

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 30969

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ESTATE OF JUDITH ANN O'NEILL

JAMES ANTHONY O'NEILL,

Petitioner/Appellant,

vs.

SANDY LANG, BETH O'NEILL and RICHARD DEAN O'NEILL,  
Respondents/Appellees,

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APPELLANT'S BRIEF

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Appeal from the Circuit Court, Sixth Judicial Circuit,  
Todd County, South Dakota,  
The Honorable Bobbi J. Rank, presiding

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Notice of Appeal filed January 16, 2025

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## **PRELIMINARY STATEMENT**

Petitioner/Appellant James Athony O'Neill will be referenced as "Tony." Respondents/Appellees Richard Dean O'Neill, Beth O'Neill and Sandy Lang will be referred to as "Rick," "Beth" and "Sandy." Respondents/Appellees will collectively be referenced as "Respondents" as they are designated as such in the record. Decedent Judith O'Neill will be referenced as "Judy." The Settled Record will be referenced as "SR." The Trial Transcripts will be referenced as "TR." Petitioner/Appellant's Appendix will be referenced as "Appx."

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction under SDCL § 15-26A-3 to consider the Judgment entered December 17, 2024, entered based upon a jury verdict determining that Judith O'Neill's Last Will and Testament and Codicil were invalid as a result of undue influence. SR 558; Appx. 1. Appellant filed a timely Notice of Appeal on January 16, 2025. SR 569.

## **LEGAL ISSUES**

- I. *Whether the Trial Court erred in admitting into evidence Findings of Fact and Conclusions of Law from a separate, unrelated case involving the Petitioner and one of the Respondents.*

Comment: The Trial Court erred in admitting that the Findings of Fact and Conclusions of Law pursuant to issue preclusion.

Most Relevant Authorities:

*Mendenhall v. Swanson*, 2017 S.D. 2, 889 N.W.2d 416  
SDCL § 19-19-403

## **STATEMENT OF THE CASE**

This is a Will contest. Tony filed a petition to probate his mother, Judy's, Last Will and Testament and Codicil. The Petition was filed on or about March 22, 2019. SR



11. Respondents objected to the Will and Codicil, claiming that both were the result of Tony's undue influence. SR 30.

Tony and his brother, Rick, who is one of the Respondents, had been involved in previous litigation in Bennett County relating to their farm and ranch operation. Rick prevailed against Tony in that litigation. During these probate proceedings, Respondents filed a motion to have the Findings of Fact and Conclusions of Law and other documents from that prior unrelated lawsuit deemed "conclusively established" pursuant to the doctrine of issue preclusion. SR 171. Tony objected. SR 186. The Trial Court entered an order granting Respondents' motion. SR 264 (Appx. 2) and SR 274 (Appx. 3); *January 11, 2022, Transcript of Bench Decision*, SR 250. These are the Orders that Tony now appeals.

A jury trial was held November 18-20, 2024. During the jury trial Respondents offered the Findings of Fact and Conclusions of Law and other documents from Tony and Rick's litigation. Exhibit 108, SR 438; TR 297. These Findings and Conclusions were admitted. Many of the Findings and Conclusions touched upon and directly addressed the Trial Court's determination regarding Tony's credibility in that unrelated case and Tony having been held in contempt of court. *See*, Exhibit 108, SR 438.

The jury returned a verdict in favor of Respondents that Judy's Last Will and Testament and Codicil were the result of undue influence. SR 558.

### **STATEMENT OF FACTS**

Judy was seventy-eight (78) years old when she passed away on or about November 28, 2018. Tony, her son, petitioned to have her Last Will and Testament and Codicil admitted to probate. SR 11. Judy's Last Will and Testament was dated August

26, 2016. Exhibit 1, SR 500. The Codicil was executed on July 26, 2017. Exhibit 2, SR 508. Judy's Last Will and Testament left her estate to Tony and her daughter, Sandy. Exhibit 1, SR 500. The Codicil, executed eleven (11) months later, removed Sandy, and left her estate to Tony. Exhibit 2, SR 500.

Judy had been married to Orval "Dean" O'Neill for approximately fifty-four years. They ran a farm and ranch operation in Bennett County. They had four children: Tony, Rick, Sandy and Beth.

It is not disputed that Judy and Dean did not have a good marriage. TR 355-356. Rick testified that Judy did not have a perfect marriage by any means. TR 358-359. In fact, Judy and Dean had not resided in the same house for many years. Judy resided in the big house while Dean resided in the little house. There is evidence in the record from nearly everyone who testified that Dean was controlling and was emotionally and physically abusive towards Judy. At one point in time, Dean had "knocked her [Judy's] teeth in." TR 144; see also TR 222.

Judy was living by herself and was lonely and in 2013, decided to move from the farm/ranch to Rapid City. TR 355-356. Although Rick now claims that Tony was trying to isolate Judy by moving her to Rapid City, Rick testified that he helped her move. TR 355-356.

Judy wanted a divorce from Dean. She commenced the divorce action in Pennington County on or about May 27, 2014. Initially, Judy hired attorney Stephanie Pochop to represent her. Because the divorce was not proceeding to a conclusion, Judy became frustrated. Judy terminated her relationship with attorney Pochop and hired Rapid City attorney Angela Colbath ("Colbath") to represent her in her divorce. TR 180-182.

Attorney Colbath testified at the jury trial. According to Colbath, the reason Judy wanted a divorce from Dean was because of decades of unhappiness and emotional and physical abuse. TR 182-183.

Q. Who made decisions as to what was going to happen in the divorce?

A. Judy did.

Q. You were comfortable that she understood what was going on with regards to the divorce?

A. Oh, absolutely.

Q. Did she want a divorce?

A. Absolutely.

Q. Did she explain to you why?

A. She did.

Q. Can you tell us about that?

A. Again, this was now almost nine years ago so I can't tell you her specific words to me. I understood from Judy that it was a very long-term marriage that had years, if not decades, of unhappiness is how I would generalize her description. A lot of disagreements with her and Dean, abuse with her and Dean and she had just had enough and wasn't going to end her life in that status as married.

Q. Did she tell you about instances of emotional abuse?

A. Yes.

Q. How about physical abuse?

A. Yes.

TR 182-183. Colbath testified that Judy told her there had been a lot of disagreements with her and Dean, abuse with her and Dean and she had just had enough and was not going to end her life in that status as married. TR 183.

Colbath got to know Judy well during the divorce representation. According to Colbath, Judy reminded her of her own mom. She described Judy as “little physically,” a “bit feisty” and “very outspoken, very smart” and “a little ornery when she needed to be.” She always came to the office “all put together, good clothes, jewelry on, hair done, nails done.” Colbath described Judy as a “memorable person.” TR 187.

Tony’s role in assisting Judy in her divorce was that of an information gatherer. TR 187. Judy made the decisions. Colbath did not get the sense the Tony was controlling or influencing anything with regards to Judy. TR 187-188. In fact, Colbath described one instance to the jury where Judy got frustrated with Tony’s presence and literally kicked him out of her office, telling Tony to go wait in the car. TR 188-189.

