APPELLANT'S BRIEF

IN THE SUPREME COURT OF SOUTH DAKOTA

No. 30830

GLENN AMBORT,

Plaintiff and Appellant,

v.

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, SHARON JUNGWIRTH,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID R. GIENAPP
Circuit Court Judge

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PRELIMINARY STATEMENT

Citations to the Indexes below will be referred to as "IDX" followed by the page number, then the page(s) within the IDX.

JURISDICTIONAL STATEMENT

This is an appeal from the lower court's Letter Decision, its Order Granting Defendant Brock Klapperich's Motion to Dismiss, its Order Granting Ronayne and King Motions to Dismiss and Judgment of Dismissal with Prejudice, and its Order Granting Defendants Victor B. Fischbach and Sharon Jungwirth's Motion to Dismiss, the latter of which were entered and filed with the Clerk of the Circuit Court in and for Spink County, South Dakota, on the 29th day of July, 2024. Notice of Entry of said Order for Defendants Victor B. Fischbach and Sharon Jungwirth was served on Plaintiff-Appellant, Glenn Ambort, on July 29, 2024. IDX 320-42. Glenn filed his Notice of Appeal of said Letter Decision, Orders and Judgment of Dismissal on August 26, 2024. IDX 346.

The circuit court's Orders and Judgment are appealable as a matter of right under SDCL 15-26A-3(1) & (2).

STATEMENT OF ISSUES

I. WHETHER BETTY CLEMENSEN IS THE REAL PARTY IN INTEREST

Most relevant case:

Ellingson v. Ammann, 830 N.W.2d 99, 101 (S.D. 2013)

Most relevant statute:

SDCL 15-6-17(a).

II. WHETHER BETTY, AS THE REAL PARTY, AND GLENN, AS THIRD PARTY LITIGANT, MUST EACH ALLEGE AN INJURY IN FACT?

Most relevant case:

Taliaferro v. Darby Tp. Zoning Bd., 458 F.3d 181 (3d Cir. 2006).

Powers v. Ohio, 499 U.S. 400, 411 (1991)

Most relevant statute:

SDCL 15-6-17(a).

III. WHETHER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT AND OUR CONSTITUTION AND ITS "OPEN COURTS" PROVISION GUARANTEED BETTY THE RIGHT TO HER DAY IN COURT?

Most relevant case:

Dusenbery v. United States, 534 U.S. 161, 167 (2002)

In re the Construction of Article III, Section 5, of the South Dakota Constitution, 464 N.W.2d 825 (S.D. 1991)

Most relevant statute:

U.S. Constitution, Amendment XIV.

South Dakota Constitution, Article VI, § 2 and § 20.

IV. WHETHER BETTY WAS DEPRIVED OF A VESTED PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW?

Most relevant Case:

Marbury v. Madison, 5 U.S. 137 (1803)

Most relevant Statute:

SDCL 15-4-1

V. WHETHER THIRD PARTY STANDING IS PROPER IF BETTY'S EXERCISE OF HER RIGHT TO CONTROL HER REAL PROPERTY IS INEXTRICABLY BOUND UP WITH THE INJURIES GLENN SUFFERED IN AIDING HER TO DO SO?

Most relevant Case:

Singleton v. Wulff, 428 U.S. 106 (1976)

Most relevant Statute:

SDCL 22-46-13

VI. WHETHER THE COMPLAINT IS BARRED BY RES JUDICATA?

Most relevant case:

Dakota Plains Ag Center v. Smithey, 772 N.W.2d 170 (S.D. 2009)

VII. WHETHER SDCL 3-21-2 APPLIES?

Most relevant case:

Hallberg v. S.D. Bd. of Regents, 937 N.W.2d 568, 576 (S.D. 2019)

Most relevant statute:

SDCL 3-21-2

STATEMENT OF THE CASE

The trial court was the Honorable David R. Gienapp. The defendants moved for dismissal of the Complaint under SDCL 15-6-12. Three Orders granting the Defendants'

motions to dismiss were signed by the court and entered on the record on July 29, 2024. IDX 326-30. The Notice of Entry of said Judgment was served on Glenn on July 29, 2024 by Counsel for Ronayne and King. IDX 330. Glenn filed his Notice of Appeal on August 26, 2024, IDX 348, appealing the denial of said Judgment and Orders. The request for the transcript for the July 2, 2024, hearing before Judge Gienapp was served on August 27, 2024. IDX 367. The transcript was emailed to Glenn previously by the Court Reporter on July 18, 2024. IDX 271. Pursuant to SDCL 15-26A-75, Glenn's opening brief as Appellant is due on October 10, 2024.

STATEMENT OF FACTS

On March 22, 2024, Glenn filed a Complaint on behalf of Betty Clemensen ("Betty"), as the real party in interest, alleging Glenn's standing under the doctrine of third party standing. IDX 1. The Defendants filed motions to dismiss under SDCL 15-6-12. IDX 66, 89, 133. All Defendants argued that Glenn lacks standing, Defendants Ronayne and King argued the Complaint was precluded under res judicata, and Defendants Fischbach and Jungwirth argued that the Claim was precluded for failure to comply with SDCL 3-21-2 (Notice prerequisite to action for damages--Time limit). Glenn opposed, the trial court held a hearing on said motions on July 2, 2024, and the Orders and Judgment of Dismissal followed on July 29, 2024. IDX 326-330. Glenn's Notice of Appeal followed on August 26, 2024. IDX 326.

ARGUMENT

Standard of Review

> [¶11.] We review a circuit court's grant of a motion to dismiss de novo. *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712. "A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the

pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496.

[¶12.] "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *N. Am. Truck & Trailer* , 2008 S.D. 45, ¶ 6, 751 N.W.2d at 712 (quoting *Thompson v. Summers* , 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390). "[W]hile the court must accept allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Nygaard v. Sioux Valley Hosps. & Health Sys.* , 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (quoting *Wiles v. Capitol Indem. Corp.* , 280 F.3d 868, 870 (8th Cir. 2002)).

LP6 Claimants, LLC v. S.D. Dep't of Tourism & State Dev., 945 N.W.2d 911, 915 (S.D. 2020).

I. WHETHER BETTY IS THE REAL PARTY IN INTEREST?

A. **The Applicable Law**:

This Court has explained the real party in interest rule:

Further, "[e]very action shall be prosecuted in the name of the real party in interest." SDCL 15–6–17(a). "The real party in interest rule is satisfied 'if the one who brings the suit has a real, actual, material, or substantial interest in the subject matter of the action.' " *Biegler v. Am. Family Mut. Ins. Co.*,2001 S.D. 13, ¶ 27, 621 N.W.2d 592, 600. "The purpose of the real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party plaintiff and that such an action must be defended only once." *Id.*

Ellingson v. Ammann, 830 N.W.2d 99, 101 (S.D. 2013).

This explanation aligns with the definition of real party in interest found in Black's Law Dictionary:

As defined in Black's Law Dictionary, a real party in interest is a "[p]erson who will be entitled to benefits of action if successful, that is, the one who is actually and substantially interested in subject matter as distinguished from one who has only a nominal, formal, or technical interest in or connection with it." BLACK'S LAW DICTIONARY 1264 (6th ed. 1990).

With v. Knitting Fever, Inc., 742 F. Supp. 2d 568, 577 n.4 (E.D. Pa. 2010).

B. **Betty is the real party in interest in this case**.

The Complaint alleges: "Ambort has standing to assert Betty's right to seek damages for exploitation, under the doctrine of third-party standing. *Powers v. Ohio*, 499 U.S. 400, 411 (1991)." IDX 1, Complaint at ¶ 9. Glenn asserted that Betty was the real party in interest: IDX 180, Opposition To Defendants' Motions To Dismiss ("OPP") at 18, 21, IDX 271, Motions Hearing (FTR Recording) at 30.

Betty passed away on September 23, 2019, Complaint ¶2, had the "real, actual, material, or substantial interest in the subject matter of the action," *Ellingson*, 830 N.W.2d at 101, and, through her estate, will benefit from this action, if successful. Black's Law Dictionary 1264 (6th ed. 1990). Glenn is not entitled to the benefits of this action, if successful. Betty is the real party in interest.

II. WHETHER BETTY, AS THE REAL PARTY, AND GLENN, AS THIRD PARTY LITIGANT, MUST EACH ALLEGE AN INJURY IN FACT?

A. **The Applicable Law:**

It is common knowledge that the real party in interest (the first party) must allege an injury in fact to bring the lawsuit. However, the third party must allege likewise.

> Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 193-194 (1976).

Secretary of State of Md. v. J. H. Munson Co., 467 U.S. 947, 956 (1984). "Thus, whether asserting first party standing or third party standing, a plaintiff must state an injury in fact." *Taliaferro v. Darby Tp. Zoning Bd.*, 458 F.3d 181, 189 (3d Cir. 2006).

B. **The Complaint alleged that Betty and Glenn suffered injuries in fact**.

The Complaint alleged injury and damages to Betty by the defendants. Complaint at ¶¶ 9, 71-72, 95-96. Her injury was pled to satisfy her status as the real party in interest. The Complaint alleged that Glenn was injured or suffered damages also. Id. at ¶¶11-12, 27. His injury-in-fact was necessary to allege third-party standing. *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("the litigant must have suffered an 'injury-in-fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute") (citations omitted).

Betty, as first party, and Glenn, as third party, each alleged that they had suffered an injury in fact, as required by the doctrines of real party and of third party standing.

III. WHETHER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT AND OUR CONSTITUTION AND ITS "OPEN COURTS" PROVISION GUARANTEED BETTY THE RIGHT TO HER DAY IN COURT?

A. **The Applicable Law**:

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without due process of law." *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (cleaned up).

> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535.

Truax v. Corrigan, 257 U.S. 312, 332 (1921).

Article VI, § 2 of the South Dakota Constitution provides, in part: "No person shall be deprived of life, liberty or property without due process of law."

> It is a principle declared by our constitution . . . that no person shall be deprived of life, liberty, or property, without due process of law. There can be no due process of law unless the party to be affected has his day in court.

In re the Construction of Article III, Section 5, of the South Dakota Constitution, 464 N.W.2d 825, 827 (S.D. 1991).

Article VI, § 20 of the South Dakota Constitution provides, in part: "All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay."

> We must continually guard against the excessive use of res judicata, especially when used to bar claims involving different parties, and against those not in privity with the parties, for fear of denying proper claims of those wrongfully damaged. To do so would deny claimants their "day in court" and be in direct violation of the open courts provision of the South Dakota Constitution art. VI, § 20.

Bruntz v. Rutherford, 451 N.W.2d 290, 293 (S.D. 1990) (SABERS, Justice, concurring specially).

B. **The due process clause of the 14th Amendment, as well as the due process clause and "open courts" provision of the South Dakota Constitution guaranteed Betty the right to her "day in court."**

Article VI, § 2 guaranteed Betty her "day in court" if her statutory right to bring a cause of action under SDCL 22-46-13 was "property" or a property right.

Article VI, § 20 also guaranteed Betty her "day in court" if she had suffered an injury done to her in her property. Her remedy was to be "by course of law."

The 14th Amendment secured her right to her day in court if her cause of action was found to be a property right under South Dakota law, and it is. *Christians v. Christians*, 637 N.W.2d 377, 382 n.2 (S.D. 2001) ("A tort cause of action is clearly a property right.").

Glenn filed the Complaint on behalf of Betty to secure her day in court under SDCL 22-46-13. IDX 1, Complaint at ¶¶9-10, 12-14, 17-19, Count One. Betty was the real party in interest in the lawsuit. IDX 271, Transcript (FTR Recording) at p.30.

The 14th Amendment of the U.S. Constitution, as well as the due process clause and open courts provision of the South Dakota Constitution, secured to Betty her day in court to litigate her claim of exploitation against the defendants if her cause of action under SDCL 22-46-13 was a property right, secured by this State, as well as by the due process clause of the Fourteenth Amendment.

IV. WHETHER BETTY WAS DEPRIVED OF A VESTED PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW?

A. The Applicable Law.

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. 137, 163 (1803).

"A tort cause of action is clearly a property right." *Christians v. Christians*, 637 N.W.2d 377, 382 n.2 (S.D. 2001).

"As previously discussed, the rights and obligations of the parties are vested at the time the injury occurs. *See, e.g. Salmon*, 72 S.D. at 118, 30 N.W.2d at 648; *Faircloth*, 2000 SD 158, ¶ 5, 620 N.W.2d at 200. " *Sopko v. C R Transfer Company Inc.*, 665 N.W.2d 94, 99 (S.D. 2003).

> [¶30.] However, our role on appeal is not to create a specific child support formula to fill the statutory gap discussed above. That is for the Legislature. Here, the child support statutes do not address the factual scenario presented and the circuit court had discretion to equitably determine an amount of child support that reflects, as closely as possible, the overarching Legislative intent behind our statutory scheme.

Burkard v. Burkard, 2024 S.D. 38, ¶ 30 (7/10/2024).

B. **Betty was deprived of a vested property right without due process of law**.

Glenn filed the tort below "to assert Betty's right to seek damages for exploitation." Complaint ¶9. "The conspiracy to commit aggravated grand theft of Betty's farmlands and her Aberdeen house by exploitation, as defined at SDCL 22-46-1(5), was completed on March 22, 2018 . . ." IDX 1, Complaint ¶50. The defendants' injury to Betty occurred and was vested on that date. *Sopko*, 665 N.W.2d at 99.

Betty died on September 23, 2019. IDX 1, Complaint ¶2, 12. Betty's tort action against the defendants, which accrued to and vested in her on March 22, 2018, survived and was vested to her upon death, under SDCL 15-4-1 which provides:

> All causes of action shall survive and be brought, notwithstanding the death of the person entitled or liable to the same. Any such action may be brought by or against the personal representative or successors in interest of the deceased.

Betty's exploitation tort against the Defendants survived and vested in her post-mortem on September 23, 2019, under SDCL 15-4-1.

On July 12, 2024, 10 days after the motions hearing before Judge Gienapp, Glenn emailed to the Court, Counsel for the defendants, and the Clerk of Court, paragraph 30 of this Court's decision in *Burkard v. Burkard*, 2024 S.D. 38, ¶ 30 (7/10/2024). Appendix 1. The circuit court rendered its decision 17 days later, on July 29, 2024, dismissing the exploitation tort for Betty with prejudice.

Brock Klapperich, Betty's personal representative, Ron Clemensen, her son, and Patrice Ellwanger, her daughter, the latter two being Betty's successors in interest, . . . all three were hindered from bringing the exploitation tort on behalf of Betty after her death. Complaint ¶¶20-23. Glenn addressed the limitations hindrance in his (IDX 180)

Opposition to Defendants' Motions to Dismiss ("OPP") at p.15 (". . . *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) ("A second obstacle is the imminent mootness, at least in the technical sense, of any individual woman's claim."); *Jane Doe v. Piper*, 165 F. Supp. 3d 789, 805 (D. Minn. 2016) ("the Does meet the third element because a sufficient 'hindrance' exists when the third party's claims are likely to soon become moot. *Craig* , 429 U.S. at 192"). An issue is moot when the limitation period has run. *Sjomeling v. Sjomeling*, 472 N.W.2d 487, 491 (S.D. 1991). * * * The statute of limitations, SDCL 15-2-13(5) is a bar / hindrance to Brock, Ron, or Lonny's [on behalf of Patrice's estate] bringing a third party suit on behalf of Betty for exploitation against the Defendants").

All of the parties named in the survival statute, SDCL 15-4-1, and in the civil exploitation statute, SDCL 22-46-13, were precluded by the statute of limitations from bringing Betty's exploitation claim against the Defendants after March 22, 2024. Glenn filed her claim on March 22, 2024, alleging third-party standing, but was denied by the court below despite the fact that he is Betty's only "effective adversary" remaining who can litigate Betty's rights. This Court should find that he has third party standing to do so.

The court below deprived Betty of her vested legal right to have her exploitation claim heard and resolved in a "day in court" on procedural grounds, namely, that Glenn lacked third-party standing. In effect, the court found that the Legislature vested within Brock, Betty's personal representative and his advisors, all of whom are alleged to have conspired to exploit Betty of her real property, . . . the power under SDCL 22-46-13 to deny Betty her vested right, under SDCL 15-4-1, to have Glenn, who satisfied the requirements of third-party standing, litigate her exploitation tort against the Defendants. Betty was deprived of her property right to have her vested legal right to litigate her

exploitation tort against the Defendants. *Marbury v. Madison,* 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. Com. 109."). Cf. also Transcript IDX 271 at 32-34 (addressing the statutory scheme surrounding SDCL 22-46-13 whereby the Legislature intended for Betty to enjoy her substantive right to litigate her exploitation tort against the Defendants even post-mortem, and urging the circuit court to find that where, as here, the Legislature did not provide for the instance wherein the personal representative would be conflicted, the doctrine of third-party standing could be used by the courts to provide a remedy for the exploitation she is alleged to have suffered at the hands of the personal representative and his advisors).

Denying Glenn third-party standing to litigate Betty's vested "property right" of exploitation, requiring the Defendants to answer for their actions will leave Betty with no access to the courts post-mortem, a violation of federal and state due process, as well as denial of access to the courts under the open courts provision of the SD Constitution. Glenn argued this issue below, IDX 271 at 31-34, excerpts following:

> THE COURT: But SDCL 15-4-1 allows causes of action surviving death of a party. . . . And where do you fit in under that statute? . . .
> MR. AMBORT: Well, I was, I was, I was hoping that I was addressing that. That if, if Brock can't bring it and the other people can't bring it, then the court, the U.S. Supreme Court and the appellate courts and state courts that have litigated these issues have found that, that somebody who has been injured and can assert the, the, the rightholder's right, that person can, can come in.
>
> And I've come in because I've been injured by her asserting her rights. In my assisting her, my, my right has been inextricably bound up with her exercise of her rights. *So somebody has to bring that right.* [italics added].
>
> * * *
>
> . . . But they [the SD legislators] went further. They named people. But it was clear by their naming it that they intended a whole bunch of people to be able to do it.
>
> But they never took into account what happens when the last person that's able to do it can't do it because he's conflicted. Then at that point, third-party standing comes in . . .

* * *

So the question that the Court has to deal with, in my opinion, is how do you -- you're, you're a little bit like Solomon and the baby. You've got the substantive right here, and you've got the procedure here. How do you split the baby?
Or how do you save Betty's right? Because if you rule that I don't have the third-party standing, you, you necessarily – although, without speaking it - you are necessarily saying, "Betty, your right has disappeared" because the legislature didn't provide for this exceptional circumstance where the personal representative would be conflicted and would be involved in looting the estate.

. . . . The Court is in the position of interpreting what it believes the legislature wanted to do.

. . . That the legislature intended Betty to have a right. They didn't -- they thought that they had provided enough procedures that, that Betty would always be able to have that exercise even after her death, but they didn't provide for when the personal representative and his advisors and his attorneys are in league together to loot the estate. Him to get the land, the attorneys to get exorbitant fees. These are the allegations.

So the Court is faced with what would the legislature intend to have happen here? Would they intend Betty's right to die? Betty's -- that came out the wrong way. Would they intend that Betty's right to sue for exploitation would expire because she has the unfortunate situation of having a conflicted personal representative? Or can the Court fashion a way using the third-party principles and doctrine to save the substantive right that Betty has by saying where in the, where in this action can I see. Well, they did offer that if Betty would have agreed to somebody to do it, that person could do it. And I certainly fit in that situation.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court addressed a situation that shed light on the standing required of litigants to address the denial of constitutional rights of others. A Connecticut law prohibited the use of contraceptives and counseling about their use. Estelle Griswold, executive director of Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton were arrested for providing contraception advice to married couples. The Court allowed Griswold and Buxton, who were medical professionals, to assert the constitutional rights of their patients (married couples seeking contraception advice). The Court recognized that if Griswold and Buxton were not allowed to assert their patients' rights, those rights would be effectively denied or diluted.

Griswold and Buxton, who ran a birth control clinic, were directly impacted by the

law because they were arrested and convicted for violating Connecticut's contraception ban. This gave them a concrete stake in challenging the law. *Id.* at 480-81.

Like Griswold and Buxton, Glenn was indicted (although the indictment was dismissed against him some 2 ½ years later, IDX 1, ¶28), arrested, jailed, required to post $50,000 bond, IDX 1, ¶27, and endured malicious prosecution without probable cause, IDX 1, ¶¶11, 15, for exploitation of Betty (SDCL 22-46-3, IDX 1, ¶28, Exhibit 12), the criminal version of the civil exploitation statute (SDCL 22-46-13) under which Glenn filed the present case for and on behalf of Betty, IDX 1, ¶1. Glenn has a concrete stake in challenging the state's application of the law under which he was arrested, jailed, and indicted. Trial of the Defendants will enable him to reveal to the court and a jury the true exploiters of Betty in her property. "Litigating her rights to own property and devise as she wished will not only vindicate her rights as determined by a jury, under directions of this Court, but will also provide evidence that Glenn was wrongly arrested, imprisoned, and prosecuted, evidence from a jury that he cannot obtain in any other judicial proceeding." IDX 180 at 14.

The Court noted that Griswold and Buxton, having suffered criminal prosecution as accessories for aiding and assisting with contraceptive advice "should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime." *Id.* at 481.

In similar vein, Glenn should have third-party standing to litigate for Betty and thereby assert to a jury that the charge of exploitation against should have been brought against the Defendants, three of whom are esteemed members of the bar.

Analogizing the standing issue to seven previous Supreme Court cases, Justice

Douglas, writing for the majority, stated: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Id.* at 481.

Unless Glenn is permitted to press the case against the Defendants to completion on behalf of Betty, her property right to bring her exploitation tort against the Defendants will be forever lost, despite the fact that her right is secured by the due process clause and the open courts provision of the South Dakota, as well as by the due process clause of the Fourteenth Amendment to the U.S. Constitution.

The Defendants succeeded in exploiting Betty of all her property for their benefit – Brock succeeded in obtaining Betty's nine quarters of agricultural land and the attorneys received exorbitant fees with no oversight from the courts.

This case is similar to cases in which the Supreme Court has recognized that practical barriers, such as fear of reprisal, lack of resources, or the transient nature of the violation, would likely prevent the rightholders from asserting their own rights effectively. By allowing third-party standing, the courts ensured that important constitutional and legal issues could be addressed and that the rights of vulnerable or disadvantaged groups could be protected. For example:

Craig v. Boren, 429 U.S. 190 (1976): A beer vendor was allowed to challenge age-based alcohol regulations on behalf of male customers. The Court recognized that the customers themselves faced practical obstacles to bringing suit.

Powers v. Ohio, 499 U.S. 400 (1991): The Court allowed a criminal defendant to challenge racial discrimination in jury selection on behalf of excluded jurors. The Court noted that excluded jurors would face significant barriers to bringing their own suits.

Eisenstadt v. Baird, 405 U.S. 438 (1972): A contraceptive distributor was granted standing to challenge contraceptive distribution laws on behalf of unmarried persons. The Court recognized the practical difficulties these individuals would face in bringing their own lawsuits.

NAACP v. Alabama, 357 U.S. 449 (1958): The Court permitted the NAACP to assert its members' rights, recognizing that individual members might be deterred from bringing suit due to fear of reprisal.

Griswold v. Connecticut, 381 U.S. 479 (1965): The Court allowed doctors to challenge contraception laws on behalf of their patients, recognizing the practical difficulties patients would face in bringing such cases themselves.

June Med. Servs. v. Russo, 140 S. Ct. 2103 (2020): The Court reaffirmed the practice of granting standing to abortion providers to litigate on behalf of women seeking abortions, recognizing the unique challenges women face in bringing such cases themselves.

