IN THE

Supreme Court

of the

State of South Dakota

No. 29809

IN THE MATTER OF
THE ESTATE OF
RUSSELL O. TANK

An appeal from the Circuit Court, Fifth Judicial Circuit
Marshall County, South Dakota

The Hon. Tony Portra
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on October 21, 2021

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JURISDICTIONAL STATEMENT

Contestant appeals the Judgment entered by the Hon. Tony Portra on September 23, 2021, with notice of entry given the same day. This Court has jurisdiction, per SDCL § 15-26A-3(1). Contestants filed their notice of appeal on October 21, 2021.

REQUEST FOR ORAL ARGUMENT

Contestant respectfully requests the privilege of appearing before this Court for Oral Argument.

STATEMENT OF THE ISSUES

I. Did the Circuit Court err by granting a Rule 50(b) motion to overturn the Jury's verdict upon grounds that were not advanced in Mr. Bender's earlier Rule 50(a) motion (and which were also conceded by counsel)?

Yes, the Circuit Court erred. A renewed motion for judgment as a matter of law (under Rule 50(b)) is strictly confined to the grounds previously advanced in a motion for judgment as a matter of law during the trial (under Rule 50(a)). Here, the Circuit Court overturned the Jury's verdict for an alleged insufficiency of evidence on the "wrongful disposition" element of undue influence, which was an issue not raised during Mr. Bender's trial motions. In addition, Mr. Bender's counsel did not just fail to raise this argument in his earlier Rule 50(a) motion, but instead *conceded* the factual sufficiency of Sherri's evidence on the third element. This constituted a waiver.

- SDCL 15-6-50(b)
- *Welch v. Haase,* 2003 S.D. 141
  Kohlman, Bierschbach & Anderson v. Veit, 409 N.W.2d 125 (S.D. 1987).
- *Wilcox v. Vermeulen*, 2010 S.D. 29
- FED. R. CIV. P. 50(B) ADVISORY COMMITTEE'S NOTE TO 2006 AMENDMENT

II. Did the Circuit Court err by vacating the Jury's verdict, following a trial at which the Contestant offered substantial evidence on all four elements of undue influence?

Yes, the Circuit Court erred. When considering a Rule 50(b) motion, all inferences and evidence must be viewed in a light most favorable to upholding the verdict, and, the non-moving party's evidence is excluded from consideration, except where it tends to support the verdict. Here, the Circuit Court granted judgment as a matter of law by using an incorrect approach and applying no discernable standard when evaluating the evidence, and, by making judgments of credibility and weight with regard to Mr. Bender's own testimony. The Verdict should be upheld.

- *In re Estate of Tank*, 2020 SD 2
- *In re Estate of Gaaskjolen*, 2020 S.D. 17

- *Fechner v. Case*, 2003 S.D. 37
- *Hayes v. N. Hills Gen. Hosp.*, 2001 S.D. 69

III. Did the Circuit Court err by granting a new trial when the evidence is sufficient to sustain the Verdict?

Yes, the Circuit Court erred. A new trial under Rule 59(a)(6) will not be granted when the evidence is sufficient. Claims of passion or sympathy are not properly before the Court as a basis for a new trial under this subsection. If the evidence was sufficient, there is no basis for a new trial.

- SDCL 15-59(a)(6)
- *Selle v. Tozser*, 2010 S.D. 64,
- *Surgical Inst. of S.D., P.C. v. Sorrell*, 2012 S.D. 48

IV. Is Sherri entitled to the post-trial relief she sought?

Yes. Sherri is entitled to an Order declaring Russell intestate. Bender is precluded from litigating the 2004 Will because of waiver and the probate statute of limitations, among other reasons. Bender is not permitted to recover his attorney's fees in this action. And, Bender is not fit to serve as Personal Representative.

- *Glover v. Krambeck,* 2007 S.D. 11
- 29A-3-108
- SDCL 29A-3-611(b)
- SDCL 29A-3-720

INTRODUCTION

The primary parties to this proceeding are Jason Bender ("Bender") and Sherri Castro ("Sherri").

Bender is the Proponent of Russell's 2012 Will, which names him as the sole beneficiary. (Russell executed a similar Will in 2004 which Bender elected not to offer into probate.)

Sherri (Tank) Castro and her three siblings (Arlo, Gina, and Renny) filed a Petition to challenge their father's 2012 Will, and, sought a declaration of intestacy. Their claims were the subject of a prior appeal to this Court. *Estate of Tank,* 2020 S.D. 2.

The Trial Transcript and Hearing Transcripts are referred to by page number, *e.g.*. [TT 144] and [HT 9/8/21, p. 13].

STATEMENT OF THE CASE

The procedural history of this case can be summarized as having three phases:

(i) a discovery phase leading to summary judgment and the first appeal, where this Court reversed summary judgment on Sherri's undue influence claim;

(ii) pre-trial hearings and a four-day trial; and

(iii) a series of post-trial proceedings, culminating in the Circuit Court's decision to set aside the Jury's Verdict.

Phase One. Russell Tank's four children formally challenged the validity of the 2012 Will offered into probate. [R.1-26; R.48-51]. In a prior

appeal, this Court reversed the entry of summary judgment on Sherri's claim of undue influence. *See, Estate of Tank,* 2020 S.D. 2, ¶ 49.

Phase Two. After remand, two pre-trial hearings were held, first before Circuit Judge Scott Myren on October 8, 2020, [1] and another before Circuit Judge Tony Portra on May 19, 2021. A four-day Jury Trial was held in Marshall County from July 19-22, 2021, before Judge Portra. The Jury unanimously found for Sherri Castro, and that Russell Tank's 2012 Will was the product of Bender's undue influence.

Phase Three: After trial, the parties filed a series of motions and pleadings, including Sherri's proposed final Order on July 29, 2021. The Circuit Court refused her Order and granted Bender's August 24, 2021, Rule 50(b) motion, and, his Rule 59(a)(6) motion for a new trial.

The Circuit Court did not issue a written decision, and its oral ruling is found in the September 8, 2021, hearing transcript. At that same hearing, the Court also granted various other post-trial relief sought by Bender, including to allow him $214,483.63 for his costs to defend the 2012 Will.[2] The Court

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[1] The trial scheduled for late October 2020 was postponed due to a Covid-related closure of the Fifth Circuit; and, shortly after that, Judge Myren joined this Court.

[2] However, the Circuit Court recognized its "serious concern" that if the Supreme Court were to reinstate the Verdict, Bender's receipt of estate funds for his fees would then be "benefitting the person who [defended an invalid Will that he himself procured.] And so this person would be then self-serving and defending basically himself, not the Will." [HT 9/8/21 pp. 28-29].

deemed moot the rest of Sherri's post-trial requests, including her Petition to remove Bender as the Personal Representative.

Following its oral ruling, the Court entered an Order and a Judgment in Mr. Bender's favor, both dated September 23, 2021, granting Mr. Bender's post-trial relief, and admitting Russell Tank's 2012 Will to probate.

The parties had also filed a set of motions regarding the implication of the Jury's Verdict invalidating the 2012 Will. After losing at trial, Mr. Bender then attempted to "re-offer" the decedent's 2004 Will into probate. Sherri argued that Bender had abandoned his 2004 Will theory back in 2016, and, that Bender's counsel had confirmed the abandonment of it on the eve of trial in July 2021.

In contrast, Sherri had filed submitted a proposed order on July 29, 2021, seeking a declaration of intestacy, because the 2012 Will was deemed invalid, and because no party had offered any other Will into probate. The Circuit Court did not rule on these issues, because its other holdings made them moot.

STATEMENT OF THE FACTS

The evidence received at trial largely echoed and amplified the factual summary found in this Court's prior opinion. *See, Estate of Tank,* ¶¶ 2-14 (background); ¶¶ 15-16 (the parties' expert witnesses); ¶¶ 35-38 (susceptibility to undue influence); ¶¶ 39 to 43 (Bender's disposition to influence); and ¶ 44 to 48 (a result clearly showing the effects of undue influence).

However, there were also some notable departures from the undue influence evidence found in the *Tank* opinion. For example, the Circuit Court granted Bender's motion *in limine* to exclude any testimony after 2012. [R.1214-16]. This exclusion precluded the Jury from hearing most of the facts summarized in Paragraph 42 of the Court's opinion, including Bender digging up Russell's cash, failing to account for it, and apparently spending it on himself (the "moldy money" testimony). [*See,* R.1387-89 (Sherri's Offer of Proof)].

By excluding *all* testimony after 2012, the Circuit Court also prevented the Jury from hearing that Bender's unusual $50 per acre rental arrangement continued *after* Russell's death, because Bender presented Russell with a five-year written lease in 2014. [R.1478; R.1389]. This ruling also excluded evidence of Bender's name being added as a beneficiary to numerous accounts of Russell's, including a sizable annuity held by Bender's wife as Russell's investment advisor. [R.1389-90; R.1462; R.1467; R.1479]. And, this ruling excluded testimony about Russell's mental health after 2012. [R.1390-91].

In addition, the Court excluded any testimony about the character of Bender's friend Boyd Hagenson, who spent substantial amounts of time with Russell and Bender, and who accompanied Russell on many of his trips to the bank, including a suspicious cash transaction in 2013 which Bender refused to investigate. [R.1390-91; 1392-93; 1444].

The background facts were not disputed. Russell Tank died in 2016 at the age of 84. He spent much of his adult life living alone near Britton, South

Dakota. In 1974 his wife divorced him and moved into town with three of their four children. After the divorce, Russell's children attempted to maintain their relationships with him, but with great difficulty. Both daughters moved away and started careers and family. Sherri continued to see him on her return visits to Britton. Both sons (Arlo and Renny) worked alongside their father, but were each kicked off of the farm without warning, beginning with Arlo in 1985. Renny then took over the farming duties from 1985 until early 2001. In 2001, Russell ejected Renny from the farm in similar fashion, abruptly and with no explanation.

During the year he expelled Renny, Russell did not farm or rent his land, and instead left the entire 700 acres fallow during the 2001 crop season. [TT 197]. Soon, "hundreds of acres of weeds…close to eight, nine feet tall for two quarters of land on both sides of the road going up the highway," and the Deputy Sheriff was sent to order Russell to remove them [TT 197].

Russell lived in a small apartment-like unit which was situated wholly inside of a repair shop building where he tinkered on several antique, Model A cars. [TT 168-69; 195]. Jason Bender (a neighbor) and some others would also play card games at Russell's shop. [*Id.*].

At trial, Jerry Smith testified that he attended one of the card-playing nights at Russell's shop in the months prior to Renny's ejection in 2001. [TT 168-69]. He recalled that Jason and Tammy Bender were both in attendance, and, that "the general conversation of six people floated around and <u>everybody</u> was making them [negative comments]" about Renny Tank. [TT

175]. Jerry Smith was outraged at this and left, because Renny was not "the type of guy that deserved to be criticized for an entire evening." [TT 170].

Smith also described Russell as someone who would often "go into a tirade," unpredictably, and "get into rampages" when "something would trip his trigger." [TT, 166, 172]. He also called Russell "paranoid," and said Russell believed that "he had been screwed" by all sorts of people, and that he would "never forget a name or an instance where he thought he got screwed." [TT 181]. Former deputy sheriff Butch Weigleitner echoed Mr. Smith's testimony about Russell's distrust and paranoia. He trusted "very few people," and did not trust his own doctors. [TT 194].

Jean Cole, a local banker, testified that she interacted with Russell as a bank customer on a regular basis from 1988 through her retirement in 2014. As the years went on, "he was a little more confused on why he was there, what he was going to be doing," and felt like Russell's mind "didn't quite click with what he wanted to do." [TT 203]. "I could tell that he was confused." [TT 207].

Multiple witnesses said conversations with Russell were confined to narrow topics like his Model A cars or his health. [TT 195; TT 206].

Testimony was also received from Ben Waldner, a Hutterite colony leader who had been a regular visitor to Russell's farm since he was a young boy. [TT 210]. Waldner noticed that Jason Bender was hanging around Russell and that Bender "didn't want to leave Russell alone with" Waldner, and that Bender "didn't want [Waldner] to see Russell alone." [TT 212-213,

215]. Waldner also noticed photographs of children on Russell's refrigerator, and when he asked Russell about them, Russell didn't know who the children were, and said that "Boyd or Jason put them there." [TT 213].

Darrin Roehr was a neighbor who testified about two instances from the early 2000's where he had concerns about Russell's mental acuity and memory. [TT 218-219] Darrin also shared his concerns about Boyd Hagenson's odd behavior, which was similar to the Bender's behavior as described by Ben Waldner. When Darrin would stop by to see Russell, "Boyd would come out of the shop" and then "interject" himself into the conversation, standing "between" Russell and Darrin. [TT 221-222].

Although her visits home were not frequent, Sherri continued to stop and see her father when she was home in Britton, and she continued to send cards and notes to her father over the years, even though he did not respond. [TT 418]. After Russell's death, she learned of Russell's 2001 Will which gave her the bulk of his estate, and she was surprised to be the only one listed. [TT 419]. Sherri also reviewed the file notes taken by Russell's probate attorneys (Tom Sannes and Kari Bartling) and said that the statements attributed to Russell were unusual and did not reflect reality, including Russell's mistaken view that the "boys had been terrible to him" and that the "girls just don't seem to care." [TT 420].

Sherri (as did her siblings) testified about her observations of Russell from childhood onward, and, described aspects of a man that appeared to have some sort of mental limitations. Sherri (as did her siblings) agreed that

Dr. Swenson's forensic assessment of her father sounded "quite accurate," to explain who Russell was. [TT 421].

From 2002 through Russell's death, Jason Bender had by far the most contact with Russell of anyone. Bender continued to rent Russell's land for the price of $50 per acre during this time, his wife became Russell's investment advisor, and Bender learned (and mapped) the location of Russell's buried case. Bender also became Russell's power of attorney in 2009, and Bender appeared as the primary beneficiary in both Russell's 2004 and 2012 Wills.

The unusual and suspicious nature of Bender's involvement with Russell is addressed in greater detail in argument Section 2, below, as well as Bender's attempts to explain and justify his behavior.

After Russell's death, Bender offered Russell's 2012 Will into probate, and Sherri and her siblings challenged it as the product of undue influence. After a four day trial, the Jury agreed. The Circuit Court vacated the Verdict by granting Bender's post-trial Rule 50(b) motion. From that decision, Sherri appeals.

STANDARD OF REVIEW

Motions challenging the sufficiency of the evidence are brought during trial under Rule 50(a), or after the Verdict under Rule 50(b). A Rule 50(a) motion challenges the sufficiency of evidence prior to the case being submitted to the Jury. A Rule 50(b) motion, on the other hand, challenges the legal sufficiency of the evidence supporting the Jury's verdict. A Rule

50(b) motion is limited to only those challenges previously brought up in a Rule 50(a) motion. In other words, a 50(b) movant "renew[s] its [earlier] request for judgment as a matter of law." SDCL 15-6-50(b).

As this Court observed, the law regarding Rule 50(a) and 50(b) motions is "well settled:

> A [Rule 50(a) motion [] questions the legal sufficiency of the evidence to sustain a verdict against the moving party. Upon such a motion, the trial court must determine whether there is any substantial evidence to sustain the action. The evidence must be accepted which is most favorable to the nonmoving party and the trial court must indulge all legitimate inferences therefrom in his favor. If sufficient evidence exists so that reasonable minds could differ, a directed verdict is not appropriate. The trial court's decisions and rulings on such motions are presumed correct and this Court will not seek reasons to reverse.
>
> A [Rule 50(b)] motion [] is based on and relates back to [the prior Rule 50(a) motion] made at the close of all the evidence. Thus, the grounds asserted in support of the [earlier, pre-verdict motion] are brought before the trial court for a second review. We review the testimony and evidence in a light most favorable to the verdict or the nonmoving party, then without weighing the evidence we must decide if there is evidence which would have supported or did support a verdict.

United States v. State, 1999 S.D. 94, 598 N.W.2d 208, 211 (citations omitted).

See, also, Harmon v. Washburn, 2008 S.D. 42, ¶¶ 9-10. [3]

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[3] Procedurally, the mechanism for overturning a verdict is now called a Rule 50(b) motion, or, a 'renewed motion for judgment as a matter of law.' Such a motion "renews" a 'motion for judgment as a matter of law' made prior to the verdict under Rule 50(a). *See*, SDCL 15-6-50(a) and (b).

The nomenclature of these motions was changed with the 2006 amendments to Rule 50. *See, Harmon v. Washburn*, 2008 S.D. 42, ¶ 10. The 2006 amendments did not change the manner in which this Court conducts its review. *Id.*

Under Rule 50(b), a Circuit Court has limited authority to overturn a Jury Verdict. Granting a Rule 50(b) motion is permissible only when "the evidence is so one-sided that reasonable minds could reach no other conclusion." *Klarenbeek v. Campbell*, 299 N.W.2d 580, 581 (S.D. 1980) (emphasis added). "[I]f the jury's verdict can be explained with reference to the evidence, rather than by juror passion, prejudice or mistake of law, the verdict should be affirmed." *Wright v. Temple*, 2021 S.D. 15, ¶ 34. "In our review of the sufficiency of the evidence supporting a jury verdict, we are not to speculate or query how we would have viewed the evidence and testimony, or what verdict we would have rendered had we been the jury." *Id.* "It is[, instead,] 'within the province of the jury as the ultimate trier of fact' to 'weigh the conflicting evidence or decide upon the credibility of the witnesses.'" *Id.*, ¶ 37.

A Rule 50(b) motion, however, cannot be predicated on the moving Party's own testimony or evidence. *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, ¶ 13, 650 N.W.2d 829, 834. A Rule 50(b) motion is evaluated in a light to sustain the verdict, and, therefore, the movant's testimony "and evidence is considered *only* insofar as it tends to amplify, clarify or explain the evidence *in support of* the verdict of the jury for the plaintiff." *Nugent v. Quam*, 82 S.D. 583, 589, 152 N.W.2d 371, 374 (1967) (emphasis added).

A similar standard applies to a decision to grant a new trial under Rule 59(a)(6). "[A] motion for new trial will not be granted if the jury's verdict can be explained with reference to the evidence, and the evidence is viewed in a

light most favorable to the verdict." *Selle v. Tozser*, 2010 S.D. 64, ¶ 14, 786 N.W.2d 748, 752-53.

SUMMARY OF ARGUMENT

1.

A Circuit Court cannot grant a Rule 50(b) motion after the verdict upon *different* grounds than those asserted in that party's Rule 50(a) motion prior to the verdict. Bender's pre-verdict motions were confined to the fourth element, and, Bender's counsel even conceded the sufficiency of evidence on the third element, *i.e.* his wrongful disposition. Thus, the Circuit Court erred by granting Bender's motion, based upon an insufficiency of evidence on the "third" element of undue influence.

2.

Sherri presented "substantial evidence" on all four elements of undue influence. The Circuit Court erred in several ways: by ignoring much of her evidence; by giving Bender's testimony weight; by ignoring inferences in the Record favoring the Verdict; by ignoring this Court's guideposts in the *Tank* opinion; and, ultimately by attributing the outcome to "passion" or "sympathy." In short, the Circuit Court failed to evaluate the verdict in a light most favorable to Sherri's evidence.

3.

Because the evidence was sufficient to sustain a verdict, a new trial was not warranted. Bender's only grounds for seeking a new trial was under subsection (6) of Rule 59(a), namely, "insufficiency of the evidence to justify

the verdict…or that it is against law." Further, because the Circuit Court erred by excluding so much of Sherri's evidence that a new trial would not change the outcome; in a second trial, the Jury would be given even more evidence of Bender's wrongdoing.

4.

