IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

BARBARA HERMANEK-PECK, in her capacity as Personal Representative of the Estate of Richard Hermanek,

Plaintiff,

vs.

RICHARD SPRY and SUSAN SPRY,

Defendants.

Certification # 29649

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DIVISION, SOUTH DAKOTA
D.S.D. CASE 4:21-CV-04034-LLP

The Honorable Lawrence Piersol
District Court Judge

Order Accepting Certification filed on June 28, 2021

DEFENDANTS' BRIEF

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PRELIMINARY STATEMENT

This matter arises out of Richard and Susan Spry's Motion to Dismiss two causes of action contained in the Complaint brought by Plaintiff, Barbara Hermanek-Peck ("Barbara"), as Personal Representative of the Estate of Richard Hermanek: Count 3, Vulnerable Adult Abuse under SDCL Chap. 21-65 and Count 4, Exploitation of Elder under SDCL §22-46-13.

In this case, this Court must determine 1) whether SDCL Chapter 21-65 creates a private cause of action that survives the vulnerable adult's death, and 2) whether a civil claim under SDCL §22-46-13 exists without a prior criminal conviction for exploitation. Barbara asks this Court to answer "yes" to both questions, but to do so would require the Court to ignore fundamental principles of statutory construction. This Court should decline Barbara's invitation and should instead answer both questions in the negative.

Throughout this Brief, Plaintiff Barbara Hermanek-Peck, in her capacity as Personal Representative of the Estate of Richard Hermanek, will be referred to as "Barbara" or "the Estate." Richard Hermanek will be referenced as "Decedent." Defendants Richard Spry and Susan Spry will be referred to collectively as "Sprys."

Sprys' Appendix is identified as "App" followed by the appropriate page number. References to the District Court proceedings, D.S.D. Case 4:21-cv-04034-LLP, will be identified by the Docket Number ("Doc. ___ ") followed by the appropriate page number.

JURISDICTIONAL STATEMENT

On May 27, 2021, the United States District Court, District of South Dakota, Southern Division, Honorable Lawrence Piersol, issued an *Order* identifying three questions to be certified to the South Dakota Supreme Court. App-14. This Court accepted the certification via an *Order Accepting Certification* dated June 28, 2021. This Court has jurisdiction pursuant to SDCL §15-24A-1.

STATEMENT OF LEGAL ISSUES

1. Does South Dakota Recognize a Private Right of Action for a Violation of Chapter 21-65 after the Death of the Vulnerable Adult?

Most Relevant Authority:

SDCL Chap. 21-65
SDCL Chap. 25-10
SDCL Chap. 22-19A

2. For a Civil Claim to be Brought under SDCL §22-46-3 and SDCL §22-46-13, Must the Person Against Whom the Claim is Brought have been Criminally Convicted of Theft by Exploitation under SDCL §22-46-3?

Most Relevant Authority:

SDCL §22-46-13
SDCL §22-46-3
K&E Land and Cattle, Inc. v. Mayer, 330 N.W.2d 529 (S.D. 1983)
Wetch v. Crum & Forster Commercial Ins., 2018 WL 10812341 (D.S.D. 2018)

3. Can a Civil Claim be Brought for Violation of SDCL §22-46-1 and SDCL §22-46-13 with no Requirement for a Preceding Criminal Conviction Given the "or" Between §22-46-1 and §22-46-3 in SDCL §22-46-13?

Most Relevant Authority:

SDCL §22-46-13
SDCL §22-46-1
SDCL §22-46-3

STATEMENT OF THE CASE

This case involves three (3) Certified Questions from the District of South Dakota, Southern Division, Judge Lawrence Piersol,

The Sprys acted as Decedent's attorneys-in-fact pursuant to a Durable Power of Attorney until Decedent's death on March 14, 2019. App-2. On August 7, 2020, Barbara filed this action against the Sprys, raising claims of Breach of Fiduciary Duty, Conversion, Vulnerable Adult Abuse under SDCL Ch. 21-65, and Exploitation of Elder under SDCL §22-46-13. App-16. The Sprys timely removed the case to the United States District Court, District of South Dakota ("District Court") on the basis of diversity of citizenship. Doc. 1.

On March 16, 2021, the Sprys filed a Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Doc. 5. On May 27, 2021, the District Court entered an Order denying the Motion as to Count 1 (Breach of Fiduciary Duty) and Count 2 (Conversion). App-1. As to

Counts 3 (Vulnerable Adult Abuse) and 4 (Exploitation of Elder), the District Court found there was no state law precedent addressing the legal questions presented by the Sprys' motion. *Id.* Finding itself "genuinely uncertain" about this question of state law, Judge Piersol certified three questions to this Court. *Id.* at 14. This Court accepted the certified questions on June 28, 2021.

STATEMENT OF THE FACTS

Decedent died intestate on March 14, 2019, at 89 years of age. App-1. Richard Spry is Decedent's nephew; Susan Spry is Richard Spry's wife. *Id.* at 2. The Sprys served as Decedent's attorneys-in-fact under a Durable Power of Attorney from July of 2018 until Decedent's death. *Id.* at 1. In this action, Barbara alleges the Sprys engaged in improper self-dealing while acting as Decedent's attorney-in-fact. *Id.* at 1. Barbara's complaint alleges claims of breach of fiduciary duty, conversion, vulnerable adult abuse, and exploitation of an elder. App-16. Sprys moved to dismiss all claims. Doc. 5.

STANDARD OF REVIEW

The legal questions at issue involve the interpretation and application of various statutory provisions. Statutory construction is a

question of law. *In re Estate of Hamilton*, 2012 SD 34, ¶7, 814 N.W.2d 141, 143 (S.D. 2012).

"The purpose of statutory construction is to discover the true intention of the law . . . . The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used." *Martinmaas v. Engelmann*, 2000 SD 85, ¶49, 612 N.W.2d 600, 611 (S.D. 2000). "Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Id.* *See also Oahe Conservancy Subdistrict v. Janklow*, 308 N.W.2d 559, 561 (S.D. 1981) (It is "presumed that the words of the statute have been used to convey their ordinary, popular meaning."). A "[j]udicial interpretation of a statute that fail[s] to acknowledge its plain language would amount to judicial supervision of the legislature." *State v. Galati*, 365 N.W.2d 575, 577 (S.D. 1985).

Statutory intent "must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing

statutes together it is presumed that the legislature did not intend an absurd or unreasonable result[.]" *Martinmaas*, ¶49, 612 N.W.2d at 611.

ARGUMENT

1. South Dakota Does Not Recognize a Private Right of Action for a Violation of Chapter 21-65 after the Death of the Vulnerable Adult.

A. Chapter 21-65 Authorizes Protection Orders, not Tort Claims.

SDCL Chapter 21-65 is entitled "Protection of Vulnerable Adults." The Chapter sets forth the procedures by which a vulnerable adult may obtain an order of protection against a wrongdoer who has committed physical abuse, emotional or psychological abuse, neglect, or financial exploitation. *See generally* SDCL Chap. 21-65. This chapter provides a mechanism through which a vulnerable adult (or authorized person on his/her behalf) may obtain an order of protection against a wrongdoer. Indeed, nearly every section of Chapter 21-65 references a protection order as the relief provided therein and, equally telling, its provisions are virtually identical to the statutory schemes governing the issuance of Stalking or Physical Injury Protection Orders, SDCL §22-19A-8, *et. seq.*, and Domestic Abuse Protection Orders, SDCL §25-10-1, *et. seq.* In contrast, and as discussed more fully below, a private civil cause of

action for damages arising out of vulnerable adult abuse or financial exploitation is found in §22-46-13.

Examination of the individual provisions in Chapter 21-65 confirms that they do not speak to, or create, claims sounding in tort. Consider the following:

- Nearly every statute references the phrase "protection order" in either the title or the text of the law. In many instances, the use of the phrase "the protection order" or "the protection order authorized by this Chapter" indicates that the protection order is the aim and purpose of this statutory scheme. *See*, *e.g.*, SDCL §21-65-4, §21-65-13.

- The language found in numerous provisions of Chapter 21-65 is functionally identical to that found in the Stalking/Physical Injury Protection Order statutes or the Domestic Abuse Protection Order statutes. *See* SDCL §21-65-2, §22-19A-8, and §25-10-3 (contents of petition and affidavit); SDCL §21-65-3, §22-19A-12; §25-10-6 (permitting *ex parte* TPOs); SDCL §21-65-2, §22-19A-8.1, §25-10-3.3 (authorizing court to issue any type of protection order if facts support its entry); §21-65-5, §22-19A-8, §25-10-3 (requiring the promulgation of *pro se*

forms for petitioners); SDCL §21-65-7, §22-19A-10, §25-10-4 (outlining requirements for personal service and timeliness of hearing): SDCL §21-65-8, §22-19A-12, §25-10-7 (authorizing continuance of *ex parte* TPOs in certain circumstances).

- SDCL §21-65-11, §21-65-12, and §21-65-13 identify the specific types of (and limitations to) relief the Court may require upon a finding that vulnerable adult abuse or financial exploitation has occurred. Each of the remedies unambiguously involves *injunctive* relief, to be included in the order of protection, requiring the respondent to take an affirmative action or prohibiting/restraining the respondent from committing certain acts. *See also* SDCL §22-19A-11, §25-10-5 (identifying the types of relief available to be included in the protection order, all in the nature of injunctive remedies).

In sum, suits under Chapter 21-65 are limited to petitions for orders of protection, and nothing in their statutory language suggests the creation of a tort claim.[1]

[1] Even if Chap. 21-65 could be construed to authorize a tort claim with monetary damages, it would be duplicative of the civil action authorized under §22-46-13.

B. A Claim for a Protection Order under Chap. 21-65 does not Survive the Death of the Petitioner.

Having established that Chapter 21-65 provides injunctive relief only, and to the extent the Estate will seek to pursue injunctive relief under Count 3 of its Complaint, the Court must now consider whether a cause of action for a protection order can survive the death of the vulnerable adult.[2] As set forth below, it cannot.

First, the statutory scheme generally refers to the vulnerable adult in the present tense, most notably, the definition of "vulnerable adult" found in SDCL §21-65-1(15):

> [A] person sixty-five years of age or older who *is* unable to protect himself or herself from abuse as a result of age or a mental or physical condition, or an adult with a disability as defined in § 22-46-1[.]

SDCL §21-65-1(15) (emphasis added). Even more telling is that, while the statute authorizes substitute petitioners to pursue a protection order on behalf of a vulnerable adult, the statute *does not* authorize a personal representative of the estate of a deceased vulnerable to serve as a substitute petitioner. SDCL §21-65-1(14) (defining "substitute petitioner" as a "family or household member, guardian, conservator, attorney in fact, or guardian ad litem for a vulnerable adult, or other

[2] Sprys reserve the right to challenge whether Hermanek was a vulnerable adult as defined by §21-65-1.

interested person who files a petition pursuant to this chapter[.]"). This contrasts starkly with SDCL §22-46-13, which authorizes a civil action for exploitation to be brought by any number of "substitute" plaintiffs, including "the personal representative of the estate of a deceased elder or adult with a disability . . . ." SDCL §22-46-13. The failure to include a personal representative as an authorized substitute petitioner under Chapter 21-65 confirms that it was designed to provide injunctive relief to a living vulnerable adult.

In addition, §21-65-4 provides that if the petition is filed by a substitute petitioner, the vulnerable adult *retains* several rights, including the right to counsel, to access personal record, to object to the protection order, the request a hearing, and to present evidence, again clearly contemplating the vulnerable adult will be alive and capable of exercising those rights. SDCL §21-65-4.

Furthermore, in assessing the statutory relief available for abuse, it is apparent that the authorized relief depends upon, or otherwise assumes, the vulnerable adult is alive: an order that the offender move out of the vulnerable adult's residence; an order that the offender provide housing for the vulnerable adult; an order prohibiting the offender from acting pursuant to any agency mechanism (most of which

do not survive the death of the agent); and other relief for the "safety and welfare" of the vulnerable adult. SDCL §21-65-11 (authorized relief from abuse). Similarly, the relief permitted in cases of financial exploitation speaks largely to the vulnerable adult being alive, including the return of assets "to the vulnerable adult," prohibiting the wrongdoer from transferring assets to anyone "other than the vulnerable adult," and not exercising control over "assets of the vulnerable adult." SDCL §21-65-12.

Barbara will likely argue that the death of a vulnerable adult should not preclude his or her estate from obtaining the exploitation remedies articulated in §21-65-12. It does not. Those remedies are specifically made available in a suit brought under §22-46-13 (which, as noted above, may be brought by a personal representative) by virtue of §22-46-17 ("The court may authorize remedies provided in § 21-65-12 for violations under § 22-46-3 or 22-46-13"). More importantly, similar remedies are available in an action for breach of fiduciary duty, breach of contract, or conversion, and nothing within Chapter 21-65 forecloses a personal representative's right to seek relief via a tort or contract action.

In sum, Chapter 21-65 creates a mechanism through which a vulnerable adult may obtain an order of protection against a wrongdoer who is abusing or exploiting them. The protection order would not survive the death of the vulnerable adult, because the person in need of protection is no longer living. Nonetheless, the vulnerable adult's estate remains able to seek redress through the judicial system, thus ensuring the strong public policy against the perpetuation of elder abuse will be maintained, preserved, and enforced.

2. For a Civil Claim to be Brought under SDCL §22-46-3 and SDCL §22-46-13, the Person against whom the Claim is Brought Must have been Criminally Convicted of Theft by Exploitation under SDCL §22-46-3.

Count 3 of the Complaint alleges a claim under §22-46-13, premised upon an allegation that Sprys' conduct constitutes "theft by exploitation, as described in 22-46-3." App-24 at ¶65.

The text of SDCL §22-46-13 requires a judicial finding of exploitation *before* the elder or vulnerable adult has a private cause of action for damages:

> A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 or 22-46-3. *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 for the exploitation. The action *may be brought* by the elder or adult with a disability, or that person's guardian,

> conservator, by a person or organization acting on behalf of the elder or adult with a disability with the consent of that person or that person's guardian or conservator, or by the personal representative of the estate of a deceased elder or adult with a disability without regard to whether the cause of death resulted from the exploitation. The action may be brought in any court of competent jurisdiction to enforce the action. A party who prevails in the action may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages.

SDCL §22-46-13 (emphasis added).

Section 22-46-3 states:

> 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, is guilty of theft by exploitation. Theft by exploitation is punishable as theft pursuant to chapter 22-30A.

SDCL §22-46-3.

Section 22-46-13 plainly predicates the civil cause of action upon a finding of exploitation. In other words, the statute is chronological, both in its sentence structure and its substance. A finding of exploitation must *precede* the civil cause of action; indeed, the civil action is borne entirely out of such a finding. SDCL §22-46-13. This is the only logical and grammatically sound construction of the statute. To hold otherwise would mean the cause of action does not accrue until

a plaintiff proves liability. Indeed, under Barbara's interpretation, the requisite judicial "finding" of exploitation would have to be within the confines of the civil cause of action itself. But the right to bring a claim cannot be based upon a *subsequent* finding of liability. Such an interpretation would result in an absurdity, and it must be presumed that the legislature "did not intend an absurd or unreasonable result." *Argus Leader v. Hagen*, 2007 SD 96, ¶15, 739 N.W.2d 475, 480 (S.D. 2007).

Beyond ignoring grammatical rules and common sense, Barbara's urged interpretation would render numerous portions of the statute meaningless, thus violating the canon that "every word of a statute must be presumed to have been used for a purpose, [and] ... every word excluded from a statute must be presumed to have been excluded for a purpose." *Wheeler v. Farmers Mut. Ins. Co.*, 2012 S.D. 83, ¶ 21, 824 N.W.2d 102, 109 (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, 181-92 (6th ed. 2000)). If a prior judicial finding is not required, the majority of the second sentence would be rendered meaningless. Similarly, the prevailing party provision would be meaningless, as that fee-shifting language is premised upon the notion

that a defendant may prevail, which is not possible if the cause of action only accrues upon the plaintiff proving liability.[3]

This does not, however, end the inquiry. As noted by Judge Piersol, the statute requires a "court" to "find" exploitation, but it does not use the phrase "criminal conviction." It is thus prudent to identify what type of judicial finding of exploitation under §22-46-3 might satisfy the prerequisite articulated in §22-46-13. Critical to this analysis is the fact that Title 22, entitled ***Crimes***, is the *criminal code*, comprised of 49 chapters devoted entirely to articulating and defining conduct that constitutes prohibited criminal activity within the State of South Dakota. *See generally* Title 22. It is therefore reasonable to construe the provisions of Title 22 as being applicable to, and primarily for use in, criminal prosecutions. In this vein, and based upon its plain language, it cannot be reasonably disputed that §22-46-3 is a criminal statute.

