IN THE

Supreme Court

of the

State of South Dakota

No. 30482

PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of The Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC, a South Dakota corporation

PLAINTIFFS/APPELLANTS

VS.

KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC.; a South Dakota corporation; and THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust; RAYMOND O'FARRELL, individually; as Trustee; and as Special Administrator of the Estate of Victoria O'Farrell; and VOR, INC (by Raymond O'Farrell).

DEFENDANTS/APPELLEES

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' BRIEF

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Notice of Appeal filed on October 6, 2023

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INTRODUCTION

This civil suit is part of a larger constellation of cases relating to a series of sudden, drastic changes to the estate plan and landholdings of Raymond and Victoria O'Farrell.

Those changes began in May and June of 2022. Those changes were so alarming that Victoria immediately filed suit against her husband and son Kelly to attempt to halt them.[1] Victoria died unexpectedly in July 2022, which led to an acceleration of these drastic changes, and left her lawsuit without a living plaintiff.

By mid-July 2022, the attorneys "helping" Raymond put the brakes on Victoria's lawsuit by securing Raymond's appointment as special administrator for Victoria's Estate.[2] They also attempted to issue a notice of death, so as to initiate the automatic termination of the claims against Raymond.

By mid-August 2022, Raymond had been convinced to sell most of the couple's long-held farm ground. The $3.2 million sale to the Hutterite Colony closed in October 2022, which led to the attempted ejection and

[1] *See,* 25CIV22-38; Appeal #30508

[2] *See,* 25PRO22-11; Appeal # not yet assigned

eviction of Paul O'Farrell from the family farm which he had helped care for and improve for decades.[3]

Paul's attempts to secure a guardianship and conservatorship for him were rejected by the Circuit Court.[4]

Meanwhile, one of Paul's creditors has filed a collection lawsuit related to fertilizer that he used while farming VOR's ground in 2022.[5] (This fertilizer bill is a debt which Paul was unable to pay promptly because of VOR's ongoing attempts to crush his farming operation.) However, within that fertilizer lawsuit, VOR (via Raymond's counsel) is now attempting to file a cross-claim against Paul, seeking to collect $1.2 million dollars of debts VOR claims it now holds against Paul. Paul has resisted VOR's attempt to assert this cross-claim because Paul's defenses to this collection claim would include all of the same issues that Paul attempted to raise in Count 1 of the Complaint in this present lawsuit. The collection case is not yet on appeal,

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[3] *See,* 23CIV23-18; Appeal #30344. As the Judgment in the present lawsuit held, "Paul's claim for rescission practically mirrors the eviction action…." [R.504, ¶ 9].

[4] *See,* 25GDN23-01; Appeal # not yet assigned

[5] *See,* 25CIV23-27 (*CHS Capital, LLC, v. Skyline Cattle Company and Paul O'Farrell, and, VOR, Inc.*)

but if the Circuit Court permits the cross-claim to move forward (and further fragment this litigation), Paul intends to appeal to avoid that fragmentation.[6]

In short, all but one of these cases are now on appeal to this Court. All of these matters are interrelated, and, ultimately we expect all of these appeals and proceedings to be combined.

The Appellants in this present appeal are Paul O'Farrell (Victoria and Raymond's oldest son, individually, and, for the benefit of Victoria's Estate); Skyline Cattle Company (Paul's company which operates the family farm); and VOR, Inc. (Victoria and Raymond's landholding entity company). They are referred to as "Paul," "Skyline," and "VOR."

The Appellees include: the Grand Valley Hutterian Brethren, Inc., ("the Colony"); the O'Farrell Family Trust; Kelly O'Farrell ("Kelly"); and Raymond O'Farrell, individually, and variously as the Special Administrator of the Estate of Victoria O'Farrell, individually, and as a trustee of the Family Trust. In addition, VOR, Inc., is also an Appellee, claiming the right to do so under Raymond's assertions that his 2022 board and management

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[6] A litigant is not permitted to split his causes of action among multiple lawsuits. *See,* Rule 13(a); *Sodak Distrib. Co. v. Wayne,* 93 N.W.2d 791, 793 (S.D. 1958). Raymond has already attempted to initiate counterclaims by VOR against Paul and Skyline within this lawsuit, and, all of Paul's defenses to the collection efforts are embraced by his Count 1 seeking declaratory relief. [R.139; R.20-24].

actions were valid as a matter of corporate governance, and, not a product of undue influence.[7]

The Circuit Court disposed of this matter following a motions hearing on July 11, 2023. That Hearing Transcript is referred to by page number as [HT 123]. A prior hearing in Victoria's lawsuit was held on October 18, 2022, and references to it are listed as: [VHT 123, 10/18/22].

References to the settled record are denoted by [R.123].

JURISDICATIONAL STATEMENT

Appellants appeal the Circuit Court's entry of Judgment by the Hon. Robert Spears on September 7, 2023, [R.502]. Notice of entry was given on September 7, 2023. [R.507]. Appellants filed their notice of appeal on October 6, 2023. [R.541]. This Court has jurisdiction, per SDCL § 15-26A-3(1).

[7] Some of these are new parties affiliated with Raymond were not listed on the original Complaint. However, none of these additional parties filed a motion to intervene under SDCL 15-6-24; they simply appeared and were treated as if they had intervened, including Raymond individually; Raymond as Trustee; Raymond as Special Administrator; and VOR, Inc., by and through Raymond. [R.103; R.123; R.126; R.139; R.140; R.433; R.506]. In a declaratory judgment action, every necessary party should be joined. SDCL 21-24-7.

STATEMENT OF THE CASE

In March of 2023, Paul O'Farrell and Skyline brought this lawsuit to halt and unwind drastic changes Raymond had made to the family's estate plan, including a precipitous sale of their family landholdings. These events are allegedly a result of Raymond's diminished capacity and the undue influence of Kelly O'Farrell.

Paul brought this lawsuit in his individual capacity; and as a beneficiary of the O'Farrell Family Trust; and for the benefit of Victoria's Estate. Paul's Complaint also included VOR, Inc., as a Plaintiff, on the basis that Paul had been improperly removed as President of the Company via a series of void corporate maneuvers foisted upon Raymond, in furtherance of Kelly's scheme.

Paul's attempted relief echoes the claims and remedies that his mother Victoria had initially pursued in her June 2022 lawsuit against Raymond and Kelly, but, also addressing the new problem that Raymond had now sold nearly all of the family's land to the Colony.

Prior to bringing this suit, Paul had attempted to intervene in Victoria's lawsuit after her death. His intervention was refused by the Circuit Court, which at that hearing also told Paul that he could still pursue

his own lawsuit, [VHT 146, 10/18/22], and, that the question of undue influence was "a claim for another day". [VHT 147, 10/18/22].

Following the Circuit Court's advisement, Paul filed this lawsuit. In the Complaint, the Colony's deed was challenged on the basis of undue influence, corporate capacity, and legal capacity. Paul's lawsuit also challenged the attempted non-renewal of the farmland; it sought tort damages; it requested a declaration of rights of Paul O'Farrell and VOR, Inc., as ongoing tenants of the VOR, Inc., farmland; it sought Raymond's replacement as Trustee; and it requested a declaration as to the validity of all of the actions relating to the Trust, VOR, the Estate, and Raymond individually, in light of the concerns about Raymond. [R.7 *et seq*].

The initial Defendants included Kelly O'Farrell, the Colony, and the family's Trust. The Complaint was filed in connection with a guardianship action, with the intent that Raymond's Conservator would be added as a party once appointed. [R.11, Complaint, ¶ 19]

Defendant Kelly O'Farrell filed an Answer and asserted a Counterclaim for barratry. [R.187].

Defendant Grand Valley Hutterian Brethren filed a Rule 12(b) motion to dismiss, for failure to state a claim. [R.200].

And, in a somewhat complicated and confusing pleading, another group of parties aligned with Raymond appeared in this lawsuit, asserting a panoply of claims. [R.126]. The parties to that pleading (as listed in the attorney signature block, [R.140], and as listed in a prior Notice of Appearance [R.103]) included:

- Raymond O'Farrell individually;
- the Raymond and Victoria O'Farrell Living Trust;
- VOR, Inc. (which is also a Plaintiff, but here asserts claims via Raymond); and
- the Estate of Victoria O'Farrell (and, in a separate notice of appearance, Raymond O'Farrell as its Special Administrator [R.123).

These parties did not seek to intervene under Rule 24, but were treated as if they had. The claims made in the pleading asserted by this group of parties included:

- a Counterclaim for barratry on behalf of the Defendant Trust;
- a Counterclaim by VOR, Inc., (which is also a named Plaintiff) against "the Plaintiff" for tortious interference with contractual rights.

- a motion to dismiss VOR, Inc., as a Plaintiff.
- A motion to dismiss the Estate of Victoria O'Farrell as a Plaintiff (even though the Estate itself was not a named Plaintiff);
- three Rule 12(b) motions to dismiss, for failure to state a claim under Counts 1, 2, or 3.
- a motion for attorney's fees pursuant to SDCL 15-17-51.

The Circuit Court held a motions hearing on July 11, 2023. At the hearing, the Circuit Court orally granted the Colony's motion to dismiss. [HT 36; R.417]. The sole reasons given by the Circuit Court were that "there is a failure of the pleadings to specify the state law that applies on the rescission issue, [and] the Complaint doesn't specify exactly what or how the Hutterian Brotherhood knew of any undue influence or anything when they purchased the real estate...." [R.417]. The Colony would later submit 115 paragraphs of findings and conclusions, which went far beyond the Circuit Court's oral ruling. [R.440].

The Circuit Court took the rest of the motions under advisement and issued a Memorandum Decision on August 9, 2023, dismissing the Complaint in its entirety. [R.425].

The Circuit Court entered findings on VOR's and the Estate's motion for attorney's fees, finding that the Complaint "was frivolous" and "so wholly without merit that it is ridiculous." [R.435; R.437, ¶ 5; R.438, ¶ 7]. Several weeks later, the Circuit Court issued a subsequent Memorandum Decision on October 10, 2023, about attorney's fees, describing the Complaint as "rambling, disjointed borderline frivolous claim." [R.640]. On the following page, the Circuit Court ruled that Paul's lawsuit was "brought by a person who either did not have standing to bring certain claims as stated in the complaint at all or should have been brought ...in the Estate/Probate file." [R.641].

The Circuit Court entered judgment accordingly, and certified it as final and appealable pursuant to Rule 54(b). [R.502-06].

No party filed a motion under Rule 12(b)(6) for "failure to join a party". Nor did any party filed a motion under Rule 12(b)(1) for lack of subject matter jurisdiction. The only Rule 12 theory asserted by any party was for "failure to state a claim." [R.200]

From this judgment, Paul, Skyline, and VOR, Inc., assign several errors.

LEGAL ISSUES

1.

A Complaint is a short, plain statement that makes a basic "showing" that the litigant is entitled to relief. A motion to dismiss for failure to state a claim s a harsh remedy available only when the Plaintiff's complaint fails to state a plausible claim for relief, when indulging every inference in favor of relief. **Does the Complaint allege *prima facie* claims for declaratory relief, rescission, and tort damages, including for conversion, breach of fiduciary duty, and tortious interference with contractual relations?**

Yes. However, the Circuit Court erred by dismissing it.

- SDCL 15-6-12(b)(5)
- SDCL 21-24-1
- SDCL 53-11-2(1)
- *Healy v. Osborne*, 2019 S.D. 56,
- *Paul v. Bathurst*, 2023 S.D. 56,
- *Kneip v. Herseth*, 87 S.D. 642, 648, 214 N.W.2d 93 (S.D. 1974)
- *Vanderwerf v. Kirwan,* 1998 S.D. 119

2.

Are there any additional parties to be joined?

The issue is undetermined, because no party filed a motion to dismiss for failure to join necessary parties. And, when such motion is filed, the proper remedy is joinder of the parties, rather than dismissal. The Circuit Court erred by dismissing upon this basis.

- SDCL 15-6-12(b)(6)
- *Titus v. Chapman*, 2004 S.D. 106
- SDCL 21-24-7.

3.

Do the Plaintiffs have standing?

Yes, these Plaintiffs have standing. However, the Circuit Court erred by determining that some of the plaintiffs lacked standing.

- *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59
- *Nooney v. StubHub, Inc.*, 2015 S.D. 102
- *Landstrom v. Shaver*, 1997 S.D. 25
- *Matter of Est. of Calvin*, 2021 S.D. 45

4.

Is Paul's Complaint frivolous, such that attorney's fees were warranted under SDCL 15-17-51?

No, this Complaint is not frivolous. However, the Circuit Court erred by holding that it was, and, by awarding fees.

- SDCL 15-17-51
- *Gronau v. Weubker,* 2003 S.D. 116
- *Ridley v. Lawrence County Comm'n,* 2000 S.D. 143
- *Hampshire v. Powell*, 626 N.W.2d 620 (Neb. 2001)
- *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431 (Del. Ch. 1972)

5.

Did the Presiding Judge err by failing to grant Paul's change of judge request?

Yes, the Presiding Judge erred by misapplying the statute, and ascribing the request to the wrong litigant.

- *State v. Tapio*, 432 N.W.2d 268, 270 (S.D. 1988)
- *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 42
- SDCL 15-12-22.
- SDCL 15-12-21.1
- SDCL 15-12-24

STATEMENT OF THE FACTS

The facts of this case are now familiar to this Court, in light of the eviction appeal already pending and argued to it in November 2023. A few additional facts pertinent to this appeal are added here, while attempting to avoid duplication of the general factual background already established in the related appeal, and not repeating those set forth in the introduction and statement of the case, above.

The Colony's purchase agreement with VOR

On August 12, 2022, purportedly on behalf on VOR, Inc., Raymond O'Farrell signed a Purchase Agreement to sell most of the family's land to the Colony for $3.2 million. [R.326-335].

The Colony's knowledge of Raymond's impairments

The Seller included a covenant that it could provide "good, marketable, and indefeasible" title, the Purchase Agreement, but this was modified by a provision in which the "BUYER HEREBY ACKNOWLEDGES" that Victoria had recently filed a lawsuit against Raymond "in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust" and then listed the civil file number ("25CIV22-000038"). [R.331] (emphasis in original].

As is apparent within the first page of her Complaint, Victoria's lawsuit sought to "unwind a covert, calculated, and unlawful scheme to deprive Victoria…of her residual ownership interest in, and control over 50% of the shares of VOR, Inc. [and that] Raymond…is a vulnerable, elderly person who appears to have no idea what he was doing, no role in conceiving the scheme, and no intention to implement its terms." [R.32].

And that's just what the Colony would find on page one. Victoria's Complaint spans 24 pages and details extensive concerns about Raymond, VOR, and Kelly O'Farrell's undue influence, which she said "reflects Kelly's desire to disrupt the estate plan of his mother and father." [R.35]. If there were any doubt, Victoria's civil file also included her Affidavit, which provided the same details and concerns about the validity of the corporate decisions being made for VOR. [R.76].

Notably, the proposed sale to the Hutterite Colony did not sell *all* of the family's land, just the large portion that Paul O'Farrell was slated to inherit. The purported sale documents also attempted to give the Colony the right of first refusal over all of the remaining family land, as well. [R.102, Purchase Agreement, ¶¶ 10.a].

Picking up where Victoria's lawsuit left off, Paul brought suit against the Colony, the Trust, and Kelly O'Farrell in an attempt to halt and reverse these changes. Paul included Victoria's lawsuit as an Exhibit and incorporated its factual assertions into his pleading. In addition, Paul included affidavits from Victoria and other parties that raised genuine concerns that Raymond was vulnerable, that he was being manipulated by Kelly, and, that Raymond did not understand his actions.

SUMMARY OF ARGUMENT

The *first* section of this brief reviews the *prima facie* claims made in the Complaint, and compares them to the basic requirements that a litigant must meet in order to survive a motion to dismiss under Rule 12(b)(5). In simplest terms, the allegations made in Paul's Complaint do not need to be extensive or exact; they must only make a "showing" that relief is plausible. The Complaint succeeds at this. Paul has alleged facts that present a familiar story of financial exploitation of an elderly, vulnerable father. The law forbids such misconduct, and, it affords several remedies to rectify the products of the abuse: declaratory relief, unwinding real estate transactions, and damages to punish the wrongdoers. This section addresses each of the three Counts, in turn.

In the *second* section of this Brief, Paul discusses what this appeal is *not* about. In particular, none of the Appellees filed a motion under Rule 12(b)(6) for failure to join other parties. Paul's Complaint cannot be dismissed on that basis. He would be happy to add any necessary parties via an amendment; moreover, by statute the Circuit Court is permitted to add such parties in a declaratory judgment action. Dismissal is not an appropriate remedy if the parties can be joined.

Third, Paul addresses the question of standing. At this stage, Paul has identified the basic injuries necessary to bring suit. A further question is that if Paul is not the right litigant under these circumstances, then <u>who else could possibly stop the wrongdoers here?</u>

Fourth, Paul responds to the Circuit Court's holding that his claims were frivolous and warranted fees under SDCL 15-17-51.

And *fifth,* Paul addresses the denial of his attempt for a change of judge in this case.

STANDARD OF REVIEW

The following standards of review apply to the issues in this appeal.

- *De novo* review applies to the construction and application of statutes and rules of procedure, *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 15, as well as to the question of "whether a complaint fails to state a claim upon which relief can be granted [pursuant to] a Rule 12(b)(5) motion to dismiss." *Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.,* 2022 S.D. 64, ¶¶ 13-14.
- At the motion-to-dismiss stage, the question of whether a complaint is "frivolous" under SDCL 15-17-51 appears to be legal question that is reviewed *de novo*,[8] although, the Circuit Court's decision to award attorney's fees is reviewed under an abuse of discretion standard, once there is an objective finding of frivolousness. *Johnson v. Miller*, 2012 S.D. 61, ¶ 19, 818 N.W.2d 804, 810.

[8] *C.f., In re Est. of Pringle*, 2008 S.D. 38, ¶ 18 ("We review any documentary or deposition evidence under a de novo standard of review.")

ARGUMENT

1. Paul's Complaint states sufficient facts for a *prima facie* case of elder abuse, and, a path forward to fix it

Paul's Complaint offers more than enough factual support to demonstrate that he and his family are entitled to relief to correct the problems created by the exertion of undue influence over Raymond in his various corporate and fiduciary capacities.

The test under Rule 12(b)(5) is not whether Paul has made an artful or perfect claim. The test is whether he has made a basic "showing" that the lawsuit should move forward.

"Our rules of civil procedure are modeled after the Federal Rules of Civil Procedure which, for the most part, eliminated the cumbersome requirement that a claimant set out in detail the facts upon which he bases his claim." *Healy v. Osborne*, 2019 S.D. 56, ¶ 32 (quoting *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007)). Under *Sisney v. Best, Inc.*, 2008 S.D. 70 (which adopted the *Bell Atlantic* test), all that a complaint must do is provide a "*showing*" rather than a "blanket entitlement" to relief *Id.* (interpreting Rule 12(b) alongside Rule 8(a)(1)) (emphasis added)

The factual threshold is not onerous: a litigant has pleaded sufficiently when he offers "a short plain statement" which moves beyond "labels and conclusion and a formulaic recitation of the elements," and, instead, offers "a statement of circumstances, occurrences, and events in support of the claim presented." *Paul v. Bathurst*, 2023 S.D. 56, ¶ 19 (quoting *Nooney v. StubHub*, 2015 S.D. 102, ¶ 9 (quoting *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 408–09).

Because a Rule 12(b)(5) motion "tests the legal sufficiency of the pleading, not the facts which support it…the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Paul v. Bathurst*, 2023 S.D. 56, ¶ 11 (quoting, *inter alia, N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 S.D. 45, ¶ 6). *Accord, Healy,* ¶ 34 ("construe [the material allegations] in a light most favorable to the pleader")

Paul's Complaint survives this test. Over the course of 23 pages (plus another 56 pages of fact-intensive exhibits), the Complaint explains in extensive detail that his vulnerable, elderly father was coerced into making massive, drastic financial decisions to the detriment of Raymond's family, his Trust, his Company, his Wife, and then his wife's Estate.

Paul's Complaint then outlines three categories of remedies he believes will halt and unwind these decisions: declaratory relief to nullify the improper legal actions (both known and unknown) and removal of Raymond as Trustee; rescission and other equitable relief to unwind the real estate transaction; and various tort damages to rectify the harms and losses (including conversion, breach of fiduciary duty, and tortious interference).

These are not novel legal theories that Paul is advancing. Each of them is found extensively in this Court's prior case law. Paul's Complaint rises far above a formulaic recitation, and, offers substantial proof that several kinds of relief is warranted.

(a) Count 1 of Paul's Complaint pleads a *prima facie* case for declaratory relief

South Dakota's Declaratory Judgment Act, is to be liberally construed and administered. *N. Star Mut. Ins. Co. v. Kneen*, 484 N.W.2d 908, 911 (S.D. 1992). "The liberality to be afforded the construction of the Declaratory Judgment Act, because of its remedial goals, should allow...the decision of present rights or status which are based upon future events when a good-faith controversy is brought before the courts." *Kneip v. Herseth*, 87 S.D. 642, 648, 214 N.W.2d 93, 96-97 (1974). The Act states that its purpose is to "declare rights, status, and other legal relations." SDCL 21-24-1.

This purpose may be accomplished by securing a declaration of the 'construction or validity' of any instrument, statute, contract, or ordinance if these affect the person seeking the declaration. SDCL 21-24-3. Such relief is available to heirs, devisees, next of kin, or cestui que trust in the administration of a trust, and can be used to direct trustees and executors to do or abstain from particular acts. SDCL 21-24-5. The enumeration of the Act's scope in these statutes "does not limit or restrict the exercise of the general powers conferred in SDCL 21-24-1." SDCL 21-24-6.

In addition, once the relief is "declared," the Circuit Court is given the authority to grant "[f]urther relief based on a declaratory judgment... whenever necessary or proper." SDCL 21-24-12. And, if other parties are necessary for complete relief, they "shall be made parties." SDCL 21-24-7.

In short, a declaratory judgment action embraces every claim that Paul's Complaint may attempt to make; it affords remedies at the conclusion of the declaration phase; and, it invites any necessary parties to be joined by the Court.

Paul's Complaint identifies several specific actions which are void or voidable under the circumstances, including those taken by Raymond under his various veils of authority: corporate, trust, probate, and individually.

[R.20, ¶ 70]. "Some of these maneuvers are known to the Plaintiffs; many are still unknown." [R.20, ¶ 69]. A Plaintiff is not required to plead with perfect foresight. "Undue influence is not usually exercised in the open." *Matter of Est. of Tank*, 2020 S.D. 2, ¶ 39.[9]

Paul's Complaint also seeks a declaration that Raymond is "unable" to serve as Trustee of the Family Trust. [R.11]. "Paul is named as a Successor Co-Trustee under §3.03 of the Family Trust." [R.11, ¶ 20].

Paul's Complaint also seeks a declaration that actions by Victoria's Estate were void, including for lack of notice, and, for failure of actual consent by Raymond. [R.22, ¶ 82].

Paul's Complaint seeks a declaration that actions taken via power of attorney over Raymond were void. [R.24, ¶90].

Paul's Complaint also seeks a declaration as to his rights and Skyline Cattle's rights, in relation to VOR, Inc., and the Colony. In particular, Paul alleged that "there was a long-standing arrangement by which Skyline's operating loans were secured by land owned by the Trust Corporation."

[9] The Complaint avers undue influence, generally, but also provides ample evidence on the four elements of undue influence. Thus far, neither the Circuit Court nor the Appellees have specifically challenged the Complaint for failing to identify sufficient facts in support of the claim of undue influence.

[R.16, n.1]. In a parallel proceeding, Paul explained that his and Skyline's relationship with VOR, Inc., was like a partnership. [HT, 10/18/22, 57:6-7] (they were operating like "partners with cattle and buildings and equipment"). And, the status of Paul and Skyline were also akin to a long-term tenant. In any event, he sought a declaration of their occupancy rights, which would necessarily include an evaluation of the validity of termination notices, notices to quit and vacate, and, the legal ability of the Colony to assert such rights if its deed were deemed invalid. [R.22-24 ¶¶ 83-89].

Paul's Complaint seeks broad declaratory relief, and, this action is an appropriate forum in which to collect diverse, individual claims (such as those related to the Trust; those related to Victoria's Estate; the validity of the Colony's deed; Paul and Skyline's occupancy rights; the nature of the partnership between Paul, Skyline, and VOR; and more). It would be cumbersome and chaotic for all of these claims to be fragmented into individual proceedings.

The Circuit Court ruled, in part, that Paul was not permitted to seek some of this relief via declaratory relief in this action, and, instead, would need to seek the relief via a separate Probate action or Trust action. [R.429]. This is contrary to the declaratory judgment statutes. It is contrary to the

concepts behind Rule 13(a) to avoid a multiplicity of actions. And it is contrary to this Court's prior case law. "The rule in this state does not permit a single cause of action to be split or divided among several suits." *Sodak Distrib. Co. v. Wayne,* 93 N.W.2d 791, 793 (S.D. 1958).

The Declaratory Judgment Act is to be construed liberally. Trust and Estate questions are expressly permitted to be resolved in a declaratory judgment forum. SDCL 21-24-5. Nor is it grounds for dismissal if certain parties were not yet joined: the Circuit Court "shall" make them parties. SDCL 21-24-7.

Their claims under Count 1 are permitted, and they should not have been dismissed. And if Paul is not the proper party to assert claims on behalf of Victoria's Estate, a suitable executor can be substituted for him once he or she is appointed.

(b) Count 2 of Paul's Complaint pleads a *prima facie* case to unwind the land transaction (and, in the alternative, so does Count 1)

Paul's rescission claim is similarly not a novel theory: when someone's legal decisions are the product of undue influence or diminished capacity, the law provides a remedy, including our statutes and common law. *E.g.,* SDCL 53-4-1 ("apparent consent is not free or real and is voidable

when obtained through...undue influence"); SDCL 53-4-7 ("Undue influence consists...[i]n taking an unfair advantage of another's weakness of mind"); *Davies v. Toms*, 75 S.D. 273, 275, 63 N.W.2d 406, 407 (1954) (affirming judgment in favor of family members who "brought the action to have the deed set aside" as a product of undue influence); SDCL 23-12-1(1) ("The rescission of a written contract may be adjudged on the application of a party aggrieved...in any of the cases mentioned in § 53-11-2"); SDCL 53-11-2(1) (a party to a contract may rescind when "consent of the rescinding party ... was ... obtained through ...undue influence exercised by or with the connivance of the party as to whom he rescinds") (emphasis added).

A successful rescission claim does not require proof that the Colony exerted undue influence upon Raymond. Instead, it is sufficient if the undue influence happened with the Colony's "connivance." SDCL 53-11-2(1). *Connivance* is defined as "knowledge of and active or passive consent to wrongdoing." *See,* Merriam-Webster.com (also listing "*complicit*" as a synonym) (emphasis added).

The Colony's complicity is demonstrated most simply by the land sale contract. Within the Purchase Agreement that led to the deed Paul seeks to unwind, the Colony agreed that it, as the "BUYER HEREBY

ACKNOWLEDGES" that Victoria had recently filed a lawsuit against Raymond in which Victoria sounded the alarm about Raymond's extreme vulnerability, which resulted in him being unduly influenced into executing documents he did not understand. [R.331] (emphasis in original].

The Circuit Court's oral ruling to dismiss the Colony was very narrow, holding only that "there is a failure of the pleadings to specify the state law that applies on the rescission issue," and, that the Complaint "doesn't specify exactly what or how the Hutterian Brethren knew of any influence or anything amiss when they purchased the real estate." [HT 36:23-37:2].

The first concern is not valid. Paul's complaint "specified" the legal theory at issue, i.e., a judicial rescission. [R.27; ¶ 106]. *See, also,* [R.26, ¶ 102 ("Raymond's consent for the transaction was procured via undue influence, or, without his full understanding, and, without following necessary corporate formalities.") A complaint does not need to be any more specific than that. *See,* Rule 8(a) ("short and plain statement"). In addition, it has always been the rule that pleadings are to be liberally construed. *See,* Rule 8(f)("All pleadings shall be so construed as to do substantial justice."); *Stutsman Cnty. v. Mansfield*, 5 Dakota 78, 37 N.W. 304, 305 (1888) ("In the

construction of a pleading, for the purpose of determining its effect, its allegations should be liberally construed with a view of substantial justice between the parties.") (quoting Code Civil Proc., Section 128).[10]

A generation ago, Justice Henderson chronicled the law's evolution from writ-pleading to notice pleading. "Technical writs were the 'open sesame' to justice under the common law. A pleader who failed to allege the facts to fit within a writ was immediately bounced out of court. This precipitated a great deal of injustice, spawning the chancery courts and ultimately a new system of pleading. In 1966, this Court reaffirmed its historic stance on construction of pleadings in *Burmeister v. Youngstrom*, 81 S.D. 578, 585, 139 N.W.2d 226, 228 (1966) by expressing:

> By statutory mandate, SDC 1960 Supp. 33.0915, [now, SDCL 15-6-8(f)] we are required to construe a pleading liberally for the purpose of determining its effect with a view of doing substantial justice between the parties. *See Baker v. Jewell*, 77 S.D. 573, 96 N.W.2d 299 [1959]. Courts do not favor objection to pleadings in the manner attempted in this case and to justify the objection interposed, it must appear that the defect relied upon is such that it could not be cured by an amendment to conform to the proof. *Knapp v. Brett*, 54 S.D. 1, 222 N.W. 297 [1929]. (note added)....

[10] "The original source of SDCL 15-6-8(f) in South Dakota is CCivP 1887, § 128." *S.W. Croes Fam. Tr. v. Small Bus. Admin.*, 446 N.W.2d 55, 59 (S.D. 1989) (Henderson, J., dissenting)

[T]he general principle [is] that pleadings must, of necessity, be construed in a light most favorable to the pleader and non-moving party or we shall step backward into common law, technical writ pleading." *S.W. Croes Fam. Tr. v. Small Bus. Admin.,* 446 N.W.2d 55, 59-60 (S.D. 1989) (Henderson, J., dissenting). Justice Henderson dissented in that case, but, the majority affirmed the dismissal of that case on other grounds, namely, that even after several prior amendments to the pleadings, "[n]othing in the record indicates that appellants could [prevail]" with further amendment. *S.W. Croes Fam. Tr. v. Small Bus. Admin.*, 446 N.W.2d 55, 58 (S.D. 1989).

Further, at the time the Complaint was drafted, it was not yet clear whether the Colony would accept the rescission. If they had, then a legal enforcement of the accepted rescission would be permitted. If they refused, then an equitable rescission would be permitted.

Much ado was made at the Circuit Court level about the alleged "innocence" of the Colony. This stems, in part, from the wording of paragraph 114 of the Complaint.[11] At least for now, Paul is not pursuing tort

[11] Paragraph 114 states that this Complaint does not seek tort damages from the Colony "and sincerely apologizes that they must be made a part of this ordeal." [R.28].

damages against the Colony, and, he has offered the Colony a simple exit ramp from this mess, *i.e.,* unwinding the transaction and walking away.

The Colony, however, trumpets Paragraph 114 as proof of its innocence, and, therefore immunity of its deed. At this stage, however, the Complaint cannot be construed in a manner less favorable than the undisputed facts. The Colony was told *at the time of its purchase agreement* that VOR's ability to give clear title was conditioned upon resolving the problem that Raymond was allegedly not making his own decisions. The Colony moved ahead anyway. The Colony was complicit. *See, also, Vanderwerf v. Kirwan,* 1998 S.D. 119, ¶ 19 (quoting *Whitford v. Dodson,* 181 N.W. 962, 964 (S.D. 1921) (deed can be set aside when buyer either has "knowledge" of the defect, or "knowledge of facts or circumstances sufficient to put an ordinarily prudent [person] upon inquiry").

Although the Complaint did not expressly discuss the Colony's knowledge, this was soon remedied by Raymond's decision to add the Purchase Agreement into the Record. Paul's counsel also pointed this out to the Circuit Court at the hearing. [R.412; HT 31:9-25].

Further, it is not clear that the Colony's knowledge would need to be specifically stated in this Complaint. Instead, the Colony's arguments about

its knowledge (or lack thereof) appears to be an affirmative defense that it would need to assert in its Answer. Whichever is the correct way to look at it, Paul's Complaint should not be dismissed based upon a hypertechnical reading of the Rules or the law of rescission.

Finally, the Colony has objected to the form and effect of the 'notice of rescission' which Paul issued to the Colony in his asserted role as still-President of VOR. None of the Appellees (nor the Circuit Court) cite authority regarding any of their various alleged defects in the notice. In fact, there is South Dakota authority to the contrary. *Larson v. Thomas*, 51 S.D. 564, 215 N.W. 927, 930 (1927) ("If the rescission was incomplete when notice was given, this action is for rescission, and the court may allow it.")

And, if for some reason the rescission-at-law remedy is not available under Chapter 53-11, the Circuit Court would still be able to grant an equitable rescission. *N.W. Realty Co. v. Carter*, 338 N.W.2d 669, 672 (S.D. 1983) ("[r]escission is *equitable* if the complaint asks the court to order rescission of a contract. It is *legal*, if the court is asked to enforce a completed rescission...," and, "trial court was correct in granting [equitable]

rescission" when litigants "do not have an adequate remedy at law.") (emphasis added).[12]

Further, it is not even a legal requirement that a party issue a notice of rescission in order to pursue it in litigation: it is sufficient to give notice of the rescission within the Complaint.

In summary, Count 2 states a valid claim to set aside the deed that VOR issued to the Colony. Such a claim does not require the Colony itself to have procured the deed via undue influence.

In the alternative, even if Count 2 were excluded from the Complaint altogether, Count 1 can be fairly read at this stage to similarly embrace the same relief: a declaration of the invalidity of the land transaction as one of the many corporate actions taken by Raymond. *See,* [R.21] (Complaint, ¶ 74: "[V]arious corporate actions [of VOR] were taken in the name of Raymond O'Farrell [and] were accomplished [*inter alia*] as a result of undue influence and manipulation;" and ¶ 70: "Plaintiffs seek a declaration that would avoid all of these improper corporate…actions.")

[12] In Paul's Complaint, the Prayer for Relief seeks "a judgment…for a rescission of the real estate transaction"). [R.29]

(c) Count 3 states a *prima facie* claim to recover damages for the harms caused by these improper actions

The Complaint concludes by identifying a series of tort claims that fit the facts of these facts. Those include tort claims for which Kelly O'Farrell faces liability, including the torts of "conversion," "breach of fiduciary duty," and "tortious interference with expected and established relationships." [R.28; Complaint, ¶¶ 111, 112]. The elements of these torts are not listed, but, the Complaint contains sufficient allegations that can be used to justify each of them. The Complaint also expressly advises that further "[d]iscovery will determine the extent and nature of the tort claims." *Id.* Further, to effectuate the pursuit of such damages, Count 3 also alleges that the Plaintiffs are "entitled to an accounting of all funds and property of the Family Trust, the Trust Corporation, and the Estate...." [*Id,* ¶ 113].

Paul's Complaint must also be construed in light of the contents of Victoria's Complaint, which was attached to it as an exhibit. Victoria's Complaint matched the facts of the case (as they existed in 2022) to the elements of conversion [R.51, ¶ 112-118]; tortious interference [R.53, ¶¶ 126-134], both of which she asserted against Kelly.

Each of these three broad categories of remedies have been prescribed by legislative enactment. There is no meaningful dispute that they are not

viable theories of relief. The objections to Paul's Complaint are, instead, procedural and non-fatal.

2. This appeal is not about who 'could' have been or 'should' have been joined as a party

Rule 12(b)(6) provides a remedy for dismissing a complaint for failure to join a necessary party. However, none of the Appellees filed a motion under Rule 12(b)(6). The Circuit Court's opinion, therefore, cannot grant relief upon that theory. *See,* SDCL 15-5-7(b)(1) (motion "shall set forth with particularity the grounds therefor, and shall set forth the relief or order sought").

Even though no party filed a Rule 12(b)(6) motion, parts of the Circuit Court's written opinion veer into impermissible territory, beyond the scope of the actual motions in front of it. This includes paragraphs 37 and 82 of its written opinion about the Colony, which contains a conclusory holding that "there are several indispensable parties that are not included in this action whose interests would be affected if this Court grants rescission of the entire transaction, including First International Bank and Paul's siblings." [R.444, R.451, ¶¶ 37, 82].

The Circuit Court's opinion does not explain who "First International Bank" is, nor their connection to this lawsuit. Nor does the Circuit Court list "Paul's siblings" by name. And the opinion does not provide any basis by which to evaluate its conclusory holding that any of these parties are "indispensable."

A Circuit Court's ruling cannot be evaluated on appeal when it does not apply the correct legal standard or offer facts that a reviewing court can use to assess the ruling. *C.f., Duffy v. Cir. Ct., Seventh Jud. Cir.*, 2004 S.D. 19, ¶ 33 ("by not applying the correct legal standard, the lower court has failed to 'regularly pursue its authority').

"Persons who might conceivably have an interest in the outcome of litigation are not to be considered indispensable parties." *Titus v. Chapman*, 2004 S.D. 106, ¶ 36. Instead, "[i]ndispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Kapp v. Hansen*, 79 S.D. 279, 286, 111 N.W.2d 333,

337 (1961). The Circuit Court gives no indication as to how these parties meet this standard.

Moreover, "[t]he proper remedy for failure to join parties is the joinder of the parties, and not dismissal of the lawsuit, so long as it is possible to join the parties." *Id.,* (citing *Agar School District No. 58-1 Bd. of Educ., Agar, S.D. v. McGee,* 527 N.W.2d 282, 287 (S.D.1995) (quoting *Johnson v. Adamski,* 274 N.W.2d 267, 268 (S.D.1979) (citing SDCL 15-6-19(b)))). When a party fails to pursue a Rule 12(b)(6) motion, it short-circuits the process by which the Plaintiff can be on notice of the need to join parties.

In sum, the Circuit Court erred by: attempting to make a ruling on indispensable parties when no party had made such a motion; by failing to make findings identifying the actual parties or explaining their indispensability; and, by effectuating a dismissal rather than an opportunity to join those parties.

The Appellees may offer speculation as to who else should be added to this lawsuit upon remand, but, the absence of those parties in the litigation thus far is not grounds for dismissal. And, under the Declaratory Judgment Act, the power to join necessary parties was in the hands of the Circuit Court. SDCL 21-24-7.