Upon remand, the post-trial relief available to Sherri is clear and undisputed. Bender is precluded by waiver (and other doctrines) from offering Russell's earlier, 2004 Will into Probate. Bender is not permitted to recover his attorney's fees for defending the 2012 Will which was the product of his own wrongdoing. And Bender must be removed as Personal Representative because he is unfit to serve.

ARGUMENT

The Jury in this case deliberated for almost four hours and unanimously agreed that Jason Bender had intentionally interfered with Russell Tank's estate. [TT 717; 721-22]. After receiving that verdict, the Circuit Court did not express any concern about the result. In fact, the Circuit Court concluded the trial transcript by complimenting counsel and remarking that, "***The case was well tried.***" [TT 724]. In addition, the Circuit Court denied multiple motions for a directed verdict by explaining that the case belonged to a Jury, rather than the Court.

At a post-trial hearing six weeks later, the Circuit Court vacated the verdict and granted Bender's Rule 50(b) motion. The Circuit Court now suggested that it had been "flabbergasted" by the verdict. In its post-trial, oral

decision, the Circuit Court failed to recite any legal standard or cases guiding its review, and then attributed the verdict to sympathetic evidence (to which Bender did not object during trial) and to a community conscience argument (to which Bender did not object during closing, nor even raise in his post-trial briefs).[4] HT 9/8/21, p. 13. The Circuit Court's decision was outside the bounds of its permissible discretion. The transcript of its oral decision is reprinted in the appendix.

In addition, the Circuit Court granted Bender's motion under Rule 50(b) using grounds that Bender had never raised in his previous motion under Rule 50(a). We begin there.

1. The Circuit Court was precluded from vacating the Verdict for insufficient evidence on the 3rd element of undue influence for two reasons: Bender failed to raise that issue in his pre-verdict motions, and Bender's counsel conceded the legal sufficiency of that element during the trial.

A Rule 50(b) motion is limited to *only* those matters raised by a prior Rule 50(a) motion. *Bauman v. Auch*, 539 N.W.2d 320, 325 (S.D. 1995). *See, also,* SDCL 15-6-50(b) (renewed motion after trial is limited to "the legal questions *raised by the motion*" at the close of evidence). That is because "[p]ermitting movants to raise an issue for the first time "after the return of the jury verdict deprives the nonmoving party the opportunity to cure the

[4] Bender's post-trial brief contains just a single, passing reference to the notion of sympathy; and, his brief contains no reference whatsoever to a 'community conscience' argument. [R.1906]

deficiency in their case, if any exists." *Welch v. Haase,* 2003 S.D. 141, ¶ 23 (quoting *Douglas County Bank & Truast Co. v. United Fin. Inc.,* 207 F.3d 473, 478 (8th Cir. 2000).[5]

At trial, all of Bender's Rule 50(a) motions were limited to the fourth element of undue influence, and, therefore his "renewed" motion after trial was procedurally restricted solely to that fourth element. Bender's counsel even conceded there was sufficient evidence to satisfy the first three elements:

> Based on the Supreme Court's opinion, at this time, I think there is sufficient evidence to take the case to the jury with regard to the first three elements of the undue influence test. However, that's not the case for the fourth element.

[TT 509:6-10]. At the close of all the evidence, Bender's *only* renewed his prior Rule 50(a) challenge to element four. [TT 659:22-24] ("Q: Mr. Rasmussen, do you wish to renew your motion as well? A: Yes, Your Honor.")

By constraining his pre-verdict motions to the fourth element, Bender was precluded from making post-trial challenges about the sufficiency of

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[5] This Court's precedence on Rule 50 motions mirror the federal courts' approach. South Dakota's current version of Rule 50(b) is modeled after the corresponding federal rule, both of which were amended in 2006. *Harmon v. Washburn*, 2008 S.D. 42, ¶ 10. Federal interpretations of our corresponding Civil Rules are "useful for guidance." *Abdulrazzak v. S.D. Bd. of Pardons & Paroles*, 2020 S.D. 10, ¶ 40 n.6. At the time of the 2006 amendment, the federal Advisory Committee stated that, "[b]ecause the Rule 50(b) motion is only a renewal of the pre-verdict motion, it can be granted only on grounds advanced in the pre-verdict motion." FED. R. CIV. P. 50(b) ADVISORY COMMITTEE'S NOTE TO 2006 AMENDMENT (emphasis added). "The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available." *Id.*

evidence on the other three elements. *Welch*, 2003 S.D. 141, ¶ 22; SDCL 15-6-50(b) ("raised by the motion").

However, Bender filed a much broader post-trial motion, which now attempted to challenge the sufficiency of evidence on the first, third, and fourth elements. [R. 1905-1906]. Bender's overbroad motion was "a procedural defect." *Welch*, 2003 S.D. 141, ¶ 23. Bender could not "renew" a motion he had not made in the first place.

A "trial court ha[s] no power to grant a [Rule 50(b) motion] in the absence of the prerequisite motion for a directed verdict." *Kohlman, Bierschbach & Anderson v. Veit*, 409 N.W.2d 125, 127 (S.D. 1987). The Circuit Court, however, erred by analyzing more than just that fourth element.

The Circuit Court denied Bender's motion on the first element, finding that the Record contained sufficient evidence as to Russell's susceptibility. The Circuit Court, however, vacated the Jury's verdict on Bender's new, *post-hoc* review of the third element (regarding Bender's "disposition"). Bender had never asked the Court to review the third element before and had even previously agreed that there was enough evidence to support a verdict on this element. It was error for the Court to vacate the Jury's verdict on a challenged not "raised by the [earlier] motion." SDCL 15-6-50(b)

Bender's prior waiver also prevented his broad, post-trial motion. As Bender's counsel stated to the Court, "I think there is sufficient evidence to take the case to the jury with regard to the first three elements of the undue influence test." [TT 509:6-9]. Bender is not allowed to concede elements

during trial and then try to challenge them after trial when the Jury returns a verdict against him. *See, Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 10 (litigants precluded from taking "clearly inconsistent" positions); *Tunender v. Minnaert*, 1997 S.D. 62, ¶ 35 (counsel admissions "may occur at any point during the litigation process"); *c.f., HOK Sport, Inc. v. FC Des Moines, L.C.,* 495 F.3d 927, 942 (8th Cir. 2007).

Regardless, the result should have been the same. Bender should not have been permitted to file a post-trial Rule 50(b) motion which was broader than the one he made at trial under Rule 50(a); and, the Circuit Court should not have entertained such a motion. The Circuit Court erred by allowing this new challenge.

The sole remaining evidentiary question, therefore, is whether Sherri met the fourth element of undue influence: a result clearly showing the effects of undue influence, in light of all of the facts, circumstances, and inferences available to the Jury.

Because these matters are fact intensive, Sherri offers a survey of all four elements of undue influence.

2. The Verdict was consistent with the substantial evidence and inferences that Sherri provided on all four elements of undue influence; it was not the product of passion or sympathy.

"This Court's task on appeal is to review the record and ascertain whether there is any substantial evidence to allow reasonable minds to differ. If sufficient evidence exists so that reasonable minds could differ, a directed

verdict is not appropriate." *Harmon v. Washburn*, 2008 S.D. 42, ¶ 8, 751 N.W.2d 297, 300.

Several decades ago, this Court explained how much evidence is sufficient to sustain a verdict: "Upon such a record, this court views the evidence in the light most favorable to plaintiff, and after the evidence is so reviewed, it must appear that there is some substantial (more than "a mere scintilla"), credible evidence in support of the verdict of the jury in order to require a reversal." *Meylink v. Minnehaha Co-op. Oil Co.*, 66 S.D. 351, 353, 283 N.W. 161, 162 (1938) (emphasis added; internal citations omitted).

The Record confirms that Sherri gave the Jury more than enough evidence to sustain a Verdict in her favor.

(a) Susceptibility to Influence

In general, the "mental strength of a testator is material regarding the question of the testator's susceptibility to undue influence...." *In re Estate of Unke*, 1998 S.D. 94, ¶ 21, 583 N.W.2d 145, 149.

In particular, the *Tank* opinion held that Russell's susceptibility could be shown via lay testimony and Dr. Swenson's expert testimony (*e.g.*, a "bank employee who interacted...with Russell for more than twenty years" noticed that Russell "seemed less certain about what he wanted to do" and Dr. Swenson's conclusion that "Russell's delusional disorder and dementia would have made him more susceptible to manipulation and influence by others"). *In re Estate of Tank*, 2020 S.D. 2, ¶¶ 35, 37. Sherri offered this evidence, and more.

Dr. Swenson is a neuropsychologist with extensive research experience, as well as a substantial clinical practice involving geriatric patients who are victims of influence. [TT 248]. He is familiar with the published literature about undue influence, including patterns and characteristics of those who would be susceptible to influence. [TT 248]. Factors of susceptibility include: cognitive decline, executive dysfunction, and physical or emotional isolation. [TT 251-252].

He also testified that a person diagnosed with "persistent delusional disorder" would be susceptible to undue influence, as would a person with "vascular dementia." [TT 252]. Dr. Swenson also explained the implication of stacking these two diagnoses: "the interaction of somebody who has *both* an early stage of vascular dementia *and* a persistent delusional disorder…would make them easily susceptible to undue influence….They would be vulnerable." [TT 252]. One "obvious" way to exert influence over a person with these problems would be to "simply just play along with their delusional disorder. You wouldn't confront them. You wouldn't tell them there's something wrong with them. You wouldn't help them. But you would, in essence, enable it, and play along with it, and just don't rock the boat. And that would be the best way to manipulate the person." [TT 263]. Such a patient would also be influenced by flattery and preying upon his paranoia. [TT 264]. And in particular, Dr. Swenson noted that the evidence from this case suggested that a manner in which to influence Russell would be to make Russell think something was his own idea. [TT 276] Russell's younger son, Renny, felt he

was always able to influence Russell, even though he "probably had to work at it a little bit." [TT 278].

Dr. Swenson also explained that being "stubborn" or hard-headed is not a diagnosis; nor is stubbornness proof that someone is immune from influence. [TT 252-253]. In fact, he testified that the opposite is true: Russell was someone "with a type of rigidity that could make them easily influenced." [TT 271].

In line with that expert testimony, Sherri offered considerable lay testimony about Russell's mental decline from the late 1990's and forward, his "rigidity," and the facts underlying his lifelong delusional disorder. The Jury was left with more than enough evidence to conclude that Russell was susceptible to influence, and, was offered a specific framework as to how someone could go about manipulating Russell.

The Circuit Court conceded that Sherri's evidence on this element was sufficient. [HT 9/8/21 7:5-7].

(b) Opportunity to Influence

The second element of undue influence is "an opportunity" to exert influence. *Tank*, 2020 S.D. 2, ¶ 33. This element does not need much attention because it is undisputed, and, the Circuit Court agreed that Bender had an opportunity to influence Russell. [HT 9/8/21, 7:8-11]

However, what is notable about this undisputed element is Jason Bender's own refusal to acknowledge it. The following question was asked during Bender's adverse direct examination:

Q. Did you have an opportunity to influence Russell regarding his estate planning matters?

A. No.

[TT 432]. A Jury could infer much about Bender from his stubborn refusal to acknowledge an obvious truth.

Bender took this same approach to numerous other issues. For example, Bender was asked simple questions about whether he had ever lied before, even if they were white lies. [TT 434]. Rather than admit the obvious, Bender continued to resist.

Perhaps the most egregious instance was when Bender told the Jury that Russell Tank had no mental health problems whatsoever from 2001 all the way through 2012. [TT 492:1-21]. Bender even claimed that Russell had no short-term memory issues, at a time when even Russell was reporting them to his medical providers. [*Id.*].

As Sherri's counsel pointed out in closing, "Everybody in this room knows that's not true. Why would you lie about that? He's not believable. He's not trustworthy." [TT 674]. The Jury would have been justified in discounting or disregarding all of Bender's testimony, in line with Instruction 6, that if "any witness in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness." [R. 1508].

(c) Bender's Disposition to Influence

The third element of undue influence is Bender's "disposition to influence Russell for an improper purpose." *Tank*, 2020 S.D. 2, ¶ 39.

This Court has repeatedly recognized that a wrongful disposition can be proven by "persistent efforts to gain control and possession of testator's property." *In re Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 33, 941 N.W.2d 808, 817.[6] Sherri offered evidence of multiple examples of his persistent efforts: Bender's multi-year efforts to learn and map the locations of Russell's buried cash; Russell's unusual decision to keep an ever-increasing amount of funds on deposit with Bender's wife (an investment advisor); and the ongoing rental arrangement whereby Bender leased all of Russell's land for $50 an acre for over a decade.

Bender's testimony about his map to Russell's buried cash was implausible.[7] Bender claimed that the purpose of the map was so that "if something happened to me [i.e., Bender], at least this [the cash] doesn't get lost in time. And he [Russell] thought that was smart." [TT 439]. However, Bender's explanation was immediately impeached the document itself: there

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[6] The Contestant proposed Jury Instruction 214(b), which would have instructed the Jury that: "A disposition to unduly influence for an improper purpose can be shown from persistent efforts to gain control and possession of one's property or to gain an advantage over him." [R.1376]. The Circuit Court refused that instruction, but, it still forms the law that governs this Court's review.

[7] The map to the cash was Exhibit 58, found at R.1736

is nothing on the map that a third-party could use to figure out the significance or locations on the map, and Bender conceded that he told nobody else about the map or the cash. [R. 1736; Exhibit 58; TT 440]. A Jury could use this as evidence of Bender's wrongful disposition, including as part of his persistent attempts to gain control over Russell's property.[8]

Russell sudden decision in 2002 to begin investing his money with Tammy Bender, rather than burying his money, is also troubling. Multiple witnesses testified that Russell was suspicious of banks, and, that he had never invested in the stock market, and, instead buried large amounts of cash. [*E.g.,* TT 338]. However, in April 2002, just a couple of weeks after Bender began leasing Russell's farmland, Russell began giving money to Bender's wife to invest. [TT 496; R. 1710; Exhibit 34]. Russell continued to turn over more and more money to Bender's wife, reaching $117,000 by the end of 2012. [R. 1738, Exhibit 59].

Bender's rental relationship with Russell was also evidence of his wrongful disposition, as was Bender's rationale for keeping the rental rate secret.

This Court previously held that Sherri could prove Bender's wrongful disposition if the Jury rejected Bender's own explanations about the rent (*i.e.,* Bender's claim that "Russell set the amount of rent and that the rent was

[8] And if the Jury had been told the entire story, they could have reached that conclusion even more directly. However, the Circuit Court excluded the "moldy money" story.

never increased because Russell always rebuffed Bender's suggestions to do so"). If the Jury disbelieved Bender, this Court held that the Jury would be permitted to conclude that "Bender took advantage of Russell in the rental arrangement." *Tank*, 2020 S.D. 2, ¶ 43, 938 N.W.2d 449, 461.)

In addition, this Court has also held that keeping transactions secret is "relevant to show disposition to exercise undue influence." *Neugebauer v. Neugebauer*, 2011 S.D. 64, ¶ 23. Just like the buried money map, Bender kept the rental situation a secret, including from Russell's son Renny. Bender's rationale for keeping it a secret was incriminating.

Bender claimed variously that the rental rate was nobody's business except for Russell's, yet Bender admitted he told some of his friends about it, but not others. [TT 463-472]. Bender also said he considered Renny Tank to be a trusted friend but didn't tell Renny. When Bender was challenged about why he didn't tell his trusted friend Renny, Bender gave unconvincing explanations, and, then ultimately admitted that he was worried that informing Renny about the low rent would have led to Renny and Russell getting back to farming together again, which would be to Bender's financial disadvantage. [TT 471:16-19; 472:1-15].

The Jury could use Bender's confusing testimony and intentional secrecy as evidence of many things: Bender's guilty mind; his disposition to manipulate Russell; his decision to knowingly take advantage of Russell; and his purposeful, and subtle efforts to keep Russell from reconciling with his own children. All of these would illustrate someone with a disposition to

influence for an improper purpose. (They also are informative of the fourth element, a result which is whether the result was clearly a product of undue influence.)

The Circuit Court's post-trial decision touches on the secrecy issue, but it approached it from the wrong angle. In the Circuit Court's view, Bender had "no obligation to go make sure that [Russell's children] are okay with how Russell is handling his affairs." [HT 9/8/21, 8:5-15). That may be true, however, Bender's 'duty' was not the point of the testimony discussed in the previous paragraphs. Instead, Bender was invited to *explain* why he told some of his friends about the rental arrangement, but not others, like Renny Tank. His ultimate answer, which he gave twice, was that if Renny Tank knew about it, it could have led to Renny and Russell reconciling. [TT 471:16-19; 472:1-15].

As further evidence on the third element, Dr. Swenson testified about what the scientific literature tells us about the characteristics of influencers. Those often include a family member or close friend "who has a relationship generally that they use to embed themselves with the person and start the process of…basically a predatory behavior." [TT 250]. Some influencers are "deceptive and predatory," while others "feel entitled" to "what they're getting from the person even though it's out of proportion to what they should get." [TT 251].

Dr. Swenson also observed from Ruth Timmis' and Dave Martin's testimony that Boyd Hagenson and Jason Bender would "go along with

anything Russell wanted," which would be the mechanism by which to embed themselves with Russell, to maintain their connection with him, and to further his emotional dependency upon them. [TT 263-264]. A Jury was free to use Dr. Swenson's testimony and characteristics and apply them to Bender.

In total, Sherri offered substantial evidence from many sources as to Bender's wrongful disposition. In contrast, opposing counsel and the Circuit Court minimized her evidence, and adopted an incorrect view of the Record.

In its post-trial ruling, the Circuit Court erred by simply "taking Bender's word for it" regarding the rental rate situation. The Circuit Court accepted Bender's testimony wholesale and said that "there simply isn't any other evidence to the contrary that [Bender's story] didn't happen." [HT 9/8/21, 8:1-4].

The Circuit Court's decision to "take Bender's word for it" is error on several levels. First, it is not the function of the Circuit Court "to weigh conflicting evidence or to pass upon credibility of witnesses; that task lies within the province of the jury." *Graham v. Babinski Props.*, 1997 S.D. 39, ¶ 12, 562 N.W.2d 395, 398. As this Court previously observed, if the Jury chose not to believe Bender's rationale behind his under-market rental rate, the Jury was permitted to conclude that "Bender took advantage of Russell in the rental arrangement." *Tank*, 2020 S.D. 2, ¶ 43. The Circuit Court, however, ignored this Court's observations and improperly substituted its judgment on weighing the parties' testimony for the Jury's judgment.

Second, it was error for the Circuit Court to find that Bender's testimony was unchallenged. Testimony of a party is *not* considered conclusive and uncontradicted when there are "circumstances tending to raise a doubt about its truth." *Nat'l Bank of Commerce v. Bottolfson*, 55 S.D. 196, 200, 225 N.W. 385, 386 (1929). "Though unchallenged by opposing witnesses, evidence need not be accepted where cross-examination casts doubt upon its reliability." *Fechner v. Case*, 2003 S.D. 37, ¶ 8. Bender's evidence should be deemed "contradicted" if it was attacked either "directly ***or*** indirectly, by other witnesses ***or*** by circumstances disclosed...." *Commercial Credit Co. v. Nissen*, 57 S.D. 158, 162, 231 N.W. 534, 535 (1930) (emphasis added).

Third, a Circuit Court should not overturn a verdict based upon the testimony and evidence offered by the losing party. "The defendant's evidence is considered *only* insofar as it tends to amplify, clarify or explain the evidence *in support of* the verdict of the jury for the plaintiff." *Nugent*, 82 S.D. at 589 (emphasis added). The Circuit Court relied on Bender's testimony for more than what amplified, clarified, or explained the evidence *in favor* of the Jury's verdict. In fact, the Circuit Court did the opposite; it relied on Bender's testimony to minimize, confuse, or explain away the evidence supporting the Jury's verdict. It was error for the Circuit Court to do so.