As Judge Duffy noted in *Wetch v. Crum & Forster Commercial Ins.*:

> When civil liability is premised on, and arises out of, violation *of a criminal statute*, there must first be a criminal prosecution and conviction before a civil action can be brought. That is because, as Justice Henderson observed in *K & E*, how can one say that a civil defendant

[3] This is an appropriate time to recall the absurdity of having a cause of action accrue only after a plaintiff proves liability.

> violated the criminal statute without such a prosecution? *The conclusion that a person has violated a criminal statute is the end product of a person being charged with a crime*, being tried or pleading guilty, and the state shouldering its burden to prove the defendant's criminal conduct beyond a reasonable doubt. . . . A civil court, such as this one, cannot make a determination that any of the defendants herein have committed the crime described in SDCL § 22-46-3, which is the basis for civil liability under SDCL § 22-46-13, unless an actual criminal prosecution has taken place.

Wetch v. Crum & Forster Commercial Ins., 2018 WL 10812341, at *20 (D.S.D. 2018) (emphasis added), *adopted in part, overruled in part*, but affirming the dismissal of the §22-46-13 claim, 2019 WL 1300497 (D.S.D. Mar. 21, 2019). Judge Duffy held that no civil cause of action could exist under §22-46-13 in the absence of a conviction under §22-46-3, relying heavily on this Court's decision in *K&E Land and Cattle, Inc. v. Mayer*, 330 N.W.2d 529 (S.D. 1983). *Id.*

K&E involved a dispute between two adjoining landowners regarding a fence built on or near the right-of-way between the two properties. The landowners had allegedly agreed to share the cost of the fence, but the defendant landowner, Mayer, was dissatisfied with the fence's location and tore down 165 feet of it. *K&E*, 330 N.W.2d at 530. The plaintiff landowner, K&E, filed suit for breach of oral contract, tortious destruction of property, treble damages, and punitive

damages. *Id.* The statute under which K&E sought treble damages stated:

> Any person who violates § 22-34-1, in addition to the punishment prescribed therefor, is liable in treble damages for the injury done, to be recovered in a civil action by the owner of the property or public officer having charge thereof.

SDCL §22-34-2 (repealed 2006). The jury returned a verdict in favor of K&E on the tortious destruction of property and awarded treble damages.

On appeal, this Court held that the right to pursue treble damages in a civil action was predicated upon a criminal conviction under §22-34-1, even though the word "conviction" is not found in §22-34-2. In so holding, the Court reasoned:

> While it is undisputed that the same act can be the basis of both a tort and a crime, SDCL 22-34-2 is dependent upon SDCL 22-34-1 which is without any tort basis. We are unable to find that appellant has violated SDCL 22-34-1 as he has not been prosecuted under that statute. Therefore, SDCL 22-34-2 is inapplicable to the case at bar.

K&E, 330 N.W.2d at 532. The first critical component of the Court's reasoning is that the referenced statute, §22-34-1, is "without any tort basis." In other words, it is a purely criminal statute. The second critical component is the notion that the Court itself, acting in a civil

capacity, was "unable" to find that the defendant violated the referenced statute in the absence of a criminal prosecution.

These rationales apply equally to the statutes in question here. Section 22-46-3 is without any tort basis; it is purely criminal. It is found in the criminal code, defines a criminal act, and articulates a criminal punishment. Further, as in *K&E*, neither this Court nor the District Court may find Sprys violated §22-46-3 because there has been no criminal prosecution. The *K&E* holding, coupled with the statutory text of §22-46-13, compels a finding that a civil cause of action under §22-46-13 is dependent upon a criminal conviction under §22-46-3.

The scenario presented in *K&E* and this case are readily distinguishable from those instances wherein a civil statute references or incorporates criminal definitions to define the scope of civil liability. For example, Title 25 (Domestic Relations) includes a statutory scheme governing issuance of domestic abuse protection orders. SDCL Chap. 25-10. In defining the term "domestic abuse," SDCL §25-10-1(1) (emphasis added) states:

> "Domestic abuse," physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury when occurring between persons in a relationship described in § 25-10-3.1. Any violation of § 25-10-13 or chapter 22-19A

> [Stalking] or any crime of violence as defined in subdivision 22-1-2(9) [Definitions, Crimes] *constitutes domestic abuse* if the underlying criminal act is committed between persons in such a relationship[.]

In addition to including a textual definition of the phrase "domestic abuse," the statute states that a "violation" of criminal stalking statutes can *constitute* "domestic abuse" for purposes of obtaining a protection order. This very statute was addressed in *Trumm v. Cleaver*, 2013 SD 85, 841 N.W.2d 22 (S.D. 2013), where the defendant/ respondent argued that a stalking conviction was required before a protection order could be issued against him for stalking. *Id.* at ¶8, 841 N.W.2d at 24.

Trumm examined the entirety of Chapter 25-10 to ascertain whether the term "violation" could be reasonably interpreted to require a preceding criminal "conviction" before a stalking protection order could be issued. Critical to the Court's rejection of the defendant's position was the Legislature's use of the word "conviction" in numerous other statutes within Chapter 25-10, evincing a legislative intent to require a conviction in certain contexts, but not others. *Id.* at ¶10, 841 N.W.2d at 24-25. Further, the word "violation" would be rendered meaningless if it was not ascribed a meaning different than "conviction." *Id.* at ¶11, 841 N.W.2d at 25. Thus, a protection order could be issued if the civil

court found the respondent to have committed the act of "stalking" as defined in the criminal statutes. In essence, the civil statute was merely borrowing the stalking definition from the criminal code; it did not require a preceding judicial finding.

Trumm, however, presents a much different scenario than this case. Here, the statute in question does not merely borrow a definition but instead requires a court to "find" that exploitation has occurred *before* the civil cause of action even exists.

3. The "or" in Section 22-46-13 does not Obviate the Need for a Criminal Conviction.

SDCL §22-46-13 states, "A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 or 22-46-3. If a court finds exploitation occurred, the elder or adult with a disability has a cause of action against the perpetrator . . . ." SDCL §22-46-13. SDCL §22-46-1(5) states:

> "Exploitation," the wrongful taking or exercising of control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability[.]

Barbara argues use of the disjunctive "or" in §22-46-13 means a court can find exploitation to have occurred based solely on §22-46-1, without resort to §22-46-3, rendering a criminal conviction is unnecessary. But this argument fails to recognize that the "finding" of exploitation under

§22-46-1 must be a predicate, or prior, judicial finding, and the only way such a finding can occur is if it is a criminal conviction under §22-46-3.

The analysis in the foregoing section applies here. As with §22-46-3, it cannot be reasonably disputed that §22-46-1 is a criminal statute: it is found in the criminal code and defines criminal conduct. The fact that it is a "definitions" statute does not alter that conclusion; indeed, nearly every Chapter of Title 22 contains one or more "Definitions" section(s) identifying and defining terms related to the prohibited conduct, each of which can appropriately be labeled a criminal statute. *See*, *e.g.*, SDCL §22-10a-1 ("Definitions"); §22-11a-1 ("Definition"); §22-25a-1 to §22-5a-6 (multiple terms defined). The salient question is, under what circumstance can there be a finding of "exploitation as defined in §22-46-1"? The answer is clear: *only* a criminal conviction can constitute the requisite finding.

Section 22-46-1(5) defines the term "exploitation," which is used in §22-46-3, §22-46-7, §22-46-8, §22-46-9, §22-46-11, and §22-46-13. Most of these statutes regulate and prescribe mandatory or voluntary reporting, and immunity therefor. Only one such provision describes prohibited conduct: §22-46-3 (describing "theft by exploitation" as a

crime). Section 22-46-3 appears to include its own definition of "theft by exploitation," which is substantially similar, but not identical, to the definition of "exploitation" found in §22-46-1.[4] Thus, we are brought full circle to the analysis set forth in the preceding section, which compels the conclusion that only a criminal conviction for exploitation will give rise to a civil cause of action under §22-46-13.

CONCLUSION

SDCL Chapter 21-65 offers relief to vulnerable or disabled adults from abuse and exploitation. The statutory scheme, plainly modeled after existing protection order statutes, is quite clearly limited in scope, however, to the issuance of protection orders on terms necessary to protect a vulnerable, living adult. It creates no claim sounding in tort or providing damages. There is nothing within Chapter 21-65 authorizing a cause of action that would survive the death of the vulnerable adult.

[4] As with the term "caretaker," it appears the legislature defined the term but never again used it "to define the limits of liability" under this statutory scheme, except to the extent it applies to §22-46-3. *Wetch*, at *17 ("Incredibly, then, the South Dakota legislature defined the term 'caretaker' and never again used it in its statutory scheme to define the limits of liability under the scheme. *See* SDCL ch. 22-46.").

SDCL §22-46-13 is obviously not an exemplar of legislative drafting. However, it is this Court's duty to analyze, interpret, and enforce the statute in accordance with well-established principles of statutory construction. When applied to this statute, these principles compel a finding that the civil cause of action created by §22-46-13 is predicated upon a prior criminal conviction of exploitation under §22-46-3. To hold otherwise would render much of the text of §22-46-13 meaningless and would result in a cause of action not accruing until after a plaintiff has filed suit and proven liability on that same cause of action. Such a result would be absurd and unreasonable.

Based on the foregoing, Sprys respectfully request the Court answer the Certified Questions as follows:

1. Does South Dakota recognize a private right of action for a violation of Chapter 21-65 after the death of the vulnerable adult? **No**.

2. For a civil claim to be brought under SDCL § 22-46-3 and SDCL §22-46-13, must the person against whom the claim is brought have been criminally convicted of theft by exploitation under SDCL § 22-46-3? **Yes.**

3. Can a civil claim be brought for violation of SDCL § 22-46-1 and SDCL §22-46-13 with no requirement for a preceding criminal conviction given the "or" between § 22-46-1 and § 22-46-3 in SDCL§22-46-13? **No.**

Respectfully submitted this 27th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Defendants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Century 13 point. The word processor used to prepare this brief indicated that there are a total of 4,700 words in the body of the brief.

/s/ Sarah Baron Houy
Sarah Baron Houy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that August 27, 2021, the foregoing *Defendants' Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

BARBARA HERMANEK-PECK, in her Capacity as Personal Representative of The Estate of Richard Hermanek, Plaintiff, vs. RICHARD SPRY and SUSAN SPRY, Defendants.	4:21-CV-04034-LLP ORDER

Plaintiff, Barbara Hermanek-Peck, in her capacity as the Personal Representative of the Estate of Richard Hermanek ("the Estate"), brought this action in First Judicial Circuit Court in Bon Homme County, South Dakota. (Doc. 1-2.) On March 9, 2021, Defendants Richard Spry and Susan Spry removed the case pursuant to 28 U.S.C. § 1446 based on diversity of citizenship. (Doc. 1.) The Sprys filed a Motion to Dismiss on March 16, 2021. (Doc. 5.) The motion has been fully briefed. For the following reasons, the Sprys's motion to dismiss will be denied as to Count 1 and Count 2. The legal issues raised by Counts 3 and 4 of the Complaint will be certified to the South Dakota Supreme Court.

BACKGROUND

Richard Hermanek ("Decedent"), born December 23, 1929, died intestate on March 14, 2019, while he was domiciled in Bon Homme County, South Dakota. A probate proceeding is currently pending regarding the Estate, captioned "*In the Matter of the Estate of Richard Hermanek*, 04PROl9-13," in the First Judicial Circuit, Bon Homme County, South Dakota. Barbara Hermanek-Peck was appointed personal representative of the Estate of Richard Hermanek ("the Estate"), and she brought this action on behalf of the Estate.

Richard Spry is the nephew of Decedent. Susan Spry is Richard's wife. They reside in Kemah, Texas. From July 25, 2018, until the date of Decedent's death on March 14, 2019, the Sprys acted as Decedent's attorneys-in-fact pursuant to a Durable Power of Attorney.

In the Complaint in this case, the Estate alleges that the Sprys engaged in self-dealing transactions while acting as Decedent's attorneys-in-fact, even though the Durable Power of Attorney did not authorize self-dealing transactions, and that Decedent (and, thus, the Estate) incurred monetary damages as a result of the Sprys's conduct.

The Complaint alleges claims for (1) breach of fiduciary duty, (2) conversion, (3) vulnerable adult abuse under SDCL ch. 21-65, and (4) exploitation of elder under SDCL § 22-46-13. The Sprys ask the Court to dismiss all four counts in the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

DISCUSSION

A. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court assessing such a motion must accept all factual allegations in the complaint as true and draw all inferences in favor of the nonmovant. *Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010); *Brooks v. Midwest Heart Group*, 655 F.3d 796, 799 (8th Cir. 2011). Courts consider "plausibility" by "'draw[ing] on [their own] judicial experience and common sense.'" *Whitney v. Guys, Inc.*, 700 F.3d 1118, 1128 (8th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 679). Also, courts must " 'review the plausibility of the plaintiff's claim as a whole, not the plausibility of each individual allegation.' " *Id.* (quoting *Zoltek Corp. v. Structural Polymer Grp.*, 592 F.3d 893, 896 n.4 (8th Cir. 2010)). Although detailed factual allegations are not required, a conclusory statement of the elements of a cause of action will not suffice. *Iqbal*, 556 U.S. at 678. Moreover, the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Nat'l Org.for Women v. Scheidler*, 510 U.S. 249, 256 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), courts primarily look to the complaint and "'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned;' without converting the motion into one for summary judgment." *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quoting 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004)).

The Estate attached eight exhibits to the Complaint. (Doc. 1-2, Exhibits A, B, C, D, E, F, G, H.) The Sprys do not deny the existence or authenticity of those exhibits, and the Court concludes that the exhibits attached to the Complaint may be considered for purposes of the motion to dismiss.

B. ALLEGATIONS IN THE COMPLAINT

The Estate's complaint alleges the following facts which are assumed to be true for purposes of the Sprys's motion to dismiss under Rule 12(b)(6):

On July 25, 2018, Decedent signed a Durable Power of Attorney appointing Richard Spry and Susan Spry as his attorneys-in-fact.[1] Among other powers, the Durable Power of Attorney gave the Sprys the power "[t]o give any property belonging to [Decedent] to any person [Decedent's] attorney in fact shall deem proper without consideration," but did not specifically articulate a power to self-deal. Decedent was eighty-eight (88) years old when he signed the Durable Power of Attorney. When the Durable Power of Attorney was signed, Decedent's assets included but were not limited to:

a. Real property with the following legal description:

> *Hermanek Tract 1 of Lot Four (4) in the Northwest Quarter of the Southwest Fraction Quarter (NW1/4-SWfr1/4) of Section Nineteen (19) in Township Ninety-Two (92) North, of Range Sixty (60), West of the Fifth P.M in Bon Homme County, South Dakota, excepting all highways, if any; and*
> *Lots One, Two, Three, Four, Five, and Six (1, 2, 3, 4, 5, & 6) in Block Eight (8) of the Original Plat of the Townsite of Running Water, in Bon Homme County, South Dakota (*hereafter, "the Running Water Property*");*

[1] A copy of the Durable Power of Attorney is attached to the Complaint as Exhibit A.

b. 2001 Ford Ranger;

c. 2005 Honda Pilot;

d. Various guns;

e. Other personal property; and

f. Approximately $131,649.03 in a checking account at Security State Bank in Tyndall, South Dakota ("Security State Bank Account").

Also, Decedent was receiving approximately $2,788.03 in monthly retirement and social security payments, which were directly deposited in the Security State Bank Account; starting in January 2019, Decedent's monthly retirement and social security payments increased to $2,809.51.

In August 2018, Decedent went into an assisted living facility, namely North Point of the Good Samaritan Society in Tyndall, South Dakota, and then about a month later was transferred to Good Samaritan Society's nursing home in Tyndall.

The Sprys, acting as Decedent's attorneys-in-fact, arranged for Peterson Auctioneers to auction off certain personal property belonging to Decedent. Peterson Auctioneers sold such personal property at its August 17, 2018 PreHarvest Consignment Sale. After deducting expenses, the net proceeds totaled $1,507.31, and a check was issued to Richard Spry.[2] That check was not deposited into the Security State Bank Account and the Estate believes it was deposited into an account owned by Richard Spry.

Susan Spry, as attorney-in-fact for Decedent, executed a Real Estate Auction Purchase Agreement dated October 6, 2018, agreeing to sell the Running Water Property to Timothy and Lisa Montgomery in exchange for $110,000, with closing to occur on or before November 11, 2018.[3] Before closing, on October 17, 2018, a joint checking account naming Decedent and the Sprys as joint owners was opened at Mutual of Omaha Bank in Omaha, Nebraska ("Mutual of Omaha Account"). The Account Agreement, dated October 17, 2018, did not designate whether the joint account was intended to include rights of survivorship.[4] The Estate believes the Sprys opened the Mutual of Omaha Account so that they could later transfer

[2] A copy of the check is attached to the Complaint as Exhibit B.
[3] A copy of the Real Estate Auction Purchase Agreement is attached to the Complaint as Exhibit C.
[4] A copy of the Account Agreement is attached to the Complaint as Exhibit D.

