and it is for you to determine, based upon the evidence, whether any particular element of damage has been proved by greater convincing force of the evidence. In determining an award of damages, your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

If you find that the Ddefendant has~~Kevin Lynch~~ met his burden on his defense of Release of Liability by Consent, Release or Ratification as to some or all the transactions in entry numbers 14-29, then you must not award any damages to the Pplaintiff~~Estate~~ for those transactions on which the Ddefendant~~he~~ met his burden. If you do not find in favor of the Ddefendant~~Kevin Lynch~~ on thate defense ~~of Release of Liability by Consent, Release or Ratification~~ on a transaction in entry numbers 14-29, then the Pplaintiff~~Ann Lynch~~'s claims as to those transactions are not barred by this defense.

If you find that the Ddefendant~~Kevin Lynch~~ met his burden on the Statute of Limitations defense as to entry numbers 15-19 in the above table, then you must not award any damages to the Pplaintiff~~Estate of Robert T. Lynch~~ for those equipment purchases. If you do not find in favor of the Ddefendant~~Kevin Lynch~~ on the Statute of Limitations defense, then Pplaintiff~~Ann Lynch~~'s claims ~~as Personal Representative for the Estate of Robert T. Lynch~~ as to entry numbers 15-19 are not barred by this defense.

If you find that the Ddefendant ~~Kevin Lynch~~ has proven either his Unjust Enrichment or Quantum Meruit defense or both defenses, you must deduct from your calculation of damages all amounts the Ddefendant~~Kevin~~ is entitled to receive as compensation for work

done for and expenses incurred on behalf of Bob Lynch before Bob's death on March 13, 2018. If you find that the Ddefendant~~Kevin Lynch~~ has not proven his Unjust Enrichment or Quantum Meruit defenses, you must not make any deduction in your calculation of damages based on these two defenses.

The Power of Attorney gave the Ddefendant the right to gift himself up to the gift tax exclusion amount for each year. The yeadly gift tax exclusion amount is set by law. If, after following all Instructions above, your calculation of damages requires a payment from the Ddefendant~~Kevin~~ to the Plaintiff~~Estate~~, then you must deduct the following amounts for each year in your calculation of damages for the Defendant's right to gift himself these amounts under Paragraph 14 of the Power of Attorney:

2011 - $13,000~~plus Kevin's 2011 medical expenses~~

2012 – $13,000~~plus Kevin's 2012 medical expenses~~

2013 - $14,000~~plus Kevin's 2013 medical expenses~~

2014 - $14,000~~plus Kevin's 2014 medical expenses~~

2015 - $14,000~~plus Kevin's 2015 medical expenses~~

2016 - $14,000~~plus Kevin's 2016 medical expenses~~

2017 - $14,000~~plus Kevin's 2017 medical expenses~~

2018 - $15,000~~plus Kevin's 2018 medical expenses incurred from January 1, 2018 through March 13, 2018.~~

~~If your calculation of damages based upon the above instructions requires Kevin to pay damages to the Estate, you must write that number in the blank in answer to Question 5 on the Verdict Form. If your calculation of damages based upon the instructions above is zero or a negative number after all deductions above have been made, then you must write "$0.00" in the blank in answer to Question 5 on the Verdict Form.~~

Source: South Dakota Pattern Jury Instructions (Civil) 50-00-10 (2019) (modified); South Dakota Pattern Jury Instruction 30-10-60 (2019) (modified); *Haas v. Griffiths*, 2006 S.D. 27, ¶ 20, 714 N.W.2d 61, 67.