3. Paul and the other Plaintiffs have standing

The rules for establishing standing are different at the initial pleading stage than they are for the evidentiary phase, including summary judgment.

> At the initial stages of litigation, it is enough for the plaintiff to allege an injury. However, the plaintiff bears the burden of proving standing in successive stages of the litigation with the manner and degree of evidence required at those later stages.
>
> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim

Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 2009 S.D. 59, ¶¶ 22-23 (internal citations and quotations omitted).

Paul, Skyline, and VOR, Inc. each had standing to bring a declaratory action as set forth in Count 1, for themselves, and for the benefit of other interested parties. Each of these litigants identified a rational connection to (and a financial stake in) the validity or invalidity of instruments and legal actions by the Trust, the Estate, the Trust Corporation, or Raymond individually. *See,* SDCL 21-24-3; SDCL 21-24-5; and, *e.g.* [R.27 ¶ 108 ("the value of capital improvements Paul has made to the Family Land at his expense, without compensation, including his residence and his shop…have an estimated value substantially in excess of one million dollars").

Likewise, the validity of the Colony's deed (addressed in Count 2) has drastic implications for the ongoing relationship between Paul, Skyline, and VOR, Inc., including not just their occupancy rights, but the trajectory of their twenty-year farming partnership.

And, any damages suffered by Paul would trigger standing for his tort claims in Count 3.

Paul's ability to bring claims on behalf of VOR has both a legal and an equitable basis. Legally, Paul is asserting that he is the most recent validly elected President. Under the corporations act, he has the right to pursue claims to evaluate that contention. SDCL 47-1A-841; 47-1A-842(3).[13]

Or, as a matter of equity, this Court has found limited exceptions to allow parties related to a corporation to bring suit "if a corporation refuses to prosecute an action in its favor...." *Landstrom v. Shaver*, 1997 S.D. 25, ¶¶

[13] The Circuit Court erred by holding that Paul did not have the ability to pursue claims on behalf of the corporation because of who the Secretary of State filings indicate as President. "A court may not consider documents 'outside' the pleadings when ruling on a motion to dismiss for failure to state a claim." *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 7, 873 N.W.2d 497, 499 (citing SDCL 15-6-12(b)(5)). Nor can the Circuit Court "weigh" the evidence it finds this way. Considering matters outside the pleadings normally requires converting the matter to a motion for summary judgment. SDCL 15-6-12(c). "Failing to convert a motion to dismiss to a summary judgment motion despite a court's consideration of matters beyond the pleadings 'can constitute reversible error. *Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 36 (citations and quotations omitted).

56-57. In such cases, other parties with beneficial rights can bring suit, because "equity, to prevent a failure of justice, disregards the corporate entity and permits suit to be brought and maintained by [those others] to protect rights beneficially belonging to him. The right exists because of special injury to him." *Landstrom v. Shaver*, 1997 S.D. 25, ¶¶ 56-57 (quotation omitted) (addressing the analogous situation of minority shareholder interests).

Paul has standing as a beneficiary of the trust, including under the Declaratory Judgment Act, as well as this Court's prior case law allowing beneficiaries to bring suit when the trustee fails to do so.

> A beneficiary may maintain a proceeding related to the trust or its property against a third party only if ... the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest. RESTATEMENT (THIRD) OF TRUSTS § 107 (2012). The beneficiary has the burden to show that the trustee is improperly refusing or neglecting to bring an action, or if the trustee is unavailable or unable to act, the protection of the trust estate may depend on the initiative of a beneficiary to act...." RESTATEMENT (THIRD) OF TRUSTS § 107 cmt. c(2) (2012). *See also Browning v. Brunt*, 330 Conn. 447, 195 A.3d 1123, 1130 (2018) (citing RESTATEMENT (THIRD) OF TRUSTS § 107 cmt. c(2)) ("[I]n order to demonstrate that they fall under this exception, beneficiaries must demonstrate that the trustee either is improperly refusing or improperly neglecting to bring an action on behalf of the trust.").

Matter of Est. of Calvin, 2021 S.D. 45, ¶¶ 17-18, 963 N.W.2d 319, 324–25.

And, Paul and Skyline are unique in this action: unlike his other siblings who are also trust beneficiaries, Paul and Skyline are able "to plead a unique and personal injury" based upon the specific and general facts in the Complaint, related to the issue of occupancy and the twenty-year farming partnership. *Cable v. Union Cnty. Bd. of Cnty. Comm'rs*, 2009 S.D. 59, ¶ 28.

4. Paul's Complaint is not "frivolous" or "malicious," and does not warrant an award of attorney's fees.

The Circuit Court awarded attorney's fees, finding fault in the claims brought by Paul. [R.425-432] (describing Paul's Complaint as "problematic;" "confusing;" "troubling;" "an untenable legal position;" "defies logic;" "disingenuous;" "not plausible on its face;" "devoid of specific facts;" and "frivolous"). *See, also,* [R.639-642] (further characterizing the Complaint as "rambling;" "disjointed;" "borderline frivolous;" and "questionable").

The Circuit Court did not recite or apply the correct and complete law in reaching this decision. *See,* [R.431; "Memorandum Decision," citing no statute or case law whatsoever]; [R.435-439; "Finding/Conclusions," citing the statute, ¶ 3, and reciting only part of this Court's test, ¶ 7][14].

[14] The Circuit Court's Conclusion of Law #4 states, incorrectly and without authority, that "frivolous or malicious are terms used in the alternative." [R.437].

Paul asks for the award of fees to be vacated, on either of two alternative grounds.

First, if this Court agrees that the Circuit Court's dismissal was in error, the statutory award of attorney's fees is *per se* erroneous. *See,* SDCL 15-17-51 ("dismissal" as a necessary element for recovery of fees); *Gronau v. Weubker,* 2003 S.D. 116, ¶ 6 (necessary element is that "the civil action is dismissed"). Paul asks for a full reversal of the Circuit Court's dismissal because he believes he has stated valid claims.

Or second, in the event this Court holds that some or all of Paul's asserted claims should be dismissed, then, Paul asks this Court to apply the "prior caselaw in which [SDCL 15-17-51] has been interpreted." *Gronau v. Weubker,* 2003 S.D. 116, ¶ 10.

"Simply because a claim or defense is adjudged to be without merit does not mean that it is frivolous....Any doubt about whether or not a legal position is frivolous or taken in bad faith must be resolved in favor of the party whose legal position is in question." *Gronau v. Weubker,* 2003 S.D. 116, ¶ 10 (quoting *Ridley v. Lawrence County Comm'n,* 2000 S.D. 143, ¶ 14). To paraphrase the analysis of *Gronau,* Paul's effort to pursue claims that would rectify substantial allegations of undue influence "cannot be

characterized as a legal position so wholly without merit as to be ridiculous." *Id.* (quoting and citing *Behrens v. American Stores Packing Co.,* 236 Neb. 279, 460 N.W.2d 671, 677 (1990). *Ridley,* 2000 SD 143, ¶ 14).

It was a reasonable legal position for the ousted CEO of the Family Trust Corporation to seek to rectify the challenged corporate acts. Taking Paul's Complaint to be true, Paul is still the bona fide president of VOR, Inc., and, as an officer he has the legal ability to pursue claims on behalf of the corporation. *See, Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 435 (Del. Ch. 1972) (when corporate meetings are not lawfully convened, the previous directors and officers continue to hold office). In a light most favorable to the Complaint's assertions, Paul is an officer, and there is a dispute about who has authority to make decisions for VOR.

It was a reasonable legal position for Victoria's son to attempt to assert claims "for the benefit of" her Estate when Raymond, as fiduciary, was unable or refused to do so. Paul does not claim to be the Special Administrator. Instead, Paul asserts that the Special Administrator (ostensibly Raymond) is incapable or has refused to pursue relief on behalf of the Estate.

There is substantial authority permitting interested parties like Paul to assert claims on behalf of an Estate like Victoria's. *See, Beachy v. Becerra*, 609

N.W.2d 648, 651-51 (Neb. 2000) (citing 31 Am.Jur.2d *Executors and Administrators,* § 1285 (1989)) (interested party to an Estate is permitted to bring or enforce claims for the benefit of the Estate when the Personal Representative has failed to act, or when his interests are antagonistic to the Estate, or are otherwise collusive).

Here, Raymond is attempting to serve on both sides of a lawsuit, which makes his interests "antagonistic to the Estate or otherwise collusive." *See, Hampshire v. Powell*, 10 Neb. App. 148, 155, 626 N.W.2d 620, 626 (2001) ("executor is not 'legally competent' to act in that capacity, where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual.") (citations omitted). *See, also,* SDCL 15-6-17(a) (real party in interest rule, which requires cognizable parties on both sides of a suit). Paul's claims are brought for the benefit of the Estate, and constitute a permissible theory under persuasive authority. (And, at the very least, Paul's efforts furthered the Estate's interests and will allow a proper executor to be substituted in his place.)

And, it was a reasonable legal position for Paul and Skyline to assert unjust enrichment claims in the alternative. SDCL 15-6-8(a) ("Relief in the alternative...may be demanded.")

Nor is it frivolous for Paul to seek to include parties who the Court later deems to be incorrect parties. "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion...on terms that are just." SDCL 15-6-21.

"A frivolous action exists when the proponent can present no rational argument based on the evidence or law in support of the claim." *Healy v. Osborne*, 2019 S.D. 56, ¶ 34. Paul has identified numerous rational arguments in support of his legal position, based on both law and fact. His claims are not frivolous.

5. The Presiding Judge erroneously refused Skyline's attempt to change judges

Less than three weeks after filing the Complaint in this action, Skyline Cattle Company issued an informal request for Judge Spears' recusal, and, then filed an affidavit seeking his recusal. [R.97; R.118]. As Skyline's initial, informal request states, this was "based upon the connection of your campaign treasurer to parties or witnesses involved in these matters." [R.97]. In particular, Judge Spears' campaign treasurer in 2022 (who was also his former employee for 12 years) now works as a paralegal for Raymond's law firm, Schoenbeck & Erickson.

By statute, "opposing litigants... cannot contest the request" for informal recusal. *State v. Tapio*, 432 N.W.2d 268, 270 (S.D. 1988) (quoting SDCL 15-12-21.1). Nonetheless, in violation of that statute, Raymond's counsel filed a multiple-page written objection to the informal request. [R.106-108, "Objection to...Informal Requests Under SDCL 15-12-21.1"].

Following Judge Spears' refusal to informally recuse himself, Skyline Cattle Company filed the affidavit permitted by SDCL 15-12-22.

Skyline had not been a party to any prior proceeding involving Raymond or Victoria. Instead, only Paul had appeared previously, not Skyline. Nonetheless, the Presiding Judge denied the change of judge request, and, erroneously stated that "the request for change of judge has been made by Petitioner-Plaintiff Paul O'Farrell." [R.121] (emphasis added).

The Presiding Judge also held that Paul "has previously submitted motions, argument, and testimony to the assigned Judge on substantive issues and has waived his right to file an affidavit for change of judge pursuant to SDCL 15-12-24." [R.121].

That statute, however, states that the waiver applies "to any party or his counsel who submitted [argument or proof in support of a motion or

application]." SDCL 15-12-24. Neither Skyline Cattle Company nor its counsel had ever previously submitted any argument or proof in support of a motion. The waiver described in that statute did not apply to Skyline or its counsel.

Further, the only active case at that time (March of 2023) was Victoria's probate, and, no hearing had yet taken place in the probate file. (The Circuit Court ran out of time to address any probate questions at the October 18, 2022, hearing.) [VHT 149 ("I denied the motion to intervene. That's what was in front of me.") Accordingly, the only still-active case in March 2023 was a probate file to which SDCL 15-12-24 did not apply, because no arguments had been heard and decided by the Judge.

In light of all of this, the denial of the change of judge appears to be in error.

Paul acknowledges that SDCL 15-12-23 provides that "the filing of such affidavit by one party is deemed to be filed by all of such parties [united in interest]." However, that statute appears to be *prospective* in application, foreclosing future affidavits. It does *not* say that a party's prior submission of argument in a separate matter is thereby imputed to all parties united in interest in later matters for purposes of waiver under SDCL 15-12-24. A

blanket waiver rule like that could be problematic, binding future litigants in future matters simply because they later become united in interest with a party who is precluded from seeking recusal. Skyline asks this Court to apply the affidavit recusal statutes and order the Circuit Judge be replaced.

Or, in the alternative, the recusal should be ordered as a sanction for Raymond's counsel's violation of SDCL 15-12-21.1 (by filing an objection to the informal request, and thereby interfering with the Circuit Court's deliberation process).

Or, in the alternative to the affidavit process, "[a] separate avenue for disqualification is found in our Code of Judicial Conduct," namely, that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned [.]" *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 42, 876 N.W.2d 486, 502 (quoting SDCL ch. 16-2 app. Canon 3 E(1)). "The standard is an objective one, requiring disqualification where there is 'an appearance of partiality even though no actual partiality exists.'" *Marko v. Marko,* 2012 S.D. 54, ¶ 20, 816 N.W.2d 820, 826 (quoting *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 860, 108 S.Ct. 2194, 2202-03, 100 L.Ed.2d 855 (1988)). Although a judge has discretion in determining whether the facts of a particular case meet the disqualifying criteria, a judge

is required to disqualify herself if she determines such criteria have been met. *Id.* ¶ 18, 816 N.W.2d at 826. However, "a judge also has an 'equally strong duty not to [disqualify herself] when the circumstances do not require [disqualification].' " *Marko*, ¶ 21, 816 N.W.2d at 826 (quoting MODEL CODE OF JUDICIAL CONDUCT 187 (Am. Bar Ass'n 2004)).

Here, the objective circumstances rise at least to the level of an appearance of impropriety. Judge Spears is sitting on a case where one of the primary law firms employes his judicial campaign treasurer, who is also one of his long-term former employees. Accordingly, Judge Spears should have recused himself, whether or not the affidavit process was available, and, Paul asks this Court to effectuate that recusal.

CONCLUSION

We offer two points in conclusion.

First, from the Eviction Appeal, this Court is familiar with Paul's arguments about Rule 13(a), regarding compulsory counterclaims. The basic principles underling that Rule also apply here. Namely, Rule 13(a) "was designed to prevent a multiplicity of actions and a duplication of judicial efforts." *Peterson v. United Accts., Inc.,* 638 F.2d 1134, 1137 (8th Cir. 1981). The Rules, more generally, allows litigants to achieve resolution of all disputes

arising out of common matters, within a single lawsuit. *Id.* Paul asks that this case be sent back so that all of the various questions can be resolved within a single proceeding, which was his intent from the outset.

Second, counsel argued at the motion to dismiss hearing that, "[t]he fascinating thing about this [land] transaction, [and] in all of this dating back to Victoria in June of 2022, is virtually none of the proceedings thus far have involved anything related to the facts. It's procedure....[P]rocedural barriers are being put out to keep the facts from being heard. That's a red flag for me, because if there's nothing wrong with this transaction, if it's all fair and above-board, let's hear the facts, and, let's someone hear the facts and have them decide upon the facts, rather than this procedural run-around that is occurring in Paul's attempt to have his case heard." [R.415, HT 34]. Paul would like a Jury to hear the facts of this case.

Paul asks this Court to reverse the dismissal, vacate the award of attorney's fees, and remand the case for further proceedings.

Dated this 20th day of November, 2023.

HOVLAND, RASMUS,
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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 approximately 9,735 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2023, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel.

I also hereby certify that on this 20th day of November, 2023, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

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

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

APPELLANTS' APPENDIX

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STATE OF SOUTH DAKOTA COUNTY OF GRANT	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of the Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC., a South Dakota corporation, Plaintiffs, vs. KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC.; a South Dakota corporation; & THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust, by and through its trustee; and any other necessary parties. Defendants.	25CIV 23-15 **JUDGMENT OF DISMISSAL AND RULE 54(b) CERTIFICATION**

Based on the Opinion and Order on Grand Valley Hutterian Brethren, Inc.'s Motion to Dismiss, Order Granting VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, and the Estate of Victoria O'Farrell's Motions to Dismiss, and based on the Findings of Fact and Conclusions of Law Regarding Defendants' Motion for Attorney's Fees Under SDCL 15-17-51, this Court enters the following Judgment of Dismissal and Rule 54(b) Certification:

1. Paul sued all Defendants for rescission and sued certain defendants, not including Hutterian Brethren, for damages. Counterclaims seeking money damages were filed by Kelly O'Farrell, Estate of Victoria O'Farrell, and the Raymond and Victoria O'Farrell Living Trust ("Counterclaim Defendants").

2. Based upon the transcript, Memorandum Decision, Opinion and Order on Hutterian Brethren's Motion to Dismiss, Order Granting VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, and the Estate of Victoria O'Farrell's Motions to Dismiss, and the Findings of Fact and Conclusions of Law Regarding Defendants' Motion for Attorney's Fees Under SDCL 15-17-51, all of Paul's claims against all Defendants are dismissed with prejudice.

3. The Counterclaims filed by the Counterclaim Defendants remain pending.

4. As part of Hutterian Brethren, VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, and the Estate of Victoria O'Farrell's Motion to Dismiss, they also requested this Court issue a SDCL § 15-6-54(b) certification to allow for any appeal of its order on these Motions to Dismiss to be appealed to the South Dakota Supreme Court in conjunction with *vOr, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* case number 25CIV23-000018, where the trial court proceedings are stayed and the matter remains on appeal before the South Dakota Supreme Court.

5. This Court grants the request for SDCL § 15-6-54(b) certification.

6. "When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." SDCL § 15-6-54(b).

7. The South Dakota Supreme Court has identified five factors to guide courts in a Rule 54(b) certification analysis:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

First Nat'l Bank v. Inghram, 2022 S.D. 2, ¶ 31, 969 N.W.2d 471, 479 (quoting *Nelson v. Est. of Campbell*, 2021 S.D. 47, ¶ 28, 963 N.W.2d 560, 568–69).

8. The claims that have been adjudicated by this Court bear no relationship to the remaining unadjudicated claims which are certain Defendants' counterclaims for money damages. These two classes of claims are simply unrelated.

9. Paul's claim for rescission practically mirrors the eviction action that is currently pending before the South Dakota Supreme Court. So, there is no chance that an appeal of this claim could moot what is going to happen later on in this lawsuit. Instead, the eviction appeal could moot Paul's rescission claim. So, principles of judicial economy suggest that these two issues should be handled at the same time before the South Dakota Supreme Court.

10. If the South Dakota Supreme Court considers the eviction claim with the rescission claim, there is absolutely no possibility that the South Dakota Supreme Court will be obliged to consider that issue a second time based on *res judicata*.

11. This Court dismissed all of Plaintiffs' claims. Thus, the Counterclaim Defendants are either going to get a money judgment against Plaintiffs or not. Regardless of the outcome, there will be no setoff.

12. By taking these issues up on appeal, now, it should cut off any possibility of duplicate appeals and shorten the overall appeal time of the issues dismissed in this case and in the eviction appeal.

13. In this case, a Rule 54(b) certification is appropriate because this is a time sensitive matter as the parties are dealing with farmland and crop seasons.

14. The eviction matter needs to reach finality and the rescission needs to be ultimately decided so that the parties can have a final determination as to ownership and the land can be farmed and maintained in the future.

15. "[T]he rule in this state does not permit a single cause of action to be split or divided among several suits." *Sodak Distrib. Co. v. Wayne*, 77 S.D. 496, 499, 93 N.W.2d 791, 793 (1958).

16. If this Court were to deny Hutterian Brethren, VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, and the Estate of Victoria O'Farrell's Motion to Dismiss and allow Paul's cause of action to proceed against the same parties, the status of the Property under the challenged the land sale transaction will remain unknown.

17. Allowing a certification of final judgment would improve the administration of justice as an appeal of this Motion would affect the appeal of the eviction proceedings as both cases involve the same Property and rights of the Hutterian Brethren in the Property. *See First Nat'l Bank*, 2022 S.D. 2, ¶ 31, 969 N.W.2d at 479 ("The purpose of Rule 54(b) certification is to 'improve[ ] [the] administration of justice[.]'" (citation omitted)).

18. Under SDCL §15-6-54(b), this Court's ruling on Hutterian Brethren, VOR, Inc., the Raymond and Victoria O'Farrell Living Trust, and the Estate of Victoria O'Farrell's Motion to Dismiss is a final, appealable judgment as this Court expressly determines that there is no just reason for delay and that this Order shall constitute entry of judgment upon the same.

19. The Court awards Defendants VOR, Inc. and the Estate of Victoria O'Farrell's reasonable attorney's fees and costs, which affidavits are to be filed and served upon Plaintiffs' counsel in accordance with SDCL 15-6-54(d). After this judgment is entered and Defendants file and serve their Affidavits, Plaintiffs shall have fourteen days after receipt of the Affidavits to object and schedule a hearing before the Court on the objection in regard to the amount of attorney's fees and costs. If no objection is filed within fourteen days, the Clerk of Courts shall endorse upon the Judgment the attorney's fees and costs in the amount of $_____ to the previously named Defendants. The amount will be inserted by the Clerk of Courts upon the Court hearing the objection of the Plaintiffs or upon the lapse of fourteen days from Plaintiffs' receipt of Defendants' Affidavit.

9/5/2023 9:55:36 AM

BY THE COURT:

Robert L. Spears

Hon. Robert Spears
Circuit Court Judge

Attest:
Mielitz, Brooke
Clerk/Deputy

STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
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August 9, 2023

Ref: Paul O'Farrell, Estate of Victoria O'Farrell, Skyline Cattle Co., Vor Inc., v. Kelly O'Farrell, Grand Valley Hutterian Brethren Inc., Raymond & Victoria O'Farrell Living Trust. 25CIV23-0015.

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Counselors, the opinion of the Court regarding the defendants' motions to dismiss the complaint captioned above for failure to state a claim is expressed below. Based on the foregoing rationale, the defendants' motions are granted.

FACTS

The plaintiff is a disgruntled member of the O'Farrell family. He commenced the above captioned lawsuit recently alleging several causes of action. He was, and perhaps still is, the principal in an agricultural venture known as the Skyline Cattle Company. Paul O'Farrell and Skyline Cattle conducted farming and ranching operations on land owned by Vor, Inc. Paul lost money on these operations for several years. His parents Victoria and Raymond allowed Paul to lease the land and even financed his loses by taking out several mortgages on the land his parents owned and leased to him. Things came to a head in early 2022.

Victoria fell and broke her hip. She was hospitalized and then transferred to a nursing facility. Unfortunately, Victoria never recovered and passed away in the spring of 2022. Prior to her passing, Victoria and Paul set up a couple of revocable trusts. Shortly after Victoria's death, Raymond, as the surviving spouse, was appointed by this Court as the Personal Representative of Victoria's Estate. Additionally, prior to Victoria's death, Raymond and Victoria set up individual revocable trusts as part of their respective estate plans and named their children as beneficiaries of the trust. Victoria and Raymond named themselves as trustees.

Shortly after Victoria's death, Raymond withdrew his shares and assets from his trust, removed Paul as president of VOR Inc., put Paul on notice that his lease to use the land for his farming and ranching operations would not be renewed and put the land up for sale. The land was subsequently sold to the defendant, Grand Valley Hutterian Brethren, Inc. (Grand Valley). Raymond also started a probate proceeding regarding Victoria's estate.

This Court has presided over at least three previous hearings concerning these parties, heard from various witnesses concerning several issues and disagreements between the individuals involved in these issues. In addition, this Court will take Judicial Notice of all previous hearings, witness testimony, exhibits, orders, attachments to the pending motions to dismiss, and all things mentioned or referred to in the complaint, answer and counterclaim. This Court conducted a hearing on the defendants' motion to dismiss the complaint on the afternoon of July 11, 2023. Additional facts, as necessary will be developed and discussed in the section below.

ANALYSIS/DECISION

The filing of this lawsuit and the motions to dismiss brought by the defendants raises several problematic and confusing issues for this Court. Generally speaking, the personal representative or a specially appointed administrator are the only persons allowed to bring a claim on behalf of an estate. *(SDCL 29A-3-617, SDCL 29A-3-711).* Paul O'Farrell is neither. Although Paul O'Farrell, one of the plaintiffs, attempted to make this issue as confusing and convoluted as he possibly could,

the analysis on this issue and applicable law is relatively straight forward and simple. The Court does not need to go any further on this issue. Consequently, the Court will dismiss all claims against the Estate Victoria O' Farrell.

Other aspects pertaining to this complaint are equally troubling and problematic for this Court. For example, Paul claims he is the president of Vor, Inc. Based on the record, this simply is not the case. Paul contends the Court must accept that as a fact as stated in the complaint and for the purposes of a 12(b)(5) motion to dismiss, and the Court cannot consider any other documents, records, or exhibits that fall outside the complaint. While this argument may sound appealing and even compelling as far as it goes, such reasoning does not take into account the well- settled law on this issue at best or is just flat wrong at worse. Trial courts can, and in many cases must, to achieve a just result, consider public records whose authentication cannot be reasonably questioned, and that includes exhibits or documents in the court records and things mentioned in the complaint, answer, or counterclaim even though such items are not attached to the compliant. *(Waldner v. N.Am. Truck and Trailor, Inc. 277 F.R.D 401 (D.S.D), (Nooney v. StubHub, Inc., 2015 S.D. 102).*

Therefore, applying the above standards to the facts presented in this case, it is clear that Paul is not the president of Vor, Inc. and does not have the authority to bring a lawsuit on Vor's behalf. In addition, Paul's complaint names Vor, Inc. as a plaintiff, yet, in the complaint Paul has named Vor, Inc. as a defendant in the same complaint. This simply is an untenable legal position,

defies logic and is disingenuous. A complaint must not be based on mere speculation and the complaint must be plausible on its face. *(Bell Atlantic Corp. v. Twombly, 550 U.S. 544, (2007).* The way this complaint is worded, its practical effect is treating Vor, Inc. as both a plaintiff and a defendant. Thus, the complaint as it applies to Vor, Inc., is not plausible on its face and Vor, Inc. is dismissed as both a plaintiff and a defendant.

Moreover, the Court will dismiss Count 1 of the Complaint in its entirety as to all defendants. Specifically, as Count 1 applies to the Estate of Victoria O'Farrell, actions must be brought within the estate/probate proceeding. This was not done as required by statute. As to Vor, Inc., the allegations contain multiple instances wherein legal conclusions are simply stated and devoid of specific facts to support such allegations, or are refuted by the public records, exhibits and attachments submitted by Vor in favor of its motion to dismiss. As stated above, this Court can consider such documents and is free to ignore legal conclusions cloaked as factual allegations. (*See Ashcroft v. Igbal, 556 U.S. 662, (2009).*

Likewise, this Court will dismiss the count in the complaint alleging tort damages. Such a charge is not recognized as an independent cause of action under South Dakota Law. Additionally, under our well- settled rules of pleadings, a complaint can include general allegations, but the complaint must put the defendants on notice as to exactly what is being alleged and put the defendants on notice as to what they should defend against. *(Kaiser Trucking Inc. v. Liberty Mutual Fire Insurance Company, 981 N.W.2d 645, 2022 SD 64).*

As to the claim of recission stated in Paul's complaint, the Court will dismiss that count as it applies to Vor, Inc. The recission claim in the complaint pertains to the sale of real estate. The parties to the sales contract were Vor, Inc. and the Grand Valley Hutterian Brethren, Inc. As I determined above, Paul is not the president of Vor, Inc. and has no authority to act on its behalf. I already dismissed the recission claim against Grand Valley for the reasons stated on the record at the close of the hearing I conducted on July 11, 2023.

It is the intent of this Court to dismiss all claims brought by the plaintiff against all named defendants for the reasons stated herein. It is also the intent of this Court to certify this decision for immediate appeal pursuant to *SDCL 15-6-54(b)* for the following reasons. All the parties are linked together, (other than Grand Valley), as family members, heirs or beneficiaries of Victoria's Trust. As such, while it is true that Vor, Inc., the Victoria O'Farrell Trust, Victoria O'Farrell Estate, have all filed a counterclaim that has not been dismissed, certification for an appeal without delay will allow the resolution of the remaining issues in the sense that Victoria's Estate and Trust will know if they will be allowed a set-off once Victoria's Estate and Trust is administered and distributed.

Moreover, interest rates, attorney fees and other economic consequences continue to accrue if this Court does not certify the claims asserted by Plaintiff for an immediate appeal that are dismissed in this opinion. For example, Grand Valley is entitled to an immediate appellate decision on the Plaintiff's recission claim. This Court will note that a similar claim involving this same real estate is already

on appeal regarding Paul O'Farrell's eviction from this same real estate. Additionally, it is the Court's opinion that if the certain claims and issues dismissed by this Court in this Memo Opinion are not certified for an immediate appeal, in all likelihood, this Court will have to hear and resolve the same or similar issues another time. As far as this Court is concerned, I have already done so on more than one occasion.

Finally, Vor, Inc. and Victoria's Estate are seeking attorney fees. These plaintiffs contend that the complaint filed in this matter was frivolous. The Court agrees with that assertion, at least to those aspects of the complaint that pertain to naming Vor, Inc. as a plaintiff, then treating Vor, Inc. as a defendant in the sense the complaint is seeking monetary damages from Vor. Additionally, this Court determines the portion of the complaint that names the Estate of Victoria O'Farrell as plaintiff is frivolous in the sense that only the personal representative or a specially appointed administrator can bring such a claim and the Estate incurred unnecessary legal expenses in dismissing the complaint. Consequently, Mr. Erickson shall file his time charges along with a supporting affidavit within the time prescribed by law and serve the same upon Paul O'Farrell. Once served and if he objects within the time prescribed by law, Paul O'Farrell shall file and serve an objection, schedule and notice a hearing.

CONCLUSION

Based on the foregoing, the motions to dismiss the complaint for failure to state a claim upon which relief pertaining to the above- mentioned defendants

are granted. In addition, Judicial Economy, along with the legal resources, expended by the parties are best served by this Court as stated in this Memo Opinion and for the reasons stated at the hearing on July 11, 2023, by certifying this decision as the final order of the Court for an immediate appeal under *SDCL 15-6-54(b)*. Mr. Erickson shall prepare findings of fact and conclusions of law, (unless waived), along with an Order consistent with this writing. Additionally, Mr. Beck will prepare the appropriate Order, findings of fact and conclusions of law,(unless waived), pertaining to the *SDCL 15-6-54(b)* Certification and consistent with this writing.

Robert L. Spears

Circuit Court Judge

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30482

PAUL O'FARRELL, individually; and, as beneficiary of the family trust; and, for the benefit of THE ESTATE OF VICTORIA O'FARRELL; SKYLINE CATTLE COMPANY, a South Dakota corporation; and VOR, INC., a South Dakota corporation

Plaintiffs/Appellants,

v.

KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC., a South Dakota corporation; THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust.

Defendants/Appellees.

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

THE HONORABLE Robert L. Spears
Circuit Court Judge

APPELLEE GRAND VALLEY HUTTERIAN BRETHREN, INC.'S BRIEF

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Notice of Appeal Filed on October 6, 2023
Amended Notice of Appeal Filed on December 6, 2023

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PRELIMINARY STATEMENT

Throughout this brief, Paul O'Farrell, Kelly O'Farrell, and Raymond O'Farrell[1] will be referred to as "Paul," "Kelly," and "Ray," respectively. Skyline Cattle Company will be referred to as "Skyline." vOr, Inc. will be referred to as "VOR." The Estate of Victoria O'Farrell will be referred to as "Victoria's Estate." Grand Valley Hutterian Brethren, Inc. will be referred to as "Brethren." The Raymond and Victoria O'Farrell Living Trust will be referred to as "the Trust." The Codington County Clerk of Court's record will be referred to by the initials "CR" and the corresponding page numbers located in its November 21, 2023, Chronological and Alphabetical Indices. References to the July 11, 2023, hearing transcript will be made using "HT" followed by the page designation found in the hearing transcript.

To the extent necessary, the additional, related actions will be referred to as *VOR, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company* (25CIV23-18) (Appeal No. 30344) ("Eviction Action); *In the Matter of the Guardianship and Conservatorship of Raymond O'Farrell* (25GDN23-1) (Appeal No. 30508) ("Ray's Guardianship"); *Estate of Victoria O'Farrell* (25PRO22-11) (Appeal No. 30532) ("Victoria's Estate"); *Victoria O'Farrell v. Raymond O'Farrell, Kelly O'Farrell* (25CIV22-38) (Appeal No. 30508) ("Victoria's Lawsuit"); and *CHS Capital, LLC v. Skyline Cattle Co., Paul O'Farrell, VOR, Inc.* (25CIV23-27) ("Collection Lawsuit").[2]

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[1] Ray is not a party to this action or appeal.

[2] Paul claims "[a]ll of these matters are interrelated, and, ultimately [they] expect all of these appeals and proceedings to be combined." (Appellants' Br., at 3.) However, Paul has never sought consolidation of these cases before the trial court(s) or this Court.

JURISDICTIONAL STATEMENT

Brethren agree with and adopt Appellant's Jurisdictional Statement as if fully set forth herein.

STATEMENT OF THE ISSUES[3]

1. **Paul alleges Kelly is solely responsible for manipulating Ray, but neither the Complaint nor Paul's testimony provided any bases for this. All claims against Kelly were dismissed by the lower court. Paul waived all claims on appeal by failing to articulate elements of each claim against Kelly, let alone the facts that support any such claim. Because Kelly is the alleged undue influencer, has Paul waived all claims in this action and the other, related actions?**

Nygaard v. Sioux Valley Hosps. & Health Sys., 2007 S.D. 34, 731 N.W.2d 184

2. **Paul is not a party to the Purchase Agreement in any personal or representative capacity. Paul has not pled that he is a party to the Purchase Agreement. Paul does not own the Property. Paul is not the president of VOR. Paul does not have an enforceable interest under the Trust. Paul is not Ray's guardian or conservator. Does Paul have standing to bring any of the pending claims? Even if he does, has Paul failed to state a claim for rescission?**

Cable v. Union Cty. Bd. of Cty. Comm'rs, 2009 S.D. 59, 769 N.W.2d 817
Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)
SDCL § 21-12-1
SDCL § 53-11-2

3. **The Purchase Agreement was signed on August 12, 2022 and closed in October 2022. To As it stands, Paul has not and cannot tender the $3.2 million to restore to Brethren the value received under the Purchase Agreement. Is Paul's Notice of Rescission and attempt to rescind defective and untimely under South Dakota law?**

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[3] Paul did not plead a cause of action against Brethren in Count 1. (CR at 20-24, ¶¶ 68-91.) Count 3 is not an independent cause of action, rather, it is a general request for tort damages. Paul expressly disclaimed any damages sought against Brethren. *See id.* at 28, ¶ 114 ("**No tort damages are sought from the Hutterite Brethren, and Paul sincerely apologizes that they must be made part of this ordeal.**") (Emphasis in original.) Furthermore, Brethren take no position as to the lower court's imposition of attorneys' fees or its failure to recuse itself from this case.

SDCL § 53-11-5
Halvorson v. Birkland, 84 S.D. 328, 171 N.W.2d 77 (S.D. 1969).

4. **Paul is alleging he has an interest in the Property because of the Trust. By extension Paul's siblings similarly have an unenforceable interest in the Property via the Trust. The bank issued a note and mortgage and was a party to the closing, giving it an enforceable interest in the Property. Paul did not name his siblings or the bank in the rescission action or include them in the Notice of Rescission. Did Paul fail to properly request the remedy of rescission by failing to name all parties in his Complaint and his Notice of Rescission?**

5. **Rescission is a remedy, not a cause of action. Paul did not plead a substantive cause of action against Brethren. Paul did not plead that Brethren connived to improperly secure Ray's assent to the Purchase Agreement. Now, on appeal, Paul is alleging Brethren were complicit in Kelly's alleged undue influence over Ray. Can Paul allege Brethren connived for the first time on appeal?**

Hauck v. Clay Cnty. Comm'n, 2023 S.D. 43, 994 N.W.2d 707
State v. Hi Ta Lar, 2018 S.D. 18, 908 N.W.2d 181
Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, 764 N.W.2d 474
McDowell v. Citicorp Inc., 2008 S.D. 50, 752 N.W.2d 209

6. **Paul did not file a Motion for Leave to Amend his Complaint following service of the Motions to Dismiss. Paul did not amend his Complaint to add a cause of action against Brethren or even to allege connivance. Paul did not even propose an Amended Complaint for the trial court to analyze in conjunction with the pending Motions to Dismiss. Can Paul, for the first time in this action, amend his Complaint to allege Brethren connived to improperly obtain Ray's assent to the Purchase Agreement in order to avoid dismissal?**

SDCL § 15-6-15(a)
Sisney v. Best Inc., 2008 S.D. 70, ¶ 23, 754 N.W.2d 804, 813

7. **Paul did not join all the parties that would have been required to accomplish rescission. Paul claims that Brethren needed to file a motion under Rule 12(b)(6) to prevail on this issue. However, the rescission statute required Paul to name all of those people. Th rescission statutes are substantive and failure to comply with the same is an independent basis to dismiss. Can Paul rely on SDCL § 15-6-12(b)(6) to cure his failures under SDCL § 15-6-12(b)(5) and SDCL Ch. 21-12 and 53-11?**

STATEMENT OF THE CASE

On March 3, 2023, Paul, individually, and purportedly on behalf of Victoria's Estate, Skyline, and VOR, filed suit against Kelly, Brethren, and the Trust for declaratory judgment, rescission, and unspecified tort damages. (CR at 7-90.) Attached to the Complaint were several pleadings from Victoria's Lawsuit: (i) the Complaint; (ii) Victoria's Brief filed in support of her Motion for Temporary Restraining Order; (iii) Affidavit of Victoria O'Farrell in support of her Motion for Temporary Restraining Order; (iv) an Affidavit of Victoria's physician's assistant. (CR at 32-90.)

On April 5, 2023, VOR, Victoria's Estate, and the Trust filed an Answer, Counterclaim, and Motions to Dismiss. (CR at 126-185.) In this filing, VOR and Victoria's Estate sought dismissal as parties and all parties moved to dismiss each Count of the Complaint and sought attorneys' fees. In addition, VOR, Victoria's Estate, and the Trust filed a Counterclaim for tortious interference with contractual rights and barratry.[4]

On April 10, 2023, Kelly filed a Separate Answer and Counterclaim for barratry. (*Id.* at 187-199.) Kelly did not file a Motion to Dismiss.