Decedent's money to that account and then claim sole entitlement to that money when Decedent passed away. The Mutual of Omaha Account was initially funded with a $673.10 check Good Samaritan Society issued to Decedent.

On or about October 23, 2018, Susan Spry, acting as Decedent's attorney-in-fact, deeded the Running Water Property to Timothy and Lisa Montgomery in exchange for $110,000.[5] After deducting closing costs, the net proceeds from the sale of the Running Water Property totaled $97,897.07.[6] These proceeds were deposited into the Mutual of Omaha Account via wire transfer on November 7, 2018. On November 9, 2018, Susan Spry, in her capacity as Decedent's attorney-in-fact, wrote a $75,000 check from the Security State Bank Account to Richard Hermanek, and that check was then deposited into the Mutual of Omaha Account on November 19, 2018.[7]

At the date of Decedent's death on March 14, 2019, all of the funds contributed to the Mutual of Omaha Account could be traced back to Decedent. No contributions were made by the Sprys to the Mutual of Omaha Account from their own personal assets.

On March 19, 2019 (five days after Decedent died), Susan Spry wrote a $170,000 check from the Mutual of Omaha Account to "BFCU," which is an abbreviation for Beacon Federal Credit Union.[8] The Sprys have an account at Beacon Federal Credit Union and they deposited the $170,000 check into their account. The Sprys took exclusive possession of Decedent's remaining sum of $3,495.17 in the Mutual of Omaha Account by removing Decedent as an owner of the Mutual of Omaha Account and naming themselves as the sole owners on said account on August 20, 2019, just six days after Richard Spry executed a Petition for Adjudication of Intestacy, Determination of Heirs and Appointment of Personal Representative nominating Richard Spry as personal representative of the Estate.

The Sprys engaged in several additional transactions using Decedent's money in the Security State Bank Account. From July 2018 through March 2019, they

[5] A copy of the Warranty Deed is attached to the Complaint as Exhibit E.
[6] A copy of the Settlement Statement executed by Defendant Susan Spry is attached to the Complaint as Exhibit F.
[7] A copy of the check is attached to the Complaint as Exhibit G.
[8] A copy of the check is attached to the Complaint as Exhibit H.

wrote several checks and made several debit card transactions from the Security State Bank Account for goods and services that allegedly had little to no benefit to Decedent and, instead, benefitted the Sprys and their children. For example, using money in the Security State Bank Account, the Sprys issued direct payments to themselves as well as to their children, Brenton and Kelly Spry, totaling approximately $9,227.68. Also, they wrote checks and made debit card purchases using money from the Security State Bank Account for personal meals, lodging, gas, and other personal expenditures. The Sprys did not reimburse Decedent for their personal expenditures. The Sprys transferred title of Decedent's two vehicles to Richard Spry (2001 Ford Ranger) and their son, Brenton Spry (2005 Honda Pilot), and also transferred several of Decedent's guns to Richard Spry and Brenton Spry.

Further, after Decedent's death, the Sprys prepared Decedent's 2018 federal tax return, with the assistance of D&D Tax Service. Decedent was entitled to a $1,714 tax refund. A refund check for $1,714 was sent to Richard Spry's address in Texas. That check was not deposited into either the Security State Bank Account or the Mutual of Omaha Account. The Estate believes that the Sprys deposited the check into their own account.

C. ANALYSIS

As an initial matter, the Court notes that this case was filed in South Dakota state court, it asserts only state law claims, and it was removed to this Court based on diversity of citizenship. Federal courts exercising diversity jurisdiction apply the forum state's substantive law, including its choice-of-law doctrines. *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 673 (8th Cir.2004). When no party raises a conflict-of-law issue in a diversity case "the federal court simply applies" the forum state's law. *Grundstad v. Ritt*, 166 F.3d 867, 870 (7th Cir. 1999); *cf. Union Elec. Co. v. Southwestern Bell Tel.*, 378 F.3d 781, 785 (8th Cir. 2004) (applying the law of the forum state, when parties apparently agreed that application of that state's law was proper). In this case application of the law of the forum state, South Dakota, is appropriate.[9]

[9] The Court rejects the Sprys's argument that Arizona law applies to the funds in the Mutual of Omaha account simply because the standard banking form number in small writing at the bottom of the Account Agreement Form contains the letters "AZ." (Exhibit D.) There is no choice of law provision in the Account Agreement, and an issue here is whether the Sprys

1. Count 1: Breach of Fiduciary Duty

In South Dakota, the elements of a breach of fiduciary duty are "1) that the defendant was acting as a fiduciary of the plaintiff; 2) that he breached a fiduciary duty to the plaintiff; 3) that the plaintiff incurred damages; and 4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages." *Grand State Prop., Inc. v. Woods, Fuller, Shultz, & Smith, P.C.*, 556 N.W.2d 84, 88 (S.D. 1996).

The South Dakota Supreme Court has held that, as a matter of law, "a fiduciary relationship exists whenever a power of attorney is created." *Hein v. Zoss*, 887 N.W.2d 62, 65 (S.D. 2016). The Sprys do not deny that they were acting in a fiduciary capacity for Decedent after they obtained his power of attorney. Rather, the Sprys argue that the claim for breach of fiduciary duty fails because the Estate did not allege either that Decedent lacked the mental capacity or that Decedent did not consent to Sprys's actions that are being challenged by the Estate. This argument misses the mark. The Estate's complaint does not allege undue influence in the execution of the power of attorney. It is the Sprys's conduct that is at issue, not the Decedent's mental capacity. The Estate alleges that the power of attorney did not authorize the Sprys to transfer Decedent's assets to themselves or to their family and that, by doing so, the Sprys breached the fiduciary duty they owed to Decedent as attorneys-in-fact and caused damage to Decedent and the Estate. These allegations are sufficient to state a claim for breach of fiduciary duty, and the Sprys's motion to dismiss this claim is denied. *See Bienash v. Moller*, 721 N.W.2d 431, 435 (S.D. 2006) (holding that that "a power of attorney must be strictly construed and strictly pursued," and "if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist").

2. Count 2: Conversion

"Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." *Western Consolidated Co-op v. Pew*, 795 N.W.2d 390, 396 (S.D. 2011). In its conversion claim, the Estate asserts that it has an ownership

breached a fiduciary duty or committed conversion by transferring money to the Mutual of Omaha account in the first place.

interest in money that belonged to the Decedent that is now in the Sprys's possession. In support of their motion to dismiss, the Sprys argue that Decedent may have consented to or approved of their actions. In response, the Estate points to its allegations that the Sprys did not have authority to take Decedent's money, vehicles or guns and, with Decedent's passing, those items should be part of the Estate. The Court concludes that the Estate's allegations are sufficient to state a claim for conversion that is plausible on its face, and that claim will not be dismissed.

3. Count 3: Vulnerable Adult Abuse under SDCL ch. 21-65

In Count 3 of its Complaint, the Estate alleges that Decedent was a vulnerable adult who was the victim of financial exploitation by the Sprys. Pursuant to SDCL ch. 21-65, the Estate requests return of the funds and assets belonging to the Estate, as well as attorney fees and costs.

Chapter 21-65 is entitled "Protection of Vulnerable Adults." One section of the statutory scheme provides that if a court finds a vulnerable adult has been the victim of financial exploitation, it may order the necessary relief, including:

> (1) Directing the respondent to refrain from exercising control over the funds, benefits, property, resources, belongings, or assets of the vulnerable adult;
>
> (2) Requiring the respondent to return custody or control of the funds, benefits, property, resources, belongings, or assets to the vulnerable adult;
>
> (3) Requiring the respondent to follow the instructions of the guardian, conservator, or attorney-in-fact of the vulnerable adult; and
>
> (4) Prohibiting the respondent from transferring the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to any person other than the vulnerable adult.

SDCL § 21-65-12. The court also may order that the respondent pay the attorney's fees and court costs of the vulnerable adult and substitute petitioner. *See* SDCL § 21-65-15.

The Sprys's main argument in favor of dismissal of Count 3 is a legal one. They claim that a private cause of action under SDCL ch. 21-65 does not survive a person's death. According to the Sprys, Chapter 21-65 "is clearly, expressly,

designed to provide a mechanism for a petitioner to protect a living person against alleged abuse or neglect," and is not a claim that can be brought by the Estate since Decedent has passed away. (Doc. 6, p. 7.) In response, the Estate asserts that the statute does not expressly prohibit a claim after the death of the vulnerable adult, and that allowing the Sprys to escape potential liability under Chapter 21-65 simply because Decedent died would undermine the South Dakota Legislature's goal of protecting those who are often unable to protect themselves. Neither party cites legal authority in support of their respective positions on this issue.

South Dakota courts have not addressed whether or not a private right of action exists for a violation of Chapter 21-65 after the death of the vulnerable adult. If a federal court sitting in diversity is confronted with an unresolved issue of state law, it has two options: (1) it may make an "Erie-educated guess" as to how the forum state's highest court would rule on the issue, or (2) it may certify the question to the state's highest court for resolution. *Blankenship*, 601 F.3d at 856; *Hatfield, by Hatfield v. Bishop Clarkson Memorial Hosp.*, 701 F.2d 1266, 1267 (8th Cir. 1983) (where there is "no state law precedent on point and where the public policy aims are conflicting" a legal question "may properly be certified to the state court"). Whether a federal court certifies a question to a state court "is a matter of discretion." *Johnson v. John Deere Co., a Div. of Deere & Co.*, 935 F.2d 151, 153 (8th Cir. 1991). However "[u]nsettled questions of state law are best left to the states." *Poage v. City of Rapid City*, 431 F.Supp. 240, 246 (D.S.D. 1977).

Neither side has provided the Court with South Dakota case law analyzing SDCL ch. 21-65, nor have they cited cases from other states with similar laws that would provide some insight into whether a private cause of action should be recognized under SDCL ch. 21-65 after the death of the vulnerable adult. Rather than make an Erie-educated guess, the Court concludes that the best course of action is to certify a question to the South Dakota Supreme Court and allow it the first opportunity to conclusively decide this issue.

The Sprys also contend that the Estate did not allege facts that support a conclusion that Decedent was a "vulnerable adult" prior to his death. "Vulnerable adult" is defined as "a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition, or

an adult with a disability as defined in § 22-46-1." SDCL 21-65-1(15). An adult with a disability is defined in § 22-46-1 as "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." SDCL § 22-46-1(1). The Complaint alleges that Decedent was 88 years old. He first moved into an assisted living facility, and then about a month later he moved into a nursing home. It is reasonable to infer that an 88-year-old person lives in a nursing home because he is unable to protect himself or provide for his own care. The facts alleged in the Complaint are sufficient to support an inference that Decedent was a vulnerable adult. The Estate alleges additional facts in its reply brief from Decedent's physician, but it did not make a formal motion to amend.

4. Count 4: Exploitation of Elder under SDCL § 22-46-13

Chapter 22-46 of South Dakota Codified Laws makes it a crime for "any person" who has voluntarily assumed a duty by written contract, by receiving payment for care, or by order of a court, to provide support of an adult with a disability, and having been entrusted with that disabled adult's property, appropriates the property with intent to defraud for a use or purpose not in the lawful execution of that person's trust. *See* SDCL § 22-46-3. This crime is defined as "theft by exploitation." *Id.* The statute does not define "any person." As explained above, the statute defines "adult with a disability" as "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." SDCL § 22-46-1(1). A "caretaker" is defined as "a person or entity who is entrusted with the property of an elder or adult with a disability, or who is responsible for the health or welfare of an elder or adult with a disability, and who assumes the position of trust or responsibility voluntarily, by contract, by receipt of payment, or by order of the court." *Id.* at (2). "Exploitation" is defined as "the wrongful taking or exercising control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability." *Id.* at (5). The statutory scheme contains the following provision for a civil remedy:

> A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 or 22-46-3. 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 for the exploitation. The action may be brought by the elder or adult with a disability, or that person's guardian, conservator, by a person or organization acting on behalf of the elder or adult with a disability with the consent of that person or that person's guardian or conservator, or by the personal representative of the estate of a deceased elder or adult with a disability without regard to whether the cause of death resulted from the exploitation. The action may be brought in any court of competent jurisdiction to enforce the action. A party who prevails in the action may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages.

See SDCL § 22-46-13. In addition to the civil penalties described in § 22-46-13, a court may impose remedies such as revocation of a revocable instrument or severance of the interests of the victim from the interests of the perpetrator in any jointly held property. *See* SDCL § 22-46-14. A court may also authorize remedies provided under SDCL § 21-65-12 for violations under §§ 22-46-3 or 22-46-13. *See* SDCL § 22-46-17. The remedies provided for in Chapter 22-46 are in addition to and cumulative of other legal and administrative remedies available to the victim. *See* SDCL § § 22-46-18.

The Sprys agree that SDCL § 22-46-13 creates a civil remedy in favor of the victim of theft by exploitation. (Doc. 6, p. 8.) They argue, however, that a civil claim can only be brought under the statute against a person who has been criminally convicted of theft by exploitation. Thus there can be no civil claim against the Sprys under SDCL § 22-46-13 because they have not been criminally charged, let alone convicted, of theft by exploitation under SDCL § 22-46-3. The Sprys rely on a Report and Recommendation by Magistrate Judge Veronica Duffy in *Wetch v. Crum & Forster Comm. Ins.*, 2018 WL 10812341 (D.S.D. Dec. 6, 2018). There, Judge Duffy concluded that "[w]hen civil liability is premised on, and arises out of, violation of a criminal statute, there must first be a criminal prosecution and conviction before a civil action can be brought." *Id.* at *20. Judge Duffy held that SDCL § 22-46-13 requires prosecution of and conviction under the criminal portion of the statute in SDCL § 22-46-3. *Id.* She therefore recommended that the district court dismiss a civil claim against the insurance company defendant under SDCL § 22-46-13 for

failure to state a claim because there was no underlying criminal conviction. *Id.* at *21. The Honorable Jeffrey Viken adopted that portion of Judge Duffy's Report and Recommendation. *Wetch v. Crum & Forster Comm. Ins.*, 2019 WL 1300497 (D.S.D. March 21, 2019).

In its responsive brief opposing dismissal, the Estate argues both that the plain language and statutory construction of Chapter 22-46 reveal that the South Dakota Legislature did not intend to predicate a civil cause of action under SDCL § 22-46-13 on an underlying criminal conviction. The Estate distinguishes the South Dakota cases relied on by Judge Duffy in *Wetch* and argues that this Court should not follow the *Wetch* holding because of the differences between the text of SDCL § 22-46-13 and the statutes at issue in the cases cited by Judge Duffy to support her conclusion in *Wetch.* The Estate asserts that another South Dakota case not considered in *Wetch* is more applicable here. In *Trumm v. Cleaver*, the South Dakota Supreme Court rejected the defendant's argument that a conviction for stalking was required before a petitioner could obtain a domestic abuse protection order under SDCL § 25-10-1(1) because of the statute's use of the phrase "violation of." *See* 841 N.W.2d 22, 24-25 (S.D. 2013). The Supreme Court held that if the South Dakota Legislature intended to require a conviction for stalking as a prerequisite to obtaining a domestic protection order under the statute it would have used the word "conviction" instead of the word "violation." *Id.* The Estate contends that because SDCL § 22-46-13 does not use even a variation of the terms "violation" or "conviction," the South Dakota Supreme Court would rule that a civil cause of action under SDCL § 22-46-13 is not predicated on a criminal conviction.

In addition, the Estate cites case law from other jurisdictions holding that the civil statutes at issue were not dependent on an underlying criminal conviction.[10] (Doc. 8, pp. 21-23.) Finally, the Estate asserts that public policy supports the availability of a civil cause of action under SDCL § 22-46-13 independent of an underlying criminal conviction, and argues that requiring an underlying criminal conviction for a civil action under SDCL § 22-46-13 contravenes the South Dakota

[10] None of the cases cited involve a civil action under a statutory scheme for exploitation of an elder.

Legislature's purpose in providing guardians and personal representatives of abused elders alternative legal remedies.