In sum, Sherri offered substantial evidence to sustain the third element of undue influence, and the Circuit Court's analysis was error.

(d) A result which shows the clear effects of undue influence

The fourth and final element is "whether the disposition of Russell's 2012 will clearly shows the effects of undue influence." *Tank,* 2020, S.D. 2, ¶ 44. As this Court held previously, questions of undue influence are "fact-intensive inquiries" which Sherri was allowed to prove "through inferences drawn from surrounding facts and circumstances." *Tank,* ¶¶ 39, 48.

Bender's position throughout this lawsuit has been to advance a very narrow defense, namely, that "the 2012 will was consistent with the prior will Russell had made in 2004," but this Court rejected that as a *per se* defense. *Id*. While the consistency of those two Wills "may be relevant, a fact finder could also consider the circumstances involving Russell's decision to give nearly all his property to Sherri in the 2001 will, and then disinherit her completely in the 2004 Will just three years later." *Tank,* ¶ 44. In fact, the *Tank* opinion indicates that this single circumstance was sufficient for Sherri to meet the fourth element. Thus, the Jury's verdict is sufficient on the fourth element.

Sherri, however, also provided a great deal of other information that a factfinder could use to infer that Bender was waging a decade-long campaign to emotionally isolate Russell from his children, and to manipulate his financial decisions for personal gain.

In the mid-1990's, Russell moved out of the farmhouse that he and Renny shared, but not far away. [TT 324:12-24]. Russell moved across the gravel road, into a simple apartment he had built inside one of his machine

sheds. *Id.* Renny and Russell remained close, and, in fact lived in close enough proximity that they still continued to share the original farm mailbox. This went on for a few years. *Id.*

By the late-1990's, however, Jason Bender began hanging around Russell at his shop, where they played cards and "tinkered" with Model A cars. [TT 325]. Renny noticed at this time that Russell seemed to grow increasingly distrustful of Renny. *Id.* Soon, Russell decided to put up his own mailbox instead of sharing with Renny. [TT 326].

Also in this same time-frame, a family friend named Jerry Smith attended one of the card-playing nights at Russell's shop, which was in the months leading up to Renny's ejection in 2001. [TT 168-69]. Jerry Smith was appalled: he described the evening as a "run Renny down" affair, by which he meant "just a continual" set of conversations about "what a nasty guy" Renny was, and that he "ain't working…He's screwing off…Driving around." [TT 168-69, 175, 176]. Jerry Smith specifically recalled that Jason and Tammy Bender were both in attendance, and, that "the general conversation of six people floated around and **everybody** was making them [negative comments]." [TT 175]. Jerry Smith was outraged and left, because Renny was not "the type of guy that deserved to be criticized for an entire evening." [TT 170]. A few months later, Jerry Smith learned that Russell had ejected Renny from the farm, which Jerry found baffling and unexpected. *Id.*

A Jury could use all of this testimony to infer that Bender was actively participating in efforts to attack Russell's family, and that Bender saw how effective such efforts could be at isolating Russell from his children.

Bender began farming Russell's ground in 2002, and within weeks, Bender's wife took on the unusual role as an investment advisor to a man who had spent his entire life burying cash because he doesn't trust banks. In this same time frame, Bender bought a Model A to restore at Russell's shop, which leads to Bender spending substantial amounts of time with Russell. [TT 572].

And Bender admits he engaged in at least two discussions with Russell in the weeks leading up to the 2004 Will. Bender testified about the nature of his interactions with Russell, including while at the hospital. The Jury was free to reject Bender's explanations as false or incomplete. In a light most favorable to the Verdict, the Jury did not believe Bender's explanations.

It is unclear why the Circuit Court held that Sherri did not meet the fourth element. Its oral ruling offered no explanation or analysis on the fourth element, and it did not mention the law of the case on this element (paragraphs 44 and 45 of the *Tank* opinion). The Circuit Court simply stated, "I find the evidence was, on that element, lacking." [HT 9/8/21 8:20-22].

Tom Sannes's notes (just like Kari Bartling's) are filled with references to Russell's belief that his children didn't care about him, and, that Bender is the only one who actually cares. On this topic, the Jury was free to interpret Sannes' notes and observations by accepting Dr. Swenson's explanation that "there's a tendency by influencers to isolate people and to convince the person

being influenced that other people don't care for them anymore…and isolate them in that manner." [TT 249:15-23].

Bender's counsel argued in closing and in his post-trial briefing that Bender "did a lot" for Russell. However, the list of things Bender did is minor in comparison to a multi-million dollar farm. The Jury was free to interpret Bender's rationale in light of Dr. Swenson's observation that influencers often "feel entitled" to "what they're getting from the person even though it's out of proportion to what they should get." [TT 251].

To paraphrase a recent undue influence case, it appears that the Jury at the Tank trial "found [Bender's] testimony lacked credibility, and [that his] denial of the claims of undue influence were confusing, evasive, and contradictory." *In re Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 41, 941 N.W.2d 808, 819.

The Jury was free to reject Bender's explanations, and, thus their Tank Verdict was appropriate. In a light most favorable to that Verdict, the Jury concluded that the 2012 Will was part of the same, ongoing efforts to manipulate Russell that Bender had been engaged in for over a decade.

(e) Sherri's evidence was sufficient, both qualitatively and quantitatively

It is not often that a trial litigant gets to follow the roadmap of a *prima facie* case, like the one given by this Court in *Estate of Tank*. In addition to being a useful framework for Sherri's evidence, it also became the "law of the case" which is "binding on the trial court" as well as on Bender "on a

subsequent appeal in the same case." *Hayes v. N. Hills Gen. Hosp.*, 2001 S.D. 69, ¶ 29, 628 N.W.2d 739, 747.

Sherri did not rest solely upon the sketch offered by this Court in *Tank*, and, instead, amplified that framework with 16 witnesses and almost 30 exhibits [R. 1633 to R. 1740].

The quantity of witnesses is obviously not determinative, but, it bears noting that Bender called just 6 witnesses other than himself. Bender's primary two witnesses spent little or no time with Russell, and they testified for a total of about 77 pages.[9]

Bender's other four witnesses, who apparently were called to testify because they knew Russell better and spent much more time with him, were asked just a small handful of questions, to which they offered only vague and conclusory testimony. [Chapin, Dinger, Beaner, and Lenius, beginning at TT 512; 518; 521; and 616, respectively].

In contrast, Sherri introduced extensive, detailed testimony from a dozen witnesses who spent considerable time with Russell over the years. Their testimony all coalesced around the same themes: that Russell was clearly impaired and had been so for his entire adult life; that Russell's limitations left him capable of being manipulated; that Bender's relationship

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[9] Those included Bender's expert, who never met Russell; and Russell's earlier attorney, Tom Sannes, who met with Russell for a very limited amount of time in his office on a limited number of occasions, and, who saw Russell only in passing outside of his office (at VWF events). [Dr. Daniel Tranel, TT 579 *et seq*]; [Tom Sannes, TT 616 *et seq*].

with Russell appeared to involve his participation and acquiescence to isolate Russell and alienate him from his children; and that Bender appeared to be doing everything possible to flatter and embed himself with Russell.

And, on top of all of this evidence, Jason Bender's testimony did little to allay the Jury's concerns about him, and instead confirmed and amplified those themes. It is important to note that the alleged wrongdoer at this trial testified (by far) the longest of any witness. Bender's testimony spans 130 pages, including around 80 pages in the morning on Wednesday (the third day of trial) and then again for 50 *more* pages on Wednesday afternoon. By comparison, the Tank siblings testified for a combined total of 122 pages 24, 18, 26, 44 [TT 313, 363, 387, 405 *et seq*.]. And, by further comparison, the combined total from both of the expert neuropsychologists was 94 pages. [TT 227; 579].

Thus, the Jury had a meaningful, lengthy, and broad opportunity to observe and hear from the person who had the most contact with Russell Tank. Bender was given every chance to explain and justify the unusual nature of the 2012 Will. And the end, the Jury did not believe Bender. It was not the role of the Circuit Court to second-guess the Jury.

Their Verdict was based on "substantial" (and perhaps overwhelming) evidence that Bender manipulated and influenced a vulnerable, elderly man into giving him a $4 million farm. It should be reinstated.

(f) The Verdict was not a result of passion or sympathy, and, such assertions were not properly before the Circuit Court

As shown above, the verdict in this case was based upon substantial evidence. In his Rule 50(b) briefing, Bender did not assert that the Jury's verdict was the result of passion. Nor did Bender object to Sherri's closing. His failure to object is a waiver. *Veith v. O'Brien*, 2007 S.D. 88, ¶ 67, 739 N.W.2d 15, 34. "There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence....It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request his interposition, and, in case of refusal, to note an exception." *Schlagel v. Sokota Hybrid Producers*, 279 N.W.2d 431, 433-34 (S.D. 1979)

At most, Bender's brief includes a passing reference about the sympathy that the Jury may have felt for the Tank children. Again, Bender did not object to the testimony when it was received. And, the Jury was instructed that closing arguments are not evidence, and, that they should disregard any remark of counsel which has no basis in the evidence. [R.1505]. The Jury was also instructed that "neither sympathy nor prejudice should influence you." [R. 1503]. The Jury is presumed to follow the instructions of the Circuit Court. *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 59.

3. Bender is not entitled to a new trial under Rule 59(a)(6)

Bender brought his motion for a new trial solely under subsection (6) of Rule 59(a), which challenges the sufficiency of the evidence to sustain the

Verdict. The sufficiency of Sherri's evidence (shown in Section 2, above) precludes any basis for Bender to seek a new trial under that subsection.

"[A] motion for new trial will not be granted if the jury's verdict can be explained with reference to the evidence, and the evidence is viewed in a light most favorable to the verdict." *Selle v. Tozser*, 2010 S.D. 64, ¶ 14, 786 N.W.2d 748, 752-53. "[I]f competent evidence exists to support the verdict, it will be upheld." *Surgical Inst. of S.D., P.C. v. Sorrell*, 2012 S.D. 48, ¶ 9, 816 N.W.2d 133, 137. Here, the Jury's verdict can be explained with reference to the evidence, as outlined above. In a light most favorable to the verdict, Sherri's evidence was sufficient. "A plaintiff should not be penalized for the misstatements of his counsel and the granting of a new trial should not be used to discipline counsel." *Schlagel v. Sokota Hybrid Producers*, 279 N.W.2d 431, 434 (S.D. 1979).

It is also necessary to point out that Bender did not bring his motion for a new trial under any other subsection of Rule 59(a), except for subsection (6). In other words, Bender did *not* seek a new trial based upon any "irregularity in the proceedings" under subsection 1. And Bender did *not* challenge the verdict as a product of "passion or prejudice" under subsection 5. He cannot claim in this appeal that he is entitled to a new trial for any other reason, except for the insufficiency of Sherri's evidence, nor could the Circuit Court grant it for any other reason.

It is also unclear why this Court should expect a different result at a new trial. Bender was given every opportunity to try this case in the manner

that *he* wanted to. He prevailed on numerous motions *in limine* as well as his objections at trial. He succeeded in excluding direct evidence of his wrongful disposition, including the "moldy money" testimony, as well as his unusual reaction to the suspicious cash incident in 2013 involving Boyd and Russell.

Bender was also the only witness to testify twice, and yet there was ample time for him to have testified even longer if he chose to. He hired his own neuropsychologist as an expert, and he utilized a seasoned defense lawyer as his advocate.

In short, Bender got the best trial he could possibly have hoped for, and yet he still lost. The Jury rejected his testimony and his explanations. We can infer that the Jury did not believe him, nor his expert, nor his evidence, nor his explanations. Indeed, legally we *must* infer that this is what happened. Bender is not entitled to judgment, nor to a new trial.

Sherri urges this Court to reject Bender's request for a new trial. However, if this Court were inclined to grant a new trial, she urges in the alternative for this Court to reinstate her excluded evidence.

This Court reviews evidentiary rulings with two steps: first, whether the Circuit Court abused its discretion, and second, whether 'in all probability' the error could affect the Jury's conclusion. *Ruschenberg v. Eliason*, 2014 S.D. 42, ¶ 23, 850 N.W.2d 810, 817. A Circuit Court abuses its discretion by making a ruling which is against law, or which is arbitrary.

Here, the Circuit Court arbitrarily excluded evidence after 2012 based on "relevance." This was error for two reasons: first, the law of the case (the

Tank opinion) had already deemed relevant; and, second, incidents occurring after the execution of the Will are relevant to prove undue influence. *In re Estate of Herbert,* 979 P.2d 39 (Haw. 1999); *c.f., In re Estate of Nelson,* 330 N.W.2d 151, 155 (S.D. 1983) ("reasonable length of time before and after the execution").

In addition, the Circuit Court excluded evidence related to Boyd Hagenson based upon Boyd's own motion that asserted *he* would be prejudiced by the evidence; but, then Boyd did not participate at the trial, nor was he affected by the Verdict. [R. 1337]. The Circuit Court's analysis was mistaken for two reasons: it adopted too narrow a view of the nature of Hagenson's and Bender's relationship; and, second, because the Circuit Court made its ruling on the premise that the suspicious cash incident from 2013 occurred "nine years after the Will was drafted." [HT 5-19-21 12:11-13]. The 2012 Will was obviously drafted less than a year prior to the incident. All of this evidence would be important for a Jury to hear, and it would further affirm a Jury's conviction that Bender had a wrongful disposition and that the Will was a clear product of undue influence.

4. Sherri is entitled to post-trial relief she requested

(a) After reinstatement of the Verdict, Sherri is entitled to an Order declaring Russell intestate

Following the Verdict, Sherri submitted a proposed order that would have declared Russell to be intestate. [R.1754] She did this because no other Will has been offered into probate. (Sherri elected not to offer the 2001 Will

because she did not believe it represented her father's genuine intentions.) In response, Bender sought to "re-offer" Russell's 2004 Will (which, obviously would have resulted in further discovery and a second trial on its validity). [R.1829]

Sherri objected to Bender's attempt to offer the 2004 Will. She raised several grounds, including the compulsory counterclaim rule; waiver; the probate statute of limitations; judicial estoppel; and SDCL 15-11-11 (for "want of prosecution). *See,* [R.1862-1874] Of these reasons, the simplest two are the probate statute of limitations (because Bender waited five years to assert this theory), and, waiver (because Bender's counsel informed Sherri's counsel in July 2021 that he had purposefully removed the 2004 Will theory from Bender's responsive pleadings in 2016, and subsequently stated that we are "not pursuing that argument." *See,* Rasmussen's email, reprinted at R.1868.)

Bender cannot claim a better view of his own pleadings than his counsel. He is now barred from pursuing any further theory about the 2004 Will.

(b) Bender should be disgorged of his attorney's fees for defending the 2012 Will

The probate code affords the recovery of attorney's fees for proceedings that are defended by the personal representative "in good faith." SDCL 29A-3-720. It is bad faith for a personal representative to defend the same Will which he improperly influenced.

In addition, if a wrongdoer is allowed to be paid his own legal fees to protect his own ill-gotten will, the Court will encourage others to advance these wills at someone else's expense. Bender should be disgorged of the $214,483.63 in fees awarded to him from the Estate.

(c) Bender should be removed as Personal Representative because he is unfit

Without belaboring the point, a person is categorically unfit to serve as Personal Representative if he procured a Will from the testator by undue influence. In addition, Bender's decision to defend the 2012 Will was an act in 'bad faith,' which is further grounds for his removal.

CONCLUSION

Since the earliest days of our statehood, great deference has been accorded to jury verdicts:

> It is the province of the jury to weigh and pass upon the evidence; to reconcile conflicting testimony; to determine the truth or value of evidence; to ascertain and declare, from all the evidence and testimony, the facts of the case; and from the facts, when ascertained by them, and the law as given to them by the court, to arrive at and announce their decision, which is their verdict. And we cannot determine what specific evidence they relied upon in reaching that verdict; nor how they reconciled or adjusted conflicting evidence or testimony; nor just what they rejected or doubted; nor the precise weight or effect they gave to any particular item of evidence or testimony. This court will, as a general rule, only ask and determine, *Is there any legal evidence or testimony which fairly warrants the verdict of the jury?* If there is, particularly in a case where the evidence is conflicting, the verdict will not be disturbed; and, if there is not, the verdict will be set aside.

Bakker v. Irvine, 519 N.W.2d 41, 49 (S.D. 1994) (quoting language which finds its origin in *Jeansch v. Lewis*, 1 S.D. 609, 611, 48 N.W. 128, 129 (1891)))

The Jury's decision here was a product of five years of litigation, four days of trial, and four hours of deliberations. That Verdict deserves the highest deference.

The Verdict should be reinstated in favor of Sherri, and judgment should be rendered accordingly. The Circuit Court should enter an Order finding that Russell died intestate, and, that Mr. Bender waived any right to pursue claims under the 2004 Will.

In addition, Mr. Bender should be removed as Personal Representative, and he should be disgorged of the $214,483.63 in attorney's fees awarded to him from the Estate for defending the same Will that he wrongfully procured.

Dated this 18th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,992 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2022, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 18th day of February, 2022, I sent copies of the foregoing to the parties and counsel, by email * and United States Mail, first class postage prepaid,++ to the following addresses:

Appellee: Reed Rasmussen * SIEGEL, BARNETT & SCHUTZ, L.L.P 415 S. Main Street, 400 Capitol Building PO Box 490 Aberdeen, SD 57402 *Attorney for Jason Bender, Appellee*	***Personal Representative, Jason Bender*** Thomas L. Sannes * Delaney, Nielsen & Sannes, P.C. P.O. Box 615 Webster, SD 57274 605-345-3321 *Attorney for the Personal Representative*
Potential Interested Party: **Neil Chapin ++** P.O. Box 352 9114 Highway 32 Forman, ND 58032	***Other Parties: John Beaner and Boyd Hagenson*** Greg L. Peterson * Bantz, Gosch, & Cremer, L.L.C. P.O. Box 970 Aberdeen, SD 57402 605-225-2232 *Attorney for Beaner & Hagenson*

One of the attorneys for Appellants

APPELLANT'S APPENDIX
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STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF MARSHALL	FIFTH JUDICIAL CIRCUIT
IN THE MATTER OF THE ESTATE OF,	43PRO16-000014
RUSSELL O. TANK,	JUDGMENT IN FAVOR OF PROPONENT
Deceased,	

In accordance with the Court's Order regarding Post-Trial Motions and the Court's comments at the hearing held on September 8, 2021,

IT IS HEREBY ORDERED that Judgment as a Matter of Law is entered in favor of Proponent and the December 19, 2012 Will of Russell O. Tank is admitted to probate.

IT IS FURTHER ORDERED that Proponent is awarded costs in the sum of $_____ (to be inserted by Clerk of Court).

BY THE COURT:

Signed: 9/23/2021 10:24:21 AM

Circuit Court Judge

Attest:
Burger, Kim
Clerk/Deputy

Filed on: 09-23-2021 MARSHALL County, South Dakota 43PRO16-000014

STATE OF SOUTH DAKOTA COUNTY OF MARSHALL	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
IN THE MATTER OF THE ESTATE OF, RUSSELL O. TANK, Deceased,	43PRO16-000014 ORDER REGARDING POST-TRIAL MOTIONS

This matter came before the Court on September 8, 2021, for a hearing on various post-trial motions filed by the parties. Contestant appeared through her attorney Daniel K. Brendtro. Proponent appeared personally and with his attorney Reed Rasmussen. Thomas L. Sannes appeared as the attorney for the Personal Representative of the Estate of Russell O. Tank. Interested parties John Beaner and Boyd Hagenson appeared personally and with their attorney Greg L. Peterson. Upon consideration of the parties written submissions and the arguments of counsel,

IT IS HEREBY ORDERED as follows:

1. Proponent's Renewed Motion for Judgment as a Matter of Law After Trial, pursuant to SDCL 15-6-50(b)(1)(C), is granted. The Court's comments at the hearing on September 8, 2021, are incorporated herein in support of this Order.