Barrows v. Jackson, 346 U.S. 249 (1953), addressed the issue of racial restrictive covenants. Jackson, a white property owner, was sued for damages by other white co-covenanters (Barrows and others) for allegedly breaching the racial covenant by selling her property to Black buyers. The Court allowed Jackson, a white property owner to challenge racially restrictive covenants on behalf of potential non-white buyers. The Court noted it would be difficult for potential non-white buyers to bring suit themselves.

Jackson, the defendant, was allowed to assert the equal protection rights of the Black buyers (who were not parties to the case) in her defense against enforcing the racial covenant. The Court made an exception to the rule against third-party standing, citing the

unique circumstances and the need to protect fundamental rights.

Glenn asks this Court to recognize the unique circumstances in this case: a *pro se* litigant bringing an action on behalf of Betty postmortem because the law and the circumstances preclude anybody else from bringing it. If Glenn is not permitted to do so, Betty's fundamental "property right" will be forever lost.

The *Barrows* Court recognized a "unique situation" where state court action could potentially result in a denial of constitutional rights:

> But in the instant case, we are faced with a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 184 Cal. 26, 192 P. 1021.

Barrows, 346 U.S. at 257.

Here, the "unique situation" is that Glenn, a pro se litigant, suffered prosecution, arrest, and imprisonment for aiding Betty, through her attorney – injuries in fact that were bound up with Betty's exercise of her constitutional right to devise her estate in the manner she wished. The circuit court's denial of Glenn's third-party standing results in the denial of Betty's constitutional right to devise her property as she chose and her "property right" to file the exploitation tort against the defendants.

Barrows noted "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Id.* 346 U.S. at 257.

So, also, it is impossible for Betty to present her grievance before any court, unless she does so through Glenn as the "only effective adversary". *Id.* at 259. See also

Stiles v. Blunt, 912 F.2d 260, 265 (8th Cir. 1990) ("The prohibition of third party standing is relaxed when the litigant is 'the only effective adversary' of the third party's rights.") (quoting *Barrows*). IDX 180 at 22-23.

As noted, the Court recognized the need to protect fundamental rights:

> Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 184 Cal. 26, 192 P. 1021.

Barrows, 346 U.S. at 257.

Likewise, the importance of protecting Betty's fundamental rights, Glenn submits, should outweigh the usual rule against raising another's rights.

The Court viewed the defendant, Ms. Jackson, as "the only effective adversary of the unworthy covenant in its last stand." *Id.* at 259. She was in a unique position to resist the enforcement of the discriminatory covenant.

Again, Glenn is in the unique position as the only effective adversary against the alleged exploitation of Betty's property by her personal representative and his advisers – those who were assigned to protect her but who, in fact, looted her estate of millions of dollars in real and personal property, a result directly contrary to Betty's "express desires." SDCL 29A-5-405.

While not the primary constitutional injury, the Court recognized that the Ms. Jackson, faced a "direct pocketbook injury" of $11,600 in damages, giving her a concrete stake in the outcome. *Id.* at 256.

Likewise, Glenn suffered unconstitutional arrest, imprisonment, malicious prosecution, loss of computer and cell phone, $50,000 bail, and public defamation of

character by the South Dakota Attorney General's office, giving him a concrete stake in the outcome of this case.

Finally, the Court was concerned that allowing the state court to grant damages for breach of the racial covenant would constitute state action in violation of the Fourteenth Amendment.

In like manner, the circuit court's dismissal of Betty's vested property right – her exploitation tort against the Defendants – constitutes state action by South Dakota in violation of the Fourteenth Amendment, as well as the due process clause and "open courts" provision of the SD Constitution. *Bush v. Gore*, 531 U.S. 98, 112 (2000) ("decisions of state courts are definitive pronouncements of the will of the States as sovereigns.")

Glenn respectfully draws this Court's attention to *Burkard v. Burkard*, 2024 S.D. 38, ¶ 30 (7/10/2024), to note the inherent authority the circuit court possessed to fashion a remedy for Betty, reflecting "as closely as possible, the overarching Legislative intent behind our statutory scheme:

> [¶30.] However, our role on appeal is not to create a specific child support formula to fill the statutory gap discussed above. That is for the Legislature. Here, the child support statutes do not address the factual scenario presented and the circuit court had discretion to equitably determine an amount of child support that reflects, as closely as possible, the overarching Legislative intent behind our statutory scheme.

Glenn respectfully asks this Court to find that the lower court's decision constitutes state action in violation of the fourteenth Amendment, as well as a violation of the due process clause and "open courts" provision of the South Dakota Constitution.

V. WHETHER THIRD PARTY STANDING IS PROPER IF BETTY'S EXERCISE OF HER RIGHT TO CONTROL HER REAL PROPERTY IS INEXTRICABLY BOUND UP WITH THE INJURIES GLENN SUFFERED IN AIDING HER TO DO SO.

A. **The Applicable Law**:

> In *Singleton*, the United States Supreme Court decided a litigant has general prudential standing to assert a legal right of a non-party if (1) the non-party's "enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue," e.g., the litigant is "fully, or very nearly, as effective a proponent of the right as the" non-party, and (2) there is "some genuine obstacle to" the non-party's ability to assert its own right, id. at 114–16, 96 S.Ct. 2868.

Sears v. U.S. Trustee (In re AFY), 734 F.3d 810, 820-21 (8th Cir. 2013).

B. **Third party standing is proper because Betty's exercise of her right to control her real property is inextricably bound up with the injuries Glenn suffered in aiding her to do so**.

Betty's "express desires," Complaint, IDX 1 at ¶¶54-59, 78, 80 (quoting SDCL 29A-5-405 (providing that the conservator must "to the extent known, consider the express desires and personal values of the protected person when making decisions, and shall otherwise act in the protected person's best interests and exercise reasonable care, diligence, and prudence"), to control and devise her real property were clear in the documents she executed on August 15, 2017, under the guidance and advice of attorney Gina Rogers. Transcript, IDX 271 at 20-21 (". . . the right she is trying to assert was done on August 15, 2017, when she exercised these deeds . . . to allow her estate to go in the manner that she wanted to her two children."). The activity Glenn wished to pursue was stated thereafter: "I was assisting her through Gina Rogers, the attorney that she used on that day. And I drafted those materials, as the public records show. And for that, I was prosecuted, as the complaint shows. The complaint shows that I was -- and as the indictment shows. The indictment shows that I was doing it by, I think the terms were that I was drafting materials for her to disown her, or disinherited certain, her grandchildren, I believe, and others, that I had prepared three videos for her, which I, all

of which I did." Id. at 21; see also Complaint, IDX 1 at ¶¶10-11 ("10. Ambort assisted Betty in the enjoyment of her constitutional right to own property and to be free from financial exploitation by the Defendants. 11. Ambort suffered an injury-in-fact that is inextricably bound up with his assistance to Betty, namely, false arrest, false imprisonment, loss of liberty, malicious prosecution, all without probable cause. See *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976).").

Glenn submits that he "is fully, or very nearly, as effective a proponent of [Betty's the right [to control and devise property] as the latter [here, Betty]." *Singleton*, 428 U.S. at 115. Attorney Gina Rogers provided invaluable assistance to Betty for several hours on August 15, 2017. Glenn assisted Gina in her professional services to Betty, but he also assisted Betty over several months previously in gathering Betty's desires that he placed in the documents Gina and Betty reviewed on August 15, 2017, and that Betty executed on that day. He continued after August 15th to assist Betty. Complaint, IDX 1 at ¶51d (video interview 3/18/2018) and ¶59.

i. *The history below supports Glenn's third-party standing*.

Betty's estate was vested with her accrued exploitation tort against the Defendants upon her death on September 23, 2019. IDX 1, ¶18. The legislature enacts laws with knowledge of judicial rulings. *McMillin v. Mueller*, 695 N.W.2d 217, 225 (S.D. 2005) ("We presume the Legislature acts with knowledge of our judicial decisions.").

As early as 1972 this Court referred to a U.S. Supreme Court's decision on third-party standing, although not referred to as such.

> The root case in this area of constitutional law is *Griswold v. State of Connecticut*, 381 U.S. 479, in which the Supreme Court held the Connecticut law forbidding the use of contraceptives was an impermissible intrusion upon the constitutionally protected peripheral or penumbral right of marital privacy. In doing so *the court*

> *relaxed the general rule that a litigant has standing to assert only his own constitutional rights or immunities by allowing the appellants, one of whom was a doctor, to raise the constitutional rights of the married people with whom they had a professional relationship.*

State v. Munson, 86 S.D. 663, 665 (S.D. 1972)

The State Legislature has been aware of third-party standing for many decades.

Glenn anticipates that the Defendants will argue that the accessories in *Griswold* had a "professional relationship" with the married people, whereas Glenn has no such "professional relationship" with Betty. However, Glenn was indicted, arrested, imprisoned, made to post $50,000 bail, endured malicious prosecution and public humiliation by the State, all without probable cause, IDX 1, ¶¶ 11, 27, because he assisted Betty via his assistance to Gina Rogers in her professional capacity as Betty's licensed attorney on August 15, 2017. IDX 1, ¶10-11. Glenn briefed this issue below. IDX 180 at 8-9.

Betty had an accrued legal right to bring an action against the Defendants during her lifetime "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." SDCL 22-46-13. Post-mortem, the only person named in the statute who could bring Betty's exploitation claim against the Defendants was the "personal representative," namely, Brock. Id.

The circuit court denied Glenn third-party standing for several reasons. First: "Applying the *Powers* criteria to the facts herein, the injury alleged to Plaintiff was the fact that certain documents ultimately resulted in a criminal indictment against Plaintiff which criminal charge was subsequently dismissed. This does not give Plaintiff sufficient concrete interest in the outcome of the issue in this dispute." Appendix 2, Denial Letter at

3. The Complaint, IDX 1, actually states: "Ambort suffered an injury-in-fact that is inextricably bound up with his assistance to Betty, namely, false arrest, false imprisonment, loss of liberty, malicious prosecution, all without probable cause. See Singleton v. Wulff, 428 U.S. 106, 114-15 (1976)." Complaint ¶11. "27. Ambort suffered an injury-in-fact when he was arrested by Spink County Sheriff's officers on July 14, 2021, and jailed in the Faulk County jail until a cash bail of $50,000 was posted for him on July 16, 2021, on the grounds that he had committed exploitation of Betty. 28. He was restricted by the court to South Dakota until the case against him was dismissed without conditions by the prosecuting attorney on January 29, 2024. Exhibit 12." IDX 1, Complaint ¶¶27-28.

This Court, addressing *Griswold*, stated that "the court relaxed the general rule that a litigant has standing to assert only his own constitutional rights or immunities by allowing the appellants, one of whom was a doctor, to raise the constitutional rights of the married people with whom they had a professional relationship." *State v. Munson*, 86 S.D. 663, 665-66 (S.D. 1972).

The circuit court found that the injuries-in-fact suffered by Glenn were not sufficient under *Powers*. Appendix 2 at 3. In *Griswold*, "The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment." 381 U.S. at 480. Glenn submits that he suffered greater injuries than the accessories in *Griswold* suffered, which gave him a sufficiently concrete interest in the outcome of the issue in dispute.

Next, the circuit court denied the "close relationship" prong of third-party standing: "The alleged close relationship in this case certainly does not come close to the

close relationship found in the *Singleton* decision, or the *Powers* decision." Appendix 2, Denial Letter at 3-4. The *Singleton* decision discussed this prong at some length:

> The first is the relationship of the litigant to the person whose right he seeks to assert. *If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue*, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that *the former is fully, or very nearly, as effective a proponent of the right as the latter*. Thus in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where two persons had been convicted of giving advice on contraception, the Court permitted the defendants, one of whom was a licensed physician, to assert the privacy rights of the married persons whom they advised. The Court pointed to the "confidential" nature of the relationship between the defendants and the married persons, and reasoned that *the rights of the latter were "likely to be diluted or adversely affected" if they could not be asserted in such a case. Id.*, at 481. See also *Eisenstadt v. Baird*, 405 U.S. 438, 445-446 (1972) (stressing "*advocate*" *relationship* and "*impact of the litigation on the third-party interests*"); *Barrows v. Jackson*, 346 U.S., at 259 (owner of real estate subject to racial covenant granted standing to challenge such covenant in part because she was "the one in whose charge and keeping repose[d] the power to continue to use her property to discriminate or to discontinue such use").

Singleton v. Wulff, 428 U.S. 106, 114-15 (1976) (italics added).

The *Powers* decision cited the "congruence of interests" as the reason for the close relationship between "the excluded juror and the criminal defendant." "This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights. " *Powers v. Ohio*, 499 U.S. 400, 414 (1991). "Additionally, courts have more readily found a sufficiently close relationship where the plaintiff and the third parties share a 'congruence of interests.' *Powers*, 499 U.S. at 414," *Fieger v. Ferry*, 471 F.3d 637, 650 (6th Cir. 2006). Betty and Glenn also shared a "congruence of interests." "Betty and Ambort share a common interest in eliminating the results of Klapperich's and others' exploitation against her." IDX 1, ¶13,

17.

The Complaint (IDX 1) at ¶¶12-17 closely mirrored the relationship standards of both *Powers* and *Singleton*. Glenn has profound incentives to pursue Betty's exploitation claims. In doing so, he hopes to expose the true exploiters of Betty's property, the Defendants, and thereby expose their wrongdoing and crimes, not only in the courts, but also in the jury of public opinion. Moreover, the false publication by the State, IDX 18, of Glenn's alleged exploitation of Betty remains on the internet today, https://bit.ly/3ZRksJ9, and is likely to remain on the internet even beyond Glenn's lifetime. "[P]rofound personal humiliation [is] heightened by its public character." *Powers*, 499 U.S. at 413.

Glenn asks this Court to find that he meets the close relationship prong of third-party standing.

Finally, the circuit court denied the hindrance prong. Appendix 2, Denial Letter 4.

Brock Klapperich, Betty's personal representative, is the party designated in SDCL 22-46-13 to file civil exploitation claims post-mortem. "Klapperich, Betty's personal representative, is hindered from suing on behalf of Betty; he is not inclined to sue himself or the other defendants who collectively conspired to commit aggravated grand theft by exploitation of Betty's home and farmlands." IDX 1, Complaint ¶20. Moreover, the statute of limitations on Betty's claim ran on March 22, 2024, the day Glenn filed this suit. IDX 1, ¶23. Nobody may now file on behalf of Betty; Glenn's claim on behalf of Betty is the only claim possible. He addressed this issue at some length. IDX 180, 21-24 ("Glenn is the only effective advocate by default.").

> The Secretary concedes, however, that there are situations where competing considerations outweigh any prudential rationale against third-party standing, and

> that this Court has relaxed the prudential-standing limitation when such concerns are present. Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of jus tertii standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal. See, e.g., *Craig v. Boren*, 429 U.S. 190, 193-194 (1976).

Secretary of State of Md. v. J. H. Munson Co., 467 U.S. 947, 956 (1984).

"If there is some genuine obstacle . . . the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent". *Singleton*, 428 U.S. at 116. *Barrows v. Jackson*, 346 U.S. 249, 259 (1953), held that a litigant may have standing to bring suit on behalf of another where that person's constitutional rights will be impaired, and the litigant is the "only effective adversary". *See also Stiles v. Blunt*, 912 F.2d 260, 265 (8th Cir. 1990) ("The prohibition of third party standing is relaxed when the litigant is 'the only effective adversary" of the third party's rights.") (*quoting Barrows*); *State v. Munson*, 86 S.D. 663, 665-66 (S.D. 1972) (same). Glenn asks this Court to find that he has third party standing as he argued. IDX 180 at 22-23.

The circuit court found that the Complaint (IDX 1) alleged the 3-part *Powers* requirement for third-party standing. However, it found that the allegations were not sufficient to meet the 3-part requirement. Appendix 2 at 3. The court appears to have overlooked the admonition that where, as here, the third party (Betty) suffers a deprivation of rights secured by the Constitution and unless third-party standing is granted, those rights will be diluted or lost, third-party standing is the "necessary and appropriate" remedy. *Powers*, 499 U.S. at 414 ("This congruence of interests makes it

necessary and appropriate for the defendant to raise the rights of the juror.").

ii. *The law and the facts compel third-party standing*.

Glenn submits respectfully that the evidence, the law, the proceedings below and those now before this Court support a finding that third-party standing for Glenn is both "necessary and appropriate" to remedy Betty's loss of the constitutional right to litigate her exploitation claim against the Defendants. The exercise of her vested property right to litigate the exploitation claim against the Defendants is inextricably bound up with Glenn's right to assist her via her licensed attorney in providing professional advice to Betty in accord with her expressed testamentary desires.

Glenn respectfully asks this Court to find that third-party standing is both necessary and appropriate to enable him to litigate Betty's exploitation claim against the Defendants and that to find otherwise would deprive Betty of her "property right" in violation of the Fourteenth Amendment, as well as the due process clause and "open courts' provision of the SD Constitution.

VI. WHETHER THE COMPLAINT IS BARRED BY RES JUDICATA?

A. The Applicable Law:

> The doctrine of res judicata bars any attempt to relitigate a cause of action by the parties or one of the parties in privity to a party to an earlier suit. . . . Res judicata serves as *claim*, preclusion to prevent relitigation of an *issue actually litigated or which could have been properly raised and determined* in a prior action. . . . Res judicata also requires that the court in which the matter was litigated have had jurisdiction and have issued a final and unreversed decision.

Dakota Plains Ag Center v. Smithey, 772 N.W.2d 170, 179 (S.D. 2009) (cleaned up).

B. The Complaint is not barred by res judicata.

The circuit court named eight cases in support of its finding that res judicata applied. Appendix 2 at 5. "The results of the litany of prior cases cited herein and which

have been disposed of illustrate prior litigation of the claim embodied herein and the relitigating of a claim is prohibited under the doctrine of res judicata." *Id.*

Glenn was the plaintiff in *Glenn Ambort v. Brock Klapperich* 71CIV20-3, one of the eight cases. Glenn could not have filed Betty's exploitation tort in that case as Defendants Ronayne and King previously argued: "Moreover, Ronayne and King previously stated that Glenn could not have raised tort claims in the 71CIV20-03 case. Exhibit 19 at 12 ("Under the plain terms of the assignment, Ambort is not the assignee of tort claims that Clemensen could conceivably have.) Glenn could not have brought the exploitation claim in that case because it is a tort claim." IDX 180 at 18. Res judicata only applies if the issue "could have been properly raised and determined in a prior action." *Dakota Plains*, 772 N.W.2d at 179. Glenn could not have filed a tort claim in 71CIV20-03. Res judicata does not apply to 71CIV20-03.

The other case cited by the circuit court in which Glenn appeared was as a defendant in *Brock Klapperich v. Ron Clemenson*, 71CIV17-77. Brock initially appeared as Conservator of Estate of Betty Clemensen, a protected person, and Successor Trustee of the Betty Clemensen Living Trust, July 29, 2014. After Betty died, he appeared as Personal Representative of the Estate of Betty Clemensen. Betty was the real party in interest in that case.

As a defendant, Glenn had the right to file a counterclaim or a claim as a third-party plaintiff. He had not suffered any injury or damages by Betty, so a counterclaim was not proper.

SDCL 15-6-14(a) provides, in part: "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint

to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Neither Betty nor Brock was liable to Glenn "for all or part of the plaintiff's claim against him." Id. A third-party exploitation claim on behalf of Betty was not an issue "which could have been properly raised and determined in a prior action," i.e., in 71CIV17-77. *Dakota Plains*, 772 N.W.2d at 179. Res judicata does not apply to 71CIV17-77.

The circuit court also stated: "Similar claims were made in the Betty Clemenson probate, 06PRO19-80 and were denied by the trial court and the trial court admitted the contested will to probate." Appendix 2 at 6. Res judicata applies when the claims are the same:

> [¶ 20.] In order for res judicata to apply, *the cause of action in the prior litigation must be the same as the cause of action in the subsequent litigation. Id.* This Court adopted the broad test in *Hanson v. Hunt Oil Co.*, 505 F.2d 1237 (8th Cir. 1974), for determining if both causes of action are the same. *Id.* A cause of action is comprised of the facts that gave rise to, or established, the right the party seeks to enforce. Id. (citations omitted). If the wrong sought to be redressed is the same in both actions, then res judicata applies. *Id.* (citing *Woodbury v. Porter*, 158 F.2d 194 (8th Cir. 1946)).

Dakota Plains, 772 N.W.2d at 179-80 (italics added).

The fact in 06PRO19-80 was Betty's 2017 Will signed by her versus the 2018 Will filed on behalf of her by Brock and signed by Brock. That fact is common to the probate case 06PRO19-80 and the present case 71CIV24-25.

However, there were additional facts in Betty's tort claim against the Defendants that were not present in the probate case. They are: 1) "exploitation of Betty or theft-by-wrongful-taking of her home and nine quarters of farmland described in the deeds," IDX 1, ¶45, 2) "Klapperich's 2018 Will for Betty, Exhibit 5, was fraudulent because it was directly contrary to her 'express wishes': a. In her 2017 Will, Exhibit 6; b. Her

discussions with Gina Rogers, above, on August 15, 2017; c. Her handwritten Will of January 25, 2018, Exhibit 8; and d. Her video interview 3/18/2018 (Exhibit 9; video at https://bit.ly/BettyatLeos), 3) the filing of the 2018 was fraudulent, IDX 1, ¶79 ("This was fraud on the court committed by King who was under a duty to advocate for Betty's 2017 Will, not for the new 2018 Will by Klapperich"), and 4) "Klapperich, as Trustee of Betty's Trust, gained Betty's nine quarters and half of her Aberdeen home by fraud or other wrongful act by him and King." IDX 1, ¶83.

The 06PRO19-80 case may be termed "a Will contest," for short. The 71CIV24-25 case may be termed "a civil exploitation case." The 2017 Will versus the 2018 Will is, to the best of Glenn's knowledge, the only common fact to both cases.

In addition, "the wrong sought to be redressed" is not the same in both cases. 06PRO19-80 sought redress for the 2018 Will by Brock to be probated instead of Betty's 2017 Will. The 71CIV24-25 case does not seek to undo the 2018 Will. It seeks damages caused by the "exploitation of Betty or theft-by-wrongful-taking of her home and nine quarters of farmland described in the deeds," IDX 1, ¶45.

In addition, Count Two seeks a declaratory judgment that Brock serves as an implied trustee. "74. Plaintiff seeks a declaratory judgment that Klapperich, as Trustee of Betty's Trust, is an implied trustee of the approx. nine quarters of Betty's farmland, half of the proceeds from the sale of her Aberdeen home, and all the proceeds from her farmland from 2017 to the present. 75. Klapperich is said implied trustee for the benefit of Betty's estate and those who would have gained said assets under her handwritten Will, Exhibit 8." IDX 1, ¶¶74-75. This is evidence that Case No. 71CIV24-25 does not

seek to challenge the probate of the 2018 Will by Brock. It seeks damages only. The two cases are not the same. Res judicata does not apply. *Dakota Plains*, 772 N.W.2d at 179.

VII. WHETHER SDCL 3-21-2 APPLIES?

A. The Applicable law:

SDCL 3-21-2 precludes damages against a public employee without a prior administrative notice. However, "state employees are not safeguarded from liability if they commit intentional torts or ultra vires acts that exceed the scope of their authority." *Hallberg v. S.D. Bd. of Regents*, 937 N.W.2d 568, 576 (S.D. 2019).

B. SDCL 3-21-2 does not apply.

The Complaint can be read to allege that Defendants Jungwirth and Fischbach joined the conspiracy to exploit Betty by failure to record the documents Betty executed on August 15, 2017. IDX 1, ¶48. However, it can also be read to allege that they joined by delivering the unrecorded papers to Brock's attorney, Rob Ronayne. Id., ¶¶33-34.