On April 10, 2023, Brethren filed a pre-Answer Motion to Dismiss. (*Id.* at 200.) On June 23, 2023, Brethren filed its Brief in Support of Motion to Dismiss, attaching the

[4] Attached to this Answer, Counterclaim, and Motion to Dismiss were (a) a September 7, 2022, Annual Report of VOR filed with the South Dakota Secretary of State, (b) Order appointing Ray the Special Administrator in Victoria's Estate and Letters of Special Administration, (c) the Purchase Agreement Paul attempted to rescind, (d) Chicago Title Insurance Company Owner's Policy issued to Brethren, (e) Notice of Rescission, (f) Acknowledgement of receipt of Notice of Rescission by Brethren's Registered Agent, (g) Order from Victoria's Lawsuit, denying Paul's Motion to Intervene, (h) Notice of Termination and Nonrenewal of Farm Lease, (i) Assignment of 50% of VOR's stock to Ray, and (j) Assignment for all remaining stock in VOR to Ray. (CR at 143-186.)

Trust document, the Purchase Agreement that is the subject of the Complaint in this matter, as well as Paul's Notice of Rescission.

On July 11, 2023, a hearing was held on the various Motions to Dismiss before the Honorable Robert L. Spears. (*Id.* at 382-419.) Prior to this hearing, Paul did not file a Motion for Leave to Amend Complaint. Prior to his hearing, Paul did not submit a proposed Amended Complaint for the lower court to consider. On August 9, 2023, the Circuit Court issued a Memorandum Decision, dismissing the Complaint in its entirety and all Defendants. (*Id.* at 425-432.) The court, below, took judicial notice of the Eviction Action, in its entirety. (CR at 443, ¶ 25.) In addition, the court took judicial notice of "all previous hearings, witness testimony, exhibits, orders, attachments to the pending motions to dismiss, and all things mentioned or referred to in the complaint, answer and counterclaim." (*Id.* at 427.)

On September 5, 2023, Judge Spears entered a Judgment of Dismissal and Rule 54(b) Certification. On September 9, 2023, Judge Spears entered an Opinion and Order on Brethren's Motions to Dismiss.[5] (*Id.* at 440-501.) On September 7, 2023, Notice of Entry of the same was filed and served on Plaintiffs. (*Id.* at 507-509). Paul filed a Notice of Appeal on October 6, 2023, and an Amended Notice of Appeal on December 6, 2023. (*Id.* at 541-544.)

STATEMENT OF THE FACTS

Ray and Victoria owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Property"). (CR at 12, ¶ 26.) Ray and Victoria put the Property into a corporation named VOR. (*Id.*, ¶ 25.) Ray and Victoria owned all the shares of VOR and

[5] Paul has not challenged the lower court's Rule 54(b) Certification.

deposited these shares of VOR into the Trust, which was a revocable trust created in 2011. (*Id.*, at 8, ¶4; 12, at ¶¶ 24-25; *see also* The Trust (*Id.* at 230-325.))

The Trust conditionally designated the majority of the Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (*Id.* at 13, ¶ 29; 24, at ¶ 92.) The Trust also conditionally designated two other quarters of ground to be inherited by Ray and Victoria's other children, Lance, Marcie, Kelly, and Rita. (*Id.* at 12, ¶ 27; 13, at ¶ 29.) The Trust granted Paul an option to purchase those two parcels. (*Id.* at 13, ¶ 29).

Victoria died on July 11, 2022. (*Id.* at 17, ¶ 52.) By operation of the Trust, Victoria's shares of VOR and her beneficial interest in the Trust went to Ray. (*See* The Trust, *Id.* at 230-325.) Raymond removed all shares of VOR from the Trust. (*Id.* at 14, ¶ 34.)

On August 12, 2022, Brethren and VOR entered into a Purchase Agreement whereby VOR sold the Property to Brethren for $3,200,000.00. The Purchase Agreement was signed on behalf of VOR by Ray, Paul's father, as its president. The land sale transaction closed in October 2022. (*Id.* at 18, ¶ 59.) Nearly seven months later, Paul signed a document purporting to be a "Notice of Rescission." (CR at 336.) Paul signed the Notice of Rescission allegedly as VOR's president. Other than recite the legal description of the property subject to the Purchase Agreement, the Notice of Rescission states, in full:

> Paul O'Farrell, as duly-elected President, and on behalf of vOr, Inc., give notice of rescission of that certain real estate transaction involving the real property listed below. By this Notice, v0r, Inc. offers to restore to Grand Valley Hutterian Brethren, Inc., that which vOr, Inc. has received from them under the contract, upon the condition that they shall do likewise.

(*Id.*) Paul did not tender $3.2 million to Brethren. Paul did not have a proposed mortgage or note from First International Bank, or any other bank. Because none of that has been presented to date, his attempt to rescind is clearly untimely.

Paul does not own the Property in his individual capacity or in any representative capacity for VOR or the Trust. Paul is not the president of VOR. (*Id.* at 143-144.) Paul is not a trustee of the Trust. (*Id.* at 230-325.) Indeed, Paul alleges that he is merely a "Successor Co-Trustee" in the event Ray is "unable" to serve. (*Id.* at 8, ¶ 4.) Paul did not include First National Bank, Ray, or any of his siblings in the Notice of Rescission. (*Id.* at 336.)

In this case, Paul has alleged that his brother, Kelly, "orchestrated a scheme to interfere with the long-standing trust and estate plans of his parents, (Raymond and Victoria). This resulted in the precipitous and illegal sale of nearly all of the family's farm ground." (*Id.* at 7.) In particular, Paul alleges that Kelly "manipulated" Ray to effectuate Paul's disinheritance and such acts have caused financial harm to Victoria, her Estate, Ray, the Trust, VOR, and to Paul. (*Id.* at 10.) Paul also alleges Kelly convinced Ray to remove shares of VOR from the Trust, separate Ray's and Victoria's assets, interfere in Paul's lending and farming activities, remove Paul and Victoria as officers and directors of VOR, attempt to fire Victoria's attorneys that were hired to stop these acts; and "signing a secret agreement to sell nine parcels of family farm ground to the Hutterite Brethren." (*Id.* at 14.) These exact same allegations appear in Ray's Guardianship as pled by Paul in an effort to obtain a guardianship and conservatorship over his father. (*See* Ray's Guardianship record, at 2-3, attached as Appendix A.)

In the Eviction Action, Paul also went to great lengths to testify that Kelly "manipulated" Ray, alleged that Ray does not know how to read or write, and that Ray has been isolated by Kelly. (*See* Eviction Action record, at 227, attached as Appendix B.) Paul even went so far as to offer hearsay about Ray's capacity. (*Id.* at 228.) However, the court in the Eviction Action specifically "found much of the testimony of the defendant [Paul] to be non-credible." (*Id.* at 255:7.) The trial court similarly rejected such claims in Victoria's Lawsuit, holding:

> Now, I have heard a lot of evidence that Mr. O'Farrell, Senior, and that's who I am going to call him, the father here ,didn't have--didn't know what he was doing on this, didn't have capacity to do that. But that is just bold testimony and statements unsupported in the record.
> There's nothing in front of the court that I've heard today that would suggest that Mr. O'Farrell is incompetent, doesn't know who his heirs are, and was subjected to undue influence.

(Victoria's Lawsuit Record, at 539:25-540:8, attached as Appendix C.) Again, the lower court, in this case, took judicial notice of the Eviction Action in its entirety, including Paul's non-credible testimony, as well as Victoria's Lawsuit proceedings. (CR at 443, ¶ 25; 427.) In Victoria's Estate action, Paul continued to allege Kelly was unduly influencing Ray and that Kelly was instrumental in making changes to the Trust and VOR. (*See* Victoria's Estate record, at 14-15, attached as Appendix D.) No judicial determination has been made, findings such claims to have merit.

Paul commenced this action as an individual and on behalf of Victoria's Estate, Skyline, and VOR. However, the record reveals that he cannot assert claims on behalf of all of these entities. Paul is not the president of VOR. (CR at 143-144.)

In Victoria's Estate action, Ray was appointed as special administrator of Victoria's Estate on July 18, 2022 by Judge Dawn Elshere. (*See* Appx. D, at 5.) On

September 26, 2022, Paul sought to remove Ray as special administrator and appointment of himself in a Petition for Appointment of Special Administrator and Petition for Removal of Special Administrator. (Appx. D, at 11-15.) Although opposition was filed, it does not appear any action was taken on Paul's Petitions, thus Paul is not a personal representative or a specially appointed administrator of Victoria's Estate. Accordingly, Judge Spears dismissed Victoria's Estate as a Plaintiff in this action. (CR at 427-428.) Paul commenced a separate appeal of Judge Elshere's Order on November 7, 2023, which is pending with this Court.

The only remedy sought against Brethren in the Complaint is Paul's request for rescission of the Purchase Agreement relating to the Property.

STANDARD OF REVIEW

To survive a motion to dismiss under SDCL 15-6-12(b)(5), a "complaint . . . does not need detailed factual allegations, [rather,] a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do (on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'). Factual allegations must be enough to raise a right to relief above the speculative level[.] [T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 7, 754 N.W.2d 804, 808 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553, 127 S. Ct. 1955, 1964–65, 167 L. Ed. 2d 929 (2007) (alterations in original)). While a court must accept allegations of fact as true, the court

"is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184 (quoting *Wiles v. Capitol Indemnity Corp.*, 280 F.3d 868, 870 (8th Cir. 2002)).

In ruling on a motion to dismiss under SDCL § 15-6-12(b), the trial court "may consider documents or attachments incorporated by reference in the pleadings[.]" *Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 43, 978 N.W.2d 768, 780 n.10. *See also Standard Fire Ins. Co. v. Cont'l Res., Inc.*, 2017 S.D. 41, ¶ 10, 898 N.W.2d 734, 737 (upholding trial court's review of the pleadings, the attachments to the pleadings, and documents incorporated by reference in the pleadings on a 12(b)(5) motion.). The Eighth Circuit Court of Appeals has held:

> In a case involving a contract, the court may examine the contract documents in deciding a motion to dismiss. This is true even if contract documents not attached to the complaint refute a breach-of-contract claim, or a claim that defendant breached a statutory or common law duty.

Zean v. Fairview Health Servs., 858 F.3d 520, 526 (8th Cir. 2017). Similarly, where a trust document is involved, the Eighth Circuit has held that it necessarily must be considered:

> The Employer Trustees did not attach the Trust Agreement to their complaint, instead attaching it only to their response in opposition to the Union Trustees' motion to dismiss. In deciding a motion to dismiss, courts ordinarily do not consider matters outside the pleadings. *See* Fed. R. Civ. P. 12(d). However, "documents necessarily embraced by the complaint are not matters outside the pleading[s]. Documents necessarily embraced by the pleadings include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'" *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012) (citations omitted). Here, the content of several provisions of the Trust Agreement was alleged in the complaint. Additionally, no party has questioned the Trust Agreement's authenticity.

> Accordingly, we will consider the entire Trust Agreement because it was necessarily embraced by the pleadings.

Gillick v. Elliott, 1 F.4th 608, 610 (8th Cir. 2021).

In addition, the court may take judicial notice when considering a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 8, 873 N.W.2d 497, 499 (considering documents incorporated by reference in the complaint); 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) (courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.).

ARGUMENT

1. Paul claims that his Complaint included tort claims against Kelly, but he failed to plead the elements of the claims or any facts to support the same, therefore, Paul failed to state a claim against Kelly.

According to Paul, Kelly is the individual at the root of the undue influence claims and is the bad actor giving rise to nearly all of the pending lawsuits. Indeed, Paul has gone to great lengths to plead alleged undue influence across multiple lawsuits including the Eviction Action, Victoria's Estate, Ray's Guardianship, and this case. As a basis for Paul's rescission claim, he alleges that Ray's consent for the sale of the Property

to Brethren "was procured via undue influence," presumably on the part of Kelly as pled elsewhere throughout the Complaint and in other actions. In addition, Paul claims that his Complaint included tort claims against Kelly for conversion, breach of fiduciary duty, and tortious interference with expected and established relationships. (Appellants' Br., at 34.) However, Paul concedes that the Complaint fails to even allege or list out the elements of each tort. Paul's argues:

> The Complaint concludes by identifying a series of tort claims that fit the facts of these facts. Those include tort claims for which Kelly O'Farrell faces liability, including the torts of "conversion," "breach of fiduciary duty," and "tortious interference with expected and established relationships." [R.28; Complaint, ¶¶ 111, 112]. *The elements of these torts are not listed*, but, the Complaint contains sufficient allegations that can be used to justify each of them. The Complaint also expressly advises that further "[d]iscovery will determine the extent and nature of the tort claims." *Id.* Further, to effectuate the pursuit of such damages, Count 3 also alleges that the Plaintiffs are "entitled to an accounting of all funds and property of the Family Trust, the Trust Corporation, and the Estate…." [*Id,* ¶ 113].

(Appellants' Br., at 34.) So, Paul admits that the Complaint fails to allege the elements of the tort claims. While he claims that the Complaint contains factual allegations against Kelly, he cannot even identify those facts for this Court. Paul's failure to plead facts in support of these claims against Kelly and his mere reliance on speculation, suspicion, and unsupported conclusory labels is fatal to his Complaint against all parties. *See Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d at 190.

Paul relies on Victoria's lawsuit to argue that it supplements his Complaint in this case and cures all of its deficiencies. (Appellants' Br., at 34.) It simply does not. Victoria's Complaint did not include breach of fiduciary duty and, Victoria claimed the Kelly wronged her. Victoria did not claim that Kelly wronged Paul. Regardless, the lower court explicitly found there was no undue influence by Kelly on Ray in Victoria's

Lawsuit. (Appx. C, at 539:25-540:8.) Considering Victoria's Lawsuit does not cure Paul's failures with respect to the Complaint in this case. Paul, himself, has not sufficiently pled facts to survive the Motions to Dismiss and the lower court properly dismissed all claims against Kelly.

It follows that, if Paul has failed to properly appeal the dismissal of this action as against Kelly, then all of Paul's claims must fail as a practical matter because there is no way for Paul to establish any of Kelly's alleged bad acts giving rise to this lawsuit or the sale of the Property. All of Paul's claims in this case stem from the alleged undue influence caused by Kelly. Because Paul has failed to meaningfully appeal dismissal of the claims against Kelly, the entire foundation for this case (and the others) cannot be established as a matter of law.

2. Paul cannot sufficiently plead facts to establish standing and cannot establish the ability to plead a rescission claim, therefore, he fails to state a claim for rescission.

For a court to have subject matter jurisdiction over a case, the plaintiff must establish standing as an aggrieved person. *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825. "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998). To establish standing, the plaintiff must show (1) injury-in-fact, (2) causation, and (3) redressability. *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825–26. Injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citation omitted). Second, a causal connection must exist between the plaintiff's injury and the conduct in the

plaintiff's complaint. *Id.* The causal connection is met "when the injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* (citation omitted). Finally, redressability is met when the plaintiff shows "it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Id.*

"Standing is established through being a 'real party in interest'. . . . 'The real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 40, 813 N.W.2d 111, 121 (citation omitted). Although a motion to dismiss provides a generous standard of review, such deference to the allegations pled is not unlimited. The Eighth Circuit has held "[w]e accept as true the factual allegations in the complaint, but give "no effect to conclusory allegations of law." *In re Polaris Mktg., Sales Pracs., & Prod. Liab. Litig.*, 9 F.4th 793, 796 (8th Cir. 2021) (quoting *Stalley ex rel. United States v. Cath. Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)). "The plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *Id.* (citation omitted). Paul hasn't even alleged facts consistent with such rights, indeed, he has only offered speculative allegations—even though the record flatly contradicts the same.

Paul alleges that he was damaged by the sale of the Property as a beneficiary of the Trust because he was set to inherit the Property pursuant to the terms of the Trust.

(CR at 8, ¶¶ 3-4). However, the Trust was revocable, and Paul has no enforceable interest until the Trust becomes irrevocable upon Ray's death.

Paul is not a real party in interest. Nor is Paul a trustee of the Trust. Paul is not a beneficiary under the Trust and has no enforceable interest under the same until it becomes irrevocable. Paul cannot plead otherwise and survive a motion to dismiss.

Paul had no interest in the Property as VOR was the sole owner of the Property and the Trust holds no shares of VOR. Paul has not and cannot plead an interest in the Property through his former role in VOR. Therefore, Paul suffered no "actual or threatened injury" by the land sale transaction based on his status as a remainder beneficiary and has no standing to challenge the land sale transaction. *See In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 41, 813 N.W.2d at 121 (finding the remainder beneficiaries had no standing to challenge the trustee's actions because they had no interest in the income distributed to the beneficiary of a revocable trust, even though the distributions did not adhere to the terms of the trust). Because he does not own the property and has no interest in the same, he is not damaged by its sale and does not have standing to seek rescission of the same.

Even if this Court found Paul to have standing, by statute, he cannot seek a rescission claim because he was not a party to the contract. "A contract may be extinguished . . . by rescission, alteration, and cancellation, as provided by statute." SDCL § 53-11-1. An action for rescission may be brought as a legal action under SDCL chapter 53–11, or as an equitable action pursuant to SDCL chapter 21–12. *Jones v. Bohn*, 311 N.W.2d 211, 213 (S.D. 1981). "If the action is in equity, the rescission is accomplished by court decree. When an action is brought pursuant to SDCL Ch. 53-11,

however, the rescission has already been accomplished by the unilateral act of one of the parties to the contract. The rescinding party brings the legal action for rescission to enforce his rights arising from the rescission." *Id.* (emphasis added). Rescission is a remedy that may be available to a party to a contract only after the party establishes grounds for rescission as provided in SDCL Ch. 53–11 or SDCL Ch. 21–12.

Pursuant to SDCL § 21-12-1,

> The rescission of a written contract may be adjudged on the application of *a party aggrieved*:
>
> (1) In any of the cases mentioned in § 53-11-2;
> (2) Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault;
> (3) When the public interest will be prejudiced by permitting it to stand.

(Emphasis added.) Under SDCL § 53-11-2,

> *A party to a contract* may rescind the same in the following cases only:
>
> (1) If consent *of the party rescinding or of any party jointly contracting with him* was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;
> (2) If through fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;
> (3) If the consideration becomes entirely void from any cause;
> (4) If such consideration before it is rendered to him fails in a material respect from any cause; or
> (5) By consent of all the other parties.

(Emphasis added.) Thus, to rescind, Paul needs to plead that he is a "party aggrieved," a party to the contract, *and* that he either is "the party rescinding" or a "party jointly contracting with him . . .." SDCL §§ 21-12-1, 53-11-2-(1). Other statutes in SDCL Ch. 53-11 support the proposition that only parties to the contract have standing to rescind the same. *See, e.g.,* SDCL §§ 53-11-3 ("Rescission, when not effected by consent can be accomplished only by the use, on the part of the *party* rescinding, of reasonable diligence

to comply with §§ 53-11-4 and 53-11- 5." (Emphasis added.)); 53-11-4 ("The *party* rescinding a contract must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, undue influence, or disability, and is aware of his right to rescind." (Emphasis added.)); 53-11-5 ("The *party* rescinding a contract must restore to the *other party* everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." (Emphasis added.)). Paul cannot truthfully plead the basic requirements of SDCL §§ 21-12-1 or 53-11-2.

The only parties to the Purchase Agreement were Brethren and VOR, through its president, Ray. Ray and Brethren have not elected to rescind under SDCL § 53-11-2(1). Ray is not even a party in this lawsuit. Paul is not Ray's guardian or conservator. Paul provides no authority for his apparent belief that he can pursue several lawsuits, simultaneously, on Ray's behalf when he has not been appointed as Ray's guardian and conservator.

Paul did not own the Property, and was not the seller under the Purchase Agreement, in his individual capacity or in any representative capacity as part of VOR or the Trust. Paul was not a party, in any capacity, to the Purchase Agreement. Therefore, as a matter of basic statutory application, Paul cannot rely on or utilize SDCL § 53-11-2 to rescind, regardless of how he pleads his rescission claim, because he is not a party to the Purchase Agreement.[6]

[6] Even beyond the explicit limitation placed on SDCL § 53-11-2, as a general rule, "[o]nly parties to a contract have rights in the contract. As such, the parties to the contract are the only ones who can seek enforcement of the contract." *Mahan v. Avera St. Luke's*, 2001 S.D. 9, ¶ 11, 621 N.W.2d 150, 154.

3. Paul provided a defective notice of rescission, has not restored any value to Brethren, and has, therefore, failed to state a claim for rescission.

Pursuant to SDCL § 53-11-5, "[t]he party[7] rescinding a contract must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."[8] *See also Halvorson v. Birkland*, 84 S.D. 328, 333, 171 N.W.2d 77, 80 (1969) ("As a condition to rescission 'the party rescinding a contract must restore to the other party everything of value which he has received from him under the contract'." (citation omitted)). Further, under SDCL § 53-11-3, "[r]escission, when not effected by consent can be accomplished only by the use, on the part of the party rescinding, of *reasonable diligence* to comply with §§ 53-11-4 and 53-11- 5." (emphasis added). Thus, more is required by a party seeking rescission than simply stating SDCL § 53-11-5 in a Notice of Rescission. Paul must have engaged in "reasonable diligence" to restore value to Brethren. No showing was pled in Paul's Complaint.

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[7] Again, as argued above, Paul's attempt to rescind the land sale transaction through the Notice of Rescission was insufficient under SDCL Ch. 53-11 because he was not a party to the Purchase Agreement, and therefore, has no authority or rights to rescind the contract.

[8] Paul attempted a legal rescission by issuing a Notice of Rescission citing SDCL § 53-11-5 to purportedly rescind the Purchase Agreement. Now, for the first time on appeal, he also asserts that he is entitled to an equitable rescission and such Notice of Rescission was unnecessary. (Appellant's Br., at 30, 32). This Court has held "[r]escission is equitable if the complaint asks the court to order rescission of a contract. It is legal, if the court is asked to enforce a completed rescission." *Nw. Realty Co. v. Carter*, 338 N.W.2d 669, 672 (S.D. 1983) (citation omitted). Paul requested the lower court to enforce his attempted rescission. Paul cannot for the first time on appeal now claim that he is also entitled to an equitable rescission when his actions and Complaint clearly show that he sought legal rescission consistent with SDCL Ch. 53-11.

First, Paul has not tendered or offered $3.2 million to Brethren—even if he is a proper party to rescind the contract. Paul has not "restored" the value received by Brethren under the terms of the Purchase Agreement.

Second, Paul has no authority or means to restore the $3.2 million to Brethren on behalf of VOR. At the time the Purchase Agreement was signed, Paul did not own any shares of VOR and was not its President.[9] Paul is not a director, owner, or shareholder of VOR. Paul has no rights or authority over the $3.2 million and did not receive anything of value in the transaction. Paul has not tendered any evidence or allegation that he has the means to restore value to Brethren. Without any authority or alleged means to restore value, Paul has not and cannot exercise the requisite reasonable diligence in accomplishing rescission of the Purchase Agreement.

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[9] Paul argues that the court erred in considering the Secretary of State filings to find that Paul was not the President of VOR because it was beyond the record. (Appellants' Br., at 39 n.13.) However, "[i]n addition to the pleadings and exhibits attached to the pleadings, a court may take judicial notice of *matters of public record*." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 15, 590 N.W.2d 463, 470 (emphasis added); *see also Jensen v. Thompson*, No. 17-CV-4014-LLP, 2018 WL 1440329, at *4 (D.S.D. Mar. 22, 2018) ("In addressing a motion to dismiss, '[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and *matters of public record*' without converting the motion into a motion for summary judgment." (citation omitted)); *Tellabs, Inc.*, 551 U.S. at 322 ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Nooney*, 2015 S.D. 102, ¶ 8, 873 N.W.2d at 499 (considering documents incorporated by reference in the complaint); 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.) (courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.).

4. Paul failed to name all parties in the rescission action and the notice of rescission and, therefore, has failed to state a claim for rescission.

Paul alleges the Trust gave him an interest in the Property sufficient to seek rescission of the Purchase Agreement. The Trust conditionally designated the majority of the Properly to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (*Id.* at 13, ¶ 29; 24, at ¶ 92.) The Trust also conditionally designated two other quarters of ground to be inherited by Ray and Victoria's other children, Lance, Marcie, Kelly, and Rita. (*Id.* at 12, ¶ 27; 13, at ¶ 29.)

Four conditions must have occurred in order for Paul and his siblings to inherit the Property under the terms of the Trust. They were: (1) one of the parents had to die, (2) the other parent had to die, (3) the terms of the Trust must have remained unchanged upon the death of both parents, and (4) the shares of VOR, which owned the Property, must have remained in the Trust. (CR at 230-325.)

If Paul is held to have an interest in the Property sufficient to bring a rescission action, then his siblings, Lance, Marcie, and Rita also have an interest in the Property. Lance, Marcie, and Rita are not parties to this action, or any of the related actions. If the Court deems Paul to have an interest in the Property, the siblings would also have a similar interest in the Property pursuant to the terms of the Trust and would have needed to be included in the Notice of Rescission and as parties to this action.

At the very least, however, First International Bank has a legitimate and enforceable interest in the Property given its issuance of a note and mortgage. As such, even if Paul is rendered to have authority to issue a Notice of Rescission, which he doesn't, he did not include First International Bank and it is, therefore, deficient.

5. Paul failed to plead a substantive cause of action against Brethren.

In Count Two, Paul requested the trial court rescind the land transaction, arguing that "Raymond's consent for the transaction was procured via undue influence, or without his full understanding, and without following necessary corporate formalities." (CR at 26, ¶ 102; 27, ¶ 106). For the first time on appeal, however, Paul is suggesting that Brethren were "complicit" in improperly obtaining Ray's assent to the Purchase Agreement, (Appellants' Br., at 31), on the sole basis that the Purchase Agreement contained the following provision:

> A lawsuit is pending against Raymond O'Farrell in his individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust (25ClV22-000038). Raymond O'Farrell is the current President of VOR, Inc., and also a Director of the Board and shareholder of VOR.

(CR at 331.) Because of this provision alluding to Victoria's Lawsuit, Paul alleges that the undue influence by Kelly on Ray happened with Brethren's connivance. (Appellants' Br., at 31.) Not only is this brand new argument in stark contrast to Paul's apology to Brethren in his Complaint for being sued, (CR at 28, ¶ 114), it must also fail for several reasons.

First, and most importantly, Paul did not plead that Brethren connived with or against Ray, or even that Brethren was "complicit" in improperly obtaining Ray's assent to purchase the Property. (*See* CR at 24-27, ¶¶ 92-109.) Paul's argument, on appeal, is appearing for the very first time and is a clear attempt at saving this lawsuit. It is well-settled that arguments made for the first time on appeal are not appropriate. *See Hauck v. Clay Cnty. Comm'n*, 2023 S.D. 43, 994 N.W.2d 707, 709 n.4; *State v. Hi Ta Lar*, 2018 S.D. 18, ¶ 17 n.5, 908 N.W.2d 181, 187 n.5; *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, 764 N.W.2d 474, 480 n.5. Certainly, Paul cannot manipulate the facts and

his Complaint at this stage to cure basic deficiencies and avoid dismissal. *See McDowell v. Citicorp Inc.*, 2008 S.D. 50, ¶ 14, 752 N.W.2d 209, 213 ("If a complaint is dismissed, 'the right to amend under Fed. R. Civ. P. 15(a) [SDCL 15-6-15(a)] terminates. If the 'dismissal of the complaint also constitutes dismissal of the action[,]' then the motion to amend is improper.") (citation omitted).

Second, even if this Court analyzed this new "connivance" argument, Paul must, at the very least, allege that that the Brethren connived with the alleged wrongdoers to exert undue influence over Ray to obtain his consent. *See* SDCL 53-11-2(1) "consent of the rescinding party . . . was . . . obtained through . . . *undue influence exercised . . . with the connivance of the party* as to whom he rescinds" (emphasis added)). It is not enough that the Brethren were put on notice of a lawsuit by reference in the Purchase Agreement. Brethren must have had knowledge of the purported undue influence exercised over Ray and proceeded with the contract anyways. *See Chan v. Lund*, 188 Cal. App. 4th 1159, 1174, 116 Cal. Rptr. 3d 122, 134 (2010), as modified on denial of reh'g (Oct. 28, 2010) (explaining a party to a contract "may obtain rescission against another contracting party, who, although not responsible for the duress, knows that [the duress] has taken place and takes advantage of it by enforcing the contract"). *Cf. Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003) (defining "connivance" in the context of whether attorneys' fees are appropriate under common law as "voluntary blindness [or] an intentional failure to discover or prevent the wrong. These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives. Such conduct lies far beyond a showing of mere 'lack of care' or 'disregard for the rights of another.'") This is particularly true where, as in the Eviction Action and Victoria's

Lawsuit, the lower court has actually found Paul's allegations of undue influence are without merit. (*See* Appx. B at255:7; Appx. C at 539:25-540:8.) Nothing in the Purchase Agreement would have put Brethren on notice that Ray's consent for this contract was allegedly obtained through undue influence. Nor has Paul alleged any facts that show the circumstances surrounding the Purchase Agreement negotiations or sale would have given Brethren knowledge of any purported undue influence. Mere knowledge of a separate lawsuit, particularly when there was adequate consideration for the sale of the Property, is not enough to charge Brethren with connivance with wrongdoing. *See Chan*, 188 Cal. App. 4th at 1174, 116 Cal. Rptr. at 134 (finding inadequate consideration to be evidence that a contracting party acted with connivance).

Third, Paul's new argument on appeal assumes that Paul can seek relief under SDCL § 53-11-2. As described above, Paul was not a party to the Purchase Agreement and, therefore, is not afforded the protections of this statute. *See, e.g., Jensen v. Thompson*, No. 17-CV-4014-LLP, 2018 WL 1440329, at *20 (D.S.D. Mar. 22, 2018) (district court, on a motion to dismiss, holding that the plaintiff, failed to allege connivance against the contracting party and was not entitled to rescission, explaining that "[o]nly parties to a contract have rights in contract."). Even if this Court finds Paul, as a non-party to the Purchase Agreement, can utilize SDCL § 53-11-2, the remedy of rescission is "extraordinary" and "should never be granted, except where the evidence is clear and convincing." *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994). The entire basis for Paul's Complaint, as currently pled, is that Kelly unduly influenced Ray. However, there are not sufficient facts pled, or in the record, to establish this high bar in this action or any other lawsuit brought by Paul. Undue influence exists:

> (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; or
> (2) In taking an unfair advantage of another's weakness of mind; or
> (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

SDCL § 53-4-7. Paul's Complaint in this case failed to plead sufficient grounds for the lower court to determine whether undue influence was an appropriate ground for rescission under SDCL Ch. 21-12 or 53-11. In the Eviction Action, the lower court specifically found that Paul's testimony was "non-credible." (Appx. B, at 255:7.) In Victoria's Lawsuit, the lower court explicitly rejected such claims, noting:

> Now, I have heard a lot of evidence that Mr. O'Farrell, Senior, and that's who I am going to call him, the father here ,didn't have--didn't know what he was doing on this, didn't have capacity to do that. But that is just bold testimony and statements unsupported in the record.
> There's nothing in front of the court that I've heard today that would suggest that Mr. O'Farrell is incompetent, doesn't know who his heirs are, and was subjected to undue influence.

(Appx. C, at 539:25-540:8.) All of these findings are part of the current record via judicial notice. (CR at 443, ¶ 25; 427.) Paul's bare and speculative assertions, across multiple lawsuits, are insufficient to justify rescission, particularly where Paul has no standing to seek such a remedy on behalf of either contracting party.

6. Paul never moved to amend to add a cause of action or alleged connivance against Brethren.

When faced with multiple motions to dismiss, Paul could have filed a Motion for Leave to Amend Complaint to cure the deficiencies and survive dismissal. SDCL § 15-6-15(a). However, Paul did not do so. Paul did not move to amend his Complaint to add additional parties needed to effectuate rescission, did not add a cause of action against Brethren or allege that they were "complicit" in obtaining Ray's assent to the Purchase

Agreement by improper means. In fact, Paul never even presented the lower court with a proposed Amended Complaint for it to consider in conjunction with the pending Motions to Dismiss to determine if such deficiencies could be cured. The first time Paul ever suggested to the lower court that he be allowed to amend was at the hearing on the Motions to Dismiss. (*See* HT at 13:9-23.) Because Paul did not properly file a motion or seek specific relief from the lower court, no such leave was given. Such practice is consistent with South Dakota law:

> In this case, Sisney only generally raised the issue of amendment in a brief resisting dismissal. He did not file a motion to amend, nor did he explain what specific factual allegation he would have added to overcome the defects requiring dismissal. For these reasons, the circuit court did not abuse its discretion in declining to make, schedule, and grant (essentially *sua sponte*) a motion allowing amendment of the complaint.

Sisney, 2008 S.D. 70, ¶ 23, 754 N.W.2d at 813. It follows that if Paul cannot obtain a *sua sponte* amendment at the lower court, he certainly cannot achieve the same on appeal. *See also McDowell*, 2008 S.D. 50, ¶ 14, 752 N.W.2d at 213.

7. No Defendant needed to file a Motion to Dismiss under SDCL § 15-6-12(b)(6).

Paul attempts to distract this Court by arguing that Defendants were required to file a Motion to Dismiss under SDCL § 15-6-12(b)(6) in order for the lower court to dismiss this action. However, as explained above, Paul has failed to properly plead the basic and fundamental requirements of a rescission action, including naming the proper parties in this lawsuit. Such requirements are substantive and specific to a claim of rescission. Paul wants this to be a Rule 12(b)(6) issue and it simply isn't.

Notably, Paul has provided this Court with an admission that he needed to include all of his siblings as named parties in this lawsuit by serving them with his appeal brief.

Paul has only now served the interested parties on appeal. Paul did not serve these individuals below. To the extent Paul is attempting to cure all of his procedural and substantive failures for the first time on appeal, such acts are impermissible and do not satisfy the requirements of rescission. Paul is not entitled to the extraordinary remedy of rescission of the Purchase Agreement as he does not have standing to assert these claims, and even if he does, he failed to state a claim upon which relief can be granted.

CONCLUSION

For the reasons stated above, Brethren respectfully request this Court affirm Judge Spears's decision below.

Dated this 23rd day of January, 2024.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ William G. Beck

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REQUEST FOR ORAL ARGUMENT

Brethren respectfully requests the opportunity to present oral argument on these issues.

Dated this 23rd day of January, 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), the undersigned certifies that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, Times New Roman (12 point) and contains 8,496 words, excluding the table of contents, table of authorities, and certificates of counsel. The undersigned has relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 23rd day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2024, a true and correct copy of the foregoing Appellee's Brief was electronically filed via Odyssey File & Serve system to the following:

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Dated this 23rd day of January, 2024.

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APPENDIX

A. Ray's Guardianship Record

B. Eviction Action Record

C. Victoria's Lawsuit Record

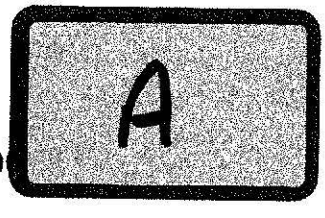
D. Victoria's Estate Record

STATE OF SOUTH DAKOTA) : : §§§	IN CIRCUIT COURT
COUNTY OF GRANT)	THIRD JUDICIAL CIRCUIT

IN THE MATTER OF THE GUARDIANSHIP AND CONSERVATORSHIP OF RAYMOND O'FARRELL, A PERSON ALLEGED TO NEED PROTECTION.	25GDN23—_____ 25GDN23-000001 **PETITION FOR APPOINTMENT OF GUARDIAN AND CONSERVATOR**

INTRODUCTION

1. This Petition seeks to establish a guardianship and conservatorship over Raymond O'Farrell. The Petition is brought by his son, Paul O'Farrell.
2. Raymond is 84 years old and currently resides at his home near Marvin, South Dakota.
3. Raymond's wife died in July of 2022. As a widower, Raymond has 5 children that qualify as interested parties to this proceeding: Kelly O'Farrell, Lance O'Farrell, Marcie Reyelts, Paul O'Farrell and Rita O'Farrell.
4. Prior to her death, Raymond's wife Victoria noted that Raymond was exhibiting symptoms and behaviors of a person in need of protection. Paul O'Farrell and other relatives agree. Raymond's physical and mental condition makes him susceptible to the influence of others, specifically, Kelly O'Farrell.
5. And, in fact, **prior to her death, Raymond's wife Victoria was so concerned about Raymond's deficits, and about Kelly O'Farrell's problematic influence over Raymond, that she sought to remove Kelly from their home.** Victoria's affidavit is



attached to this Petition as Exhibit 1.

6. In conjunction with her concerns about Raymond, Victoria initiated a lawsuit in order to unwind numerous financial transactions for which Kelly had manipulated Raymond. That lawsuit is sealed and is on file with the Clerk. *See,* 25CIV22-000038 (Grant County, S.D.)

7. Paul has initiated a similar lawsuit to unwind those, and other transactions. This new lawsuit is on file with the Clerk. *See,* 25CIV23—000015 (Grant County, S.D.).

8. Raymond relies on the assistance of others for transportation and other basic living activities. Raymond requires the use of a walker to move around and has suffered at least three strokes. In addition, he has a long history of alcohol abuse and is in poor health.

9. Raymond's family members have observed that Kelly continues to exert the same isolation of Raymond and influence over Raymond that Victoria observed in the summer of 2022.

10. This influence and isolation increased after the passing of Raymond's wife Victoria.

STATEMENT OF FACTS LEADING TO THE FILING OF THIS PETITION

11. In early 2022, Kelly O'Farrell secretly began an orchestrated effort to alienate and isolate Raymond from his family, with the intent of thwarting various features of Raymond and his wife's Estate plan, and disrupting their farming operations.

12. Kelly's efforts resulted in such actions as: Raymond signing documents which

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"withdrew" shares of the family farm corporation from the Family Trust; "separated" Raymond's and Victoria's assets; interfered in Paul's lending and family farming activities; "removed" Paul and Victoria as officers and directors of the family farm corporation; attempted to fire the attorneys that Victoria hired to stop all of this; and, ultimately, entered into a secret agreement to purportedly sell nine parcels of family farm ground to the Grand Valley Hutterian Brethren.