2. Should the Court's ruling granting Proponent's Renewed Motion for Judgment as a Matter of Law After Trial be vacated or reversed, Proponent's Alternative Motion for a New Trial is granted, pursuant to SDCL 15-6-50(c) and 15-6-59(a)(6).

3. Contestant's Motion to Remove Jason Bender as Personal Representative of the Estate is denied.

4. Contestant's Objection to Notice of Intent to Cash Certificate of Deposit is overruled.

5. The Personal Representative's Petition to Compensate Attorneys Pursuant to SDCL 29A-3-720 is granted. Attorney fees for Reed Rasmussen and Siegel, Barnett & Schutz, L.L.P. are approved in the sum of $214,483.63. Attorney fees for Thomas L. Sannes and the law firm of Delaney, Nielson, Sannes, P.C. are approved in the sum of $81,681.53.

6. Contestant's Motion for Order Denying Will to Probate and for Declaration of Intestacy is determined to be moot.

BY THE COURT:

Signed: 9/23/2021 10:24:02 AM

Circuit Court Judge

Attest:
Burger, Kim
Clerk/Deputy

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF MARSHALL — FIFTH JUDICIAL CIRCUIT

In the Matter of — 43 PRO16-14

RUSSELL O. TANK, — **MOTIONS HEARING**

Deceased.

DATE & TIME	September 8, 2021 1:00 p.m.
BEFORE:	THE HONORABLE TONY L. PORTRA CIRCUIT COURT JUDGE Aberdeen, South Dakota, 57402
LOCATION:	Brown County Courthouse Aberdeen, South Dakota

APPEARANCES:

For the Proponent Jason Bender:	Reed Rasmussen Attorney at Law PO Box 490 Aberdeen, SD 57402
For Contestant Sherri Castro:	Daniel Brendtro Attorney at Law PO Box 2583 Sioux Falls, SD 57101
For the Estate:	Tom Sannes Attorney at Law PO Box 615 Webster, SD 57274
For John Beaner & Boyd Hagenson:	Greg Peterson Attorney at Law PO Box 970 Aberdeen, SD 47402

presented, Your Honor. You heard the testimony, I don't think a transcript is necessary.

THE COURT: The Court is going to grant the motion for judgment after the verdict as a matter of law. The Court finds that -- the Court is very well aware that -- this Court doesn't look at the evidence, and say, well, I thought this witness was better than this one or this evidence was more credible than that.

The Court is very well aware that -- in that I have never granted such a motion in my 22 year judicial career because I'm quite aware of what the burden is. However, in this case, from the moment that the verdict came in, I was flabbergasted at the verdict.

Specifically, the Court finds with the -- as to the four elements with regard to susceptibility, I am concerned that we label people with pervasive delusional disorder or depression or anxiety or whatever other label we put on somebody.

And at this point then, somehow we decide that they're not capable of doing what they want with their own property, then they'll -- you know, the label or even the, I'll say, "condition" may have helped explained their view of the world and how they perceive things and how they go about their daily affairs. That explanation doesn't necessarily negate their ability to do what they want to do.

That being said, I still think it's a question of fact.

Some people said he was a son of a gun and you couldn't tell him to do anything he didn't want to do. Others said, yeah, you could, if you just didn't hit him head on and went -- did an end run, and, you know, kind of went about it in an indirect way.

As I said, I'm troubled by that evidence, but in the end, I find it's a question of fact. And the Court will not supplant its view of that evidence for the jury's.

I think the opportunity to influence -- I don't think there's any question that there was an opportunity. They spent time together. They spent time alone together. I think the opportunity was there.

A disposition to do so for an improper purpose by Mr. Bender. I find that the evidence there was non-existent. The -- essentially, I find that Sherri, her argument, came down to a couple of points.

Essentially, she argued that Mr. Bender must have been trying to get something from her father because no one could stand to be around him if they didn't want something. There were multiple witnesses that testified that that simply wasn't the case. That it wasn't per se, you only could be around him if you were trying to get something out of him as opposed to just enjoying his company.

And then there was a lot of discussion about the lease. The only evidence with regard to that amount of the lease and the negotiations of that lease came from Mr. Bender, himself.

His testimony was, that every year he would ask Russell if they wanted to have more for the lease. Russell told him no. There simply isn't any other evidence to the contrary that that did not happen.

There was some implication, indication, that he was -- Mr. Bender was somehow obligated then to go talk to Russell's children to see if they were okay with this lease. The Court finds that there simply is no obligation. There would be no obligation if Mr. Tank and his kids got along great. There would still be no obligation to go make sure that they're okay with what their dad was doing with his own land.

I think it's even more so in the situation where he has -- Mr. Tank has absolutely no relationship with any of his children. There's no obligation by Mr. Bender to go and see if they're okay with how Russell is handling his affairs.

And so I just find that the evidence of any disposition to do so for an improper purpose was lacking. Again, I'm not saying I think one witness was better than another. I'm saying the evidence wasn't present.

Then finally, the last element, is a result clearly showing the effect of undue influence. Again, I find the evidence was, on that element, was lacking.

So the plaintiff's burden was a result clearly showing the effect of undue influence. If Russell had any relationship with his children at all, I think this factor would be met.

By her own testimony, Sherri indicated, I think, that she spent about an hour with her father in the 10 years prior to the making of the 2004 Will.

Again, it may not be her fault that they didn't spend any time together. She testified that she tried to have a relationship with him and he would just stare off into space and not really connect with her. He didn't interact with her.

Be that as it may, you know, one or two hours in 10 years doesn't show a result clearly showing the effect of undue influence.

By contrast, Mr. Bender spent time with him, with Russell. Leased his land. Fixed his doors. Changed his sump pumps. Took down his trees. Gave him meat. Played cards. Put up fence. Worked on cars. All of that is undisputed evidence.

So the Court simply finds that elements 3 and 4 were not met.

The Court finds that the jury's verdict, essentially, was based on two key factors. That Russell's children had a bad childhood and that this is farmland and it must stay in the family.

Those arguments were made to the jury in closing arguments. I did have the reporter make me a partial transcript. It does include the closing arguments.

The testimony from the kids was elicited that -- what their childhood was like. I find that that was done for no other

purpose then to evoke the sympathy of the jury. And I'm not saying it wasn't an effective strategy, but it's not relevant evidence. It has no bearing on the outcome of this case.

And so each one of the kids went through their horrendous childhood and their lack of relationship with their father. I find that it was done for no other purpose then to evoke sympathy of the jury.

And then in closing, it was re-emphasized. Mr. Brendtro, in closing, made these statements: Arlo who spent a decade and a half in an eerily quiet house. No furniture. With a man who made him work from sun up to sun down. It was a hard story to hear.

And then later, goes on, witness 13 was Arlo. Dutiful. Sad. Hard-working son. I think you know more about Arlo than most of Arlo's friends do right now, because he had to sit there, under oath, and answer my questions about his childhood.

You could see him, there's a spot on that wall up there that he was gazing off to. He was gone. He was not here with us re-envisioning the things that happened. But Arlo survived. Told you he figured out a way to start a business. He prevailed over difficult circumstances.

Stood next to his dad at a funeral. That didn't work. He bought an old fixed up car. Took it in a parade. Parked it right next to Russell's. A bid for his dad's affection and attention.

Can you imagine what it was like for Arlo to drive home that day knowing that that didn't work? Because if that didn't work, nothing was going to work.

What Arlo didn't know and what you know now is that he was -- Russell was mentally ill.

The 14th witness was Gina. She's the one that left, I think, the soonest out of Russell's orbit. She made a life for herself. She told us what it was like. She gets dropped off at the farm at the end of the driveway and they have to find whoever it was to find.

You might want to try and find Russell, but it's not going to lead to anything, so the kids had each other. Several hundred acres of farmland. They're out there somewhere, and this land is what they wandered through their childhood with each other. It's family land. You can see why they call it family land. It was where they grew up with each other.

So this is all inviting the jury to look at the sympathy for the lack of relationship, the horrible childhood that these kids had, and then keep this family farmland in the family. It's not the relevant inquiry for this action, for the jury.

And then on top of that, I characterized, what I would call, a community conscience argument. Mr. Brendtro indicates in his closing, small world -- and again, I'm not saying every single thing Mr. Brendtro said.

But he says, it's a small world. This is a small town. In

a small town like this where we've already heard about the case before it starts, they're going to hear about your verdict for a long time.

You have a chance to send a message to this county. You say, yes, you're going to undo the Will and everybody on -- in the future will be on the lookout for things like that.

If you say no, it will be pretty easy for people just to kind of ignore the Russell Tanks in the future. That's not the result that this community needs. That's not what a small town would do.

Again, I think that is inviting the jury to decide the case not on the facts and the evidence, but on some other greater issue of sending a message.

The South Dakota Supreme Court has discussed a community conscience argument, of course in the criminal contexts, and they have disapproved of those arguments.

In my research, I have found cases where other courts have extended that to civil matters. I'll direct your attention to ***Ortega vs. State Farm Mutual Automobile Insurance Company***. 2021 WL 2213792. That is from the United States District Court, the Southern District of Iowa, Davenport Division.

949 N.W.2d 249 ***Kipp v. Stanford***, Dr. Douglas Stanford, Court of Appeals of Iowa. In talking about the application of kind of a community conscience argument to a civil case as opposed to just a criminal case.

Considering all of the evidence which this Court has now done, sat through the trial, listened to the facts, the Court finds that this verdict was not based on the facts and the evidence.

That the elements, three and four were missing. That the jury was invited to find this case based on sympathy. That they -- and a call to basically warn the community against people preying on farmland and they took that invitation, and improperly entered -- or found a verdict for Sherri Castro.

The Court, therefore, is going to grant judgment as a matter of law for Mr. Bender and I would direct Mr. Rasmussen to prepare that judgment.

Mr. Rasmussen, questions as far as the Court's ruling today?

MR. RASMUSSEN: I guess I would also intend to prepare findings and conclusions, Your Honor. I think that would be appropriate in a situation such as this.

THE COURT: All right. And you would then obviously present those to counsel for objections?

MR. RASMUSSEN: Oh, yes. Certainly.

THE COURT: Mr. Brendtro, questions on the Court's ruling today?

MR. BRENDTRO: No Judge.

THE COURT: All right. So then we have other issues in front of the Court. What makes the most sense as far as the

STATE OF SOUTH DAKOTA COUNTY OF MARSHALL	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
IN THE MATTER OF THE ESTATE OF, RUSSELL O. TANK, Deceased,	43PRO16-000014 ORDER REGARDING PRETRIAL MOTIONS

This matter came before the Court for a hearing on October 8, 2020, concerning Proponent's Motions in Limine and Motion to Exclude Contestant's Expert Witnesses. Contestant appeared through her attorney Daniel K. Brendtro, who participated by Zoom. Proponent appeared personally and with his attorney Reed Rasmussen. Upon consideration of the parties' written submissions and the arguments of counsel,

IT IS HEREBY ORDERED as follows:

1. Paragraphs 2, 6, 8, and 11 of Proponent's Motions in Limine are denied.

2. Paragraph 1 of Proponent's Motions in Limine is granted in part and denied in part. It is denied to the extent that Contestant will be able to offer evidence regarding the January 5, 2013, documents signed by Russell Tank concerning property to be given to John Beaner and Boyd Hagenson. Otherwise, subject to Contestant establishing grounds for admission, Contestant is prohibited from offering any evidence or argument regarding acts alleged to support Contestant's claim of undue influence occurring after December 19, 2012.

3. Paragraph 3 of Proponent's Motions in Limine is granted. Contestant is prohibited from offering any evidence or argument regarding Russell Tank's testamentary capacity or insane delusions.

4. Paragraph 4 of Proponent's Motions in Limine is granted. Contestant is prohibited from offering any lay testimony that Russell Tank suffered from a mental illness.

5. Paragraph 5 of Proponent's Motions in Limine is granted in part and denied in part. Attached are pages 6 and 7 of Proponent's Pretrial Brief which contains a chart setting forth the evidence which is the subject of paragraph 5 of Proponent's Motions. Contestant is prohibited from offering any evidence or argument regarding the following items listed on that chart on the grounds that the evidence is only marginally relevant. Any probative value is substantially outweighed by the danger of unfair prejudice and causing confusion to the jury.

- Russell held his hand over the mouth of a 10-year-old girl until she turned blue in 1950.
- Russell forced his parents to deed over their land to him in 1965.

- Russell kicked his brother off the farm in 1965.
- Russell provided his friend Art Timmis false information about the reason for Russell's divorce.
- Russell would not engage in conversation with his 14-year-old daughter.
- Russell settled a lawsuit with Arlo by having Renald take out a loan for the settlement amount and told people that he gave Arlo his inheritance as a result of the settlement.
- County weed inspectors were afraid to go to Russell's farm to issue a citation concerning weeds in 2001.
- Phil Morgan assured Renald he was still in Russell's Will in the mid 2000's.
- Russell told a neighbor he felt like he had aliens in his head in the mid 1980's.
- In the middle of a project, Russell would scream that his head hurt and had to go lay down.
- Russell told a bank cashier he was frustrated and felt like his mind wasn't doing what he wanted it to do in 1989.
- Russell refuses to attend brother-in-law Cyril's funeral in 2006.
- Russell engages in a cash transaction at Claremont bank that was suspicious in 2013.
- Russell appears to have significant memory loss in 2014.

Proponent's Motion is denied as to the following evidence:

- Russell can't identify people pictured in photographs on his refrigerator.
- Russell falsely states he has made advances to each of his children during his lifetime.
- Medical records from 2010 and 2012 indicate difficulty following instructions, difficulty with memory, and confusion.

6. Paragraph 7 of Proponent's Motions in Limine is granted. Contestant is prohibited from offering any evidence regarding what Contestant will do if the jury determines Russell Tank was unduly influenced by Proponent.

7. Paragraph 9 of Proponent's Motions in Limine is granted in part and denied in part. Contestant is prohibited from offering any evidence or argument regarding the existence of the *Castro v. Bender* lawsuit or the nature of the claims in that lawsuit. Subject to other objections, Contestant will be allowed to offer evidence regarding facts underlying the *Castro v. Bender* lawsuit.

8. Paragraph 10 of Proponent's Motions in Limine is granted. Contestant is prohibited from offering any evidence or argument regarding contact by any of the Tank children with the Marshall County Sheriff's office concerning a committal of Russell Tank or establishment of a guardianship or conservatorship.

9. Paragraph 12 of Proponent's Motions in Limine is reciprocally granted. Both parties are prohibited from offering any expert testimony that has not been previously disclosed.

10. Paragraph 13 of Proponent's Motions in Limine is reciprocally granted. Witnesses, with the exception of experts, will be sequestered.

11. Paragraph 14 of Proponent's Motions in Limine is reciprocally granted. Counsel for both parties are required to admonish and advise their clients and witnesses of the existence, terms, and substance of the Motions in Limine granted by the Court.

12. Proponent's Motion to exclude the testimony of Dr. Rodney Swenson is denied.

13. Proponent's Motion to exclude the testimony of Judge David Gienapp is granted.

BY THE COURT:

Signed: 11/13/2020 8:05:26 AM

Circuit Court Judge

Attest:
Burger, Kim
Clerk/Deputy

subjects is not relevant and should be excluded. Paragraph 3 of Proponent's Motions in Limine should be granted.

4. ***Prohibiting lay testimony regarding mental illness***

Paragraph 3 of Contestants' First Amended Petition to Contest the Will alleges that Russell Tank was mentally ill. Some of the children testified about this allegation. (*See* Renald Depo 31-34; Arlo Depo 38-40; Gina Depo 19-20). Other witnesses testified about allegedly bizarre behavior exhibited by Russell. None of the children or any other lay witnesses who have provided deposition testimony concerning this matter are qualified to render an opinion as to whether Russell suffered from a mental illness. Such testimony should be excluded and paragraph 4 of Proponent's Motions in Limine should be granted.

5. ***Prohibiting testimony unrelated to undue influence claim***

Exhibit DD is a document prepared by Contestant's attorney designated as a Fact Summary. There are a number of entries on that summary that appear to be designed to attack Russell's character or raise questions about his mental stability. Examples include the following:

Date	Description	Page No.
1950	Russell held his hand over the mouth of a 10-year-old girl until she turned blue.	1
1965	Russell forced his parents to deed over their land to him.	1
1965	Russell kicked his brother off the farm.	1
1974	Russell provided his friend Art Timmis false information about the reason for Russell's divorce.	1
1970's	Russell would not engage in conversation with his 14-year-old daughter.	2
1986	Russell settles lawsuit with Arlo by having Renald take out a loan for the settlement amount and tells people that he gave Arlo his inheritance as a result of settling the lawsuit.	2

Date	Description	Page No.
2001	County weed inspectors afraid to go to Russell's farm to issue a citation concerning weeds.	2-3
2000's	Russell can't identify people pictured in photographs on his refrigerator.	3
Mid-2000's	Phil Morgan assures Renald he is still in Russell's Will.	4
December 2012	Russell falsely states he has made advances to each of his children during his lifetime.	4-5
Mid-1980's	Russell told the neighbor he felt like he had aliens in his head.	5
1990's	In the middle of a project, Russell would scream that his head hurt and had to go lay down.	5
1999	Russell told a bank cashier he was frustrated and felt like his mind wasn't doing what he wanted it to do.	5
2006	Russell refuses to attend brother-in-law Cyril's funeral.	6
2010 and 2012	Medical records indicate difficulty following instructions, difficulty with memory, and confusion.	6
October 2013	Russell engages in a cash transaction at Claremont bank that was suspicious.	6
2014	Appears to have significant memory loss.	6

Evidence such as the foregoing has nothing to do with whether Russell was unduly influenced in connection with the preparation of the 2004 Will which disinherited Sherri. Such evidence can only be designed to create sympathy for Contestant since she had to deal with a father such as Russell. This is particularly true with regard to any events occurring after the execution of the 2004 Will. Paragraph 5 of Proponent's Motions in Limine should be granted.

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF MARSHALL	FIFTH JUDICIAL CIRCUIT

IN THE MATTER OF **THE ESTATE OF RUSSELL O. TANK,** DECEASED	43 PRO.16-014 **ORDER ON HAGENSON AND BEANER'S MOTION IN LIMINE**

THE ABOVE CAPTIONED MATTER came before the Court as part of a pretrial conference before the Honorable Tony L. Portra on May 19, 2021, in the courtroom of the Brown County Courthouse at 9:30 a.m. Contestant appeared via telephone through counsel, Daniel K. Brendtro of Sioux Falls, South Dakota. Proponent appeared personally with counsel, Reed A. Rasmussen of Aberdeen, South Dakota, and Boyd Hagenson and John Beaner appeared personally, with counsel, Greg L. Peterson of Aberdeen, South Dakota.

Before the Court was Hagenson and Beaner's Motion in Limine. The Court entered its oral ruling and reasoning therefore from the bench. Upon consideration of the written submissions and the arguments of counsel,

IT IS HEREBY ORDERED as follows:

1. Contestant's objection as to the timing of the hearing on Hagenson and Beaner's Motion in Limine is overruled.

2. Hagenson and Beaner's Motion in Limine is granted. Contestant is prohibited from eliciting character evidence testimony, testimony of alleged wrongs or other acts, or extrinsic evidence to prove specific instances of Boyd Hagenson's conduct designed to attack his character for truthfulness.