This Court has held that "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *North American v. M.C.I.* 751 N.W.2d 710, 712 (S.D. 2008).

Glenn submits that there are two sets of facts alleged in the Complaint that pertain to SDCL 3-21-2 and to the holding in *Hallberg*. Glenn concedes that Jungwirth and Fischbach are entitled to dismissal if the issue of non-recording is the only fact connecting them to the conspiracy. However, that is not the case; the delivery of the unrecorded documents to attorney Ronayne may be found by reasonable jurors to connect them to the conspiracy. An order by the trial court limiting Glenn from using the non-

recording to tie Jungwirth and King to the conspiracy will remove the non-recording from the jury and leave the delivery to Ronanyne as the sole fact allegedly tying them to the conspiracy.

Delivering Betty's unrecorded papers to Ronanyne does not come within the scope of either Jungwirth or Fischbach's scope of authority. *Hallberg*, 937 N.W.2d at 576. They are not safeguarded from liability for their action in delivering the documents to Ronayne as part of their alleged joining of the conspiracy to exploit Betty. Indeed, if those documents had not been delivered and had been returned to Gina Rogers, there is a possibility that the exploitation of Betty may never have occurred. SDCL 3-21-2 does not apply.

CONCLUSION

The Defendants have little or nothing to lose by answering to the trial court and a jury for their actions pertaining to Betty Clemensen's real property. They have not done so heretofore and are not likely to do so hereafter. Betty has one and only one opportunity to vindicate her constitutional rights to own and devise her real property in accord with her "express desires." Betty cannot do it for herself. Brock, Ron, and Lonny (for Patrice) can no longer do it for her.

Betty's only effective adversary by default is "the present *jus tertii* champion" before this Court. *Powers v. Ohio*, 499 U.S. 400, 414 (1991). Glenn asks this Court, on behalf of Betty, to deny the Defendants' motions to dismiss and allow her exploitation tort proceed to trial.

REQUEST FOR ORAL ARGUMENT

Appellant Glenn Ambort requests oral argument in this matter.

Respectfully submitted this 11th day of October 2024.

/s/ *Glenn Ambort*
Defendant-Appellant, *pro se*
P.O. Box 599
Redfield, SD 57401
605-377-8656 (cell)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct of the foregoing replacement brief was emailed to the Supreme Court Clerk, Counsel for the Defendants at the addresses listed below on the 11th day of October 2024 and will be mailed to the Supreme Court Clerk on October 11, 2024

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/s/ Glenn Ambort

CERTIFICATE OF COMPLIANCE

I certify that, in accordance with the type-volume limitation set forth in SDCL § 15-26A-66(b)(2), this Appellant's Brief is proportionately spaced, has a typeface of 12-point, Times New Roman, contains 9,983 words, and was prepared using Microsoft Office Word. Headings, footnotes, and quotations were counted.

/s/ Glenn Ambort

APPENDIX TABLE OF CONTENTS

Gmail **Glenn Ambort <gambort11@gmail.com>**

Late Authority

8 messages

Glenn Ambort <gambort11@gmail.com> Fri, Jul 12, 2024 at 12:38 PM
Reply-To: gambort11@gmail.com
To: "Judge David R. Gienapp" <dgienapp@sio.midco.net>, "Steven W. Sanford" <ssanford@cadlaw.com>, "Ryan S. Vogel" <RVogel@rwwsh.com>, "Zachary W. Peterson" <zpeterson@rwwsh.com>, Elisha Kuhfeld <Elisha.Kuhfeld@ujs.state.sd.us>, Glenn Ambort <gambort11@gmail.com>

Judge Gienapp and Counsel,

In the spirit of SDCL 15-26A-73 (Supplemental brief with late authorities--Service on counsel.), I draw this Court's attention to *Burkard v. Burkard*, 2024 S.D. 38, ¶ 30 (7/10/2024):

> [¶30.] However, our role on appeal is not to create a specific child support formula to fill the statutory gap discussed above. That is for the Legislature. Here, the child support statutes do not address the factual scenario presented and the circuit court had discretion to equitably determine an amount of child support that reflects, as closely as possible, the overarching Legislative intent behind our statutory scheme.

Respectfully,

Glenn Ambort
Plaintiff, *pro se*
71CIV24-25

Appendix 1

David R. Gienapp

Retired Circuit Court Judge

P.O. Box 14

Madison, SD 57042

07/19/24

Elisha Kuhfeld

Spink County Clerk of Courts

210 E.7th Ave.

Redfield, SD 57469-1299

RE: 71CIV24-25

Dear Elisha;

Enclosed herein for filing you will find a letter decision in 71CIV24-25. Would you please file the same.

By copy of this letter a copy of this document is being sent to Mr. Ambort and counsel for Defendants.

Sincerely yours,

David R. Gienapp

CC. GlennAmbort

Ryan Vogel

Steven Sanford

Zachary Peterson

Appendix 2

David R. Gienapp
Circuit Court Judge
P.O. Box 14
Madison, SD 57042

07/19/24

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Aberdeen, SD 57402-1030

RE: Ambort v. Klapperich et.al. 71CIV24-25

Dear Counsel and Mr. Ambort;

This letter shall constitute the Court's decision relating to three separate Motions to dismiss filed by counsel on behalf of all the named Defendants. These Motions are submitted pursuant to SDCL 15-6-12(b) (1) & (5). The Motions, to some extent have varying arguments as a result of their clients having varying involvements under the factual background embodied herein. In order to survive a Motion to Dismiss the factual allegations in the Complaint must be enough to raise a right to relief above the speculative level. Sisney v. Best, Inc.754 N.W.2d 804 (2008). If the Complaint affirmatively discloses an insuperable bar to the claim asserted bar to the claim submitted is entitled to a dismissal with prejudice. Sisney v. State, 754 N.W.2d 639 (2008).

FACTUAL BACKGROUND

The facts referenced in the Complaint involve disputes that have been chronicled since 2017. Other litigation has occurred involving this dispute which will be referenced to some extent subsequently in this opinion. The Complaint in this case is brought against Brock Klapperich who is the Trustee of the Betty Clemenson Trust, Sharon Jungwirth who was the Spink County Register of Deeds during the referenced time frame referenced herein, Victor Fishbach who was Spink County States Attorney during the time period referenced herein, an Attorney with an Aberdeen law firm, Robert Ronayne, who was involved in some of the previous litigation and Rory King an Aberdeen attorney who was Court appointed to represent Betty Clemenson in a guardianship action. Betty Clemenson is now deceased, and the action was commenced by Glenn Ambort on a pro se basis claiming exploitation of Betty Clemenson and conspiracy relating to the exploitation of Betty Clemenson.

DECISION

It is the decision of the Court that the Motions to dismiss filed on behalf of all of the Defendants are granted. This decision is granted for various reasons discussed subsequently herein and some of the reasons for dismissal relate to varying Defendants.

STANDING

All Defendants in connection with their motions to dismiss raised the Plaintiff's standing to bring this action. It is the Court's decision that the Plaintiff does not have the standing to bring this action and the Motion to Dismiss on the standing issue is granted as to all Defendants.

The Plaintiff in his complaint cites Powers v. Ohio, 499 U.S. 400 (1991) as support for his position that he has standing to bring this action which action is basically on behalf of Betty Clemenson who is deceased. The Powers decision dealt with a criminal Defendant questioning the use of preemptory challenges relating to certain jurors in his criminal case. The Powers decision established three criteria for litigants to legally bring an action on behalf of third parties. Those criteria are:

1.The litigant must have suffered an injury in fact thus giving him a sufficient concrete interest in the outcome of the issue in dispute.

2.The litigant must have a close relation to the third party.

3.There must exist some hindrance to the third party's ability to protect her own interest.

The evolving litigation in previous litigation was the claim that a prior will leaving portions of Betty Clemenson's estate to Ron Clemenson and his sister, Patrice Ellwanger the now deceased wife of Lonny Ellwanger as opposed to a will enacted within a guardianship of Betty Clemenson which was approved by the Court in the guardianship proceeding. Applying the Powers criteria to the facts herein, the injury alleged to Plaintiff was the fact that certain documents ultimately resulted in a criminal indictment against Plaintiff which criminal charge was subsequently dismissed. This does not give Plaintiff sufficient concrete interest in the outcome of the issue in this dispute. In connection with the second prong of the Powers criteria the Complaint doesn't establish adequate facts to establish a close relationship between Betty Clemenson and Plaintiff. Singleton v. Wulff, 428 U.S.106 (1976) held that a third party had standing. The alleged close relationship in this case certainly does not come close to the close relationship found in the Singleton decision, or the

Powers decision. The Singleton decision also poses the warning, applicable herein, that federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The third criteria of the Powers decision is also not present herein. Betty Clemenson is deceased so obviously is not available, however the trustee of her Trust is Brock Klapperich who the Plaintiff has sued herein and is made ineligible by the Plaintiff. The other two people who have appropriate standing are Ron Klapperich and Lonny Ellwanger, the surviving husband of Ron Klapperich's sister Patrice Ellwanger. Ron Klapperich is unavailable because he created the hindrance by, while being represented by counsel, agreeing to a settlement in another case which prohibited him from commencing litigation against Brock Klapperich. Ron Ellingson has chosen not to be involved. These are hindrances created by these individuals are not the type of hindrances present in the cases permitting third party representation.

The South Dakota Supreme Court has held that standing is an essential element of a cognizable cause of action. Lippold v. Meade Cty. Bd.. of Commissioners, 906 N.W.2d 917 (2018) The decision by the South Dakota Supreme Court sets forth three prong criteria for third party standing in Cable v. Union County Bd. Of County Com'rs, 769 N.W.2d 817 (2009). Those three criteria are:

1.Plaintiff suffered an injury.

2.Causal connection between Plaintiff's injury and conduct.

3.Plaintiff must show that is likely not speculative that the injury will be addressed by a favorable decision.

It is obvious that Plaintiff's claimed injury will not be addressed by a favorable decision.

COUNT 1

In addition to the failure to have standing as set forth previously herein an additional reason is applicable to Count 1 of the complaint. Count 1 alleges exploitation under SDCL 22-46-13 and is brought against all Defendants. SDCL 22-46-13 specifically defines who may bring a claim under SDCL 22-46-13. The Plaintiff herein is not any of the individuals authorized to commence claims in Count 1 and as a consequence Count 1 of the Complaint fails. Lippold v. Meade Cty. Bd.of Com'rs, 906 N.W.2d 922 (SD2018) states that statutory authorization is necessary for there to be standing.

SDCL 3-21-2

For an additional reason the action is dismissed against Defendants Fishbach and Jungworth for failure by the Plaintiff to comply with SDCL 3-21-2. At all times pertinent to the Complaint herein Fishbach was the Spink County States Attorney and Jungworth was the Spink County Register of Deeds. The allegations relating to these two Defendants relate to Jungworth not filing a deed based on the advice of Fishbach and allegations that some of these documents were subsequently delivered to others. All of these actions were in connection with their official capacities. SDCL 3-21-2 requires notice of injury in all actions against a public employee sounding in tort pursuant to

SDCL 3-21-2. This notice was not given by Plaintiff. Plaintiff argues that the action was brought against these two Defendants in their individual capacities which is only a claim by Plaintiff and not supported by the allegations in the complaint in paragraphs 32 and 46 of the complaint. The claim relating to an allegation as to individual capacity was dealt with by the South Dakota Supreme Court in Olson v. Equitable Life Assurance Co. 681 N.W.2d 471(2004).

RES JUDICATA

The Defendants also raise the issue of res judicata in support of their Motions to Dismiss. The Court finds that the Motions to Dismiss are also granted in that this action as being barred by the doctrine of res judicata.

Healy Ranch Inc. v. Healy, 978 N.W.2d 786 (2022) recognizes the two preclusion concepts relating to res judicata, those being issue preclusion and claim preclusion. A Motion to Dismiss is to be decided based on the pleading filed. One recognized exception is that in addition to the pleadings and exhibits attached to the pleadings, a Court may take judicial notice of matters of public record. Jenner v. Dooley, 590 N.W.2d 463 (1999). In connection with the examination of public records the Court examined a litany of actions previously before Courts relating to issues arising from Betty Clemenson's will, trust and claims relating to the filing of a deed and other claims raised by Glenn Ambort, Ronald Clemenson and others. A listing of this litany of cases is as follows:

1.Conservatorship of Betty Clemenson 71GDN17-2.

2.In Re Estate of Betty Clemenson 06PRO19-80

3.Brett Klapperich v. Ron Clemenson 71CIV17-77

4.Klapperich v. Ron Clemenson 06CIV19-556

5.Betty Clemenson Living Trust 71TRU17-02

6.Glenn Ambort v. Brock Klapperich 71CIV20-3

7.Ron Clemenson v. Jungwirth 71CIV20-91

8.Ron Clemenson v. Rory King et.al 06CIV24-164 (pending)

The issue of res judicata can be decided pursuant to a Motion to Dismiss pursuant to SDCL 15-6-12(b)(5). See Ceplecha v. Sullivan, 998 N.W.2d 351 (SD2023); Riley v. Young, 879N.W.2d 108 (SD2016), and C.H. Robinson Worldwide, Inc v. Lobrano, 695 F3d 758 (8th Cir. 2012).

The results of the litany of prior cases cited herein and which have been disposed of illustrate prior litigation of the claim embodied herein and the relitigating of a claim is prohibited under the doctrine of res judicata. The previously referenced Spink County case of Glenn Ambort v. Brock Klapperich et.al., 71CIV20-3 was also initiated against Ronald Ronayne and Rory King and contained claims similar to the claims embodied in the Complaint herein. In connection with the dismissal of the claims against Ronayne and King the trial Court stated in it's Order as follows:

" The claims by Ambort against Defendants shall be dismissed on their merits with prejudice and this Order shall have the same res judicata effect as a Judgment of dismissal on the merits"

Similar claims were made in the Betty Clemenson probate, 06PRO19-80 and were denied by the trial court and the trial court admitted the contested will to probate.

The claim against Fishbach and Jungwirth arise out of their decision not to file the deed which is the basis of the Complaint as it relates to these two Defendants. The failure to file the deed was litigated in a mandamus action; Ronald Clemenson v. Jungwirth, 71 CIV 20-91. The trial Court upheld the propriety of the actions of Defendant's Fishbach and Jungwirth.

OTHER ISSUES

Counsel for the various Defendants have raised other issues in connection with their motions to dismiss other than the issues ruled on by the Court herein. The main issues not discussed herein are:

1.Statute of Limitations.

2.Claim that action is frivolous.

3.No duty owed to Plaintiff by King and/or Ronayne.

It is felt by the Court that since the Motion's to Dismiss are granted on other grounds that there is no need to address these additional issues.

ATTORNEY FEES AND SANCTIONS

Various requests for Attorney fees are not granted. There is a request for Sanctions pursuant to SDCL 15-6-11(c). The Court finds that sanctions are appropriate because of the failure of the Plaintiff to comply with SDCL 15-6-11 (1) & (2). The Sanction imposed is that the Plaintiff is prohibited from filing any actions in the 5th circuit involving any of the named Defendants in this action without first submitting the pleading to the undersigned Judicial officer for determination as to whether the pleading can be filed and served.

CONCLUSION

Each Defense counsel should prepare an Order on behalf of counsel's client or clients in accordance with this decision and counsel should furnish me that pleading via mail or email. Counsel Sanford should also prepare a separate Order relating to the Sanction issue.

Sincerely yours,

David R. Gienapp, Circuit Court Judge

STATE OF SOUTH DAKOTA) : SS. COUNTY OF SPINK)		IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
GLENN AMBORT, Plaintiff, -vs- BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, and SHARON JUNGWIRTH, Defendants.		71CIV24-25 **ORDER GRANTING DEFENDANT BROCK KLAPPERICH'S MOTION TO DISMISS**

On July 2, 2024, the Court held a hearing on Defendant Brock Klapperich's Motion to Dismiss. Plaintiff Glenn Ambort appeared personally and pro se. Defendant Brock Klapperich appeared by and through his attorney, Ryan S. Vogel. The Court, having received and reviewed the submissions of the parties, having heard the arguments, and otherwise being duly informed, determines that Defendant Brock Klapperich's Motion to Dismiss should be granted for the reasons stated by the Court in its Letter Decision dated July 19, 2024 on file herein, which is incorporated by this reference.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendant Brock Klapperich's Motion to Dismiss is GRANTED, and that all claims made against Defendant Brock Klapperich are hereby dismissed with prejudice.

Attest:
Kuhfeld, Elisha
Clerk/Deputy

BY THE COURT:

Circuit Court Judge

STATE OF SOUTH DAKOTA) : SS. COUNTY OF SPINK)		IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
GLENN AMBORT, Plaintiff, -vs- BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, SHARON JUNGWIRTH, Defendants.		71CIV24-25 ORDER GRANTING DEFENDANTS VICTOR B. FISCHBACH AND SHARON JUNGWIRTH'S MOTION TO DISMISS

On May 17, 2024, Defendants Victor B. Fischbach and Sharon Jungwirth filed a Motion to Dismiss pursuant to SDCL 15-6-12(b)(1) and 15-6-12(b)(5). The Motion came on for hearing on July 2, 2024. Plaintiff Glenn Ambort appeared pro se. Defendant Brock Klapperich appeared by and through his attorney, Ryan S. Vogel. Defendants Rob Ronayne and Rory King appeared through their attorney, Steve Sanford. Defendants Victor B. Fischbach and Sharon Jungwirth appeared through their attorney, Zachary W. Peterson. The Court, having received and reviewed the submissions of the parties, having heard the arguments, and otherwise being duly informed, determines that the Motion to Dismiss should be granted for the reasons stated by the Court in its Letter Decision dated July 19, 2024, on file herein, which is incorporated by this reference.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED that Defendants Victor B. Fischbach and Sharon Jungwirth's Motion to Dismiss is GRANTED, and that all claims made against Defendants Victor B. Fischbach and Sharon Jungwirth are hereby dismissed with prejudice.

Attest
Kuhfeld Elisha
Clerk/Deputy

BY THE COURT:

The Honorable David R. Gienapp
Circuit Court Judge

STATE OF SOUTH DAKOTA : SS COUNTY OF SPINK	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
GLENN AMBORT, Plaintiff, v. BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, SHARON JUNGWIRTH, Defendants.	)	Case No. 71CIV24-25 ORDER GRANTING RONAYNE AND KING MOTIONS TO DISMISS AND JUDGMENT OF DISMISSAL WITH PREJUDICE

Defendants Robert Ronayne and Rory King, by their counsel of record, filed motions to dismiss Plaintiff's Complaint on the dates and as shown by the eCourts docket sheet in this matter. Such motions were fully briefed and a hearing for arguments thereon was held on Tuesday, July 2, 2024, at 9:30 o'clock A.M. in the courtroom of the Spink County Courthouse in Redfield, South Dakota. At such hearing, Plaintiff appeared in person *pro se* and Defendants appeared by their respective counsel of record. After the date of the argument, the Court received further submissions. Upon consideration of all briefs, arguments and additional submissions, the Court having served and filed its letter memorandum decision dated July 19, 2024 granting Defendants' motions to dismiss.

NOW, THEREFORE, for cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Motions to Dismiss of Defendants Ronayne and King shall be and hereby are granted.

2. **Plaintiff's Complaint against Defendants Ronayne and King shall be and hereby is in all respects dismissed upon its merits and with prejudice.**

BY THE COURT:

Attest:
Kuhfeld, Elisha
Clerk/Deputy

David R. Gienapp
Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF SPINK	)	FIFTH JUDICIAL CIRCUIT

GLENN AMBORT, Plaintiff, v. BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, SHARON JUNGWIRTH, Defendants.	)	Case No. 71CIV24-25 ORDER FOR SANCTIONS AGAINST PLAINTIFF PURSUANT TO SDCL 15-6-11(c)

Upon motion by Defendants Rory King and Robert Ronayne, by their counsel of record, pursuant to SDCL 15-6-11(c); and the Court having expressly determined in its letter memorandum decision dated July 19, 2024 that just cause exists therefor;

IT IS HEREBY ORDERED AS FOLLOWS:

1. That Plaintiff may not and shall not serve or file any further action against Defendants or their law firms without first submitting the proposed pleading to the Circuit Court for the Judicial Circuit and County where such action is proposed to be filed and obtaining a written order from such Court permitting service and filing of the pleading.

2. In the event Plaintiff violates this Order, the Court reserves the right to impose further sanctions, including, without limitation, attorneys' fees and expenses.

Attest:
Kuhfeld, Elisha
Clerk/Deputy

BY THE COURT:

David R. Gienapp
Circuit Court Judge

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30830

GLENN AMBORT,

Appellant,

v.

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, AND SHARON JUNGWIRTH,

Appellees.

Appeal from the Circuit Court
Fifth Judicial Circuit
Spink County, South Dakota
THE HONORABLE DAVID R. GIENAPP
Presiding Judge

BRIEF OF APPELLEES ROBERT M. RONAYNE AND RORY P. KING

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Appellant pro se

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Attorneys for Appellees Robert M. Ronayne and Rory P. King

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Attorneys for Appellees Brock Klapperich, Victor B. Fischbach and Sharon Jungwirth

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Notice of Appeal was filed August 26, 2024

Filed: 11/25/2024 10:00 AM CST Supreme Court, State of South Dakota #30830

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellees King and Ronayne concur in Appellant's Jurisdictional Statement and agree that the Notice of Appeal was timely filed.

LEGAL ISSUES

I. Does Plaintiff/Appellant have sufficient standing under federal or state law?

Trial Court: Held in the negative

SDCL 22-46-13

SDCL 29A-3-703(c)

Powers v. Ohio, 499 U.S. 400 (1991)

Cable v. Union County Board of County Commissioners, 2008 SD 59, 769 N.W.2d 817

II. Are the claims alleged in Plaintiff's Complaint barred by res judicata?

Trial Court: Held in the affirmative

Healy Ranch, Inc. v. Healy, 978 N.W.2d 786, 2022 SD 43

Crowley v. Spearfish Independent School District, 445 N.W.2d 308 (S.D. 1989)

III. Did Defendants King and Ronayne owe any legal duty to Plaintiff?

Trial Court: Did not decide this issue

Chem-Age Industries, Inc. v. Glover, 2002 SD 122, 652 N.W.2d 756

Friske v. Hogan, 2005 SD 70, 698 N.W.2d 526

Thompson v. Harrie, 404 F. Supp. 3d 1233 (D.S.D. 2019)

IV. Are Appellees King and Ronayne entitled to Rule 11 Sanctions?

Trial Court: Held in the affirmative

SDCL 15-6-11(c)

Ortman v. Thomas, 99 F.3d 807 (6th Cir. 1996)

STATEMENT OF THE CASE[1]

Appellees King and Ronayne concur in Appellant's Statement of the Case.

STATEMENT OF FACTS

This action arises from or is inexorably tied to a number of separate terminated actions, namely:

Glenn Ambort v. Brit Inc., Ronald P. Clemensen, Brock Klapperich, in Circuit Court for the Fifth Judicial Circuit, Spink County, South Dakota, 71CIV17-000070

Glenn Ambort v. Brock Klapperich, et al, in Circuit Court for the Fifth Judicial Circuit, Spink County, South Dakota, 71CIV20-3

In the Matter of the Conservatorship of Betty Clemensen, in Circuit Court for the Fifth Judicial Circuit, Spink County, South Dakota, 71GDN17-000012

In the Matter of the Estate of Betty Clemensen, Deceased – Glenn Ambort v. Estate of Betty Clemensen, et al, in Circuit Court for the Fifth Judicial Circuit, Brown County, South Dakota, 06PRO19-000080

Ronald P. Clemensen v. Rory King, et al, in Circuit Court for the Fifth Judicial Circuit, Brown County, South Dakota, 06CIV24-164

[1] The Clerk's Index filed with the Supreme Court will be referred to as "Idx" followed by the applicable page number(s).