While the divorce was pending, Judy requested that Colbath draft a Last Will and Testament for her. It was taking a long time to get the divorce completed and Judy expressed to Colbath that she was very concerned that she would die without a Will. TR 191-193. Colbath drafted the Last Will and Testament that was petitioned for probate in this case. TR 191-193; SR 1. In this Will, Judith leaves the residue and bulk of her estate to Tony and Sandy<sup>1</sup>. Specifically, the Will states that Tony is to receive Judy’s real property. The balance of Judy’s estate was to be divided equally between Tony and Sandy. Exhibit 1, Article Two; SR 500.

The reason Judy gave to attorney Colbath for this disposition was because of strife in the family and that her children were “polarized between Dean and Judy.” TR 192. From Judy’s perspective two kids (Rick and Beth) were on Dean’s side and two kids (Tony and Sandy) were on Judy’s side. TR 190. Judy’s concern was that if she died

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<sup>1</sup> Sandy is one of the Respondents challenging Judy’s Last Will and Testament and Codicil.

before the divorce was finalized any property in her estate would pass to Dean. Judy did not want that. TR 190. Colbath wrote in Judy's Last Will and Testament at Article 1.1: "I am currently married to Orvall "Dean" O'Neill. As of this writing there is currently a divorce pending in Pennington County, South Dakota. I specifically desire that no part of my estate or property be awarded to Orvall "Dean" O'Neill." Exhibit 1, Article 1.1; TR 192, SR 500.

At the time this Last Will and Testament was executed on August 26, 2016, the divorce was still pending. According to attorney Colbath, Judy really did not own anything because a majority of if not all of the property of any substantial value was titled in Dean's name. To be sure, Judy had an interest in that property by way of her marital estate, but nothing that could be disposed of by way of a Last Will and Testament. *See*, TR 192-193

The divorce was not moving towards a resolution and as a result Judy continued to be frustrated. She wanted a divorce from the man who had controlled and abused her throughout all those years. She then hired attorney Robert Galbraith to get the divorce done.

Judy wanted a divorce from Dean. She was adamant about it. Both of her attorneys, Angela Colbath and Robert Galbraith, testified that they had absolutely no doubt or reservations that a divorce is exactly what Judy wanted. TR 141. Neither of them observed anything that led them to believe the divorce was Tony's idea. Attorney Galbraith was directed by Judy to get the divorce finished. TR 141; ("She wanted me to try the case and get it to conclusion."). Clearly by this time there was a schism in the family with Tony supporting Judy and the other children supporting and helping their

father, Dean. Dean was engaging in delay tactics and making the divorce drag out. By the time Galbraith became involved, the divorce had been pending for three years.

Judy gave Galbraith “strict marching orders” to bring the divorce to a conclusion. TR 140-141. Galbraith had “no doubt” Judy wanted a divorce. TR 141. A divorce trial was set for September 7, 2017. TR 147. At a pretrial hearing, Dean’s attorney, Kristen Aasen, indicated that attorney Patricia A. Meyers, on behalf of Sandy, was going to be proceeding with a guardianship and conservatorship petition against Judy, claiming she was incompetent. This tactic stalled the divorce for Judy yet again. TR 147-149. Seventh Judicial Circuit Judge Heidi Linngren continued the divorce trial to November of 2017. TR 148-149. Judy was angry, frustrated and upset. According to Galbraith, “she was mad.” TR 149.

No guardianship petition was filed at the time, however, as was represented by Dean’s attorney. Instead, the divorce case proceeded until immediately before the court trial in November. TR 150. Then, as Galbraith stated, “on the eve of trial” Sandy filed a petition for guardianship/conservatorship of Judy. TR 150-151. As a result, Judy’s divorce case was stopped, again. At this point in time, according to Galbraith, “we were all very angry.” TR 151. Galbraith testified that it was like “somebody playing games.” TR 151. The purpose of the guardianship was for delay. TR 151. When asked at trial whether Dean was intentionally delaying the divorce, Galbraith responded, “somebody certainly was.” TR 146-147. Not only was the divorce trial delayed, but Dean was also not financially supporting Judy as he was ordered to do. On top of that, because of the guardianship and conservatorship action filed by Sandy, Judy was required to undergo a psychological evaluation. She was not happy. Judy did not take the

guardianship/conservatorship proceeding lying down. To the contrary, she hired attorney Michael Sabers to represent her in that case.

In 2017, Judy then asked attorney Galbraith to amend her Last Will and Testament. Following Judy's directions, Galbraith drafted a Codicil to Judy's Last Will and Testament that removed Sandy. TR 157-158; SR 9. Galbraith had a "very clear understanding" as to why Judy wanted to remove Sandy. TR 170. Judy was the one who directed him to do so based on Sandy's conduct in connection with the guardianship/conservatorship proceeding. According to Galbraith, as far as he was aware Tony had no knowledge of the Codicil. TR 158-160. Tony did not participate in drafting the Codicil. TR 158-160.

Judy passed away on November 28, 2018. Her Will nominates Tony as her personal representative. Exhibit 1, Article Three; SR 500. Tony filed the Petition seeking to probate both the Will and the Codicil which was objected to by Respondents alleging that both instruments were the result of Tony's undue influence. SR 28.

Tony was initially represented in this case by attorney Brad Schreiber. After Mr. Schreiber withdrew, Tony was represented by attorney James Hurley. Respondents filed a motion asking the court to order that the Findings of Fact and Conclusions of Law entered by Judge Kathleen Trandahl in the previously mentioned lawsuit between Rick and Tony be "conclusively established" and admitted pursuant to the doctrine of "issue preclusion." Attorney Schreiber made objections to the Findings and Conclusions on the ground of relevance and SDCL § 19-19-403 (Rule 403). *January 6, 2022, Transcript of Pretrial Hearing*, p. 15-16; *January 11, 2022, Transcript of Bench Decision*, p. 3:22-23. Mr. Hurley argued that issues regarding credibility determinations from Judge Trandahl

should not be admitted as that is a question for the jury. *October 26, 2023, Transcript of Pretrial Conference*, p. 27-29.

Ultimately, the Findings of Fact and Conclusions of Law (Exhibit 108, SR 438) that were determined by the Trial Court to constitute issue preclusion were forty-three (43) pages in length and involved substantial and voluminous detail concerning the litigation between Rick and Tony and their farm/ranch operation. Exhibit 108 also included the following Findings of Fact and Conclusions of Law that the jury was instructed have been conclusively established:

39. Rick made a copy of the written agreement signed by both he and Tony. A copy of the Land Separation Agreement is Exhibit C. Tony's testimony to the contrary is not credible.

40. Tony took the original of Exhibit C with him at the conclusion of the meeting. Tony's testimony to the contrary is not credible.

Exhibit 108, SR 505.

12. Tony's strategy in dealing with Rick has been one of dishonesty and malicious mischief. Tony was not honest with Rick before this lawsuit, and during this lawsuit in the handling of the corporate financing. In addition, Tony committed fraud on this court by lying about the existence of a signed Land Separation Agreement [Exhibit C]. The evidence is clear that Tony signed the Land Separation Agreement [Exhibit C] on August 16, 2011. Tony was also not honest with this court when he denied the existence of the negotiated agreement reached between the parties by their attorneys regarding the silage chopper in order to obtain an \$827.93 advantage.

Exhibit 108, SR 530.