13. Some of these actions were accomplished via the misuse of Power of Attorney documents.

14. In addition, Kelly began taking or diverting funds from his parents and converted them to his own use, including checks for $1,200 alleged to be for labor/services.

15. Kelly has isolated Raymond from his family members. Kelly has given Raymond false information about his family members, in order to alienate Raymond from Paul and other family members, and as part of a plan and scheme to enrich himself and harm his other family members.

16. The problems appear to have started when Kelly moved in with his parents in 2021, where he and his wife began living rent-free.

17. Despite the free rent, by 2022, Kelly was demanding that his siblings pay him $1,200 per month to care for Raymond and Victoria. Kelly threatened that he would leave the house and take Raymond with him if the siblings didn't pay Kelly the money he was demanding.

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18. Raymond's wife Victoria temporarily moved out of the home after she fell and broke her leg in April 2022. This required surgery and recuperation outside of the home, first a hospital and then a nursing home in Garretson, South Dakota.

19. Raymond had long relied upon his wife Victoria.

20. In the vacuum created by her absence, Victoria realized that Kelly was isolating Raymond. In the summer of 2022, she submitted an affidavit outlining her observations and concerns, which is attached as Exhibit 1.

21. Kelly convinced Raymond to terminate Victoria as his power of attorney and to appoint Kelly as his power of attorney, instead.

22. Kelly then took further steps to disempower Victoria. He directed his sister Rita to solicit a letter from an Avera physician in June 2022 which purported to advise that their mother Victoria was unable to make financial decisions. The physician letter was issued, and then Kelly acted upon it. However, less than two weeks later, the same Avera doctor learned that the letter had been procured under false pretenses and disavowed its contents. Instead, the doctor advised that she knew of no issues with Victoria's cognition nor with her ability to make financial decisions.

23. At all times, Victoria was fully capable of making decisions, and, she was keenly aware that Kelly had been engaging in a pattern of wrongdoing.

24. Victoria voiced concerns about Kelly in her affidavit: "[I]t became clear that Kelly was trying to influence how Raymond thought about vOr, Inc's [*i.e.,* the family farming

corporation's] relationship with Paul and about what the corporation should do in regard to [Paul's farming] loans coming due [for which family trust land had long-served as collateral]. Since coming to live with us, Kelly seems to have attempted to influence Raymond more and more, and I believe that was part of an effort to undo or disrupt estate planning decisions that my husband and I had already made about what would be done with the family land."

25. Victoria also reaffirmed the validity of her and Raymond's estate plans: "Raymond and I put a lot of thought into our estate plan, and the specific distributions that are called for in the Trust Instrument are the result of a lot of reflection and discussion between us about what we believe and how we want our estate distributed."

26. As of June of 2022, Victoria noted that Raymond had "never expressed to me any inclination to change the estate plan or to make any alteration to the trust. The recent actions that he has taken relating to the Trust and the changes to [the family farm corporation's] directors and officers were not his idea, and I do not believe he even understands what he purports to have done." This was based on Victoria's conversations with Raymond at that time.

27. Victoria remained grateful to Kelly's wife, Donna, for her help and care, as well as to Kelly's and Donna's children. But, Victoria concluded, "based on the series of actions that have been taken, **I no longer want Kelly to live in my home**. It saddens me to come to that conclusion, but I feel I have no other choice, based on what has gone on in

the last month."

28. Victoria planned to return home after recuperating in the nursing home, and, stated that as part of her plan to return home, "**I want the Court to compel [Kelly] to leave.**"

29. Victoria died unexpectedly on July 11, 2022, before she could return home.

30. Since that time, Raymond has continued to live with Kelly O'Farrell and his wife Donna. And, since that time, Kelly has continued to exert influence and control, and, Raymond has continued to sign documents which ostensibly seek to carry out substantial changes to the original family estate plan, and which put Raymond's finances at risk.

31. These attempted actions (carried out in Raymond's name) were contrary to years and years of prior understanding, and they were carried out without proper authority, consent, or comprehension.

32. In the months since, Kelly has continued to isolate Raymond and exert influence, which has resulted in other wrongful actions and transactions that are not in Raymond's best interests.

33. Each of the various actions and transactions was legally ineffective because of a failure of notice, consent, capacity, authority, undue influence, and/or estoppel.

34. The Petitioner's parallel civil lawsuit seeks to remedy and unwind those various actions and transactions.

35. This conservatorship and guardianship proceeding seeks to prevent such misdeeds from occurring again.

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36. Raymond's ability to respond to people, events, and environments is impaired to such an extent that he lacks the capacity to manage property or financial affairs without the assistance or protection of a conservator.

37. Raymond's impairments also prevent him from meeting the essential requirements for his health care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian.

STATEMENT OF FACTS REQUIRED BY STATUTE

Pursuant to SDCL 29A-5-305(1) through (12), Paul O'Farrell provides the following information:

1. The contact information for the proposed guardian is as follows:

   Paul O'Farrell
   14551 466th Ave.
   Marvin, SD 57251

   Date of Birth: 06/30/1938

2. Raymond's nearest relatives, including those entitled to notice of these proceedings, and who "would be entitled to succeed the person's estate by intestate succession":

Name	Address	Relationship
Kelly O'Farrell	46658 143rd St., Marvin, SD 57251	Son
Lance O'Farrell	14845 465th Ave., South Shore, SD 57263	Son
Marcie Reyelts	24700 W. 265th St., Paola, KS 66071, *or*	Daughter

	12601 Robinson St., #11-207, Overland Park, KS 66213	
Paul O'Farrell	14551 466th Ave., Marvin, SD 57251	Son
Rita O'Farrell	4657 Melbourne Ave., #13 Los Angeles, CA 90027, *or* 36101 Bob Hope Dr., #E5, Rancho Mirage, CA 92270	Daughter

3. Raymond is currently living at his home with the assistance of Kelly or Donna O'Farrell, 46658 143rd St., Marvin, SD 57251.
4. Kelly O'Farrell claims to be the current attorney-in-fact for Raymond under durable power of attorney dated March 1, 2022. The validity of that instrument is disputed.
5. It is not known whether Raymond's incapacity will prevent his attendance at a hearing in this matter, although he may not understand or fully understand the proceedings.
6. Raymond O'Farrell is not an absentee.
7. The petitioner seeks a full guardianship and conservatorship, for the reasons and facts outlined above.
    a. A conservatorship is warranted because Raymond's ability to respond to people, events, and environments is impaired to such an extent that he lacks the capacity to manage property or financial affairs without the assistance or protection of a conservator.

b. A guardianship is warranted because those same impairments result in a lack of capacity to meet the essential requirements for his health care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian.

c. The Petitioner's interest in this appointment is as an interested relative.

8. The contact information of the proposed guardian and conservators is:

Proposed conservators:

Paul O'Farrell	&	Lance O'Farrell
14551 466th Ave.		14845 465th Ave.
Marvin, SD 57251		South Shore, SD 57263

Proposed guardians:

Paul O'Farrell	&	Lance O'Farrell
14551 466th Ave.		14845 465th Ave.
Marvin, SD 57251		South Shore, SD 57263

9. *n/a.* (The identity of any validly nominated conservator or guardian is unknown at this time.)

10. No guardian has previously been appointed in this state or elsewhere.

11. *n/a.* (A full conservatorship is sought.)

12. *n/a.* (A full guardianship is sought.)

RELIEF REQUESTED

A. The Petitioner seeks leave to file the petition without an evaluation report, and, thus requests that the Court order the appropriate assessments or examinations, and order

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that a report be prepared and filed with the Court.

B. The Petitioner requests the court set a time and place for a hearing on this Petition and enter an order appointing a guardian and conservator.

C. The Petitioner requests that his legal fees and costs be paid in accordance with the statute or as the court determines appropriate.

D. The Petitioner also requests any additional relief that the Court deems appropriate.

Dated this 8th day of March, 2023.

HOVLAND, RASMUS,
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Attorneys for Petitioner, Paul O'Farrell

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF GRANT — THIRD JUDICIAL CIRCUIT

VOR, Inc. and Grand Valley Hutterian Brethren, Inc.

Plaintiffs,

25 CIV 23-18

Court Trial

V.

Paul O'Farrell and Skyline Cattle Company, a South Dakota Corporation,

Defendants.

DATE & TIME: April 27, 2023 10:00 a.m.

BEFORE: THE HONORABLE ROBERT L. SPEARS
CIRCUIT COURT JUDGE
Watertown, South Dakota

LOCATION: Grant County Courthouse
Milbank, South Dakota

B

APPEARANCES:

For Plaintiff - VOR, Inc.	Lee Schoenbeck Attorney at Law 1200 Mickelson Dr. Ste 310 Watertown, SD 57201
For Plaintiff - Hutterian Brethren, Inc.	Kiera Leddy Attorney at Law PO Box 490 Aberdeen, SD 57402
For Defendants:	Daniel Brendtro Attorney at Law PO Box 2583 Sioux Falls, SD 57101

Index into Exhibits

	Offered	Received
1. 8-18-22 Notice (non-ag)	19	20
2. 8-18-22 Notice (ag land)	21	21
3. 8-12-22 Purchase Agreement	52	53
4. 10-17-22 Warranty Deed	43	43
5.		
6. Photos	43	43

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Paul O'Farrell	18	28	36	40
Tom Wipf	41			
Tom Wipf	44			
Lance O'Farrell	50			

his age and pretty much drinks all day, and I'll even ask Tom -- you know, you go over there and have a few beers with Raymond and you're best friends with him. That's all it took.

And then Kelly is the one that manipulated -- yeah, none of this would have happened. Kelly's making the decisions, not Raymond. And Raymond, he doesn't know what he's doing. He can't read. He can't write.

Q. How long has it been the case that your father has difficulty reading and writing?

A. What's that?

Q. How long has that been that your father can't read or write?

A. Oh, it's been a while. I don't know how many years, but yeah. Actually, Raymond never run VOR. I did and my mom did.

Q. Has your father been isolated by Kelly?

A. Yes. My son used to go over there every Sunday and now, yeah, they run him off. They won't let anybody near Raymond. They won't let me near Raymond. My own father. If I could actually talk to him, I could have maybe reasoned with him a little bit, but he doesn't know what he's doing.

Q. Did changes to your parents' estate plan begin happening after your mother moved into the nursing home?

MR. SCHOENBECK: Your Honor, I'm going to object. That is beyond the scope of an eviction proceeding.

THE COURT: I'm going to sustain the objection. We're

getting far-field here. I'm trying to be good-natured and allow both sides some leeway.

I will also comment, that based on my memory, late last fall, Mr. O'Farrell senior testified live in front of me and it's this Court's opinion that some of the testimony now is contrary to what this Court observed. The objection is sustained. Ask your next question.

MR. BRENDTRO: You Honor, I'd move to strike that as evidence in this proceeding.

THE COURT: Move to strike what?

MR. BRENDTRO: Your observations from a prior proceeding.

THE COURT: That is overruled.

MR. BRENDTRO: Thank you.

THE COURT: You take that up on appeal.

Q. Paul, did you have contact with representatives from the Hutterite Colony regarding their attempt to purchase VOR's land?

A. After they purchased it.

Q. Did you -- and who did you talk to from the colony?

A. Tom.

Q. What did Tom tell you about what he thought about Raymond's capacity?

A. He thought Raymond was incompetent and then he said it on his own that he thought Kelly was incompetent. I think they -- it was both incompetent. I don't think either one of them know what they're doing.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF GRANT	)	THIRD JUDICIAL CIRCUIT
_____	)	
Victoria O'Farrell, in her individual capacity and as Trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021,	)	
Plaintiff,	)	
	)	Judge's Decision
vs.	)	
Raymond O'Farrell, in his individual capacity and as trustee of the Raymond and Victoria O'Farrell Living Trust dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021, and Kelly O'Farrell,	)	
	)	25CIV22-000038
Defendants.	)	
_____	)	

BEFORE: **THE HONORABLE ROBERT L. SPEARS**
Circuit Court Judge
Watertown, South Dakota
October 18, 2022, at 5:27 p.m.

APPEARANCES:

For the Plaintiff: **MR. ALEX HAGEN**
Cadwell, Sanford, Diebert & Garry
200 East 10th Street, #200
Sioux Falls, South Dakota 57104

C

APPEARANCES CONTINUED:

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For the Defendant Raymond O'Farrell:
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For the Defendant Kelly O'Farrell:
MR. JACK H. HIEB
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P.O. Box 1030
Aberdeen, South Dakota 57402

(WHEREUPON, the following proceedings were duly had:)

THE COURT: All right. Here's what I am going to do. It's the decision of this Court that, based on the developments, I am trying to schedule day two for November 4th; but if I do that, issues will be moot. That is not the Court's fault. That is not my scheduling staff's fault.

And as I mentioned earlier in this proceeding -- and we're going well after 5:00. It's nearly 5:30. I indicated about a half an hour ago, when I called the first case, why wasn't it brought to my attention that this was going to be an issue, but we proceeded well over now three hours, three and a half hours, in file number 22-0038, the motion to intervene.

Based on the exhibits, the testimony presented, I am going to reverse myself when I said I would not rule from the bench. I am going to rule from the bench this afternoon. Based on the three-hour-and-thirty-minute hearing and the testimony I've taken, it appears to this Court that the law is pretty clear and the law requires I deny the motion to intervene. Nothing in that ruling or the order prevents this plaintiff from filing further claims against the estate such as undue influence or anything else.

Now, I heard a lot of evidence that Mr. O'Farrell,

Senior, and that's who I am going to call him, the father here, didn't have -- didn't know what he was doing on this, didn't have capacity to do that. But that is just bold testimony and statements unsupported in the record.

There's nothing in front of the Court that I've heard today that would suggest that Mr. O'Farrell is incompetent, doesn't know who his heirs are, and was subjected to undue influence. Perhaps, that's a claim for another day. But I am going to dismiss the motion to intervene in file number 0038 for the reasons I just stated.

This was a revocable living trust. It's clear on this Court's review of the trust document and the testimony presented that Mr. O'Farrell had every right to withdraw certain trust assets and assign them to himself, at least 50 percent of the joint property pursuant to the trust document. Therefore, the plaintiff in file number 0038, motion to intervene, will be denied.

Now, on the other issue, whether or not I should remove Mr. Schoenbeck because of an alleged conflict of interest and his partners or any attorneys employed by him, I've heard nothing on that except argumentative statements from both sides.

Both sides know that I, long before I was a circuit court judge, I was on the ethics committee. So I feel I

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

****

25PRO22-000011

ESTATE OF	*	
VICTORIA O. O'FARRELL,	*	ORDER APPOINTING
Deceased.	*	SPECIAL ADMINISTRATOR

****

Upon consideration of the petition for the appointment of a special administrator, the court finds:

1. The venue is proper in this court and it is proper to appoint the petitioner, Raymond A. O'Farrell, as Special Administrator without further notice for the reasons presented in the petition for appointment as Special Administrator without bond. The court is satisfied that at the time of decedent's death, she was involved as a party in a lawsuit in Grant County, South Dakota, (25CIV22-000038), and also, there appears to be pending negotiations involving possible foreclosure proceedings that would have considerable adverse effects on the estate of the decedent. Pursuant to SDCL 29A-3-614, petitioner is an interested person, and it is necessary to protect the estate of the decedent pending the search for a Will and determination of whether the decedent died testate or intestate.

2. The decedent died on the 11th day of July, 2022.

3. The decedent was domiciled at death in Grant County, South Dakota.

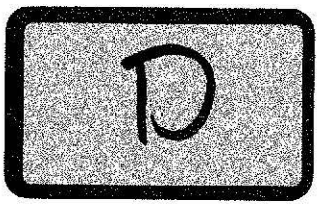
4. The appointment of a Special Administrator is necessary to protect the estate pending the search for a Will and determination of the proper probate proceedings.

IT IS ORDERED:

A. The findings are made a part of this order.

B. Raymond A. O'Farrell is appointed as Special Administrator of the estate of Victoria O. O'Farrell with the powers of a general personal representative until such time as the duties have been completed.

The personal representative's term should be limited to such time as it necessary to investigate whether the decedent has a Will, and such is offered and accepted in probate or



upon determination that the decedent died intestate and intestate proceedings properly commenced.

And letters shall be issued to the special administrator to serve without bond.

BY THE COURT:

7/18/2022 3:00:58 PM

Attest:
Reichling, Sandy
Clerk/Deputy

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF GRANT — THIRD JUDICIAL CIRCUIT

ESTATE OF — 25PRO22-000011

VICTORIA O. O'FARRELL,
Deceased.

PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR PURSUANT TO SDCL 29A-3-614

COMES NOW, Paul O'Farrell whose address is 14551 466th Avenue, Marvin, South Dakota 57251, as an interested party of the estate, by and through his attorney of record, David A. Geyer of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota and respectfully moves this Court for its Order Appointing Paul O'Farrell as Special Administrator of the above captioned estate pursuant to SDCL 29A-3-614, and in support of this Petition shows the Court as follows:

1. SDCL 29A-3-614(2) entitled "Special Administrator—Appointment." states in part as follows:

   A special administrator may be appointed:

   ...

   (2) In a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. ...

2. Paul O'Farrell is the decedent's son and is an interested person in this proceeding.

3. Paul O'Farrell is one of the successor trustees of the Raymond and Victoria O'Farrell Living Trust, dated January 14, 2011, restated March 29, 2017, and amended August 26, 2021.

4. Paul O'Farrell has been the registered agent for vOr, Inc., a family farm coporation, since 2002.

5. Paul O'Farrell's appointment as special administrator is necessary to preserve the decedent's estate or to secure its proper administration.

6. It is in the best interest of the decedent's estate to appoint Paul O'Farrell as special administrator because he is familiar with the decedent's estate plan and is willing to fulfill his duties according to SDCL 29A-3-703(a).

WHEREFORE, Paul O'Farrell requests that this Court enter its Order as follows:

A. Enter its Order Appointing Paul O'Farrell as Special Administrator of the above captioned estate; and

B. For such other and further relief to which the Petitioner may be entitled.

Dated this 24 day of September 2022.

DELANEY, NIELSEN & SANNES, P.C.

David A. Geyer
Attorney for Petitioner
PO Box 9
520 2nd Avenue East
Sisseton, SD 57262
(605) 698-7084

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF GRANT THIRD JUDICIAL CIRCUIT

ESTATE OF 25PRO22-000011

VICTORIA O. O'FARRELL,
Deceased.

PETITION FOR REMOVAL OF SPECIAL ADMINISTRATOR PURSUANT TO SDCL 29A-3-611

COMES NOW, Paul O'Farrell whose address is 14551 466th Avenue, Marvin, South Dakota 57251, as an interested party of the estate, by and through his attorney of record, David A. Geyer of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota and respectfully moves this Court for its Order removing Raymond A. O'Farrell as Special Administrator of the above captioned estate pursuant to SDCL 29A-3-611 and 29A-3-618, and in support of this Petition shows the Court as follows:

1. SDCL 29A-3-611 entitled "Termination of appointment by removal—Cause; procedure." states in part as follows:
   (a) Any interested person may petition for removal of a personal representative for cause at any time.
   (b) Cause for removal exists when:
   (1) Removal is in the best interests of the estate.

2. Raymond A. O'Farrell ("Raymond") and the decedent each owned 50% of the shares of vOr, Inc., a family farm corporation organized under the laws of South Dakota.

3. The decedent and Raymond were Trustors and Trustees of the Raymond and Victoria O'Farrell Living Trust ("Trust") dated January 14, 2011, and amended August 26, 2021. The decedent and Raymond collectively owned all of the shares of vOr, Inc., and jointly assigned all of those shares in 2011.

4. On June 27, 2022, the decedent filed a Summons and Complaint with the case number

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25CIV22-000038 along with other documents that commenced an action ("Lawsuit") against Raymond and their son, Kelly O'Farrell ("Kelly").

5. The Complaint alleges that Raymond purported to reverse his and the decedent's joint assignment of shares to the Trust as part of their estate plan, thereby imperiling the estate planning objectives which motivated the creation of the Trust in the first place, all without the knowledge of the decedent.

6. In order to accomplish this, the Complaint alleges that Raymond attempted to remove the decedent as a director of vOr, Inc., modify the corporate Bylaws, appoint new officers, and vote on all 25,000 shares that were assigned to the Trust, all while the decedent was recovering from surgery in the hospital.

7. Decedent alleged that when she learned what Raymond had done, she spoke with him about these acts. She determined that Raymond was being unduly influenced by their son, Kelly.

8. Additionally, decedent alleges that Raymond has refused to provide necessary information to the lender to permit vOr, Inc., to refinance, which resulted in vOr, Inc. to have allegedly defaulted on two loans. The Complaint alleges this is another byproduct of Kelly's undue influence on Raymond.

9. The decedent requested in her Complaint that the Court find Raymond liable for conversion and civil conspiracy and to remove Raymond as Trustee because of actions taken in breach of his fiduciary duty.

10. Raymond, as a special administrator, is a fiduciary of the estate who has a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and South Dakota law included SDCL 29A-3-703(a).

11. This Lawsuit creates a conflict of interest since the decedent was in the process of suing Raymond right before her death for actions he took related to their estate plans without her knowledge.

12. After the decedent's death, Raymond, through his attorney, filed a Suggestion of Death in the Lawsuit, triggering the 90 days requirement to file a motion for substitution pursuant to SDCL 15-6-25(a)(1) to allow the Lawsuit to continue. Raymond has made no action to substitute a party in the Lawsuit.

13. Raymond, as special administrator, could not substitute himself as the plaintiff in the Lawsuit in place of decedent pursuant to SDCL 15-6-25(a) because Raymond is a defendant in this same matter and it would create a conflict of interest.

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14. This conflict of interest renders Raymond unable to be a fiduciary of the decedent's estate pursuant to SDCL 29A-3-703(a).

15. Prior to the decedent's death, the decedent alleged in her Complaint that Raymond had breached his fiduciary duty as a trustee of the Trust.

16. The decedent asserted that Raymond's actions listed above have resulted in the waste and mismanagement of vOr Inc. bank accounts so that the checking account was overdrawn by $2,800.00 without the knowledge of the decedent.

17. Since before the decedent's death, she asserted that Raymond has been influenced by Kelly to drastically and unlawfully restrict the decedent's access to the Trust and vOr Inc., which interrupted the estate plan that Raymond and the decedent had in place since 2011.

18. Based on decedent's allegations in the Lawsuit, it is clear that Raymond has no intention of acting in the best interest of the decedent's estate, and therefore Raymond is unable to fulfill his fiduciary duty as Special Administrator.

19. It is in the best interest of the decedent's estate to remove Raymond A. O'Farrell as special administrator of the estate.

WHEREFORE, Paul O'Farrell requests that this Court enter its Order as follows:

A. Enter its Order Removing Raymond A. O'Farrell as Special Administrator of the above captioned estate; and

B. For such other and further relief to which the Petitioner may be entitled.

Dated this 26 day of September 2022.

DELANEY, NIELSEN & SANNES, P.C.

David A. Geyer
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(605) 698-7084

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30482

**PAUL O'FARRELL, individually;
and, as a beneficiary of the family trust;
and, for the benefit of THE ESTATE OF
VICTORIA O'FARRELL; SKYLINE CATTLE COMPANY,
a South Dakota corporation;
& VOR, INC., a South Dakota corporation,**

Plaintiffs and Appellants,

vs.

**KELLY O'FARRELL, an individual;
GRAND VALLEY HUTTERIAN BRETHREN, INC.,;
a South Dakota corporation; and THE RAYMOND AND
VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust.**

Defendants and Appellees.

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

HONORABLE ROBERT L. SPEARS
Presiding Judge

APPELLEES' BRIEF
(VOR, INC., REVOCABLE TRUST, AND ESTATE OF VICTORIA O'FARRELL)

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& TRZYNKA, Prof. LLC
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Filed: 1/19/2024 4:03 PM CST Supreme Court, State of South Dakota #30482

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Kelly O'Farrell

Notice of Appeal was filed October 6, 2023

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INTRODUCTION

This case involves a son, Paul O'Farrell, who through a series of various legal actions is attempting to recover what he believes is his "expected" inheritance from his parents. At the outset, Paul O'Farrell's "expected inheritance" is not a viable claim in South Dakota.[1]

The one-sided story told by Paul O'Farrell ignores Paul O'Farrell's use of VOR, Inc. as a personal piggy bank for Paul and his company, Skyline Cattle Company. Paul and Skyline encumbered VOR, Inc.'s property with loans totaling over $1.2 million dollars and faced with a foreclosure action to pay that debt, VOR, Inc. sold land to Grand Valley. In short, Paul is not a victim.

Today, there are four pending appeals with this Court and one petition for an intermediate appeal by Paul O'Farrell and/or Skyline Cattle. Two of the appeals are related to orders entered by the Third Circuit Court in relation to Victoria O'Farrell's lawsuit after she passed away and Victoria O'Farrell's Estate—both orders appealed from were entered approximately a year prior to Paul O'Farrell's recent appeals.

In this case, which Paul O'Farrell continuously relies on in his eviction proceeding (Appeal #30344) and the grain priority proceeding (Appeal #30584),

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[1] *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶ 41, 991 N.W.2d 95, 109:

> A mere possibility, such as the expectancy of an heir apparent, is not deemed an interest of any kind. (citations omitted.) [A] testator may, up to the moment of death, revise and amend the disposition of the estate, and a prospective beneficiary's right to inherit depends on the decedent's final testamentary disposition in favor of that beneficiary. (citations omitted.)

is a case where Paul O'Farrell attempted to bring claims on behalf of several entities in which he did not have standing and did not state a claim upon which relief could be granted. Those entities include VOR, Inc., the Revocable Trust, and Victoria's Estate. A review of the complaint in this case (and the documents that it incorporates) makes it clear the trial court did not err when it dismissed claims brought by Paul on behalf of these entities or that Paul also brought against these entities—in the same complaint.

PRELIMINARY STATEMENT

Appellants/Plaintiffs, Paul O'Farrell and Skyline Cattle Company, will be referred to as "Paul," "Skyline," and collectively as "Appellants"; Appellee/Defendant, the Raymond and Victoria O'Farrell Living Trust, will be referred to as the "Revocable Trust"; Appellees/Defendants, Kelly O'Farrell and Grand Valley Hutterian Brethren, Inc., will be referred to as "Kelly" and "Grand Valley"; VOR, Inc., was named a Plaintiff in the underlying matter, but was also asserted as a Defendant, and is now named an Appellant who will be referred to as "VOR"; and finally, the Estate of Victoria O'Farrell was listed as a Plaintiff in the underlying matter, but also asserted as a Defendant, and is now listed as an Appellee who will be referred to as "Victoria's Estate."

The motions hearing noted by Appellants from another O'Farrell proceeding held on October 18, 2022, will be referred to as "VHT" followed by the appropriate page number; the Appendix for this brief will be referred to as "App." followed by the appropriate page number; and the settled record will be referred to as "SR" followed by the page number.

JURISDICTIONAL STATEMENT

This is an appeal from the Judgment by the Honorable Robert L. Spears on September 5, 2023. (SR 502.) Notice of Entry was given on September 7, 2023 (SR 507), and Appellants filed their Notice of Appeal on October 6, 2023 (SR 541). This Court has jurisdiction pursuant to SDCL 15-24A-3(1).

STATEMENT OF LEGAL ISSUES

1. **Whether the Circuit Court erred when it dismissed this Complaint against the Revocable Trust.**

No, the Circuit Court did not err by dismissing this Complaint against the Revocable Trust.

SDCL 21-24-5.
Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 and 570 (2007).
Cable v. Union County Bd. of County Com'rs, 2009 S.D. 59, 769 N.W.2d 817.
In re Florence Y. Wallbaum Revocable Living Tr. Agreement, 2012 S.D. 18, 813 N.W.2d 111.

2. **Whether the Circuit Court erred when it dismissed VOR as a Plaintiff.**

No, the Circuit Court did not err when it dismissed VOR as a plaintiff to the case.

SDCL 47-1A-841.
SDCL 47-1A-842(3).
Healy Ranch P'ship v. Mines, 2022 S.D. 44, 978 N.W.2d 768.
Landstrom v. Shaver, 1997 S.D. 25, 561 N.W.2d 1.
Nooney v. StubHub, Inc., 2015 S.D. 102, 873 N.W.2d 497.
Gillick v. Elliott, 1 F.4th 608 (8th Cir. 2021).

3. **Whether the Circuit Court erred when it dismissed Victoria's Estate as a Plaintiff.**

No, the Circuit Court did not err when it dismissed Victoria's Estate as a plaintiff.

SDCL 29A-3-617.
SDCL 29A-3-711.
Matter of Estate of Jones, 970 N.W.2d 520, 2022 S.D. 9.

4. Whether the Complaint was frivolous under SDCL 15-17-51.

Yes, the Complaint was frivolous as to VOR and Victoria's Estate.

> SDCL 15-17-51.
> *Healy v. Osborne*, 2019 S.D. 56, 934 N.W.2d 557.
> *Ridley v. Lawrence County Com'n*, 2000 S.D. 143, 619 N.W.2d 254.

5. Did the presiding judge, Gregory J. Stoltenburg, of the Third Judicial Circuit err by failing to permit Paul's change of judge request.

No, the presiding judge did not err.

> SDCL 15-12-23.
> SDCL 15-12-24.

STATEMENT OF THE CASE

Contrary to Paul's remark in his brief, this complaint was not at all based upon the circuit court's "advisement"—the circuit court never told Paul to bring this case on behalf of the entities that he claims authority over and to bring these claims against these entities.[2] (Appellants' Brief p. 6.) On his own accord, Paul started this case where he purported to be acting on behalf of Victoria's Estate, VOR, and his company, Skyline, and filed suit against Kelly, Grand Valley, and the Revocable Trust for a declaratory judgment, rescission, and "tort damages." (SR 3-30.)

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[2] Instead, Judge Spears said the following at a hearing when Paul tried to intervene in Victoria's lawsuit in 2022:

> There's nothing in front of the Court that I've heard today that would suggest that Mr. O'Farrell is incompetent, doesn't know who his heirs are, and was subjected to undue influence. Perhaps, that's a claim for another day. But I am going to dismiss the motion to intervene in file number 0038 for the reasons I just stated.

(VHT 147:2-8.)

In response, Victoria's Estate, the Revocable Trust, and VOR filed an answer to the complaint, along with motions to dismiss and a counterclaim against Paul. (SR 126-141.)

Additionally, Grand Valley filed a motion to dismiss for failure to state a claim. (SR 200-201, 214-229.)

Following Grand Valley's motion and brief, defendant Revocable Trust, "plaintiff" Victoria's Estate, and "plaintiff" VOR joined the motion and the arguments made by Grand Valley's brief regarding the legal arguments for dismissal of the complaint. (SR 339-343.) Within this brief in support of their motion to dismiss, these parties also directed the trial court to the recent South Dakota Supreme Court case, *Estate of Lynch v. Lynch*, which described that an expectancy of an inheritance is "not deemed an interest of any kind."[3]

The circuit court held a motions hearing on July 11, 2023. At the hearing, the circuit court orally granted Grand Valley's motion to dismiss, and later entered an opinion and order related to Grand Valley's motion to dismiss. (SR 440-455.)

In regard to the other motions, the trial court issued a memorandum decision on August 9, 2023, that described the dismissal of Paul's complaint in its entirety. (SR 425-432.) The trial court also entered a memorandum decision regarding its decision of attorney's fees on October 10, 2023. (SR 639-642.)

Additionally, the trial court entered its order that dismissed the case as to VOR, Victoria's Estate, and Revocable Trust on September 5, 2023 (SR 433-434);

[3] 2023 S.D. 23, ¶ 41, 991 N.W.2d 95, 109 (citations omitted).

a judgment of dismissal and Rule 54(b) certification on September 5, 2023 (SR 502-506); and opinion and order on Grand Valley's motion to dismiss on September 5, 2023 (SR 440-455).

STATEMENT OF THE FACTS

1. The Relationship between the Farm Property, the Revocable Trust, and VOR.

Raymond and Victoria O'Farrell owned approximately 1,000 acres of farmland in Grant County, South Dakota (the "Farm Property"). (SR 12.) Raymond and Victoria then put that Farm Property into a corporation named VOR, Inc. (SR 12.) Raymond and Victoria owned all the shares of VOR and deposited all shares of VOR into the Revocable Trust, which was a revocable trust created in 2011. (SR 8, 12, 230-325.)

The Revocable Trust additionally designated the majority of the Farm Property to be inherited by their son, Paul, which included nine contiguous parcels comprising 703.33 acres. (SR 13, 24.) However, the four conditions that must have occurred in order for Paul and his siblings to inherit any of the Farm Property owned by VOR and under the terms of the Revocable Trust were: (1) one of the parents had to die; (2) the other parent had to die; (3) the terms of the Revocable trust must have remained unchanged upon the death of both parents; and (4) the shares of VOR, which owned the Farm Property, must have remained in the Revocable trust. (SR 230-325.) In addition to Paul's conditional inheritance through the Revocable Trust, the other O'Farrell siblings—Lance, Marcie, Kelly, and Rita—all were to inherit certain property as well. (SR 12-13.)

2. Raymond's Shares of VOR.

On July 11, 2022, Victoria O'Farrell passed away. (SR 17.) By operation of the Revocable Trust, Victoria's shares of VOR and her beneficial interest in the Revocable Trust went to Raymond O'Farrell. (SR 230-325.) With Raymond in full control of the shares within the Revocable Trust, Raymond removed all the shares of VOR from the Revocable Trust. (SR 14.)

3. Sale of VOR land and resulting eviction proceeding.

On or about August 12, 2022, Grand Valley executed a purchase agreement for the sale of nine contiguous parcels for $3.2 million. (SR 326-335.) As the only owner of VOR's shares, Raymond signed the purchase agreement on behalf of VOR in his capacity as president of VOR. (SR 143-144.) The land sale transaction closed in October 2022. (SR 18.)

After the land sale, Grand Valley and VOR initiated eviction proceedings in *VOR, Inc. and Grand Valley Hutterian Brethren v. Paul O'Farrell and Skyline Cattle Company*, 25CIV.23-18 (referred to as "Eviction Action"), to evict Paul and Skyline from the Farm Property. As a result of this case, the trial court ordered Paul and Skyline to vacate the Farm Property. During that Eviction Action, Paul never filed a motion to stay with surety and he did not file a motion to consolidate this lawsuit with the Eviction Action. The Eviction Action is currently on appeal to the South Dakota Supreme Court, Appeal #30344.

4. Paul cannot act on behalf of VOR, Victoria's Estate, or the Revocable Trust.

Paul's complaint further claims that damages are available for Raymond, Victoria, Victoria's Estate, the Revocable Trust, and VOR based on Kelly's actions and "discovery will determine the extent and nature of the tort claims...such damages would be available as a result of conversion, breach of fiduciary duty, and tortious interference with their expected and established relationships." (SR 28.) First, Raymond, Victoria, and the Revocable Trust are not plaintiffs in this lawsuit where Paul claims they are allowed to seek damages. Second, Paul has no authority to bring any action on behalf of Victoria's Estate, the Revocable Trust, or VOR.

Raymond was ordered as the special administrator to Victoria's Estate by the circuit court on July 18, 2022. (SR 146-147.) Paul petitioned to have Raymond removed, but then left that petition without ever seeking a hearing on that issue. (App. 1-4.)

Regarding VOR, Paul was a former president of the company. (SR 8.) Paul was never a shareholder. (SR 12, 230-325.) Raymond was appointed as president—of the company that he owns 100% of the shares of. (SR 143-144, 230-325.)

In regard to the Revocable Trust, Paul is not a trustee and he only claims that he could be a "Successor Co-Trustee." (SR 8.) As explained before, until several events happened, Paul is not even a beneficiary of any of the shares of VOR that were once held by the Revocable Trust—and are no longer held in the Revocable Trust. Paul has never filed any document within a trust proceeding to

have Raymond removed as the trustee and have himself appointed—like he started to in Victoria's Estate. (App. 1-4.)

5. Paul is not a victim.

First Interstate Bank initiated a foreclosure on VOR's Farm Property on July 22, 2022. (App. 11-20.) Page three of the foreclosure complaint summarizes the four notes Paul took out, pledging VOR's land as collateral, which had a remaining balance at the time of foreclosure, according to pages 6 and 7, of $1,248,420.10. (App. 11-20.) Paul had been previously able to get his father to sign mortgages on VOR's land, until his father received independent legal counsel from Susan Yexley Jennen of Clark, South Dakota. To resolve the foreclosure, Raymond, VOR, and their attorney were able to sell part of the land to Grand Valley to pay off the debt as previously described in the purchase agreement. (SR 326-335.)

STANDARD OF REVIEW

This appeal primarily relates to the trial court granting various parties' motions to dismiss, and a de novo review applies to the court's rulings. *Kaiser Trucking, Inc. v. Liberty Mutual Fire Ins. Co.*, 2022 S.D. 64, ¶ 13, 981 N.W.2d 645, 650-651.

Additionally, the appeal pertains to whether the presiding judge of the third circuit erred by not removing the Honorable Judge Spears from the case. The standard of review for a presiding judge ruling on removal of a judge is one of statutory construction and is likely, therefore, de novo. *In re West River Elec. Ass'n, Inc.*, 2004 S.D. 11, ¶ 14, 675 N.W.2d 222, 226.

The circuit court's decision to award attorney's fees, under SDCL 15-17-51, is reviewed under an abuse of discretion standard. *Johnson v. Miller*, 2012 S.D. 61, ¶ 19, 818 N.W.2d 804, 810.

ARGUMENT

1. The Trial Court did not err when it dismissed the claims against the Revocable Trust.

The Revocable Trust is listed as a defendant[4] in this lawsuit by Paul, but Paul's complaint fails to state a claim against the Revocable Trust upon which relief can be granted. There are three counts/requests to Paul's complaint: Count 1—a request for declaratory relief; Count 2—a request for rescission of the purchase agreement between VOR and Grand Valley; and Count 3—"tort damages." Of these three counts, the only two that apply in any way to the Revocable Trust are Count 1 and Count 3.