As noted by Judge Duffy in *Wetch*, the South Dakota Supreme Court has not had occasion to interpret SDCL § 22-46-13, the provision in the statutory scheme creating civil liability. *Wetch*, 2018 WL 10812341 at *16. Judge Duffy noted that a criminal case interpreting the criminal statute, § 22-46-3, upon which § 22-46-13 is based, did "not shed much light on the issues raised by the parties." *Id.* (citing *State v. Warren*, 462 N.W.2d 195 (S.D. 1990)). The same is true of a more recent case involving a conviction for theft by exploitation in violation of § 22-46-3. *See State v. Hauge*, 932 N.W.2d 165 (S.D. 2019). Though the South Dakota Supreme Court in *Hauge* did not address the civil remedy under § 22-46-13, the Court made clear that financial exploitation of vulnerable adults is a matter of vital public concern in South Dakota. In rejecting the defendant's argument that his fifteen-year sentence was cruel and unusual punishment in violation of the Eighth Amendment, the Court stated, in part:

> The gravity of Hauge's offense is significant when viewed on the spectrum of criminality. Commission of any felony is a serious matter. Although Hauge's offense is not a crime of violence, theft by exploitation is particularly insidious in that it involves the manipulation of disabled or elderly adults, a particularly vulnerable population. This is especially so because the victim is often dependent on the thief for help and support. Victims who are elderly and in poor mental or physical health are largely defenseless against such crimes. Exploiting the elderly for financial gain wreaks havoc not only on the victim but in many cases the entire family, often irreparably destroying familial bonds. Financial exploitation of a vulnerable adult is therefore a serious offense when weighed against other types of crimes.

Hauge, 932 N.W.2d at 175.

Though the South Dakota Supreme Court has yet to have an opportunity to address the issue whether a civil action may be brought under § 22-46-13 without a criminal conviction under § 22-46-3, the issue has been raised on at least two occasions in federal court -- in *Wetch* and in this case -- and it may recur in other cases. In *Wetch*, Judge Duffy predicted that the South Dakota Supreme Court would require a criminal conviction as a predicate to a civil remedy. But here the Estate points to a persuasive case that Judge Duffy did not address and that may have led

her to a different conclusion. *See Trumm*. It is conceivable that this Court would predict that the South Dakota Supreme Court would not require a criminal conviction, which would result in inconsistent rulings on the issue. The South Dakota Supreme Court has an interest in development of this state law, and litigants have an interest in the clarification of the law. Though the Sprys are citizens of Texas, the South Dakota Supreme Court's decision will have the most impact on citizens of South Dakota. The unanswered question of South Dakota law at issue in Count 4 is of broad significance and not just specific to this case.

CONCLUSION

Under SDCL § 15-24A-1, a federal court may certify a question of law to the South Dakota Supreme Court if there is a question of South Dakota law "which may be determinative of the cause pending" in the federal court and it appears "that there is no controlling precedent" in the South Dakota Supreme Court's decisions. The use of a State's certification procedure "rests in the sound discretion of the federal court." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). "The most important consideration guiding the exercise of this discretion . . . is whether the reviewing court finds itself genuinely uncertain about a question of state law." *Johnson v. John Deere Co., a Division of Deere*, 935 F.2d at 153 (quoting *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C.Cir. 1988)). The Court is satisfied that certification of the issues presented here is appropriate to allow the South Dakota Supreme Court's independent interpretation of SDCL ch. 21-65 and SDCL § 22-46-13. Accordingly, the questions will be certified to the South Dakota Supreme Court.

IT IS ORDERED:

1. The motion to dismiss filed by Defendants Richard Spry and Susan Spry, Doc. 5, is denied.
2. The following questions will be certified to the South Dakota Supreme Court:
   a. Does South Dakota recognize a private right of action for a violation of Chapter 21-65 after the death of the vulnerable adult?
   b. For a civil claim to be brought under SDCL § 22-46-3 and SDCL § 22-46-13, must the person against whom the claim is brought have

been criminally convicted of theft by exploitation under SDCL § 22-46-3?

c. Can a civil claim be brought for violation of SDCL § 22-46-1 and SDCL §22-46-13 with no requirement for a preceding criminal conviction given the "or" between § 22-46-1 and § 22-46-3 in SDCL § 22-46-13?

3. That under SDCL § 15–24A–5, the Clerk of Court shall forward this certification order under official seal to the South Dakota Supreme Court.

Dated this 27th day of May, 2021.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK

STATE OF SOUTH DAKOTA) : SS COUNTY OF BON HOMME)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
BARBARA HERMANEK-PECK, in her capacity as Personal Representative of the Estate of Richard Hermanek, Plaintiff, vs. RICHARD SPRY and SUSAN SPRY, Defendants.	CIV. _____ **COMPLAINT AND PETITION**

The Plaintiff, Barbara Hermanek-Peck, in her capacity as Personal Representative of the Estate of Richard Hermanek, for her Complaint and Petition against the Defendants, Richard Spry and Susan Spry, states and alleges as follows:

PARTIES

1. Richard Hermanek ("Decedent"), born December 23, 1929, died intestate on March 14, 2019, at which time he was domiciled in Bon Homme County, South Dakota.

2. Plaintiff, Barbara Hermanek-Peck, was appointed personal representative of the Estate of Richard Hermanek ("the Estate") by court order dated May 15, 2020, and brings this Complaint and Petition on behalf of the Estate.

3. Presently, there is a probate proceeding currently pending regarding the Estate, captioned as follows: *In the Matter of the Estate of Richard Hermanek*, 04PRO19-13, First Judicial Circuit, Bon Homme County, South Dakota.

4. Defendants, Richard Spry and Susan Spry, are husband and wife and reside in Kemah, Texas.

EXHIBIT
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Filed: 2/25/2021 3:19 PM CST Bon Homme County, South Dakota 04CIV21-000012

5. Defendant Richard Spry is the nephew of Decedent.

6. From July 25, 2018, until the date of Decedent's death (March 14, 2019), Defendants acted as Decedent's attorneys-in-fact pursuant to a Durable Power of Attorney.

FACTUAL BACKGROUND RELEVANT TO ALL COUNTS

7. On July 25, 2018, Decedent signed a Durable Power of Attorney appointing Defendants, Richard Spry and Susan Spry, as his attorneys-in-fact. A copy of the Durable Power of Attorney is attached hereto as **Exhibit** A.

8. Among other powers, the Durable Power of Attorney gave Defendants the power "[t]o give any property belonging to [Decedent] to any person [Decedent's] attorney in fact shall deem proper without consideration," but did not specifically articulate a power to self-deal.

9. Decedent was eighty-eight (88) years old when he signed the Durable Power of Attorney.

10. When the Durable Power of Attorney was signed, Decedent's assets included but were not limited to:

a. Real property with the following legal description:

Hermanek Tract 1 of Lot Four (4) in the Northwest Quarter of the Southwest Fraction Quarter (NW1/4-SWfr1/4) of Section Nineteen (19) in Township Ninety-Two (92) North, of Range Sixty (60), West of the Fifth P.M. in Bon Homme County, South Dakota, excepting all highways, if any; and

Lots One, Two, Three, Four, Five, and Six (1, 2, 3, 4, 5, & 6) in Block Eight (8) of the Original Plat of the Townsite of Running Water, in Bon Homme County, South Dakota

(hereafter, "the Running Water Property");

b. 2001 Ford Ranger;

c. 2005 Honda Pilot;

d. Various guns;

e. Other personal property; and

f. Approximately $131,649.03 in a checking account at Security State Bank ("Security State Bank Account").

11. Also, Decedent was receiving approximately $2,788.03 in monthly retirement and social security payments, which were directly deposited in the Security State Bank Account; starting in January 2019, Decedent's monthly retirement and social security payments increased to $2,809.51.

12. In August 2018, Decedent went into an assisted living facility, namely North Point of the Good Samaritan Society in Tyndall, South Dakota, and then about a month later was transferred to Good Samaritan Society's nursing home in Tyndall.

Defendants Liquidate Assets and Move Decedent's Money into a Purported "Joint Account" So Defendants Could Claim Sole Entitlement to the Same

13. After Decedent went into the Good Samaritan Society, Defendants decided to liquidate Decedent's property.

14. Defendants, acting as Decedent's attorneys-in-fact, arranged for Peterson Auctioneers to auction off certain personal property belonging to Decedent.

15. Peterson Auctioneers sold such personal property at its August 17, 2018 PreHarvest Consignment Sale.

16. After deducting expenses, the net proceeds totaled $1,507.31, and a check was issued to Richard Spry. A copy of the check is attached hereto as **Exhibit B**.

17. That check was not deposited into the Security State Bank Account, and upon information and belief, the check was deposited into an account owned by Richard Spry.

18. Defendants also decided to sell the Running Water Property.

19. Defendant Susan Spry, as attorney-in-fact for Decedent, executed a Real Estate Auction Purchase Agreement dated October 6, 2018, agreeing to sell the Running Water Property to Timothy and Lisa Montgomery in exchange for $110,000, with closing to occur on or before November 11, 2018. A copy of the Real Estate Auction Purchase Agreement is attached hereto as **Exhibit C**.

20. Before closing, on October 17, 2018, a joint checking account naming Decedent and Defendants as joint owners was opened at Mutual of Omaha Bank in Omaha, Nebraska ("Mutual of Omaha Account"). The Account Agreement, dated October 17, 2018, did not designate whether the joint account was intended to include rights of survivorship. A copy of the Account Agreement is attached hereto as **Exhibit D**.

21. Upon information and belief, Defendants opened the Mutual of Omaha Account so that they could later transfer Decedent's money to that account and then claim sole entitlement to such money as soon as Decedent passed away.

22. The Mutual of Omaha Account was initially funded with a $673.10 check Good Samaritan Society issued to Decedent.

23. On or about October 23, 2018, Defendant Susan Spry, acting as Decedent's attorney-in-fact, deeded the Running Water Property to Timothy and Lisa Montgomery in exchange for $110,000. A copy of the Warranty Deed is attached hereto as **Exhibit E**.

24. After deducting closing costs, the net proceeds from the sale of the Running Water Property totaled $97,897.07. A copy of the Settlement Statement executed by Defendant Susan Spry as attorney-in-fact is attached hereto as **Exhibit F**.

25. These proceeds were deposited into the Mutual of Omaha Account via wire transfer on November 7, 2018.

26. Next, on November 9, 2018, Defendant Susan Spry, in her capacity as Decedent's attorney-in-fact, wrote a $75,000 check from the Security State Bank Account to Richard Hermanek, and that check was then deposited into the Mutual of Omaha Account on November 19, 2018. A copy of the check is attached hereto as **Exhibit G.**

27. In sum, in less than four months after being appointed power of attorney for Decedent, Defendants liquidated many of Decedent's assets, deposited nearly $100,000 of the proceeds from said liquidation efforts into a joint account they had just opened, misappropriated $1,507.31 belonging to Decedent, and transferred another $75,000 from Decedent's solely-owned account to this purported joint account.

28. At the date of Decedent's death on March 14, 2019, all of the funds contributed to the Mutual of Omaha Account could be traced back to Decedent. No contributions were made by the Defendants to the Mutual of Omaha Account from their own personal assets.

29. Not surprisingly, on March 19, 2019, (five days after Decedent died) Defendant Susan Spry wrote a $170,000 check from the Mutual of Omaha Account to "BFCU," which is an abbreviation for Beacon Federal Credit Union. A copy of the check is attached hereto as **Exhibit H.**

30. Defendants have an account at Beacon Federal Credit Union and deposited the $170,000 check into their account.

31. Defendants took exclusive possession of Decedent's remaining sum of $3,495.17 in the Mutual of Omaha Account by removing Decedent as an owner of the Mutual of Omaha Account and naming Defendants as the sole owners on said account on August 20, 2019, just six days after Defendant Richard Spry executed a Petition for Adjudication of Intestacy,

Determination of Heirs and Appointment of Personal Representative nominating Defendant Richard Spry as personal representative of the Estate.

Defendants Engage in Other Self-Dealing Transactions Using Decedent's Money and Property

32. Separately, after being appointed power of attorney for Decedent, Defendants engaged in several additional self-dealing transactions using Decedent's money in the Security State Bank Account.

33. From July 2018 through March 2019, Defendants wrote several checks and made several debit card transactions from the Security State Bank Account for goods and services that had little to no benefit to Decedent and, instead, benefited Defendants and Defendants' children.

34. For example, using money in the Security State Bank Account, Defendants issued direct payments to themselves as well as to their children, Brenton and Kelly Spry, totaling approximately $9,227.68.

35. Also, Defendants wrote checks and made debit card purchases using money from the Security State Bank Account for personal meals, lodging, gas, and other personal expenditures.

36. Defendants did not reimburse Decedent for their personal expenditures and instead used the Security State Bank Account as their own personal slush fund.

37. Defendants, acting as attorneys-in-fact, also transferred title of Decedent's two vehicles (i.e., 2001 Ford Ranger and 2005 Honda Pilot) to Defendant Richard Spry (2001 Ford Ranger) and Defendants' son, Brenton Spry (2005 Honda Pilot), and also transferred several of Decedents' guns to Defendant Richard Spry and Brenton Spry.

38. Further, after Decedent's death, Defendants prepared Decedent's 2018 federal taxes, with the assistance of D&D Tax Service.

39. Decedent was entitled to a $1,714 tax refund.

40. A refund check for $1,714 was sent to Defendant Richard Spry's address in Texas.

41. That check was not deposited into either the Security State Bank Account or the Mutual of Omaha Account.

42. Upon information and belief, Defendants deposited the check into their own account.

COUNT 1 – Breach of Fiduciary Duty

43. Plaintiff incorporates all previous allegations as if fully set forth.

44. Defendants were acting as Decedent's fiduciaries; indeed, they were acting as his attorneys-in-fact.

45. Based on the above-described conduct, Defendants breached their fiduciary duties owed to Decedent.

46. For example, Defendants engaged in several self-dealing transactions.

47. Under South Dakota law, a "fiduciary must act with utmost good faith and avoid any act of self-dealing that places his personal interest in conflict with his obligations to the beneficiaries." *Hein v. Zoss*, 2016 S.D. 73, ¶ 8, 887 N.W.2d 62, 66.

48. "[I]f the power to self-deal is not specifically articulated in the power of attorney, that power does not exist." *Bienash v. Moller,* 2006 S.D. 78, ¶ 14, 721 N.W.2d 431, 435.

49. The power of attorney must have "clear and unmistakable language" authorizing self-dealing transactions. *Hein v. Zoss*, 2016 S.D. 73, ¶ 9, 887 N.W.2d 62, 66.

50. The Durable Power of Attorney does not include clear and unmistakable language authorizing Defendants to engage in self-dealing transactions, nor is such a power specifically articulated in the Durable Power of Attorney.

51. Accordingly, Defendants were not authorized to engage in self-dealing transactions and, in doing so, breached their fiduciary duties owed to Decedent.

52. Decedent incurred damages as a result of Defendants' breaches.

53. Further, Defendants' conduct was willful, wanton, or malicious.

COUNT 2 – Conversion

54. Plaintiff incorporates all previous allegations as if fully set forth.

55. The Estate has an ownership interest in money that belonged to the Decedent that is now in Defendants' possession.

56. The Estate's ownership interest in said money is greater than that of Defendants.

57. As a result of Defendants' conversion, the Estate has been damaged in an amount to be determined by a jury.

COUNT 3 – Vulnerable Adult Abuse under SDCL ch. 21-65

58. Plaintiff incorporates all previous allegations as if fully set forth.

59. From July 25, 2018, through March 14, 2019, Decedent was a "vulnerable adult" as defined by SDCL 21-65-1(15).

60. Plaintiff is a "substitute petitioner" as defined by SDCL 21-65-1(14).

61. From July 25, 2018, through March 14, 2019, Decedent was the victim of financial exploitation committed at the hands of Defendants.

62. Plaintiff seeks relief from the Court in accordance with SDCL 21-65-12, namely that the Court direct Defendants to return custody or control of the funds, benefits, property, resources, belongings, and/or assets of the Decedent to the Estate.

63. Further, the Estate requests the Court award the Estate its attorneys' fees and court costs in accordance with SDCL 21-65-15.

COUNT 4 – Exploitation of Elder under SDCL 22-46-13

64. Plaintiff incorporates all previous allegations as if fully set forth.

65. Defendants' conduct constitutes theft by exploitation, as described in SDCL 22-46-3.

66. Accordingly, Plaintiff brings this cause of action pursuant to SDCL 22-46-13 and seeks reasonable attorneys' fees, costs, compensatory damages, and punitive damages.

WHEREFORE, Plaintiff respectfully requests judgment as follows:

A. For judgment in Plaintiff's favor and against Defendants, jointly and severally, in a monetary amount to be proven at trial, which includes both compensatory and punitive damages;

B. For Plaintiff's attorneys' fees, costs and disbursements; and

C. For such other relief as the Court deems appropriate, fair, just, and equitable.

Dated at Sioux Falls, South Dakota, this 7th day of August, 2020.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF YANKTON)

Barbara Hermanek-Peck, being first duly sworn, verifies that she is the Plaintiff named in the foregoing Complaint and Petition; that she has read the Complaint and Petition and knows the contents thereof; and that the same is accurate and complete to the best of Plaintiff's knowledge and belief.