Klapperich v. First Dakota National Bank, et al, in Circuit Court for the Fifth Judicial Circuit, Spink County, South Dakota, 71CIV17-000077

State of South Dakota v. Ronald Peter Clemensen, in Circuit Court for the Fifth Judicial Circuit, Spink County, South Dakota, 74CRI21-74

State of South Dakota v. Ernest Glenn Ambort, in Circuit Court for the Fifth Judicial Circuit, Spink County, South Dakota, 71CRI21-000073

At the center of all these cases is a scheme of elder abuse principally by Ronald Clemensen of his mother, Betty Clemensen, after Betty in 2014 had set up an estate plan and trust, using the Thompson Law Firm. *See Ambort Complaint ¶ 29 Idx 4.* In 2017, Ronald Clemensen caused her to execute a new will and used a power of attorney essentially to misappropriate Betty's assets contrary to her trust and estate plan. *Idx 116-40.*

Most recently, after this appeal was filed, Ronald Clemensen was found guilty by a Spink County jury on August 13, 2024; and, thereafter, the Circuit Court pronounced and entered Judgment of Conviction on multiple counts of aggravated grand theft by exploitation (SDCL 22-46-3). *See App 001 attached hereto.* Appellant had also been indicted for his role in that process, but the Complaint against him was eventually dismissed. *See Docket 71CR21-000073; Idx 222.*

When the abuse was discovered, a conservatorship was started and Rory King was appointed as attorney for Betty Clemensen. *See Docket 71GDN17-000012; Idx 112-15.* Robert Ronayne represented the court-appointed Conservator, Brock Klapperich, a grandson of Betty. *Id.* In the Conservatorship

action, the court found that the 2014 estate planning documents were valid, the 2017 will, etc. were invalid and approved the Conservator's execution of new estate planning instruments consistent with those done in 2014. *See Appellee's Motion to Dismiss Brief Ex. 2, Idx 96-115, App 011-018.*

When Betty died in 2019, a probate was commenced and Brock Klapperich was appointed personal representative, again represented by Appellee Robert Ronayne. As a part of that probate action, Ambort and Ronald Clemensen sought to have their abuse-obtained will admitted to probate instead of the will and trust submitted by the personal representative. The probate court denied Ambort and Clemensen's attempts and that decision was summarily affirmed by this Court. *See Appellees' Motion to Dismiss Brief Ex. 3 and 4, Idx 116-140, App 019-021.*

Ambort previously commenced suit against Appellees King and Ronayne, their law firms and other lawyers and law firms in Spink County, Fifth Judicial Circuit, entitled *Ambort v. Brock Klapperich, et al,* 71CIV20-503. In that action, Ambort claimed he was acting as assignee of Ronald Clemensen. *See Plaintiff's Amended Complaint in 71CIV20-503.* The Amended Complaint filed on January 22, 2020 concerned the same subject matter and made essentially the same basic allegations as in this action. Importantly, all claims against King and Ronayne and their respective law firms were, by Ambort's stipulation, "dismissed on their merits with prejudice; *and this order shall have the same res judicata effect as a judgment of dismissal on the merits.*" (emphasis supplied) *See Ex 1 to King and Ronayne's Brief in Support of Motion to Dismiss, Idx 108-110, App 022.*

Ambort claims that he is a proper third party to assert the rights of Betty, who being deceased is not able to assert them herself. In other words, an admitted participant in what has been found in Court over-and-over to be elder abuse supposedly has the right to assert that the efforts of counsel to defend Betty, as victim, against such abuse constitute abuse of Betty. Such spinning of facts and law are simply dizzying. Luckily, the Circuit Court kept a steady head in rejecting such absurdity.

ARGUMENT[2]

A. Standards Applicable to Motions to Dismiss

A motion to dismiss under SDCL § 15-6-12(b)(5) tests the legal sufficiency of the pleadings. *Gruhlke v Sioux Empire Federal Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 408-409. Where the Complaint affirmatively discloses an insuperable bar to the claim asserted, the moving party is entitled to judgment of dismissal with prejudice. *Sisney v. State*, 2008 SD 71, ¶8, 754 N.W.2d 639, 643; *Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008).

In order to survive a motion to dismiss, factual allegations "must be enough to raise a right to relief above the speculative level." *Sisney v. Best Inc.*, 2008 S.D. 70, ¶7, 754 N.W.2d 804, 809 (quoting and adopting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007)). Though well-pleaded facts are taken as true, "the court is

[2] Appellees do not adopt Appellant's argument headings and designated subject classifications, and instead present heading subjects that more simply and accurately define the dispositive issues.

free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping conclusions cast in the form of factual allegations." *Nygaard v. Sioux Valley Hosp. & Health Syst.*, 2007 SD 34, ¶9, 731 N.W.2d 184, 190 (internal citation and quotation marks omitted).

Satisfying the threshold pleading standards "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Sisney*, 2008 SD 70, ¶7, 754 N.W.2d at 809 (quoting *Bell Atlantic Corp.*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In cases "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). Like its federal counterpart, "SDCL 15-6-8(a) also requires a 'showing' that the pleader is 'entitled' to relief[.]" *Sisney*, 2008 SD 70, ¶8, 754 N.W.2d at 808-09. Accordingly, a reviewing court "will not speculate" that a plaintiff "might have undisclosed statements or facts to support recovery." *Gruhlke*, 2008 SD 89, ¶21, 756 N.W.2d at 410.

B. Scope of What May Be Considered on a Motion to Dismiss

As noted above, this action is a tag-along companion to a number of other terminated actions. To understand the nature of the claims alleged in Ambort's

Complaint and why those claims fail as a matter of law, this Court can and should consider the lawsuits that preceded this one.

"In addressing a motion to dismiss, the court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir. 2011) (citation omitted); *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 2007 SD 33, ¶11, 730 N.W.2d 626, 631 (recognizing that consideration of exhibits attached to complaint is appropriate on motions to dismiss). *See also Jenner v. Dooley*, 1999 SD 20, ¶15, 590 N.W.2d 463, 470 (recognizing that a court may take judicial notice of matters of public record); *accord Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (matters of public record and materials necessarily embraced by the Complaint may be considered when deciding a motion to dismiss); *accord* 5A Wright & Miller, Federal Practice and Procedure, Civil 2d, §1357, at 299 (1990).

Most importantly, the facts, filings and outcomes of the companion litigation – including the parties to each suit, the claims set out therein and their disposition – are proper subjects of judicial notice under SDCL §19-19-201. Section 19-19-201(c)(2) requires judicial notice if requested and "the court is supplied with the necessary information." The records of the related actions are too voluminous to specify individually, but copies of most critical filings were included in the record below and are cited in the arguments below.

I. Ambort lacks standing under both federal and state law.

Standing is an essential element of a cognizable cause of action. A litigant must have standing in order to bring a claim in court. *Lippold v. Meade Cty. Bd. of Commissioners*, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 921. "Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing." *Id.* (citation omitted). To establish standing a party must have suffered an injury in fact *to a legally protected interest* that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, (1992); *Cable v. Union County Board of County Commissioners*, 2008 SD 59 ¶21, 769 N.W.2d 817, 825-26. Accordingly, an action commenced by a party who lacks a legal protected interest--i.e. lacks standing--is subject to dismissal under SDCL §15-6-12(b)(1).

Ambort's arguments on standing are first and foremost contrary to South Dakota statutes. Regarding Ambort's attempted assertion "for Betty" of a claim under SDCL 22-46-13, that statute reads as follows:

> 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.

This statute lists categories of those who can assert such claim on behalf of the abused elder. As is patently obvious, Ambort does not fit any of those categories.

Ambort here has another fundamentally incurable problem in asserting standing, even outside § 22-46-13. SDCL 29A-3-703(c) provides:

> Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as the decedent had immediately prior to death.

In other words, it is the personal representative of the probate estate that has standing to assert Betty's claims that arose before her death and, of course, the probate has been long since completed and closed.

Even ignoring these statutes, Ambort cannot establish his standing. Yes, as Ambort cites, there are a number of cases permitting assertion of third-party claims on behalf of persons who would otherwise be plaintiffs, but for interfering difficulties. In supposed support of Plaintiff's assertion of his right to assert "Betty's rights," Plaintiff cites *Singleton v. Wulff,* 428 U.S. 106, 118 (1976), affirming *Wulff v. Singleton,* 508 F.2nd 1211 (8th Cir. 1974). In that case the Eighth Circuit Court of Appeals held:

> Clearly the claims of doctors to "freely practice medicine according to the highest medical standards without arbitrary outside restraints" are inextricably bound up with the privacy rights of women who seek abortions.

508 F.2d at 1213. The Supreme Court in its opinion further detailed the standards to be applied to determine whether a litigant had a right to assert the interests of third parties. *Id.* at 113-117. Obviously, Plaintiff does not have and did not have the relationship with Betty Clemensen contemplated as sufficient in *Singleton*. Of particular significance is the Supreme Court's caution that federal courts must hesitate before resolving a controversy on the basis of the rights of third persons not parties to the litigation. *Id.* at 113-114.

Ambort cites *Griswold v. Connecticut,* 381 U.S. 479 (1965). There, the two plaintiffs "gave information, instruction, and medical advice to *married persons* as to the means of preventing conception." They were charged and convicted as accessories under a Connecticut statute barring certain methods of preventing conception. The Supreme Court held that they had standing because "The accessory should have standing to assert that the offense with which he is charged with assisting is not, or cannot constitutionally be, a crime." *Id.* at 480-81. Obviously, those material facts are a long way away from the facts here. Ambort is obviously not challenging the elder abuse statutes.

More specifically, the Supreme Court in *Powers v. Ohio,* 499 U.S. 400 (1991), also cited by Ambort, establishes three required elements for third-party assertion of standing:

1. The litigant must have suffered an injury in fact thus giving him a sufficient concrete reason in the outcome of the issue in dispute.

2. The litigant must have a close relationship to the third party.

3. There must exist some hindrance to the third party's ability to protect her interests.

Id. at 410-411. *See also Kewalski v. Tesmer,* 543 U.S. 125 (2004); *Metro Life Ins. Co. v. Melin,* 853 F.3d 410 (8th Cir. 2017); *Wikimedia Foundation v. NSA/Central Serv.*, 14 F.4th 276 (4th Cir. 2021); *Military-Veterans Advocacy v. Sec. of Veterans Affairs,* 7 F.4th 1110 (Fed. Cir. 2021); *Alamo Forensic Servs. LLC v. Bextar Cty,* 861 Fed Appx. 564 (5th Cir. 2021); *Crawford v. United States Dept of Treasury,* 868 F.3d 438 (6th Cir. 2017); *King v. Governor of N.J.,* 767 F.3d 216 (3rd Cir. 2014). As is obvious and indisputable, Ambort cannot satisfy at least the second and third required elements. As a participant in conduct that has been judicially found to be elder abuse, Ambort has no close relationship to Betty. Furthermore, Betty's interests have been protected over-and-over in prior judicial proceedings, namely the conservatorship and the probate - so certainly no hindrance.

Under South Dakota law, as the Court below noted, this Court has held that standing involves a three-part criteria test for third-party standing:

1. Plaintiff suffered an injury.

2. Causal connection between Plaintiff's injury and conduct.

3. Plaintiff must show that it is likely, not speculative, that the injury will be addressed by a favorable decision.

Cable, supra, 769 N.W.2d at 825-26, ¶ 21.

Regarding the third required element of standing under South Dakota law, it has already been determined in the probate action that the wills and related

transfers forming the basis of Ambort's claims were ineffective and the 2018 will, trust documents and related estate planning were in fact applicable. *See* Order Granting Motion for Summary Judgment dated January 29, 2020 and Order Directing Issuance of Judgment of Affirmance (SDSC #29587), true copies of which are attached to Appellees' Motion to Dismiss Brief below as Exhibits 3 and 4 respectively, *Idx 116-140, App 019-021.*

See also discussion on res judicata, *infra.* In other words, Ambort has already lost once and has also agreed that his previous action was dismissed on its merits and with prejudice to the same effect as a judgment on the merits. So, in other words, his success is not only unlikely, but instead impossible.

II. Plaintiff/Appellant's claims are barred by res judicata.

This is very simple. As a preliminary matter, the issue of res judicata can be decided on a Motion to Dismiss under SDCL 15-6-12(b)(5) when the defense is apparent from the "face of the complaint," which includes public records identifiable by judicial notice. *See Ceplecha v. Sullivan,* 998 N.W.2d 351, 2023 SD 63, fn 8.

Here, Ambort attempts to take a second swing at King and Ronayne arising from the same facts and circumstances in the first action dismissed with prejudice. The law of res judicata is well settled in South Dakota. *See Healy Ranch, Inc. v. Healy,* 978 N.W.2d 786, 2022 SD 43. Res judicata consists of two preclusion concepts, issue preclusion and claims preclusion:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect is also referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing the litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]

Id. at 798, *40. Claim preclusion "precludes relitigation of a claim . . . actually litigated *or which* could have been properly raised." *Id.* *41 [quoting *Nelson v. Hawkeye Sec. Ins. Co.,* 369 N.W.2d 379, 381 (S.D. 1985)]. Even if Ambort were to claim newly discovered evidence after the dismissal, this does not prevent application of res judicata. *Estate of Johnson v. Weber,* 898 N.W.2d 718, 734, *43, 2017 SD 36.

In this case, obviously there was not a full adjudication, i.e., a trial on the merits, since the Court, by the parties' stipulation, granted the parties' Motion to Dismiss. But, the Order for dismissal expressly provides that it shall have the "same res judicata effect as a judgment of dismissal on the merits." Accordingly, the res judicata principles and cases above-cited apply with full effect.

Plaintiff may claim that the dismissal order in the previous action cannot have *res judicata* effect because it included, in part, a determination that Plaintiff had no standing and thus the court had no jurisdiction. Plaintiff might then argue that since the court determined by order that it had no jurisdiction because of lack of standing, the order itself cannot have *res judicata* effect.

Since Plaintiff agreed in his prior action that the no-duty portion of Appellees' Motion in his first action against Appellees constituted *res judicata*,

such an argument about lack of jurisdiction is simply insufficient. Even if lack of standing were the sole basis for the judgment of dismissal in Plaintiff's prior action, our Supreme Court has expressly applied *res judicata* in the lack-of-standing context. See *Crowley v. Spearfish Independent School District,* 445 N.W.2d 308 (S.D. 1989). It would be insane to otherwise hold. If Plaintiff's potential argument would be accepted, that would mean that Plaintiff could bring the same action and same claims over and over and over and over. Obviously, the whole purpose and objective of the doctrine of *res judicata* is finality.

Additionally, an essential element of proof for Plaintiff is that the will he purportedly wrote for Betty Clemensen is in fact her valid will, instead of the court-authorized will and trust executed by Brock Klapperich in his capacity as conservator. In fact, the opposite has been judicially determined, i.e. that the Klapperich-executed will and trust are valid instead of the 2017 supposed will. Plaintiff also appeared and participated in probate proceedings and thus is bound by that determination under *res judicata*. See Exhibits 2, 3 and 4 attached to Appellees' initial Brief below. *Idx 116-140. App 011-021.*

III. Appellees Rory King and Rob Ronayne owed no duty to Appellant.

There is one other important point: specifically, the lack of duty. Even though the Circuit Court below expressly did not rule on this issue, the Supreme Court is free to consider it and, of course, should. If there in fact exists any basis supporting the ruling of the trial court, whether considered by the trial court or not,

the Supreme Court can and should affirm the ruling. *Wolff v. Secretary of South Dakota Game, Fish and Parks Dept.*, 544 N.W.2d 531, 537, 1996 SD 23, ¶ 32. *See also Healy Ranch, Inc. v. Healy*, 978 N.W.2d 786, 793, 2022 SD 43, ¶ 17; *Jorgensen Farms, Inc. v. Country Pride Coop, Inc.*, 824 N.W.2d 410, 2012 SD 78; *Murray v. Manscheim*, 779 N.W.2d 379, 2010 SD 18; *Cole v. Wellmark of South Dakota, Inc.*, 776 N.W.2d 240, 2009 SD 108; *Cowan Bros., LLC v. American State Bank*, 743 N.W.2d 411, 2007 SD 131.

The existence or absence of duty is tied to the existence or absence of privity. South Dakota "has long subscribed to the strict privity rule in attorney malpractice cases." *Chem-Age Industries, Inc. v. Glover*, 2002 SD 122, ¶30, 652 N.W.2d 756, 769. At minimum, a plaintiff "must first show that an attorney-client relationship existed between the lawyer and the plaintiff." *Id.* *Glover* emphasized that any exception to the strict privity rule "should have limited application in adversarial proceedings because the rule of ethics require that lawyers represent their clients zealously within the bounds of the law[.]" 2002 SD 122, ¶30, 652 N.W.2d 756, 769.

South Dakota, unlike other jurisdictions, has not relaxed the strict rule of privity in legal malpractice cases because the rule "preserves an attorney's duty of loyalty to and effective advocacy for the client." *Id.* As has been observed:

> A lawyer representing a party in litigation has *no duty of care* to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment e hereto).

Restatement (Third) of the Law Governing Lawyers, §51 cmt c.; *accord Glover,* 2002 SD 122, ¶30, 652 N.W.2d at 769.

In *Glover,* this Court discussed, but did not adopt, certain exceptions to the strict privity rule. None of the exceptions apply where the parties are adverse. Consequently, there are no grounds to move beyond what *Glover* licensed and consider whether the allegations suffice to break from the strict privity rule.

Also, as an adversary, Ambort cannot claim benefit of the one exception to that strict privity rule essential to existence of duty. In *Friske v. Hogan,* 2005 SD 70, 698 N.W.2d 526, this Court addressed a malpractice claim brought by beneficiaries who alleged that the estate planning lawyer failed to assure that property in decedent's will was properly titled so as to give effect to decedent's wishes. The Court held that where a non-client plaintiff is an identifiable beneficiary of a client's estate plan and one of the primary objectives of a lawyer's representation was to benefit the non-client, the lawyer may owe a duty of care to the non-client, so long as it does not impair or compromise the lawyer's obligations to the client and the absence of such a duty would make performance of those obligations unlikely. *Id.* 2005 SD 70, ¶15, ¶17, 698 N.W.2d at 531. Obviously, Ambort was never such a beneficiary – in fact the opposite.

Additionally, this Court has consistently characterized the attorney-client relationship as *sui generis*:

> The nature of the relationship between attorney and client is highly fiduciary. It consists of a very delicate, exacting and confidential

> character. It requires the highest degree of fidelity and good faith. It is a purely personal relationship, involving the highest personal trust and confidence.

Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259, 264 (S.D. 1988). The U.S. District Court for the Southern Division thus held that attorney malpractice claims are not assignable. *Thompson v. Harrie*, 404 F. Supp. 3d 1233 (D.S.D. 2019). The District Court's analysis in *Thompson, supra,* correctly recognizes that the public policies reflecting the unique nature of this relationship would preclude assigning a legal malpractice claim from a client to another party. *Id.* at 1239-40. This is yet another inherent defect that Ambort cannot cure and that should lead to affirming the dismissal with prejudice of all claims against the Ronayne and King Defendants.

Ambort may argue that the circumstances here do not involve an assignment that is precluded. Instead, he is just asserting the claim of Betty as a third party without an assignment. But it is indisputable that Ambort was an adversary in the conservatorship proceeding and the probate. Certainly, he cannot erase that determinative status by "stealing" Betty's hat. There is simply no authority allowing that supposed shift in status to be a basis for suit against former opposing counsel. So, he is still a non-client and adversary attempting to assert a claim solely cognizable within the attorney-client relationship. Accordingly, recognition of Ambort's claims of the right to assert Appellant's supposed duty to Betty would run afoul of public policies favoring confidentiality, trust and integrity in the attorney-client relationship.

IV. Appellees King and Ronayne are entitled to Rule 11 Sanctions.

While Appellant has not raised the issue, this Court should affirm the Circuit Court's Order for Sanctions Against Plaintiff pursuant to SDCL 15-6-11(c). The Circuit Court entered an Order for Sanctions Against Plaintiff pursuant to SDCL 15-6-11(c) which bars any further litigation by Appellant against Defendants unless he obtains prior permission from the court in which such proceeding is to be filed. *See Idx 328.* As demonstrated by the two actions filed by Ambort against Defendants King and Ronayne and the arguments made above, such sanction is most certainly warranted and necessary.

SDCL 15-6-11 does not expressly or specifically provide for this type of sanction, and it does not appear that this Court has had the opportunity to consider its availability on appeal. Nevertheless, this Court has observed that § 15-6-11 is modeled after the corresponding federal rule. *Hobart v. Ferebee,* 776 N.W.2d 67, 72, 2009 SD 101, ¶ 14. For FRCP 11, there are several federal decisions permitting the type of sanction ordered by the Circuit Court. *See e.g. Ortman v. Thomas,* 99 F.3d 807 (6th Cir. 1996); *Bigsby v. Runyon,* 950 F.Supp. 761 (D.Miss. 1996); *Conway v. Nusbaum,* 109 Fed. Appx. 44 (6th Cir. 2004). Accordingly, the Court's Order for Sanctions should be affirmed.

CONCLUSION

For all the reasons above stated, Appellees King and Ronayne respectfully request the Judgment of Dismissal of the Circuit Court and its Order on Sanctions

be in all respects affirmed. Additionally, Appellees respectfully request that such Judgment and Order be summarily affirmed pursuant to SDCL 15-26A-87.1.

REQUEST FOR ORAL ARGUMENT

If the Court declines to summarily affirm, Appellees King and Ronayne request oral argument.

Dated: November 25, 2024

CADWELL SANFORD DEIBERT
& GARRY LLP

By _/s/ SW Sanford_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2021, with Times New Roman 13-point font. This brief contains 4,450 words, per the Microsoft word count feature, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel.

Dated: November 25, 2024

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the Brief of Appellees Robert M. Ronayne and Rory P. King and Appendix thereto were served on those listed below in the manner so indicated:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30830

GLENN AMBORT,

Appellant,

v.

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, AND SHARON JUNGWIRTH,

Appellees.

Appeal from the Circuit Court
Fifth Judicial Circuit
Spink County, South Dakota
THE HONORABLE DAVID R. GIENAPP
Presiding Judge

APPENDIX TO BRIEF OF APPELLEES ROBERT M. RONAYNE AND RORY P. KING

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Notice of Appeal was filed August 26, 2024

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FILED

OCT 25 2024

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF SPINK	)	FIFTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA,	)	71CRI 21-74
Plaintiff,	)	
	)	JUDGMENT OF CONVICTION
v.	)	
RONALD PETER CLEMENSEN, DOB: 2-16-1963	)	
Defendant.	)	

An Indictment was filed with this Court on the 8th day of July 2021, charging the Defendant with the crimes of **COUNT 1 Conspiracy to Commit Aggravated Grand Theft by Exploitation** (SDCL 22-3-8, 22-4-1, 22-46-3), a Class 2 felony; **COUNTS 6 - 7 Aggravated Grand Theft by Exploitation** (SDCL 22-46-3), a Class 2 felony; and **COUNTS 8-12 Grand Theft by Exploitation** (SDCL 22-46-3), a Class 4 felony. Defendant was arraigned on said Indictment on the 7th day of September 2021. The Defendant, the Defendant's attorney Casey Bridgman, and Kimberly J. Zachrison, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of his constitutional and statutory rights pertaining to the charges that had been filed against him including, but not limited to, the right against self-incrimination, the right of confrontation, and the right to a jury trial. The Defendant pled not guilty.

On January 29, 2024, the State dismissed **COUNT 1 – Conspiracy to Commit Aggravated Grand Theft by Exploitation** (SDCL 22-3-8, 22-4-1, 22-46-3), a Class 2 felony.