A review of the two claims "against" the Revocable Trust show that there is an insuperable bar to relief and that Paul's allegations are just mere recitals and conclusions. Additionally, Paul has no standing for any claims against the Revocable Trust relating to shares of VOR, when Paul only had an expectation of

[4] To the extent that Paul is also claiming to bring claims on behalf of the Revocable Trust, the Recovable Trust must be dismissed as a plaintiff. Paul does not have standing to bring any claims on behalf of the Recovable Trust. See *Matter of Estate of Calvin*, 2021 S.D. 45, ¶¶ 17-18, 963 N.W.2d 319, 324-325. Paul makes no allegations that he has asked the Revocable Trust to pursue certain claims and that the Revocable Trust has declined to pursue such a claim. Further, the same reasons that support that the Revocable Trust cannot be a defendant, also support that Paul cannot act as a plaintiff on behalf of the Revocable Trust.

an inheritance. Therefore, Paul's claims against the Revocable Trust were rightfully dismissed.

a. Applicable Law.

The U.S. Supreme Court has laid out the following principals for a motion based on a failure to state a claim upon which relief can be granted, (in the South Dakota Rules of Civil Procedure it is a "12(b)(5)" motion, whereas in the Federal Rules of Civil Procedure it is a "12(b)(6)" motion):

- The facts plead in the Complaint "must be enough to raise a right to relief above the speculative level" and must be "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 and 570 (2007).
- Additionally, "the tenant that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
- Although not the U.S. Supreme Court, the 8th Circuit held "[w]here the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate." *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3rd 866, 870 (8th Cir. 2008).
- Further, the South Dakota District Court has held "[w]hen ruling on a motion to dismiss under Rule 12(b)(6), courts can consider matters of public record in addition to the complaint's factual allegations." *Waldner v. N. Am. Truck & Trailer, Inc.*, 277 F.R.D. 401, 406 (D.S.D. 2011).

Additionally, "[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*,

523 U.S. 83, 102, 118 S. Ct. 1003, 1016, 140 L. Ed. 2d 210 (1998). To establish standing, the plaintiff must show (1) injury-in-fact, (2) causation, and (3) redressability. *Cable v. Union County Bd. of County Com'rs*, 2009 S.D. 59, ¶ 21, 769 N.W.2d 817, 825–26. Injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citation omitted). Second, a causal connection must exist between the plaintiff's injury and the conduct in the plaintiff's complaint. *Id.* The causal connection is met "when the injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* (citation omitted). Finally, redressability is met when the plaintiff shows "it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Id.*

"Standing is established through being a 'real party in interest'. . . . 'The real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 S.D. 18, ¶ 40, 813 N.W.2d 111, 121 (citation omitted).

b. There is an insuperable bar to any declaratory relief for Paul against the Revocable Trust because he does not have standing to bring the claim.

Paul's brief defends its Count 1 against the Revocable Trust by claiming that the declaratory judgment act is liberal and that it can be used to decide various issues within a trust and, because he makes various assertions related to

trust documents, then his claim against the Revocable Trust cannot be dismissed. (Appellants' Brief pp. 20-26.)

Paul's defense to allow his claim for declaratory judgment to continue against the Revocable Trust faces an insuperable bar to relief—the Revocable Trust has no VOR shares and Raymond, upon Victoria's death, became the recipient of all VOR's shares held by the Revocable Trust. These facts by the plain terms of the Revocable Trust bar any type of declaratory judgment by Paul related to VOR shares in the Revocable Trust. Further, Raymond is not a defendant individually in this case, and Raymond removed the VOR shares from the Revocable Trust. Apart from Paul's various conclusory claims related to actions of the Revocable Trust, there is no claim that relief can be granted upon in relation to the Revocable Trust because there is no claim that turns Paul's rights into anything other than a speculative "expectation of an inheritance" claim.[5]

For the first time in this case, Paul claims declaratory relief against the Revocable Trust should continue because SDCL 21-24-5 allows for the determination of rights under trust or a decedent's estate through a declaratory

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[5] *Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶ 41, 991 N.W.2d 95, 109:

> A mere possibility, such as the expectancy of an heir apparent, is not deemed an interest of any kind. (citations omitted.) [A] testator may, up to the moment of death, revise and amend the disposition of the estate, and a prospective beneficiary's right to inherit depends on the decedent's final testamentary disposition in favor of that beneficiary. (citations omitted.)

judgment action.[6] However, not only is his argument barred because it is only first being made on appeal (*Sioux Falls Shopping News, Inc. v. Dept. of Revenue and Regulation*, 2008 S.D. 34, ¶ 29, 749 N.W.2d 522, 528), this argument also is incorrect because SDCL 21-24-5 does not apply to the facts here.

Under SDCL 21-24-5, it appears (although not analyzed in Appellants' brief) that Paul claims it applies because of subsection 3: "To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings." However, Paul's complaint does not make any claims regarding the construction of the Revocable Trust itself or its writings, rather he claims "relief" against the Revocable Trust because of purported bad acts by Kelly. Further, Paul is not a beneficiary under the Revocable Trust until Raymond passes away. Therefore, the statute does not allow Paul to bring his claims against the Revocable Trust itself.

In short, just because declaratory judgments are allowed, does not mean they cannot be dismissed when there are no rights to declare. In this case, Paul and Skyline do not have rights related to the Revocable Trust's VOR shares that went to Raymond after Victoria's death, and Paul and/or Skyline's allegations against Kelly do not automatically allow suit against the Revocable Trust.

c. There are no tort claims against the Revocable Trust.

The only other part of Paul's complaint that could potentially be against the Trust appears to be Count 3 "tort damages." However, there are no facts in the Complaint that Paul is asserting any tort against the Revocable Trust.

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[6] Paul did not make this argument in his briefing or at the hearings on the motions to dismiss. (SR 356-364, 382-419.)

Instead, it appears that Paul's complaint only involves claims against Kelly acting improperly. Of course, this would not result in any tort liability against the Revocable Trust itself. Further, by Appellants' own brief, it appears that Paul is not making any tort claims against the Revocable Trust. (Appellants' Brief p. 34.)

2. VOR should be dismissed from this case as a plaintiff.

In a bizarre fashion, VOR—the corporation that Raymond is president of and owns 100% of the shares—is listed as a plaintiff in this case by Paul. Even stranger, within the same complaint, Paul makes claims that VOR may owe him money damages.[7]

To the extent any claims are made against VOR or that VOR is alleged to make claims against any purported party by Paul's Complaint, the trial court correctly decided Paul could not act on behalf of VOR and dismissed the Complaint's claims related to VOR entirely.

a. Applicable Law

In addition to the law regarding a "12(b)(5)" motion, South Dakota's law on the consideration of documents in a motion to dismiss is applicable to Paul's complaint in its entirety. South Dakota law on this issue is as follows:

- This Court "may consider documents or attachments 'incorporated by reference in the pleadings' when deciding a motion to dismiss under SDCL 15-6-12(b)." *Healy Ranch P'ship v. Mines*, 2022 S.D. 44, ¶ 43 n.10, 978 N.W.2d 768, 780 n.10.

[7] As Paul put it in his opposition to VOR's motion to dismiss: "in paragraphs 107 and 108, Paul is asserting his potential right to recover damages against VOR." (SR 358.)

- "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007).
- *Standard Fire Ins. Co. v. Cont'l Res., Inc.*, 2017 S.D. 41, ¶ 10, 898 N.W.2d 734, 737, upheld trial court's review of the pleadings, the attachments to the pleadings, and documents incorporated by reference in the pleadings on a 12(b)(5) motion.
- *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 8, 873 N.W.2d 497, 499, considered documents incorporated by reference in the complaint.
- Courts may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment. 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.).
- "In a case involving a contract, the court may examine the contract documents in deciding a motion to dismiss. This is true even if contract documents not attached to the complaint refute a breach-of-contract claim, or a claim that defendant breached a statutory or common law duty. *Zean v. Fairview Health Servs.*, 858 F. 3ed 520, 526 (8th Cir. 2017).

- Similarly, where a trust document is involved, the Eighth Circuit has held that it necessarily must be considered:

> The Employer Trustees did not attach the Trust Agreement to their complaint, instead attaching it only to their response in opposition to the Union Trustees' motion to dismiss. In deciding a motion to dismiss, courts ordinarily do not consider matters outside the pleadings. See Fed. R. Civ. P. 12(d). However, "documents necessarily embraced by the complaint are not matters outside the pleading[s]. Documents necessarily embraced by the pleadings include 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'" Ashanti v. City of Golden Valley, 666 F.3d 1148, 1151 (8th Cir. 2012)(citations omitted). Here, the content of several provisions of the Trust Agreement was alleged in the complaint. Additionally, no party has questioned the Trust Agreement's authenticity. Accordingly, we will consider the entire Trust Agreement because it was necessarily embraced by the pleadings.

Gillick v. Elliott, 1 F.4th 608, 610 (8th Cir. 2021).

b. Paul's allegations regarding his control of VOR are wholly unsupported.

In an attempt to justify his complaint and position that VOR is a plaintiff in this matter, Paul claims that he is the only "rightful" president. However, this is contrary to public documents and Paul's own knowledge that he is not the president of VOR. (SR 143-144.) For clarity, Paul's only legal connection to VOR is that he was a former president of the corporation that used the real property held by VOR as collateral to receive loans for his company, Skyline.

Paul attempts to get around this by making the conclusory statement that VOR cannot act in this manner because Raymond was purportedly unduly influenced to become the president of VOR by Kelly.

In addition to the clear documents that show that Raymond is the president of VOR, Paul's own complaint shows that he is not acting in the benefit of VOR—even if he were to have the authority to do so. Within his own complaint, Paul also makes claims against VOR for money damages. (SR 27, ¶¶ 107-108.) Appellants never addressed the conflict and problem with claiming to act on behalf of VOR and then bring claims against VOR in the same complaint, even though it was extensively argued at the motion to dismiss hearing and formed the basis for the trial court's award of attorney fees against Paul and Skyline.

Instead, Paul argues that he should be able to make claims on behalf of VOR and against VOR in the same complaint because he is acting in accordance with SDCL 47-1A-841 and SDCL 47-1A-842(3).

Neither of these statutes support that Paul is allowed to act on behalf of VOR when the clear documents show that he is not the valid president. Specifically, SDCL 47-1A-842(3) states the following: "An officer, when performing in such capacity, shall act: (3) In a manner the officer reasonably believes to be in the best interests of the corporation." Even if Paul were the president, there is no valid argument that Paul is acting in the best interests of the corporation when he purportedly brings this lawsuit in VOR's name and also makes claims against VOR in the same lawsuit. Further, Paul cannot be acting in a manner that is in the "best interests of the corporation" when he is acting in a manner that only benefits himself. As is known throughout his entire complaint, and admitted in his pleadings, Paul is only acting in a manner that benefits him and what he desired for an inheritance.

In addition to SDCL 47-1A-841 and SDCL 47-1A-842(3), Paul claims that *Landstrom v. Shaver* supports the claim that he can bring this action on behalf of VOR. (Appellants' Brief p. 39.) 1997 S.D. 25, 561 N.W.2d 1. Paul's reliance on *Landstrom* is wholly misplaced. To the contrary, *Landstrom* supports that Raymond would be the only person available to make a claim on behalf of VOR—as Raymond owns all the shares and Paul has never alleged nor been a shareholder.

Specifically, the quote attributed to *Landstrom* by Paul on page 40 of his brief actually replaced the word "stockholder" with "[those others]." It is clear through a quick reading of *Landstrom* and that quote—without Paul's edit—that *Landstrom* is applicable to stockholders/shareholders of a corporation—not former presidents. Further, *Landstrom* is a decision discussing whether a shareholder has to bring a derivative suit or whether a shareholder can bring it on an individual basis (see *Landstrom*, at ¶ 54), and the language cited by Paul (inaccurately) is the limited exception to the rule that "an action to redress injuries to a corporation cannot be maintained by a shareholder on an individual basis but must be brought derivatively." *Id.*

Through law or equity, there is no meritorious argument that VOR should be included as a plaintiff in this case. Paul does not have standing to bring such a claim. Even if Paul did have standing, he cannot also turn around and sue VOR in the same complaint for money damages. The law is clear and Paul's purported actions on behalf of VOR are not allowed.

c. VOR joins Grand Valley's brief regarding rescission "claim."

VOR joins Grand Valley in its position regarding Paul's inability to move forward in any manner on the remedy of rescission. VOR is not going to restate the supporting authorities of Grand Valley's argument that Paul's "claim" of rescission should be dismissed. Instead, VOR joins Grand Valley in its position and authorities, and requests that claim is also dismissed.

3. The Trial Court did not err when it dismissed Victoria's Estate as a plaintiff.

To begin, the trial court did not err when it dismissed Victoria's Estate as a plaintiff because Paul did not have any authority to bring such a claim on behalf of the Estate. South Dakota law clearly requires that authority.

Paul then complains that he brought the lawsuit because Raymond is attempting to serve on both sides of a lawsuit. It appears in that respect, Paul is referring to the lawsuit that Victoria started that was voluntarily dismissed by her attorney. Currently, the issues with that old lawsuit are up on appeal by Paul, Appeal #30508.

Paul's attempt to include Victoria's Estate as a plaintiff is not allowed and the court correctly applied the law.

a. Applicable Law.

The probate code reserved powers to bring litigation on behalf of an estate to either a personal representative or special administrator:

> A special administrator appointed by order of the court in any formal proceeding has the powers of a general personal representative, except as limited in

> the order of appointment, and the duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts or on other terms as the court may direct.

SDCL 29A-3-617.

> Until termination of an appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

SDCL 29A-3-711.

Recently, in *Matter of Estate of Jones*, this Court addressed an issue where interested parties to an estate attempted to petition for a special administrator be appointed to pursue a wrongful death claim because of an alleged conflict of interest by the personal representative of the estate. 970 N.W.2d 520, 2022 S.D. 9. Particularly of importance in this case, the Court described that the petition for a special administrator required further proceedings to determine whether a special administrator was appropriate to bring a claim for wrongful death. *Id.* at ¶ 33. Further, this Court described that the circuit court would be "determining who shall pursue a wrongful death claim on behalf of an estate." *Id.* The South Dakota Supreme Court did not state anything within *Jones* regarding interested parties being able to file a lawsuit on behalf of the estate without being appointed as a special administrator. *Id.*

b. Victoria's Estate was rightfully dismissed as a plaintiff.

Paul appears to claim that Victoria's Estate is not a plaintiff in this case because of how he captioned his complaint. However, in his summons, it appears

that Victoria's Estate is a plaintiff and is argued as such in his briefings and at the motion to dismiss hearing in front of the trial court.

It is clear that South Dakota law does not allow Paul to bring an action on behalf of Victoria's Estate. To bring an action on behalf of an estate, one must be either a personal representative or special administrator.

Paul's recourse—for not being either a personal representative or special administrator—is not to bring a complaint that he's not allowed to bring, rather it would be to address his issues with the special administrator within the probate action itself. Instead, it appears Paul relies on the liberal nature of a declaratory judgment action to claim that it is not necessary and upon a case from Nebraska. (Appellants' Brief p. 43.)

However, Paul is asking this Court to remove the special administrator of Victoria's Estate and simultaneously allow him to bring an action on the Estate's behalf. Of course, there are specific statutes within the probate code that must be followed to remove a special administrator, which Paul knows because he filed a petition to do so, but did not pursue it past the filing of a petition and Raymond's objection. (App. 1-10.)

Further, Paul's complaint does not explain in any way how an action on behalf of Victoria's Estate will benefit the Estate. As Paul's submissions admit, the only focus of Paul's complaint is an attempt to benefit himself.

4. The Complaint was frivolous under SDCL 15-17-51.

Paul's complaint is frivolous because it ignored facts Paul knew to be true and asserted claims on behalf of VOR and Victoria's Estate without any authority to do so, and then turned around and made claims against them.

Paul's response to why the complaint was not frivolous is unsupported by South Dakota law.

a. Applicable Law.

SDCL 15-17-51:

> If a civil action, including an action for appeal of a zoning decision, or special proceeding is dismissed or requested relief is denied and if the court determines that it was frivolous or brought for malicious purposes, the court shall order the party whose claim, cause of action, or defense was dismissed or denied to pay part or all expenses incurred by the party defending the matter, including reasonable attorneys' fees.

A "frivolous action exists when the proponent can present no rational argument based on the evidence or law in support of the claim...." *Healy v. Osborne*, 2019 S.D. 56, ¶ 34, 934 N.W.2d 557, 566-7 (citations omitted).

b. There is no rational position for Paul's assertions.

In response to whether Paul's claims were frivolous on behalf and against VOR, Paul asserts that he had a reasonable legal position to bring an action on behalf of VOR because of a case from Delaware in 1972 that stated that previous officers continued to hold office if corporate meetings are not lawfully convened. *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431 (De. Ch. 1972). The Delaware case does not provide any law on if a former president—who feels he was incorrectly dismissed as president—can start a lawsuit against the corporation and on behalf

of the same corporation in the same complaint. This case does not control in South Dakota and does not make his argument legitimate.

As previously described, Raymond—by all public documents—is the acting president of VOR. Further, the action that Paul apparently believes he can take because of *Landstrom* is one where he must be a shareholder—Paul knows he is not a shareholder, and he did not allege that he was a shareholder. Paul had all this information available to him at the time he filed his complaint, but he filed anyway. What makes his position more irrational is that he then pursues claims against VOR within the same complaint. This type of behavior squarely fits within the South Dakota definition of frivolous.

As to Victoria's Estate, Paul knew he was unable to bring the lawsuit, but then claims he brought it because Raymond refused to do so. However, Paul does not explain that the lawsuit was voluntarily dismissed by the attorney that was acting as Victoria's attorney. There is no explanation within the complaint that allows Paul to escape the fact that his lawsuit ignores the probate code and Paul's own knowledge. Paul instead relies on a case from Nebraska in 2000 to claim that he could bring such an action. (Appellants' Brief p. 44.) Again, this does not change South Dakota law. It also does not change that Paul abandoned his petition to remove Raymond as a special administrator of Victoria's Estate.

c. The Trial Court correctly applied the law in its frivolous finding.

On page 41 of Paul's brief, he claims that the circuit court "did not cite or apply the correct and complete law in reaching its decision." However, Paul does not in any way explain how the court's application of the law was deficient.

(*Sioux Falls Shopping News, Inc. v. Dept. of Revenue and Regulation*, 2008 S.D. 34, ¶ 29, 749 N.W.2d 522, 528.) Contrary to this position, in *Ridley v. Lawrence County Com'n*, 2000 S.D. 143, ¶ 14, 619 N.W.2d 254, 259, the Supreme Court described a frivolous action under SDCL 15-17-51: "To fall to the level of frivolousness, there must be such a deficiency in fact or law that no reasonable person could expect a favorable judicial ruling."

Similarity, within the trial court's findings and conclusions, the court specifically stated that test, "The Court finds there is a deficiency in facts, such that neither plaintiffs nor their counsel could expect a favorable ruling."

The trial court correctly applied SDCL 15-17-51 and found Paul and Skyline's claims frivolous because there is no reasonable person that could expect that Paul could act on behalf of and against VOR in the same complaint. Further, Paul knew he had no authority to act on behalf of Victoria's Estate and attempted to anyway.

5. It was not error for the Presiding Judge Stoltenburg to deny Paul's request to remove Judge Spears.

Paul claims that Judge Spears should have been removed because Skyline had not previously submitted any argument or proof in support of a motion, only Paul had. Therefore, Paul claims that the previous decisions made by Judge Spears do not apply to Skyline, and Judge Spears should have been removed.

However, this ignores that Paul previously waived any issue with the judge presiding for the same reason Paul now claims there is an "appearance of impropriety." Further, Paul's recollection of the facts ignores that he made his

informal request for Judge Spears to recuse himself in two files at the same time, "My letter to you is attached regarding recusal in 25GDN23-000001 and 25CIV23-000015." (SR 97-99.) Presiding Judge Stoltenburg then issued his denial of Skyline's formal request for removal in a manner that followed Paul and Skyline's initial informal request—with both cases captioned together. (SR 121-122.)

a. Presiding Judge Stoltenburg acted appropriately.

First, informal requests from Paul and Skyline were apparently made in two files at the same time (SR 97-102), this file and the guardianship proceeding. Thus, based on Paul's own submission, the joint requests included the guardianship file where previous orders had been made. (SR 97-101.) Then, it appears that counsel for Paul and Skyline did an affidavit just in this civil file, and the presiding judge captioned his response as to both the civil file and the guardianship file when the presiding judge ruled there was "previously submitted motions, arguments, and testimony to the assigned judge on substantive issues and has waived his right to file an affidavit for change of judge pursuant to SDCL 15-12-24." (SR 121-122.) Now, Skyline wants to say this was in error because the pervious decisions only related to Paul. However, in all the informal requests and communications, Paul and Skyline made their submission as one and for both proceedings together.

In light of the presentation of the requests, and the intertwined nature of the cases, the presiding judge correctly interpreted SDCL 15-12-23 and SDCL 15-12-24 in denying the removal of the judge by affidavit. Further, as referenced by

the presiding judge's order, the nature of all these lawsuits makes it judicially efficient to be heard by the same judge.

b. There is no appearance of impropriety requiring removal.

The appearance of impropriety relating to the campaign treasurer of the judge's campaign that works for Schoenbeck & Erickson, PC is without merit. As described in Judge Spears' email to counsel for Paul and Skyline, Paul was advised that his former campaign treasurer was a paralegal at Schoenbeck & Erickson, and Paul agreed he had no issue with Judge Spears continuing to stay on whether Paul could intervene in the lawsuit initiated by Victoria. (*Victoria O'Farrell v. Raymond O'Farrell, et al.*, 25CIV.22-000038, Appeal #30508). (SR 102, 110.) Appellants cited no case law that requires removal of a judge when a former campaign treasurer works as a paralegal for a firm in front of that judge. Like Paul previously agreed, this is not an unusual circumstance in the small communities of South Dakota and does not require removal.

CONCLUSION

Based on the foregoing, Victoria's Estate, the Revocable Trust, and VOR respectfully request this Court affirm the trial court's dismissal of each of them in their entirety—as either a plaintiff or a defendant—in Paul's complaint. Victoria's Estate and VOR further respectfully request that this Court affirm the award of attorney's fees against Paul and Skyline. Finally, VOR respectfully asks that this Court affirm the dismissal of the rescission "claim."

DATED this 19th day of January, 2024.

Respectfully submitted,

SCHOENBECK & ERICKSON, PC

By: __/s/ Joe Erickson_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 6,391 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 19th day of January, 2024.

SCHOENBECK & ERICKSON, PC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on January 19, 2024, I served a true and correct copy of the foregoing *Appellees' Brief* via electronic means on the following:

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APPENDIX
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STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF GRANT — THIRD JUDICIAL CIRCUIT

ESTATE OF — 25PRO22-000011

VICTORIA O. O'FARRELL,
Deceased.

PETITION FOR REMOVAL OF SPECIAL ADMINISTRATOR PURSUANT TO SDCL 29A-3-611

COMES NOW, Paul O'Farrell whose address is 14551 466th Avenue, Marvin, South Dakota 57251, as an interested party of the estate, by and through his attorney of record, David A. Geyer of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota and respectfully moves this Court for its Order removing Raymond A. O'Farrell as Special Administrator of the above captioned estate pursuant to SDCL 29A-3-611 and 29A-3-618, and in support of this Petition shows the Court as follows:

1. SDCL 29A-3-611 entitled "Termination of appointment by removal—Cause; procedure." states in part as follows:
   (a) Any interested person may petition for removal of a personal representative for cause at any time.
   (b) Cause for removal exists when:
   (1) Removal is in the best interests of the estate.

2. Raymond A. O'Farrell ("Raymond") and the decedent each owned 50% of the shares of vOr, Inc., a family farm corporation organized under the laws of South Dakota.

3. The decedent and Raymond were Trustors and Trustees of the Raymond and Victoria O'Farrell Living Trust ("Trust") dated January 14, 2011, and amended August 26, 2021. The decedent and Raymond collectively owned all of the shares of vOr, Inc., and jointly assigned all of those shares in 2011.

4. On June 27, 2022, the decedent filed a Summons and Complaint with the case number

Filed: 9/26/2022 10:32 AM CST Grant County, South Dakota 25PRO22-000011

25CIV22-000038 along with other documents that commenced an action ("Lawsuit") against Raymond and their son, Kelly O'Farrell ("Kelly").

5. The Complaint alleges that Raymond purported to reverse his and the decedent's joint assignment of shares to the Trust as part of their estate plan, thereby imperiling the estate planning objectives which motivated the creation of the Trust in the first place, all without the knowledge of the decedent.

6. In order to accomplish this, the Complaint alleges that Raymond attempted to remove the decedent as a director of vOr, Inc., modify the corporate Bylaws, appoint new officers, and vote on all 25,000 shares that were assigned to the Trust, all while the decedent was recovering from surgery in the hospital.

7. Decedent alleged that when she learned what Raymond had done, she spoke with him about these acts. She determined that Raymond was being unduly influenced by their son, Kelly.

8. Additionally, decedent alleges that Raymond has refused to provide necessary information to the lender to permit vOr, Inc., to refinance, which resulted in vOr, Inc. to have allegedly defaulted on two loans. The Complaint alleges this is another byproduct of Kelly's undue influence on Raymond.

9. The decedent requested in her Complaint that the Court find Raymond liable for conversion and civil conspiracy and to remove Raymond as Trustee because of actions taken in breach of his fiduciary duty.

10. Raymond, as a special administrator, is a fiduciary of the estate who has a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and South Dakota law included SDCL 29A-3-703(a).

11. This Lawsuit creates a conflict of interest since the decedent was in the process of suing Raymond right before her death for actions he took related to their estate plans without her knowledge.

12. After the decedent's death, Raymond, through his attorney, filed a Suggestion of Death in the Lawsuit, triggering the 90 days requirement to file a motion for substitution pursuant to SDCL 15-6-25(a)(1) to allow the Lawsuit to continue. Raymond has made no action to substitute a party in the Lawsuit.

13. Raymond, as special administrator, could not substitute himself as the plaintiff in the Lawsuit in place of decedent pursuant to SDCL 15-6-25(a) because Raymond is a defendant in this same matter and it would create a conflict of interest.

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14. This conflict of interest renders Raymond unable to be a fiduciary of the decedent's estate pursuant to SDCL 29A-3-703(a).

15. Prior to the decedent's death, the decedent alleged in her Complaint that Raymond had breached his fiduciary duty as a trustee of the Trust.

16. The decedent asserted that Raymond's actions listed above have resulted in the waste and mismanagement of vOr Inc. bank accounts so that the checking account was overdrawn by $2,800.00 without the knowledge of the decedent.

17. Since before the decedent's death, she asserted that Raymond has been influenced by Kelly to drastically and unlawfully restrict the decedent's access to the Trust and vOr Inc., which interrupted the estate plan that Raymond and the decedent had in place since 2011.

18. Based on decedent's allegations in the Lawsuit, it is clear that Raymond has no intention of acting in the best interest of the decedent's estate, and therefore Raymond is unable to fulfill his fiduciary duty as Special Administrator.

19. It is in the best interest of the decedent's estate to remove Raymond A. O'Farrell as special administrator of the estate.

WHEREFORE, Paul O'Farrell requests that this Court enter its Order as follows:

A. Enter its Order Removing Raymond A. O'Farrell as Special Administrator of the above captioned estate; and

B. For such other and further relief to which the Petitioner may be entitled.

Dated this 26 day of September 2022.

DELANEY, NIELSEN & SANNES, P.C.

David A. Geyer
Attorney for Petitioner
PO Box 9
520 2nd Avenue East
Sisseton, SD 57262
(605) 698-7084

Filed: 9/26/2022 10:32 AM CST Grant County, South Dakota 25PRO22-000011

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF GRANT | THIRD JUDICIAL CIRCUIT

ESTATE OF | 25PRO22-000011

VICTORIA O. O'FARRELL,
Deceased.

SUPPLEMENT TO PETITION FOR APPOINTMENT OF SPECIAL ADMINISTRATOR PURSUANT TO SDCL 29A-3-614

Paul O'Farrell, an interested party in the above-entitled matter, having filed with this Court his Petition for Appointment of Special Administrator, by and through his attorney of record, submits the following supplement to said petition as follows:

7. Alternatively, Petitioner moves the Court to appoint Paul O'Farrell and Lance O'Farrell as co-Special Administrators in the above-entitled estate.

8. It is in the best interest of the decedent's estate to appoint Paul O'Farrell and Lance O'Farrell as co-Special Administrators because they are familiar with the decedent's estate plan and are willing to fulfill their duties according to SDCL 29A-3-703.

WHEREFORE, Paul O'Farrell requests that this Court enter its Order as follows:

C. Alternatively, enter its Order Appointing Paul O'Farrell and Lance O'Farrell as co-Special Administrators of the above captioned estate.

Dated this 3 day of October 2022.

DELANEY, NIELSEN & SANNES, P.C.

David A. Geyer
Attorney for Petitioner
PO Box 9
520 2nd Avenue East
Sisseton, SD 57262
(605) 698-7084

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

	)	
	)	25PRO.22-11
ESTATE OF	)	
VICTORIA O. O'FARRELL,	)	RESISTANCE TO PETITION FOR
	)	REMOVAL OF SPECIAL
Deceased.	)	ADMINISTRATOR
	)	

Comes Now Raymond O'Farrell, through his attorneys of record, Lee Schoenbeck and Joe Erickson, and resists the Petition for Removal of Special Administrator filed by Paul O'Farrell, for the reasons set for below.

INTRODUCTION

The particulars of the Petition are addressed below. There are some critical introductory matters that the Court needs to be aware of to understand the context in which Paul O'Farrell is making this attack on his father's status as a special administrator of his mother's Estate:

1. Paul O'Farrell has systematically looted his parents' estate, culminating in he and his parents' corporation, VOR, Inc., being sued by First Interstate Bank f/k/a Great Western Bank, which debts totaled in excess of $1.5 million dollars.

2. Raymond O'Farrell had the assistance of counsel, particularly Susan Yexley Jennen, to assist him in protecting his property from the looting efforts of his son, Paul.

3. All the actions that were taken by Raymond were to stop Paul from looting Raymond's assets.

4. Raymond is the beneficiary of his wife's Estate, so Paul attempting to get

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the Court to remove Raymond, because Raymond won't sue himself for a lawsuit where Raymond would be the ultimate beneficiary of, is ridiculous.

RESPONSE TO ALLEGATIONS

Raymond offers these responses to the allegations made in the Petition:

1. Paragraph 1 does not require a response.
2. Denied. The shares of VOR, Inc. were not owned individually, but were owned 100% by the Trust. The shares were transferred into the Trust by Raymond and held separately by Raymond in the Trust.
3. Denied. See the response to Paragraph 2 above. Additionally, Raymond assigned the shares to the Trust, and they would have been held as his separate property within the Trust.
4. With respect to the Complaint alleged in Paragraph 4, we admit that the lawsuit was commenced with the influence of Paul upon his mother, Victoria, and contains the allegations reflected in Paragraphs 4, 9, 15, 16, and 17.
5. Denied. See response to Paragraph 2 above. In June of 2022, Raymond transferred one-half of his shares in VOR, Inc. to himself, personally.
6. Admit the Corporation removed Paul as a director. Admit the Corporation modified the Bylaws to move from two directors to four directors. Admit the Corporation elected new officers. Admit that Raymond voted his 12,500 shares he held individually and his 12,500 shares held in his account within the Trust.
7. Deny, hearsay.

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8. Raymond and VOR, Inc. don't have to let Paul and his company continue borrowing and looting from his parents.

9. See response to Paragraph 4.

10. Admit.

11. Denied. There is no conflict of interest, as there is no valid claim for Raymond to assert against himself.

12. Admit.

13. Denied. The lawsuit was moot when Victoria died, and Raymond has the ability and the right to evaluate the allegations and make the appropriate decisions.

14. Denied.

15. See response to Paragraph 4.

16. See response to Paragraph 4.

17. See response to Paragraph 4.

18. Denied.

19. Denied.

WHEREFORE, Raymond O'Farrell prays that the Court dismiss the Petition for Removal of Special Administrator attempting to remove him as the special administrator of his wife's Estate.

Dated this 11th day of October, 2022.

SCHOENBECK & ERICKSON, PC

/s/ Lee Schoenbeck
Lee Schoenbeck
Joe Erickson

Attorneys for Raymond O'Farrell
1200 Mickelson Dr., STE. 310
Watertown, SD 57201
(605) 886-0010

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing *Resistance to Petition for Removal of Special Administrator* on the following:

David Geyer
Delaney, Nielsen & Sannes, PC
PO Box 9
Sisseton, SD 57262
Attorney for Paul O'Farrell

via electronic means, and upon the following:

Kelly O'Farrell
46658 143rd St.
Marvin, SD 57251
Interested Party

Lance O'Farrell
14845 465th Ave.
South Shore, SD 57263
Interested Party

Rita O'Farrell
36101 Bob Hope Dr., STE. E5
Rancho Mirage, CA 92270
Interested Party

Rita O'Farrell
4657 Melbourne Ave., Apt. 13
Los Angeles, CA 90027
Interested Party

Marcie Reyelts
24700 W. 265th St.
Paola, KS 66071
Interested Party

Marcie Reyelts
12601 Robinson St., Apt. 11-207
Overland Park, KS 66213
Interested Party

by U.S. Mail, postage prepaid, this 11th day of October, 2022.

/s/ Lee Schoenbeck
LEE SCHOENBECK

Filed: 10/11/2022 3:48 PM CST Grant County, South Dakota 25PRO22-000011

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

ESTATE OF VICTORIA O. O'FARRELL, Deceased.	25PRO.22-11 RESISTANCE TO PETITION AND SUPPLEMENT FOR APPOINTMENT OF SPECIAL ADMINISTRATOR

Comes Now Raymond O'Farrell, through his attorneys of record, Lee Schoenbeck and Joe Erickson, and resists the Petition and Supplement Petition for Appointment of Special Administrator filed by Paul O'Farrell, for the reasons set for below.

1. Raymond O'Farrell incorporates by reference the allegations contained in the other Resistances that have been filed by him in this probate and the testimony that will be produced before the Court.

2. Raymond O'Farrell has statutory priority to serve as the special administrator of his wife's Estate, and there's no reason to allow Paul O'Farrell to have any role in the Estate of Victoria O'Farrell, particularly concerning Paul O'Farrell's efforts to loot his parents' estate.

Dated this 11th day of October, 2022.

SCHOENBECK & ERICKSON, PC

/s/ Lee Schoenbeck

Lee Schoenbeck
Joe Erickson
Attorneys for Raymond O'Farrell
1200 Mickelson Dr., STE. 310
Watertown, SD 57201
(605) 886-0010

Filed: 10/11/2022 3:48 PM CST Grant County, South Dakota 25PRO22-000011

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served a true and correct copy of the foregoing *Resistance to Petition and Supplement for Appointment of Special Administrator* on the following:

David Geyer
Delaney, Nielsen & Sannes, PC
PO Box 9
Sisseton, SD 57262
Attorney for Paul O'Farrell

via electronic means, and upon the following:

Kelly O'Farrell
46658 143rd St.
Marvin, SD 57251
Interested Party

Lance O'Farrell
14845 465th Ave.
South Shore, SD 57263
Interested Party

Rita O'Farrell
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Interested Party

Rita O'Farrell
4657 Melbourne Ave., Apt. 13
Los Angeles, CA 90027
Interested Party

Marcie Reyelts
24700 W. 265th St.
Paola, KS 66071
Interested Party

Marcie Reyelts
12601 Robinson St., Apt. 11-207
Overland Park, KS 66213
Interested Party

by U.S. Mail, postage prepaid, this 11th day of October, 2022.

/s/ Lee Schoenbeck
LEE SCHOENBECK

Filed: 10/11/2022 3:48 PM CST Grant County, South Dakota 25PRO22-000011

STATE OF SOUTH DAKOTA :SS
COUNTY OF GRANT

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

FIRST INTERSTATE BANK, a Montana banking corporation, successor by merger to GREAT WESTERN BANK, a South Dakota banking corporation,

Plaintiff,

vs.

vOr, INC., a South Dakota corporation; and SKYLINE CATTLE COMPANY CO. aka Skyline Cattle Company, a South Dakota corporation

Defendants.

_____ CIV 25CIV22-000041

COMPLAINT FOR FORECLOSURE AND JUDGMENT ON NOTES

NOTICE: PLAINTIFF INTENDS TO SEEK A DEFICIENCY JUDGMENT AGAINST THE OBLIGORS OF A PROMISSORY NOTES. THIS COMPLAINT INCLUDES A REQUEST FOR THE COURT TO DETERMINE THE FAIR AND REASONABLE VALUE OF THE MORTGAGED PREMISES.

COMES NOW First Interstate Bank ("Bank" or "Plaintiff"), for its Complaint for Foreclosure and Judgment on Notes, and states and alleges as follows:

PARTIES

1. The Plaintiff, First Interstate Bank ("Bank" or "Plaintiff"), is a Montana banking corporation and is successor by merger to Great Western Bank, a South Dakota banking corporation, with offices in several locations throughout South Dakota.

2. Defendant, vOr, Inc. ("vOr") is a South Dakota corporation. Said Defendant's rights, if any, to the Mortgaged Property which is the subject of this action, are junior and inferior to that of the Plaintiff.

3. Defendant, Skyline Cattle Co. aka Skyline Cattle Company ("Skyline") is a South Dakota corporation. Said Defendant's rights, if any, to the Mortgaged Property which is the subject of this action, are junior inferior to that of the Plaintiff.

Exhibit C 10/18/22 KC

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4. Jurisdiction and venue are proper because the transactions giving rise to this Complaint occurred in the state of South Dakota and the Property that is the subject of this Complaint is within Grant County, South Dakota.

GENERAL ALLEGATIONS

5. On or about January 14, 2003, Defendant, vOr, took fee simple title by virtue of a Quit Claim Deed which was filed at the Grant County Register of Deed's Office on January 15, 2002, as Document No. 203184, in Book 109 at Page 103 to the Property legally described as:

> **Parcel 1:** The SE1/4, except Lot 1, Kane Subdivision, and except the West 100 feet of the East 133 feet of the South 100 feet of the SE1/4, and except Lot H-3, of Section 1, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota
>
> **Parcel 2:** The NW1/4 of Section 16, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota
>
> **Parcel 3:** The S1/2SE1/4 and the S1/2SW1/4 of Section 22, and the S1/2NW1/4, and the S1/2NE1/4, and the N1/2NE1/4, and the SE1/4, except Lot 1, Hopewell Subdivision in the SE1/4, and the N1/2SW1/4 of Section 23, all in Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota
>
> **Parcel 4:** Lot 2A of the Plat of Lots 2A and 2B, O'Farrell Subdivision, a Replat of Lot 2 of the Plat of Lots 1 and 2, O'Farrell Subdivision, located in S1/2SE1/4 of Section 14, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota
>
> **Parcel 5:** The S1/2SW1/4 of Section 23, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

(the "Mortgaged Property"). A copy of the Quit Claim Deed together with the Register of Deed's Certificate is attached hereto as Exhibit "1" and by this reference is incorporated herein.