Respondents' main focus during the trial was on these forty-three pages of Findings and Conclusions, Exhibit 108. This Exhibit, along with the Court's instruction stating that the jury was to consider these matters conclusively established, was clearly designed to ensure maximum influence on the jury's decision. Tony maintains that the decision to admit these Findings and Conclusions and other documents from the



unrelated litigation between him and Rick was erroneous and that the Judgment should be reversed.

### STANDARD OF REVIEW

This case involves a challenge to the Trial Court’s evidentiary rulings. The standard of review of an evidentiary ruling “requires a two-step process[:] first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was prejudicial error that ‘in all probability’ effected the jury’s conclusion.” *Johnson v. United Parcel Services, Inc.*, 2020 S.D. 39. ¶ 27, 946 N.W.2d 1, 8. This Court has noted that an abuse of discretion “is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” *Id.*; quoting *Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶ 14, 863 N.W.2d 540, 546. A trial court’s decision to grant or deny a particular jury instruction is also reviewed under the abuse of discretion standard. *Id.* at ¶ 28.

### ARGUMENT

- I. *The Trial Court erred in admitting into evidence Findings of Fact and Conclusions of Law from a separate, unrelated case involving the Petitioner and one of the Respondents.*

This is a Will contest. The background of this case, though, involves an elderly lady, Judy, wanting her freedom from a man who had controlled and abused her for decades. She wanted a divorce. Three of Judy’s adult children aligned with their father in the divorce by consulting with and working with Dean’s attorneys to delay the proceedings. TR 501. They even went so far as to hire an attorney to file a formal guardianship/conservatorship action to delay or stop the divorce, and in the process they

called Judy incompetent to manage her own affairs and required her to undergo a psychological evaluation.

In their efforts to defeat Judy's intentions for the disposition of her property as set out in her Last Will and Testament, Respondents either discount or entirely ignore Judy's desire for a divorce, and their filing of a guardianship action against Judy. Instead, the central theme Respondents put forth to set aside Judy's testamentary dispositions focused almost exclusively on the separate lawsuit between Rick and Tony. Respondents claim that Tony was lying to Judy about what was going on in that case and telling Judy that Rick was the cause of all the family problems. The Trial Court, over Tony's objections, allowed into evidence over forty pages of irrelevant and unfairly prejudicial Findings of Fact and Conclusions of Law from that unrelated litigation under the theory of issue preclusion, without ever detailing or determining exactly what "issue" was being "precluded." A fair review of the record reveals that this document (Exhibit 108), along with the other file documents from the Rick and Tony lawsuit, were essentially Respondents' entire case. No disinterested witnesses testified concerning Judy's testamentary intentions other than her attorneys. There were no medical records entered into evidence or relied upon by Respondents.

The Findings of Fact and Conclusions of Law in the partnership litigation between Rick and Tony (Exhibit 108) were ordered by the Trial Court to have been "conclusively established" pursuant to issue the preclusion doctrine. *See*, Jury Instruction No. 25, SR 552. Because the dispositive issue in the former case and this case are not identical, and because the Conclusions of Law in Rick and Tony's case do not constitute estoppel, this ruling was erroneous.

Issue preclusion applies when four elements are satisfied: (1) the issue decided in prior adjudication is identical to the issue raised in the action in question; (2) there is a final judgment on the merits in the prior adjudication; (3) the party whom preclusion is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is now asserted was afforded a full and fair opportunity to litigate the issue for which preclusion is being asserted. *Estate of Johnson v. Weber*, 2017 S.D. 36 ¶ 41 (citing *People ex re. L.S.*, 2006 S.D. 76 ¶ 22). This Court has further opined that the finder of fact must analyze them under SDCL § 19-19-201 in order for them to be conclusively established facts to be judicially notice adjudicative facts. *Mendenhall v. Swanson*, 2017 S.D. 2, ¶ 12, 889 N.W.2d 416.

The factual findings in the Rick and Tony partnership lawsuit are not conclusively established facts constituting estoppel because they fail the first and fourth elements of issue preclusion. As *Rao v. Rao*, 927 So. 2d 356 (1st Cir. 2005) opined:

Credibility is essentially a fact issue, it is not generally the dispositive issue before the trier of fact, but rather a preliminary issue or factor in determination of the ultimate dispositive issue. Issue preclusion requires the issue to have been a dispositive issue which the prior court must have considered in a contest between the same parties. The trier of fact need not accept all of the testimony of any witness as being true or false and may believe and accept any part of the testimony... In summary, a credibility assessment made for the purpose of determining a dispositive issue is generally not itself an adjudicated issue upon which collateral estoppel or issue preclusion can rest.

Even if the parties are in privity, it can hardly be conclusively asserted that the issues concerning business transactions and land separation agreements are identical to alleged assertions of undue influence. While the claim of *res gestae* has been asserted by Respondents as an exception to the otherwise inadmissible Conclusions of Law from Rick and Tony's case, it is important to note that "[t]he *res gestae* embraces matters and

statements immediately antecedent to, and having a causal connection with, the main transaction.” *State v Jones*, 2002 S.D. 153, ¶ 16; 654 N.W.2d 817. Whether the two cases form a similar transaction as asserted by Respondents is a genuine issue of fact to be adjudicated, and applying issue preclusion in this context deprived Tony of his ability for a full and fair opportunity to litigate the issue as it was not asserted in the former case.

While applying issue preclusion in the present case to deprive Tony of the ability for full and fair opportunity to litigate the issues before this Court may serve the interest of judicial economy, it does not serve the interests of justice. As it stands, the issue in the present case does not reflect the former, and as *Rios v. Davis* has previously held, “[i]t is the judgment and not the conclusions of fact filed by a trial court that constitutes estoppel. A finding of fact by a jury or court, which does not become the basis or one of the grounds of the final judgment, is not conclusive against either party to a suit.” *Rios v. Davis*, 373 S.W.2d 386, 388 (Tex. Civ. App. 1963). In short, to apply the conclusions of the Judge in Rick and Tony’s case as evidence of a wholly new claim against Tony was an improper application of the doctrine of issue preclusion.

“Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.” *American Family Insurance Group v. Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774. Issue preclusion prevents a party from relitigating a “particular issue or fact *common to both actions*.” *Id.* (emphasis added.) (quoting *Bollinger v. Bollinger*, 524 N.W.2d 118, 122 (S.D. 1994); see also *Golden v. Oahe Enters., Inc.*, 240 N.W.2d 102, 109 (S.D. 1976)). Here, Tony was not attempting to relitigate the decade old judgment or any of the Findings of Fact and Conclusions of Law

entered by the Trial Court in that case. Rather, he was defending against a claim of undue influence.

Tony objected to the issue preclusion/collateral estoppel issue at it concerns the Findings of Fact and Conclusions of Law, as well as argued evidentiary issues of relevance and SDCL § 19-19-403. *January 6, 2022, Transcript of Pretrial Hearing* p. 15-16; see also *January 11, 2022, Transcript of Bench Decision*, p. 3, p. 11. At the time, Tony was represented by attorney Brad Schreiber.

Mr. Schrieber: ....The issue in this case is basically undue influence. That's the issue. I don't see anything -- and we're basically talking about relevancy is what we're talking about. But I don't think these come in under the issue preclusion because I'm not sure exactly what the issue is we're talking about other than trying to admit all of these documents.

*January 6, 2022, Transcript of Pretrial Hearing* p. 15. Mr. Schrieber goes on to explain his concerns to specific examples set out in the Findings of Fact and Conclusions of Law as it relates to Tony's credibility. Id.