A jury trial began on August 5, 2024. On August 13, 2024 Defendant was found **GUILTY** of **COUNTS 6 - 7 Aggravated Grand Theft by Exploitation** (SDCL 22-46-3), a Class 2 felony; and **COUNTS 8-12 Grand Theft by Exploitation** (SDCL 22-46-3), a Class 4 felony.

It is the determination of this Court that the Defendant has been regularly held to answer for said offense and that the Defendant was represented by competent counsel. It is, therefore, the

JUDGMENT of this Court that the Defendant is guilty of **COUNTS 6 - 7 Aggravated Grand Theft by Exploitation** (SDCL 22-46-3), a Class 2 felony; and **COUNTS 8-12 Grand Theft by Exploitation** (SDCL 22-46-3), a Class 4 felony.

SENTENCE

On the 25th day of October 2024, the Defendant, Ronald Peter Clemensen, the Defendant's attorney Casey Bridgman, and Kimberly J. Zachrison, Assistant Attorney General, appeared for Defendant's sentencing. The Court heard argument of counsel. The Court then asked whether any legal cause existed to show why sentence should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

As to the offense of **COUNT 6: AGGRAVATED GRAND THEFT BY EXPLOITATION**:

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of twenty-five (25) years. Those twenty-five (25) years are suspended on the following terms and conditions:

1. Defendant shall serve twenty (20) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay fines in the amount of $500.00 and court costs in the amount of $104.00.
3. Defendant's sentence shall run consecutive to Count 7.
4. Defendant shall be placed on probation for a term of five (5) years. Defendant shall abide by the standard probation agreement with Court Services.
5. Defendant shall complete moral recognition therapy within six months.
6. Defendant shall maintain contact with his attorney.
7. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 7: AGGRAVATED GRAND THEFT BY EXPLOITATION**:

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of twenty five (25) years. Those twenty five (25) years are suspended on the following terms and conditions:

1. Defendant shall serve twenty (20) days in the Spink County Jail or any other Spink County facility. Defendant shall self report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of $500.00 and court costs in the amount of $104.00.
3. Defendant's sentence shall run consecutive to Count 6.
4. Defendant shall be placed on probation for a term of five (5) years. Defendant shall abide by the standard probation agreement with Court Services.
5. Defendant shall complete moral recognition therapy within six months.
6. Defendant shall maintain contact with his attorney.
7. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 8: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run consecutive to Counts 6 and 7 and concurrent to Counts 9-12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 9: GRAND THEFT BY EXPLOITATION**:

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8, 10-12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 10: GRAND THEFT BY EXPLOITATION:**

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8-9, 11-12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 11: GRAND THEFT BY EXPLOITATION**:

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8-10, 12.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

As to the offense of **COUNT 12: GRAND THEFT BY EXPLOITATION**:

IT IS THEREFORE

ORDERED that the Defendant be sentenced to the South Dakota State Penitentiary for a period of ten (10) years. Those ten (10) years are suspended on the following terms and conditions:

1. Defendant shall serve ten (10) days in the Spink County Jail or any other Spink County facility. Defendant shall self-report to the Spink County Sheriff's office no later than Monday, October 28, 2024 at 10:00 a.m. Work released is authorized.
2. Defendant shall pay a fine in the amount of one hundred dollars ($100.00) and court costs totaling $104.00.
3. Defendant's sentence shall run concurrent to Count 8-11.
4. Defendant shall complete moral recognition therapy within six months.
5. Defendant shall maintain contact with his attorney.
6. Defendant shall complete any evaluations recommended by his court services officers and comply with any recommendations. Defendant shall complete any and all programs proscribed by his court services officer.

IT IS FURTHER ORDERED that the Defendant shall make restitution in the amount of $8,717.94 to the Spink County Clerk of Courts for prosecution costs.

IT IS FURTHER ORDERED that the Defendant shall make restitution in the amount $294.80 to the Attorney General's Office for prosecution costs.

IT IS FURTHER ORDERED that the Court expressly reserves control and jurisdiction over the Defendant for the period of sentence imposed and that this Court may revoke the suspension at any time and reinstate the sentence without diminishment or credit for any of the time that the Defendant was on probation.

IT IS FURTHER ORDERED that the Court reserves the right to amend any or all terms of this Order at any time.

Dated this 25th day of October 2024.

BY THE COURT:

Robert L. Spears
Robert Spears
Circuit Court Judge

ATTEST:
Tisha Kuntz
Clerk of Courts
By: _____
Deputy

SEAL

NOTICE OF RIGHT TO APPEAL

You, Ronald Peter Clemensen, are hereby notified that you have a right to appeal as provided by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of South Dakota and the State's Attorney of Spink County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within thirty (30) days from the date that this Judgment of Conviction and Order Suspending Execution of Sentence was signed, attested and filed.

STATE OF SOUTH DAKOTA)
SS
COUNTY OF SPINK)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* * * * * * * * * * * * 71GDN17-000012

In the Matter of the Conservatorship of BETTY CLEMENSEN, a person in need of protection.

LETTERS OF CONSERVATORSHIP

* *

WHEREAS, by order of the Court, Brock Klapperich was appointed conservator of Betty Clemensen, and has duly qualified for such office;

NOW, THEREFORE, Brock Klapperich is hereby authorized to enter upon the discharge of his duties as such conservator and to continue therein until such appointment is terminated.

Dated this 22nd day of March, 2018.

BY THE COURT:

Signed: 3/22/2018 2:35:49 PM

Circuit Court Judge

(COURT SEAL)

ATTEST: Attest: Kuhfeld, Elisha Clerk/Deputy

_____, Clerk

By _____, Deputy

STATE OF SOUTH DAKOTA)
ss
COUNTY OF SPINK)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* * * * * * * * * * * * 71GDN17-000012

In the Matter of the Conservatorship of BETTY CLEMENSEN, a person in need of protection.

ORDER APPOINTING CONSERVATOR

* *

A hearing on the petition of Brock Klapperich for the appointment of conservator for Betty Clemensen was held on the 22nd day of March, 2018, at the hour of 9:00 a.m.; and notice of the hearing having been given as directed by this Court and the hearing having come on regularly before the Court, the Honorable Richard A. Sommers, Circuit Court Judge, presiding, and the petitioner, Brock Klapperich, appearing by and through his attorneys, Robert M. Ronayne and Thomas J. Cogley, Ronald Clemensen, appearing by and through his attorney, Scott Kuck, and Rory King, appointed by the Court to represent Betty Clemensen, and notice of hearing having been given as required by law, and the Court having read the petition and being satisfied that it is in the protected person's best interest that a conservator be appointed, and Brock Klapperich is a suitable and qualified person to serve as conservator, and no request having been made, findings of fact and conclusions of

law in support of this order are deemed waived; now, therefore, it is hereby

ORDERED, that Betty Clemensen is a person in need of protection; and it is further

ORDERED, that Brock Klapperich is hereby appointed as the conservator of the estate of Betty Clemensen, a person alleged to be in need of protection; and it is further

ORDERED, that this appointment shall become effective and letters of conservatorship shall issue upon the conservator filing an acceptance of office; and it is further

ORDERED, that no bond shall be required of the conservator at this time; and it is further

ORDERED, that the conservator shall act as a fiduciary and in the best interest of the protected person and shall have the authority to exercise the powers set forth in SDCL §29A-5-411 subject to the limitations and restrictions set forth in SDCL §29A-5-413 and this order; and it is further

ORDERED, the conservator shall at all times act in the protected person's best interest and exercise reasonable care, diligence and prudence; and it is further

ORDERED, all assets listed on the statement of financial resources are managed by the protected person and such assets should be subject to the control of the conservator; and it is further

ORDERED, that the property power of attorney dated January 4, 2016 is hereby revoked; and it is further

ORDERED, within ninety (90) days following this appointment, the conservator shall present an inventory of the real and personal property of the protected person, which has come into the possession, or knowledge of the conservator. The inventory shall, with reasonable detail, list each item of the estate, its approximate fair market value, and the type and amount of encumbrance to which it is subject. An annual accounting and report of the conservator shall be filed within sixty (60) days following the first anniversary of the appointment as dictated in SDCL § 29A-5-408.

Dated this 22nd day of March, 2018.

BY THE COURT:

Signed: 3/22/2018 2:34:28 PM

Circuit Court Judge

(COURT SEAL)

Attest:
Kuhfeld, Elisha
Clerk/Deputy

ATTEST:

_____, Clerk

By_____, Deputy

STATE OF SOUTH DAKOTA)
ss
COUNTY OF SPINK)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* * * * * * * * * * * * 71GDN17-000012

In the Matter of the Conservatorship of BETTY CLEMENSEN, a person in need of protection.

ORDER APPROVING PETITION FOR AUTHORITY TO EXERCISE FINANCIAL POWERS (TRUST AND WILL)

* *

A hearing on the petition of Brock Klapperich for the authority to exercise financial powers was held on the 22nd day of March, 2018, at the hour of 9:00 a.m.; and notice of the hearing having been given as directed by this Court and the hearing having come on regularly before the Court, the Honorable Richard A. Sommers, Circuit Court Judge, presiding, and the petitioner, Brock Klapperich, appearing by and through his attorneys, Robert M. Ronayne and Thomas J. Cogley, Ronald Clemensen, appearing by and through his attorney, Scott Kuck, and Rory King, appointed by the Court to represent Betty Clemensen, and notice of hearing having been given as required by law, and the Court having read the petition and being satisfied that it is in the protected person's best interest that the conservator be given authority to exercise financial powers, and no request having been made, findings of fact and conclusions of law in support of this order are deemed waived; now, therefore, it is hereby

ORDERED, that Brock Klapperich is authorized to execute the proposed amended and restated Betty Clemensen Living Trust Agreement and the proposed Last Will and Testament of Betty Clemensen on behalf of Betty Clemensen.

Dated this 22nd day of March, 2018.

BY THE COURT:

Signed: 3/22/2018 2:34:58 PM

Circuit Court Judge

(COURT SEAL)

ATTEST: Attest: Kuhfeld, Elisha Clerk/Deputy

_____, Clerk

By _____, Deputy

Filed on: 3/22/2018 SPINK County, South Dakota 71GDN17-000012

STATE OF SOUTH DAKOTA)
ss
COUNTY OF SPINK)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* * * * * * * * * * * * 71GDN17-000012

In the Matter of the Conservatorship of BETTY CLEMENSEN, a person in need of protection.

ORDER APPROVING PETITION FOR AUTHORITY TO EXERCISE FINANCIAL POWERS (ANNUAL GIFTS)

* *

A hearing on the petition of Brock Klapperich for the authority to exercise financial powers was held on the 22nd day of March, 2018, at the hour of 9:00 a.m.; and notice of the hearing having been given as directed by this Court and the hearing having come on regularly before the Court, the Honorable Richard A. Sommers, Circuit Court Judge, presiding, and the petitioner, Brock Klapperich, appearing by and through his attorneys, Robert M. Ronayne and Thomas J. Cogley, Ronald Clemensen, appearing by and through his attorney, Scott Kuck, and Rory King, appointed by the Court to represent Betty Clemensen, and notice of hearing having been given as required by law, and the Court having read the petition and being satisfied that it is in the protected person's best interest that the conservator be given authority to exercise financial powers, and no request having been made, findings of fact and conclusions of law in support of this order are deemed waived; now, therefore, it is hereby

ORDERED, that Brock Klapperich is authorized to make a gift of $14,000 to Patrice Ellwanger for the 2017 year; and it is further

ORDERED, that Brock Klapperich is authorized to make a gift of $14,000 to Ronald Clemensen and a gift of $14,000 to Patrice Ellwanger for the 2018 year.

Dated this 22nd day of March, 2018.

(COURT SEAL)

BY THE COURT:

Signed: 3/22/2018 2:34:40 PM

Circuit Court Judge

ATTEST:
Attest:
Kuhfeld, Elisha
Clerk/Deputy
, Clerk

By , Deputy

Filed on: 3/22/2018 SPINK County, South Dakota 71GDN17-000012

STATE OF SOUTH DAKOTA)
ss
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

* * * * * * * * * PRO. 19-080

In the Matter of the Estate of * **ORDER GRANTING MOTION**

BETTY CLEMENSEN, Deceased. * **FOR SUMMARY JUDGMENT**

* *

The above entitled matter having come on for hearing pursuant to a *motion for summary judgment* filed on behalf of movant, Brock Klapperich, Personal Representative of the Estate of Betty Clemensen, deceased, on the 21st day of January, 2020, at 2:30 p.m., the Honorable Richard A. Sommers, presiding, and the movant appearing personally and by and through his attorneys, Robert M. Ronayne and Rebecca L. Ronayne; and there being no other appearances; and proper service of the *petition for formal probate of will, determination of heirs, and appointment of personal representative* having been shown, and there being no objections to the motion, and the Court having heard the argument of counsel and being fully advised in the premises, and finding that no issue of material fact exists in this matter and that movant is entitled to an order granting motion summary judgment;

EXHIBIT 3

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That the plaintiff's *motion for summary judgment* is granted;

2. That the decedent died testate on September 23, 2019; that decedent was domiciled at the time of death in Brown County, South Dakota, and therefore venue in this county is proper;

3. That the Will of the decedent dated March 22, 2018, which is on file with the office of the Brown County Clerk of Courts, and which was admitted to informal probate on September 30, 2019, is declared to be valid and is admitted to formal probate;

4. That the heirs of the decedent are those shown in the *petition for formal probate of will, determination of heirs and appointment of personal representative* dated November 4, 2019;

5. That Brock Klapperich is formally appointed as personal representative of the decedent's estate, to serve without bond, and *letters of personal representative* issued to the personal representative on September 30, 2019, are confirmed.

BY THE COURT:

Signed: 1/29/2020 11:01:20 AM

Circuit Court Judge

Attest:
Schmidt, Beth
Clerk/Deputy

STATE OF SOUTH DAKOTA
In the Supreme Court
I, Shirley A. Jamesson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this 27th day of Nov. 20 21
Clerk Supreme Court
Deputy

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
OCT 12 2021
Clerk

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

FILED
NOV - 8 2021
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT
By

IN THE MATTER OF THE ESTATE OF BETTY CLEMENSEN, DECEASED.

ORDER DIRECTING ISSUANCE OF JUDGMENT OF AFFIRMANCE

#29587

The Court considered all of the briefs filed in the above-entitled matter, together with the appeal record, and concluded pursuant to SDCL 15-26A-87.1(A), that it is manifest on the face of the briefs and the record that the appeal is without merit on the ground that the issues on appeal are clearly controlled by settled South Dakota law pursuant to SDCL 29A-3-412, now, therefore, it is

ORDERED that a judgment affirming the Order of the circuit court be entered forthwith.

DATED at Pierre, South Dakota, this 12th day of October, 2021.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice Steven R. Jensen and Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

EXHIBIT 4

STATE OF SOUTH DAKOTA : SS COUNTY OF SPINK	)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
GLENN AMBORT, Plaintiff, v. BROCK KLAPPERICH; THOMPSON LAW, P.C.; ESTATE OF CAROLYN A. THOMPSON; REBECCA LONGCROW; ETHAN HUIZENGA; ANDREW J. KNUTSON; RONAYNE LAW OFFICE, P.C.; ROBERT M. RONAYNE; REBECCA L. RONAYNE; THOMAS J. COGLEY; HEIDEPRIEM, PURTELL, SIEGEL, & HINRICHS, LLP; SCOTT N. HEIDEPRIEM; JOHN HINRICHS; MATTHEW TYSDAL; BANTZ, GOSCH & CREMER, LLC; RORY P. KING; Defendants.	)	71Civ20-3 ORDER DISMISSING CERTAIN DEFENDANTS WITH PREJUDICE AND GRANTING PLAINTIFF LEAVE TO FILE HIS SECOND AMENDED COMPLAINT

Upon stipulation (i) of Plaintiff in his capacity as an assignee of Ron Clemensen on his own behalf, and (ii) of all Defendants by their respective counsel of record; and it appearing to the Court that the following motions have been filed by certain of the Defendants:

Motion to Dismiss by Defendants Bantz, Gosch & Cremer, L.L.C.; Rory P. King; Ronayne Law Office, P.C.; Robert M. Ronayne; and Rebecca L. Ronayne dated January 31, 2020 (the "Bantz/Ronayne Motion")

Thompson Law Defendants' Motion for Judgment on the Pleadings dated February 24, 2020 (the "Thompson Motion")

EXHIBIT 1

Defendant Thomas J. Cogley's Motion to Dismiss dated March 6, 2020 (the "Cogley Motion")

Heidepriem, Purtell, Siegel & Hinrichs, LLP, Heidepriem, Hinrichs and Tysdal's Motion to Dismiss dated March 12, 2020 (the "Heidepriem Motion");

and the Court being further advised that the Motion of the Bantz/Ronayne Defendants for Sanctions Pursuant to SDCL 15-6-11 may be deemed withdrawn upon entry of this Order; and the Court further finding that there is no just reason for delay in entering final judgment in favor of the dismissed Defendants, in that the stipulation of all parties satisfies the factors this Court must determine as set forth in *Knecht v. Evridge*, __ N.W.2d __, 2020 SD 9; and for cause shown:

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Bantz/Ronayne Motion shall be and hereby is in all respects granted; and all claims of Plaintiff in this action against those Defendants shall be and hereby are dismissed on their merits with prejudice; and this Order shall have the same res judicata effect as a judgment of dismissal on the merits.

2. The Thompson Motion shall be and hereby is in all respects granted; and all claims of Plaintiff in this action against those Defendants shall be and hereby are dismissed on their merits with prejudice; and this Order shall have the same res judicata effect as a judgment of dismissal on the merits.

3. The Cogley Motion shall be and hereby is in all respects granted; and all claims of Plaintiff in this action against Defendant Cogley shall be and hereby are dismissed on their merits with prejudice; and this Order shall have the same res judicata effect as a judgment of dismissal on the merits.

4. The Heidepriem Motion shall be and hereby is in all respects granted; and all claims of Plaintiff in this action against those Defendants shall be and hereby are dismissed on their merits with prejudice; and this Order shall have the same res judicata effect as a judgment of dismissal on the merits.

5. All claims of Plaintiff against all other Defendants except Brock Klapperich shall be and hereby are in all respects dismissed on their merits and with prejudice; and this Order shall have the same res judicata effect as a judgment of dismissal on the merits.

6. As to the dismissed Defendants, this Order shall constitute a final judgment under SDCL 15-6-54(b).

7. No costs or disbursements shall be taxed against Plaintiff in favor of any dismissed Defendant.

8. Plaintiff's Motion to Amend his Amended Complaint dated March 13, 2020 is hereby granted and Plaintiff is hereby permitted to serve and file his Second Amended Complaint against Brock Klapperich dated March 13, 2020.

Attest:
Kuhfeld, Elisha
Clerk/Deputy

BY THE COURT:
Signed: 4/8/2020 3:12:24 PM

Circuit Court Judge

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

GLENN AMBORT

Appellant

vs.

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, and SHARON JUNGWIRTH

Appellees

Appeal No. 30830

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID R. GIENAPP
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE BROCK KLAPPERICH

Mr. Glenn Ambort
18 West 8th Avenue
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Attorneys for Appellees Victor B. Fischbach and Sharon Jungwirth

Filed: 11/25/2024 12:53 PM CST Supreme Court, State of South Dakota #30830

NOTICE OF APPEAL FILED
AUGUST 26, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Appellant Glenn Ambort will be referred to as "Ambort." Appellee Brock Klapperich will be referred to as "Klapperich". Ronald Clemensen will be referred to as "Ron." Betty Clemensen will be referred to as "Betty." The Spink County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers.

JURISDICTIONAL STATEMENT

Ambort's appeal is based on the trial court's Orders granting the defendants' motions to dismiss. (CR 326-327; 330-331.) The Notices of Entry regarding the trial court's Orders were served on July 29, 2024. (CR 1838.) Ambort filed a Notice of Appeal on August 26, 2024. (CR 346-347.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because Ambort timely appealed final judgments of dismissal.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT CORRECTLY HELD THAT AMBORT LACKS THIRD-PARTY STANDING TO BRING CLAIMS ON BETTY'S BEHALF AGAINST KLAPPERICH.

After an analysis of the criteria for third-party standing, the trial court held that Ambort lacks standing to bring claims against Klapperich on behalf of Betty. Based on this analysis, Klapperich's motion to dismiss was granted.

Powers v. Ohio, 499 U.S. 400 (1991)

Singleton v. Wulff, 428 U.S. 106 (1976)

II. WHETHER THE TRIAL COURT CORRECTLY HELD THAT AMBORT LACKS STANDING TO BRING CLAIMS PURSUANT TO SDCL 22-46-13.

> *This action was brought by Ambort claiming to seek redress for Betty's alleged exploitation. The trial court concluded that Ambort fits in none of the categories of persons with authority to sue under SDCL 22-46-13, as Betty is deceased. Based on this, Klapperich's motion to dismiss was granted.*

Lippold v. Meade Cty. Bd. Of Com'rs, 2018 S.D. 7, 906 N.W.2d 922.

SDCL 22-46-13.

STATEMENT OF THE CASE

On March 22, 2024, Ambort filed a Complaint attempting to assert claims on behalf of Betty. (CR 1-12.) In his Complaint, Ambort names Klapperich, among others, as a defendant. (Id.) Ambort attempts to assert third-party standing to seek damages on behalf of Betty. (Id.) Ambort contends he suffered injuries in assisting Betty in exercising her constitutional rights. (Id.) The injuries Ambort alleges to have suffered are false arrest, false imprisonment, loss of liberty, and malicious prosecution. (Id.) Further, Ambort claims he is "fully, or very nearly, as effective a proponent of [Betty's] right to free from financial exploitation as Betty..." (Id.) Finally, Ambort asserts that Ron, Betty's son, and Lonny Ellwanger ("Lonny"), husband of Betty's deceased daughter, cannot or will not protect their own interests. (Id.) On April 23, 2024, Klapperich filed a Motion to Dismiss all claims asserted by Ambort against Klapperich. (CR 66.)

Klapperich's motion to dismiss was heard by the Honorable David R. Gienapp on July 2, 2024. Judge Gienapp filed a written letter decision

granting Klapperich's and all other defendants' motions to dismiss on July 23, 2024. (CR 320-324.) Orders granting the motions were then entered. (CR 326-331.)

STATEMENT OF FACTS

In his Complaint, Ambort attempts to assert third-party standing to bring claims on Betty's behalf. (CR 2-4.) Ambort contends he suffered injuries in assisting Betty in exercising her constitutional rights. (CR 2.) He alleges to have suffered false arrest, false imprisonment, loss of liberty, and malicious prosecution due in part to Klapperich's actions. (Id.) Further, Ambort claims he is "fully, or very nearly, as effective a proponent of [Betty's] right to free from financial exploitation as Betty..." (Id.) Finally, he asserts that Ron, Betty's son, and Lonny, husband of Betty's deceased daughter, cannot or will not protect their own interests. (CR 3-4.) It should be noted that at no time while Betty was living or deceased did Ambort serve Betty in a representative capacity. Instead, Klapperich was appointed by the Circuit Court to be Betty's conservator and later her personal representative. (CR 1; 31-32; 111-115; 120.)

In July 2014, Betty established a revocable trust and transferred her real property to this trust, as she owned several parcels of real property in Spink County, South Dakota. (CR 4, 13.) In August 2017, Ambort drafted several documents, including two (2) warranty deeds and a new will, seeking to change Betty's estate plan and move property out of the trust and back to

Betty, individually. (CR 176-177; T26.) Klapperich became aware of what Ambort was attempting to do with Betty's property and applied to the Court and was appointed as Betty's temporary conservator. (CR 31-32.)