Barbara Hermanek-Peck, in her capacity as Personal Representative of the Estate of Richard Hermanek

Subscribed and sworn to before me this 7th day of August, 2020.

Notary Public, South Dakota

My Commission expires: 8-19-2021

21-65-1 Definitions.

Terms used in this chapter mean:

(1) "Attorney-in-fact," an agent under a power of attorney pursuant to chapter 59-2 or an attorney-in-fact under a durable power of attorney pursuant to § 59-7-2.1 or chapter 59-12;

(2) "Caretaker," a related or nonrelated person who has the responsibility for the health or welfare of a vulnerable adult as a result of assuming the responsibility voluntarily, by contract, by receipt of payment for care, or by order of the court;

(3) "Conservator," as defined in subdivision 29A-5-102(2);

(4) "Vulnerable adult abuse," any of the following:

(a) Physical abuse as defined in subdivision 22-46-1(7);

(b) Emotional and psychological abuse as defined in subdivision 22-46-1(4);

(c) Neglect as defined in subdivision 22-46-1(6) and § 22-46-1.1; or

(d) Financial exploitation;

(5) "Family or household member," a spouse, a person cohabiting with the vulnerable adult, a parent, or a person related to the vulnerable adult by consanguinity or affinity, but does not include children of the vulnerable adult who are less than eighteen years of age;

(6) "Fiduciary," a person or entity with the legal responsibility to make decisions on behalf of and for the benefit of a vulnerable adult and to act in good faith and with fairness. The term, fiduciary, includes an attorney in fact, a guardian, or a conservator;

(7) "Financial exploitation," exploitation as defined in subdivision 22-46-1(5) when committed by a person who stands in a position of trust or confidence;

(8) "Guardian," as defined in subdivision 29A-5-102(4);

(9) "Peace officer," as defined in subdivision 23A-45-9(13);

(10) "Petitioner," a vulnerable adult who files a petition pursuant to this chapter, and includes a substitute petitioner who files a petition on behalf of a vulnerable adult pursuant to this chapter;

(11) "Present danger of vulnerable adult abuse," a situation in which the respondent has recently threatened the vulnerable

adult with initial or additional abuse or neglect or the potential for misappropriation, misuse, or removal of the funds, benefits, property, resources, belongings, or assets of the vulnerable adult combined with reasonable grounds to believe that abuse, neglect, or exploitation is likely to occur;

(12) "Pro se," a person proceeding on the person's own behalf without legal representation;

(13) "Stands in a position of trust or confidence," the person has any of the following relationships relative to the vulnerable adult:

(a) Is a parent, spouse, adult child, or other relative by consanguinity or affinity of the vulnerable adult;

(b) Is a caretaker for the vulnerable adult; or

(c) Is a person who is in a confidential relationship with the vulnerable adult. A confidential relationship does not include a legal, fiduciary, or ordinary commercial or transactional relationship the vulnerable adult may have with a bank incorporated pursuant to the provisions of any state or federal law; any savings and loan association or savings bank incorporated pursuant to the provisions of any state or federal law; any credit union organized pursuant to the provisions of any state or federal law; any attorney licensed to practice law in this state; or any agent, agency, or company regulated under title 58 or chapter 36-21A;

(14) "Substitute petitioner," a family or household member, guardian, conservator, attorney in fact, or guardian ad litem for a vulnerable adult, or other interested person who files a petition pursuant to this chapter; and

(15) "Vulnerable adult," a person sixty-five years of age or older who is unable to protect himself or herself from abuse as a result of age or a mental or physical condition, or an adult with a disability as defined in § 22-46-1.

21-65-11 Relief available for vulnerable adult abuse.

Upon a finding by a preponderance of the evidence that vulnerable adult abuse has occurred, the court may order any of the following:

(1) That the respondent be required to move from the residence of the vulnerable adult if both the vulnerable adult and the respondent are titleholders or contract holders of record of the real property, are named as tenants in the rental agreement concerning the use and occupancy of the dwelling unit, are living in the same residence, or are married to each other;

(2) That the respondent provide suitable alternative housing for the vulnerable adult;

(3) That a peace officer accompany the party who is leaving or has left the party's residence to remove essential personal effects of the party;

(4) That the respondent be restrained from vulnerable adult abuse;

(5) That the respondent be restrained from entering or attempting to enter on any premises when it appears to the court that restraint is necessary to prevent the respondent from committing vulnerable adult abuse;

(6) That the respondent be restrained from exercising any powers on behalf of the vulnerable adult through a court-appointed guardian, conservator, or guardian ad litem, an attorney-in-fact, or another third party; and

(7) In addition to the relief provided in § 21-65-12, other relief that the court considers necessary to provide for the safety and welfare of the vulnerable adult.

Any relief granted by the order for protection shall be for a fixed period and may not exceed five years.

21-65-12 Relief available for financial exploitation.

If the court finds that the vulnerable adult has been the victim of financial exploitation, the court may order the relief the court considers necessary to prevent or remedy the financial exploitation, including any of the following:

(1) Directing the respondent to refrain from exercising control over the funds, benefits, property, resources, belongings, or assets of the vulnerable adult;

(2) Requiring the respondent to return custody or control of the funds, benefits, property, resources, belongings, or assets to the vulnerable adult;

(3) Requiring the respondent to follow the instructions of the guardian, conservator, or attorney-in-fact of the vulnerable adult; and

(4) Prohibiting the respondent from transferring the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to any person other than the vulnerable adult.

22-46-1 Definition of terms.

Terms used in this chapter mean:

(1) "Adult with a disability," 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;

(2) "Caretaker," a person or entity who is entrusted with the property of an elder or adult with a disability, or who is responsible for the health or welfare of an elder or adult with a disability, and who assumes the position of trust or responsibility voluntarily, by contract, by receipt of payment, or by order of the court;

(3) "Elder," a person sixty-five years of age or older;

(4) "Emotional and psychological abuse," a caretaker's willful, malicious, and repeated infliction of:

(a) A sexual act or the simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene;

(b) Unreasonable confinement;

(c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or

(d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability;

(5) "Exploitation," the wrongful taking or exercising of control over property of an elder or adult with a disability with intent to defraud the elder or adult with a disability;

(6) "Neglect," harm to the health or welfare of an elder or an adult with a disability, without reasonable medical justification, caused by a caretaker, within the means available for the elder or adult with a disability, including the failure to provide adequate food, clothing, shelter, or medical care; and

(7) "Physical abuse," physical harm, bodily injury, attempt to cause physical harm or injury, or fear of imminent physical harm or bodily injury.

22-46-3 Theft by exploitation--Penalty.

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, is guilty of theft by exploitation. Theft by exploitation is punishable as theft pursuant to chapter 22-30A.

22-46-13 Action against perpetrator for exploitation--Compensatory and punitive damages--Attorney's fees.

A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 or 22-46-3. 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 for the exploitation. The action may be brought by the elder or adult with a disability, or that person's guardian, conservator, by a person or organization acting on behalf of the elder or adult with a disability with the consent of that person or that person's guardian or conservator, or by the personal representative of the estate of a deceased elder or adult with a disability without regard to whether the cause of death resulted from the exploitation. The action may be brought in any court of competent jurisdiction to enforce the action. A party who prevails in the action may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BARBARA HERMANEK-PECK, in her capacity as Personal Representative of the Estate of Richard Hermanek,

Plaintiff,

vs.

RICHARD SPRY and SUSAN SPRY,

Defendants.

Certification # 29649

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DIVISION, SOUTH DAKOTA
D.S.D. CASE 4:21-CV-04034-LLP

The Honorable Lawrence L. Piersol
District Court Judge

Order Accepting Certification filed on June 28, 2021

PLAINTIFF'S RESPONSE BRIEF

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PRELIMINARY STATEMENT

In this brief, the Plaintiff, Barbara Hermanek-Peck, in her capacity as Personal Representative of the Estate of Richard Hermanek, will be referred to as "the Estate." Richard Hermanek will be referred to as "Decedent." Together, Richard Spry and Susan Spry will be referred to as "the Sprys."

The Estate is not including an appendix. Accordingly, citations to "App. ___" are to the Sprys' Appendix.

JURISDICTIONAL STATEMENT

On May 27, 2021, the United States District Court, District of South Dakota, Honorable Lawrence Piersol, issued an Order certifying three questions to this Court. (App. 1-15.) This Court accepted the certification on June 28, 2021. Therefore, this Court has jurisdiction under SDCL § 15-24A-1.

STATEMENT OF THE ISSUES

1. Does South Dakota recognize a private right of action for a violation of Chapter 21-65 after the death of the vulnerable adult?

   Most Relevant Authority

   - SDCL §§ 21-65-1, -2, -12, and -15
   - *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, 814 N.W.2d 413

2. For a civil claim to be brought under SDCL § 22-46-3 and SDCL § 22-46-13, must the person against whom the claim is brought have been criminally convicted of theft by exploitation under SDCL § 22-46-3?

   Most Relevant Authority

   - SDCL §§ 22-46-1, -3, -13, -17, and -18
   - *Trumm v. Cleaver*, 2013 S.D. 85, 841 N.W.2d 22
   - *State v. Hauge*, 2019 S.D. 45, 932 N.W.2d 165

3. Can a civil claim be brought for violation of SDCL § 22-46-1 and SDCL § 22-46-13 with no requirement for a preceding criminal conviction given the "or" between § 22-46-1 and § 22-46-3 in SDCL § 22-46-13?

Most Relevant Authority

- SDCL §§ 22-46-1, -3, -13, -17, and -18
- *Trumm v. Cleaver*, 2013 S.D. 85, 841 N.W.2d 22
- *State v. Hauge*, 2019 S.D. 45, 932 N.W.2d 165

STATEMENT OF THE CASE

This is a civil case pending in the United States District Court, District of South Dakota, before the Honorable Lawrence Piersol. The Estate has brought claims against the Sprys for (1) breach of fiduciary duty, (2) conversion, (3) vulnerable adult abuse under SDCL ch. 21-65, and (4) exploitation of elder under SDCL § 22-46-13. (App. 16-25.) In response to a motion to dismiss filed by the Sprys, Judge Piersol certified the above-listed questions to this Court.

STATEMENT OF FACTS

The facts alleged in the Estate's Complaint and Petition, which must be accepted as true for purposes of a motion to dismiss, are as follows:

On July 25, 2018, Richard Hermanek ("Decedent"), who was 88 years old at the time, signed a Durable Power of Attorney appointing the Sprys as his attorneys-in-fact. (¶¶ 7, 9.)[1] The Durable Power of Attorney did not specifically articulate a power to self-deal. (¶ 8.)

When Decedent signed the Durable Power of Attorney naming the Sprys as his attorneys-in-fact, he owned, among other things, real property ("the Running Water

[1] The paragraphs are in reference to the paragraphs in the Complaint, which is in Defendants' Appendix, namely App. 16-25. For readability, only the paragraph number will be cited.

Property"), a 2001 Ford Ranger, a 2005 Honda Pilot, various guns, other personal property, and approximately $131,649.03 in a checking account at Security State Bank. (¶ 10.) Decedent was also receiving approximately $2,788.03 in monthly retirement and social security payments, which were deposited directly in the Security State Bank Account; starting in January 2019, Decedent's monthly payments increased to $2,809.51. (¶ 11.)

In August 2018, less than a month after the Sprys were appointed attorneys-in-fact, Decedent went into an assisted living facility, namely North Point of the Good Samaritan Society. About a month later, Decedent was transferred to Good Samaritan Society's nursing home in Tyndall, South Dakota, where he remained until he died intestate on March 14, 2019. (¶¶ 1, 12.)

Just days after Decedent went into the nursing home, the Sprys began wielding their power as attorneys-in-fact to enrich themselves personally while exploiting Decedent. To do this, the Sprys immediately began liquidating Decedent's property. (¶ 13.) First, they sold, via auction, personal property belonging to Decedent. Rather than deposit the auction proceeds into Decedent's Security State Bank Account, the Sprys kept the sale proceeds for themselves, depositing the check into their personal bank account. (¶¶ 14-17.)

About a month later, the Sprys went to work looting Decedent's most valuable non-cash asset, the Running Water Property. (¶¶ 18-26.) The Sprys entered into a purchase agreement to sell the Running Water Property on October 6, 2018, and scheduled closing for November 11, 2018. (¶ 19.) Shortly before closing, the Sprys opened a joint checking account at Mutual of Omaha Bank in Omaha, Nebraska, naming

themselves and Decedent as joint owners. (¶ 20.) Of course, at the time, 88-year-old Decedent was a nursing home resident in Tyndall, South Dakota, and already had a bank account at a bank in Tyndall, South Dakota (i.e., Security State Bank).[2] (¶¶ 9, 12.)

The Sprys opened the Omaha joint account so that they could later transfer Decedent's money to that account and then claim sole entitlement to such money as soon as Decedent passed away. (¶ 21.) Indeed, the Sprys did precisely that. First, after the Running Water Property sale closed, the Sprys deposited the proceeds (i.e., $97,897.07) therefrom into the Omaha joint account and not Decedent's solely-owned account at Security State Bank. (¶ 25.)

Next, the Sprys turned their attention to Decedent's solely-owned bank account at Security State Bank. Less than 48 hours after depositing the Running Water Property sale proceeds, the Sprys wrote a $75,000 check from Decedent's Security State Bank Account and deposited it into the Omaha joint account. (¶ 26.)

Altogether, in less than four months after being appointed attorneys-in-fact for Decedent and within three months of Decedent being admitted into a nursing home, the Sprys (1) liquidated many of Decedent's personal assets and kept the sale proceeds for themselves, (2) liquidated Decedent's real property and deposited the proceeds ($97,897.07) therefrom into a "joint" account they had just opened at a different bank in a different state than Decedent's account, and (3) transferred an additional $75,000 from Decedent's solely-owned account to this new "joint" account in Omaha.

[2] The non-moving party—here, the Estate—receives the benefit of all reasonable inferences. Given the facts alleged, namely that Decedent was an 88-year-old nursing home resident in Tyndall, South Dakota, a reasonable inference to draw is that Decedent did not open a joint account at a brand new bank located in Omaha, Nebraska, knowingly and/or voluntarily.

Decedent died on March 14, 2019. (¶ 28.) Less than five days after Decedent died, the Sprys began cleaning out the Omaha joint account, which had been totally funded with Decedent's money. (¶¶ 28-31.) First, they wrote a $170,000 check to their personal account at Beacon Federal Credit Union. (¶¶ 28-31.) Then, on August 20, 2019, six days after Defendant Richard Spry executed a Petition for Adjudication of Intestacy, Determination of Heirs, and Appointment of Personal Representative nominating himself as the personal representative of Decedent's Estate, the Sprys removed Decedent as an owner on the Omaha joint account and named themselves as sole owners, taking exclusive possession of the remaining $3,495.17 in the account. (¶ 31.)

In addition to the above, the Sprys, acting as Decedent's attorneys-in-fact, engaged in several other self-dealing transactions. (¶¶ 32-42.) From July 2018 through March 2019, the Sprys wrote several checks and made several debit card transactions from Decedent's Security State Bank account for goods and services that had little to no benefit to Decedent and, instead, benefitted the Sprys and their children. (¶ 33.) For example, the Sprys issued direct payments to themselves as well as to their children, Brenton Spry and Kelly Spry, totaling approximately $9,227.68. (¶ 34.) The Sprys also transferred title of Decedent's two vehicles (i.e., the 2001 Ford Ranger and 2005 Honda Pilot) and Decedent's guns to Defendant Richard Spry and Defendants' son, Brenton Spry. (¶ 37.) The Sprys also used Decedent's money for personal meals, lodging, gas, and other personal expenditures. (¶ 35.) Put simply, the Sprys used Decedent's Security State Bank account as their personal slush fund. (¶ 36.)

The above-described self-dealing transactions performed by the Sprys were done while acting as Decedent's attorneys-in-fact, even though the Durable Power of Attorney did not authorize self-dealing transactions. (¶¶ 6, 8, 50, 51.) Naturally, Decedent (and, thus, the Estate) incurred monetary damages as a result of the Sprys' abuse, exploitation, and misconduct. (*E.g.*, ¶¶ 27, 29, 31, 37, 52, 57.)

Although not alleged in the original Complaint, the Complaint has since been amended to include the following factual allegations:

- Decedent received regular medical care and treatment from Dr. Mel Wallinga for the last several years of Decedent's life.
- Dr. Wallinga is a family medicine physician with over 20 years of experience and has seen residents of the Good Samaritan Society for several years as a part of his practice.
- Dr. Wallinga believes (1) that Decedent struggled with memory loss and the inability to make appropriate decisions for the last several years of his life, (2) that the Decedent was not capable of making financial or any other decisions for the last 3-4 years of his life, and (3) that Decedent was unable to provide for his own basic needs and care.