Mr. Schrieber: And I'm just going to use an example and I'm going to take it from their brief, is on number 40 on number 4 it says, "Tony took the original Exhibit C with him at the conclusion of the meeting. Tony's testimony to the contrary is not credible." I have no idea why that would come in. However, it says not credible and I think there are several of these where Judge Trandahl said Tony is not credible.

There's other ones. For example, on page six of their brief at the bottom, number 13 says, "Tony failed to comply with a lawful order of the court." Well, those are conclusions by the judge is what they are. Those are certainly issues of credibility in that proceeding, not in this proceeding.

Id. p. 15-16.

So I think basically what we're coming down to, Judge, is, is this stuff even relevant? But I don't see anything in here that has been identified as being relevant except that it sounds to me like there's more of an issue of credibility. And I don't know that this is a proper means of challenging credibility in a trial until my client testifies and then you've got to pull

specific information out of findings of fact or something like that to challenge the credibility.

Id. p. 16; see also, *October 16, 2023, Transcript of Pretrial Conference*, p. 27-29.

Counsel for Respondents argued in favor of having the Findings of Fact and Conclusions of Law conclusively established through issue preclusion further arguing that issues of credibility and opinions for truthfulness “come in all the time.” Id. p. 19.

Counsel then made further argument seemingly based upon judicial economy.

MR. SARGENT: Right, but they can disregard it if they want, her opinion [Judge Trandahl’s] on that matter. I guess the biggest thing that -- I believe that this is all relevant and so we need to know if I need to have the forensic witness --

THE COURT: Right.

MR. SARGENT: -- come back, if I need to have all of my documents from that first trial, if we're going to try that along with it because again, this is all a timeline. I mean, so you're going hear this is what's going on in the family in 2011, 2012, 2013.

Id. p. 19-20.

At trial, however, the vast and overwhelming bulk of Respondents’ case pertained exclusively and in detail to the prior litigation involving Rick and Tony. *See*, e.g. TR 263-325 (Tony O’Neill cross-examination); see also TR 349-355 (Rick O’Neill direct examination). It also took up eleven pages of opening statement. TR 122-134. Tony was confronted on cross-examination with numerous questions solely relating to the prior litigation and extensive questions concerning his business relationship with his brother, Rick. Despite the fact that he had not contradicted anything regarding the prior case up to that point in time, Tony was hammered throughout his cross-examination with Judge Trandahl’s Findings of Fact and Conclusions of Law, even those pertaining to Judge Trandahl’s Findings regarding Tony’s credibility and his having been held in contempt of

court. Objections were made during the examination, which were overruled. TR 267, 269, 271, 274, 276, 288, 297, 312, 314.

Additionally, the Jury was then instructed that the Findings of Fact and Conclusions of Law set forth in Exhibit 108, were “conclusively established.” Jury Instruction No. 25, SR 552. The jury had no choice but to accept them as true.

Tony was cross-examined on matters concerning his relationship with Rick, the agreement they reached on dividing up property, the location of the property, what property had which pivots, which pivots were more productive, the location of the headquarters, the agreement that they would swap houses, and various meetings and decisions held relating to these matters and the litigation. *See, e.g.* 265-269, 271-272, 274, 276. Additionally, Tony was questioned on specific Findings of Fact concerning his credibility.

Q. So in Finding of Fact 39, Judge Trandahl states, Rick made a copy of the written agreement signed by both he and Tony. A copy of the Land Separation Agreement is Exhibit C. Tony's testimony to the contrary is not credible.

Again you're disputing that still today?

A. I don't agree with it but I've learned to live with it.

Q. Finding of Fact 40, the judge found that Tony took the original of Exhibit C with him at the conclusion of the meeting. Tony's testimony to the contrary is not credible.

Again you're disputing that you took the original with you that day?

A. I don't agree with it but I've learned to live with it.

Q. And that was one of the big disputes. I mean, you're claiming, hey, there's no original document there. Rick testified that you took it with you and you denied that you did that; right?

A. If you say so.

Q. Finding of Fact number 46, Tony claims Exhibit C is a forgery. He claims that he took Exhibit 3 to the meeting. The land split on Exhibit 3 would give Tony Pivots 1, 2, 3, 4 and 5 and Rick would take Pivots 6, 7, 8, 9 and the deeded pasture around the pivots.

That is what you testified to; correct?

A. I believe so.

TR 298-299. Tony was also cross-examined on further credibility Findings of Judge Trandahl as it relates to other witnesses, such as Dean, Kari and Rick. *See*, TR 301 (“Kari credibly testified she first saw a copy of the signed Land Separation Agreement . . .”); (“the judge found that Dean credibly testified he also saw a copy of the signed Separation Agreement . . .”). Kari never testified in this case. Dean is deceased.

Tony was further cross-examined on matters pertaining to creating another corporation and guaranteeing loans using O’Neill Farms, Inc. and O’Neill Cattle Company. TR 307-308. Tony was questioned on the Findings of Judge Trandahl concerning his strategy in dealing with Rick as being “one of dishonesty and malicious mischief” and whether he committed fraud on the court. TR 310. (“Q: Did you dispute the judge’s finding that you committed fraud on her court? A: That’s what she said. I probably don’t agree with it.” TR 310. Despite the objections being made, (*See*, e.g. TR 267, 269, 271, 274, 276, 288, 297, 312, 314) the cross-examination regarding the Findings of Fact and Conclusions of Law as set forth in Exhibit 108, continued.

Respondents relied upon the case of *Mendenhall v. Swanson* to support the motion to admit the prior litigation documents including the Findings and Conclusions pursuant to the issue preclusion doctrine. *Mendenhall* addressed the issue of issue preclusion to admit exhibits from prior litigation proceedings. In *Mendenhall*, the



husband commenced a claim for slander against his ex-wife alleging that she had filed false reports to law enforcement claiming that he had sexually abused her daughter. The ex-wife then counterclaimed against the husband for intentional infliction of emotional distress, invasion of privacy, slander, and alienation of her daughter's affections. The parties in that case had suffered through a contentious divorce. Before the divorce was finalized, the ex-wife had obtained protection orders against husband which were extended based upon the circuit court's findings of fact detailing husband's conduct towards wife. There was also a substantial custody dispute with wife being awarded primary physical custody. Husband was also held in contempt of court in for failing to abide by the parenting time order. *Mendenhall* at ¶ 3-4.

At trial, the ex-wife offered and the court admitted fourteen exhibits pertaining to the divorce and protection order cases. *Mendenhall* at ¶ 6. For example, the trial court admitted letter decisions from the circuit court concerning motions for custody and for mental health evaluations, orders for contempt, protection orders, and findings of fact and conclusions of law. *Id.* at ¶ 6. The jury returned a verdict in favor of ex-wife. On appeal, husband argued that it was improper for the circuit court to admit the fourteen exhibits, and to instruct the jury that they were to accept as conclusive any of the facts. In that case, the court had admitted the documents under a theory of judicial notice, however, it was intertwined with arguments relating to issue preclusion, which was addressed by the South Dakota Supreme Court on appeal. *Id.* at ¶ 10.