After being appointed temporary conservator, Klapperich was appointed as Betty's conservator on March 22, 2018, and Judge Sommers entered Orders allowing Klapperich to execute a proposed amended and restated trust and will for Betty and authorized Klapperich to make annual gifts. (CR 5; 111-118.) This new will transferred Betty's property to the Betty Clemensen Living Trust. (CR 20-23.)

After Betty's death, which occurred on September 23, 2019, Klapperich filed a petition with the Circuit Court seeking to probate the March 22, 2018 will. (CR2; 119-120.) After Klapperich filed a motion for summary judgment and a hearing was held, the Circuit Court admitted the will to probate on January 29, 2020. (CR 119-120) On November 8, 2021, this Court summarily affirmed the Circuit Court's decisions in the probate. (CR 121.)

After initiating numerous legal proceedings involving Klapperich, Ron entered into a negotiated settlement agreement, resolving all his claims in these pending proceedings, on March 30, 2023, and expressly released Klapperich:

> Ron does likewise hereby unconditionally release and forever discharge Brock, the Estate, the Trust, all beneficiaries, heirs, successors, and assigns from any and all claims, demands, liabilities, obligations, damages, costs, expenses, actions and causes of action including each and every right of payment for damages including all claims and defenses that were made by

> Ron in any of the proceedings listed above, or which could have been made.

(CR 78-83.)

In the pending matter, Ambort accuses Klapperich and others of many deeds, including taking actions contrary to Betty's wishes, and seeks damages, a declaration that Klapperich is an implied trustee of Betty's land and funds received, removal of Klapperich as trustee, the termination of Betty's trust, and "distribution of the remaining trust property in accordance with Betty's probable intention." (CR 1-12.)

ARGUMENT

A. Ambort lacks third-party standing to bring claims on behalf of Betty.

The trial court correctly analyzed prior cases on third-party standing and determined Ambort lacks third-party standing to bring claims on Betty's behalf.

"A litigant must have standing to bring a claim in court." Lippold v. Meade Cty. Bd. Of Com'rs, 2018 S.D. 7, ¶ 18, 906 N.W.2d 922 (citing Cable v. Union Cty. Bd. of Cty. Commn'rs, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825-26). Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject matter jurisdiction unless the parties have standing. Id. (citing Lake Hendricks Improvement Ass'n v. Brookings County Planning and Zoning Com'n, 2016 S.D. 48, ¶ 19, 882 N.W.2d 307, 313). The question of whether a party has standing to maintain an action is a question

of law. Estate of Calvin, 2021 S.D. 45, ¶ 14 (quoting Benson v. State, 2006 S.D. 8, ¶ 6, 710 N.W.2d 131, 140).

"Standing is established through being a 'real party in interest.'" Estate of Calvin, 2021 S.D. 45, ¶ 14 (quoting In re Florence Y. Wallbaum Revocable Living Tr. Agreement, 2012 S.D. 18, ¶ 40, 813 N.W.2d 111, 121). "'The real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Id. (quoting Florence Y. Wallbaum, 2012 S.D. 18, ¶ 40, 813 N.W.2d at 121). Standing is a threshold question that must be resolved in order to determine if the court has power to act. Id.

"There is an exception to prudential standing where the party asserting the right has a close relationship with the person who possesses the right and there is a hindrance to the possessor's ability to protect his own interests. ***But only in exceptional cases*** may a party have standing to assert the rights of another." Alma v. Noah's Ark Processors, 2021 U.S. Dist. LEXIS 37778, *11-12 (emphasis added) (citing Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689, 198 L. Ed. 2d 150 (2017) and Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty., 115 F.3d 1372, 1378-79 (8th Cir.)).

"We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: ***The litigant must have suffered an "injury in fact," thus giving him or her a***

"sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 410-411 (internal citations omitted) (emphasis added).

First, Ambort must demonstrate that he suffered an injury in fact. To have standing to maintain an action against Klapperich, the injury Ambort claims to have suffered must have been in some way caused by Klapperich. "Traceability requires a causal connection . . . between the injury and the challenged conduct." Belsito Commc'ns, Inc. v. Decker, 845 F.3d 13, 21 (1st Cir. 2016). As stated above, Ambort claims to have been falsely arrested, falsely imprisoned, lost his liberty, and been maliciously prosecuted, all which stem from a criminal matter in Spink County.

To support his claim that his injury was tied to Klapperich, Ambort states that materials which were obtained by state officials from Defendants, which presumably includes Klapperich, led to Ambort being indicted on criminal charges. (CR 4.) Additionally, Ambort asserts Klapperich, as conservator, executed a will on March 22, 2018 which was contrary to Betty's wishes. (CR 5.) However, Ambort neglects to mention the March 22, 2018 will was executed by Klapperich after Court approval. (CR 76.) Merely providing documents to state officials, which possibly lead to criminal charges, and executing a will and an amendment to a trust, both with Court

approval, does not satisfy the injury in fact prong. The trial court correctly applied the injury in fact criteria to these facts and determined Ambort did not have a sufficient concrete interest in the outcome to have suffered an injury in fact. (CR 321.)

Second, Ambort must demonstrate he has a close relationship with Betty. "Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply." Singleton v. Wulff, 428 U.S. 106, 116. In the Complaint, Ambort does not set forth any relevant facts which support he has a close relationship to Betty. Ambort contends the "relationship" is that "[e]liminating the results of exploitation against [Betty] would provide Ambort with evidence that he was a victim of false arrest, wrongful imprisonment, and malicious prosecution..." (CR 2.) Ambort best explained his attempted fishing expedition when he stated, "Litigating [Betty's] rights to own property and devise as she wished will not only vindicate her rights as determined by a jury, under directions of this court, but will also provide evidence that Glenn was wrongly arrested, imprisoned, and prosecuted, evidence from a jury that he cannot obtain in any other judicial proceeding." (CR 238.)

The main cases on point are Singleton, Griswold, and Eisenstadt. In Singleton v. Wulff, 428 U.S. 106 (1976), physicians brought an action challenging the constitutionality of a state statute regarding abortions. The basis for challenging this statute was that the statute would directly affect

their businesses. See Id. In Griswold v. Connecticut, 381 U.S. 479 (1965), a physician and the director of a planned parenthood clinic brought an action challenging the constitutionality of a state statute under which they were convicted as accessories for supplying methods of contraception to married person. Id. Finally, in Eisenstadt v. Baird, 405 U.S. 438 (1972), Baird was convicted of a crime for providing contraceptives to an unmarried woman. Id. After conviction, Baird challenged the constitutionality of the statute used for his conviction.

In this lawsuit, the trial court correctly held that "[t]he alleged close relationship ... certainly does not come close to the close relationship found in the Singleton decision, or the Powers decision." (CR 321-322.) The trial court went on to state that it took into consideration the warning "that federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." (CR 322). The type of relationships outlined in the previous cases is not akin to the "relationship" Ambort asserts he has with Betty, and Ambort fails to establish a close relationship.

Third, Ambort must establish some hindrance to the third party's ability to protect his or her own interests exists. The Supreme Court of the United States has noted that "[t]hus far, we have permitted third-party standing only where more "daunting" barriers deterred the rightholder." Miller v. Albright, 523 U.S. 420, 449. "A hindrance signals that the

rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so." Id. at 450. "To take an extreme example, in Hodel v. Irving, 481 U.S. 704, 95 L. Ed. 2d 668, 107 S. Ct. 2076 (1987), we concluded that plaintiffs had third-party standing to assert the rights of their deceased parents." Id. at 449. "If there is some genuine obstacle . . . the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." Singleton v. Wulff, 428 U.S. 106, 116. Ambort is not the best proponent to assert Betty's alleged claims. For the sake of argument, the best proponents to assert Betty's supposed claims would be Ron and Lonny.

Ambort asserts that Ron "cannot bring this action because he and Klapperich have agreed not to sue on another." (CR 3.) Ron entered into a negotiated settlement agreement, while represented by counsel, to forgo any claims against Klapperich. (CR 78-83.) This "hindrance" was self-imposed by Ron. As for Lonny, his "hindrance" is one of disinterest in bringing any claim. Lonny's and Ron's disinterest is the exact situation noted in Miller which does not give rise to a hindrance justifying third-party standing.

The trial court considered the "hindrances" of Ron and Lonny when making its decision and found that "[t]hese are hindrances created by these individuals and not the type of hindrances present in the cases permitting third party representation." (CR 322.) None of the "hindrances" set forth by

Ambort meet the bar set forth by the Supreme Court of the United States; therefore, the trial court correctly held that Ambort lacks third-party standing.

B. Ambort lacks standing to pursue a tort claim for exploitation against Klapperich pursuant to SDCL 22-46-13.

Count One of Ambort's Complaint seeks redress for civil conspiracy to commit aggravated grand theft by exploitation pursuant to SDCL 22-46-13 and 22-46-1(5). (CR 1-12.)

SDCL 22-46-13 provides a list those who may pursue a tort cause of action for 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." Since Betty is deceased, none of the other categories apply, and only her personal representative could bring an action under SDCL 22-46-13. "'In applying legislative enactments, we must accept them as written. The legislative intent is determined from what the legislature said, rather than from what we or others think it should have said.'" Lippold v Meade Cty. Bd. Of Com'rs, 2018 S.D. 7, ¶ 24, 906 N.W.2d at 924 (quoting In re Petition, of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D. 1984)).

Ambort's attempt to point to cases such as Burkhard v. Burkhard, 2024 S.D. 38, 9 N.W.2d 752, is misplaced. The factual and legal circumstances presented in Burkhard are much different than those present in the current matter. Standing is barred as to all other persons, including Ambort, who fits in none of the categories of SDCL 22-46-13. The trial court rightly concluded that Ambort "is not any of the individuals authorized to commence claims in Count 1 and as a consequence County 1 of the Complaint fails" and dismissal of Count One based on SDCL 22-46-13 should be affirmed. (CR 322.)

CONCLUSION

Appellee Brock Klapperich respectfully requests this Court affirm the dismissal of Ambort's lawsuit on all grounds set forth by the trial court.

Respectfully submitted this 25th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Appellee of Brock Klapperich does not exceed the number of words permitted by SDCL 15-26A-66(b)(2). Said brief contains 2,799 words Century Schoolbook, 12-point, and 14,607 characters (no spaces), exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

Dated this 25th day of November, 2024.

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CERTIFICATE OF SERVICE

The undersigned one of the attorneys for Appellee Brock Klapperich, hereby certifies that on the 25th day of November, 2024 a true and correct copy of BRIEF OF APPELLEE BROCK KLAPPERICH was served via Odyssey on:

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and an electronic version of the brief was also electronically transmitted in Word format to the Clerk of the Supreme Court.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

GLENN AMBORT,

Plaintiff/Appellant,

-vs-

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, and SHARON JUNGWIRTH,

Defendants/Appellees.

Appeal No. 30830

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID R. GIENAPP,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEES VICTOR B. FISCHBACH AND SHARON JUNGWIRTH

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AUGUST 26, 2024

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PRELIMINARY STATEMENT

In this brief, the Appellant, Glenn Ambort, will be referred to as "Ambort." Appellees Brock Klapperich, Robert M. Ronayne, Rory P. King, Victor B. Fischbach, and Sharon Jungwirth will be referred to by their surnames. Ron Clemensen will be referred to as "Ron." Betty Clemensen will be referred to as "Betty." The Spink County Clerk of Courts' record will be referred to by the initials "CR" and the corresponding page numbers. The transcript of the July 2, 2024 hearing will be referred to as "T" followed by the corresponding page numbers. The Appendix to this brief will be referred to as "Appx." followed by the corresponding page numbers.

JURISDICTIONAL STATEMENT

This appeal follows the trial court's Orders granting the defendants' motions to dismiss. (CR 326-327; 330-331.) The trial court also entered an Order for Sanctions against Plaintiff pursuant to SDCL 15-6-11(c). (CR 328-329.) The Notices of Entry regarding the trial court's Orders were served on July 29, 2024. (CR 1838.) Ambort filed a Notice of Appeal on August 26, 2024. (CR 346-347.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because Ambort timely appealed final judgments of dismissal.

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT AMBORT LACKS STANDING TO SUE UNDER SDCL 22-46-13.

The trial court recognized that Betty is deceased, that this action is being pursued by Ambort on a pro se basis claiming to seek redress for Betty's

supposed exploitation, and that Ambort fits in none of the categories of persons with authority to sue under SDCL 22-46-13. Thus, Fischbach and Jungwirth's motion to dismiss was granted.

Lippold v. Meade Cty. Bd. Of Com'rs, 2018 S.D. 7, 906 N.W.2d 922.

SDCL 22-46-13.

II. WHETHER THE TRIAL COURT CORRECTLY CONCLUDED THAT AMBORT'S CLAIMS AGAINST JUNGWIRTH AND FISCHBACH ARE BARRED BY HIS FAILURE TO COMPLY WITH SDCL 3-21-2.

Ambort conceded that he provided no notice of injury to the Spink County Auditor concerning the public employees he sued, but argued that notice under SDCL 3-21-2 was unnecessary. The trial court disagreed and granted Fischbach and Jungwirth's Motion to Dismiss.

Yankton Cnty. v. McAllister, 2022 S.D. 37, 977 N.W.2d 327.

Olson v. Equitable Life Assurance Co., 2004 S.D. 71, 681 N.W.2d 471.

SDCL 3-21-2.

STATEMENT OF THE CASE

On March 22, 2024, Ambort filed a Complaint alleging five counts. (CR 1-12.) Only Count One, which alleges "Civil Conspiracy to Commit Aggravated Grant Theft of Betty Clemensen by Exploitation (SDCL 22-46-13, 22-46-1(5))," targets Fischbach and Jungwirth. (Id.) On May 17, 2024, Fischbach and Jungwirth filed a Motion to Dismiss pursuant to SDCL 15-6-12(b)(1) and 15-6-12(b)(5). (CR 133.) They also sought their attorney's fees and costs under SDCL 15-17-51. (Id.)

Defendants' motions were heard by the Honorable David R. Gienapp on July 2, 2024. Judge Gienapp filed a written decision granting all

defendants' motions to dismiss on July 23, 2024. (CR 320-324.) While Judge Gienapp declined to award defendants' attorney's fees, he ordered as a sanction that Ambort "is prohibited from filing any actions in the Fifth Circuit involving any of the named Defendants in this action without first submitting the pleading to the undersigned Judicial officer for determination as to whether the pleading can be filed and served." (CR 324.) Orders granting the motions were then entered. (CR 326-331.)

STATEMENT OF FACTS

This lawsuit is another chapter in the unfortunate saga of litigation that has grown from Ron Clemensen's exploitation of his mother, Betty Clemensen, between 2015 and 2017, as Betty suffered from cognitive decline. (CR 194-202; Appx. 1-9.)

Betty owned several quarters of Spink County real estate. In July 2014, she established a revocable trust and transferred her property to the trust. (CR 4, 13.) In August 2017, Ambort drafted several documents seeking to change Betty's estate plan and move property out of the trust and back to Betty, individually. (CR 176-177; T26.) He convinced Betty to sign a Warranty Deed conveying her undivided one-half interest in her residence in Aberdeen, and another Warranty Deed conveying the Spink County real estate. (CR 15-17.) At the same time, Betty was presented with and signed a new will drafted by Ambort. (CR 24-28.) Ambort's will listed Ron as the

primary personal representative and stated the following with respect to the disposition of Betty's property:

> I will, devise, bequeath and give all of my property of every kind and character, including, but not limited to, real and personal property in which I have an interest at the date of my death, to my Daughter, Patrice Ellwanger, and my Son, Ronald P. Clemensen, to be distributed equally by my Personal Representative.
>
> If one shall die before me, all my property shall go to the other.
>
> If both die before me, all my property shall be distributed to Patrice's surviving children equally.

(CR 26.)

In mid-August 2017, upon learning what Ambort and Ron were trying to do with Betty's property, Klapperich applied to the Court and was appointed as Betty's temporary conservator. (CR 31-32.) At the same time, Circuit Court Judge Richard Sommers entered a Temporary Restraining Order to keep Ron from selling, transferring, or encumbering the Spink County real estate listed in the Warranty Deed that Ambort drafted. (CR 16-17, 33-35.)

On March 22, 2018, Klapperich was appointed as Betty's conservator. (CR 5; 111-114.) That same date, Judge Sommers entered Orders allowing Klapperich to execute a proposed amended and restated trust and will for Betty and authorizing Klapperich to make annual gifts. (CR 115-118.) The will that Klapperich signed gave Betty's property to the Betty Clemensen Living Trust. (CR 20-23.)

Betty died on September 23, 2019. (CR 2.) Following her death, Klapperich petitioned the Circuit Court to admit the March 22, 2018 will to probate, and, following a motion for summary judgment and hearing, the Circuit Court admitted the will to probate on January 29, 2020. (CR 119-120.) On November 8, 2021, this Court summarily affirmed the Circuit Court's decisions in the probate. (CR 121.)

On March 30, 2023, Ron entered into a negotiated settlement agreement, resolving all his claims in the various pending proceedings. (CR 78-83.) Ron expressly released Klapperich:

> Ron does likewise hereby unconditionally release and forever discharge Brock, the Estate, the Trust, all beneficiaries, heirs, successors, and assigns from any and all claims, demands, liabilities, obligations, damages, costs, expenses, actions and causes of action including each and every right of payment for damages including all claims and defenses that were made by Ron in any of the proceedings listed above, or which could have been made.

(CR 79.)

Ambort claims to pursue this lawsuit on Betty's behalf. While Betty was alive, Ambort did not serve as her guardian, conservator, trustee, or in any other representative capacity. Instead, Klapperich was appointed by the Circuit Court to be her conservator. (CR 1; 31-32; 111-114.) When Betty died, Ambort was not appointed as her personal representative. Again, Klapperich was appointed by the Court and performed that role. (CR 1; 120.) In this lawsuit, Ambort casts a variety of accusations against Klapperich, Ronayne, the attorney who represented Klapperich, and King, the attorney

who represented Betty. He also accuses two public employees, Fischbach and Jungwirth, of joining a supposed conspiracy to exploit Betty. (CR 1-12.)

Ambort's theory is that the defendants worked together to keep Betty's "true wishes" from being honored with respect to the conveyance of her real estate and her estate planning. Ambort's Complaint points generally to two actions as supposed evidence of the conspiracy. First, Ambort cites Fischbach and Jungwirth's refusal to record a Warranty Deed delivered to the office of the Spink County Register of Deeds in August 2017, which would have conveyed Betty's land from her trust to Betty, individually. (CR 6.) Second, Ambort claims the other defendants took actions directly contrary to Betty's express wishes when Klapperich executed the will on March 22, 2018. (CR 6-7.)

The *Appellant's Brief* was filed on October 11, 2024, and asserts: "Trial of the Defendants will allow [Ambort] to reveal to the court and a jury the true exploiters of Betty in her property." (Appellant's Brief, at 19.) However, the Appellant's Brief neglects to mention that, on August 13, 2024, Ron was convicted by a Spink County jury of two counts of Aggravated Grand Theft by Exploitation and five counts Grand Theft by Exploitation, all in violation of SDCL 22-46-13. All seven counts pertain to Ron improperly exercising authority over Betty's property between 2015 and 2017. (CR 194-202.) Ron's

Motion for Judgment of Acquittal was denied on August 28, 2024, and Ron was sentenced on October 25, 2024.[1]

Ambort's Complaint seeks damages, a declaration that Klapperich is an implied trustee of Betty's land and funds received, removal of Klapperich as trustee, the termination of Betty's trust, and "distribution of the remaining trust property in accordance with Betty's probable intention." (CR 12.) Distilled, Ambort's claim is that the Spink County land conveyance and will that he put together in 2017 – designed to unravel Betty's trust and ensure *more of Betty's property went to Ron* – did not come to fruition because of defendants. (CR 6-8; 26.)

In other words, Ambort's Complaint is about vindicating *Ron's* right to the inheritance Ambort's deeds and will tried to create. And Ambort persists with his claims and this appeal, even though the Spink County jury empaneled three months ago found, beyond a reasonable doubt, that Ron was Betty's "true exploiter," to use Ambort's parlance.[2]

---

[1] Jungwirth and Fischbach request that the Court take judicial notice of the Verdict, Memorandum Decision denying Ron's Motion for Judgment of Acquittal, and Judgment of Conviction in 71CRI21-74. A Motion for Judicial Notice and to Supplement Record will be filed.

[2] One might ask why Ambort cares about Ron's inheritance and advocates so fervently for Betty's trust to be terminated and its property distributed to Ron. Perhaps an answer lies not in Ambort's benevolence on behalf of Betty, but in Ambort's ability to satisfy the $2.6 million judgment he has against Ron. See 71CIV17-70.

ARGUMENT

A. Ambort has no authority to bring a claim under SDCL 22-46-13.

The plain language of SDCL 22-46-13 and the allegations of the Complaint make clear that Ambort lacks standing to pursue Count One. The trial court correctly dismissed, determining that Ambort's lack of standing deprives the Court of subject matter jurisdiction. See Lippold v. Meade Cty. Bd. Of Com'rs, 2018 S.D. 7, ¶ 18, 906 N.W.2d 917, 922 (citing Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning & Zoning Comm'n, 2016 S.D. 48, ¶ 19, 882 N.W.2d 307, 313) ("Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing.").

Ambort's sole claim against Fischbach and Jungwirth is in Count One, which seeks redress for civil conspiracy to commit aggravated grand theft by exploitation, under SDCL 22-46-13 and 22-46-1(5). SDCL 22-46-13 specifically defines who may bring a claim: "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 final clause in the preceding sentence squares with SDCL

15-4-1, which allows personal representatives to bring actions on behalf of deceased persons.

Ambort did not address this argument below. Now, he points to a paragraph from Burkard v. Burkard, 2024 S.D. 38, ¶ 30, 9 N.W.2d 752, 762, to essentially argue that this Court can "fill a statutory gap" by adding him to the list of persons who can pursue Betty's exploitation claim under SDCL 22-46-13. (Appellant's Brief, at 14-15.) Burkard recognized a situation where a child support referee, faced with no directly controlling formula, had to exercise discretion in setting child support. "[N]o statutory formula is applicable to the child custody arrangement in this case. Therefore, the Referee and circuit court have discretion to arrive at an amount of child support that best approximates what the Legislature would have intended." Id. at ¶ 21, 9 N.W.2d at 760. Under those circumstances, the referee and the circuit court's decisions are reviewed for abuse of discretion. Id.

Setting aside that Burkard is both factually and legally inapposite, Ambort ignores very basic tenets of statutory interpretation this Court follows. The Court cannot simply rewrite SDCL 22-46-13 to give standing to more individuals than those listed by the Legislature. "'In applying legislative enactments, we must accept them as written. The legislative intent is determined from what the legislature said, rather than from what we or others think it should have said.'" Lippold, 2018 S.D. 7, ¶ 24, 906

N.W.2d at 924 (quoting In re Petition, of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D. 1984)).

Lippold is helpful, because it shows another instance in which standing was legislatively set. Through an appeal of Meade County's decision, the City of Sturgis, Gary Lippold, and Jane Murphy sought to void the incorporation of the municipality of Buffalo Chip City. SDCL 9-3-20 provides that "[t]he regularity of the organization of any acting municipality shall be inquired into only in an action or proceeding instituted by or on behalf of the [S]tate." This Court concluded: "SDCL 9-3-20 bars standing to all parties other than the State or persons acting on the State's behalf in any action or proceeding inquiring into the regularity of the organization of any acting municipality." Lippold, 2018 S.D. 7, ¶ 19, 906 N.W.2d at 922. Likewise, SDCL 22-46-13 lists those who have standing to bring a tort cause of action for exploitation:

1. The elder or adult with a disability;
2. The person's guardian or conservator;
3. 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
4. The personal representative of the deceased elder or adult with a disability.