3. Counsel shall admonish his clients and witnesses of the existence, terms, and substance of the motion in limine granted by this Court.

BY THE COURT:
Signed: 6/1/2021 10:51:41 AM

Attest:
Swanson, Jeannine
Clerk/Deputy

Filed on: 06/01/2021 Marshall County, South Dakota 43PRO16-000014

Appendix 17

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTATE OF, RUSSELL O. TANK, Deceased,	Appeal No. 29809

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

THE HONORABLE TONY L. PORTRA
Circuit Court Judge

APPELLEE JASON BENDER'S BRIEF

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Notice of Appeal was filed October 21, 2021

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTATE OF, RUSSELL O. TANK, Deceased,	Appeal No. 29809

APPELLEE JASON BENDER'S BRIEF

PRELIMINARY STATEMENT

This Brief will refer to Contestant/Appellant Sherri Castro as either Contestant or Sherri. Sherri's siblings, Arlo Tank, Renald Tank, and Gina Ellingson will be referred to by their first names. Proponent/Appellee Jason Bender will be referred to as either Proponent or Jason. Testator Russell Tank will be referred to as Russell. References to the Clerk's Index will be referred to as CI followed by the page number. References to the Appendix attached to Contestant's Brief will be referred to as App followed by the page number. Contestant's Brief will be referred to as CB followed by the page number.

JURISDICTIONAL STATEMENT

Proponent agrees with the Jurisdictional Statement set forth in Contestant's Brief.

STATEMENT OF LEGAL ISSUES

1. IN ORDER TO REVERSE THE TRIAL COURT'S GRANTING OF PROPONENT'S MOTION FOR JUDGMENT AS A MATTER OF LAW, CONTESTANT MUST ESTABLISH THAT THERE WAS COMPETENT AND SUBSTANTIAL EVIDENCE PRESENTED THAT RUSSELL TANK'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE

The trial court ruled that Contestant's evidence was insufficient regarding the issues of disposition to exercise undue influence for an improper purpose, and a result clearly showing the effects of such influence.

Williams v Brinkman, 2016 SD 50, 883 N.W.2d 74;

Huether v. Mihm Transportation Company, 2014 SD 93, 857 N.W.2d 854;

Estate of Dimond, 2008 SD 131, 759 N.W.2d 534;

Harmon v. Washburn, 2008 SD 42, 751 N.W.2d 297.

2. DID THE TRIAL COURT ERR IN GRANTING PROPONENT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL ON THE GROUNDS THAT CONTESTANT FAILED TO ESTABLISH THAT PROPONENT HAD A DISPOSITION TO EXERT UNDUE INFLUENCE FOR AN IMPROPER PURPOSE?

The trial court ruled that a reasonable jury could not have found in favor of Contestant regarding this issue.

Wright v. Temple, 2021 SD 15, 956 N.W.2d 436;

In re Estate of Gaaskjolen, 2020 SD 17, 941 N.W.2d 808;

Thompson v. Mehlhaff, 2005 SD 69, 698 N.W.2d 512;

Tunender v. Minnaert, 1997 SD 62, 563 N.W.2d 849.

3. DID THE TRIAL COURT ERR IN GRANTING PROPONENT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AFTER TRIAL ON THE GROUNDS THAT RUSSELL TANK'S DECISION TO DISINHERIT HIS DAUGHTER AND BEQUEATH HIS ESTATE TO PROPONENT WAS NOT A RESULT CLEARLY SHOWING THE EFFECTS OF UNDUE INFLUENCE?

The trial court ruled that a reasonable jury could not have found in favor of Contestant regarding this issue.

In re Estate of Gaaskjolen, 2020 SD 17, 941 N.W.2d 808;

Berry v. Risdall, 1998 SD 18, 576 N.W.2d 1;

Bridge v. Karls, Inc., 538 N.W.2d 521 (S.D. 1995);

Stormo v. Strong, 469 N.W.2d 816 (S.D. 1991).

4. DID THE TRIAL COURT ERR IN GRANTING PROPONENT'S ALTERNATIVE MOTION FOR A NEW TRIAL?

The trial court granted a new trial should its ruling granting Proponent's Renewed Motion for Judgment as a Matter of Law After Trial be vacated or reversed.

Roth v. Farner-Bocken Co., 2003 SD 80, 667 N.W.2d 651;

Henry v. Henry, 2000 SD 4, 604 N.W.2d 285;

Morrison v. Mineral Palace Limited Partnership, 1999 SD 145, 603 N.W.2d 193 (S.D. 1999);

Basin Electric Power Cooperative v. Gosch, 240 N.W.2d 96 (S.D. 1976).

5. DID THE TRIAL COURT ERR IN DENYING CONTESTANT'S MOTION TO REMOVE PROPONENT AS PERSONAL REPRESENTATIVE OF THE ESTATE?

The trial court ruled Proponent could continue to serve as personal representative of the Estate.

In re Estate of Unke, 1998 SD 94, 583 N.W.2d 145.

6. DID THE TRIAL COURT ERR IN GRANTING PROPONENT'S MOTION FOR THE ESTATE TO PAY HIS ATTORNEY FEES?

The trial court ordered that the Estate could pay the attorney fees of Proponent's counsel.

SDCL 29A-3-720.

7. SHOULD THE SUPREME COURT ADDRESS CONTESTANT'S MOTION FOR ORDER DENYING WILL TO PROBATE AND FOR DECLARATION OF INTESTACY?

The trial court did not rule on this Motion because it was moot.

State v. Hayes, 1999 SD 89, 598 N.W.2d 200.

STATEMENT OF THE CASE

Sherri and her three siblings challenged the 2012 Will of their father Russell Tank on the grounds of lack of testamentary capacity, undue influence, and insane delusion. On March 4, 2019, a Summary Judgment was filed in favor of Proponent with regard to all of Contestants' claims. (CI 919). That ruling was appealed. On January 22, 2020, this Court issued its Opinion affirming the Summary Judgment in all respects with the exception of Sherri's undue influence claim. *In re Estate of Russell O. Tank*, 2020 SD 2, 938 N.W.2d 449.[1] Upon remand, the case was tried in Marshall County beginning on July 19, 2021. The jury returned a verdict in favor of Contestant. On September 23, 2021, an Order was filed granting Proponent's Renewed Motion for Judgment as a Matter of Law After Trial and Proponent's Alternative Motion for a New Trial. (App 2). This appeal followed.

STATEMENT OF THE FACTS

On March 19, 2001, Russell executed a Last Will and Testament prepared by Webster attorney Tom Sannes. (Ex 17-CI 1663-65). This Will specifically disinherited his children Arlo, Renald, and Gina. With the exception of some automobiles which were bequeathed to his friend Art Timmis, the entirety of Russell's estate was designated to go to Sherri.

Sherri testified she left the Britton area in 1982. (CI 2412). She then lived in Fargo, Denver, Kansas City, and Phoenix. (CI 2413). She saw her father in the summer of 2001. (CI 2431). She did not see him again until the summer of 2004. (CI 2430-31). She never saw him again after the visit in 2004. (CI 2030-31).

On August 9, 2004, Jason was involved in a serious motorcycle accident, which left him hospitalized in Sturgis, Rapid City, Rochester, and Britton, until November 6,

[1] This Opinion will henceforth be referred to as *Tank*.

2004. (CI 2553-56). While he was hospitalized in Britton, Russell came to see him a couple of times. (CI 2556).

On October 28, 2004, Russell contacted Tom Sannes and told him he wanted to change his Will. (CI 2633-34). He returned to see Sannes on November 1, and told him he wanted to give most of his property to Jason. (CI 2635). Russell informed Sannes about Jason's accident. (CI 2637). He also said he had not spoken to Jason about his Will. (CI 2636-37). On November 5, 2004, after another meeting, Russell signed his new Will. (CI 2638-39; Ex 20-CI 1673-75). That Will gave some vehicles to Boyd Hagenson and Neil Chapin. The remainder of Russell's Estate was bequeathed to Jason.

On December 19, 2012, Russell signed his final Will. (Ex 24-CI 1680-81). The 2012 Will was exactly the same as the 2004 Will with the exception that the provision granting vehicles to Boyd Hagenson and Neil Chapin was removed. It was this Will that was offered for probate.

In *Tank*, this Court affirmed Judge Myren's decision granting Summary Judgment to Proponent with regard to Contestants' claims of lack of testamentary capacity and insane delusion. 2020 SD 2 at ¶¶ 26 and 32. The Court also affirmed Judge Myren's decision that the disinheritance of Arlo, Renald, and Gina was not the result of undue influence. *Id.* at ¶ 47. The only issue upon which Judge Myren was reversed was Sherri's claim of undue influence. The Court stated there were issues of fact regarding "Russell's decision to give nearly all his property to Sherri in the 2001 will and then disinherit her completely in the 2004 will, just three years later." *Id.* at ¶ 44. The Court went on to state that, "there is nothing in the record to suggest that anything occurred in

the relationship between Russell and Sherri from 2001 to 2004 that would have caused Russell to disinherit his daughter." *Id.* at ¶ 45.

The Court recognized the consistency between the 2004 and 2012 Wills. *Id.* at ¶ 44. The minor changes made in the 2012 Will had nothing to do with Sherri. The question in the Court's mind was obviously what happened between 2001 and 2004 to cause Russell to disinherit Sherri.

In light of this, Jason attempted to get the trial court to limit the evidence to events occurring prior to 2004. (CI 1167-68). Although Jason was successful in getting certain evidence excluded, the Court did not grant the Motion to exclude all evidence of events occurring between 2004 and 2012. (App 12-16). Contestant was, therefore, able to offer evidence regarding Russell's mental state from 2004 to 2012.

ARGUMENT

1. CONTESTANT'S EVIDENCE MUST RISE TO THE LEVEL OF BEING COMPETENT AND SUBSTANTIAL IN ORDER FOR THE TRIAL COURT'S DECISION GRANTING PROPONENT'S MOTION FOR JUDGMENT AS A MATTER OF LAW TO BE REVERSED

Contestant's Brief incorrectly cites a 1999 Supreme Court opinion in setting forth the standard of review. The standard was changed in *Williams v. Brinkman*, 2016 SD 50, 883 N.W.2d 74, where the Court adopted a *de novo* standard of review. *Id.* at ¶¶ 11-13.

Contestant cites a 1938 case regarding how much evidence is sufficient to sustain a verdict. (CB 17). That case refers to substantial evidence as meaning more than "a mere scintilla." As far as Proponent has been able to determine, the mere scintilla language has not been used in a Supreme Court opinion since 1953. *See Madsen v. Watertown Bottling Company*, 59 N.W.2d 735, 737 (S.D. 1953).

More modern cases have dropped the scintilla language and used other terms to describe the amount of evidence needed to sustain a verdict. The Court has used such terms as "legally sufficient evidentiary basis," *Williams* 2016 SD 50 at ¶ 14; "substantial evidence," *Olson v. Judd*, 534 N.W.2d 850, 852 (S.D. 1995); and "competent and substantial evidence," *Huether v. Mihm Transportation Company*, 2014 SD 93, ¶ 16, 857 N.W.2d 854.

The phrase "competent and substantial evidence" is found in SDCL 19-19-301. The Court addressed the meaning of that term in *Estate of Dimond*, 2008 SD 131, ¶ 9, 759 N.W.2d 534:

> [T]he substantial, credible evidence requirement means that a presumption may be rebutted or met with such evidence as a trier of fact would find sufficient to base a decision on the issue, if no contrary evidence was submitted. But mere assertions, implausible contentions, and frivolous avowals will not avail to defeat a presumption.

It is clear that a judgment as a matter of law is appropriate even though the nonmoving party presents some evidence in support of its position. The nonmoving party's evidence must be substantial. This is evidenced by a number of opinions from this Court where motions for judgment as a matter of law have been approved despite dissenting opinions pointing out evidence in favor of the nonmoving party. *See, e.g., Diamond Surface v. State Cement Plant Commission*, 1998 SD 97, 583 N.W.2d 155; *Haberer v. Radio Shack*, 1996 SD 130, 555 N.W.2d 606; *Nugent v. Quam*, 152 N.W.2d 371 (S.D. 1967).[2]

One case in particular demonstrates the mere fact there is some evidence to support the nonmoving party's position does not mean that a judgment as a matter of law

[2] Older cases refer to directed verdicts and judgments notwithstanding the verdict. For ease of reference, this Brief will simply refer to all such situations as judgments as a matter of law.

is inappropriate. In *Harmon v. Washburn*, 2008 SD 42, 751 N.W.2d 297, the defendant was the lead car in a slow moving ten-vehicle caravan which was accompanying some horseback riders. *Id.* at ¶¶ 2, 12. The plaintiff approached the caravan from the rear and began passing it. *Id.* at ¶ 3. The defendant attempted a left turn and was struck by the plaintiff. *Id.* at ¶ 4. The jury returned a verdict for the defendant. The trial court denied motions for judgment as a matter of law regarding the defendant's negligence and the plaintiff's contributory negligence. *Id.* at ¶ 6. This Court reversed the trial court stating: "There was no legally sufficient evidentiary basis for a reasonable jury to find [the plaintiff] contributorily negligent. The trial court erred by not granting the judgment as a matter of law on this issue." *Id.* at ¶ 21.

Judge Portra was designated to sit on the Supreme Court in *Harmon*. He submitted a vigorous dissent joined by Chief Justice Gilbertson. *Id.* at ¶ 46. His dissent fully outlined the evidence he believed supported the jury's verdict. *Id.* at ¶¶ 33-45. Echoing the arguments made by Contestant in the pending case, Judge Portra argued that the jury could have disbelieved the plaintiff and rejected all of her testimony. *Id.* at ¶ 39. Despite this, the Court concluded the plaintiff was entitled to judgment as a matter of law.

The *Harmon* case illustrates at least two things. First, the fact the nonmoving party presents some evidence in support of its position is not always enough to avoid judgment as a matter of law. Second, Judge Portra's dissent shows that he appreciates the sanctity of jury verdicts. In granting Proponent's Motion for Judgment as a Matter of Law in this case, Judge Portra noted that this is the first time in his twenty-two years on the bench he has granted such a Motion. (App 4).

A verdict can be set aside if it is "unreasonable, arbitrary, and unsupported by the evidence." *Welch v. Haase*, 2003 SD 141, ¶ 25, 672 N.W.2d 689. A *de novo* review of this case will establish that the jury's verdict was unreasonable, arbitrary, and unsupported by the evidence.

Evidence was produced at trial to answer this Court's question as to what happened between 2001 and 2004 to cause Russell to disinherit Sherri and give his Estate to Jason. Sherri did not see her father at all between 2001 and 2004. (CI 2431-32). Her visit in 2004 obviously did not go well in that she never returned to see her father again. (CI 2030-31).

The other major thing that happened between 2001 and 2004 was Jason's accident. Russell and Jason clearly had established a relationship by 2004. It is certainly understandable that Jason's accident might have prompted Russell to change his Will. This was recognized by Contestant's counsel in his closing argument where he stated that Russell would have been influenced by the pain Jason was in. (CI 2689). This subject was addressed in the examination of Jason by Contestant's counsel.

> Q. Russell was a person who was very specific and noticed issues of personal physical pain, wasn't he?
>
> A. I think so.
>
> Q. So you were a very sympathetic character at that point in time in your hospital bed in pain, weren't you?
>
> A. Possibly.
>
> Q. And your future was in question, wasn't it?
>
> A. Probably.

> Q. And then that made you an even more sympathetic character to Russell at that point in time?
>
> A. It sure could have. I don't know what was going on in Russell's mind.

(CI 2578). The fact Russell's sympathy for Jason might have had something to do with his decision to change the Will cannot be considered undue influence.

The fact we may now have an answer as to why Russell disinherited Sherri does not in and of itself provide grounds for Judge Portra's decision to grant Proponent's Motion for Judgment as a Matter of Law. What does supply grounds is that Contestant failed to present substantial credible evidence to establish that Jason had a disposition to exert undue influence for a wrongful purpose. Moreover, Russell's 2004 and 2012 Wills did not clearly show the effects of undue influence.

2. THE TRIAL COURT CORRECTLY RULED THAT CONTESTANT FAILED TO ESTABLISH THAT PROPONENT HAD A DISPOSITION TO EXERT UNDUE INFLUENCE FOR AN IMPROPER PURPOSE

The jury was instructed as follows:

> To establish the existence of undue influence, the Contestant must prove, by the greater convincing force of the evidence, four elements:
>
> (1) That Russell Tank was susceptible to undue influence;
>
> (2) That Proponent Jason Bender had opportunity to exert such influence and effect a wrongful purpose;
>
> (3) That the Proponent Jason Bender had a disposition to do so for an improper purpose; and
>
> (4) A result which clearly shows the effects of such influence.
>
> For influence to be undue, it must be of such a character as to destroy the free agency of the testator and substitute the

> will of another for that of the testator. Whether undue influence occurred is determined from all the surrounding facts and circumstances.

(CI 1515).

Judge Portra determined that Contestant failed to present sufficient evidence to meet elements (3) and (4) of the test. Contestant's Brief spends four pages talking about elements (1) and (2). (CB 17-20). Those issues are not part of this appeal. Proponent's emphasis will be on the elements relied upon by Judge Portra to grant the Motion for Judgment as a Matter of Law.

This Court is not barred from considering the trial court's ruling concerning element 3 of the undue influence test

Because of a comment made by Proponent's counsel when making a Motion for Judgment as a Matter of Law at the close of Contestant's case, Contestant argues the trial court was precluded from considering whether Contestant's evidence was sufficient to satisfy element (3) of the undue influence test. It is true that, in making the Motion, Proponent's counsel expressed an opinion that there was probably sufficient evidence to take the case to the jury on elements (1) through (3) of the test. Contestant, however, ignores counsel's concluding comment which was not limited to element (4).

> For influence to be unduly [sic], it must be of such character as to destroy the free agency of the testator and substitute the will of another for that of the testator. That has not been established by the contestant and therefore the proponent is entitled to judgment as a matter of law under Rule 50A [sic].

(CI 2517).

Contestant cites authority to the effect that a motion under SDCL 15-6-50(b) is limited to matters raised by a prior SDCL 15-6-50(a) motion. Contestant goes on to state

that the reason for this rule is that allowing movants to raise an issue for the first time after the jury has returned a verdict prevents the nonmoving party from curing any deficiencies in their case. (CB 13-14). Contestant points to no evidence she did not present based on the comments made by counsel in making the Rule 50(a) Motion.

Contestant cites *Tunender v. Minnaert*, 1997 SD 62, ¶ 35, 563 N.W.2d 849, in support of her position.[3] (CB 16). That case deals with judicial admissions. *Tunender* involved a rear-end admitted liability collision. *Id.* at ¶ 5. In closing argument, defense counsel stated the plaintiff deserved $10,000. *Id.* at ¶ 7. The jury returned a verdict for the defendant awarding no damages. *Id.* The trial court granted the plaintiff's motion for a new trial based on the admission made by defense counsel. *Id.* at ¶ 8. This Court determined the trial court had abused its discretion in finding that the statement made in closing argument constituted a judicial admission. *Id.* at ¶ 18.

The Court described a judicial admission as follows:

> A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of a fact claimed to be true, and is used as a substitute for legal evidence at the trial." *Harmon v. Christy Lumber, Inc.*, 402 N.W.2d 690, 692-93 (SD 1987). An admission "is limited to matters of fact which would otherwise require evidentiary proof," and cannot be based upon personal opinion or legal theory. *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128, 1133 (NMCtApp 1991).