This Court reversed holding that “[r]egardless of whether the court had relied on judicial notice or issue preclusion it had failed to conduct the appropriate analysis in either case.” *Id.* at ¶ 12. Specifically, the Court stated as follows:

An analysis of these elements is not apparent in the record in regard to any of the 14 exhibits, let alone to *each* of the facts contained in those exhibits. In order to treat those facts as conclusively established or proven, the court should have analyzed them under SDCL 19-9-201 or principles of issue preclusion. The court's failure to do so was error.

Id. at ¶ 12. (emphasis in original).

In this instance, the Court did provide its analysis regarding admitting the Findings of Fact and Conclusions of Law pursuant to issue preclusion or collateral estoppel. *January 11, 2022, Transcript of Bench Decision* p. 6 (“and so I want to make it clear in this case that this is an issue for collateral estoppel. I am not applying res judicata. I am not applying judicial notice and collateral estoppel as specific facts.”) The analysis however did not entail what “issue” was subject to “preclusion” or “collateral estoppel” or how the entirety of these Findings of Fact and Conclusions of Law were relevant or whether the probative value of the entire exhibit was outweighed by the danger of unfair prejudice, misleading of the jury or confusion of the issues. SDCL § 19-19-403.

Tony anticipates the argument that any “evidentiary objections” to the specific findings and conclusions have been waived as untimely, presumably referring to any objections beyond the court’s determination to apply issue preclusion such as relevance and objections based on SDCL § 19-19-403. *See*, SR 264 (App. 2) and SR 274 (App. 3); *See also October 16, 2023, Transcript of Pretrial Conference*, p. 25-32. The relevance and Rule 403 objections were nonetheless made both of Tony’s prior legal counsel and current counsel during trial.

## CONCLUSION

Based on the foregoing and the erroneous orders concerning issue preclusion, Appellant respectfully requests this Court reverse the Judgment and remand to the Trial Court.

## REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

Dated this 16th day of May, 2025.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief is submitted under SDCL § 15-26A-66(b). I certify that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief contains 5,607 words and 33,269 characters, excluding the table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

DATED this 16th day of May, 2025.

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## CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy via eFileSD, and the original of the above and foregoing Appellant's Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

Clerk of the Supreme Court  
State Capital Building  
500 E. Capitol Avenue  
Pierre, SD 57501

DATED this 16th day of May, 2025.

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### APPELLANT'S APPENDIX

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SS:

IN CIRCUIT COURT

COUNTY OF TODD )

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE OF  
JUDITH ANN O'NEILL,

Deceased.

60PRO19-000003

## JUDGMENT

On March 22, 2019, Tony O'Neill a/k/a James Anthony O'Neill filed a Petition for Formal Probate of Will, Determination of Heirs, and Appointment of Personal Representative seeking, *inter alia*, that the Last Will and Testament of Judith Ann O'Neill dated August 26, 2016, and the First Codicil to the Last Will and Testament of Judith Ann O'Neill dated July 26, 2017, be admitted to probate.

On April 10, 2019, Richard O'Neill, Sandra Lang f/k/a Sandra O'Neill and Bethany O'Neill filed their objections to Tony's Petition alleging, *inter alia*, that the will and codicil offered for probate were the product of undue influence.

A jury trial was held November 18-20, 2024, at the Tripp County Courthouse, the Honorable Bobbi J. Rank presiding. Petitioner James Anthony O'Neill appeared personally and with his attorneys of record, James G. Sword and Michael Wheeler. Respondents Richard O'Neill, Sandra Lang and Bethany O'Neill appeared personally and with their attorneys of record, Clint Sargent and James S. Simko. On November 20, 2024, by special verdict form, the jury concluded that the August 26, 2016, Last Will and Testament of Judith Ann O'Neill is invalid as a result of Tony O'Neill's undue influence on Judith Ann O'Neill and the July 26, 2017, First Codicil to the Last Will and Testament of Judith Ann O'Neill is invalid as a result of



Tony O'Neill's undue influence on Judith Ann O'Neill. Based on the jury's verdict and good cause appearing,

Now, therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the August 26, 2016, Last Will and Testament of Judith Ann O'Neill is invalid as a result of Tony O'Neill's undue influence on Judith Ann O'Neill, and therefore, the will is denied probate;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the July 26, 2017, First Codicil to the Last Will and Testament of Judith Ann O'Neill is invalid as a result of Tony O'Neill's undue influence on Judith Ann O'Neill, and therefore, the codicil is denied probate;

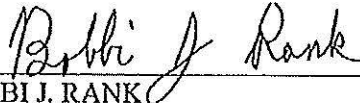
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the estate of Judith Ann O'Neill shall pass by intestate succession to the heirs of Judith Ann O'Neill;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the heirs of Judith Ann O'Neill at that time of her death were Sandra Lang, James Anthony O'Neill, Richard O'Neill and Bethany O'Neill;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that U.S. Bank Trust National Association S.D. shall continue to serve as personal representative and administer the Estate according to the laws of intestate succession.

12/17/2024 11:13:01 AM

BY THE COURT:



HON. BOBBI J. RANK  
Circuit Court Judge

Attest:  
Calhoon, Jodi

ATTEST: Clerk/Deputy

Clerk of Court



STATE OF SOUTH DAKOTA     )  
  :SS  
COUNTY OF TODD            )

IN CIRCUIT COURT  
SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE ESTATE OF  
JUDITH ANN O'NEILL,  
  
                          Deceased.

60 PRO 19-3  
  
**ORDER RE:  
MOTION TO RECOGNIZE  
FACTUAL FINDINGS IN BENNETT  
COUNTY CASE CIV. 12-22 AS  
CONCLUSIVELY ESTABLISHED  
PURSUANT TO ISSUE PRECLUSION  
DOCTRINE**

A hearing was held on Respondents' Motion to Recognize Factual Findings in Bennett County Case Civ. 12-22 as Conclusively Established Pursuant to Issue Preclusion Doctrine on January 6, 2022 at the Todd County Courthouse. Petitioner James Anthony O'Neill appeared by and through his attorney of record, Brad Schreiber. Respondents Richard O'Neill, Sandy O'Neill and Bethany O'Neill appeared by and through their attorneys of record, Clint Sargent and James S. Simko. The Court considered the submissions and arguments of counsel. A telephonic hearing was held on January 11, 2022 at which time the Court orally stated its ruling on the motion and the Court's findings and conclusions in support thereof.

Now, therefore,

IT IS HEREBY ORDERED that Respondent's Motion is granted in part and denied in part. The motion is granted with respect to the findings of fact and conclusions of law stated in the following pleadings:

1. Findings of Fact and Conclusions of Law - November 4, 2013 (except Conclusions of Law 78 through 111 inclusive).
2. Order Re: Defendant's Motion for Contempt - March 14, 2014
3. Findings of Fact and Conclusions of Law Re: Motion for Contempt - March 29, 2017

The Court concludes that the elements of issue preclusion have been met with respect to the foregoing findings and conclusions. However, the findings and conclusions are subject to any evidentiary objections raised by Petitioner James Anthony O'Neill in accordance with the Court's procedure set forth below.

IT IS FURTHER ORDERED that the motion is denied with respect to Conclusions of Law 78 through 111 inclusive stated in Findings of Fact and Conclusions of Law - November 4, 2013 because the elements of issue preclusion have not been met.