Betty died on September 23, 2019. She could neither bring her own action nor consent to another person or organization bringing an action on her behalf almost five years later. Betty's conservatorship terminated upon

her death. See SDCL 29A-5-507. The only person with the statutory authority to bring an action for exploitation under SDCL 22-46-13 is the personal representative of her estate. Ambort is not Betty's personal representative. Rather, he expressly pleads that Klapperich is Betty's personal representative. (CR 1.) The fact that Ambort lacks authorization under SDCL 22-46-13 to bring Count One is dispositive. The dismissal of Count One should be affirmed.

1. Third-party standing is inapplicable.

Fischbach and Jungwirth maintain the only claim against them, Count One, is easily resolved under the plain language of SDCL 22-46-13. That statute does not give Ambort the authority to pursue Betty's supposed exploitation claim. Therefore, the third-party standing arguments that span the bulk of the Appellant's Brief are not germane to the claim Ambort pursues against Fischbach and Jungwirth. However, even if the Court entertains Ambort's third-party standing argument, the Circuit Court's dismissal should be affirmed.

"Third-party standing is largely disfavored." Swanson v. Hilgers, No. 4:24CV3072, 2024 U.S. Dist. LEXIS 161299, at *8 (D. Neb. Sep. 9, 2024) (citing Kowalski v. Tesmer, 543 U.S. 125, 130 (2004)). "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." Powers v. Ohio, 499 U.S. 400, 410 (1991). "We have recognized the right of

litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interest." Id. at 410-411 (internal citations omitted).

The Circuit Court correctly analyzed these elements and held that Ambort satisfied none of them with the allegations of the Complaint. First, Ambort's alleged injury is the fact that certain documents ultimately resulted in a criminal indictment against him. (CR 2.) This does not give Ambort a concrete interest in the outcome of the issues in this dispute, which seeks to undermine the results of various previously adjudicated decisions, dissolve Betty's trust, and give more of Betty's property to Ron. Indeed, a favorable outcome in this lawsuit will do nothing to redress Ambort's claimed injuries.

Second, the Circuit Court correctly concluded that the Complaint does not set forth any relevant facts which support a close relationship between Ambort and Betty. "[T]he relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." Powers, 499 U.S. at 413 (quoting Singleton v. Wulff, 428 U.S. 106, 115 (1976)). Nothing in the record or Complaint allegations before this Court would support such determination.

If anything, the record suggests Ambort has consistently acted as a shill for Ron, not an advocate for Betty.

Third, the Circuit Court correctly recognized that the supposed "hindrances" involved here are self-created. The Supreme Court has noted that "[t]hus far, we have permitted third-party standing only where more 'daunting' barriers deterred the rightholder." Miller v. Albright, 523 U.S. 420, 449 (1998). "A hindrance signals that the rightholder *did not simply decline to bring the claim on his own behalf, but could not in fact do so.*" Id. at 450 (emphasis added).

Ambort recognizes that there are two successors in interest to Betty, Ron and his brother-in-law, Lonny Ellwanger. (CR 3.) Ambort asserts that Ron "cannot bring this action because he and Klapperich have agreed not to sue on another." (Id.) More accurately, Ron entered into a negotiated settlement agreement, while represented by counsel, to forgo any claims against Klapperich in exchange for consideration. (CR 78-83.) This "hindrance" was self-imposed by Ron. He made a conscious choice, and formally declined to bring any such claim. As for Lonny Ellwanger, his "hindrance" is one of disinterest in bringing any claim. Lonny's and Ron's disinterest is the exact situation noted in Miller which does not give rise to a hindrance justifying third-party standing. None of the "hindrances" argued by Ambort meet the bar set forth by the Supreme Court.

This is not the case to extend third-party standing, and that is plain from the allegations in the Complaint. The Circuit Court acted correctly by dismissing the case under SDCL 15-6-12(b)(1).

B. Ambort's failure to comply with SDCL 3-21-2 bars his tort claims against Fischbach and Jungwirth, who are public employees.

The Circuit Court also correctly dismissed Ambort's claims against Fischbach and Jungwirth for failure to state a claim. Ambort never provided written notice of the claims he pursues against Jungwirth and Fischbach to the Spink County Auditor.

SDCL 3-21-2 provides, in part:

> No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury.

This Court has interpreted SDCL 3-21-2 to require notice of injury for all causes of action sounding in tort. Yankton Cnty. v. McAllister, 2022 S.D. 37, ¶ 16, 977 N.W.2d 327, 334-35 (quoting Wolff v. Sec'y of S.D. Game, Fish & Parks Dep't, 1996 S.D. 23, ¶ 20, 544 N.W.2d 531, 534.) "In applying SDCL 3-21-2, we have held that '[i]n order to commence suit on [tort claims], the provision of statutory notice was mandatory." Yankton Cnty, 2022 S.D. 37, ¶ 16, 977 N.W.2d at 335 (quoting Finck v. City of Tea, 443 N.W.2d 632, 635 (S.D. 1989).

Ambort tried to plead around this requirement by suing Fischbach and Jungwirth in their "individual capacity." (CR 1-2.) This tactic fails for two reasons. First, the balance of the Complaint tells a different story. Ambort alleges that "[t]he Spink County Register of Deeds, Sharon Jungwirth, refused to record the deed on the advice of Ronayne & Fischbach" and Jungwirth and Fischbach acted unlawfully by "refusing to recognize that her deed, Exhibit 3, was recorded in the Spink County Register of Deeds, pursuant to SDCL 43-28-14, as to those with notice." (CR 4, 6.) These allegations plainly concern duties that Jungwirth and Fischbach perform as public employees. See SDCL 7-9-1 (register of deeds' duty to record); 7-16-8 (states attorney's duty to advise civil officers of the county).

Second, this Court analyzed and rejected an identical "individual capacity" argument in Olson v. Equitable Life Assurance Co.:

> Olsons also argue that they were not required to give notice to the county auditor regarding their claim against Sheriff Jung in his "individual capacity." Olsons have not cited any authority for this proposition. They sued Sheriff Jung for actions he took as the Sheriff of Jones County. Their argument runs contrary to the plain language of SDCL 3-21-2.

2004 S.D. 71, ¶ 29, 681 N.W.2d 471, 477.

In this appeal, Ambort now shifts to arguing that SDCL 3-21-2 does not apply because Fischbach and Jungwirth acted outside the scope of their authority. (Appellant's Brief, at 36-37.) The text of SDCL 3-21-2 does not differentiate between actions within the scope of employment vs those alleged to be outside the scope of employment. Instead, SDCL 3-21-2 simply

precludes actions against public employees unless timely notice is provided. Intuitively, the distinction that Ambort attempts to create makes no sense. Alleged actions outside the authority of the office and alleged violations of duty are quite often the reason public employees are the subject of tort suits. If all that a claimant must do to avoid the 180-day notice requirement is characterize the defendant public employee's actions as "outside the scope of their employment," SDCL 3-21-2 would be pointless.

Ambort cites Hallberg v. S.D. Bd. of Regents, 937 N.W.2d 568, 576 (S.D. 2019), to claim that Fischbach and Jungwirth are not safeguarded from liability. (Appellant's Brief, at 37.) This case does not help him, because, unlike in Hallberg, the issues in this case do not concern sovereign immunity. SDCL 3-21-2 is neither cited nor discussed in Hallberg.[3] Instead, Hallberg was an appeal of a circuit court's determination that the defendants' actions were discretionary and protected by the doctrine of sovereign immunity. Hallberg's holding has nothing to do with the SDCL 3-21-2 notice requirement that Ambort failed to meet in this case.

Ambort commenced this suit seeking tort damages against Fischbach and Jungwirth, both of whom are public employees, without providing timely

[3] Hallberg was discharged in December 2017 and filed suit in April 2018, which is within 180 days of the claimed injury. A pleading may substantially comply with the requirements of SDCL 3-21-2. Yankton Cnty., 2022 S.D. 37, ¶¶ 20-21, 977 N.W.2d at 336.

statutory notice. His claims against those public employees are barred. The Circuit Court's decision to dismiss on this basis should be affirmed.

CONCLUSION

Appellees Victor Fischbach and Sharon Jungwirth respectfully request that the Court affirm the dismissal of Ambort's case.

Respectfully submitted this 26th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(4). This brief is 17 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service; is typeset in Century Schoolbook (12 pt.) and contains 3,887 words. The word processing software used to prepare this brief is Microsoft Word 2019.

Dated this 26th day of November, 2024.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellees Victor B. Fischbach and Sharon Jungwirth, hereby certifies that on the 26th day of November, 2024, a true and correct copy of **BRIEF OF APPELLEES VICTOR B. FISCHBACH AND SHARON JUNGWIRTH** was served via Odyssey on:

Mr. Ryan Vogel
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and a true and correct copy was sent by first-class mail, postage prepaid, to:

Mr. Glenn Ambort
Post Office Box 599
Redfield, SD 57401

The original was mailed by first-class mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
Supreme Court of South Dakota
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

and an electronic version of the brief was transmitted to the Clerk of the Supreme Court via electronic mail.

Dated at Aberdeen, South Dakota, this 26th day of November, 2024.

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Appellees Victor B. Fischbach and Sharon Jungwirth

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

GLENN AMBORT,

Plaintiff/Appellant,

-vs-

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, and SHARON JUNGWIRTH,

Defendants/Appellees.

Appeal No. 30830

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID R. GIENAPP,
CIRCUIT COURT JUDGE

APPENDIX OF APPELLEES VICTOR B. FISCHBACH AND SHARON JUNGWIRTH

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NOTICE OF APPEAL FILED
AUGUST 26, 2024

INDEX TO APPENDIX

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
COUNTY OF SPINK) FIFTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

v.

RONALD PETER CLEMENSON,
DOB: 02/16/1963
40037 SD Highway 20
Conde, SD 57434

ERNEST GLENN AMBORT,
DOB: 02/19/1940
18 W. 8th Ave.
Redfield, SD 57469

ROGER DEAN WALDNER,
DOB: 02/14/1963
517 W. 2nd St.
Redfield, SD 57469

Defendants.

71CRI21-73

INDICTMENT FOR:

COUNT 1
CONSPIRACY TO COMMIT AGGRAVATED GRAND THEFT BY EXPLOITATION
(SDCL 22-3-8, 22-4-1, 22-46-3)
(Class 2 felony)

COUNT 2
OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING
(SDCL 22-11-28.1)
(Class 6 felony)

COUNT 3
OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING
(SDCL 22-11-28.1)
(Class 6 felony)

COUNT 4
OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING
(SDCL 22-11-28.1)
(Class 6 felony)

COUNT 5
OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING
(SDCL 22-11-28.1)
(Class 6 felony)

Exhibit 16

COUNT 6
AGGRAVATED GRAND THEFT BY EXPLOITATION (SDCL 22-46-3)
(Class 2 felony)

COUNT 7
AGGRAVATED GRAND THEFT BY EXPLOITATION (SDCL 22-46-3)
(Class 2 felony)

COUNT 8
GRAND THEFT BY EXPLOITATION
(SDCL 22-46-3)
(Class 4 felony)

COUNT 9
GRAND THEFT BY EXPLOITATION
(SDCL 22-46-3)
(Class 4 felony)

COUNT 10
GRAND THEFT BY EXPLOITATION
(SDCL 22-46-3)
(Class 4 felony)

COUNT 11
GRAND THEFT BY EXPLOITATION
(SDCL 22-46-3)
(Class 4 felony)

COUNT 12
GRAND THEFT BY EXPLOITATION
(SDCL 22-46-3)
(Class 4 felony)

THE SPINK COUNTY GRAND JURY CHARGES:

COUNT 1

Between the 1st day of January 2017 and the 31st day of October 2017, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON, **ERNEST GLENN AMBORT**, and ROGER DEAN WALDER did commit the public offense of **CONSPIRACY** (SDCL 22-3-8, 22-4-1, 22-46-3) in that he did enter

into an agreement with another person to commit an unlawful act, namely **AGGRAVATED GRAND THEFT BY EXPLOITATION,** and he and /or his co-conspirator did an overt act to effect the object of the conspiracy and with the intent to advance the object of the conspiracy, including (but not limited to) using B.C.'s Power of Attorney to sell B.C.'s land appraised at over five hundred thousand dollars ($500,000.00), having B.C.'s heirs sign an acknowledgement approving of the sale of B.C.'s land, creating documents to disinherit B.C.'s heirs, and creating videos to make B.C. appear competent; and as to

COUNT 2

Between the 10th day of August 2017 and the 20th day of August 2017, in the County of Spink, State of South Dakota, ROGER DEAN WALDNER did commit the public offense of OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING (SDCL 22-11-28.1) (Class 6 felony) in that he did offer any false or forged instrument, knowing that the instrument is false or forged, for filing, registering, or recording in a public office, which instrument, if genuine, could be file, registered, or recorded under any law of this state or of the United States, to-wit: Certificate of Trust; and as to

COUNT 3

Between the 10th day of August 2017 and the 20th day of August 2017, in the County of Spink, State of South Dakota, ROGER DEAN WALDNER did commit the public offense of OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING (SDCL 22-11-28.1) (Class 6

felony) in that he did offer any false or forged instrument, knowing that the instrument is false or forged, for filing, registering, or recording in a public office, which instrument, if genuine, could be file, registered, or recorded under any law of this state or of the United States, to-wit: Warranty Deed; and as to

COUNT 4

Between the 10th day of August 2017 and the 20th day of August 2017, in the County of Spink, State of South Dakota, ROGER DEAN WALDNER did commit the public offense of OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING (SDCL 22-11-28.1) (Class 6 felony) in that he did offer any false or forged instrument, knowing that the instrument is false or forged, for filing, registering, or recording in a public office, which instrument, if genuine, could be file, registered, or recorded under any law of this state or of the United States, to-wit: Declaration of Gina Rogers; and as to

COUNT 5

Between the 10th day of August 2017 and the 20th day of August 2017, in the County of Spink, State of South Dakota, ROGER DEAN WALDNER did commit the public offense of OFFERING FALSE OR FORGED INSTRUMENT FOR FILING, REGISTERING, OR RECORDING (SDCL 22-11-28.1) (Class 6 felony) in that he did offer any false or forged instrument, knowing that the instrument is false or forged, for filing, registering, or recording in a public office, which instrument, if genuine, could be file, registered, or recorded under any law of this state or of the United States, to-wit: Last Will of B.C.; and as to

COUNT 6

On or about the 29th day of September 2016, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of AGGRAVATED GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 2 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful execution of B.C.'s trust in an amount that exceeds five hundred thousand dollars ($500,000.00); to-wit: DMAC Loan on NW 1/4, Section 6, Township 119, Range 61 land. B.C. was an elder or an adult with a disability; and as to

COUNT 7

On or about the 29th day of September 2016, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of AGGRAVATED GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 2 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful execution of B.C.'s trust in an amount that exceeds five hundred thousand dollars ($500,000.00), to-wit: DMAC Loan on NE 1/4,

Section 24, Township 119, Range 62 land. B.C. was an elder or an adult with a disability; and as to

COUNT 8

On or about the 19th day of September 2016, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 4 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful execution of B.C.'s trust in an amount more than five thousand dollars ($5,000.00) but less than or equal to one hundred thousand dollars ($100,000.00), to-wit: $100,000 Great Plains loan. B.C. was an elder or an adult with a disability; and as to

COUNT 9

On or about the 12th day of August 2015, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 4 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful execution of B.C.'s trust in an amount more than five thousand dollars

($5,000.00) but less than or equal to one hundred thousand dollars ($100,000.00), to-wit: $88,000 transfer from Edward Jones. B.C. was an elder or an adult with a disability; and as to

COUNT 10

On or about the 26th day of April 2017, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 4 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful execution of B.C.'s trust in an amount more than five thousand dollars ($5,000.00) but less than or equal to one hundred thousand dollars ($100,000.00), to-wit: $50,000 check to Crossroads. B.C. was an elder or an adult with a disability; and as to

COUNT 11

On or about the 16th day of June 2017, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 4 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful

execution of B.C.'s trust in an amount more than five thousand dollars ($5,000.00) but less than or equal to one hundred thousand dollars ($100,000.00), to-wit: $45,000 check to Crossroads. B.C. was an elder or an adult with a disability; and as to

COUNT 12

On or about the 29th day of June 2017, in the County of Spink, State of South Dakota, RONALD PETER CLEMENSON did commit the public offense of GRAND THEFT BY EXPLOITATION (SDCL 22-46-3) (Class 4 felony) in that he had a duty, either voluntarily assumed, by written contract, by receipt of payment of care, or by order of a court to provide for the support of B.C. and having been entrusted with B.C.'s property, did, with intent to defraud, appropriate B.C.'s property for a use or purpose not in the due and lawful execution of B.C.'s trust in an amount more than five thousand dollars ($5,000.00) but less than or equal to one hundred thousand dollars ($100,000.00), to-wit: $25,000 check to Crossroads. B.C. was an elder or an adult with a disability;

contrary to statute in such case made and provide against the peace and dignity of the State of South Dakota.

Dated this 8th day of July 2021.

A True Bill

"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

GRAND JURY FOREPERSON

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARD TO THIS INDICTMENT:

Dave Lunzman, Brown County Chief Deputy
Brett Spencer, DCI Agent
Brock Klapperich
Brent Klapperich
Sharon Jungwirth

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT OF SOUTH DAKOTA

No. 30830

GLENN AMBORT,

Plaintiff and Appellant,

v.

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, SHARON JUNGWIRTH,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
SPINK COUNTY, SOUTH DAKOTA

THE HONORABLE DAVID R. GIENAPP
Circuit Court Judge

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Plaintiff-Appellant, *pro se*

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Notice of Appeal Filed August 26, 2024.

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APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT OF SOUTH DAKOTA

No. 30830

GLENN AMBORT,

Plaintiff and Appellant,

v.

BROCK KLAPPERICH, ROBERT M. RONAYNE, RORY P. KING, VICTOR B. FISCHBACH, SHARON JUNGWIRTH,

Defendants and Appellees.

PRELIMINARY STATEMENT

Citation to Indexes will be "IDX". Briefs of Appellees will be: King and Ronayne = K&R; Fischbach and Jungwirth = F&J; Brock = BB; Glenn's Brief = AB; this Court's Order of 12-31-2024 granting F&J Motion = F&J Order.

I. OPPOSITION TO APPELLEES COLLECTIVELY

1. It is constitutional error to deny third-party standing.

Brock contends that he alone has the authority to initiate legal action for Betty, citing SDCL 22-46-13. BB 11-12; K&R 8-12; F&J 9. "When interpreting a statute we presume the legislature intended to enact a valid statute, and where a statute can be construed so as not to violate the constitution, we will adopt such a construction." *State v. Martin*, 674 N.W.2d 291, 300 (S.D. 2003) (cleaned up).

Glenn argued for third-party standing below. IDX 1, ¶¶9-24; IDX 190-201.

Legislative Knowledge and Intent

The Legislature is presumed to act with knowledge of judicial decisions. *McMillin v. Mueller*, 695 N.W.2d 217, 225 (S.D. 2005). This implies:

1) That the Legislature was aware that Betty's right to file the tort action constituted a "property right." *Christians v. Christians*, 637 N.W.2d 377, 382 n.2 (S.D. 2001).

2) That it understood that Betty could not be deprived of this right without due process. *In re Constr. of Art. III*, 464 N.W.2d 825, 826 (S.D. 1991).

Conservator's Duties and Legislative Intent

1) SDCL 29A-5-405 mandates that a conservator consider the protected person's "express desires" when making decisions.

2) Brock was aware of Betty's desires but ignored them during her lifetime. IDX 1, ¶¶51, 57-59.

3) Probate did not limit remedies for fraud against Betty during her lifetime. SDCL 29A-1-106.

4) SDCL 22-46-13 empowered Brock to bring a tort claim against the Appellees to secure Betty's property right.

5) The Legislature did not intend Brock to refuse to bring an exploitation claim for Betty, if he was aware that she had "been exploited as defined in § 22-46-1 or 22-46-3." SDCL 22-46-13.

6) The Legislature was aware that Brock's refusal would deprive Betty of her property right without Federal and State due process.

7) The Legislature did intend Brock to deprive Betty of her property right.

Constitutional Considerations and Third-Party Standing

1) Brock's refusal to bring the exploitation claim deprived Betty of her property right without Federal and State due process.

2) The Legislature was aware that the courts have long used third-party standing to enable litigants to bring tort claims on behalf of others. *Griswold v. Connecticut,* 381 U.S. 479 (1965), cited in *State v. Munson*, 86 S.D. 663, 665 (S.D. 1972).

3) If Brock's refusal to use SDCL 22-46-13 precludes third-party standing, it violates Federal and State due process *as applied.*

4) Alternatively, construing the statute to permit third-party standing upholds its constitutionality *as applied* herein. *In re A.L.*, 781 N.W.2d 482, 487 (S.D. 2010).

Constitutional Interpretation

A balanced interpretation of SDCL 22-46-13 will:

1) Recognize the Legislature's intent to protect Betty's "property right."

2) Acknowledge the potential for conflicts of interest in personal representatives.

3) Allow for the application of third-party standing when necessary to protect decedent's fundamental rights.

4) Uphold Federal and State rights of due process and access to courts.

This interpretation aligns with the presumption that the Legislature intended to enact a valid statute under *all* circumstances, including scenarios where personal representatives might exploit their position. It preserves the courts' ability to employ third-party standing to protect the rights of vulnerable individuals when their designated representatives fail to protect their fundamental rights.

2. **Glenn addressed the issue of the personal representative's standing below.**

Appellees argue that Glenn did not address this argument below. F&J 9. He addressed Brock's hindrance that prevented him from bringing the exploitation case against himself and others. IDX 194 at ¶7. There was no need to address Brock's "self-created" hindrance, F&J 13, after the statute had run; the limitations provision is an absolute bar.

a. *Substantial Hindrance*

Courts will likely view a conflict that is deliberately self-created to exploit an elder as a substantial hindrance to the protection of the elder's rights under *Powers v. Ohio,* 499 U.S. 400 (1991). Glenn addressed Brock's conflict-hindrance. IDX 302-04.

b. *Congruence of Interests*

Glenn's interests are "inextricably bound up" with Betty's right to bring the exploitation claim. This congruence of interests, combined with Betty's inability to assert her own rights and Brock's refusal to do so, supports Glenn's argument that third-party standing is both "necessary and appropriate" under *Powers*, 499 U.S. at 414 ("congruence of interests makes" third-party standing "necessary and appropriate").

c. *Preventing Abuse*

Allowing third-party standing provides a remedy for Brock's refusal to protect Betty's "fundamental rights," *Barrows v. Jackson,* 346 U.S. 249, 257 (1953), especially since there is *prima facie* and actual evidence that he intended to (and did) misappropriate her estate contrary to her "express desires." SDCL 29A-5-405.

d. *Summary*

While SDCL 22-46-13 does not explicitly provide for third-party standing, recognizing such standing preserves Legislature's intent for the statute to apply post-

mortem and avoids "as applied" constitutional challenge.

3. **Glenn's relationship with Betty is contemplated by *Singleton*.**

Appellees argue: Glenn did not have a relationship with Betty contemplated in *Singleton v. Wulff*, 428 U.S. 106 (1976). K&R 10, F&J 12, BB 11-14. A close personal or family relationship is neither necessary nor sufficient to assert third party standing. The *Powers* Court concluded that a litigant had third party standing to raise the rights of an excluded juror even though the two did not know each other personally. *Amato v. Wilentz*, 952 F.2d 742, 752 (3d Cir. 1991). "Congruence of interests" was sufficient. *Powers*, 499 U.S. at 414.

a. *Betty's Right to Devise Property*

Betty exercised her right to devise her property through two written Wills and three video recordings. IDX 1, ¶¶6, 8-9, 14. This right is fundamental to estate planning and is protected by law.

b. *Glenn's Assistance and Its Implications*

Glenn's involvement in Betty's estate planning was significant:

- He drafted the 2017 Will and other documents for Betty's attorney. F&J 3.
- He recorded Betty's wishes in three videos. IDX 1, ¶14.