6. Defendants are engaged in a farming operation upon the Mortgaged Property.

7. Plaintiff has provided financing to the Defendants evidenced by certain Promissory Notes as follows:

A. A Promissory Note dated February 2, 2011 executed by vOr in favor of Plaintiff in the original principal sum of Three Hundred Fifty Thousand, One Hundred Eighty-Two and 00/100 Dollars ($350,182.00), as amended by those

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certain Change in Terms Agreements dated November 4, 2016, December 14, 2016 and November 30, 2021 (collectively, "Note 1"). A copy of the redacted Note 1 is attached hereto as Exhibit "2" and by this reference is incorporated herein.

B. A Promissory Note dated February 29, 2016 executed by Skyline in favor of Plaintiff in the original principal sum of Six Hundred Thousand and 00/100 Dollars ($600,000.00), as amended by those certain Change in Terms Agreements dated December 13, 2016, January 10, 2018, and December 15, 2021 (collectively, "Note 2"). A copy of the redacted Note 2 is attached hereto as Exhibit "3" and by this reference is incorporated herein.

C. A Promissory Note dated July 9, 2018 executed by Skyline in favor of Plaintiff in the original principal sum of Five Hundred Thousand Two Hundred Fifty and 00/100 Dollars ($500,250.00), as amended by those certain Change in Terms Agreements dated July 10, 2018, February 5, 2019, January 27, 2020, February 13, 2020, March 31, 2021 and December 15, 2021 (collectively, "Note 3"). A copy of the redacted Note 3 is attached hereto as Exhibit "4" and by this reference is incorporated herein.

D. A Promissory Note dated December 28, 2018 executed by Skyline in favor of Plaintiff in the original principal sum of Three Hundred Thousand, Two Hundred Fifty and 00/100 Dollars ($300,250.00) ("Note 4"). A copy of the redacted Note 4 is attached hereto as Exhibit "5" and by this reference is incorporated herein.

E. A Promissory Note dated January 31, 2019 executed by vOr in favor of Plaintiff in the original principal sum of Three Hundred Thousand, Two Hundred Fifty and 00/100 Dollars ($300,250.00) ("Note 5") A copy of the redacted Note 5 is attached hereto as Exhibit "6" and by this reference is incorporated herein.

F. A Promissory Note dated May 6, 2021 executed by Skyline in favor of Plaintiff in the original principal sum of Two Hundred Fifty Thousand, One Hundred Forty-Nine and 99/100 Dollars ($250,149.99) ("Note 6," and

together with Notes 1-5, the "Notes"). A copy of the redacted Note 6 is attached hereto as Exhibit "7" and by this reference is incorporated herein.

8. To secure payment of the Notes, vOr executed and delivered to Plaintiff that certain Mortgage dated February 2, 2011 which Mortgage was recorded February 4, 2011, as Document No. 221384 in Book 382 at Page 332 of the Grant County Register of Deed's Office, upon the Mortgaged Property, which Mortgage was modified by that certain Addendum to Collateral Real Estate Mortgage dated January 15, 2016 and recorded January 22, 2016 as Document No. 230549 in Book 422 at Page 351 in the Grant County Register of Deed's Office, and further modified by that certain Addendum to Collateral Real Estate Mortgage dated December 1, 2020, and recorded December 2, 2020 as Document No. 240244 in Book 466 at Page 454 in the Grant County Register of Deed's Office, as further modified by that certain Modification of Mortgage dated January 27, 2020 and recorded January 31, 2020 as Document No. 238518 at Book 454 at Page 941 in the Grant County Register of Deed's Office, as further modified by that certain Modification of Mortgage dated March 31, 2021 which was recorded April 15, 2021 at Document 241042 in Book 470 at Page 433 in the Grant County Register of Deed's Office on the parcels (the Mortgage and all Addendums and Modifications, collectively, "Mortgage 1"). Mortgage 1 is a first lien upon the parcels. A true and correct copy of the redacted Mortgage 1, together with the Register of Deed's Certificate thereon is attached hereto as Exhibit "8" and by this reference is incorporated herein.

9. To secure payment of the Notes, vOr executed and delivered to Plaintiff one certain Mortgage-Collateral Real Estate Mortgage dated August 3, 2015 which Mortgage was recorded August 3, 2015, as Document No. 229676 in Book 418 at Page 615 of the Grant County Register of Deed's Office, upon the Mortgaged Property, which Mortgage was modified by that certain Modification of Mortgage dated January 31, 2019 and recorded February 4, 2019 as Document No. 236760 at Book 446 at Page 672 in the Grant County Register of Deed's Office, as further modified by that certain Modification of Mortgage dated March 31, 2021 and recorded April 15, 2021 as Document No. 241043 at Book 470 at Page 448 in the Grant County Register of Deed's Office, and as further modified by that certain Addendum to Collateral Real Estate Mortgage dated June 30, 2020 and recorded July 1, 2020 as Document No. 1013958 in Book 460 at Page 752 in the Grant County Register of Deed's Office (the Mortgage and all Addendums and Modifications, collectively, "Mortgage 2", and collectively with Mortgage 1, the Mortgage).

Mortgage 2 is a second lien upon the parcels. A true and correct copy of the redacted Mortgage 2, together with the Register of Deed's Certificate thereon is attached hereto as Exhibit "9" and by this reference is incorporated herein.

10. The Notes and Mortgages provide that in case of default the holder may declare the entire principal and the interest accrued thereon due and payable and the Mortgages may be foreclosed.

11. There has been a failure to pay the Notes and interest thereon as provided by the terms of the Notes and Mortgages.

12. On or about May 2, 2022, Plaintiff sent demands for payment to the Defendants on the Notes. Copies of the redacted demand letters are attached hereto as Exhibits "10" through "15" and by this reference is incorporated herein.

13. The Defendant have failed or refused to pay the sums demanded in said demand letters.

14. On June 3, 2022, the South Dakota Department of Agriculture and Natural Resources issued an Agricultural Mediation Release with respect to the Defendants pursuant to SDCL §§ 54-13 and 54-13-1 in connection with above-described Notes, Mortgages, and demand letters. A true and correct copy of said Agricultural Mediation Release is attached hereto as Exhibit "16" and by this reference is incorporated herein.

15. In order to commence this foreclosure proceeding, the Plaintiff has incurred costs and attorneys' fees and costs, which includes the sum of Three Hundred Sixty Two and 10/100 Dollars ($362.10) expended for a title report. Plaintiff is entitled to a judgment for costs and accruing costs, and also reasonable attorneys' fees and costs.

COUNT 1 – FORECLOSURE

16. Plaintiff incorporates by reference herein the allegations contained in the foregoing paragraphs.

17. The Plaintiff reserves the right to pursue deficiency against the Defendants and recognizes their right of redemption, which length of redemption shall be later determined by the court under applicable law.

18. The Plaintiff is the holder of the Notes and Mortgages, and due demand has been made for payment and payment has been refused.

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19. No proceedings at law or otherwise for the recovery of the debt evidenced by the Note and the Mortgage have been had.

20. By reason of the failure to pay the Notes and interest, the Plaintiff has elected and does hereby elect in accordance with the terms and conditions of the Notes to declare the whole of the Notes due and payable forthwith and to exercise its right to enforce payment of the entire Notes as provided by the Notes and to foreclose the Mortgages given to secure the same.

21. The total unpaid balance of the Notes as of April 12, 2022 after allowing all credits due to the Defendants, is $2,116,920.08, with aggregate accruing interest thereafter of $259.63271 per diem, as follows:

A. Note 1: The sum of One Hundred Ten Thousand, Two Hundred Ninety-Two and 49/100 Dollars ($110,292.49) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of $13.50795 per diem;

B. Note 2: The sum of Four Hundred Forty-Three Thousand, Four Hundred Thirty-Six and 12/100 Dollars ($443,436.12) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of $69.46196 per diem;

C. Note 3: The sum of Two Hundred Twenty-Seven Thousand, Five Hundred Eighty-Four and 66/100 Dollars ($227,584.66) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of $29.85501 per diem;

D. Note 4: The sum of Two Hundred Ninety-Three Thousand, One Hundred Fifty-Two and 11/100 Dollars ($293,152.11) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of $44.76377 per diem;

E. Note 5: The sum of Two Hundred Eighty Fourth Thousand Two Hundred Forty Seven and 30/100 Dollars ($284,247.30) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest

continues to accrue on the unpaid principal balance at the rate of $51.07344 per diem;

F. Note 6: The sum of Two Hundred Fifty-Nine Thousand, Two Hundred Seventy-Two and 47/100 Dollars ($259,272.47) which sum includes interest calculated at the current contractual rate through April 12, 2022. Interest continues to accrue on the unpaid principal balance at the rate of $26.75215 per diem.

22. A Receiver may be necessary and is allowed if requested by the Plaintiff pursuant to the terms of the Mortgages.

23. The Plaintiff is entitled to recover attorneys' fees and costs as provided in the Notes and Mortgages.

COUNT 2 – JUDGMENT ON THE NOTE

24. Plaintiff incorporates by reference herein the allegations contained in the foregoing paragraphs.

25. Plaintiff is entitled to an *in personam* deficiency judgment against the Defendant, vOr, for such deficiency as may remain owing on the Note 1 and Note 5 indebtedness after application of the foreclosure sale proceeds.

26. Plaintiff is entitled to an *in personam* deficiency against the Defendant, Skyline, for such deficiency as may remain owing on the Note 2, 3, 4 and 6 indebtedness after application of the foreclosure sale proceeds.

WHEREFORE, the Plaintiff, First Interstate Bank, prays for the following:

A. A judgment for the sums prayed for in this Complaint will be entered *in rem* against the Mortgaged Property legally described as:

Parcel 1: The SE1/4, except Lot 1, Kane Subdivision, and except the West 100 feet of the East 133 feet of the South 100 feet of the SE1/4, and except Lot H-3, of Section 1, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 2: The NW1/4 of Section 16, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 3: The S1/2SE1/4 and the S1/2SW1/4 of Section 22, and the S1/2NW1/4, and the S1/2NE1/4, and the N1/2NE1/4, and the SE1/4, except Lot 1, Hopewell Subdivision in the SE1/4, and the N1/2SW1/4 of

Section 23, all in Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 4: Lot 2A of the Plat of Lots 2A and 2B, O'Farrell Subdivision, a Replat of Lot 2 of the Plat of Lots 1 and 2, O'Farrell Subdivision, located in S1/2SE1/4 of Section 14, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota

Parcel 5: The S1/2SW1/4 of Section 23, Township 121 North, Range 50 West of the 5th P.M., Grant County, South Dakota.

B. That said judgment be declared a lien upon the Mortgaged Property from the date of the Plaintiff's Mortgage 1 and Mortgage 2, prior and superior to any right, title, lien or interest of the Defendants or any of them therein;

C. That the Plaintiff's Mortgages be foreclosed;

D. That any right, title, lien or interest of the Defendants in said Mortgaged Property be declared junior and inferior to the lien of Plaintiff's Mortgages;

E. For the Court to determine the fair and reasonable value of the Mortgaged Property;

F. That an Order be issued by the Court for the sale of the Mortgaged Property or so much thereof as may be necessary to satisfy the judgment including interest, costs, and accruing costs up to and including the sale,

G. That such sale be subject to easements, reservations, declarations of restrictions and covenants to run with the land; that from and after said sale under Court Order, the right, title, lien or interest of the Defendants in and to the Mortgaged Property be forever cut off, barred and foreclosed, and the purchaser at said sale take free and clear of any right, title, lien or interest of the Defendants;

H. That if the Court determines the fair and reasonable value of the Mortgaged Property to be less than the *in rem* judgment entered in favor of Plaintiff thereupon, that Plaintiff be authorized bid not less than the fair and reasonable value of the Property as thus determined at the sale of the Property;

I. That if, pursuant to the Court's authorization, the Plaintiff bids less than the sum of the judgments for the Property, such sale proceeds be applied to Plaintiff's *in rem* judgment;

J. If a deficiency remains after application of the sale proceeds, that a judgment for the deficiency amount be entered *in personam* against the Defendants, and that Plaintiff be entitled to a general execution for such deficiency upon application to the Court; and

K. That a receiver be appointed upon request of the Plaintiff.

The Plaintiff further prays for a Writ of Possession to be issued under the seal of this Court, directed to the Sheriff of Grant County, South Dakota, commanding him or her to put the purchaser at said sale under Court Order or a successor in interest in the possession of the Mortgaged Property.

The Plaintiff further prays for such other and further relief as the Court may deem just and equitable under the circumstances.

Dated this 22nd day of July, 2022.

FIRST INTERSTATE BANK, a Montana banking corporation, successor by merger to GREAT WESTERN BANK, a South Dakota banking corporation, Plaintiff.

By: _____

Craig A. Knickrehm, Attorney at Law (#4908)
Andrew R. Biehl, Attorney at Law (#4948)
WALENTINE O'TOOLE, LLP
11240 Davenport Street, P.O. Box 540125
Omaha, NE 68154-0125
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cknickrehm@walentineotoole.com
abiehl@walentineotoole.com
ATTORNEYS FOR PLAINTIFF

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FAIR DEBT COLLECTION PRACTICES ACT NOTICE

This communication is an attempt to collect a debt and any information obtained will be used for that purpose. Unless, within thirty (30) days after your receipt of this Notice, you dispute the validity of the debt, or any portion thereof, the debt will be assumed to be valid by us. If you notify us in writing within such thirty (30) day period that the debt, or any portion thereof, is disputed, we will obtain verification of the debt and mail a copy of such verification to you. Upon your written request within the thirty (30) day period, we will provide you with the name and address of the original creditor, if different from the current creditor.

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IN THE

Supreme Court

of the

State of South Dakota

No. 30482

PAUL O'FARRELL, individually; and, as a beneficiary of the family trust; and, for the benefit of The Estate of Victoria O'Farrell; SKYLINE CATTLE COMPANY, a South Dakota corporation; & VOR, INC, a South Dakota corporation

PLAINTIFFS/APPELLANTS

VS.

KELLY O'FARRELL, an individual; GRAND VALLEY HUTTERIAN BRETHREN, INC.; a South Dakota corporation; and THE RAYMOND AND VICTORIA O'FARRELL LIVING TRUST, a South Dakota trust; RAYMOND O'FARRELL, individually; as Trustee; and as Special Administrator of the Estate of Victoria O'Farrell; and VOR, INC (by Raymond O'Farrell).

DEFENDANTS/APPELLEES

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Robert L. Spears
CIRCUIT COURT JUDGE

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed on October 6, 2023

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ARGUMENT-IN-REPLY

The Appellees offer a total of twelve responsive arguments in their briefs (seven by the Colony, five by Raymond). For structure here, we first follow the numbering of the Colony's seven arguments, and then turn to Raymond's. However, we will address Raymond's arguments in conjunction with the Colony's in the few instances where they overlap.

1. Paul has not "waived all claims in this action and the other, related actions" by failing to list the elements of tort claims against Kelly

Pleading an independent tort claim against a wrongdoer is not a prerequisite for undue influence claims. *E.g., Matter of Est. of Tank,* 2023 S.D. 59, ¶ 35 (listing elements). Yet, this is the premise behind Section 1 of the Colony's brief (pp.11-13).

In its Section 1, the Colony first faults Paul's Complaint for failing to "list out the elements of each tort" and failing to "plead facts in support [his tort] claims against Kelly." Colony's Brief, p.12. The Colony claims that, as a result, Paul "has not sufficiently pled facts to survive the Motions to Dismiss" and, ergo, "the lower court properly dismissed all claims against Kelly." Colony's Brief, p.13.

This is an unusual argument to make for two reasons. First, elements

are *law,* not *facts.* Thus, not listing *elements,* i.e., *the law,* is different than a failure to list any *facts.*

This argument is also unusual because the Colony is attempting to make it on behalf of Kelly, who has not appeared in this appeal, and, who filed his own Answer to the Complaint, [R.187-199, "Separate Answer and Counterclaim of Defendant Kelly O'Farrell"]. Kelly sufficiently understood the relief being alleged: he interposed affirmative defenses against them, [R.188], and responded to the facts in 114 detailed paragraphs. [R.188-195]. Kelly is the only party who would be aggrieved by the wording the claims against him in Count 3. His Answer is proof that he understood what was being alleged, and what he should defend against.

Furthermore, *none* of the parties below filed, noticed, or briefed a motion seeking dismissal of Paul's tort claims against Kelly.[1] In short, Kelly did not voice the arguments and concerns that the Colony raises in Section 1, and, he waived such arguments by filing an Answer rather than a motion.

Paul and Skyline's allegations against Kelly are simple: that his misconduct amounted to tortious interference with Paul's and Skyline's

[1] *See,* [R.200] (Colony's motion sought "dismissal of Plaintiffs' Complaint against Grand Valley"); [R.131] (Raymond's motion sought dismissal of Count 3 as to "his" entities, but not as to Kelly).

business relationships with VOR. This is not a complicated or novel allegation. Failing to list the *elements* of a cause of action does not require its dismissal under Rule 12(b)(5). Appellees offer no authority to the contrary, and they do not even argue that the facts of the Complaint would not satisfy the elements of tortious interference.

The Colony then morphs its argument, claiming that Paul's alleged failure to plead Count 3 sufficiently against Kelly results in a procedural default of *all other claims*, including undue influence. In the Colony's words, "the entire foundation for this case (and the others) cannot be established as a matter of law," if valid, independent tort claims cannot be pursued against Kelly.

But the elements of undue influence do not require a viable tort claim against the influencer. *See, Matter of Est. of Tank,* 2023 S.D. 59, ¶ 35. At most, the third element requires "a disposition to do so for an improper purpose." *Id.* Proving undue influence is not dependent upon any independent tort. Nor are independent torts required as predicate offenses to the *other* claims that Paul raises: Raymond's lack of capacity; VOR's failure to follow corporate procedure and notice provisions; illegality of trust transfers; and declarations as to Paul's lease, occupancy, and equitable

rights. In short, Issue 1 of the Colony's brief does not support dismissal of the Complaint.

2. Paul and Skyline have standing to pursue declaratory and tort relief.

Section 2 of the Colony's brief questions Paul's standing to pursue his claims. The Colony recites some of the pertinent case law, but then narrowly focuses its analysis upon the claim that "Paul has no enforceable interest until the Trust becomes irrevocable upon Ray's death," and, that Paul is not the current Trustee. Colony's Brief, p.14.

A portion of Raymond's brief (Section 1) also makes a similar standing argument. *See,* p.10 (Paul lacks standing because he "only had an expectation of an inheritance"); p.14 ("Paul is not a beneficiary under the Revocable Trust until Raymond passes away."); p.12 (listing elements of standing but then failing to apply the elements).

Neither of the Appellees squarely address the business injuries alleged by Paul and Skyline. *See,* Paul's Brief, p.38 ("value of capital improvements"); p.39 (the "occupancy rights" of Paul and Skyline, and "the trajectory of their twenty-year farming partnership"); p.39 ("any damages suffered by Paul"). Those injuries offer an independent basis for

standing, regardless of any discussion about Paul's role as a beneficiary.

Likewise, neither of the Appellees refute Paul's argument that he has standing premised upon his role as Successor Trustee, and Paul's assertion that Raymond is no longer able to continue in that role. [R.11]; Paul's Brief, p.24.

Nor do the Appellees refute that Paul has standing to assert that he was improperly removed as President of VOR. *See,* Paul's Brief, p.39.

Nor do the Appellees refute the special exception created in *Matter of Est. of Calvin* for a beneficiary to pursue relief when "the trustee is improperly refusing or neglecting to bring an action, or if the trustee is unavailable or unable to act...." *See,* Paul's Brief, p.40.

Instead, the Appellees concentrate their arguments upon the general rule that a beneficiary of a revocable trust does not have rights in the trust during the trustor's lifetime. Yet, even this general rule has exceptions, including when competency and undue influence are at issue.

For example, courts have held that a beneficiary of a revocable trust has standing *during* the trustor's lifetime in when seeking to challenge trust actions which are the result of undue influence or incompetence. *Starr v. Ashbrook*, 304 Cal. Rptr. 3d 275, 288 (2023), as modified on denial of reh'g

(Jan. 26, 2023), review denied (Apr. 12, 2023) ("Jonathan's allegations that Arnold is incompetent, accepted as true, support Jonathan's standing to bring the petition. Jonathan must, at some point, prove Arnold's incompetence, but that is for a later day."); *accord, Barefoot v. Jennings,* 456 P.3d 447, 450 (Cal. 2020) (settlor's exclusive standing to pursue trust claims applies "as long as settlor is alive...*and* the settlor is *competent*") (emphasis added). "[W]e permit those whose well-pleaded allegations show that they have an interest in a trust—because the amendments purporting to disinherit them are invalid—to petition the probate court." *Id.,* at 451. This exception is necessary to protect vulnerable parties, their assets, and their intended heirs.

In the *Starr v. Ashbrook* case, a beneficiary of a revocable trust alleged that that his father, the settlor, "is no longer competent and is subject to fraud and undue influence[,]....lacks legal capacity...and cannot presently revoke the Trust." 304 Cal. Rptr. 3d at 287. The son's standing was disputed because, like here, the trust was revocable and the settlor was still living. The Court of Appeal found the allegations of undue influence and competency to be sufficient to confer standing upon the son, "subject to his ability to meet his ultimate burden of proving [his father's] incompetence."

Starr, 87 Cal. App. 5th 999, 1016 (citing *Drake v. Pinkham,* 217 Cal.App.4th 400, 408-409 (2013)).

Both Appellees focus upon the number of steps that must be completed prior to Paul's ability to achieve complete relief. But that is not the question here, and, neither of the Appellees addresses the sliding scale of proof required for standing at various stages of the proceeding. *E.g., Cable v. Union Cty.,* 2009 S.D. 59, ¶¶ 22-23 (cited on page 38 of Paul's brief). The *Starr* case from California highlights the use of that principle: if the pleadings themselves suggest standing, then, the litigant has standing to proceed, subject to proving up the basis for it later.

Finally, the South Dakota case of *Arnoldy v. Mahoney*, 2010 S.D. 89 offers an analogous (procedurally and legally complicated) multi-party case in which standing was at issue. There, a would-be sheriff's sale purchaser used a declaratory judgment action to challenge the validity of the actions which led to another party's efforts at redemption, including challenging transactions to which he was not a party. Arnoldy's potential claim (with an equitable interest in the property, and potential financial detriment to him), was sufficient to confer standing. Here, Paul has an equitable interest in this land (because of the improvements he made, and he faces financial

detriment from the termination of the farming relationship and sale of the ground).

"We do not consider whether the party filing the challenge 'will ultimately be entitled to any relief but whether he has the legal right to seek judicial redress for his grievance.'" *Arnoldy*, 2010 S.D. 89, ¶ 27 (quoting *D.G. v. D.M.K.*, 1996 S.D. 144, ¶ 22 (quoting *In re Baby Boy K.*, 1996 S.D. 33, ¶ 14). "In examining South Dakota statutes and case law, it is apparent that a declaratory judgment action is not precluded even when there may be jurisdiction in another action." *Arnoldy,* ¶ 18.

"When standing is placed in issue in a case, the question is whether the person whose standing is challenged, is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99–100 (1968) (quoted favorably in *Matter of Adoption of Baby Boy D.*, 1985 OK 93, ¶ 14, which in turn was a key standing case cited in *In re Baby Boy K.*, 1996 S.D. 33, ¶ 14). "'Standing' is the right to commence litigation, to take the initial step that frames legal issues for ultimate adjudication by a court or jury." *Matter of Adoption of Baby Boy D.*, 1985 OK 93, ¶ 15, 742 P.2d 1059, 1062 (overruled on other grounds).

There, this Court held that '[t]he real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Arnoldy,* ¶ 19. Paul and Skyline meet that test. Or, using the elements of standing, Paul and Skyline show: (i) numerous injuries-in-fact (listed above, and, on pages 38 to 40); (ii) the cause of those (undue influence; lack of capacity; ultra vires corporate acts); and, (iii) their putative redressability (rescission; voiding instruments and actions; replacement of Raymond as trustee; and equitable and tort damages).

The Colony attempts to obfuscate the inquiry by a claiming that Paul cannot seek declaratory relief and a rescission "because he was not a party to the contract." Colony's Brief, p.15. But, that is not the test for standing. And, again, the Colony cites no authority that an interested non-party is precluded from relief. (Indeed, if Paul is *legally* excluded from pursuing rescission as a matter of law, such as via Chapter 53-11, then he would not have an adequate remedy at law, and, would qualify for rescission as a matter of equity.) However, Paul also alleges in his Complaint that he is *bona fide* officer of VOR, Inc., who, but for his wrongful ouster, has such authority.

Or, we can look again to the *Arnoldy* Court, which analogized to

unsuccessful construction bidder cases, in which standing is bestowed for third-parties to challenge agreements (to which they are not parties) when they are tainted by wrongful conduct which undermines the objective and integrity of the process. *Id.*, ¶ 29.

Beyond Paul's and Skyline's standing, the Appellees debate whether Paul is a proper party to pursue claims on behalf of his mother's Estate, the Trust, or VOR, Inc. Paul has outlined his legal theory as to why he can pursue those.

But, since this is a declaratory judgment action, *it does not matter whether Paul is deputized to pursue them.* Each of those parties would be necessary parties to Paul's declaratory action—whether as plaintiff or defendant. Thus, each of those parties *shall* be joined to this action, whether represented by Paul or someone else. SDCL 21-24-7. And, at the conclusion of the declaratory action, the Circuit Court will have the power to award "further relief based on a declaratory judgment...whenever necessary or proper." SDCL 21-24-12. Thus, as long as Paul has standing to bring his own claims (and Skyline's), the presence of these other parties and the relief forthcoming to them is intrinsic and incidental.

Paul has standing as it is defined by this Court.

3. The Colony argues (repeatedly and without any authority) that rescission claims must be pled *with particularity*

The recurring theme in Sections 3, 4, and 5 of the Colony's brief is that rescission claims must be pled with special facts and heightened specificity. In Section 3, for example, the Colony demands that Paul provide extensive facts in order to survive a motion to dismiss. *See, e.g.,* p.18 ("No showing was pled in Paul's Complaint [that he] engaged in 'reasonable diligence' to restore value to Brethren"); p.21 ("Paul did not plead that Brethren connived..."); p.24 ("Paul's Complaint failed to plead sufficient grounds for the lower court to determine whether undue influence was an appropriate ground for recission...."); p.25 ("Paul has failed to properly plead the basic and fundamental requirements of a rescission action").[2]

But the Colony does not cite authority for heightened pleading requirements, and, counsel for Paul has been unable to find any. In contrast, Rule 8 does *not* require copious details within a Complaint, and, instead asks

[2] The Colony also attempts to assert facts, such as that "Paul has no authority or means to restore the $3.2 million to Brethren on behalf of VOR," and "has not tendered any evidence or allegation that he has the means." Colony's Brief, p. 19. Factual allegations like this are, by definition, beyond the scope of a motion to dismiss. The Colony claims Paul is not the President of VOR, attempting to shoehorn facts into the Record from the Secretary of State's filings. Those filings showing Raymond as president are not probative, and, in fact, are circumstantial evidence of Paul's claims: that he *was* the President, and then was improperly removed. Again, this is not an appropriate use of public records in a motion to dismiss.

only or "a short and plain statement." SDCL 15-6-8(a). Rule 8 further explains that the averments "shall be simple, concise, and direct. No technical forms of pleading or motions are required." SDCL 15-6-8(a)(1).

Under our Rules, there is only one type of case which must be pled "with particularity," namely, Rule 9(b) for allegations of fraud. But even this requirement has been tempered by this Court, and only "requires *slightly* more notice than would be forthcoming under Rule 8." *North American Truck & Trailer, Inc., v. MCI,* 2008 S.D. 45, ¶ 9. And, in such fraud cases, the Complaint is sufficient if it alleges "all of the essential elements". *Id.,* ¶ 10. If alleging "the elements" is the *heightened* standard, then, in non-fraud cases, the elements are not required, and, it is sufficient to offer a "short plain statement." Paul's Complaint suffices.

4. Paul's Complaint is not defective for failing to name various other parties.

Commensurate with this strain of "particularity" argument, the Colony also asserts that Paul fails to state a claim for rescission because he "failed to name all parties in the rescission action and the notice of rescission...." Colony's Brief, p.20. *See, also,* p.25-26 (arguing, in essence, that Defendants need not file a Rule 12(b)(6) motion to get relief via

12(b)(6)). This argument is made in Section 4 of the Colony's brief, and again in Section 7. Both are devoid of authority.

In Section 4, the Colony cites no statute or case which supports its claim that Paul's siblings "would need to be included in the Notice of Rescission and as parties to this action." *Id.* Likewise, there is no authority for the proposition that the Notice of Rescission is "deficient" because Paul failed to issue it to First International Bank. *Id.*

Then, with sleight-of-hand, the Colony expands its argument in Section 7 by claiming (again with no authority) that Paul's failure to "plead the basic and fundamental requirements of a rescission action, including naming the proper parties" is a fatal defect that it was not required to raise via a Rule 12(b)(6) motion below.

In sum, there is no law requiring a rescission claim to be pled with specificity, nor is there a law requiring dismissal of a rescission action for the failure to join parties newly alleged to be essential on appeal.

Paul attempted to preempt these types of arguments with Section 2 of his opening brief (pp. 35 to 37). Paul's claim in Section 2 was simple: since none of these Defendants filed a Rule 12(b)(6) motion challenging the absence of necessary parties, this should not be an issue here. And, even if

Defendants had had filed such a motion, the remedy lay with the Circuit Court who "shall" join them as parties to this declaratory judgment action, as required by SDCL 21-24-7.

Raymond asserts that this is a new argument on appeal, and, thus impermissible. This misconstrues the definition of a 'new argument.' Paul raised the arguments in Issue 2 to preempt any 'missing party' arguments in the Appellees' briefs. Paul is not making a new argument to attack the judgment; he is pointing out that nobody should be making the argument. And in any event, now that they have made this argument, Paul would be permitted to respond to that argument in his reply, relying upon the same authority as in his opening brief.

The issue of 'missing parties' was not properly raised by any party below. It is not raised properly on this appeal. It is not a fatal defect in Paul's Complaint. On remand, Paul asks this Court to direct the Circuit Court to join any necessary parties under SDCL 21-24-7.

5. Paul's Complaint pled a substantive cause of action involving the Colony

Continuing further with its demands for "particularity," the Colony uses Section 5 of its Brief to argue that the Complaint does not adequately allege the Colony's "connivance" or "knowledge."

The Colony begins by asserting that Paul did not raise the issue of the Colony's "knowledge" at the Circuit Court level. Colony's Brief, p.21. This is incorrect. At the hearing, Paul pointed out that the Colony could be imputed with knowledge, based upon the wording of the Purchase Agreement, which identifies Victoria's lawsuit. [HT, p. 31:13-32:9].

The Colony provides no authority for its premise that the Complaint needed to include allegations of the Colony's complicity. Such a requirement is contrary to Rule 8, discussed above.

The Colony also attempts to redefine *connivance.* But, even using its Iowa court definition ("voluntary blindness"), the Record contains sufficient evidence that the Colony was either intentional or willfully blind in its assessment of whether Raymond could enter into this transaction. [R.155, "Purchase Agreement"] (where Colony acknowledges Victoria's lawsuit pending against Raymond).

The Colony does not respond at all to Paul's argument that the Colony's "knowledge (or lack thereof) appears to be an affirmative defense that it would need to assert in its Answer." Appellants' Brief, p.32.

Next, the Colony quibbles with "which" avenue of rescission Paul is pursuing. The Complaint does not specify. Paul need not specify.

Rescission is available under various Chapters, and, any of them *could* be the right avenue here. *E.g.,* Chapter 53-11 (effectuating statutory rescission); Chapter 21-12 (equitable); SDCL 20-11A-2 ("conveyance...of a person of unsound mind...subject to rescission").

The Colony fails to address the basic arguments outlined in Paul's opening brief: that rescission can be either equitable or legal. If the attempted legal rescission was unsuccessful, the circuit court can grant an equitable rescission. Paul's Complaint sought "equitable relief as appropriate, including...any other such relief necessary." [R.29; Complaint, ¶ H.]. Under the rules we follow, Paul's Complaint sufficiently seeks a rescission, whether it be legal or equitable.

Finally, the Colony attempts to rely upon factual findings from the truncated eviction proceeding (in which the Circuit Court intentionally *constrained* the testimony so as *not* to get into issues related to the issues of capacity and undue influence). Those proceedings are not binding upon this motion to dismiss.

Paul's Complaint states a valid claim upon which to seek rescission. Paul seeks declaratory relief to invalidate a series of actions, including a land transaction. Rescission against the Colony is a remedy available if those

actions are invalid.

6. Paul is not required to amend his Complaint

In Section 6, the Colony asserts that Paul cannot survive dismissal because he did not move to amend his Complaint to add additional parties, or, add a "cause of action against Brethren," or allege they were complicit.

The simplest response is that the Complaint is sufficient, as is. No amendments are necessary.

The next response is to point out that Paul sought the remedy of amendment at the hearing. [HT, 13:9-23] ("If something is amiss with our complaint, Judge, and this applies to not just this particular motion, but all of these motions to dismiss, Paul and the rest of the plaintiffs ask for the opportunity to amend their pleadings in order to conform with whatever it is that's permissible as far as a recovery."). The Circuit Court ignored and rejected that request.

In contrast, the litigant in *Sisney v. Best* raised the issue only in a reply brief (and not at a hearing). Since Paul's motion was oral, there was no need to file, schedule, or otherwise brief the issue. Based upon that request, Paul simply would have expected the Court's memorandum opinion to invite that remedy. It was clear, however, that no amount of amendments would have

satisfied the Circuit Court.

7. Raymond's withdrawal of trust assets does not prevent Paul's claims

In addition to the standing arguments (addressed above), Section 1 of *Raymond's* Brief makes the claim that Paul cannot pursue any claims because the Trust no longer has any assets, since Raymond withdrew them all personally, and because Raymond is not a party to this lawsuit. Raymond claims that this is "an insuperable bar to relief." Raymond's Brief, p.13.

This is erroneous. Factually, there is no question that Raymond is, indeed, a party to this lawsuit. At the very outset, Raymond appeared in this action. [R.103] ("Notice of Appearance," dated 3/21/2023). In part, Raymond's Notice states:

> PLEASE TAKE NOTICE that Lee Schoenbeck and Joe Erickson of Schoenbeck & Erickson, PC, 1200 Mickelson Drive, Suite 310, Watertown, South Dakota 57201, hereby make an appearance as attorneys for Raymond O'Farrell, The Raymond and Victoria O'Farrell Living Trust, and VOR, Inc., in the above-entitled action.

Raymond's argument gives us the opportunity to underscore a key attribute of declaratory relief. "When declaratory relief is sought, *all* persons shall be made parties who have or claim any interest which would be effected by the declaration...." SDCL 21-24-7 (emphasis added). Raymond made himself a party by appearing.

To the extent that *other* parties need to be joined, the Circuit Court is commanded by SDCL 21-24-7 to join them. Moreover, *even if* some of those other parties are not joined, that statute says that the declaratory relief is *still* effective against all parties who have been joined. *Id.* In sum, the "insuperable bar to relief" alleged by Raymond does not exist, legally or factually.

Raymond also claims that Paul is making "new" arguments about the broad scope of declaratory relief available to him. But in Paul's briefing below, he expressly made this claim. *See, e.g.,* [R.361; "Plaintiffs' Brief Opposing Motions to Dismiss", ¶ 25]. Paul argued, with authority, that "South Dakota's Declaratory Judgment Act is to be liberally construed and administered," and then in ¶¶ 26-27 cited other authority and gave statutory examples from the Act.

8. VOR should not be dismissed as a Plaintiff. But, in any event, VOR is a *necessary* party and Raymond has attempted to appear for it.

Section 2 of Raymond's Brief attempts to argue that VOR was improperly made a Plaintiff. This question revolves around the validity of Paul's ouster as President. If he was invalidly removed, Paul can bring VOR's claims. If not, he can't. But either way, the *question itself* can be raised by Paul, whether VOR is a Plaintiff, or a Defendant. That is the nature of declaratory relief.

"In general, all that is required for declaratory judgment action is existence of justiciable and ripe controversy between adversely interested parties." *Carver v. Heikkila*, 465 N.W.2d 183, 185 (S.D 1991).

Raymond then persists with making the same erroneous argument he made in the eviction appeal, namely, that Paul cannot seek alternate, contradictory theories of relief. This is warranted by the Rules, as well as by this Court's holdings. Rule 8 permits the pleading of inconsistent claims, and, a litigant can "'state *as many separate claims or defenses as he has regardless of consistency* and whether based on legal or on equitable grounds or on both'...and have them submitted to the jury." *United States v. State*, 1999 S.D. 94, ¶ 11 (quoting SDCL 15-6-8(e)(2)) (emphasis in original).

9. Paul is permitted to seek relief "for the benefit" of Victoria's Estate, particularly when her Estate refuses to protect its interests

Section 3 of Raymond's Brief attempts to argue that Victoria's Estate was properly dismissed as a Plaintiff, since Paul is not its fiduciary. To clarify, her Estate is not listed as a Plaintiff. The caption simply announces that Paul is seeking relief that *may* benefit her Estate. (The Summons and Complaint are worded identically, including the phrase "for the benefit of.")

Raymond claims that only he, as its fiduciary, can seek relief. But, in

simplest legal terms, the fact that this is a declaratory action makes it easy to resolve this issue. Paul believes that the Estate has an interest in the outcome of this action. Nobody has asserted her Estate is *not* and indispensable party. And, Raymond (for now) has appeared in this action on behalf of the Estate. [R.123] ("Supplemental Notice of Appearance). We now have the "adversely interested parties" necessary for declaratory relief involving her Estate.