IT IS FURTHER ORDERED that any additional evidentiary objections to the findings and conclusions that satisfy the elements of issue preclusion shall be presented by Petitioner James Anthony O'Neill in writing and identified by paragraph number with appropriate authority supporting the objection and filed by January 18, 2022. Respondents' response to Petitioner's objections shall be submitted in writing and filed by January 24, 2022. The Court intends to rule on any objections at the pretrial hearing scheduled for January 27, 2022 at 3:00 p.m.

Date: \_\_\_\_\_

1/14/2022 11:42:11 AM

BY THE COURT:



HON. BOBBI J. RANK  
Circuit Court Judge

ATTEST: Attest:  
Cihak-Brozik, Sally  
Clerk/Deputy

Clerk of Courts



STATE OF SOUTH DAKOTA )

IN CIRCUIT COURT

COUNTY OF TODD )

:SS

SIXTH JUDICIAL CIRCUIT

60 PRO 19-3

IN THE MATTER OF THE ESTATE OF  
JUDITH ANN O'NEILL,

Deceased.

**SECOND ORDER RE:  
MOTION TO RECOGNIZE  
FACTUAL FINDINGS IN BENNETT  
COUNTY CASE CIV. 12-22 AS  
CONCLUSIVELY ESTABLISHED  
PURSUANT TO ISSUE PRECLUSION  
DOCTRINE**

WHEREAS on January 14, 2022, the Court entered its ORDER RE: MOTION TO RECOGNIZE FACTUAL FINDINGS IN BENNETT COUNTY CASE CIV. 12-22 AS CONCLUSIVELY ESTABLISHED PURSUANT TO ISSUE PRECLUSION DOCTRINE, which included the setting of certain deadlines for the parties to submit any written objections and responses thereto before trial; and,

WHEREAS on January 18, 2022, the Court granted the parties joint request for a continuance of the trial date; and

WHEREAS this matter is currently set for a jury trial to commence on October 16, 2023, and the Court desires to set new deadlines;

NOW, THEREFORE;

IT IS HEREBY ORDERED that any additional evidentiary objections to the findings and conclusions that satisfy the elements of issue preclusion, which the Court has ruled include:

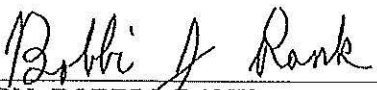
1. Findings of Fact and Conclusions of Law - November 4, 2013 (except Conclusions of Law 78 through 111 inclusive).
2. Order Re: Defendant's Motion for Contempt - March 14, 2014
3. Findings of Fact and Conclusions of Law Re: Motion for Contempt - March 29, 2017

shall be presented by Petitioner James Anthony O'Neill in writing and identified by paragraph number with appropriate authority supporting the objection and filed by September 15, 2023. Respondents' response to Petitioner's objections shall be submitted in writing and filed by September 22, 2023.

Date: \_\_\_\_\_

9/14/2023 11:24:59 AM

BY THE COURT:

  
\_\_\_\_\_  
HON. BOBBI J. RANK  
Circuit Court Judge

ATTEST: Attest:  
Cathoon, Jodi  
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Clerk of Courts



IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

Appeal No. 30969

---

**ESTATE OF JUDITH ANN O'NEILL  
JAMES ANTHONY O'NEILL**  
Petitioner/Appellant,

v.

**SANDY LANG, BETH O'NEILL and RICHARD DEAN O'NEILL,**  
Respondents/Appellees,

---

Appeal from the Circuit Court, Sixth Judicial Circuit  
Todd County, South Dakota

The Honorable Bobbie J. Rank  
Circuit Court Judge

---

APPELLEES' BRIEF

---

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Notice of Appeal filed January 16, 2025

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## **PRELIMINARY STATEMENT**

Petitioner/Appellant James Athony O'Neill will be referenced as "Tony." Respondents/Appellees Richard Dean O'Neill, Beth O'Neill and Sandy Lang will be referred to as "Rick," "Beth" and "Sandy." Respondents/Appellees will collectively be referenced as "Respondents" as they are designated as such in the record. Decedent Judith O'Neill will be referenced as "Judith." The Settled Record will be referenced as "SR." The Trial Transcripts will be referenced as "TR." Motion hearing transcripts will be referred to by the date of the hearing followed by "HT." Trial Exhibits will be referenced as "Ex."

## **LEGAL ISSUES**

*I. Whether the circuit court erred in admitting into evidence Findings of Fact and Conclusions of Law from a separate lawsuit involving Petitioner and one of the Respondents.*

The circuit court correctly applied the doctrines of collateral estoppel and issue preclusion in admitting the disputed evidence.

Most Relevant Authorities:

*Hamilton v. Sommers*, 2014 S.D. 76, 855 N.W.2d 855

*Mendenhall v. Swanson*, 2017 S.D. 2, 889 N.W.2d 416

## **STATEMENT OF FACTS**

Judith Ann O'Neill (Judith) died on November 28, 2018. On March 22, 2019, her son, James Anthony O'Neill (Tony), filed a petition for formal probate of a will dated August 26, 2016 (Will), and a codicil dated July 26, 2017 (Codicil). SR 11. The Will and Codicil bequeathed Judith's entire estate to Tony, and specifically disinherited Judith's other three children, Rick, Sandra, and Bethany (Respondents). SR 11.

Respondents filed objections to Judith's Will and Codicil on the grounds that Tony had unduly influenced their mother, Judith. SR 30. Respondents offered evidence at trial that Tony's efforts, and ultimate success, in obtaining undue influence over Judith was part of an overall scheme that started in 2011.

Starting in the summer of 2011, Tony set upon a scheme to bully his brother and business partner, Rick, and gain financial advantage over him. In 2012, Tony sued Rick in the Bennett County Circuit Court. Ex. 105. The suit related to the brothers' farm partnership agreements and separation agreements. Rick counterclaimed seeking specific performance of certain separation agreements and other equitable relief and asserting actions for breach of fiduciary duties, conversion, and punitive damages. Ex. 108.

A five-day court trial commenced on July 15, 2013, at the Bennett County Courthouse in Martin, SD. *Id.* The Honorable Kathleen Trandahl presided. *Id.* Both parties were represented by counsel. *Id.* Rick and Tony each testified and were cross-examined. *Id.* Multiple lay and expert witnesses were also called during the multi-day court trial and numerous exhibits were offered and admitted into evidence. *Id.*

During that trial, Tony accused Rick of forgery breaking into Tony's house to alter documents on Tony's computer, and conspiring with their father Dean to violate pre-trial orders. Ex. 108.

On November 4, 2013, Judge Trandahl filed detailed Findings of Fact & Conclusions of Law regarding the relationships within the O'Neill family and Tony's conduct and credibility in dealing with disputes within the O'Neill family. *Id.*

Before, during, and after Tony's litigation with Rick, Tony portrayed himself to his mother as a victim of Rick's wrongful conduct. TT 458, 470-72. Tony told family

members that Rick had mental problems and may be suicidal. TT 401, 455. Tony told family members that Rick was not doing any work for the farming operations, and Tony was doing it all. TT 456. Tony convinced his mother that his brother, Rick, and his father, Dean, were working together against Tony. TT 470-72. Tony convinced his mother that Rick was getting an unfair split of the partnership assets, that Rick owed Tony a “ton of money,” and that Dean had completely sided with Rick and loaned Rick “hundreds of thousands of dollars.” TT 471-72. Judith was convinced that Tony was a millionaire and everything Tony “does turns to gold.” TT 473. “Everything was pro-Tony, Rick is bad, Rick is the cause of all the issues.” TT 473.