(Doc. 16 at 3.)[3]

[3] References to the District Court proceedings, D.S.D. Case 4:21-cv-4034, will be identified by the Docket Number followed by the appropriate page number, "Doc. __."

ARGUMENT

Question 1 – Does South Dakota recognize a private right of action for a violation of Chapter 21-65 after the death of the vulnerable adult?

Defendants argue SDCL ch. 21-65, which is titled "Protection of Vulnerable Adults," does not create a private right of action and, further, even if it did, the right of action would die the moment the vulnerable adult died. Neither argument passes muster.

A. SDCL ch. 21-65 Creates a Private Right of Action

"A private right of action essentially indicates the right of an individual to bring an action to enforce particular regulations or statutes." *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, ¶ 16, 814 N.W.2d 413, 417. "[S]tatutory intent to create a private remedy is determinative." *Id*.

A review of SDCL ch. 21-65 shows the Legislature intended to create a private right of action when it enacted the same. SDCL § 21-65-2 provides: "A vulnerable adult or a substitute petitioner may seek relief from vulnerable adult abuse by filing a petition and affidavit in the circuit court[.]" "Vulnerable adult abuse" includes financial exploitation, which is defined as the wrongful taking or exercising control over property of an elder with intent to defraud the elder by a person who stands in a position of trust or confidence. SDCL § 21-65-1(4) and (7). "If the court finds that the vulnerable adult has been a victim of financial exploitation, *the court may order the relief the court considers necessary to* prevent or *remedy the financial exploitation*," including any of the following:

> (1) Directing the respondent to refrain from exercising control over the funds, benefits, property, resources, belongings, or assets of the vulnerable adult;

> (2) Requiring the respondent to return custody or control of the funds, benefits, property, resources, belongings, or assets to the vulnerable adult; . . . and
>
> (4) Prohibiting the respondent from transferring the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to any person other than the vulnerable adult.

SDCL § 21-65-12 (emphasis added). Also, the "court may order that the respondent pay the attorney's fees and court costs of the vulnerable adult and substitute petitioner." SDCL § 21-65-15. Certainly the above language creates a private right of action, as it permits a private person (e.g., a substitute petitioner) to come into court and seek monetary relief from a wrongdoer.

The Sprys argue SDCL ch. 21-65 only authorizes protection orders. That is not so. SDCL § 21-65-12 explicitly states that, in the case of financial exploitation, "the court may order the relief the court considers necessary to . . . remedy the financial exploitation." Such relief would assuredly include monetary damages, as monetary damages are likely the most suitable way in which to remedy financial exploitation. Furthermore, SDCL § 21-65-12 explicitly affords a court the authority to order that money in the wrongdoer's possession be transferred to the vulnerable adult or substitute petitioner; that is simply describing a money judgment. Put simply, SDCL ch. 21-65 authorizes relief beyond just protection orders; indeed, it authorizes any relief the court considers necessary to remedy financial exploitation.

B. The Right of Action Survives the Death of the Vulnerable Adult

Given SDCL ch. 21-65 creates a private right of action, the question before the Court is whether that right of action survives the death of the vulnerable adult. Because nothing in the statutory scheme suggests the right of action dies when the vulnerable

adult dies and the obvious goal in passing SDCL ch. 21-65 was to punish and deter vulnerable adult abuse, the answer to the question is yes, the right of action survives the death of the vulnerable adult.

Nowhere in SDCL ch. 21-65 does it say that a claim for vulnerable adult abuse ceases to exist upon the death of the vulnerable adult. Thus, for this Court to conclude the claim dies upon the death of the vulnerable adult, the Court would need to insert language into the statute that is not there. Doing so would be inconsistent with rules of statutory interpretation. *See Olson v. Butte Cnty. Comm'n*, 2019 S.D. 13, ¶ 10, 925 N.W.2d 463, 466 ("When we interpret legislation, we cannot add language that simply is not there."). Had the Legislature intended the claim to cease upon the death of the vulnerable adult, it would have stated as much.

Moreover, it is evident SDCL ch. 21-65 was passed to punish and deter vulnerable adult abuse. If an abuser could avoid the ramifications in SDCL ch. 21-65 through the death of the vulnerable adult, that would not serve as much of a deterrent to abuse. In fact, it would do just the opposite. Thus, a finding that a claim for vulnerable adult abuse ceases to exist upon the death of the vulnerable adult would undermine the Legislature's goal in passing SDCL ch. 21-65.

Not surprisingly, the Sprys (i.e., the alleged abusers here) argue a claim for vulnerable adult abuse dies upon the death of the vulnerable adult. Their first argument points to the fact that the definition of "vulnerable adult" uses the present tense. This argument makes little sense. Of course the definition of "vulnerable adult" uses the present tense; there needs to be a living vulnerable adult for a claim of vulnerable adult

abuse to arise. But that does not mean the claim dies (and abusers are suddenly reprieved from their wrongdoing) when the vulnerable adult dies.

Next, the Sprys argue because the definition of "substitute petitioner" does not explicitly include personal representative, the Legislature must have intended to cut off a claim for vulnerable adult abuse upon the death of the vulnerable adult. This argument ignores the broad language the Legislature used when defining "substitute petitioner." SDCL § 21-65-1(14) defines "substitute petitioner" as "a family or household member, guardian, conservator, attorney in fact, or guardian ad litem for a vulnerable adult, *or other interested person* who files a petition pursuant to this chapter." (emphasis added). Including the catch-all phrase "or other interested person" shows the Legislature intended a broad definition of substitute petitioner, which includes a personal representative. *See In re Marvin M. Schwan Charitable Trust Foundation*, 2016 S.D. 45, ¶ 23, 880 N.W.2d 88, 94 (recognizing the Legislature intends to broadly define the class of persons who are "interested" in a particular subject matter when it does not include modifying language limiting said class). Surely a personal representative for the vulnerable adult is an "interested person" as that term is used in the statute. *See* SDCL § 29A-3-703 (recognizing a personal representative has the same standing to sue as the decedent had immediately prior to death). And it makes sense that a personal representative would be permitted to bring a claim for vulnerable adult abuse, because oftentimes with elder abuse the abuse is not discovered until after the abused has died. Thus, how the Legislature defined "substitute petitioner" does not support the Sprys' argument.

The Sprys also point to some of the injunctive relief (e.g., an order that the offender move out of the vulnerable adult's residence) afforded under SDCL ch. 21-65 as

evidence the claim dies upon the death of the vulnerable adult. This argument ignores the other relief afforded under SDCL ch. 21-65, specifically the relief afforded when financial exploitation occurs. As previously noted, upon a finding of financial exploitation, the court may order any relief "the court considers necessary to . . . remedy the financial exploitation." SDCL § 21-65-12. Such relief could include ordering compensatory damages against the abuser to the estate of the deceased vulnerable adult for the damages caused to the vulnerable adult by an abuser who committed financial exploitation, as doing so would help remedy the financial exploitation.

In sum, there is no indication the Legislature intended to cut off a claim for vulnerable adult abuse upon the death of the vulnerable adult. After all, what policy objective would be served by doing so? Why would the Legislature give abusers of vulnerable adults immunity from a claim for vulnerable adult abuse simply because the abused died? *See Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 ("[I]n construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result."). Therefore, the answer to certified Question 1 is yes—South Dakota recognizes a private right of action for a violation of SDCL ch. 21-65 after the death of the vulnerable adult.

Question 2 – For a civil claim to be brought under SDCL § 22-46-3 and SDCL § 22-46-13, must the person against whom the claim is brought have been criminally convicted of theft by exploitation under SDCL § 22-46-3?

This question relates specifically to the interplay between SDCL § 22-46-13 and SDCL § 22-46-3. SDCL § 22-46-13 provides in relevant part:

> A court may find that an elder or adult with a disability *has been exploited as defined* in § 22-46-1 *or* 22-46-3. 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 for the exploitation. . . . . A party who prevails in the action may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages.

(emphasis added). Notably, SDCL § 22-46-13 creates a private right of action if "exploitation" of an elder occurs, with "exploitation" being defined in SDCL § 22-46-1 or § 22-46-3. This certified question, however, focuses exclusively on the interplay between § 22-46-13 and § 22-46-3. Question 3, which is addressed in the next section, relates to the interplay between § 22-46-13 and § 22-46-1. Accordingly, this section of the Estate's brief will attempt to focus exclusively on the interplay between § 22-46-13 and § 22-46-3, though some of the arguments apply equally to Question 3.

A. Plain Language of SDCL § 22-46-13 and of Other Sections of Chapter 22-46 Does Not Require a Criminal Conviction for a Civil Claim to Exist

"In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole." *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166. "[I]f the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *State v. Bariteau*, 2016 S.D. 57, ¶ 15, 884 N.W.2d 169, 175. "[T]he starting point when interpreting a statute must always be the language itself." *State v. Livingood*, 2018 S.D. 83, ¶ 31, 921 N.W.2d 492, 499.

The plain language of § 22-46-13 does not require a criminal conviction under § 22-46-3 for a civil claim to arise. The plain language of § 22-46-13 states that a court may find an individual has been exploited "as defined in" §§ 22-46-1 or 22-46-3. The reference to § 22-46-3 is solely to define the word "exploited," and it does not create a prerequisite of a criminal conviction. The statute does not state that the cause of action

must be "based on a violation" or "based on a conviction" under SDCL § 22-46-3. Indeed, words like prosecution, violation, and conviction are totally absent from § 22-46-13. Instead, the statute plainly uses the phrase "as defined in," which shows the Legislature's reference to § 22-46-3 was for definitional purposes only.

Omitting terms like violation, prosecution, and conviction reflects a legislative intent not to predicate a civil claim under SDCL § 22-46-13 on a criminal conviction under SDCL § 22-46-3. "Every word of a statute must be presumed to have been used for a purpose [and] . . . every word excluded from a statute must be presumed to have been excluded for a purpose." *Trumm v. Cleaver*, 2013 S.D. 85, ¶11, 841 N.W.2d 22, 25 (citing *Wheeler v. Farmers Mut. Ins. Co.*, 2012 S.D. 83, ¶ 21, N.W.2d 102, 109 (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, 181-92 (6th ed. 2000))). The Legislature has used variations of the term "violate" or "conviction" within the language of other state civil statutes when it intended to do so. *See, e.g.*, SDCL § 40-38-5; SDCL § 22-34-2 (repealed); SDCL § 22-13-18 (using phrase "found guilty"); SDCL § 22-14A-26 ("The court may, after conviction or adjudication . . ."). Like those statutes, the Legislature could have used such language in SDCL § 22-46-13 to require the recovery of civil damages predicated upon a criminal violation or conviction. But the Legislature did not do so here, and any such requirement of a violation or conviction of the underlying criminal statute is notably absent in the language of SDCL § 22-46-13. Accordingly, a civil claim under SDCL § 22-46-13 is not dependent upon a criminal conviction.

Other sections of SDCL ch. 22-46 further reflect the Legislature's intent not to predicate a civil cause of action under SDCL § 22-46-13 on an underlying criminal

conviction. For example, SDCL § 22-46-17—entitled "Additional remedies for violation"—provides: "The court may authorize remedies provided in § 21-65-12 for violations under § 22-46-3 *or* 22-46-13." (emphasis added). The disjunctive language of SDCL § 22-46-17 is additional statutory evidence that the Legislature intended there could be a violation apart and distinct of SDCL § 22-46-3 in SDCL § 22-46-13. Further, SDCL § 22-46-18—entitled "Remedies cumulative with other legal and administrative remedies"—makes clear that "[t]he remedies provided in §§ 22-46-13 to 22-46-17, inclusive, *are in addition to and cumulative with* other legal and administrative remedies available to an elder or adult with a disability." (emphasis added). To hold that SDCL § 22-46-13 requires a criminal conviction would render SDCL § 22-46-18 and its use of the phrase "in addition to" other legal remedies meaningless. *See Peterson v. Burns*, 2001 S.D. 126, ¶ 30, 635 N.W.2d 556, 567-68 ("We should not adopt an interpretation of a statute that renders the statute [or part of it] meaningless."). As discussed in more detail below, other courts have found that statutory language such as "in addition to other remedies provided by law" is evidence of a legislative intent that an underlying criminal conviction was not necessary to support a civil cause of action. *See Millard v. Schafer*, 2012 WL 3142958 (Iowa Dist. 2012).

In sum, the plain language of SDCL § 22-46-13 and other sections of SDCL ch. 22-46 shows that a criminal conviction is not required for a civil claim to exist under SDCL § 22-46-13.

B. This Court's Precedent Supports the Conclusion that SDCL § 22-46-13 Does Not Require an Underlying Criminal Conviction

In *Trumm v. Cleaver*, this Court considered a petitioner's request for a domestic abuse protection order under SDCL § 25-10-1(1). 2013 S.D. 85, ¶¶ 1-8, 841 N.W.2d at

23-24. Domestic abuse includes a number of statutory definitions including "[a]ny violation of . . . chapter 22-19A [stalking] . . . if the underlying criminal act is committed between family or household members[.]" SDCL § 25-10-1(1).

The circuit court granted a domestic abuse protection order because it found that the actions of the petitioner's husband amounted to stalking. 2013 S.D. 85, ¶ 7, 841 N.W.2d at 24. The defendant argued on appeal that a conviction for stalking was required based on the plain language of SDCL § 25-10-1(1). *Id.* ¶ 8. Defendant argued that SDCL § 25-10-1(1) was predicated upon a violation and conviction of stalking based on the statute's use of the phrase "violation of." *Id.*

This Court held that if the Legislature required a "conviction" as a prerequisite to obtaining a domestic protection order under the statute it would have used the word "conviction" instead of the word "violation." *Id.* ¶ 10, 841 N.W.2d at 24-25. Guided by the principles of statutory construction, this Court noted that "[e]very word of a statute must be presumed to have been used for a purpose [and] . . . every word excluded from a statute must be presumed to have been excluded for a purpose." *Id.* ¶ 11, 841 N.W.2d at 25. A defendant could violate SDCL § 22-19A-1 regardless "whether or not the State elects to prosecute the case as a criminal matter." *Id.* ¶ 12, 841 N.W.2d at 25. Thus, because the word "conviction" was excluded from SDCL § 25-10-1(1), this Court presumed it to have been excluded for a purpose such that a criminal conviction was not a prerequisite. *Id.*

Here, SDCL § 22-46-13 does not use a variation of the term "violation" or "conviction." Much like the decision in *Trumm* was guided by the fact that "every word excluded from a statute must be presumed to have been excluded for a purpose," it should

be presumed that any variation of such terms in SDCL § 22-46-13 was excluded for a purpose. SDCL § 22-46-13 used the phrase "as defined in," not "in violation of" or "convicted under." The Legislature's use of "as defined in" is presumed to have been used for a purpose. Thus, based on *Trumm*, because SDCL § 22-46-13 does not use the term "violation" or "conviction," a civil cause of action under SDCL § 22-46-13 is not predicated upon a criminal conviction.

Apart from its statutory construction, in *Trumm* this Court also found it significant that the Legislature used a variation of the term "conviction" in other subsections of chapter 25-10 while the relevant statute at issue only used the term "violation." *Id.* (citing SDCL §§ 25-10-5.3, 25-10-17.1, 25-10-25). This Court noted that " 'statutes must be construed according to their intent, [and] the intent must be determined from the statute as a whole, *as well as enactments relating to the same subject*.' " *Id.* (quoting *In re Estate of Hamilton*, 2012 S.D. 34, ¶ 7, 814 N.W.2d 141, 143) (emphasis added). As previously discussed, other sections of Chapter 22-46 indicate the Legislature intended for the civil remedy afforded under SDCL § 22-46-13 be in addition to—and not dependent upon—the criminal remedy of SDCL § 22-46-3. Indeed, SDCL § 22-46-18 makes clear that "[t]he remedies provided in §§ 22-46-13 to 22-46-17, inclusive, *are in addition to and cumulative with* other legal and administrative remedies available[.]" (emphasis added).

This Court should follow the rationale of *Trumm* and find that, based on both the plain language of SDCL § 22-46-13 and enactments relating to the same subject within Chapter 22-46, a civil claim under SDCL § 22-46-13 is not dependent upon an underlying criminal conviction.