These actions demonstrate Glenn's desire to assist Betty was closely intertwined with the exercise of her right to devise her property. This relationship meets the "inextricably bound up" standard in *Singleton*, 428 U.S. at 114.

c. *Legal Consequences*

Glenn's efforts to help Betty through her attorney resulted in Glenn's suffering serious personal injuries. IDX 188, Exhibit 16. The Complaint sets forth the congruence

of their interests, IDX 2-3; their congruence of interests "makes it necessary and appropriate" for Glenn "to raise the rights of" Betty. *Powers*, 499 U.S. at 414.

d. *Summary*

The relationship between Betty's exercise of her right to devise her estate and Glenn's wish to assist her satisfies the close relationship standard in *Singleton*. Their interests are "inextricably bound" together, meeting the *Singleton* basis for Glenn's third-party standing. 428 U.S. at 114.

4. **Glenn challenges the "application" of the elder abuse statutes.**

Appellees argue: Glenn "is obviously not challenging the elder abuse statutes." K&R 10. Glenn does challenge the elder abuse statute *as applied* against him (and Ron) in his litigation of Betty's case:

a. **Exposing Exploitation**: Glenn aims to demonstrate that Betty was exploited by the Appellees. IDX 1, ¶¶11-17. This aligns with Betty's interests in revealing the wrongdoers against her.

b. **Congruence of Interests**: Glenn and Betty share a "congruence of interests" in exposing theft of her estate by Brock. This congruence meets the *Singleton* standard for third-party standing. 428 U.S. at 114.

c. **Statutory Remedy**: Pursuing this case before a jury would provide Betty with the remedy available under SDCL 22-46-13.

d. **Revealing Appellees' Actions**: The trial will uncover:

- Brock's theft of Betty's estate from the rightful heirs, Ron and Patti,
- Exorbitant fees collected by Ronayne and King,
- The State's misapplication of SDCL 22-46-3 against Glenn.

e. **Challenging Statute Application**: Glenn contests State's use of SDCL 22-46-3 *as applied* against him, drawing a parallel to *Griswold,* 381 U.S. at 481. Glenn argues he should have standing because the offense he was charged with was not a crime; it was brought by State to cover up the Appellees' theft of Betty's estate.

This approach addresses Betty's exploitation and also challenges the criminal actions against Glenn. They share a congruence of interests in exposing her true exploiters and State's misuse of its prosecutorial powers to aid and assist in the Appellees' aggravated grand theft of her estate by exploitation.

5. **Glenn satisfies the hindrance element of *Powers*.**

The Defendants argue: "Furthermore, Betty's interests have been protected over-and-over in prior judicial proceedings, namely the conservatorship and the probate - so certainly no hindrance." K&R 11; F&J 13; BB 9-11.

For Brock, two factors contribute to meeting the *Powers* element of hindrance:

- **Statute of limitations**: The expiration of the statute of limitations under SDCL 22-46-13 precluded Brock from filing the action. Imminent mootness is a hindrance under *Singleton*, 428 U.S. at 117.
- **Conflict of interest**: Brock's self-created desire to acquire Betty's estate for himself, rather than allowing it to pass to Ron and Patti, functioned as a significant hindrance.

a. Brock's Conflict of Interest

Brock did not address that he was hindered from bringing the exploitation action. Brock waived this point on appeal. *In re People ex rel. M.S.*, 845 N.W.2d 366, 371 n.4 (S.D. 2014). Brock's refusal to bring the exploitation action stems from his desire to

misappropriate Betty's estate during her lifetime and after her death. This conflict is evidenced by:

- The settlement with Ron for $60,000 per year during Ron's lifetime. IDX 188.
- The loss of nine quarters of agricultural land, valued at approximately $7-8 million, if he were to file the exploitation action. IDX 1, ¶45.
- The gain of the land if he refused to file it.

The gain of $7-8 million by his refusal creates a "daunting" hindrance. *Miller v. Albright*, 523 U.S. 420, 449 (1998).

b. Betty's Express Desires

Evidence demonstrates Betty's desire to pass her estate to Ron and Patti:

- Her 2017 Will; IDX 1, ¶41, Exhibit 6;
- Her 2018 handwritten, notarized Will; IDX 1, ¶51c, Exhibit 8;
- Her March 15, 2018 video statement; IDX 1, ¶51d, Exhibit 9.

Brock's apparent failure to disclose her "express desires" to the probate court, despite being aware of them, constitutes a violation of SDCL 29A-5-405 and is deceit under SDCL 20-10-2(3).

c. *Summary*

The expiration of the statute, Brock's self-imposed conflict-hindrance, and his suppression of Betty's express desires, prevented him from fulfilling his duties as Betty's personal representative. In light of these circumstances, granting Glenn third-party standing emerges as the only remaining avenue to uphold Betty's fundamental rights and ensure that her interests are adequately represented in court. *Singleton,* 428 U.S. at 116; *Albright*, 523 U.S. at 450; *Barrows*, 346 U.S. at 257.

6. **Ron did not exploit his Mother**.

The Appellees' assertion of "Ron Clemensen's exploitation of his mother, Betty Clemensen," F&J 3, is legally flawed.[1] This claim overlooks a crucial element of the exploitation statutes, SDCL 22-46-1 & -3, which require the elder to own property.

a. *Betty's Property Transfer*

On July 29, 2014, Betty transferred all her present and future property to a Trust. IDX 1, ¶29, Exhibit 1, p.1, ¶¶3, 4. Betty retained "no interest whatsoever in the Property" held as nominee for the Trustee. Id., ¶b. The only evidence that Betty altered this transfer occurred on August 15, 2017. IDX 1, ¶¶29-31.

b. *Legal Precedent on Trust Ownership*

This Court has established that property placed in a trust no longer belongs to the trustor. *In Re Pooled Advocate Trust*, 2012 S.D. 24, ¶44; *Schroeder v. Herbert C. Coe Trust*, 437 N.W.2d 178, 185 (S.D. 1989).

c. *Exploitation against Betty not Possible before August 15, 2017*.

The Indictment, F&J, App. 1, alleged criminal acts by Ron that occurred before Betty transferred her real property from the Trust to her name personally. The acts occurred while the Trust, not Betty, owned the land and cash assets. IDX 1, ¶¶29-31. It is an essential element of SDCL 22-46-3 that the property was owned by Betty, not the Trust. *Hermanek-Peck v. Spry*, 2022 S.D. 60, ¶31.

d. *Betty's Cash Assets were owned by the Trustee.*

Betty transferred *all* her present and future assets to the Trust. IDX 1, ¶29, Exhibit

[1] This section applies to Appellees' assertion that Glenn was a "participant in conduct that has been judicially found to be elder abuse." K&R 11.

1 at 1. Her Edward Jones accounts remained in her name but were owned by the Trustee. Likewise, the Assignment document, IDX 1, ¶29, Exhibit 1, stated that any future-acquired property (such as social security payments) were also to be owned by the Trustee. Id. However, for administrative convenience, "Trustor is holding title to the Property as nominee for Trustee to the full extent of the interest therein. Trustor expressly acknowledges that *Trustor has no interest whatsoever in the Property*." Id. at ¶b (italics added).

e. *Circuit Court's Erroneous Interpretation*

The Circuit Court stated: "State demonstrated to the jury that the Defendant exploited the trust by attempting to mortgage trust property." F&J Order, Exhibit B at 5. The attempts occurred on September 29, 2019, F&J, App. 5, while the land was still owned by the Trust. The court also noted that the evidence showed that the checks Ron wrote on the joint bank account came from "her Edward Jones dividends and Social Security." Under the Assignment (7/29/2014), which was tied to the Trust, the joint bank account and its deposits were owned by the Trustee, not Betty. It was the duty of the lower court to declare and enforce the provisions of Betty's Assignment. *Plains Commerce Bank, Inc. v. Beck*, 2023 S.D. 8, ¶26.

Yet, the court construed SDCL 22-46-3 to allow for exploitation of property held in the Trust. F&J Order, Exhibit B at 5. This is an unforeseeable judicial enlargement of the criminal statute.

f. *Due Process and Fair Warning*

An unforeseeable judicial enlargement of a criminal statute applied retroactively violates due process. *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

g. *Violation of Due Process*

The lower court's expansion and its retroactive application violated Ron's due process right to fair warning. This expansion was "unexpected and indefensible by reference to the law that has been expressed in this jurisdiction prior to the conduct in issue." *State v. Plastow*, 2015 S.D. 100, ¶24, 873 N.W.2d 222, 230 (S.D. 2015).

h. *Summary*

Given these considerations, it is evident that Ron did not exploit his mother as defined by SDCL 22-46-3. The court's retroactive application of the expansion and the subsequent jury verdict based on this expansion violated Ron's due process rights. This expansion was inconsistent with established South Dakota law regarding trust property ownership and lacked the requisite fair warning for criminal liability.

7. **Res Judicata does not apply.**

Appellees argue that res judicata applies. K&R 12, referring to *Ambort v. Klapperich*, 71CIV20-03. K&R 4.

In their Motion to Dismiss in that case, Appellees contended that Glenn lacked standing and was not the real party in interest, IDX 195, leading to the court's decision to grant their motion. This Court has held that invocation of a court's subject-matter jurisdiction is contingent upon the parties having standing. But, it is a fundamental principle that a court always retains jurisdiction to determine its own jurisdiction.

a. *Jurisdictional Considerations*

The court's authority in that case was limited to dismissing the action for lack of standing. Additional commentary or ruling beyond dismissal is *obiter dictum*; the court lacked jurisdiction to address the merits of the case, even if the parties agreed. *State v.*

Med. Eagle, 2013 S.D. 60, ¶38. The principle of res judicata applies solely to the dismissal of that case, not to its merits.

b. *Plaintiff's Standing and Rights*

Glenn's role in that case was as plaintiff pursuing Ron's *contract* rights through assignment. He had no authority to litigate Betty's *tort* rights. IDX 197.

c. *Legal Precedents*

The court's jurisdiction to determine its own jurisdiction is well-established. *Wipf v. Hutterville Hutterian Brethren, Inc.*, 2013 S.D. 49, ¶21. This ensures that courts can always assess the validity of their authority in any given case.

d. *Summary*

The court's dismissal of that case for lack of standing was within its jurisdictional purview. Any further rulings on the merits exceeded its subject-matter jurisdiction. The res judicata effect applies to the dismissal itself, not to the merits of the case that were not properly before the court.

8. **Res judicata does not preclude Betty's tort claim**.

The Appellees argue that the validity of the 2018 Will by Brock is res judicata vis-à-vis the 2017 Will Betty executed with attorney Gina Rogers. K&R 14.

The present Complaint seeks damages for "intent to defraud" Betty by Appellees' acts and omissions during her lifetime; it does not attempt to overturn the 2018 Will. It outlines four specific facts to support its allegations of fraud against her during her lifetime. IDX 1, ¶¶51a-d. This approach aligns with South Dakota's legal framework for addressing exploitation of vulnerable adults.

a. *Statutory Basis for the Claim*

SDCL 22-46-13 provides for a civil action against perpetrators of exploitation.

b. *Probate Proceedings and Fraud*

While probate proceedings typically handle matters related to the execution and validity of wills, SDCL 29A-1-106 allows for claims of fraud that occurred during the decedent's lifetime to be pursued separately from the probate process.

c. *Summary*

Betty's right to claim exploitation with "intent to defraud" based on events occurring during her lifetime is supported by South Dakota law. The Complaint's focus on lifetime events and pursuit of damages under SDCL 22-46-13, rather than challenging the 2018 Will, align with the legal framework provided by the elder abuse statutes and the probate code's provisions for addressing fraud.

9. **This is an exploitation case, not a legal malpractice case**.

The Appellees argue that this a legal malpractice case, K&R 14-17. The exploitation Count appears at IDX 1, ¶¶ 45-76, and alleges that Brock violated his fiduciary duty as Betty's conservator by disregarding her express desires, a direct violation of SDCL 29A-5-405.

This Count is directed at Brock's actions as a conservator; it does not allege any violation of legal duty by King or Ronayne. It frames the issue within the context of a conservator's fiduciary responsibilities, not on an attorney's professional obligations.

The Appellees' assertion that Glenn is "a non-client and adversary attempting to assert a claim solely cognizable within the attorney-client relationship," K&R 17, is misplaced. Count One is not predicated on any legal malpractice claim or breach of

attorney-client relationship; it focuses solely on Brock's exploitation of Betty as her conservator.

In summary, Count One is appropriately characterized as an exploitation claim based on Brock's violation of his fiduciary duty as a conservator, not as a legal malpractice claim against attorneys. The Complaint should be analyzed on *its legal theory*, not on *Appellees' theory*.

II. OPPOSITION TO APPELLEES FISCHBACH & JUNGWIRTH

10. **A favorable outcome will benefit Glenn immensely**.

The Appellees argue: "a favorable outcome in this lawsuit will do nothing to redress Ambort's claimed injuries." F&J 12.

Betty's land and house transfer occurred on August 15, 2017. IDX 1, ¶¶30-31; SDCL 43-25-1. The trial court in this case will instruct the jury that they must find that Betty owned the property in order to find that she was exploited. That instruction will provide redress to Glenn's injuries, because the only acts or omissions alleged to have exploited Betty were committed or omitted by the Appellees *after* August 15, 2017. No acts alleged in the Indictment occurred after August 15, 2017. It was legally impossible to exploit Betty under SDCL 22-46-3 prior to August 15, 2017, because she owned no property, an essential element of the exploit statute.

The jury's finding for Betty will redress her loss and Glenn's wrongful Indictment, etc., without probable cause. The jury is likely to find the Appellees as the true exploiters. Moreover, a successful outcome will serve as a powerful incentive for future personal representatives and their assistants to refrain from exploitation of vulnerable individuals.

A successful outcome will provide Glenn the redress that he seeks in this case.

11. **SDCL 3-21-2 does not bar non-employee claims.**

Appellees argue that Glenn's failure to comply with SDCL 3-21-2 bars the tort claims against Appellees as public employees. F&J 14-17. SDCL 3-21-2 requires written notice to be given if the claim is against the public entity or its "employees." The argument against applying SDCL 3-21-2 to bar Betty's claim can be summarized as follows:

1) *Non-Employee Actions*

The claim is not against Spink County or its employees acting in their official capacity. Passing Betty's documents to Brock and Ronayne was not within the scope of employment for the Register of Deeds or State's Attorney. It was an act of their individual will. "If the President claims authority to act but in fact exercises mere 'individual will' and 'authority without law,' the courts may say so." *Trump v. United States,* 144 S. Ct. 2312, 2327 (2024). Appellees exercised their "individual will" and "authority without law" by passing the documents to Brock; they were not acting as county employees.

In *Trump,* the Court was tasked with distinguishing a President's "official" from "unofficial' acts. It held: "When the President acts pursuant to 'constitutional and statutory authority,' he takes official action to perform the functions of his office" but does not enjoy immunity for acts taken without such authority. *Id.* at 2333. It noted earlier:

> "[I]t [is] the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis." *Forrester v. White*, 484 U.S. 219, 229 (1988). The separation of powers does not bar a prosecution predicated on the President's unofficial acts.

Id. at 2332 (alterations in *Trump*).

2) *Conservator's Responsibility*

The first damages to Betty occurred on March 22, 2018. IDX 1, ¶¶40. Other damages by omission followed. Id., at ¶51. As Betty's conservator at that time, Brock was responsible for providing notice under SDCL 3-21-2, not Glenn. His failure to give notice was but another omission by Brock intended to deprive Betty, without Federal or State due process, of her right to bring an exploitation claim against Appellees for acts done without statutory or constitutional authority.

3) *Legislative Intent*

The Legislature did not intend SDCL 3-21-2 to apply to *unofficial, non-employee acts* taken without such authority. As in *Trump*, it is the nature of the function performed, not the identity of the actor who performs it, that should inform this Court's immunity analysis. *Hallberg v. South Dakota Bd. of Regents*, 2019 S.D. 67, ¶24.

4) *Summary*

SDCL 3-21-2 should not apply to non-employee (unofficial) acts. The Court must consider whether Brock's failure to give notice aligned with legislative intent and Betty's constitutional protections.

III. OPPOSITION TO APPELLEE BROCK KLAPPERICH

12. **Glenn's injury-in-fact was caused by Appellees**.

Brock argues: "Merely providing documents to state officials, which possibly lead to criminal charges . . . does not satisfy the injury in fact prong." BB 7-8. Brock knows that on or about October 11, 2018, he served upon Glenn the complaint in *Klapperich v. Clemensen*, 71CIV17-77, AB, App. 2, p.5 at ¶3, in Spink County Court, and knows further that the Complaint against Glenn included conspiracy to commit conversion of

Betty's property, ¶275, conspiracy to fraudulently induce Betty to mortgage her land, ¶281, joint R.I.C.O. violations, ¶¶296-300, and that Glenn engaged in a **criminal enterprise and scheme** carried out through transfers and/or obligations made **with actual intent to defraud Betty**, ¶289.

1. *State became an unnamed conspirator with the Appellees*

State filed an Indictment against Glenn on July 15, 2021. F&J, Appendix 1. Count One charged Glenn with violating SDCL 22-46-3, theft by exploitation and required State to prove that he acted **with intent to defraud Betty** of her property.

Brock and his conspirators needed the State to take action against Glenn to cover up their own theft of Betty's lands by exploitation. The Complaint alleged that State took its criminal action against Glenn without probable cause, IDX 1, ¶11, and likewise subjected him to malicious prosecution. Id., ¶¶11, 15. State sought its Indictment against Glenn to cover up the Appellees' aggravated grand theft of Betty's lands. The Indictment was based in part on data provided by Appellees to State. IDX 1, ¶26.

2. *Why did the Appellees need State to cover for them?*

Civil and criminal exploitation require that Betty owned the exploited property. The nine quarters of Spink County land were owned by the Trust until Betty transferred them to herself personally on August 15, 2017. Id., ¶¶29-31. All acts in support of the Indictment occurred *before* that date. F&J, Appendix 1. Glenn could not be civilly or criminally liable for or guilty of exploiting Betty, because she owned no property *before* August 15, 2017. IDX 1, ¶¶29-31. Wrongful actions taken on or after that date support both civil and criminal exploitation liability. The Appellees' acts pertaining to Betty's property occurred after August 15, 2017. None of the acts in support of the Indictment

occurred after that date. The only persons against whom an exploitation crime could be charged are those whose actions or omissions occurred *after* that date. Appellees are those persons. Glenn and Ron are not, because all of their alleged acts or omissions occurred *before* August 15, 2017.

The Appellees committed fraud to gain Betty's property. IDX 1, ¶¶51, 83. The Appellees' actions satisfy the elements of SDCL 22-46-3 & -13 for criminal and civil aggravated grand theft by exploitation. They were the true exploiters of Betty.

3. *State convinced the Circuit Court to expand the reach of SDCL 22-46-3.*

It is true that the Circuit Court expanded the reach of the exploitation statute to include property owned by the Trust. F&J Order, Exhibit B at 5. Its expansion will not survive Appeal to this Court, *Bouie*, 378 U.S. at 352, or *habeas corpus*, 28 USC 2254.

Discovery will provide evidence that the Appellees approached the Feds to take the case against Glenn but were turned down and they then approached State and convinced it to take the case. The outcome of the criminal case against Glenn did not matter to the Appellees. They needed to put him on ice long enough to complete Betty's probate and have it affirmed by this Court. *In re Clemensen*, #29587 (10-12-2021).

Appellees conspired with State to bring the Indictment against Glenn without probable cause. They and State knew Betty owned no property and that he could not exploit an elder with no property. SDCL 22-46-3; *Hermanek-Peck*, 2022 S.D. 60, ¶31.

The actions and urgings of Appellees caused State to subject Glenn to a defective indictment, false arrest, malicious prosecution, etc., without probable cause in violation of due process, thereby allowing Brock to loot Betty's estate and King and Ronayne to enrich themselves with exorbitant fees.

13. **Glenn has a concrete interest in the outcome of Betty's case**.

Brock argues: Glenn "did not have a sufficient concrete interest in the outcome to have suffered an injury in fact. (CR 321)." BB 8.

A jury verdict in Betty's favor will:

- demonstrate that Appellees were her true exploiters,
- rehabilitate Glenn's reputation severely damaged by State and Appellees' accusations over the past seven years, and
- provide a serious and public condemnation of the Appellees and the State's actions against Betty and Glenn.

Glenn has a powerful incentive to see that exploitation by conflicted personal representatives is eliminated in South Dakota; he was a collateral victim of Betty's exploitation. IDX 1, ¶15. The Complaint lists additional goals Glenn wished to pursue, IDX 1, ¶¶11-17, and which will be realized by a successful outcome. *Singleton*, 428 U.S. at 114.

The tangible connection to the case's outcome reinforces Glenn's standing and his motivation to pursue justice vigorously. *Singleton*, 428 U.S. at 112; *Griswold*, 381 U.S. at 481 (1965) ("Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime."). Glenn "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 956 (1984)

14. **Glenn opposes summary affirmance of the Judgment and Order below**.

The Appellees seek summary affirmance pursuant to SDCL 25-26A-87.1. K&R 19. Glenn opposes. The world needs to know that exploitation of vulnerable elders is not tolerated in South Dakota.

CONCLUSION

The Legislature did not intend SDCL 22-46-13 to vest in a conflicted personal representative the sole, unanswerable power to misappropriate a decedent's estate and to deny the courts their longstanding use of third-party standing to remedy such theft. "[T]he legislature has the right to limit remedies; those restrictions must also be constitutional." *Matter of Certif. of Questions of Law*, 1996 S.D. 10, ¶24. The Appellees' arguments to limit SDCL 22-46-13 to Brock have deprived Betty of her tort "property right" and her estate without Federal and State due process. It is this Court's "responsibility to ensure access to the courts as guaranteed by our state constitution." *Id.* (citation omitted). The Appellees' arguments, to limit SDCL 22-46-13 to Brock and deprive the courts' use of third-party standing to remedy his theft, violate Federal and State due process and effectively deny Betty all access to the courts. SDCL 22-46-13 is unconstitutional *as applied*.

Exploitation is a civil and criminal offense. It is also a sin. Yahweh commands us: "You must not exploit a widow or an orphan. If you exploit them in any way and they cry out to me, then I will certainly hear their cry." Exodus 22:22-23 (NLT). "The wages of sin is death." Romans 6:23. Those who exploited Betty and die unrepentant "will suffer the just penalty of eternal destruction." 2 Thess. 1:9 (CJB). Glenn cries out to Yahweh for the widow and the orphan, seeking such remedy as seems just to Him.

WHEREFORE, Glenn respectfully asks this Court to deny Appellees' Motions to Dismiss and find the Complaint contains sufficient facts in support of its claims which would entitle Betty to relief.

Dated this 22nd day of January 2025.

/s/ *Glenn Ambort*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct of the foregoing Appellant's Reply Brief was emailed to the Supreme Court Clerk and Counsel for the Defendant-Appellees at the addresses listed below on the 22nd day of January 2025.

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CERTIFICATE OF COMPLIANCE

I certify that, in accordance with the type-volume limitation set forth in SDCL § 15-26A-66(b)(2), this Appellant's Reply Brief is proportionately spaced, has a typeface of 12-point, Times New Roman, contains 5,000 words, and was prepared using Microsoft Office Word. Headings, footnotes, and quotations were counted.

/s/ Glenn Ambort