Once Tony started his business separation from Rick in 2011, Tony’s poor business decisions over the next several years crippled Tony financially. The final entry of judgment by Judge Trandahl against Tony in favor of Rick would be the final nail in Tony’s financial coffin. TT 245. After Judge Trandahl’s decision was remanded by this Court, a hearing to finalize Tony and Rick’s litigation was scheduled for August 25, 2016. The Court was set to hear Rick’s Motion for Approval of Accounting, Motion for Addendum to Judgment and Motion for Contempt against Tony. On August 19, 2016, Tony filed a Motion for Continuance of the August 25 hearing, which was rescheduled for August 31. On August 26, 2016, Tony took Judith to a lawyer in Rapid City, at which time and place, Judith executed a Durable Power of Attorney appointing Tony as her attorney in fact. TT 206-209. Judith also executed a Last Will and Testament that excluded Rick and Beth as heirs. *Id.* On the morning of August 31, just hours before the hearing on Rick’s motions and five days after Judith appointed Tony her attorney in fact and main heir, Tony filed for bankruptcy – automatically staying all proceedings in the

circuit court. TT 246, 250.

Despite the indisputable fact that Tony had filed for bankruptcy, Judith still believed that Tony was financially successful, and that Rick was lying about Tony being in bankruptcy and Rick simply “made it up.” TT 476. Judith had become “very, very focused on it being Rick’s fault.” TT 476.

Many of these allegations made by Tony against Rick were litigated in the Bennett County action and found to be untrue by Judge Trandahl. Ex. 108. However, Tony’s allegations of Rick and Dean’s conspiring against Tony were effective in convincing Judith to divorce Dean and to eventually disinherit all of her children and grandchildren except Tony.

Knowing that much of Tony’s prior conduct would be offered as evidence of his undue influence scheme over Judith, and knowing that Tony would likely attempt to dispute at the will contest trial that he engaged in such conduct, Respondents filed a Motion to Recognize Factual Findings in Bennett County Case Civ. 12-22 as Conclusively Established Pursuant to Issue Preclusion Doctrine. SR 171. The circuit court heard arguments from counsel at a hearing on January 6, 2022, took the matter under advisement, and issued her oral ruling at a hearing on January 11, 2022. Applying the tests stated in *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 34, 855 N.W.2d 855, 866 and *Mendenhall v. Swanson*, 2017 SD 2, ¶ 10, 889 N.W.2d 416, 419–20, the circuit court concluded:

THE COURT: What [Respondents] were arguing is, look, to the extent that any of those previous facts that we litigated are relevant in this case, Tony does not get to go back and open those back up.

For example, if it were -- if part of what Tony was claiming in that the -- as to why his -- he did not exert undue influence was that his mom was mad at his brother for forging a land separation agreement. He can't go there. Judge Trandahl already determined that in the previous lawsuit.

And so as I look at these elements and I apply them to the Findings and Conclusions and other orders at issue in the previous case, clearly element four is met. They had a full and fair opportunity to litigate those issues.

They're the same parties, so element three is met.

And in regard to element two, whether there's a final judgment on the merits, I think that element is met, except for Conclusions 78 through 111, which I'll address in a minute.

And, one, was the issue decided in the prior adjudication identical to the one presented in the action in question. That element is met to the extent that these findings and orders are relevant in the current action.

And so with the exception of Conclusions 78 through 111, I think the elements of collateral estoppel have been met and the respondents are not required to put on evidence to re-litigate any of those issues, nor can Tony O'Neill re-litigate any of those issues.

To the extent that those Findings of Fact and Conclusions of Law are relevant to this particular proceeding and to the extent that they survive other evidentiary challenges, I'll get to that in a minute.

1/11/22 HT 7-9.

In regard to the remaining Findings and Conclusions and orders, again, I think they come in and they are conclusively established and Tony O'Neill cannot relitigate those, cannot question those under collateral estoppel; however, that does not mean that they are not subject to challenge pursuant to relevance, pursuant to [Rule] 403, and perhaps pursuant to other evidentiary challenges.

1/11/22 HT 10.

And so where I'm at right now in regard to the remaining Findings of Fact and Conclusions of Law, other than Conclusions 78 through 111 which I'm not letting in, is that the evidentiary issues in regard to those particular matters, I, at this time, don't think that they have been fully and properly teed up before me.

What Mr. Schreiber has referenced said, well, I don't think they're relevant and I don't think they're -- they should be excluded under 403 and -- but, look, this Court could go through each one of those Findings of Facts and Conclusions of Law and write a hundred page opinion on all the potential various evidentiary issues, but I don't think this Court is required to do that.

I think that's heavy lifting that needs to be done by the parties. And if Mr. Schreiber is objecting, he obviously can preserve his relevance and 403 objection to all of the Findings of Facts and Conclusions of Law.

But I know what's going to happen, so I go through and I spend a whole day saying, well, I think these are relevant, these aren't, blah, blah, blah, blah, and then I come -- and then we show up at trial and it's like, well, I preserved my objection. They may be relevant, but I think they're excluded because, and then eight other evidentiary matters are cited to me. I don't want to be doing that.

I want to address all evidentiary issues at once. And Mr. Schreiber indicated that if I said they could come in under collateral estoppel and motion in limine was coming, let's get this teed up and let's argue it all.

And Mr. Sargent also referenced that, look, the parties may be able to review these Findings of Facts and Conclusions of Law and some of them they may agree just don't come in, and I think -- I don't think all of them need to come in under 403 for reasons beyond prejudice, that being confusion of the jury and wasting of time.

And so I'm going to hold in abeyance the other evidentiary issues in regard to those Findings of Fact and Conclusions of Law and orders. And I want the parties to meet and confer in regard to that, whether there is agreement to exclude or redact any of those Findings and Conclusions.

And I want a motion in limine raising all potential evidentiary issues in regard to those Findings and Conclusions, and I want them referenced by Finding and Conclusion in regard to the specific objections. And I want that by Tuesday, the 18th of January.

I will give the petitioner -- excuse me -- I will give the respondents, Mr. Sargent and Mr. Simko's clients, until January 24th to submit their response.

And I will make my ruling in regard to which specific Findings and Conclusions come in and which ones are excluded at the pretrial hearing on January 28th.

So the motion to bring these in under collateral estoppel as a general matter is granted, except for Conclusions 78 through 111.

I'm holding in abeyance all other potential evidentiary objections to these Findings and Conclusions. I will rule on those specifically at that hearing.

Any questions?

MR. SCHREIBER: No, Your Honor.

1/11/22 HT 10-13.

Tony did not file a motion in limine or written objections by the January 18, 2022 deadline set by the Court. The trial scheduled for January 31, 2022, was continued on January 18, 2022, based on a joint request from the parties due to a COVID outbreak in Tripp County.

The jury trial was subsequently re-scheduled to commence on October 16, 2023. The circuit court entered a new order commanding that any specific evidentiary objections to the Bennett County Findings of Fact and Conclusions of Law be presented by Tony "in writing and identified by paragraph number with appropriate authority supporting the objection and filed by September 15, 2023." SR 274. Tony did not file any written objections by the deadline.