Thus, regardless of whether Paul has authority or not, Victoria's Estate has been made a party, by and through Raymond's appearance. The Special Administrator can argue against the relief. Paul can argue for it. But the fact that Paul's Complaint seeks remedies "for the benefit of" her Estate does not warrant dismissal of the Complaint. Instead, the Estate is an essential party, and, Raymond solved this problem for everyone by appearing on its behalf.

And Raymond does not dispute the rule followed in Nebraska, and elsewhere, that an interested party to an Estate may pursue relief for it when its fiduciaries fail to act. The *Matter of Estate of Jones* case does not refute that rule, and, merely involves a fight over who would be appointed as the administrator. Such a rule is not foreclosed by existing South Dakota law.

10. Paul's Complaint is not frivolous

Section 4 of Raymond's Brief outlines his theory of a frivolous action. It stands in stark contrast to the "reasonableness" arguments in Paul's Brief. The descriptions are like ships passing in the night.

What is notable about Raymond's brief, however, is that he does *not* refute Paul's argument that "if this Court agrees that the Circuit Court's dismissal as in error, the statutory award of attorney's fees is *per se* erroneous." *See,* Paul's Brief, p.42, citing SDCL 15-17-51. Thus, if this Court remands the case, Paul asks the Court to apply that rule.

In the alternative, we also point out that Raymond similarly failed to respond to the rule of law quoted on page 42, from *Gronau v. Weubker,* 2003 S.D. 116, ¶ 10 ("any doubt [about frivolous claim] must be resolved in favor of the party whose legal position is in question"). In the alternative, under that rule, an award of fees was erroneous. Raymond does not dispute this, either. In the alternative, Paul seeks relief from the fee award under *Gronau.*

11. A change of judge is warranted and required

Finally, in Issue 5, Raymond addresses the change-of-judge issues. Notable about this section are all of the arguments Raymond *fails* to address, and, thereby waives.

Raymond does not dispute that his counsel improperly attempted to contest the request for recusal. Raymond does not dispute that SDCL 15-12-23 is *prospective* in application, foreclosing only future affidavits after an initial affidavit. (Nor does that statute say that prior positions are imputed to all parties.) And Raymond does not dispute Paul's argument that recusal should be ordered as a sanction for violating SDCL 15-12-21.1.

As for Paul's argument that disqualification is warranted because Judge Spears' "impartiality might reasonably be questioned," Raymond's sole argument is that "appellants cited no case law that requires removal of a judge when a campaign treasurer works as a paralegal for a firm in front of that judge" (and, was a former employee of that judge). Raymond's Brief, p. 27.

Raymond is correct that Paul did not find a specific case addressing this particular circumstance of a campaign treasurer. Instead, Paul offered cases that an *appearance* of partiality is sufficient, and, he argued that this standard is met here.

Paul's opening brief states that "the objective circumstances rise at least to the level of an appearance of impropriety." Paul's Brief, p. 49.

Raymond does not even attempt to dispute this. Accordingly, Paul

asks this Court to effectuate the disqualification under Canon 3 E(1).

CONCLUSION

Paul asks this Court to reverse the dismissal, vacate the award of attorney's fees, assign this case to another Judge, and remand the case for further proceedings.

Paul believes he has identified both the remedy and the forum for these claims to be heard upon their merits. If not, the prayer for relief in his Complaint requests "any other such relief necessary." [[R.29 Complaint, ¶ H(v)]]. Whatever the shape of such relief, Paul is asking for it.

Dated this 20th day of February, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing approximately 4,997 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2024, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel.

I also hereby certify that on this 20th day of February, 2024, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

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

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

IN THE

Supreme Court

of the

State of South Dakota

No. 30532

IN THE MATTER OF THE
ESTATE OF VICTORIA O. O'FARRELL,
DECEASED

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Dawn Elshere
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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INTRODUCTION

This Appeal

This appeal relates to the unusual (and, as we argue, illegal) appointment of Raymond O'Farrell as the special administrator for his late wife Victoria's estate. The appointment was achieved without notice or a hearing, and, it placed Raymond in the role where he would assume the role of plaintiff in his late wife's pending lawsuit against him. The law does not allow this.

Related Appeals

This appeal[1] relates to several other matters and appeals. The initial matter was a civil lawsuit commenced by Victoria O'Farrell against her husband Raymond, in which she sought to halt a series of drastic changes to their estate plan.[2] Victoria died shortly after commencing that suit, and, the attorneys helping Raymond opened this probate and attempted to secure his appointment as the special administrator for Victoria's Estate, in July 2022.

By mid-August 2022, Raymond had been convinced to sell most of the couple's long-held farm ground. The $3.2 million sale to Grand Valley

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[1] Appeal #30532, arising from 25PRO22-11

[2] Appeal #30508, arising from 25CIV22-38

Hutterite Colony closed in October 2022 (the day prior to the hearing on Paul's motion to intervene in Victoria's dormant lawsuit). The land sale led to the attempted ejection and eviction of Paul O'Farrell from the family farm which he had helped care for and improve for decades.[3]

However, prior to the filing of that eviction claim, Paul had already commenced a lawsuit (in March 2023) seeking to unwind the real estate sale and to invalidate Raymond's other corporate and fiduciary actions.[4] Meanwhile in a parallel action, Paul's attempt to secure a guardianship and conservatorship for Raymond was rejected by the Circuit Court.[5]

All of these matters are interrelated, and, ultimately we expect all of these appeals and proceedings to be combined.

Transcript & Record

References to the settled record are denoted by [R.123]. The Circuit Court conducted a motions hearing on October 18, 2022. That Hearing Transcript is referred to by page number as [VHT 123, 10/18/22].

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[3] *See*, 23CIV23-18; Appeal #30344

[4] *See*, 25CIV23-15; Appeal #30482

[5] *See*, 25GDN23-01; Appeal # not yet assigned

JURISDICATIONAL STATEMENT

Appellants appeal the Circuit Court's entry of an Order by the Hon. Dawn Elshere on 7/18/2022 [R.5]. No notice of entry was given of that Order, nor any subsequent action by the Circuit Court. Appellants filed their notice of appeal on 11/7/2023. [R.54].

This Court has jurisdiction under SDCL 15-26A-3(4) to consider an appeal from the circuit court's order appointing Raymond as special administrator. An order appointing a special administrator is a final action upon the petition seeking appointment. *See Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d 766, 770 ("orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for decision").

STATEMENT OF THE CASE

In June of 2022, Victoria O'Farrell brought a lawsuit to halt Raymond from making further changes to the family's estate plan. Her Complaint describes an orchestrated campaign of undue influence exercised by their son Kelly, who was angry at his prospective inheritance under the Trust. [R.13-14]. The Complaint alleges that Raymond had diminished capacity, couldn't

read, and did not understand the actions he was taking. [R.14]. Victoria died prior to further proceedings, and the upcoming hearing was canceled.

Paul attempted to intervene in his mother's lawsuit, and, also attempted to alert the Court that Raymond was not a suitable representative for the Estate. The Circuit Court held a motions hearing on October 18, 2022, involving the Estate, and, involving Victoria's lawsuit against Raymond. [VHT 1-175]. At the outset of the hearing, the Circuit Court noted that, "I have two files set for hearing at the same time [including] 25CIV22-38...and...25PRO22-11," and it took up the civil file first. [VHT 6]. The Court discussed (but did not squarely address) the problems of Raymond's appointment.

Paul's appeals from the original order appointing Raymond, and he assigns two errors: that the appointment was *procedurally* void because of a failure of notice, or, that the appointment was *legally* void because it purported to install Raymond as the Plaintiff in a pending lawsuit against himself.

LEGAL ISSUES

1.

The Probate Code contains mandatory notice provisions, as well as a separate proof-of-notice provision. *See* SDCL 29A-1-401(a) and (c). Interested parties are afforded 14 days' notice of formal proceedings. In proceedings to appoint a Special Administrator, the Probate code contains an exception to the notice requirements notice in certain situations when "an emergency exists," but, the Probate Code still requires a hearing to be conducted. *See* SDCL 29A-3-614(2).

Here, the Record contains no proof that service was made upon interested parties of the Petition; nor does the Record show that notice of a hearing was given; nor that a hearing took place; nor that the Circuit Court made a finding that an "emergency" existed to dispense with notice; nor that the Circuit Court made a conclusion that notice could be waived here; nor that any parties were issued notice of the appointment after the Court's action.

Is the Circuit Court's appointment of Raymond procedurally void? Yes, the appointment is procedurally void.

Ruling Below: The Circuit Court appointed Raymond as Special Administrator one week after Victoria's death. [R.5] The Order makes no findings of an emergency, no conclusions waiving notice, and no indication that a hearing was conducted.

- SDCL 29A-1-401(a) (14-day notice)
- SDCL 29A-1-401(c) (proof of notice)
- SDCL 29A-3-614(2) (formal proceeding for appointment of special administrator)
- *Matter of Est. of Petrik*, 2021 S.D. 49

2.

Special Administrators are "qualified" fiduciaries who may be appointed in lieu of Personal Administrators "when necessary to preserve the estate," or, "where a general personal representative cannot or should not act." SDCL 29A-3-614(2). An individual is not legally competent to serve as an executor/fiduciary of an Estate where his duties would involve prosecuting a suit which he would, at the same time, defend as an individual. More generally, collusive lawsuits are not permitted under the Rules of Civil Procedure, nor under the Rules of Professional Conduct.

Is the Circuit Court's appointment of Raymond as Special Administrator legally void? Yes, the order appointing Raymond was substantively and legally void.

Ruling Below: The Circuit Court appointed Raymond as Special Administrator upon a finding that "it is necessary to protect the estate of the decedent pending the search for a will." [R.5]. The ruling makes reference to Victoria's lawsuit against Raymond only by its file number (25CIV22-38). The ruling does not expressly recognize that Raymond is a defendant in Victoria's lawsuit. *Id.*

- SDCL 29A-3-614
- SDCL 15-6-17(a)
- *Hampshire v. Powell,* 626 N.W.2d 620 (Neb. 2001)
- *Matter of Est. of Jones*, 2022 S.D. 9
- *Matter of Est. of Cutler*, 368 N.W.2d 724 (Iowa Ct. App. 1985)

STATEMENT OF THE FACTS

The background facts are familiar to this Court in light of the related appeals. For the sake of efficiency, we refer the Court to the factual summary sections in the parallel appeals. *See,* Appellants' Brief #30482 (pp. 15-17); Appellants' Brief #30344 (pp. 9-17); Appellants' Reply Brief #30344 (pp. 2-7); Appellant's Brief #30508 (pp. 16-20). What follows here is a brief summary of the facts referenced in the Petition and Order of appointment. [R.1 to R.6].

The Order appointing Raymond as Special Administrator was to be self-limiting, confined "to such time as it is necessary to investigate whether the decedent has a will." [R.5] There is no indication that a subsequent search took place, or, as to what was found.

The also Order refers to "pending negotiations involving possible foreclosure proceedings that would have considerable adverse effects on the estate of the decedent." [R.5]. No inventory has been filed identifying Victoria's assets which would have been adversely affected by the foreclosure. Further, no foreclosure had been filed or served at the time of the Petition.

The Order does not refer to an emergency. The Petition asserts that there is an "emergency" requiring appointment without further notice because "the pending litigation [in which Raymond was a Defendant] requires immediate attention of a Special Administrator to protect the estate of decedent....." [R.2, ¶ 6].

A deputy clerk appears to have issued the initial letters of Special Administration on July 21, 2022, and, "corrected" letters signed by Judge Elshere were then issued and filed on July 22, 2022. [R.7, R.8].

STANDARD OF REVIEW

The following standards of review apply to the issues in this appeal.

- *De novo* review applies to the construction and application of statutes, rules of procedure, and the Probate Code. *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 15; *In re Est. of Flaws*, 2016 S.D. 61, ¶ 12; *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16. This Court has also used *de novo* review when interpreting statutory notice requirements. *Abata v. Pennington Co. Bd. of Comm'rs,* 2019 S.D. 39, ¶ 9.
- A circuit court's appointment of a special administrator (or personal representative) is reviewed for an *abuse of discretion. Matter of Est. of Jones*, 2022 S.D. 9, ¶ 33. An abuse of discretion refers to "a discretion

exercised to an end or purpose not justified by, and clearly against reason and evidence." *Matter of Shirley A. Hickey Living Tr.*, 2022 S.D. 53, ¶ 14 (quotations and citations omitted). A Circuit Court abuses its discretion by applying the wrong legal standard, or failing to apply any standard. *State v. Vento*, 1999 S.D. 158, ¶ 5.

SUMMARY OF ARGUMENT

1.

The Circuit Court abused its discretion by appointing Raymond as special administrator without following the procedure set forth in the Probate Code. It did not conduct a hearing; it made a ruling on a petition that Raymond filed and pursued without notice; and the Circuit Court did not expressly waive the notice requirements due to an emergency. As a result, the Order was void.

2.

Even if it had followed the proper procedure, the Circuit Court further abused its discretion as a matter of substance. A special administrator is legally incapable of assuming an appointment of a role in which he would litigate claims against himself. Raymond was legally incapable of serving the

role to which the Circuit Court appointed him, and, his Petition appeared to conceal this conflict of interest from the Circuit Court.

Thus, in addition to being procedurally void due to a lack of notice, the appointment was substantively invalid.

ARGUMENT

1. Raymond's appointment as Special Administrator is procedurally invalid because of a failure of notice and a hearing

Raymond's appointment as special administrator involves the application of SDCL 29A-3-614, as well as the notice provisions of the Probate Code. *See, generally, Matter of Est. of Petrik,* 2021 S.D. 49, ¶ 22 (discussing and quoting 14-day notice provisions).

In this case, the lawyers representing Raymond convinced the Circuit Court to appoint him as Special Administrator without a hearing, without prior notice to anyone, without an express finding of emergency, and without notice to anyone following the appointment. Any of these defects render the appointment procedurally void.

(a) The Order is void for failure of notice

On July 18, 2022, the Circuit Court signed and filed an Order appointing Raymond as Special Administrator for his wife's Estate. [R.5]. This Order was entered seven days after her death, and, on the same day that

the Petition was filed. This does not comply with the Probate Code's notice provisions.

Probate proceedings can involve either *informal* proceedings conducted by the Clerk of Courts, or, *formal* proceedings conducted by the Circuit Judge. SDCL 29A-3-105.

"[T]he UPC distinguishes informal from formal proceedings, and their notice requirements, based upon whether a request for relief is directed to a court or the clerk. 'Informal proceedings' simply refer to 'those conducted *without notice* to interested persons by the clerk of court.' SDCL 29A-1-201(22) (emphasis added). 'Formal proceedings,' by contrast, refer to 'proceedings conducted before a judge *with notice* to interested persons.' SDCL 29A-1-201(18) (emphasis added); *see also In re Estate of Ricard*, 2014 S.D. 54, ¶ 12, 851 N.W.2d 753, 757 (noting the distinction between informal proceedings and formal proceedings)." *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 22.

"Applying these uncomplicated statutory definitions," the Circuit Court's appointment of the Special Administrator is a formal proceeding subject to the notice and hearing requirements. *See id.* at ¶ 23. "The court

may hear and determine formal proceedings...after notice in conformity with § 29A-1-401...." SDCL 29A-3-105.

Notice requirements "in conformity with" SDCL 29A-1-401 mandate that "notice shall be given...by mailing [or delivering] a copy of the notice of hearing and of the petition at least fourteen days before the time set for the hearing...." SDCL 29A-1-401(a)(1) and (2). This statute contains a separate requirement that the Petitioner file **proof of compliance** with this notice requirement. *See* SDCL 29A-1-401(c) ("proof of the giving of notice shall be made on or before the hearing and filed in the proceeding"). "As a rule of statutory construction, we have determined that 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." *Discover Bank v. Stanley*, 2008 SD 111, ¶ 21 (interpreting civil litigation rule).

Here, in contrast to those mandates, no notice was given; no proof of notice was filed; and, it would have been mathematically impossible for such notice to have been given. If the Probate Code had been followed, the Petition and a Notice of Hearing should have been mailed to the interested parties at least "fourteen days before the time set for the hearing." SDCL 29A-1-401(a)(1) and (2).

No notice was issued, but even if Raymond's attorneys had sent such notice and filed it with the Court, the relief obtained here could not comport with the notice requirements. The Order was issued on July 18, 2022, and the Petition is signed and dated the same day, July 18, 2022, *i.e.,* less than 14 days.

Further, this was just seven days following Victoria's death, so the Circuit Court had not even had jurisdiction over her Estate for 14 days at the time of this Order. If the ordinary notice process had been followed, the *earliest* the hearing could have taken place would be on July 25, 2022, absent some affirmative act by the Circuit Court to shorten the notice requirements. The Order is void for failure of notice of the Petition.

(b) The Order is void for failure to adjust or waive notice

No steps were taken to adjust or eliminate the notice provisions of the Probate Code. There are statutory mechanisms by which parties can (in limited circumstances) waive notice. But those statutes were not followed.

For example, SDCL 29A-1-402 provides that "a person...may **waive** notice by a writing signed by the person or the person's attorney and filed in the proceeding." (emphasis added). No such waiver appears in the Record.

The Special Administrator statute also contains a mechanism by which the Circuit Court can dispense with notice, but that statute was not followed either. In pertinent part, SDCL 29A-3-614(2) provides that "[i]f it appears to the court that an emergency exists, appointment may be ordered without notice." But the Circuit Court did not make express findings that such an emergency existed. Nor do the facts here suggest an emergency.

(c) The Order is void for the failure to conduct a hearing

Furthermore, *even if an emergency existed,* the Circuit Court cannot conduct such proceedings without a hearing. The black and white text of SDCL 29A-3-614(2) provides that when a special administrator is appointed in formal proceedings, it must be done "after notice ***and hearing***...." (emphasis added). The *emergency* clause dispenses only with the *notice* requirement, but *not* the *hearing* requirement.

In this case, there is no indication that a hearing took place. So, not only was there a failure to notify anyone of the Petition, and, a failure to issue notice of a hearing, but Raymond's attorneys failed to even seek a hearing upon that Petition. Thus, the Order is void because no hearing took place.

A hearing on a probate matter is not an idle exercise, as this case demonstrates. At a hearing, the Circuit Court would have been handed a

copy of Victoria's Complaint, rather than simply the numerical file number. A hearing in this case would have given the Circuit Court the opportunity to ask questions of counsel, and the Court would very likely have recognized that Raymond was not entitled to the relief he was requesting. The Circuit Court would have immediately recognized that Raymond was, in actuality, seeking to become the Plaintiff in a lawsuit against himself. The Circuit Court would have refused the maneuver.

(d) The Order is void for failure of notice of its entry

Finally, no notice was given of the Circuit Court's order of appointment. This, too, is problematic, because no interested party would have any other way to learn what Raymond was doing. Further, the Order would not become "final" until thirty days after notice of its entry. *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 19. Absent notice before or after, the Order was a rogue document upon which nobody should yet rely.

In sum, the Order was void as a matter of law. It was issued to a party who failed to comply with the Probate Code's notice provisions. It was issued without a Hearing. And no notice was given after its entry.

Timely notice is an essential element of a probate proceeding. *See, In re Estate of Schuldt*, 457 N.W.2d 837, 840 (S.D. 1990). A proper hearing is an

essential element of a probate proceeding. *Matter of Estate of Petrik,* 2021 S.D. 49, ¶¶ 24, 31 ("absence of…a hearing").

The remedy for a failure of notice, or, for a failure to conduct a hearing is to "vacate the court's order…and remand the case for further proceedings." *Id.* at ¶ 31.

Paul asks that the July 18, 2022, Order be vacated because it is void.

2. The order of appointment is also substantively invalid because of Raymond's inherent conflict of interest.

The use of a special administrator is limited to circumstances where "appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act." SDCL 29A-3-614(2). If the person seeking to be named as special administrator is not named personal representative in the will, they must be a "qualified person." SDCL 29A-3-615(b). An individual is not "qualified to serve" if they are "unsuitable." *C.f.,* SDCL 29A-3-303 (addressing personal representative qualifications). *See also,* SDCL 29A-3-611(b)(3) (disqualifying conditions for special administrator include being "incapable of discharging the duties of

office" or, "intentionally misrepresent[ing] material facts in the proceedings leading to appointment").

"No one can serve as a special administratrix whom the trial court finds unsuitable. A person may be deemed unsuitable by reason of an interest in pending litigation, or bias or prejudice.....The circuit court must have confidence that the person will demonstrate the utmost loyalty, impartiality, and integrity, and that the person does not have an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment." *Matter of Est. of Jones*, 2022 S.D. 9, ¶ 33 (quoting *In re Est. of Hutman,* 705 N.E.2d 1060, 1064-65 (Ind.Ct.App. 1999)).

Raymond's Petition for special administrator did not seek to cure the statutory situation of "circumstances where a general personal representative cannot and should not act." Instead, Raymond was seeking appointment under circumstances where he, himself, *cannot and should not act.* In particular, he sought this office so that he could assume the mantle as plaintiff in a pending lawsuit against him. This is legally impermissible, and, it made his appointment void from the start.

One of the basic, structural requirements of a lawsuit is that there are lawyers zealously advocating *both* sides of the case. This Court has described it as "the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation...." *Wilcox v. Vermeulen*, 2010 S.D. 29, ¶ 35, 781 N.W.2d 464, 474 (citing SDCL 16-18 App., Rules of Prof. Conduct, Rule 1.7, cmt 17) (Meierhenry, J., and Gilbertson, C.J., concurring specially). *And, see, Southard v. Hansen,* 342 N.W.2d 231, 233 (S.D. 1984) (citing *Dehn v. Prouty,* 321 N.W.2d 534 (S.D. 1982) (likening collusion between plaintiff and defendant as "opposing parties breathing together to the detriment of another party.") *C.f.,* SDCL 15-6-17(a) (real party in interest statute).

More particularly for probate proceedings, courts "recognize the rule that a person...is not 'legally competent' to act in that capacity [as executor], where his duties would require him to prosecute on behalf of adversary litigants, a suit which he would at the same time defend as an individual." *Hampshire v. Powell*, 626 N.W.2d 620, 626 (Neb.App. 2001) (citing *In re Moss Est.*, 157 N.W.2d 883, 886 (Neb. 1968) (in turn, quoting *In re Estate of Blochowitz*, 245 N.W. 440 (Neb. 1932)).

The rule in Nebraska is that "where there exists at the time of the hearing on appointment of executor, a conflict of interest of a nature sufficiently adverse or antagonistic that the exercise of proper judicial discretion would require the immediate removal of an executor if he were appointed, the named executor is not legally competent under [the Nebraska Probate Code][6] and should not be appointed." *In re Moss Est.*, 157 N.W.2d at 887.

Courts in Iowa and Wisconsin have similarly held that an executor's appointment is impermissible when it would place the executor at odds with himself within pending litigation. "His plain duty would be to conserve the estate. His personal interest would demand that the claim of the estate against himself be defeated. Under such conditions he could not faithfully

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[6] The Court referred to section 30–302, R.R.S.1943, which provided that when "the court, in the exercise of a sound judicial discretion, determines that such applicant for appointment is 'incapable or unsuitable to discharge the trust,' such appointment should not be made". *In re Haeffele's Est.*, 145 Neb. 809, 813, 18 N.W.2d 228, 231 (1945) (quoting and applying section 30-302).

That Nebraska statute is substantially the same as SDCL 29A-3-303(f)(2), which states that: "No person is qualified to serve as a personal representative who is…[a] person whom the court finds **unsuitable** in formal proceedings") (emphasis added); and SDCL 29A-3-611(b)(3) (disqualifying conditions for special administrator include being "**incapable** of discharging the duties of office")

serve two masters. There would undoubtedly exist such a conflict of interest and such hostility as would interfere with the proper administration of the estate." *Matter of Est. of Cutler*, 368 N.W.2d 724, 727 (Iowa Ct. App. 1985) (quoting *In re Zartner's Will*, 198 N.W. 363, 367 (Wis. 1924)).

The same conclusion was reached by an Ohio court of appeals. Although the executrix "has every right to assert her personal claims...the fiduciary obligations as executrix impose upon her...a confidential relationship....Such a fiduciary must be capable of reasonable impartiality...and of reasonable zeal to further the interest of the estate as against any particular claimant." *In re Young's Est.*, 212 N.E.2d 612, 617 (Ohio Ct. App. 1964). In that case, her personal interests and claim were "antagonistic not only to the estate as such but...directly adverse to legatees and beneficiaries," and thus she was "not in a position to reasonably fulfill those obligations and is not a suitable person to act in a fiduciary capacity." *Id.*

It is not a defense that the executor's appointment was unchallenged at that time. "We perceive no good reason to permit an executor to anchor himself in office by merely floating by any meaningful examination of his suitability at the time of appointment. To do so is to put an unintended

premium on the initial appointment of an executor, which is often done perfunctorily and expeditiously." *Matter of Est. of Cutler*, 368 N.W.2d at 727. *See, also, Moss*, 157 N.W.2d at 887 (noting "the absurdity that a court might be required to appoint an executor who should be immediately removed. Such an approach glorifies form at the expense of substance.")

The Nebraska approach treats the question of disqualification as one of judicial discretion, but, with the recognition that some conflicts of interest will be so "serious, adverse, or antagonistic to prevent appointment...." *In re Moss' Est.*, 157 N.W.2d at 887 (Neb. 1968) (citing ANNOTATION 18 A.L.R.2d 633, '*Adverse interest or position as disqualification for appointment as personal representative.*').

This is a fact-intensive inquiry. "The problem of whether a personal interest is of a nature sufficiently adverse or antagonistic to be deemed a disqualification can only be answered with reference to the nature or extent of such interest, the relationship of the parties, or other circumstances involved in the particular situation. The necessity for an accounting, the fact that an interest is disputed or contested, or in litigation, have all been considered as important elements in making such a determination." *In re Moss Est.*, 157 N.W.2d at 887.

However, as a universal rule, Courts have held that an individual is *per se* disqualified from serving as an executor when the appointment would place her in a position opposite herself in an Estate lawsuit. *E.g., Hampshire v. Powell*, 626 N.W.2d 620, 626 (Neb.App. 2001) (prosecuting and defending same lawsuit disqualifies personal representative from office); *In re Estate of Mills*, 29 Pac. 443, 444 (Or. 1892) (administrator incapable of serving while holding real estate claim adverse to estate); *Putney v. Fletcher,* 19 N.E. 370, 370-371 (Mass. 1889) (executor unsuitable because Estate held claim against him for fraudulent conveyance); *Corey v. Corey,* 139 N.W. 509, 511 (Minn. 1913) (estate representative "unsuitable plaintiff to prosecute an action...against himself" regarding validity of prior transactions); *In re Zartner's Will*, 198 N.W. 363, 367 (Wis. 1924) (not possible for administrator to serve two masters by bringing claim against himself).

In short, Victoria's Estate, Paul, and all of the other interested parties "are entitled to have their interests in the estate proceedings represented by someone independent of the conflicts of interest apparent here." *Matter of Est. of Cutler*, 368 N.W.2d 724, 729 (Iowa Ct. App. 1985). In that case, as with all of the other cases cited, the remedy is to "remand for the trial court's appointment of a new executor." *Id.*

Although a Circuit Court's discretion is broad, there are no circumstances under which it could appoint Raymond as special administrator, thereby installing him as caretaker of the lawsuit pending against him personally. The Petition sought relief that was void, invalid, and illegal from the start.

CONCLUSION

Paul asks for this Court to vacate the Order appointing Raymond as Special Administrator and remand for further proceedings.

Dated this 22nd day of December, 2023.

HOVLAND, RASMUS,
BRENDTRO & TRZYNKA, PROF. LLC

/s/ Daniel K. Brendtro
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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 approximately 4,433 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2023, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel and counsel for interested parties.

For those interested parties not represented by counsel, I also hereby certify that on this 22nd day of December, 2023, I sent a copy of the foregoing via U.S. Mail to the following:

Lance O'Farrell
15196-455th Ave.
Summit, SD 57266
Potential Interested Party

Marcie Reyelts
24700 W. 265th St.
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Rita O'Farrell
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Potential Interested Party

I also hereby certify that on this 22nd day of December, 2023, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

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

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

APPELLANTS' APPENDIX

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

****

25PRO22-000011

ESTATE OF	*	
VICTORIA O. O'FARRELL,	*	ORDER APPOINTING
Deceased.	*	SPECIAL ADMINISTRATOR

****

Upon consideration of the petition for the appointment of a special administrator, the court finds:

1. The venue is proper in this court and it is proper to appoint the petitioner, Raymond A. O'Farrell, as Special Administrator without further notice for the reasons presented in the petition for appointment as Special Administrator without bond. The court is satisfied that at the time of decedent's death, she was involved as a party in a lawsuit in Grant County, South Dakota, (25CIV22-000038), and also, there appears to be pending negotiations involving possible foreclosure proceedings that would have considerable adverse effects on the estate of the decedent. Pursuant to SDCL 29A-3-614, petitioner is an interested person, and it is necessary to protect the estate of the decedent pending the search for a Will and determination of whether the decedent died testate or intestate.

2. The decedent died on the 11th day of July, 2022.

3. The decedent was domiciled at death in Grant County, South Dakota.

4. The appointment of a Special Administrator is necessary to protect the estate pending the search for a Will and determination of the proper probate proceedings.

IT IS ORDERED:

A. The findings are made a part of this order.

B. Raymond A. O'Farrell is appointed as Special Administrator of the estate of Victoria O. O'Farrell with the powers of a general personal representative until such time as the duties have been completed.

The personal representative's term should be limited to such time as it necessary to investigate whether the decedent has a Will, and such is offered and accepted in probate or

upon determination that the decedent died intestate and intestate proceedings properly commenced.

And letters shall be issued to the special administrator to serve without bond.

BY THE COURT:

7/18/2022 3:00:58 PM

Attest:
Reichling, Sandy
Clerk/Deputy

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30532

In the Matter of the
ESTATE OF VICTORIA O'FARRELL,

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

HONORABLE DAWN ELSHERE
Presiding Judge

APPELLEE RAYMOND O'FARRELL'S BRIEF

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Notice of Appeal was filed November 7, 2023

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INTRODUCTION

Paul O'Farrell initiated this appeal while he also has a pending Petition in front of the trial court requesting the same relief—removing Raymond as a special administrator. (SR PRO. 13-15, App. 1-3.) Paul's Petition in front of the trial court has been pending since September 2022, after it was not heard at the hearing that Paul O'Farrell set for October 18, 2022. Paul now ignores that Petition and seeks appellate review.

Further, Paul claims Raymond should be removed as a special administrator of Victoria's Estate because of purported *procedural defects* never presented to the trial court and Raymond's position as a defendant in Victoria's lawsuit. (Victoria's lawsuit was voluntarily dismissed in 2022 (SR V. 553), and Paul started his own lawsuit in 2023 (SR P. 7).) Because the trial court did not abuse its discretion and Paul waived his notice arguments with his pending Petition, if this Court has jurisdiction, the trial court's order appointing Raymond should be upheld.

PRELIMINARY STATEMENT

Appellant, Paul O'Farrell, as an interested party to the Estate of Victoria O'Farrell, will be referred to as "Paul"; Skyline Cattle Company, Appellant's company, will be referred to as "Skyline"; Lance O'Farrell as a potential interested party and represented by Appellant's counsel will be referred to as "Lance"; Appellee Raymond O'Farrell, individually and as special administrator of the Estate of Victoria O'Farrell, will be referred to as "Raymond"; Victoria

O'Farrell, deceased, and the Estate of Victoria O'Farrell will be referred to as "Victoria" or "Victoria's Estate."

The motions hearing transcript dated October 18, 2022, will be referred to as "VHT" followed by the appropriate page number. There are four court files included in the settled record for this appeal, but only the following two files are cited in this brief:

1. "SR PRO." is a reference to the underlying court file of this appeal, *Estate of Victoria O'Farrell*, 25PRO.22-11 (Appeal #30532); and
2. "SR V." is a reference to the civil lawsuit, 25CIV.22-38 (Appeal #30508), *Victoria O'Farrell v. Raymond O'Farrell, et al.*

All cites to the settled record will be followed by the appropriate page numbers. The Appendix for this brief is referred to as "App." followed by the appropriate page number.

JURISDICTIONAL STATEMENT

This Court does not have jurisdiction for this appeal because of Paul's pending Petition requesting appointment as a special administrator and a request for the removal of Raymond O'Farrell. (SR PRO. 11-15, App. 1-3.) As this Court described in the *Matter of Estate of Petrik*, when there are two petitions with the same subject matter—an appeal cannot be taken until there is an order that leaves nothing for the trial court to decide:

> Once a petition is filed, it defines a proceeding. Further pleadings relating to the same subject matter, whether labeled motions or petitions, are part of the same proceeding. When the subject matter of two petitions overlap, it would generally be appropriate to consider both petitions as belonging to the same

> proceeding .... [A]n order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding.

2021 S.D. 49, ¶ 17, 963 N.W.2d 766, 770 (citations omitted).

Paul does not acknowledge his pending Petition in his Appellant Brief and does not provide an explanation for why his pending Petition was *abandoned* before the trial court ruled on it.

STATEMENT OF LEGAL ISSUES

1. **Whether this Court has jurisdiction to hear Paul's appeal of the Trial Court's Order appointing Raymond special administrator when Paul has a pending Petition to remove Raymond as special administrator that the Trial Court has not ruled upon.**

No, this Court does not have jurisdiction.

SDCL 15-26A-3(2)

Estate of Fox, 2018 S.D 35, 911 N.W.2d 746
Matter of Estate of Petrik, 2021 S.D. 49, 963 N.W.2d 766
In Re Estate of Geier, 2012 S.D. 2, 809 N.W.2d 355

2. **Whether the Trial Court's Order appointing Raymond as a special administrator is void, if this Court has jurisdiction to address that issue.**

No, the Order appointing Raymond as special administrator is not void.

SDCL 29A-3-614
SDCL 29A-3-611

Matter of Estate of Jones, 2022 S.D. 9, 970 N.W.2d 520
Schafer v. Shopko Stores, Inc., 2007 S.D. 116, 741 N.W.2d 758
Sioux Falls Shopping News, Inc. v. Dept. of Revenue and Regulation, 2008 S.D. 34, 749 N.W.2d 522

STATEMENT OF THE CASE

On July 18, 2022, the trial court entered an Order appointing Raymond as special administrator to Victoria's Estate. (SR PRO. 5-6.) The clerk of courts first issued letters of special administration on July 21, 2022. (SR PRO. 7.) Then, on July 22, 2022, the judge signed letters of special administration. (SR PRO. 8.)

On September 26, 2022, Paul filed a Petition asking the trial court to appoint him as a special administrator. (SR PRO. 11-12.) On September 26, 2022, Paul also filed a Petition for Removal of Special Administrator pursuant to SDCL 29A-3-611, wherein Paul alleges Raymond should be removed as the special administrator because Raymond was named a defendant in Victoria's lawsuit before she died. (SR PRO. 13-15, App. 1-3.) Paul filed "proof of notice" of these various petitions on September 26, 2022. (SR PRO. 26-27.)

On October 3, 2022, Paul filed a supplement to this Petition for appointment of special administrator—wherein Paul asked the trial court to "alternatively," appoint himself and Lance as co-special administrators. (SR PRO. 28.)

On October 7, 2022, the trial court entered an order that stated the petitions filed by Paul would be heard on October 18, 2022.[1] (SR PRO. 31.)

Paul also filed motions in Victoria's lawsuit asking to intervene (SR V. 264-265) and noticed it for the same one-hour hearing date of October 18, 2022 (SR V. 296-297)—the trial court heard that issue first. For that issue, Paul called

[1] Paul's counsel submitted the proposed notice and order for hearing to the trial court after requesting a one-hour hearing on the various petitions via email on September 27, 2022.

witnesses and presented evidence for more than three hours. (VHT pp. 12-129; SR V. 567-720.) After that evidence, the trial court asked Paul about rescheduling his petitions within the probate. However, Paul never set a new hearing date for his petitions.

Now, Paul appeals the order appointing Raymond as special administrator, even though Paul still has a pending Petition to remove Raymond as special administrator that raises the same issues that he now asks this Court to rule on.

STATEMENT OF THE FACTS

As noted by Paul, there are several briefs that describe various facts regarding the relationship between these parties. (In Appeal #30344, Appellees' Brief pp. 5-11; In Appeal #30482, Appellees' Brief pp. 6-9; In Appeal #30508, Appellee's Brief pp. 5-11.) For purposes of this appeal, the Statement of the Case describes several applicable facts, and the remaining facts are overviewed below.

1. Paul's pending Petition requesting removal of Raymond as special administrator.

Paul's pending Petition requesting Raymond be removed as special administrator repeatedly refers to Raymond as special administrator of Victoria's Estate and raises no notice issues that Paul now raises for the first time in this appeal. (SR PRO. 13-15, App. 1-3.) Specifically, Paul stated the following in his pending Petition:

> 10. Raymond, as a special administrator, is a fiduciary of the estate who has a duty to settle and distribute the estate of the decedent in accordance with the

terms of any probated and effective will and South Dakota law included SDCL 29A-3-703(a).

. . . .

12. After the decedent's death, Raymond, through his attorney, filed a Suggestion of Death in the Lawsuit, triggering the 90 days requirement to file a motion for substitution pursuant to SDCL 15-6-25(a)(1) to allow the Lawsuit to continue. Raymond has made no action to substitute a party in the Lawsuit.

13. Raymond, as special administrator, could not substitute himself as the plaintiff in the Lawsuit in place of the decedent pursuant to SDCL 15-6-25(a) because Raymond is a defendant in this same matter and it would create a conflict of interest.

. . . .

18. Based on decedent's allegations in the Lawsuit, it is clear that Raymond has no intention of acting in the best interest of the decedent's estate, and therefore Raymond is unable to fulfill his fiduciary duty as Special Administrator.

19. It is in the best interest of the decedent's estate to remove Raymond A. O'Farrell as special administrator of the estate.

. . . .

WHEREFORE, Paul O'Farrell requests that this Court enter its Order as follows:

A. Enter its Order Removing Raymond A. O'Farrell as Special Administrator of the above captioned estate;

(SR PRO. 14-15, App. 2-3.)