Id. at ¶ 21. The Court emphasized that alleged judicial admissions "should not be relegated to a game of 'gotcha.'" *Id.* at ¶ 28. The comment made by Proponent's counsel amounted to a personal opinion or legal theory. It was not used as a substitute for legal evidence at the trial. It was not, therefore, a judicial admission.

[3] The paragraph cited by Contestant is from the dissenting opinion.

Contestant also cites *Wilcox v. Vermeulen*, 2010 SD 29, ¶ 10, 781 N.W.2d 464, in support of her argument that the trial court erred in considering element (3) of the undue influence test. *Wilcox* deals with judicial estoppel, which involves a situation where a party has been caused to part with something of value or do some other act relying upon the conduct of the party to be estopped. *Id.* at ¶ 9. This case involves no such situation.

Contestant contends Proponent should not have been allowed to file his post-trial Rule 50(b) Motion and that the circuit court erred by entertaining it. (CB 16). Contestant did not object to the trial court's consideration of the disposition or susceptibility elements when Proponent filed his Motion for Judgment as a Matter of Law After Trial.[4] Therefore, that argument has been waived. *See Wright v. Temple*, 2021 SD 15, ¶ 33, 956 N.W.2d 436. ("[T]he failure to bring an argument to the circuit court's attention ordinarily waives it on appeal.")

Citing *Welch*, 2003 SD 141 at ¶ 23, Contestant argues that Proponent's Motion constituted "a procedural defect."[5] (CB 15). If that is the case, this Court has the authority to set aside and ignore procedural defects. *In re J.D.M.C.*, 2007 SD 97, ¶ 27, 739 N.W.2d 796.

Judge Portra had the authority to grant judgment as a matter of a law regarding element (3) of the undue influence test. Even if this Court agrees with Contestant's argument that Proponent's Motion was overbroad, Contestant waived that argument by failing to raise it with the trial court. Furthermore, this Court also has the authority to

[4] *See* Contestant's Brief opposing Bender's Renewed Motion for Judgment as a Matter of Law, or for New Trial. (CI 1912-31).

[5] It is assumed Contestant meant to cite ¶ 22 of the *Welch* decision.

ignore any procedural defect in Proponent's Motion if it would serve the interests of justice to do so.

The trial court correctly determined that Contestant's evidence was insufficient to establish a disposition on Proponent's part to unduly influence Russell Tank for an improper purpose

Although the focus of this Court's prior Opinion concerning Sherri's claim dealt with the question as to what happened between 2001 and 2004, virtually all of the evidence upon which Contestant attempted to rely at trial, and what she attempts to rely on before this Court, has to do with events occurring after 2004.

Contestant's Brief cites five examples of evidence to support her position that she established Jason's disposition to influence Russell for an improper purpose. Although all of these claims were disputed at trial, Jason recognizes that neither Judge Portra nor this Court should be weighing the evidence. Therefore, this Brief will not cite any evidence presented by Proponent except to the extent such evidence is uncontradicted.[6]

Contestant's first example of evidence allegedly supporting the claim of an improper disposition on Jason's part has to do with Jason's efforts to learn and map the location of Russell's buried cash. (CB 21). Discussions about the buried cash did not start until 2010. (CI 2445-46). This was obviously well after the 2004 Will was drafted which, as previously noted, was virtually identical to the 2012 Will.

[6] Contestant cites authority to the effect that the moving party's evidence can only be considered where it tends to support the jury's verdict. (CB 26). That tells only part of the story. The Court can consider uncontradicted evidence produced by the moving party. *Fechner v. Case*, 2003 SD 37, ¶ 6, 600 N.W.2d 631. *See also Roden v. General Casualty Company*, 2003 SD 130, ¶ 16, 671 N.W.2d 622 ("We have long recognized that facts proven by uncontradicted testimony not inherently improbable should be taken as conclusively established.").

Contestant also points to the arrangement for Jason's renting of Russell's land. (CB 21). The Court's prior Opinion contains an error regarding this subject. Jason started renting Russell's land in 2002 for $50 per acre. *Tank*, 2020 SD 2 at ¶ 7. The Court's Opinion states that Jason acknowledged the 2002 $50 rental rate was significantly less than market rate. *Id.* Uncontradicted evidence presented at trial showed otherwise. Contestant's Brief notes that Russell left his farmland fallow in 2001. (CB 5). Therefore, when Jason started renting it in 2002, it was a "weedy mess." (CI 2473). It took at least two or three years to clean up the land after Jason started renting it. (CI 2480-81).

Evidence produced at trial established that the average rental rate for non-irrigated cropland in Marshall County in 2002 was $52.60. (CI 2539-40; Ex 102-CI 1526-27).[7] Even Contestant's counsel admitted during his opening statement that the amount paid by Jason in 2002 "could be about right." (CI 2158). When examining Jason about the rental rate, Contestant's counsel stated he was not concerned about the first couple of years and focused on the later years. (CI 2474). There is no dispute that Jason paid a lower than market rate at some point after 2004.

Contestant may argue that the evidence regarding the appropriate rental rate for 2002 was contradicted because Renald testified he had to pay more than that for land he rented to replace Russell's land. (CI 2350). There are a couple of things to note about this testimony. First, Renald did not testify that $50 per acre did not represent the market rate in 2002. Furthermore, Jason paid a total of $28,630 to rent the land in 2002. (CI 2540; Ex 33-CI 1707). When Renald farmed the same land in 2000, he paid only

[7] Because of it having been left fallow in 2001, the cropland possibly could have been classified as low productivity land in 2002. The average rental rate in Marshall County for land with low productivity in 2002 was only $36, $14 per acre less than the amount paid by Jason. (CI 1527).

$26,950. (CI 2540-41; Ex 103-CI 1528). There was no evidence presented that the rate paid by Jason up through 2004 was well below the market rate. Issues in that regard did not arise until after the execution of the 2004 Will. Evidence was also produced that Jason was renting similar land during this same time period for $45 per acre. (CI 2541-43; Exs 104-107-CI 1529-32).

Contestant also complains about Jason keeping the rental rate a secret. (CB 23). When Jason initially rented the land, he informed Renald of his intention to do so. (CI 2464). This testimony was uncontradicted by Renald. The criticisms about Jason being secretive focused on the 2008, 2009 time period. (CI 2470).

As further evidence of Jason's alleged disposition, Contestant cites evidence that Russell made a "sudden decision in 2002 to begin investing his money with Tammy Bender, rather than burying his money. . . ." (CB 22). Contestant does not cite any portion of the record to support this statement because no evidence was presented that this was a sudden decision causing Russell to quit burying money. It is true he invested $5,000 with Tammy Bender in 2002, but the rest of the statements in Contestant's Brief are not supported by the record. (Ex 34-CI 1708).

The only other evidence to which Contestant points to support her argument regarding disposition is the testimony of Dr. Swenson. Jason sought to exclude Dr. Swenson's testimony, which motion was denied. (App 14, ¶ 12). Contestant's Brief cites Dr. Swenson's testimony about the characteristics of influencers. (CB 24). The Brief also cites Dr. Swenson's reliance on testimony from Ruth Timmis and Dave Martin that Boyd Hagenson and Jason would go along with what Russell wanted. (CB 24-25).

The testimony of Ms. Timmis and Mr. Martin had to do with trips Jason made to Ohio with Russell to see Art Timmis, an old Army buddy. These trips occurred in 2009 through 2012, well after the execution of the 2004 Will. (CI 2563). Jason readily admitted that he let Russell and his friend Art do whatever they wanted in Ohio because it was their vacation. (CI 2512).

Dr. Swenson testified there is a tendency by influencers to isolate people. (CI 2256). Renald, the child who lived the closest to Russell, testified he was unaware of Jason ever doing anything to prevent him or anyone else from seeing Russell. (CI 2358). The only testimony whatsoever about Jason possibly interfering with people who wanted to visit Russell came from Ben Waldner who testified he got the sense Jason did not want to leave him alone with Russell. (CI 2219-20). Waldner admitted Jason never prevented him from seeing Russell. (CI 2221).

Swenson defined an influencer as "somebody who has a relationship generally that they use to embed themselves with the person and start the process – I mean, it's not nice to say but it's basically a predator behavior, it's a course of behavior, it's a set of behaviors that we see in other abusive settings." (CI 2257-58). He said the way a person influences someone like Russell is to play along with their delusional disorder. (CI 2269-70). Swenson testified that one could influence Russell by flattering him or preying upon his paranoia. (CI 2271). He further testified that one could not form a relationship with Russell by being honest and rational. (CI 2282-83). Swenson also relied extensively on an MRI of Russell's brain that was performed in 2010. (CI 2263-67; Ex 4-CI 1634). What he didn't talk much about was a similar MRI that was done in 2003 that indicated some mild ischemic changes which are not uncommon. (CI 2275; Ex 1-CI 1633).

Swenson's primary opinion was that Russell was susceptible to undue influence. (CI 2274). That, however, is not a subject of this appeal. Nevertheless, Contestant is apparently attempting to rely upon Dr. Swenson to support her argument concerning elements (3) and (4) of the undue influence test.

Despite all the statements referenced above, Dr. Swenson acknowledged he was unaware of Jason ever encouraging Russell to change his Will or make specific bequests. (CI 2277). He was unaware of anything Jason did between 2001 and 2004 to cause Russell to disinherit his daughter and make Jason his primary beneficiary. *Id.* Swenson had no information Jason ever tried to influence Russell by flattering him or preying upon his paranoia. (CI 2281).

The problem with Contestant's case was that not only did Dr. Swenson have no evidence to support the theories he propounded, but neither did any of Contestant's witnesses. All of Russell's children testified they had no evidence indicating Jason had ever done anything to unduly influence their father. (CI 2359, 2389, 2407, 2434). The same was true of individuals who knew both Jason and Russell and spent time with them. (CI 2521-22, 2527, 2530). Tom Sannes also saw nothing to make him believe Russell had been unduly influenced when he prepared the 2004 Will. (CI 2640). Similar testimony was provided by Kari Bartling who prepared the 2012 Will. (CI 2318). Contestant's case was based entirely on speculation, conjecture, and innuendo.

A case demonstrating that speculation is not enough to support a verdict is *Thompson v. Mehlhaff*, 2005 SD 69, 698 N.W.2d 512. That case involved a collision between two trucks where the defendant claimed the plaintiff was contributorily negligent. The jury agreed and returned a verdict for the defendant. *Id.* at ¶ 39. The trial

court granted the plaintiff's motion for judgment as a matter of law. *Id.* In affirming, this Court stated that the defendant's evidence of contributory negligence was "built on speculation and innuendo." *Id.* at ¶ 42. The Court noted that speculation as to where the plaintiff might have been before the collision "did not meet the threshold necessary to create a question of fact for the jury on contributory negligence." *Id. See also Virchow v. University Homes, Inc.*, 2005 SD 78, ¶ 17, 699 N.W.2d 499 (requiring a jury to speculate in order to find in favor of a party is not enough to avoid judgment as a matter of law). This Court also recently rejected some claims of personal bias in a case challenging a decision of a board of adjustment because the claims were "merely speculative or theoretical." *Miles v. Spink County Board of Adjustment*, 2022 SD 15, ¶ 46, ___ N.W.2d ___.

Contestant's claims concerning Jason's alleged disposition to exercise undue influence for an improper purpose is based entirely on either events which occurred well after the execution of the 2004 Will or claims that are totally speculative.

The Court should not consider events occurring after 2004

Proponent recognizes that in the Court's prior Opinion reference was made to certain events which occurred after the execution of the 2004 Will. The Opinion referenced testimony of a bank employee who became concerned about Russell in his later years and testified about an incident involving Boyd Hagenson as well as the addition of Jason's name to Russell's bank account. *Tank*, 2020 SD 2 at ¶¶ 35, 36.[8] The Court also referenced Dr. Swenson's testimony about Russell showing signs of vascular

[8] Regarding Mr. Hagenson, this Court previously recognized that there were no facts showing Hagenson had anything to do with the preparation of the 2012 Will or that any of his actions benefited Jason. *Id.* at ¶ 35, n. 6. There is also no evidence in the record that Hagenson had anything to do with the preparation of the 2004 Will.

dementia by 2009. *Id.* at ¶ 37. The Court discussed the rental arrangement. *Id.* at ¶¶ 40, 41.[9] Finally, the Court made mention of something that has been referred to as the moldy money incident. *Id.* at ¶ 42. Based on the fact the Court's primary focus was on what happened between 2001 and 2004, the incidents which occurred after 2004 do not establish Jason had a disposition to unduly influence Russell when the 2004 Will was executed. Contrary to an argument made by Contestant, the Court's mentioning of these incidents did not signal the Court's determination that they should have been admitted as evidence at trial. (CB 35-36). In fact, other than Dr. Swenson's testimony and evidence regarding the rental arrangement, all of the other events mentioned by the Court occurring after 2004 were excluded by Judge Myren and Judge Portra. (App 12-16; CI 1333). Judge Portra made an appropriate comment in this regard. "I still find it very difficult to understand how something that happened after the Will was made shows undue influence in the production of that Will." (CI 2197).

Contestant argues that incidents occurring after the execution of a will are relevant to prove undue influence. Contestant cites a Hawaii case[10] and *In re Estate of Nelson*, 330 N.W.2d 151, 155 (S.D. 1983). (CB 36). The statement cited by Contestant from the *Nelson* case has nothing to do with disposition. It involves testamentary capacity. The will in *Nelson* was signed November 1, 1975. *Id.* at 155. The statement cited by Contestant involved the admissibility of medical records from March 1976, which were consistent with other records leading up to the execution of the will. That is not at all akin to the type of evidence Contestant claims is relevant in this case.

[9] As noted previously, there is no evidence the rental arrangement was not a reasonable one until after 2004.

[10] *In re Estate of Herbert*, 979 P.2d 39 (Haw. 1999).

The situation in the Hawaii case is also not at all similar to Contestant's proffered evidence. In that case, the will in question was signed on December 20, 1989, and the decedent passed away in July 1990. 979 P.2d at 484. Like the *Nelson* case, the issue in *Herbert* was testamentary capacity. The Court commented that evidence of facts occurring after death is ordinarily not admissible and that remoteness is a factor. *Id.* at 59. The *Herbert* court made a comment that is relevant to the issues involved in this case.

> [T]here is no doubt . . . "that the *undue influence must be proved to have operated as a present constraint at the very time of making the will*[.]" . . . And yet direct evidence of such influence at the precise time of execution is not indispensable. That may be shown by circumstantial evidence . . . *but only in so far as it tends to show that undue influence was in fact operative at the time of the execution*. . . .

Id. at 56 (citing *In re Will of Notley,* 15 Haw. 435, 440 (Haw. 1904)) (emphasis in original). Accordingly, the focus should be on the evidence of undue influence that existed when Sherri was disinherited in 2004. As far as disposition is concerned, there was no substantial evidence presented at trial.

Disposition to influence is evidenced by persistent efforts to gain control or possession of property. *In re Estate of Gaaskjolen*, 2020 SD 17, ¶ 33, 941 N.W.2d 808. That case is instructive in that it outlines the type of evidence which supports a claim of disposition to unduly influence for an improper purpose. The case involved a dispute between two sisters. Vicki alleged that Audrey had unduly influenced their mother. There was evidence Audrey played a major role in terminating a lease that had been granted to Vicki. *Id.* at ¶ 33. Through emails and other communications, Audrey demonstrated feelings that Vicki should not receive anything. *Id.* at ¶¶ 34-35. The type

of evidence present in the *Gaaskjolen* case is nothing like the evidence upon which Contestant is attempting to rely. Judge Portra was correct in determining Contestant failed to provide sufficient evidence for a reasonable jury to conclude Jason had a disposition to unduly influence Russell for an improper purpose. The Court's decision to grant judgment as a matter of law on that element of the undue influence test should be affirmed.

3. THE TRIAL COURT CORRECTLY RULED THAT CONTESTANT FAILED TO PROVIDE SUFFICIENT EVIDENCE TO ESTABLISH THAT RUSSELL'S DECISION TO DISINHERIT HIS DAUGHTER AND BEQUEATH HIS ESTATE TO PROPONENT WAS A RESULT CLEARLY SHOWING THE EFFECTS OF UNDUE INFLUENCE

The contention that Jason is precluded from arguing the disposition element of the undue influence test does not apply to element (4) of the test. That issue was clearly brought to the Court's attention by way of the Motion for Judgment as a Matter of Law made at the close of Proponent's case and by renewal of the Motion following the completion of all of the evidence. (CI 2516-17, 2666).

Element (4) is addressed on pages 27-30 of Contestant's Brief. Contestant initially argues that paragraph 44 of the Court's Opinion in *Tank* discussing Russell's decision to give everything to Sherri in 2001 and disinherit her in 2004 is, in and of itself, sufficient for Sherri to meet the fourth element. (CB 27). The Opinion says nothing of the kind. The Court remanded the case because it was felt there were issues of fact regarding that decision. As discussed previously, the trial may have provided the reasons for Russell's decision but, more importantly, Contestant failed to produce any substantial evidence to prove element (4).

Contestant makes the comment that there was a great deal of evidence "a factfinder could use to infer that Bender was waging a decade-long campaign to emotionally isolate Russell from his children, and to manipulate his financial decisions for personal gain." (CB 27). While undue influence does not always occur in the open and the jury is entitled to reach certain conclusions based upon inferences, there has to be more than an expert witness saying I cannot believe someone could be a friend of Russell Tank's without unduly influencing him. The Court requires "inferences from the evidence to be reasonable, not merely within the realm of possibilities." *Koenig v. London*, 2021 SD 69, ¶ 40, 968 N.W.2d 646.

There is no evidence of a decade-long campaign to isolate Russell and manipulate his financial decisions. This is just rank speculation on the part of Contestant. This Court has already determined Jason had nothing to do with the disinheritance of Arlo, Renald, and Gina. If Jason had truly influenced Russell to disinherit Sherri in 2004, why would he have had to engage in the alleged decade-long campaign? His goal would have been accomplished. He certainly did not need to engage in a campaign to keep Russell's children away from him after 2004, since, by that time, with the exception of occasionally seeing Renald, Russell had nothing to do with any of this children. *Tank*, 2020 SD 2 at ¶¶ 4-6.[11]

In support of her argument regarding a result showing the clear effects of undue influence, Contestant cites that Russell quit sharing a mailbox with Renald sometime in the late 1990's. (CB 27-28). Contestant does not explain what that has to do with Russell's decision to disinherit Sherri. The deterioration of Renald's relationship with his father has nothing to do with Sherri's situation. Furthermore, Renald attributed Russell's decision to

[11] Paragraph 6 states that Sherri rarely saw her father after 2005. At trial, she acknowledged she never saw her father after the summer of 2004. (CI 2030-31).

get a separate mailbox to Russell spending time with Boyd Hagenson, not Jason. (CI 2332-33).

Contestant described an incident involving Jerry Smith who claimed he attended a card game at Russell's residence one night where everybody in attendance, including Jason, were making negative comments about Renald. (CB 28). Again, Contestant fails to explain why situations involving Renald have anything to do with Russell's decision to disinherit Sherri. Furthermore, Mr. Smith testified that Russell was making a number of the critical comments about Renald. (CI 2183). He could not recall any specific comments made by Jason. (CI 2182).

Contestant again makes reference to Russell investing money with Jason's wife. It is noteworthy that, in Tom Sannes' notes, Russell described Tammy Bender favorably. (CI 1677). Contestant presented no evidence to establish that Jason had anything to do with Russell deciding to invest with Tammy.

Contestant notes Jason spent a substantial amount of time with Russell restoring a Model A. (CB 29). Just because Jason spent time with Russell and became his friend does not establish that Russell's Will clearly shows the effects of undue influence.