C. Persuasive Case Law from Other Jurisdictions Have Held that Similar Civil Statutes Are Not Dependent upon an Underlying Criminal Conviction

Other jurisdictions have similarly held that civil damage statutes do not require an underlying criminal conviction based on the language of the civil statute. For example, in *Itin v. Ungar*, the Colorado Supreme Court concluded that a statute allowing the owner of property taken by theft, robbery, or burglary to recover civil treble damages did not first require an underlying criminal conviction of theft, robbery, or burglary. 17 P.3d 129, 132-35 (Colo. 2000). The applicable civil statute provided that "[a]ll property obtained by theft, robbery, or burglary shall be restored to the owner . . . [who] may maintain an action . . . against the taker thereof" for civil damages and attorney fees. *Id.* at 133. In reaching its conclusion, the court noted that an analysis to determine whether a criminal conviction was a prerequisite to recovery of civil damages begins with an examination of the specific wording of the civil statute to give proper effect to a state legislature's intent. *Id.* The court emphasized that the omission of the word "convict," "conviction," or "convicted" "reflect[ed] a legislative intent not to require a criminal conviction." *Id.* The court also noted that the legislature "could have included words providing that recovery of civil damages is predicated upon proof of a criminal conviction," but that its failure to do so reflected an intent not to require an underlying criminal conviction. *Id.* Instead, the language of the statute showed that the legislature "intended for this statute to require proof of the commission of a criminal act, but not proof of a prior conviction of the defendant as a condition for recovery of treble damages." *Id.*; *see also Chyar v. Woof,* 21 P.3d 428, 431 (Colo. App. Sept. 14, 2000) (similarly holding that a different civil statute was not predicated upon a criminal conviction because nowhere in the statute did the legislature "condition a damage award upon a showing of a 'conviction' by the taker;

indeed the words 'convict,' 'convicted,' and 'conviction' do not even appear in the statute."). Thus, the civil claim was not dependent upon a criminal conviction.

The Ohio Supreme Court also recently held that a civil damage statute was not predicated upon an underlying criminal conviction. In *Buddenberg v. Weisdack*, the statute at issue provided that "[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action[.]" 161 N.E.3d 603, 606 (Ohio 2020). The defendant argued that a plain reading of the statute showed a legislative intent for there to be an underlying conviction before civil liability could be imposed. *Id.* The Ohio Supreme Court disagreed, holding that the language of the civil statute did not require proof of an underlying conviction because the word "conviction" was noticeably absent from the statute. *Id.* Based on the language of the statute, "criminal acts" can be committed without a conviction and "often are." *Id.* The Court further stated that "[t]he fact that a person's actions subject him or her to prosecution in no way establishes that he or she will in fact be prosecuted. And being subjected to prosecution . . . does not mean conviction necessarily results." *Id.* at 606-07. To the Court, use of the phrase "criminal act" within the civil statute did not mean "a criminal act that resulted in a conviction." *Id.* at 607. Thus, the Court construed the statute "as written and conclude[d] that the plain language d[id] not require a criminal conviction as a prerequisite for civil liability." *Id.* at 608.

There are several other cases similar to *Trumm*, *Itin*, and *Buddenberg* in which courts have held that statutes creating civil liability were not conditioned upon a conviction of the underlying criminal statute. *See Millard v. Schafer*, 2012 WL 3142958 (Iowa Dist. 2012) (concluding that the plain language of the civil statute was not

necessitated upon a criminal conviction of identity theft as the court did "not believe the legislature would have intended to create a civil cause of action for only those victims of identity theft who were charged, prosecuted criminally, and convicted in criminal court" and had "the legislature wanted to limit recovery under the statute to those individuals actually convicted of identity theft, it could have said so plainly"); *Crabbe v. Crabbe*, 2017 WL 3837821, at *2 (Cal. Super. Apr. 19, 2017) (holding that there was "no language in [the statute] that indicates that a criminal conviction is a prerequisite to a civil cause of action under the statute."); *Bell v. Feibush*, 151 Cal. Rptr. 3d 546, 549 (Cal. App. 4th. Dist. 2013) (concluding that "a criminal conviction . . . is not a prerequisite to recovery of [civil] treble damages by any person injured by a violation of [the criminal statute]" because "[h]ad the Legislature intended to make a criminal conviction a prerequisite to treble damage liability, . . . it easily could have."); *Heritage Cablevision of Ca., Inc. v. Pusateri*, 45 Cal. Rptr. 2d 191, 193 (Cal. App. 1995) (finding no ambiguity in the meaning of the phrase "person who violates," holding that "[t]he noun form of violates, violation, means: 'Injury; infringement, breach of right, duty of law, ravishment; seduction. The act of breaking, infringing, or transgressing the law.' None of these meanings require a prefatory criminal conviction.").

Like the civil statutes in these cases, SDCL § 22-46-13 uses no variation of the term "conviction." And perhaps more compelling, SDCL § 22-46-13 does not even use a variation of the term "violate" as was the case in many of these cases. Language predicating the civil remedy under SDCL § 22-46-13 on a criminal conviction is wholly absent. Thus, a civil cause of action under SDCL § 22-46-13 is not dependent upon a criminal conviction.

D. Public Policy Supports the Availability of a Civil Cause of Action under SDCL § 22-46-13 Independent of an Underlying Criminal Conviction

Public policy supports the availability of a civil cause of action under SDCL § 22-46-13 independent of an underlying criminal conviction. In finding no underlying criminal conviction requirement, the *Trumm* Court noted that domestic abuse statutes are enacted "to provide an efficient remedy for victims of abuse as an alternative to other available legal remedies such as criminal charges[.]" 2013 S.D. 85, ¶ 13, 841 N.W.2d at 25 (internal quotation omitted). The Court also noted that availability of alternative remedies to a civil claim such as a criminal prosecution does "not displace" the civil "remedies available to victims." *Id.*

The same public policy argument exists with SDCL § 22-46-13 and elder abuse statutes. Indeed, this Court has previously commented on the seriousness of financial exploitation of elders and indicated it is a matter of vital public concern in South Dakota:

> The gravity of Hauge's offense is significant when viewed on the spectrum of criminality. Commission of any felony is a serious matter. Although Hauge's offense is not a crime of violence, theft by exploitation is particularly insidious in that it involves the manipulation of disabled or elderly adults, a particularly vulnerable population. This is especially so because the victim is often dependent on the thief for help and support. Victims who are elderly and in poor mental or physical health are largely defenseless against such crimes. Exploiting the elderly for financial gain wreaks havoc not only on the victim but in many cases the entire family, often irreparably destroying familial bonds. Financial exploitation of a vulnerable adult is therefore a serious offense when weighed against other types of crimes.

State v. Hauge, 2019 S.D. 45, ¶ 35, 932 N.W.2d 165, 175.

Like domestic abuse statutes, SDCL § 22-46-13 and other subsections of the elder abuse chapter provide victims with an "alternative remedy to criminal prosecutions . . . They allow victims to obtain protection without having to . . . rely on the State to elect to

prosecute a criminal case." *Trumm*, ¶ 13, 841 N.W.2d at 25. And much like victims of domestic abuse who are "unable or unwilling to use" other available legal remedies, elders or adults with disability are also vulnerable members of society who may be unable or unwilling to use legal remedies. *Id.* Too often, much like the case here, the exploitation of the elder is not known until the elder has passed away and the facts of the case are uncovered by the personal representative of the estate. An interpretation that a civil action under SDCL § 22-46-13 is dependent upon an underlying criminal conviction "contravenes the Legislature's purpose" in providing guardians and personal representatives of abused elders alternative remedies to criminal prosecutions. Thus, public policy also supports a conclusion that the plain language of SDCL § 22-46-13 provides a civil cause of action independent from a criminal conviction.

E. The Sprys' Counterarguments Are Not Persuasive

The Sprys' first argument is that the text of SDCL § 22-46-13 is "chronological," namely that a court must first find exploitation occurred before a party has a cause of action. They go on to argue that the "chronological" structure of the statute means there must be a judicial finding of exploitation *before* a lawsuit can even be started. Admittedly, at first blush, the argument is eloquently simple. But when you consider other causes of action, the argument quickly crumbles.

Take, for example, a cause of action for breach of contract. For a breach of contract action to exist, there must first be a finding that an enforceable contract exists. That does not mean a plaintiff must obtain a judicial finding that an enforceable contract exists *before* commencing a lawsuit for breach of contract. Whether an enforceable contract exists is part of the lawsuit. The same goes for a negligence claim. For a

negligence claim to exist, there must first be a finding that the defendant owed a duty to the plaintiff. But that does not mean a plaintiff must obtain a judicial finding that the defendant owed a duty to the plaintiff *before* commencing a lawsuit for negligence. Whether the defendant owed a duty to the plaintiff is part of the lawsuit. The situation here is no different. Whether exploitation occurred is part of the lawsuit.

Next, the Sprys direct the Court to Judge Duffy's decision in *Wetch v. Crum & Forster Comm. Ins.*, 2018 WL 10812341 (D.S.D. Dec. 6, 2018) and this Court's decision in *K&E Land and Cattle, Inc. v. Mayer*, 330 N.W.2d 529 (S.D. 1983). For the reasons set forth in the Estate's Memorandum in Opposition to Defendants' Motion to Dismiss (*see* Doc. 8 at 11-24), which is incorporated herein by this reference, the holding in *Wetch* was misplaced and *K&E* is easily distinguishable. For the sake of brevity, the Estate will not re-hash all the arguments it previously made regarding the *Wetch* decision but will briefly address how *K&E* is distinguishable.

In *K&E*, this Court analyzed SDCL § 22-34-2, which has since been repealed. The text of SDCL § 22-34-2 provided: "Any person who *violates* § 22-34-1 . . . is liable in treble damages for the injury done, to be recovered in a civil action by the owner of the property[.]" (emphasis added). Noticeably, the Legislature explicitly stated a defendant needed to *violate* the criminal statute before being subject to treble damages. As discussed above, the statute at issue here does not include the term violate (or prosecute, conviction, guilt, or any variation thereof). Instead, SDCL § 22-46-13 simply references § 22-46-3 for definitional purposes. This difference in the statutory language makes *K&E* distinguishable, and in fact, shows the Legislature can use the word "violate" or "convict" when it intends to do so. Therefore, *K&E* is distinguishable.

The Sprys also reference the attorneys' fee language in SDCL § 22-46-13 and claim the language is premised upon the notion that a defendant may prevail. First, the Sprys do not explain how that claim advances their position here. Second, and more importantly, the attorneys' fee language does not permit a defendant the right to recover attorneys' fees. The language provides: "A party who prevails in the action may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages." Obviously, defendants do not recover compensatory damages or punitive damages. Therefore, the language is directed to the plaintiff party. The reason the Legislature used the word "party" is due to the number of potential persons who can bring a claim, e.g., the elder or a guardian, conservator, organization, or the personal representative.[4]

In sum, the answer to Question 2 is no—SDCL § 22-46-13 does not require an underlying criminal conviction before a civil cause of action may be brought against a perpetrator of financial exploitation of an elder.

Question 3 – Can a civil claim be brought for violation of SDCL § 22-46-1 and SDCL § 22-46-13 with no requirement for a preceding criminal conviction given the "or" between § 22-46-1 and § 22-46-3 in SDCL § 22-46-13?

Respectfully, this question is inappropriately phrased, because there can be no "violation" of SDCL § 22-46-1, as § 22-46-1 is merely a definitional statute. The more appropriate question is: Can a civil claim be brought under SDCL § 22-46-13 with no

[4] If the Sprys are correct that the attorneys' fee provision permits a defendant to recover attorneys' fees if they prevail, then their argument that a criminal conviction is required before a civil claim exists would seemingly never allow a defendant to prevail in a civil action, as the criminal proceeding would have already determined liability.

requirement for a preceding criminal conviction given the "or" between § 22-46-1 and § 22-46-3 in SDCL § 22-46-13? The answer is yes.

SDCL § 22-46-13 provides in relevant part: "A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 *or* 22-46-3. If a court finds exploitation occurred, the elder or adult with a disability has a cause of action against the perpetrator[.]" (emphasis added). The language is disjunctive such that there is no requirement that a civil cause of action must arise from the "criminal statute" (as labeled by the Sprys in their brief) of § 22-46-3. Stated differently, a civil claim may exist without any reference or reliance upon the criminal statute of § 22-46-3. This is further proof that the plain language of SDCL § 22-46-13 does not require an underlying criminal conviction for a cause of action to exist.

The Legislature's use of the disjunctive in SDCL § 22-46-13 shows that its references to §§ 22-46-1 and 22-46-3 were for definitional purposes only. Had the Legislature intended an underlying criminal conviction be required, it would have said something along the lines of: "When there is a conviction under SDCL § 22-46-3, the elder or adult with a disability has a cause of action against the perpetrator and may recover actual and punitive damages for the exploitation." Instead, the Legislature referenced both § 22-46-3 and § 22-46-1 simply to define what "exploited" means in the context of a civil claim under SDCL § 22-46-13. If a party can prove an elder was exploited, as that term is defined in § 22-46-1 or § 22-46-3, then the party "may recover reasonable attorney's fees, costs of the action, compensatory damages, and punitive damages." SDCL § 22-46-13. No underlying criminal conviction is required.

The Sprys restate the same arguments they made in response to Question 2, so there is no need to respond to them again. Though, the Sprys do make one very important acknowledgement—that the definitions of "exploitation" found in § 22-46-1 and § 22-46-3 are *different*. That acknowledgement supports the Estate's position here. If a perpetrator commits the exploitation described in § 22-46-3, it is a crime. If a perpetrator commits the exploitation described in § 22-46-1, it may not be a crime, but it would still expose the perpetrator to civil liability under § 22-46-13. Accordingly, the plain language of § 22-46-13 shows no underlying criminal conviction is required to bring a civil claim.

CONCLUSION

When it passed SDCL ch. 21-65 and SDCL ch. 22-46, the Legislature had goals of punishing and deterring vulnerable adult abuse and the abuse of the elderly. This is particularly so when the abuse takes place at the hands of someone who the elderly relies upon, such as a power of attorney. One mechanism to punish abusers and deter abuse is to hold abusers civilly liable for their abuse. Therefore, the Legislature created two separate avenues in which an abuser may be held accountable civilly: (1) a private right of action for vulnerable adult abuse under SDCL ch. 21-65, and (2) a private right of action for financial exploitation under SDCL § 22-46-13.

With respect to a claim under SDCL ch. 21-65, there is no indication the Legislature intended to give the abuser a free pass if the vulnerable adult happens to die. Why would it? Therefore, the answer to Question 1 is yes—South Dakota recognizes a private right of action for a violation of Chapter 21-65 after the death of the vulnerable adult.

With respect to a claim under SDCL § 22-46-13, the Legislature did not include any language that a civil claim was dependent upon a criminal conviction or violation. Had the Legislature desired that to be the case, it surely could have said so. It did not. Therefore, both Question 2 and Question 3 are answered by the principle: an underlying criminal conviction is not required to bring a claim under SDCL § 22-46-13. Accordingly, the answer to Question 2 (i.e., For a civil claim to be brought under SDCL § 22-46-3 and SDCL § 22-46-13, must the person against whom the claim is brought have been criminally convicted of theft by exploitation under SDCL § 22-46-3?) is no. And the answer to Question 3 (i.e., Can a civil claim be brought for violation of SDCL § 22-46-1 and SDCL § 22-46-13 with no requirement for a preceding criminal conviction given the "or" between § 22-46-1 and § 22-46-3 in SDCL § 22-46-13?) is yes.

Respectfully submitted this 8th day of October, 2021.

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The undersigned hereby certifies that this Response Brief of Plaintiff complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2016, this Response Brief contains 7,164 words and 36,604 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and any certificates of counsel. This Response Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 8th day of October, 2021.

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 8, 2021, the foregoing "Plaintiff's Response Brief" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

BARBARA HERMANEK-PECK, in her capacity as Personal Representative of the Estate of Richard Hermanek,

Plaintiff,

vs.

RICHARD SPRY and SUSAN SPRY,

Defendants.

Certification # 29649

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DIVISION, SOUTH DAKOTA
D.S.D. CASE 4:21-CV-04034-LLP

The Honorable Lawrence Piersol
District Court Judge

Order Accepting Certification filed on June 28, 2021

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Argument

1. SDCL Chapter 21-65 Authorizes Protection Orders, Not Damages.

Barbara argues that the relief authorized by SDCL §21-65-12 "assuredly include[s] monetary damages[.]" *Barbara's Brief* at 8. Barbara is wrong. Nothing in Chapter 21-65 speaks to or authorizes an award of damages. Rather, SDCL §21-65-12 outlines a variety of alternatives in the form of injunctive relief that the Court may issue to remedy financial exploitation. Indeed, the verbs utilized in that section are hallmark verbs used in fashioning equitable relief:

> (1) *Directing* the respondent to refrain from exercising control over the funds, benefits, property, resources, belongings, or assets of the vulnerable adult;
>
> (2) *Requiring* the respondent to return custody or control of the funds, benefits, property, resources, belongings, or assets to the vulnerable adult;
>
> (3) *Requiring* the respondent to follow the instructions of the guardian, conservator, or attorney-in-fact of the vulnerable adult; and
>
> (4) *Prohibiting* the respondent from transferring the funds, benefits, property, resources, belongings, or assets of the vulnerable adult to any person other than the vulnerable adult.