Paul's pending Petition makes no argument nor comment relating to any error by the trial court for appointing Raymond as special administrator in its Order signed on July 18, 2022. (SR PRO. 13-15, App. 1-3.) Further, Paul does

not complain of notice nor any other purported *procedural defect* with Raymond's Petition to be appointed as special administrator. (SR PRO. 13-15, App. 1-3.)

Instead, Paul's pending Petition—that he has not set for a new hearing—argues for Raymond's removal solely because Raymond was named as a defendant in Victoria's lawsuit and that Raymond had not yet substituted Victoria's Estate as the plaintiff in that case. (SR PRO. 13-15, App. 1-3.) Paul's pending Petition expressly states that he is requesting Raymond's removal because Paul claims "Removal is in the best interest of the estate." (SR PRO. 13, App. 1.)

2. Raymond's Petition for appointment as special administrator and the Trial Court's Order and letters of special administration.

On July 18, 2022, Raymond filed his Petition for appointment as special administrator to Victoria's Estate. (SR PRO. 1-3.) Within that Petition, Raymond disclosed that Victoria passed away on July 11, 2022. (SR PRO. 1.) Further, within the Petition, Raymond disclosed the case number of Victoria's lawsuit and described that an emergency existed because of that pending litigation and because of a possible foreclosure action that could have an effect on Victoria's Estate. (SR PRO. 1-2.)

On July 18, 2022, the trial court's Order did provide its reasons for not requiring further notice. Specifically, the Order states:

> The venue is proper . . . and it is proper to appoint the petitioner, Raymond A. O'Farrell, as Special Administrator without further notice for the reasons

> presented in the petition for appointment as Special Administrator without bond.

(SR PRO. 5.)

Additionally, the Order stated: "The appointment of Special Administrator is necessary to protect the estate pending the search for a Will and determination of the proper probate proceedings." (SR PRO. 5.)

Lastly, the Order described that Raymond had the "powers of a general personal representative until such time as the duties have been completed"—and, the Order described the duration of the special administration as "should be limited to such time as it [is] necessary to investigate whether the decedent has a Will, and such is offered and accepted in probate or upon determination that the decedent died intestate and intestate proceedings properly commenced." (SR PRO. 5-6.)

STANDARD OF REVIEW

Regarding whether this Court has jurisdiction, this Court applies statutory review of its jurisdictional authority. Specifically, as in *Fox*, this Court reviews SDCL 15-26A-3(2) and its application to the posture of the proceedings in this case. See *Estate of Fox*, 2018 S.D 35, ¶16, 911 N.W.2d 746, 750.

In regard to the trial court appointing Raymond as special administrator, this Court reviews the trial court's appointment of a special administrator under an abuse of discretion standard. *Matter of Estate of Jones*, 2022 S.D. 9, ¶33, 970 N.W.2d 520, 531.

ARGUMENT

1. This Court does not have jurisdiction.

This Court does not have jurisdiction to decide Paul's appeal because Paul has a pending Petition that requests Raymond's removal as special administrator. Rather than allow the trial court to rule on his Petition, Paul seeks appellate relief. The law does not allow Paul to seek appellate relief while at the same time asking the trial court to provide the same relief.

a. Applicable law.

Recently, this Court has addressed the issue of jurisdiction over a probate order in two cases—*Estate of Fox* and *Estate of Petrik*. *Fox*, 2018 S.D 35, 911 N.W.2d 746; *Petrik*, 2021 S.D. 49, 963 N.W.2d 766. Both of these cases are instructive as to this case.

In *Fox*, this Court described when it did not have jurisdiction under SDCL 15-26A-3(2) where the trial court entered—through informal proceedings—letters of appointment to a personal representative to a party and then revoked those letters of appointment after a formal proceeding was commenced by an opposing party. *Fox*, at ¶¶ 8-13. This Court found that it did not have jurisdiction regarding the order revoking the letters to a personal representative because "the circuit court has not yet held a hearing to determine whether the October 11, 2017 Clerk's Statement of Informal Probate and Appointment of Personal Representative is void...." *Id.* at ¶ 12.

In *Fox*, the party that opposed the appointment of the informally appointed personal representative, "petitioned the circuit court to determine

testacy and to appoint a personal representative. In particular, [the] petition requested that the circuit court fix a time and place for a hearing and that the court enter an order formally declaring that [the deceased] died intestate. [The party opposing informal appointment] served notice of his petition upon [the party who had informal appointment revoked and appealed]." *Id.* at ¶ 13.

This Court held that because of the filings by the opposing party—that were still pending in front of the trial court—the circuit court's order revoking the informal appointment did not end "the particular action in which it [was] entered and leave[ ] nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding." *Id.* at ¶ 14.

In *Petrik*, there was no pending petition in front of the trial court regarding an order related to the termination of a joint tenancy. 2021 S.D. 49, ¶ 17. This Court found that it did have appellate jurisdiction and held:

> Once a petition is filed, it defines a proceeding. Further pleadings relating to the same subject matter, whether labeled motions or petitions, are part of the same proceeding. *When the subject matter of two petitions overlap, it would generally be appropriate to consider both petitions as belonging to the same proceeding* .... [A]n order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding.

Id. at ¶ 17 (citations omitted) (emphasis added).

b. Paul's Petition to remove Raymond is still pending and does not allow Paul to make this appeal simultaneously.

Applying both *Fox* and *Petrik* to the facts of this probate, this Court does not have jurisdiction to rule on the Order appointing Raymond as special administrator when Paul currently still has a Petition requesting Raymond's removal as special administrator. Of course, both Raymond's Petition and Paul's pending Petition to remove Raymond as special administrator contain subject matters that are identical—because of that, this Court must allow the trial court to make a ruling.

This Court first addressed the issue of a final order in the context of a probate proceeding in *In Re Estate of Geier*, 2012 S.D. 2, 809 N.W.2d 355, where this Court first analyzed SDCL 15-26A-3(2) in relation to a UPC and how to analyze that issue. In that first case, and in *Fox* and *Petrik* described above, this Court cited back to *Scott v. Scott*.[2] Specifically, in *Scott*, this Court repeatedly included the following language:

> When the subject matter of two petitions overlap, it would generally be appropriate to consider both petitions as belonging to the same proceeding.

Scott, at 897; *In Re Estate of Geier*, at ¶ 13; and *Petrik*, at ¶ 17.

In this case, the pending Petition by Paul and the Petition by Raymond to be appointed as special administrator not only *overlap* but are identical subject matters. Thus, this Court should not exercise jurisdiction over this appeal when the trial court is still left with rulings that will "determine the rights of the parties" as to Raymond serving as special administrator. *Petrik*, at ¶ 17.

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[2] 136 P.3d 892, 896 (Colo.App.2006).

Throughout Paul's Appellant Brief, he does not address his pending Petition and, instead, only mentions that he "attempted to alert the Court that Raymond was not a suitable representative for the Estate." (Appellant's Brief p. 4.) Paul's non-disclosure of his Petition is telling because his Petition clearly takes jurisdiction away from this Court and his pending Petition is inconsistent with his procedural defect argument in the Order appointing Raymond as special administrator.

Therefore, Raymond respectfully asks this Court to dismiss Paul's appeal for lack of jurisdiction.

2. The Trial Court's Order appointing Raymond as special administrator is not void.

The Order appointing Raymond as special administrator was not an abuse of discretion by the trial court. Instead, the trial court acted rightfully under SDCL 29A-3-614, and fulfilled all statutory requirements. Additionally, Paul's claimed *procedural defects* relating to the trial court's Order were waived by Paul's own pleadings and Petition requesting for Raymond's removal—wherein Paul makes no claim of any procedural defect in the Order appointing Raymond as special administrator.

Further, Paul's claim that Raymond should be removed because of a "conflict of interest" because Raymond was a defendant in Victoria's old lawsuit is not properly before the Court on this appeal. It is the exact argument Paul makes in his pending Petition to have Raymond removed, which Paul has not let the trial court rule upon. As Paul puts it in his Appellate Brief, the removal for

the purported "adverse interest" is a "fact-intensive inquiry." (Appellant's Brief p. 21.)

a. Applicable law.

SDCL 29A-3-614 describes the process for the appointment of a special administrator.

> A special administrator may be appointed:
>
> > (1) Informally by the clerk on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or, if a prior appointment has been terminated, as provided in § 29A-3-609; or
> >
> > (2) In a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

In relation to Paul's new arguments on appeal relating to notice and procedure, this Court has held the following:

> "Generally, questions over . . . notice must be raised at the first reasonable opportunity or they are waived. Moreover, actual participation in legal proceedings waives irregularities in notice and service procedures and even a lack of formal notice."

Matter of Estate of Jones, 2022 S.D. 9, ¶ 17, 970 N.W.2d 520, 527 (citations omitted).

As it relates to who can serve as a special administrator, this Court has held the circuit court has "discretion to determine if a special administrator is 'necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act.'" *Id.*, at ¶ 33. Further, this Court has stated, "[T]he '[circuit] court must have confidence that the person will demonstrate the upmost loyalty, impartiality, and integrity, and that the person does not have an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment.'" *Id.*

Lastly, upon petition, like the one Paul has pending, a special administrator may be removed when—*after notice of a petition for removal and a hearing on that petition*—shows that:

> (b) Cause for removal exists when:
>
> > (1) Removal is in the best interests of the estate;
> >
> > (2) The personal representative or the person requesting the representative's appointment intentionally misrepresented material facts in the proceedings leading to appointment; or
> >
> > (3) The personal representative has disregarded an order of court, has become incapable of discharging the duties of office, has mismanaged the estate, or has failed to perform any duty pertaining to the office.

SDCL 29A-3-611(b)(1), (2), and (3).

b. The Order is not void under SDCL 29A-3-614.

The strange circumstance of Raymond's appointment is that Raymond was appointed special administrator by both the clerk of courts and by Order of the judge. (SR PRO. 5-8.) It is not disputed that Raymond's Petition and the Order were entered by the judge on the same day, July 18, 2022. Contrary to Paul's unique reading of the UPC, SDCL 29A-3-614 allowed for the trial court to issue its Order on July 18, 2022.

Under SDCL 29A-3-614(2), the trial court is required to provide notice and have a hearing unless "it appears to the court that an emergency exists, appointment may be ordered without notice." The Order by the trial court specifically referenced appointment of Raymond as special administrator "without further notice for the reasons presented in the petition for appointment as Special Administrator without bond." (SR PRO. 5.) That language is exactly what SDCL 29A-3-614 allows the trial court to do.

In response, Paul claims the language only waives notice and not the requirement of a hearing. It is true that SDCL 29A-3-614 only states that appointment may be ordered without notice—however, it is an absurd result to read the statute to require a hearing when notice is not required.[3] Under a reasonable interpretation of SDCL 29A-3-614, the trial court did not have any procedural defects in its Order.

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[3] *Schafer v. Shopko Stores, Inc.*, 2007 S.D. 116, ¶ 7, 741 N.W.2d 758, 761 (citations omitted):

> "We presume that the Legislature intended no absurd or unreasonable result."

c. Paul waived his notice and hearing arguments.

Even if Paul's reading of SDCL 29A-3-614 was correct, Paul waived his right to argue about these procedural issues when he filed his Petition to remove Raymond as special administrator and when he failed to raise them at any level before this appeal.[4]

Paul's pending Petition repeatedly refers to Raymond as a special administrator and makes no allegation in relation to the procedural follow through of the trial court in ordering Raymond as the special administrator. (SR PRO. 13-15; App. 1-3.) Instead, Paul's pending Petition to remove Raymond focuses entirely on Paul's position that Raymond cannot serve in that role because of Victoria's old lawsuit against Raymond. SDCL 29A-1-402 and the *Matter of Estate of Jones* support that Paul waived his right to bring these procedural defects on appeal.

SDCL 29A-1-402 provides that, "A person . . . may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding." Paul's attorney in a writing signed by his attorney repeatedly acknowledged Raymond as the special administrator and made no assertion that there was any procedural defect with the Order appointing Raymond as special administrator.

In *Matter of Estate of Jones*, this Court described that notice issues "must be raised at the first reasonable opportunity or they are waived." 2022 S.D. 9, ¶

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[4] *Sioux Falls Shopping News, Inc. v. Dept. of Revenue and Regulation*, 2008 S.D. 34, 749 N.W.2d 522 (citations omitted):

> "Having never raised the issue at the trial level, [Appellant] cannot now assert the trial court erred on matters it did not determine."

17 (citations omitted). Of course, the first opportunity for Paul to raise his issues with notice or the lack of hearing would have been when he petitioned the trial court to remove Raymond as the special administrator.

This Court also cited to the holding in a Nebraska case in *Jones* where "notice may be waived through unequivocal conduct such as voluntary appearance or filing a lawsuit." *Id.* In this case, Paul unequivocally conducted himself in a manner by filing his Petition to remove Raymond as a special administrator, which was akin to *filing a lawsuit*.

d. Paul cannot skip a removal hearing—Raymond's appointment as special administrator requires a fact-intensive inquiry.

After claiming that Raymond should not be special administrator because of procedural defects, Paul then claims that Raymond should be removed because he is not "a qualified person." (Appellant's Brief p. 16.) However, Paul ignores that the process for removal of the special administrator is through SDCL 29A-3-611—which requires notice and a hearing. Paul's attempt to move past what he calls a "fact-intensive inquiry" is odd given that Paul has a pending Petition to remove Raymond as a special administrator under SDCL 29A-3-611.

As noted in *Jones*, the discretionary decision by the trial court to appoint a special administrator requires the court to review whether the person has "an interest in pending litigation, or bias or prejudice, such that the appointment would be adverse to the interest of those to be served by the appointment." 2022 S.D. 9, ¶ 33. In this case, because Paul has never put this issue in front of the trial judge, there has been no factual findings related to whether Raymond serving as

special administrator would be adverse to the interest of those to be served by the appointment.[5] Therefore, Paul's claims that there are no circumstances under which Raymond could act as special administrator is not factually developed and skips the required hearing on Raymond's removal. Therefore, this Court cannot and should not take any position in regard to Raymond's appointment as special administrator.

CONCLUSION

Based on the foregoing, Raymond asks this Court to dismiss this appeal because the Court lacks jurisdiction. Alternatively, if this Court finds that it does have jurisdiction, Raymond asks the Court to affirm the trial court's Order appointing Raymond as special administrator.

DATED this 5th day of February, 2024.

Respectfully submitted,

SCHOENBECK & ERICKSON, PC

By: __/s/ Joe Erickson_____
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[5] Paul also cites *Hampshire v. Powell*, 626 N.W.2d 620, 626 (Neb.App. 2001), to claim a special administrator is *per se* disqualified if the appointment results in "prosecuting and defending same lawsuit." (Appellant's Brief p. 22.) However, the case cited by Paul expressly states the following:

> If the personal representative has a conflict, the proper procedure would be for the interested beneficiary to petition the court for removal of the personal representative pursuant to Neb.Rev.Stat. § 30-2454 or to plead and prove that an exception to the general rule applied.

Id., at 626.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 3,729 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 5th day of February, 2024.

SCHOENBECK & ERICKSON, PC

___/s/ Joe Erickson_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 5, 2024, I served a true and correct copy of the foregoing *Appellee's Brief* via electronic means on the following:

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Interested party

and by U.S. Mail, postage prepaid, to the following:

AscensionPoint Recovery Services, LLC
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__/s/ Joe Erickson_____
Attorney for Appellee
Raymond O'Farrell

APPENDIX
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STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF GRANT — THIRD JUDICIAL CIRCUIT

ESTATE OF — 25PRO22-000011

VICTORIA O. O'FARRELL,
Deceased.

PETITION FOR REMOVAL OF SPECIAL ADMINISTRATOR PURSUANT TO SDCL 29A-3-611

COMES NOW, Paul O'Farrell whose address is 14551 466th Avenue, Marvin, South Dakota 57251, as an interested party of the estate, by and through his attorney of record, David A. Geyer of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota and respectfully moves this Court for its Order removing Raymond A. O'Farrell as Special Administrator of the above captioned estate pursuant to SDCL 29A-3-611 and 29A-3-618, and in support of this Petition shows the Court as follows:

1. SDCL 29A-3-611 entitled "Termination of appointment by removal—Cause; procedure." states in part as follows:
   (a) Any interested person may petition for removal of a personal representative for cause at any time.
   (b) Cause for removal exists when:
   (1) Removal is in the best interests of the estate.

2. Raymond A. O'Farrell ("Raymond") and the decedent each owned 50% of the shares of vOr, Inc., a family farm corporation organized under the laws of South Dakota.

3. The decedent and Raymond were Trustors and Trustees of the Raymond and Victoria O'Farrell Living Trust ("Trust") dated January 14, 2011, and amended August 26, 2021. The decedent and Raymond collectively owned all of the shares of vOr, Inc., and jointly assigned all of those shares in 2011.

4. On June 27, 2022, the decedent filed a Summons and Complaint with the case number

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25CIV22-000038 along with other documents that commenced an action ("Lawsuit") against Raymond and their son, Kelly O'Farrell ("Kelly").

5. The Complaint alleges that Raymond purported to reverse his and the decedent's joint assignment of shares to the Trust as part of their estate plan, thereby imperiling the estate planning objectives which motivated the creation of the Trust in the first place, all without the knowledge of the decedent.

6. In order to accomplish this, the Complaint alleges that Raymond attempted to remove the decedent as a director of vOr, Inc., modify the corporate Bylaws, appoint new officers, and vote on all 25,000 shares that were assigned to the Trust, all while the decedent was recovering from surgery in the hospital.

7. Decedent alleged that when she learned what Raymond had done, she spoke with him about these acts. She determined that Raymond was being unduly influenced by their son, Kelly.

8. Additionally, decedent alleges that Raymond has refused to provide necessary information to the lender to permit vOr, Inc., to refinance, which resulted in vOr, Inc. to have allegedly defaulted on two loans. The Complaint alleges this is another byproduct of Kelly's undue influence on Raymond.

9. The decedent requested in her Complaint that the Court find Raymond liable for conversion and civil conspiracy and to remove Raymond as Trustee because of actions taken in breach of his fiduciary duty.

10. Raymond, as a special administrator, is a fiduciary of the estate who has a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and South Dakota law included SDCL 29A-3-703(a).

11. This Lawsuit creates a conflict of interest since the decedent was in the process of suing Raymond right before her death for actions he took related to their estate plans without her knowledge.

12. After the decedent's death, Raymond, through his attorney, filed a Suggestion of Death in the Lawsuit, triggering the 90 days requirement to file a motion for substitution pursuant to SDCL 15-6-25(a)(1) to allow the Lawsuit to continue. Raymond has made no action to substitute a party in the Lawsuit.

13. Raymond, as special administrator, could not substitute himself as the plaintiff in the Lawsuit in place of decedent pursuant to SDCL 15-6-25(a) because Raymond is a defendant in this same matter and it would create a conflict of interest.

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14. This conflict of interest renders Raymond unable to be a fiduciary of the decedent's estate pursuant to SDCL 29A-3-703(a).

15. Prior to the decedent's death, the decedent alleged in her Complaint that Raymond had breached his fiduciary duty as a trustee of the Trust.

16. The decedent asserted that Raymond's actions listed above have resulted in the waste and mismanagement of vOr Inc. bank accounts so that the checking account was overdrawn by $2,800.00 without the knowledge of the decedent.

17. Since before the decedent's death, she asserted that Raymond has been influenced by Kelly to drastically and unlawfully restrict the decedent's access to the Trust and vOr Inc., which interrupted the estate plan that Raymond and the decedent had in place since 2011.

18. Based on decedent's allegations in the Lawsuit, it is clear that Raymond has no intention of acting in the best interest of the decedent's estate, and therefore Raymond is unable to fulfill his fiduciary duty as Special Administrator.

19. It is in the best interest of the decedent's estate to remove Raymond A. O'Farrell as special administrator of the estate.

WHEREFORE, Paul O'Farrell requests that this Court enter its Order as follows:

A. Enter its Order Removing Raymond A. O'Farrell as Special Administrator of the above captioned estate; and

B. For such other and further relief to which the Petitioner may be entitled.

Dated this 26 day of September 2022.

DELANEY, NIELSEN & SANNES, P.C.

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IN THE

Supreme Court

of the

State of South Dakota

No. 30532

IN THE MATTER OF THE
ESTATE OF VICTORIA O. O'FARRELL,
DECEASED

An appeal from the Circuit Court, Third Judicial Circuit
Codington County, South Dakota

The Hon. Dawn Elshere
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

Submitted by:
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Notice of Appeal filed on November 7, 2023

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INTRODUCTION

Is This How Lawyers Should Act? Is This What Lawyers Can Do?

At its core, this appeal invites the Court (and counsel) to reflect upon the conduct and tactics we should expect from practicing attorneys. It also raises questions about the limits of judicial action.

Can an "emergency order" be granted without a hearing, and, without either prior *or* subsequent notice to anyone? Can a Circuit Court exercise emergency powers without first declaring the emergency? Can a Circuit Court install the same person to act as both plaintiff and defendant in the same case?

And, if Circuit Courts cannot do these things, is it improper for lawyers to even seek such relief? Shouldn't lawyers know enough about the law to realize that the same person cannot possibly act as the plaintiff and defendant in the same case? Is it proper for a lawyer to submit an "emergency" petition to a Circuit Court which disguises and suppresses key information?

Yes, emergencies will occur. Our Circuit Courts will be asked—on rare and unique occasions—to exert their substantial powers of law and equity to fix or avert problems. But the law does not allow a Circuit to

exercise its powers in secret. The law does not allow a Circuit Court to wield emergency power without meaningful consideration of the emergent issues. The law does not permit emergency powers to be used without a declaration of an emergency. And the law does not allow a Circuit Court to fix proven emergencies without careful steps designed to alert interested parties after the fact about what the Court has done.

If the law does not permit such things, it is impermissible to try and convince a Judge to do those things.

These are fundamental problems that made Raymond's appointment void *from the outset*. The invalidity of his appointment is a legal issue which is distinct and separate from the question of Raymond's removal from office. The first seeks to declare the office vacant from day one. The other seeks to remove the officeholder based upon unfitness. These are not dependent upon each other.

ARGUMENT-IN-REPLY

Raymond sidesteps nearly all of the substantive arguments raised by Paul. He confines his response to three, narrow defenses: *first,* that this Court lacks jurisdiction because Paul did not pursue his removal petition; *second,* that a hearing was not required, based upon his reading of SDCL §

29A-3-614(2); and, *third,* that Raymond's appointment cannot be challenged because Paul waived notice. We begin with jurisdiction.

1. The Circuit Court's order appointing Raymond was a final, appealable order which confers appellate jurisdiction here.

Raymond's first argument is that this Court lacks jurisdiction because Paul's subsequent *removal* proceedings are inextricably connected to an appeal challenging the validity of the original *appointment.* This argument is not supported by his authorities. And, this argument fails to recognize the distinct remedies sought by *removal* versus declaring an appointment *void ab initio.*

We begin with that "temporal" element of those remedies. In short, a removal proceeding is forward looking. In contrast, this appeal looks backward.

A petition to *remove* a personal representative is an administrative proceeding which tests the suitability of a personal representative (or special administrator) to *continue* in her fiduciary role. The decision to *remove* is based upon a statutory test. SDCL § 29A-3-611(b). A *removal* petition does not attack the appointment itself, and, instead seeks to replace the individual who was appointed. *Id.* If successful, the *removal* petition will result in a replacement of the fiduciary with a new fiduciary to act for the Estate, but

would *not* affect any prior acts taken by the fiduciary prior to removal. And, critically, the filing of a *removal* petition triggers a statutory, protective pause upon any further activities of the appointed fiduciary. SDCL § 29A-3-611(a). All of this is different from an appeal of the appointment itself.

In contrast, the *appeal* of the original *appointment* order challenges the validity of the appointment altogether. The *appeal* argues that there was a legal or procedural or factual[1] defect in the appointment. The *appeal* does not trigger the statutory, protective pause. If successful, the *appeal* would provide a basis to invalidate all *prior* actions taken by the fiduciary from the time of appointment to the time the appointment order is vacated. The *appeal* challenges the original decision of the Circuit Court. The *appeal* can be pursued independently of a removal petition because it seeks different relief.

Raymond quotes this Court's prior language about "overlapping" Petitions. Raymond misses the point. There were not overlapping Petitions at any point in time. Paul's subsequent Petition for Removal was filed

[1] Although not the primary issue here, an appeal of an appointment order could challenge the findings of fact as clearly erroneous, such as whether someone factually meets the criteria for priority, or, whether the Circuit Court correctly decided factual questions related to 'fitness,' or the facts related to the Estate's best interests.

months after Raymond's appointment proceeding concluded. And, as discussed above, the removal petition sought different relief than this appeal seeks. They do not address "identical" subject matter.[2]

Raymond's jurisdiction argument is ultimately premised upon a misapplication of the probate rules concerning discrete "proceedings." Under well-settled precedent, "orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for decision." *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16. Under that simple rule, the Order appointing Raymond "disposed of all issues relative to" his Petition and left "nothing for decision."

Raymond misreads portions of *Petrik* in service of his argument.[3] At the time the Circuit Court entered its first order in Petrik, there were no

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[2] Raymond all but concedes this later, on page 15 of his Brief: "Paul's pending Petition to remove Raymond focuses *entirely* on Paul's position that Raymond cannot serve in that role because of Victoria's old lawsuit against Raymond." (emphasis added). In contrast, this appeal focuses primarily upon the procedural defects of the appointment. These are different.

[3] Raymond also cites the *Fox* case, which is inapposite. The dispute in *Fox* centered around the finality of a Clerk's informal appointment, which then morphed procedurally into a formal proceeding which challenged the Clerk's actions as defective, which was then stayed during the appeal. *Est. of Fox*, 2018 S.D. 35, ¶ 12. Here, in contrast, the appointment

other pending petitions, whether related or unrelated. The same is true here.

At the time that the Circuit Court entered its order appointing Raymond in July 2022, there were no other pending petitions, whether related or unrelated. Thus, the appointment "proceeding" started and ended quickly, within a matter of days. As this Court explained in *Petrik,* "[o]]nce a petition is filed, it defines a proceeding....An Order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding." *Id.,* ¶ 17. Raymond's court-ordered appointment left nothing more for the circuit court to do. That ended the proceeding. The removal petition did not restart the appointment proceeding.

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proceeding started and ended as a formal proceeding in July 2022. Paul's subsequent petition for removal was *only* forward looking, which, by statutory definition, is the nature of a removal petition. SDCL § 29A-3-611. A removal does not challenge the original validity of the appointment. *Id.* But Stanton Fox's petition to the circuit court *did* challenge the original validity of the clerk's informal appointment, and, thus, the Circuit Court had not yet "finally determine[d] the rights of the parties as it relates to...appointment of a personal representative." *Id.* In that case, there was still an open petition. Here, there was never a petition which challenged the July 18, 2022, order.

In short, the appointment process is a discrete proceeding unto itself. If it were not, then the appointment process would remain open and subject to attack *indefinitely*. How long after the entry of an Order does the window remain open for a determination of finality? How long would we wait for someone to file a subsequent petition that could disrupt our understanding of finality? In short, the finality of an Order is not governed by subsequent events, but, instead by the character of the Order relative to the Petition, and, the date of the Order obtained by it, and any truly contemporaneous attacks upon the Order. Finality is *not* governed by petitions filed months later that do not directly attack the order itself. Under those tests, the July 18th Order concluded the appointment proceedings. It is separately appealable. This Court has jurisdiction.

To paraphrase *Petrik,* the claim that [this Court] lack[s] jurisdiction because [Paul's removal Petition] remains pending is unmistakably foreclosed by our precedent." *Id.*, ¶ 16.

2. SDCL § 29A-3-614(2) allows for a Circuit Court to dispense with notice, but does not eliminate the requirement of a hearing

In Section 2.a, Raymond quotes law but does make any substantive arguments. And, as discussed below, Raymond's Section 2.a omits key authority pertinent to his inquiry.

In Section 2.b, Raymond argues that his appointment was valid because SDCL § 29A-3-614(2) dispenses with *both* the notice *and* the hearing requirements in case of emergency. However, for this (which is his central argument) Raymond cites no authority.

To refute Raymond's statutory argument, the plain text of SDCL § 29A-3-614(2) dispenses with *notice* in an emergency, but not a *hearing*. A primary rule of construction is the "plain meaning" rule: "if the words and phrases in the statute have plain meaning and effect, we should simply declare their meaning and not resort to statutory construction." *Olson v. Butte Cnty. Comm'n,* 2019 S.D. 13, ¶ 5. The phrase "after notice and a hearing" in the first sentence has a plain meaning which is different than the phrase "without notice." By its plain meaning, an emergency dispenses with notice, but does not eliminate the requirement of a hearing.

As authority beyond this plain meaning, the Court can consider the statutory maxim of *expressio unius est exclusio alterus.* "[T]he expression of one thing is the exclusion of another." *Sacred Heart Health Servs., Inc. v. Yankton Cnty.,* 2020 S.D. 64, ¶ 16 (quotations and citations omitted). The first sentence of SDCL § 29A-3-614(2) governs the appointment of a special administrator by the court, which is "after notice and a hearing." The

second sentence then alters this process, so that if it "appears to the Court that an emergency exists, appointment may be ordered without notice." SDCL § 29A-3-614(2). If the Legislature intended to dispense with notice *and* a hearing, it knew how to do so, and, it would have expressly stated so in the second sentence.

Finally, the Court can look to the overall structure of the Probate Code. "Formal proceedings" refer to "proceedings conducted before a judge with notice to interested persons." *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 22 (quoting SDCL § 29A-1-201(18)). *See, also,* Black's Law Dictionary, 1221 (7th edition, 1999) ("proceeding" defined as "a hearing"). A hearing was required. The proceeding contemplated for appointment is an actual hearing. Given modern technology, there are numerous ways to accomplish a hearing, even in an emergency. There was no hearing here.

Without a hearing, the Order was void.

3. Dispensing notice was error because there was no finding of "emergency"

Raymond does not respond to Paul's argument that the Court failed to make any finding of emergency. *See,* Paul's Brief, pp. 5, 14. Without such a finding, the waiver of notice would be error, and, the Order would be

vacated. The Court can reach this conclusion without any further analysis, and Raymond waived this argument by omission.

4. Raymond's appointment was not made *both* by the Clerk *and* by the Court; instead, he was appointed by the Court under SDCL § 29A-3-614(2)

In Section 2.b, Raymond also discusses the "strange circumstance of Raymond's appointment...by *both* the clerk of courts and by Order of the Judge." *See,* Raymond's Brief, p. 15 (emphasis added). To clear up any confusion, the Clerk's appointment [at R.7] was erroneous and of no import, as a matter of law. We know this through at least three independent portions of the Record.

First, Raymond sought appointment via a *petition*, rather than via an *application.* [R.1-2]. By statute, a *petition* seeks an order from the Court; and an *application* would have been the method to seek appointment by the Clerk of Courts. *Compare,* SDCL § 29A-3-614(1), *with* SDCL § 29A-3-614(2) ("Special Administrator is either appointed by the Clerk "on the *application*" of an interested person, or, by "order of the court on the *petition* of any interested person"). *See, also, Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 21 (quoting SDCL § 29A-3-105) (persons may "*apply* to the clerk of court" and may "*petition* the court for orders") (emphasis added). When Raymond

captioned his pleading as a Petition, he was seeking an order from the Court, and invoking the Court's authority, rather than the Clerk's.

Second, it is also clear that Raymond was seeking a Court order because of the extent of the relief available under such an order, relative to letters that could have been issued by the Clerk. In particular, a Special Administrator appointed by the Clerk has far more *limited* duties than one appointed by Order of the Court. *Compare,* SDCL § 29A-3-616, *with* SDCL § 29A-3-617 (court-ordered special administrator has "the powers of a general personal representative, except as limited in the order of appointment; clerk-appointed special administrator has only those "powers of a general personal representative…as are necessary to perform the special administrator's duties" which include solely "the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative…..."). Raymond's Petition sought powers to address litigation. [R.1]. Such powers would have been unavailable under a clerk-appointed role.

And third, Raymond's own Petition Raymond invoked an emergency exception which is unique to the court-ordered subsection of the Special

Administrator statute. [R.2]; SDCL § 29A-3-614(2). Emergencies are not mentioned in SDCL § 29A-3-614(1).

In short, Raymond sought an order of the Court, and, he ultimately got one. The Clerk's Letters were issued in error, and, this was soon corrected by the Judge-issued Order, [R.5-6], and, the Court-issued Letters, [R.8]. The Letters themselves even indicate that the appointment was made by the Court. Thus, the appointment was not *made* by "both" the Clerk and the Court. It was *made* by the Court.

5. Paul did not waive his notice and hearing arguments.

In Section 2.c., Raymond argues that Paul's petition to remove Raymond waived any right to challenge the appointment, and, particularly by "fail[ing] to raise them at any level before this appeal." Raymond's Brief, p. 16.

Raymond's argument is premised upon a similar misunderstanding of the probate rules concerning discrete "proceedings," as the one which was addressed in Section 1, above.

Under well-settled precedent, "orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for

decision." *Matter of Est. of Petrik*, 2021 S.D. 49, ¶ 16. The Order appointing Raymond "disposed of all issues relative to" his Petition and left "nothing for decision." The appointment process is a discrete proceeding unto itself.

In other words, Paul agrees that he didn't raise this issue below because the "proceeding" at which Paul could have raised any objections was long-since concluded. So, in exactly the same way as in *Petrik,* the notice and hearing arguments raised by Paul in this appeal could *never* have been raised in the proceeding below, because Paul had no notice or opportunity to participate in that proceeding. The proceeding started and ended in July 2022, in secret, and without a hearing.

It is for this basic reason that *Matter of Estate of Jones* does not apply. In that case, all of the interested parties were participating at all stages of the pertinent "proceeding," namely, the one commenced by the filing of a petition for appointment of special administrator. An earlier hearing had been scheduled and then canceled due to illness. Meanwhile, the petitioners engaged in discovery for their petition, which resulted in a motion to compel which was then noticed for hearing. At this hearing (and *while the Petition for special administrator was still pending*), the circuit court addressed the substance of the Petition. Doug and Jessica's lawyer appeared at the hearing

and "addressed the merits of the Petition at the...hearing without any mention that a hearing had not been noticed" on the petition itself. *Matter of Est. of Jones*, 2022 S.D. 9, ¶ 18. This participation was deemed a waiver.

In contrast, the appointment "proceeding" in this case was over and done with in July 2022. Paul was not present to raise any objections because he had no notice, and because there was no hearing at which to raise such defects.

Months later, Paul filed a petition for removal. This was a new proceeding. Paul noticed the petition for hearing. No hearing was conducted upon it on that date because of time constraints. And, even if the hearing had addressed it, the petition for removal was limited to the question of whether Raymond would *continue* as Special Administrator.

What Raymond is essentially arguing is that Paul should have asked the Circuit Court to *reconsider* its prior order of appointment, at the same time as he filed his Petition for Removal. But a motion to reconsider is not a predicate to an appeal. The order of appointment is final (and appealable) based upon the content and impact of that order itself.

Raymond also argues that Paul's "participation" in subsequent proceedings nullified his right to challenge the validity of earlier proceedings.

This stretches the definition of probate "proceedings" beyond what this Court has stated. And, it echoes the same argument Raymond makes about SDCL § 29A-1-402, on page 16.

As to that statute, Raymond argues that Paul waived notice under SDCL § 29A-1-402 via "a writing signed by...[his] attorney] and filed in the proceeding." This is an incorrect view of a "proceeding" and highlights the inherent problem with Raymond's argument. The appointment "proceeding" occurred without Paul's participation, in July 2022. Raymond is suggesting that Paul's filings in a *later proceeding* (seeking removal in September 2022) somehow cured the notice and hearing requirements of the prior proceeding. That is not how the statute is written. Nor is that what happened. Nor did Paul's attempt to initiate removal *waive* the issue of the appointment's invalidity. They are separate proceedings with separate aims, based upon separate defects.

6. Paul is not "skipping" a removal hearing

Raymond's final argument is that even if Paul can argue procedural defects to the appointment process in this appeal, Paul is precluded from prevailing on the substantive issue of whether Raymond is a "qualified person" without first having the question remanded for a factual hearing at

the Circuit Court level. He claims, further, that the Record is not sufficiently developed for a determination of this issue. (Raymond claims that Paul never "put this issue in front of the trial judge" at the time of Raymond's appointment, but, again, Paul was precluded from the appointment proceedings altogether.)

Ultimately, Raymond suggests this is too fact-intensive for a determination here. We suggest, instead, that the review is *de novo,* and that the Court should put itself in the shoes of the Circuit Court. And, we suggest that the Court should ask what determination could be made from the facts which can be gleaned from Raymond's Petition (i.e., those facts that Raymond himself made *undisputed* by alleging them). With only those facts, Raymond's Petition argues that there is an emergency that requires the appointment of himself as Special Administrator, so that he can serve as the Plaintiff in his own wife's lawsuit against him, where he is already the Defendant.

There are no further facts which could make this acceptable. A hearing would not change this. This is wrong and impermissible.

CONCLUSION

In this case, the lawyers representing Raymond convinced the Circuit Court to appoint him as Special Administrator without a hearing, without prior notice to anyone, without an express finding of emergency, and without notice to anyone following the appointment. Any of these defects render the appointment procedurally void. And, the attempted scheme was premised upon an illegal conflict of interest, where Raymond sought appointment in order to control a lawsuit pending against him. He claimed this was an emergency.

Paul asks for this Court to vacate the Order appointing Raymond as Special Administrator and remand for further proceedings.

Dated this 6th day of March, 2024.

HOVLAND, RASMUS,
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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 approximately 3,425 words, exclusive of the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Daniel K. Brendtro
One of the attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2024, I electronically filed the foregoing via the Odyssey File and Serve system with the Supreme Court Clerk, which will send notice to Appellee's Counsel and counsel for interested parties.

For those interested parties not represented by counsel, I also hereby certify that on this 6th day of March, 2024, I sent a copy of the foregoing via U.S. Mail to the following:

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Potential Interested Party

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Potential Interested Party

Rita O'Farrell
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Potential Interested Party

I also hereby certify that on this 6th day of March, 2024, I sent a bound copy of the foregoing to the Supreme Court Clerk at the following address:

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

/s/ Daniel K. Brendtro
One of the attorneys for Appellants