Contestant again engages in speculation when she argues that, because Russell visited Jason in the hospital a couple of times before he executed the 2004 Will, Jason must have unduly influenced him. (CB 29). Like the other facts described in Contestant's Brief, Contestant's claim amounts to pure speculation.

Contestant then makes a strange statement that Judge Portra "offered no explanation or analysis on the fourth element." (CB 29). That is a misstatement of the record. The Court's full comments were as follows:

> Then finally, the last element, is a result clearly showing the effect of undue influence. Again, I find the evidence was, on that element, was lacking.
>
> So the plaintiff's burden was a result clearly showing the effect of undue influence. If Russell had any relationship with his children at all, I think this factor would be met.
>
> By her own testimony, Sherri indicated, I think, that she spent about an hour with her father in the 10 years prior to the making of the 2004 Will.
>
> Again, it may not be her fault that they didn't spend any time together. She testified that she tried to have a relationship with him and he would just stare off into space and not really connect with her. He didn't interact with her.
>
> Be that as it may, you know, one or two hours in 10 years doesn't show a result clearly showing the effect of undue influence.
>
> By contrast, Mr. Bender spent time with him, with Russell. Leased his land. Fixed his doors. Changed his sump pumps. Took down his trees. Gave him meat. Played cards. Put up fence. Worked on cars. All of that is undisputed evidence.
>
> So the Court simply finds that elements 3 and 4 were not met.

(App 6-7).

Commenting on all the things Jason did for Russell, Contestant states that those things were minor in comparison to inheriting a multimillion dollar farm. (CB 30). Jason never contended that the things he did for Russell entitled him to inherit Russell's farm. He did what he did because he was Russell's friend.

In commenting on the fourth element of the undue influence test, the *Gaaskjolen* court summarized the evidence supporting the decision in that case.

> The will and codicil completely disinherited Vicki and left Dora Lee's entire estate to Audrey. This change increased the value of Audrey's inheritance by approximately 1.5

> million dollars. The circuit court found that this "disposition is totally contrary to the way Dora Lee had lived and treated her daughters and grandchildren." This finding is supported by evidence of Dora Lee's desire to treat her children and grandchildren equally, as well as the original wills signed by Marlin and Dora Lee that equally divided their estate between Audrey and Vicki. Even after Marlin's death, Dora Lee did not change her will until after the dispute arose between Audrey and Vicki over the north half of the ranch. There was also evidence that Dora Lee and Vicki had a good relationship, and it was Audrey, not Dora Lee, who had animosity towards Vicki and sought to keep Vicki from visiting Dora Lee.

2020 SD 17 at ¶ 37.

The description of Dora Lee's relationship with her children is dramatically different than Russell's relationship with his children. Russell's 2004 and 2012 Wills were not totally contrary to the way he had lived and treated his children. Russell exhibited no desire to treat his children equally. The first known Will completely disinherited three of his four children. Unlike Dora Lee and Vicki, Russell and Sherri never had a good relationship. Furthermore, Contestant presented no evidence whatsoever that Jason had any animosity toward Sherri or in any manner sought to keep Sherri from visiting her father.

The evidence of a result clearly showing the effect of undue influence simply does not exist. Judge Portra was correct in concluding it appears the jury's verdict was based on evidence that Russell was a terrible father and that his farmland must stay in the family. (App 7). The trial court also expressed the opinion that sympathy had a lot to do with the verdict. (App 8). Contestant argues that, because Proponent did not object to Contestant's closing argument and did not assert the jury's verdict was a result of passion, Judge Portra could not consider the effect sympathy might have played in the case. The issue of

sympathy was raised to the trial court.[12] This Court has stated on numerous occasions that a jury verdict should not be affirmed if it is a result of "juror passion, prejudice, or mistake of law." *See, e.g., Bridge v. Karls, Inc.*, 538 N.W.2d 521, 525 (S.D. 1995). This Court has also stated that the trial court is in the best position to determine whether a verdict is a product of passion or prejudice. *Berry v. Risdall*, 1998 SD 18, ¶ 10, 576 N.W.2d 1. The trial court has the benefit of observing the jury for signs of passion, partiality, or prejudice. *Stormo v. Strong*, 469 N.W.2d 816, 826 (S.D. 1991). *See also Roth v. Farner-Bocken Co.*, 2003 SD 80, ¶ 41, 667 N.W.2d 651. Contestant cites no authority to the effect that a trial court cannot, based on the Court's observation of the trial, conclude that the verdict was based upon passion or sympathy where there is a lack of substantial evidence to support the verdict. The failure to cite authority in support of an argument is a violation of SDCL 15-26A-60(6) and is deemed a waiver. *Kostel v. Schwartz*, 2008 SD 85, ¶ 34, 756 N.W.2d 363.

One other thing which is not mentioned in Contestant's Brief is the concluding paragraph of Instruction No. 13.[13] "For influence to be undue, it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator. Whether undue influence occurred is determined from all of the surrounding facts and circumstances." This language also appears in paragraph 33 of *Tank*.

Judge Portra properly concluded that there was a lack of evidence to establish Jason destroyed Russell's free agency and substituted his will for that of Russell's. The decision to grant judgment as a matter of law with reference to the fourth element of the undue influence test should be affirmed.

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[12] Proponent stated in his Brief in Support of the Renewed Motion for Judgment as a Matter of Law, "[t]he jury was obviously influenced by the sympathetic testimony of the children as to what a terrible father Russell was." (CI 1906).

[13] CI 1515.

4. THE TRIAL COURT DID NOT ERR IN GRANTING PROPONENT'S ALTERNATIVE MOTION FOR A NEW TRIAL

The standard of review regarding the granting of a motion for a new trial is different from that for review of a judgment as a matter of law:

> Whether a new trial should be granted is left to the sound judicial discretion of the trial court, and this Court will not disturb the trial court's decision absent a clear showing of abuse of discretion. If the trial court finds an injustice has been done by the jury's verdict, the remedy lies in granting a new trial. We determine that an abuse of discretion occurred only if no judicial mind, in view of the law and circumstances of the particular case could reasonably have reached such a conclusion.

Roth, 2003 SD 80 at ¶ 9 (quoting *Biegler v. American Family Mutual Insurance Company*, 2001 SD 13, ¶ 17, 621 N.W.2d 592)). There must be a clearer showing of abuse of discretion when a new trial has been granted than when one has been denied. *Henry v. Henry*, 2000 SD 4, ¶ 8, 604 N.W.2d 285. "It is . . . fundamental law in this state that a stronger case must be made to justify the appellate court in disturbing the finding of the trial court granting a new trial than if the trial court had refused a new trial." *Basin Electric Power Cooperative v. Gosch*, 240 N.W.2d 96, 99 (S.D. 1976).

In addressing the granting of a motion for a new trial, the Supreme Court views the evidence most favorable to the conclusions reached by the trial court as opposed to most favorable to the verdict when a new trial is denied. *Morrison v. Mineral Palace Ltd. Partnership*, 1999 SD 145, ¶ 9, 603 N.W.2d 193, 196 (S.D. 1999). *See also Basin Electric Power*, 240 N.W.2d at 99. ("The record must be examined viewing it most favorably to the conclusion of the trial court."). In *Henry*, 2000 SD 4 at ¶ 9, this Court stated: "In considering a new trial motion, the judge is not required to view the evidence in a light most favorable to the nonmoving party" (citing 1 S. Childress and M. Davis,

Federal Standards of Review § 5.09 (2d ed 1992)). This statement is not consistent with language cited by Contestant in her Brief. (CB 34). Nevertheless, however the evidence is considered, Judge Portra clearly did not abuse his discretion in granting a new trial in light of his feeling that an injustice had been done.

Contestant argues Judge Portra could not, in granting a new trial, consider passion or prejudice because Jason did not seek a new trial under SDCL 15-6-59(a)(5). That provision references "excessive or inadequate damages appearing to have been given under the influence of passion or prejudice." There is no issue about damages in this case. Contestant cites no authority to support her position that Judge Portra could not take passion or prejudice into account.

Jason obviously believes the Court should affirm the granting of the Judgment as a Matter of Law. If, however, it does not do so, Judge Portra's ruling granting the new trial should be affirmed and this case remanded to the trial court.

5. THE TRIAL COURT DID NOT ERR IN DENYING CONTESTANT'S MOTION TO REMOVE PROPONENT AS THE PERSONAL REPRESENTATIVE OF THE ESTATE

Contestant states that the Motion to remove Jason as the personal representative was deemed moot. (CB 2-3). That is incorrect. Judge Portra denied the Motion. (App 2, ¶ 3).

Decisions regarding the removal of a personal representative are reviewed under an abuse of discretion standard. *In re Estate of Unke*, 1998 SD 94, ¶ 29, 583 N.W.2d 145. During the September 28, 2021 hearing on the post-trial motions, counsel for the Estate explained to the Court how Jason was appropriately serving as PR. (CI 2842-43). In light of the Court's ruling to grant judgment in Jason's favor, it only made sense for

him to continue serving as the PR. Judge Portra did not abuse his discretion in making that decision and should be affirmed.

6. THE TRIAL COURT DID NOT ERR IN GRANTING PROPONENT'S MOTION FOR THE ESTATE TO PAY HIS ATTORNEY FEES

Under SDCL 29A-3-720, a personal representative "who defends or prosecutes any proceeding in good faith, *whether successful or not*, is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fees" (emphasis added). On the basis of that statute, Jason moved for authority to use estate funds to pay his counsel's fees as well as the fees of the Estate's attorney. Contestant appeals from only the granting of the Motion to allow Jason to pay his counsel.

Contestant has not objected to the reasonableness of the fees. Contestant also did not seek a stay of Judge Portra's ruling pending this appeal. She argues it is bad faith for a personal representative to defend a Will he improperly influenced and asked that Jason be asked to disgorge his counsel's fees in the sum of $214,483.63. (CB 37-38). Based on the ruling granting the Motion for Judgment as a Matter of Law, there is no basis for Judge Portra to be reversed concerning the award of attorney fees.

7. THE COURT SHOULD NOT ADDRESS CONTESTANT'S DENIAL OF THE 2004 WILL TO PROBATE AND A DECLARATION OF INTESTACY

In light of Judge Portra's ruling granting Jason's Motion for Judgment as a Matter of Law, the Court declared Contestant's Motion for Order Denying Will to Probate and for Declaration of Intestacy to be moot. (App 2, ¶ 6). Therefore, Judge Portra did not rule on that Motion. Should this case be remanded for further proceedings, those are issues the Judge may have to address. It would, however, be inappropriate for this Court to reach any decisions on those issues at this time because there has been no lower court ruling. The Court has stated on numerous occasions that the trial court must be given an

opportunity before an issue will be reviewed at the Supreme Court level. *See, e.g., State v. Hayes*, 1999 SD 89, ¶ 16, 598 N.W.2d 200.

Contestant also asked the Court to reinstate evidence that was excluded. (CB 35). It would be inappropriate for the Court to do that at this point. Should the case be sent back for a retrial, the trial court should be given the first opportunity to decide what evidence should be admitted. Furthermore, for purposes of this appeal, the excluded evidence is of no significance in that Contestant has acknowledged that the excluded evidence was meant to address the issue of susceptibility. (CI 2879).

CONCLUSION

Contestant's Brief lists four themes. (CB 31-32). The first is that Russell was clearly impaired and had been so for his entire life. It has previously been determined he was not so impaired as to lack testamentary capacity or that his Wills were the result of an insane delusion. Second, Russell's limitations left him capable of being manipulated. That goes to the susceptibility issue which is not part of this appeal. Third, Jason's "relationship with Russell *appeared* to involve his participation and acquiescence to isolate Russell and alienate him from his children." Fourth, that Jason "*appeared* to be doing everything possible to flatter and embed himself with Russell" (emphasis added). There was a lack of evidence to support Contestant's third and fourth themes. Contestant's entire case was based upon the speculation of Dr. Swenson that no one could be Russell's friend unless they were dishonest and irrational. Dr. Swenson's testimony was aptly described by Judge Myren in granting summary judgment at the motions hearing on February 8, 2019:

> When asked about it, Dr. Swenson did not cite any facts to support his conclusion. Instead he essentially made a res

> ipsa loquitor argument. Specifically he testified, quote, the only way I can explain how two people, not his children, later in life were able to form some type of relationship that ended up in much benefit to them, I know for a fact that it can't be done by being honest and rational with this individual, end quote. It happened, so it must have been as a result of undue influence.

(CI 988).

Renald testified he should receive a portion of Russell's Estate simply because he is family. (CI 2359-60). Gina said she should inherit because she is Russell's child. (CI 2409). Sherri believes the land should stay in the family. (CI 2435). Despite the fact the Tank children had no relationship with their father, they feel they are entitled to an inheritance, even though none of them can point to evidence that Jason unduly influenced their father. When it comes to disposition and a result clearly showing the effects of undue influence, Contestant's entire case is based upon speculation and conjecture. Judge Portra was correct in granting Jason's Motion for Judgment as a Matter of Law. That decision should be affirmed. Alternatively, Judge Portra should be affirmed with regard to his motion to grant a new trial. He should also be affirmed regarding the other issues raised by Contestant.

Dated this 30th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 8,938 words and 43,841 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellee Jason Bender, hereby certifies that on the 30th day of March, 2022, a true and correct copy of the foregoing APPELLEE JASON BENDER'S BRIEF was served by electronic transmission on the following:

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/s/ Reed Rasmussen

IN THE

Supreme Court

of the

State of South Dakota

No. 29809

IN THE MATTER OF
THE ESTATE OF
RUSSELL O. TANK

An appeal from the Circuit Court, Fifth Judicial Circuit
Marshall County, South Dakota

The Hon. Tony Portra
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Mr. Bender's brief contains the same impermissible arguments he used in the previous *Tank* appeal. In that appeal, he argued in favor of summary judgment by weighing evidence, discounting inconvenient testimony, quibbling with the expert, and arguing factual scenarios from prior probate cases.

Here, he continues this same strategy, in the hopes of rejecting the Jury's Verdict. He weighs evidence. He speculates. He challenges expert testimony with his own lay arguments. He attempts to limit the facts. And, above all, he continues to demand *direct evidence* of his undue influence.[1]

None of this is allowed. The central question in both a motion for summary judgment and a motion for dismissal is the same. Our job is not to weigh the evidence, nor to speculate, nor to assign prejudice. Instead, we search for any evidence that can sustain the Verdict, indulging all reasonable inferences, and ignoring any of Mr. Bender's own evidence.

And, of course, in cases like this, much of the evidence of wrongdoing will be circumstantial, because "[u]ndue influence is not usually exercised in the open. 'It is therefore usually solely through inferences drawn from surrounding facts and circumstances that a court arrives at the conclusion

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[1] His demand for direct evidence is a constant refrain in his Brief: "Tom Sannes saw nothing...." p. 18. "Dr. Swenson had no information Jason ever tried to influence Russell...." p. 18. Russell's children "had no evidence indicating Jason had ever done anything to unduly influence their father." p. 18.

that a will is the product of undue influence working on the mind of the testator.'" *In re Estate of Tank*, 2020 S.D. 2, ¶ 39.

This Verdict is supported by ample evidence, and it should be reinstated.

RESPONSE TO MR. BENDER'S STATEMENT OF THE FACTS

Because the facts must be construed in a light most favorable to the Verdict, we offer the following responses to Mr. Bender's Statement of Facts.

First, even though Sherri did not return to Britton every year, she did continue to maintain constant contact with Russell by sending him Father's Day cards, birthday cards, letters, pictures, and invitations. [TT 418].

Second, Mr. Bender is improperly attempting to narrow the scope of this case into the window between 2001 and 2004. He suggests that since the 2004 and 2012 Wills were "consistent," therefore the only purpose for a trial was to find out what transpired between 2001 and 2004 (or, in his words, "the question in the Court's mind [in *Tank*] was obviously what happened between 2001 and 2004 to cause Russell to disinherit Sherri"). Appellee's Brief, at 6.

His assertion misconstrues the *Tank* opinion. Here is how this Court explained it:

> [w]hile the consistency between the 2004 and 2012 wills may be relevant, a fact finder could also consider the circumstances involving Russell's decision to give nearly all his property to Sherri in the 2001 will and then disinherit her completely in the 2004 will, just three years later....Aside from Bender's increased involvement with Russell, there is nothing in the record to suggest that anything occurred in the relationship between Russell and Sherri from 2001 to 2004 that would have caused Russell to disinherit his daughter. A fact finder could consider these circumstances, and inferences drawn from them, in

determining whether Russell's decision to disinherit Sherri in the 2012 will was clearly the result of any undue influence by Bender.

Tank, ¶¶ 44-45.

In addition, Mr. Bender's attempt to narrow the pertinent time window reflects a fundamental misunderstanding of the nature of influence, which is often persistent, and which can *continue* to manifest itself in subsequent Wills. *E.g., Estate of Borsch*, 353 N.W.2d 346, 351 (S.D. 1984) (undue influence found in spite of another, subsequent will that continued the same disinheritance). Mr. Bender's conduct after 2004 also remains relevant to our inquiry because a Jury can infer that his disposition did not suddenly change. His persistent efforts are found throughout this case.[2]

Third, Mr. Bender correctly states that the *Tank* opinion had the effect of *legally* ending Renny's claim for undue influence; however, the *Tank* opinion did not foreclose Sherri's own *factual* inquiry into this topic. In fact, with the hindsight of Sherri's trial, the *Tank* opinion appears to be incorrect when stating that "it is undisputed that Russell had already decided to disinherit...Renny...in 2001, before there was any claim of undue influence by Bender." *Tank*, ¶ 47 (emphasis added).

In contrast, the evidence at Sherri's trial confirmed that prior to 2001, Mr. Bender was making disparaging remarks about Renny in the presence of

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[2] *See, Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 33, 941 N.W.2d 808, 817 (a disposition to influence is "evident from persistent efforts to gain control and possession of testator's property")

Russell. [TT 168-69, 175, 176]. The witness to Mr. Bender's conduct did not recall specific comments, but he did find it so egregious that he protested and then promptly left the gathering. [TT 170]. Within just a few months of this troubling incident, Russell kicked Renny off the farm, [TT 327], and then wrote Renny out of his 2001 Will. [R.1663].

In line with this example, Sherri's expert (Dr. Swenson) explained to the Jury that a key characteristic of influencers is that "they turn other people against them...to basically take people that were previously trusted and convince the person they can't trust them anymore." [TT 249-250]. He explained that this is a manner of emotionally isolating someone that does not require physical isolation. *Id.*

A Jury could have concluded that this is what Mr. Bender was doing in late 2000, which led to Renny being ousted from the 2001 Will. And, a Jury could have concluded that (even from his hospital bed) Bender was continuing the same strategy in 2004 to turn Russell against Sherri, and, which finally succeeded in inserting himself into the Will.

A Jury could use all of this as evidence of Mr. Bender's disposition, and, as part of a persistent effort to influence Russell's estate planning for his own benefit, and, as evidence that Russell's 2012 was clearly the result of Mr. Bender's actions.

ARGUMENT-IN-REPLY

The structure of Mr. Bender's brief makes it somewhat hard to follow, because he does not directly and sequentially address the four primary issues

raised in Sherri's opening brief. Instead, he has formulated the case into seven "legal issues presented," none of which correspond to Sherri's original numbering. To avoid further confusion, this Reply Brief will defer to Mr. Bender's numbering.

But in simplest form, this appeal is not about seven topics. At the core, this appeal will turn upon just two issues (after which all others become either moot or self-evident). Those two issues are the third and fourth elements of undue influence, namely, the question of Mr. Bender's wrongful disposition, and, the question of whether Russell's 2012 Will is a result clearly showing the effects of undue influence. If we set all of the other matters aside, and, if the Record contains evidence of those two elements, this Court's inquiry is essentially complete.