SDCL §21-65-12 (emphasis added). Directing a party to take, or prohibiting a party from taking, an action is classic injunctive relief designed to prevent or protect. 42 AM. JUR. 2D *Injunctions* §2 ("Mandatory injunctions compel positive action to change existing

conditions and to restore the status quo, while prohibitory injunctions preserve the status quo, by restraining the commission or continuance of an act."). To the extent the authorized remedies involve the return or transfer of money, they are not "money damages," but instead constitute equitable relief in the form of restitution or disgorgement. *See*, *e.g.*, *Liu v. Securities and Exchange Commission*, 140 S.Ct. 1936 (2020) (discussing equitable nature of disgorgement and restitution); *Johnson v. Larson*, 2010 SD 20, 779 N.W.2d 412 (discussing equitable nature of restitution).

Further evidence that this Chapter is limited to the issuance of a protection order is found in the title of §21-65-13 ("Limitations on *protection order*") and the text of §21-65-14, stating that a "protection order shall be for a fixed period of time not to exceed five years." SDCL §21-65-14. The word "damages" is not found anywhere within Chapter 21-65, because damages are not authorized therein. The Chapter is designed to provide equitable relief to vulnerable adults via issuance of a protection order.

a) A protection order does not survive the death of the protected person.

"It goes without saying that [a] restraining order is no longer in effect" after the protected person passes away. *Shin v. Shin*, No.

B303153, 2021 WL 82855, at *2 (Cal. Ct. App. Jan. 11, 2021), reh'g denied (Feb. 3, 2021) (unpublished). In *Shin*, the plaintiff was a vulnerable adult residing in a skilled nursing facility. *Id.* at *1. Plaintiff's son obtained an "elder or dependent adult abuse" restraining order against his sister, the defendant (also plaintiff's daughter). *Id.* The trial court entered a temporary restraining order and, later, a permanent, five-year restraining order. *Id.* The defendant appealed the permanent order; during the pendency of the appeal, the plaintiff died. *Id.* The appellate court dismissed the appeal as moot, noting that "[a]lthough the restraining order may have been for five years, respondent, the protected person, has passed away. *It goes without saying that the restraining order is no longer in effect.* It is moot, and therefore so is this appeal." *Id.* at *2 (emphasis added). The appellate court rejected the defendant's argument that the restraining order remain in effect until it was formally vacated or terminated: "Appellant directs us to no legal authority to support her novel proposition that when a person protected by a restraining order passes away, someone must move to vacate the restraining order or it will continue until its expiration." *Id.* at 3.

b) A victimized elder, or disabled adult, will not be left without a remedy.

Barbara devotes much of her Brief to arguing that abusers will get away with wrongdoing if the vulnerable adult dies, unless the right to pursue a protection order under Chapter 21-65 survives the vulnerable adult's death. This reflects a fundamental misapprehension of the law.

Multiple types of abuse are addressed in Chapter 21-65: physical abuse, emotional/psychological abuse, neglect, and financial exploitation. SDCL §21-65-1(4) (defining "vulnerable adult abuse"). Chapter 21-65 offers protection to vulnerable adults who are victims of any form of vulnerable adult abuse. This does not, however, preclude a victim from seeking other relief. If a vulnerable adult is a victim of physical or emotional abuse or neglect, they will also have a tort cause of action for personal injury against the perpetrator – assault, battery, or intentional infliction of emotional distress, to name a few. These claims will survive in the event of the victim's death and may be pursued by a personal representative of the estate. SDCL §15-4-1; *see*, *e.g.*, *Yellow Horse v. Pennington County*, 225 F.3d 923 (8th Cir. 2000); *Platt v. Rapid City*, 291 N.W. 600 (S.D. 1940). If the vulnerable adult is the victim of financial exploitation, they will have a cause of action against the perpetrator in tort or, potentially, contract, and even the

statutory cause of action outlined in §22-46-13 – breach of fiduciary duty, breach of contract, fraud, and conversion, to name a few. These, too, will survive the victim's death. SDCL §15-4-1; *see*, *e.g.*, *Yellow Horse*, 225 F.3d 923; *Platt*, 291 N.W. 600. A personal representative may pursue redress against an alleged perpetrator for abuse of a deceased vulnerable adult, and they may seek a multitude of remedies, including damages or equitable relief, depending on the particular claim brought. Indeed, Barbara herself has brought such claims in this action.[1]

Abusers will not be "suddenly reprieved from their wrongdoing" upon the death of a victimized vulnerable adult. *See Barbara's Brief* at 10 (supplying quoted language). Far from it. An abuser may be pursued civilly by the decedent's estate through any number of tort, contract, or statutory claims, and they may also be prosecuted criminally via SDCL Chapter 22-46.

[1] In her claim brought under SDCL Chapter 21-65, Barbara has alleged financial exploitation, and seeks the return of "custody or control of the funds, benefits, property, resources, belongings, and/or assets" of the Decedent to the Estate, pursuant to SDCL §21-65-12. Doc. 1-2 at 8 (¶61), 9 (¶62). These remedies are no longer available via a protection order under Chapter 21-65, but they are potentially available to her through her claims of breach of fiduciary duty and conversion.

2. SDCL §22-46-13 Creates a Cause of Action only *After* a Finding of Exploitation.

Barbara distorts Sprys' argument regarding the structure and language of the statute by asserting that all claims require proof of multiple elements; therefore, proof of exploitation in an action under §22-46-13 is unremarkable. *See Barbara's Brief* at 21-22. This misconstrues Sprys' argument and ignores the statutory language entirely.

Proving essential elements of a claim in order to establish liability, or proving liability in order to establish a right to damages (or other remedy) is inherent in every civil action. That is not the issue here. Here, the statute *requires a judicial finding before the cause of action arises*, and not merely before there can be an entitlement to damages: "A court may find that an elder or adult with a disability has been exploited as defined in § 22-46-1 or 22-46-3. *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 for the exploitation." SDCL §22-46-13. There is no other way to interpret this language.

Barbara cites to numerous cases from other jurisdictions, but none of those statutes require a judicial finding prior to the cause of action

being created. Indeed, those cases involve statutes that require particular conduct by the defendant, such as "commission of a criminal act," obtaining property via "theft, robbery, or burglary," of "violat[ing] a law." *Barbara's Brief* at 18-19. But none of these statutes require a judicial action, such as a "conviction" or, as in this case, a "find[ing]." Moreover, several of the cases cited by Barbara involve statutes that required a "violation" of another statute, and those holdings are in direct contradiction to this Court's holding in *K&E Land and Cattle, Inc. v. Mayer*, 330 N.W.2d 529 (S.D. 1983) (holding that the phrase "[a]ny person who violates §22-34-1" required proof of a criminal conviction). Such cases are thus not persuasive at all but are, in fact, inapposite.

Barbara's attempt to distinguish *K&E* from this case, and instead focus on *Trumm v. Cleaver*, 2013 SD 85, 841 N.W.2d 22, ignores the limited applicability of *Trumm*. The *Trumm* opinion did not cite to *K&E*, but *Trumm*'s holding was expressly based upon the existence of "related statutes in chapter 25-10 addressing protection from domestic abuse [that] require a criminal conviction." *Trumm*, at ¶10, 841 N.W.2d at 24-25. Specifically, there were several statutes in chapter 25-10 that contained the phrase "convicted of a crime involving domestic abuse[.]" *Id.* (collecting statutes). It was critical to the

Trumm Court that the word "convict" or "conviction" was not included in the text of SDCL §25-10-1(1). This is distinguishable from *K&E*, where there were no related statutes to shed light on the use of the word "violate."

As noted in the opening brief, *K&E* is more applicable than *Trumm* to the instant case. The statute at issue in *K&E* that created civil liability for treble damages – SDCL §22-34-2 – was part of the criminal code within the chapter defining the underlying criminal conduct. *See* SDCL Title 22 ("Crimes"). Here, too, the statute in question is found within the criminal code, in the chapter pertaining to the crime of elder abuse. *See* SDCL Chap. 22-46 ("Abuse, Neglect, or Exploitation of Elders or Adults with Disabilities"). Furthermore, the statute in *K&E* required a violation of a criminal definition statute that was "without any tort basis." *K&E*, 330 N.W.2d at 532. Here, too, both SDCL §22-46-3 and §22-46-1 are criminal statutes, "without any tort basis." As the *K&E* Court recognized, it was "unable to find" a violation of the criminal statute because the defendant had not been prosecuted under that statute. *Id.* The same rationale applies here. Barbara cannot escape the criminal nature of SDCL §§ 22-46-3 and 22-46-1, and the *K&E* holding compels a finding here that a civil action under §22-46-13 must be predicated upon a criminal conviction.

Barbara's argument regarding public policy is similarly unconvincing, because it is premised upon the notion that SDCL §22-46-13 is the exclusive civil remedy for a victim of financial exploitation of an elder. Yet again, Barbara fails to recognize the multitude of civil remedies available to a victim of elder abuse, including obtaining a protection order pursuant to SDCL Chapter 21-65 and seeking relief via a tort or contract claim. Public policy absolutely supports the existence of remedies for a victim of elder abuse of any kind, but that policy is not thwarted or stymied by requiring a criminal conviction to precede a statutory cause of action under §22-46-13, particularly when the plain language of that statute requires it.

The only possible judicial finding of exploitation as defined by §22-46-3 is via a criminal conviction. SDCL §22-46-3 is not referenced anywhere else in the Code and thus cannot be the basis of any other judicial finding. Consequently, the requisite judicial finding to give rise to the statutory cause of action under §22-46-13 must be a criminal conviction.

3. The Reference to SDCL §22-46-1 Does Not Alter the Result.

SDCL §22-46-1 defines seven terms, including "exploitation." SDCL §22-46-1(6). The term "exploitation" is used throughout SDCL Chap.

22-46 in relation to reporting exploitation to law enforcement, a state's attorney, or the Department of Human Services. *See* SDCL § 22-46-5 (investigation by agency or law enforcement), §22-46-7 (reporting), §22-46-8 (immunity for reporting), §22-46-9 (mandatory reporting), §22-46-10 (mandatory reporting), §22-46-11 (voluntary reporting), §22-46-12 (information required in report). The term is also used in the statutes creating the civil action under §22-46-13 and additional penalties under §22-46-14. Lastly, the word is found in SDCL §22-46-3, which prescribes the elements of the crime of *theft by exploitation* of an elder or disabled adult. SDCL §22-46-3.

Barbara fails to identify any circumstance under which there can be a "judicial finding" of exploitation under §22-46-1 so as to trigger the cause of action specified in §22-46-13. Nor has she identified any circumstance under which there can be a "judicial finding" of exploitation *other than a criminal conviction* of theft by exploitation as articulated in §22-46-3. *See generally Barbara's Brief* at 23-25. Instead, she contends that the definitions in those statutes are to be used within the confines of the civil action brought under §22-46-13. This argument puts the cart before the horse; there must first be a judicial finding of exploitation, which cannot occur outside of a criminal conviction, before the cause of action arises.

Barbara further argues the Legislature could have drafted the statute differently, and "said something along the lines of: 'When there is a conviction under SDCL §22-46-3, the elder or adult … has a cause of action ….'" *Barbara's Brief* at 24. Sprys agree this statute was poorly drafted, but supposition about how it could have been better drafted is a reciprocal exercise that ultimately favors Sprys' position more than Barbara's. Had the Legislature intended the result urged by Barbara, it would have omitted the first sentence, and the first half of the second sentence, and simply said, "An elder or adult with a disability has a civil cause of action for financial exploitation as defined in §22-46-1 or §22-46-3. The aggrieved elder or adult with a disability may recover actual and punitive damages for the exploitation." In other words, significant revision of the statutory language is necessary to accomplish Barbara's interpretation, while Sprys' interpretation is based on the language as written, even if it could have been drafted differently.

4. If the Court finds an Ambiguity, the Task Force Report Provides Evidence of Legislative Intent.

If a statute is unambiguous, resort to legislative history is not warranted. *Fin-Ag, Inc. v. Cimpl's, Inc.*, 2008 SD 47, ¶20, 754 N.W.2d 1, 9. Should this Court find the statutes in question to be ambiguous,

the best record of legislative intent can be found in the South Dakota Elder Abuse Task Force Report.

During the 2015 Legislative Session, Senate Bill 168 was passed to create the South Dakota Elder Abuse Task Force. South Dakota Elder Abuse Task Force, *Final Report and Recommendations* (Dec. 2015) ("Task Force Report"), available at https://dhs.sd.gov/LTSS/docs/Attachment%20J%20South%20Dakota%20Elder%20Abuse%20Task%20Force%20Report(Final).pdf. The Task Force was directed to "study the prevalence and impact of elder abuse in South Dakota and to make recommendations to the Legislature on policies and legislation to effectively address the issue." *Id.* Relevant to this case are two Task Force recommendations: 1) Expand *protection orders* for elders and adults with a disability, and 2) Create a *civil action for exploitation* of vulnerable adults. *Id.* at p. 4. The Task Force Report provides the history of, and proposals for, the legislation found in SDCL Chap. 21-65 and SDCL §22-46-13; the legislation proposed in the report appears to be identical to what was passed by the Legislature. *Compare* Task Force Report at pp. 18-27 *with* SDCL Chap. 21-65; *and* Task Force Report at pp. 48-52 *with* SDCL Chap. 22-46.

The protection order statutory scheme was modeled after Iowa Code §235F.1 and contains many parallels to South Dakota's existing protection order statutory schemes. These similarities were discussed in the opening brief and are discussed in the Task Force Report. Task Force Report at p. 20. The Task Force Report notes the goal of providing a "remedy to *physically protect* elders and adults with a disability where they are domiciled, a remedy *like that found in South Dakota's domestic protection order statutes*." *Id.* at p. 6 (emphasis added). In sum, the report clearly evinces the Task Force's intent to provide *protection* in the form of protection orders, not tort claims for monetary damages.

The Task Force further recommended a civil cause of action be created for financial exploitation to provide "additional protection" to "victimized elders." *Id.* at p. 9. As noted in the opening brief, this civil cause of action incorporates some of the injunctive remedies found within the protection order statutes. *Id.* at p. 30. The Task Force Report is silent on whether a criminal conviction is a predicate to the civil cause of action, but SDCL §22-46-13 is modeled after Florida statute (F.S.A.) §415.1111. The Florida statute is located within Title XXX (Social Welfare), Chapter 415 (Adult Protective Services); it is not

part of the Florida criminal code. Critically, the statute states, in its entirety:

> A vulnerable adult who has been abused, neglected, or exploited as specified in this chapter has a cause of action against any perpetrator and may recover actual and punitive damages for such abuse, neglect, or exploitation. The action may be brought by the vulnerable adult, or that person's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person's guardian, or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect, or exploitation. The action may be brought in any court of competent jurisdiction to enforce such action and to recover actual and punitive damages for any deprivation of or infringement on the rights of a vulnerable adult. A party who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult. Notwithstanding the foregoing, any civil action for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part II of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.023, or against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part I of chapter 429 relating to its operation of the licensed facility shall be brought pursuant to s. 429.29. Such licensee or entity shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party in an action brought under this section.

Florida Statute (Annotated) §415.1111. In other words, the Task Force added the first sentence and the first half of the second sentence to

SDCL §22-46-13, which is the very language that conditions the existence of the cause of action upon a "court find[ing] exploitation occurred." SDCL §22-46-13. The addition of this language is convincing evidence of the legislative intent to predicate the civil cause of action upon a criminal conviction.

The legislative intent, as expressed in the Task Force Report, supports Sprys' urged interpretation of the statutes in question.

Conclusion

Chapter 21-65 authorizes the existence of protection orders, not compensatory damages. Because protection orders do not survive the death of the petitioner (and likely not the death of the respondent), a claim under Chapter 21-65 cannot survive the death of the vulnerable adult, and Barbara has no standing to seek a protection order against Sprys.

Nor does Barbara have a claim under §22-46-13 in the absence of a criminal conviction. This is compelled not only by the text of the statute, but also upon consideration of the Elder Abuse Task Force's specific inclusion of that text to a statute that did not require a prior judicial finding.

Sprys respectfully this Court answer "No" to Certified Questions 1 and 3, and "Yes" to Certified Question 2.

Respectfully submitted this 25th day of October, 2021.

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Pursuant to SDCL § 15-26A-66(b)(4), Defendants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Century 13 point. The word processor used to prepare this brief indicated that there are a total of 3,333 words in the body of the brief.

/s/ Sarah Baron Houy
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The undersigned hereby certifies that October 25, 2021, the foregoing *Defendants' Reply Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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