The third and fourth element are addressed in Sections 2 and 3 below. Mr. Bender's brief offers a tepid response to both of those elements, in which he argues about the weight and meaning of the evidence against him, rather than the absence of evidence against him.

First, we begin with a discussion about the standard of review and the evidence required to sustain a Verdict.

1. The proper standard of review and the correct meaning of substantial evidence

In Section 1, Mr. Bender addresses the standard of proof, and then attempts to define and apply it.

As to the standard of review, Appellee's initial statement is correct: in 2016, this Court held that "a circuit court's decision to grant or deny a motion for judgment as a matter of law must be reviewed *de novo* on appeal." *Williams v. Brinkman*, 2016 S.D. 50, ¶ 13, 883 N.W.2d 74, 81.

But the rest of Mr. Bender's argument on pages 6 to 8 (in his Section 1, discussing "substantial evidence") is riddled with inaccuracies. Those inaccuracies then extend into his analysis on pages 9 and 10.

Mr. Bender attempts to define the standard of review by offering conclusory synonyms for 'substantial evidence' ("legally sufficient" and "competent and substantial"). He then attempts to add a new requirement into the law, claiming on page 8 that "some" evidence is not enough. (This Court has never said that.) Mr. Bender also misquotes Rule of Evidence 301, which he says contains the phrase "competent and substantial evidence." (It does not.) And he takes issue with Sherri's use of the phrase "more than a mere scintilla," because (he claims) "this language has not been used in a Supreme Court opinion since 1953." (It has.)

This Court used and explained the "scintilla" phrase in a 1992 case. *Olson v. Deadwood*, 480 N.W.2d 770, 774-75 (S.D. 1992). Identical language has been used by "modern" cases regularly since 1953, including the U.S. Supreme Court and in all federal circuits. *E.g., Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Hastings v. Bos. Mut. Life Ins. Co.*, 975 F.2d 506, 509 (8th Cir. 1992).

This Court's 1992 case (*Olson*) also makes it clear that Mr. Bender is wrong to assert that the "substantial evidence" test imposes a higher threshold for evidence. "Substantial evidence is defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, or evidence which affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . .The phrase does not mean a large or considerable amount of evidence . . .but means 'more than a mere scintilla' of evidence." *Olson v. Deadwood*, 480 N.W.2d 770, 774-75 (S.D. 1992)

Ultimately, the concept of "what is substantial evidence" boils down to the same question asked at the summary judgment stage: "a *de novo* inquiry into whether the evidence, when viewed in a light most favorable to the nonmoving party, is sufficient to permit reasonable people to disagree on the merits." *Williams v. Brinkman*, 2016 S.D. 50, ¶ 12 n.7, 883 N.W.2d 74, 80. *See, also, Williams*, at ¶ 13 ("the central question in both a motion for summary judgment and a motion for dismissal is whether a party is entitled to judgment as a matter of law").

And, although the *Williams* case clarified the standard of review, the functional analysis mandated by *Williams* is still identical to what Sherri set forth on pages 9 and 10 of her opening brief:

> [T]he evidence is reviewed in a light most favorable to the verdict or to the nonmoving party. Without weighing the evidence, the court must then decide if there is evidence that supports a verdict. If sufficient evidence exists so that reasonable minds could differ, judgment as a matter of law is not appropriate.

Williams v. Brinkman, 2016 S.D. 50, ¶ 14, 883 N.W.2d 74, 81 (internal citations omitted). *See, also, Williams,* at fn.7 (demonstrating that prior cases were already using *de novo* review but labeling it incorrectly).[3] Such a basis exists, unless "the evidence is **so one-sided** that reasonable minds could reach **no other conclusion**." *Klarenbeek v. Campbell*, 299 N.W.2d 580, 581 (S.D. 1980) (emphasis added).

Paraphrasing *Williams*, then, "[i]n light of the foregoing, we review *de novo* the question whether 'there is [any] legally sufficient evidentiary basis for a reasonable jury to find' [that Russell's 2012 Will was the product of undue influence.]" *Williams v. Brinkman*, 2016 S.D. 50, ¶ 14.

Finally, the *Williams* case offers a cautionary note which is applicable here: the Defendant's arguments in that case "amount[ed] to little more than an attempt to relitigate the trial." *Williams,* at ¶ 15.

Sherri makes the same critique of Mr. Bender's brief today. He is ultimately arguing about the *meaning* of various pieces of evidence, rather than proving the total absence of evidence. In addition, Mr. Bender's brief overlooks this Court's mandate that "if the jury's verdict can be explained with reference to the evidence, rather than by juror passion, prejudice or mistake of law, the verdict should be affirmed." *Wright v. Temple*, 2021 S.D. 15, ¶ 34.

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[3] In support of his argument that "some" evidence is not enough, Bender discusses various dissents, including Judge Portra's involvement in *Harmon*. Notably, *Harmon* predates *Williams* by 8 years. Yet, even with that prior experience, Judge Portra did not quote any legal standard that guided his decision--not from either of those cases, nor from any other case.

Indeed, Mr. Bender does not even address this principle of law, and, yet continues to assert that the Verdict was the product of passion (to which he never objected). 'Passion' is a topic to which he devoted less than a sentence in his post-trial brief, and it merits little attention here.

In short, Mr. Bender may not use this appeal to relitigate his case.

2. The evidence demonstrated that Mr. Bender had a disposition to exert influence upon Russell for a wrongful purpose (i.e., the third element); or, Mr. Bender waived his right to challenge this element

The Record contains a substantial amount of evidence of Mr. Bender's wrongful disposition. Sherri's opening brief specified five different areas of evidence, any one of which was sufficient to support such a finding. In response, Mr. Bender spends eight pages (a quarter of his brief) quibbling about the weight of this evidence against him and disputing the time-frame of the evidence. He asks that we accept his version of the facts, and urges us to ignore everything he did after the year 2004.

But that is not what was envisioned by this Court's opinion in *Tank,* which suggested that Mr. Bender's conduct after 2004 (and even after 2012) could be used to prove his disposition.[4] Moreover, the Circuit Court *admitted*

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[4] *Accord, In re Estate of Herbert,* 979 P.2d 39 (Haw. 1999) (circumstantial evidence from other time periods can be used to show wrongful disposition, "in so far as it tends to show that undue influence was in fact operative at the time of execution.") This is similar to this Court's rule for capacity evidence, which is relevant for a reasonable time before and after execution. *In re Estate of Nelson,* 330 N.W.2d 151, 155 (S.D. 1983). It is also common sense: a wrongful disposition does not stop and start overnight.

this post-2004 evidence, and Mr. Bender failed to file a notice of review to challenge that admission.[5]

Mr. Bender goes to great lengths to suggest that the Jury should have found in his favor because he didn't start taking advantage of Russell on the rental rate (or mapping his buried cash) until sometime after 2004. This is an argument about weight. Recall, too, that Mr. Bender attempted to explain at trial about his justification for paying substantially below-market rent. The Jury watched him testify. It did not believe him. "It is within the province of the jury as the ultimate trier of fact to weigh the conflicting evidence or decide upon the credibility of the witnesses." *Wright v. Temple*, 2021 S.D. 15, ¶ 37, 956 N.W.2d 436, 448.

Although Mr. Bender is correct that "uncontested" evidence can be utilized in *some* cases, Mr. Bender's evidence is not "uncontested" here because he and his witnesses were subjected to cross-examination about their bias and inconsistencies.[6]

Mr. Bender also fails to refute Dr. Swenson's testimony about the characteristics of influencers. Dr. Swenson offered a road map to explain how someone like Russell could be manipulated, and he explained common

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[5] *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶ 10, (failure to file notice of review precludes appellate review of that issue).

[6] As explained in Sherri's opening brief: testimony of a party is *not* considered conclusive and uncontradicted when it is challenged, either "directly **or** indirectly, by other witnesses **or** by circumstances disclosed…." *Commercial Credit Co. v. Nissen*, 57 S.D. 158, 162, 231 N.W. 534, 535 (1930) (emphasis added).

characteristics of influencers. Without anything further, the Jury could have applied that testimony to Mr. Bender and conclude that he fit the description.

Finally, as a matter of procedure, Mr. Bender's post-trial motion on the third element should have been rejected outright, both because it was beyond the scope of his earlier Rule 50 motions, and because his counsel conceded the justiciability of that element. *Bauman v. Auch*, 539 N.W.2d 320, 325 (S.D. 1995); Rule 50(b).

Mr. Bender is correct that Sherri did not specifically raise the Rule 50 limitation issue below. And, Mr. Bender is correct that "ordinarily" an issue not raised below is waived on appeal.

However, Sherri *did* urge the Court at the September 8, 2021, hearing to allow the parties to order a transcript prior to making its ruling, so that the parties and the Court would have the benefit of the actual proceedings, rather than their memories and handwritten notes about a trial that had occurred seven weeks earlier. [HT, 9/8/2021, 2:24—4:1].

The Circuit Court had the opportunity to pause the proceedings and order the transcript but refused. Today, and with the benefit of that transcript, this Court can see the exact moment and text where Mr. Bender's attorney conceded the justiciability of the third element prior to the verdict, and that he confined his motion to the fourth element.

This Court has explained the rationale against raising issues for the first time in an appellate brief is because it "limits the opposing party's ability to respond. Had the issue been specifically raised below, the parties would have

had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration." *Gabriel v. Bauman*, 2014 S.D. 30, ¶ 23, 847 N.W.2d 537, 544.

There is nothing about raising the Rule 50(b) issue now that would have changed the outcome of the Circuit Court's ruling (because of its ultimate position on the fourth element). No additional, post-trial factual record would have been necessary. And, Mr. Bender has been afforded a full ability to respond to the legal arguments in his briefing here. The rule is that "ordinarily" an issue not raised below is waived; this is not an instance that is "ordinary."

Even if this Court does not reject Bender's arguments on the third element as a matter of procedure, the outcome is the same, because Sherri introduced more than enough evidence to prevail on that element. She proved Bender's disposition to exert influence for an improper purpose.

3. The evidence demonstrated that Russell's 2012 Will was a result clearly showing the effects of undue influence (i.e., the fourth element)

In Section 3, Mr. Bender argues the fourth element of undue influence. Earlier in his brief (on page 18), Mr. Bender questioned why Sherri had spent four pages addressing the first and second elements of undue influence, which are not contested in this appeal. The reason is simple: the facts supporting those elements are integrated within the set of "circumstances" that the Jury

examined when making its decision on the other elements. These facts are not neatly packaged and isolated; they are interrelated.

For example, the details of Russell's susceptibility directly relate to the amount and character of influence that would be necessary to manipulate him (i.e., to make Russell think something was his own idea).[7]

Similarly, Mr. Bender's outrageous claim that he had zero opportunity to influence Russell helped inform the Jury's conclusion about the nature of the result he achieved. Mr. Bender was also asked directly and indirectly if he injected himself into Russell's estate planning. The Jury was free to accept his answers, or, to reject them.

In addition to that evidence on the fourth element, Sherri's opening brief asserted that Russell's sudden disinheritance of her could be used as evidence of undue influence. Mr. Bender disputes this, claiming that the *Tank* opinion "says nothing of the kind." Bender's Brief, p. 22. But the *Tank* opinion does say this, as do prior cases.

Here is the language from *Tank*: "[w]hile the consistency between the 2004 and 2012 wills may be relevant, a fact finder could also consider the circumstances involving Russell's decision to give nearly all his property to

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[7] *See, also,* Instruction No. 13 ("For influence to be undue, it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator.") The nature of Russell's susceptibility is bound up in the question of what "character" of influence could destroy his free agency.

Sherri in the 2001 will and then disinherit her completely in the 2004 will, just three years later." ¶ 44.

The *Tank* holding was echoed in two prior undue influence cases, in which the sudden act of disinheritance was *itself* a circumstance that could be used to prove influence. *In re Estate of Borsch*, 353 N.W.2d 346, 351 (S.D. 1984) (near-total disinheritance "just one year later"); *In re Estate of Jones*, 320 N.W.2d at 170, ("their total disinheritance just five years after the execution of the 1974 will demands close judicial scrutiny"). In particular, this Court in *Borsch* said that "the most damaging evidence in this respect [i.e., a "result showing effects of such influence"] **are the wills** of March 20, 1981, and July 8, 1981." *In re Estate of Borsch*, 353 N.W.2d 346, 351 (S.D. 1984) (emphasis added).

The remainder of his arguments in Section 3 are wedded to the idea that he can challenge the meaning and weight of the evidence against him. In addition, Bender professes innocence throughout his brief, and he seems oblivious to the actual evidence and inferences that are stacked against him. There is perhaps no better example of his myopia than his rhetorical question on page 23:

> If Jason had truly influenced Russell to disinherit Sherri in 2004, why would he have had to engage in the alleged decade-long campaign? His goal would have been accomplished.

Bender answered his own question, at trial when he explained why he kept the low rental rate a secret from his "friend" Renny Tank, while revealing it to his other friends, like Boyd Hagenson.

Bender's ultimate answer, which he gave twice, was that if Renny Tank knew about the low rent, it could have led to Renny and Russell reconciling. [TT 471:16-19; 472:1-15]. That is the last thing that Mr. Bender wanted, because it would mean the end of his grift.[8] It would mean the restoration of Russell's prior relationships. And (regardless of who replaced him) it would almost certainly result in Bender's removal from the Will.

From all of this, a Jury could reasonably conclude that Mr. Bender knew exactly what he was doing, and, that he knew it was wrong. The Jury also had the opportunity to watch and listen to Mr. Bender for several hours. If the Jury had believed what he was saying, the Verdict here could very well have been different. Mr. Bender cannot complain that he was not credible.

Mr. Bender asserts on page 27 that "Contestant cites no authority to the effect that a trial court cannot, based on the Court's observation of the trial, conclude that the verdict was based upon passion or sympathy where there is a lack of substantial evidence to support the verdict." However, Sherri did cite authority. A Circuit Court cannot overturn a verdict on the basis of prejudice or sympathy to which the Defendant did not object. *Schlagel v. Sokota Hybrid Producers*, 279 N.W.2d 431, 433-34 (S.D. 1979). And, a Circuit Court

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[8] Judge Portra hit upon the same issue. He ruled that "if Russell had any relationship with his children at all, I think this factor would have been met." App. 6. What he failed to see is that this was Sherri's argument: Russell *did* have a relationship with Renny and Sherri prior to Mr. Bender's entrance into his life. Mr. Bender admitted that he actively concealed the rental arrangement to forestall a reconciliation with Renny. That is the essence of emotional isolation.

cannot vacate a verdict for prejudice when it can be explained by the evidence. *Wright v. Temple*, 2021 S.D. 15, ¶ 34.

Moreover, the Circuit Court here did not make any substantive "findings" about prejudice or passion based on its observations of the Jury. Indeed, the Circuit Court did not even discuss its observations of the Jury. Instead, the Circuit Court focused upon how ***it*** viewed the outcome: "from the moment that the verdict came in, I was flabbergasted at the verdict." [HT 9/8/2021, 6:11-13].

Or, in other words, the Circuit Court and the Jury arrived at different conclusions. Reasonable minds approached the evidence differently. This is the essence of our inquiry here, and it is proof that Sherri submitted substantial and competent evidence. The Verdict should be upheld.

4. Mr. Bender is not entitled to a new trial

If this Court agrees that there is sufficient evidence in the Record on the third and fourth element, there is no need to decide the question of a new trial. If the evidence is sufficient to sustain the Verdict, the Verdict should be reinstated, and the matter will have concluded.

Bender asserts that this is an issue of discretion. However, the Circuit Court did not make any record as to why it was exercising its discretion to grant a new trial.

Its oral ruling on September 8, 2021, did not address the new trial issue at all. The only time that the 'new trial' issue was addressed was in an email between Court and counsel a week later, which advised of its intent to grant a

new trial, conditionally, "based upon SDCL 15-6-59(6).") [R. 1953]. That subsection deals with "insufficiency of the evidence." Or, in other words, the Circuit Court did not grant a new trial based upon passion or prejudice. Its only basis was insufficient evidence.

Mr. Bender asserts that appellate review of a motion for new trial follows a different standard, such that we should give deference to the Circuit Court's own view of the evidence. Bender's Brief, p. 28 (citing several cases). Those earlier cases appear to be in conflict with this Court's more recent holdings, in which we must view the evidence and inferences in favor of the non-moving party (i.e., Sherri).

"While we accord greater deference to a circuit court's decision to grant rather than deny a motion for a new trial, such deference . . . is not without its limits, and a circuit court may only set aside a jury's verdict . . . if the jury's conclusion was unreasonable and a clear illustration of its failure to impartially apply the reasoning faculty on the facts before them. **We grant all inferences in favor of the nonmoving party. If the jury's verdict can be explained with reference to the evidence, it should be affirmed.**" *ISG v. PLE, Inc.*, 2018 S.D. 64, ¶ 24, 917 N.W.2d 23, 31.

Thus, if the Court agrees with Sherri's evidence on the third and fourth elements, the Jury's decision was reasonable, and there are no grounds for granting a new trial. Under Rule 50(c), this Court should order that no trial is needed.

5. Mr. Bender should not continue as Personal Representative

Mr. Bender does not address any of the arguments or facts from Sherri's opening brief on this issue. Instead, he asserts that it is not an abuse of discretion to allow him to remain as Personal Representative. Based on the facts and the law previously cited, and, based upon what Sherri hopes is a restoration of the Verdict, his continued role as Personal Representative would be an abuse of discretion. He is unfit.

6. Mr. Bender is not entitled to his attorney's fees

In support of his claim for fees, Mr. Bender quotes the same statute that Sherri did in her brief (SDCL 29A-3-720), but, he highlights a different part of it. In particular, Mr. Bender wants this Court to focus on the phrase "*whether successful or not.*" Sherri, instead, directs the Court to the earlier part of the statute, which requires that the defense must be "*in good faith.*"

Mr. Bender did not address the substance of Sherri's arguments on the topic of his bad faith.[9] Instead, Mr. Bender anchors his fee award solely to the Circuit Court's granting of his Rule 50(b) motion. In short, Mr. Bender does not dispute that if the Verdict is reinstated, his fees must be disgorged. Sherri asks this Court to disgorge them.

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[9] *See, also,* Sherri's briefing of this argument at R. 1860-1862

7. Mr. Bender cannot pursue a probate of the 2004 Will

Again, Mr. Bender does not address the merits. Instead, he asks for the the issue of the 2004 Will to be remanded. There is not any legal rationale upon which Mr. Bender can pursue probate of the 2004 Will, and he offers none here.

Sherri proposed her relief to the Court in the form of a proposed order that would bypass the 2004 Will. [R. 1754]. The Circuit Court had an opportunity to act upon it. It failed to act. This case should be remanded with instructions that her Order be entered, in the format that she proposed.

Finally, Mr. Bender did not address the merits of Sherri's arguments about the evidence excluded from trial. If the Verdict is upheld, this matter is moot. If this matter is sent back for trial, this Court should rule upon those evidentiary questions in order to provide guidance for such a trial.

CONCLUSION

The Circuit Court concluded the trial transcript by complimenting counsel and remarking that, "*The case was well tried.*" [TT 724].

The Jury's Verdict was sustained by competent, substantial evidence that caused the Court's reasonable mind to differ from the Jury.

The Verdict should be reinstated; Sherri's proposed Order should be entered; Mr. Bender should be removed as Personal Representative; and, he must repay the $214,483.63 in attorney's fees he collected for defending the 2012 Will.

Dated this 4th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,995 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2022, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
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500 East Capitol Avenue
Pierre, South Dakota 57501

and via email attachment to the following address:
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I also hereby certify that on this 4th day of May, 2022, I sent copies of the foregoing to the parties and counsel, by email to the following addresses:

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