After Tony's lawyer failed to appear at two pretrial hearings scheduled on October 11 and 12, 2023, the circuit court postponed the trial one day and ordered the parties to appear for a pretrial hearing on October 16, 2023, which was to be the first day of trial. At the October 16 hearing, the circuit court again addressed the issue of the Bennett County Findings of Fact and Conclusions of Law.

THE COURT: And so turning to the Respondents' exhibit list amended October 4th, which is in the file and is on file as of October 5th, the Court previously ruled in reference to exhibits, I believe 108, 109 and 109-A, there was a hearing and there was extensive briefing regarding the

Respondents' request for this Court to allow those as collateral estoppel in reference to this particular matter. And the Court did allow those -- the Court issued an order ruling saying those come in as collateral estoppel in regard to certain facts. And at that time the Court specifically ordered that if there were other, any evidentiary objections to those documents or parts of those documents, that those had to be specifically designated per finding or conclusion.

And after Mr. Schreiber withdrew, the Court, at Respondents' request, issued another deadline in which any evidentiary objections to those documents or parts of those documents had to be submitted by the deadline, which I believe was a month ago. No objections were submitted and so I think there's been a waiver of any objections in regard to those particular documents with the exception that I did exclude certain conclusions from the Court's order on the collateral estoppel issue.

And I'm assuming that the documents that are marked as those exhibits, I'm assuming that those portions that the Court did not allow are excised from those documents. Is that correct, Mr. Sargent?

MR. SARGENT: That is correct. Exhibit 108 has been redacted so the conclusions that the Court identified as not satisfying the issue preclusion and collateral estoppel have been redacted and I've provided copies of the redacted versions to Mr. Hurley and I have an exhibit binder for the Court.

THE COURT: And Mr. Hurley, does your client expect any objections to any of the Exhibits 101 through 136 in this matter, just so the Court can have some idea of what may be coming in this matter?

MR. HURLEY: Well, Brad Schreiber, the lawyer before me, had made objections and we just rested on those and that's where it stands today.

THE COURT: Well, so you're talking about the objection to noticing those for collateral estoppel, which the Court -- obviously, his arguments regarding collateral estoppel the Court considered and overruled and that's in the file. And I specifically ordered that if there were any other evidentiary objections, that they had to be raised by a set date and I gave an extended deadline on that while you were counsel and no such objections were raised. And so I'm presuming you're talking about the collateral estoppel objections that were made in regard -- that I already overruled from Mr. Schreiber. Is that correct?

MR. HURLEY: Yes, that's correct.

10/16/23 HT 20-23.

After this colloquy, the issue was addressed again by Tony's counsel.



MR. HURLEY: The objection to that is that in that Bennett County case it was a trial to the Court and the finder of fact was, of course, Judge Trandahl. She was the jury. And on any issue of credibility of witnesses, which they're attacking the credibility, of course, of Tony O'Neill, that is a question for the finder of fact.

This case is different. We have a jury and we think it's wrong to try to take that obligation of the jury to determine credibility of the witnesses. They're the finder of fact in this case and so the two cases are different in that respect is that Judge Trandahl, as the finder of fact, put down her views on the credibility, which is appropriate. But in this case we have a jury to do that. We think it's wrong to take that decision away from the jury.

THE COURT: But isn't that exactly what was argued to the Court in regard to whether those should be collateral estoppel in this matter? I mean collateral estoppel of specific facts.

MR. HURLEY: But the credibility of Mr. Tony O'Neill would still be a question for this jury and what's happening here is that they're bringing in from a different case the credibility of that finder of fact based on those facts and those issues, which are not present here.

Here we have a Will that's being attacked and that's the sole issue here is whether or not she was capable of making her own decision and making her own Will without undue influence from somebody else, including Tony O'Neill. So it's different issues, different facts and –

THE COURT: But that sounds like a specific evidentiary objection to those findings or conclusions that you would agree with me that the Court set a deadline in which your client was to submit their specific evidentiary findings to each finding and conclusion and no such objections were received.

MR. HURLEY: Correct.

THE COURT: Would that not be what that is?

MR. HURLEY: Well, there was no specific objections other than what Brad Schreiber had put down but –

THE COURT: And I had specifically said I'm not going to allow you to make a blanket objection. I said you are going to lay out your objections by specific finding and conclusion so I can rule so I don't get ambushed at trial.

MR. HURLEY: Well, I'm not --

THE COURT: And I'm not implying that's what you're doing but tell me how that's not waived because the Court specifically set an order in which those specific objections had to be submitted in advance of trial.

MR. HURLEY: Correct. And we didn't have any specific objections to those specific things except if it's going to be used to say that that's already been decided and you have no obligation here, this jury has no obligation to make a decision on the credibility of Tony O'Neill.

THE COURT: Mr. Sargent, your response.

MR. SARGENT: Judge, I would ask the Court to make a specific finding on the record so that this record is clear that the Court set a deadline a year and a half ago to exactly what the Court said, any specific objections to any of the findings and conclusions in Exhibit 108 needed to be specific, they needed to be in writing and they needed to be done by a date certain.

Again knowing that this was a potential issue, I raised it again in August and the Court in September set a deadline where again reiterating when Mr. Hurley had been counsel of record for over a year, that any specific objections as to Exhibit 108 needed to be submitted in writing with authority by a date certain and then also gave the Respondents an opportunity to respond in writing. Nothing was filed.

Those objections have been waived, clearly waived and it's prejudicial to the Respondents to allow those objections to be made now on the eve of trial and not give us proper time to research and respond with reasoned arguments as to why those objections should be overruled. And so I'm asking the Court to overrule any objections raised here today and prohibit any objections during the trial because they have been waived for failure to follow the Court's scheduling order.

THE COURT: And so again, because of the issues that I discussed at the very beginning of this pretrial hearing, we now are having the pretrial hearing on the first day of what was supposed to be trial. I've had to push back trial a day and the Court previously specifically ruled in regard to the collateral estoppel issue in regard to those findings and conclusions in [Exhibit] 108 and I specifically ordered that any other evidentiary objections to those findings and conclusions and, obviously, I excluded some conclusions, that any evidentiary objections to those findings and conclusions had to be stated in writing and had to be by finding and conclusion so the Court could rule on specific objections.

Mr. Schreiber withdrew. Mr. Hurley had the opportunity -- an order was in

the file in which he had the opportunity to submit those specific objections and nothing was received. There was no request for an extension. There was no objection to the Court's order setting a deadline and again, now on the eve of trial on what was supposed to be the first day of trial, this is being raised before the Court and those objections have been waived.

And Mr. Hurley, I'll let you speak but they have been waived at this point. Go ahead.

MR. HURLEY: Yes. And I agreed with that earlier and maybe I didn't speak clearly. What I was asking for is a request that when this comes in and when it gets time for us to address the jury, it can't be stated that, as the instructions state, that the jury has the duty and obligation and opportunity to address the credibility of any of the witnesses. We aren't taking that away and we aren't making a new instruction to the jury and that's all I was trying to question so I didn't overstep something in terms of what the jury is doing here.

They are what a jury always does and whatever this testimony is, how they handle it is their obligation and they'll be doing that. It isn't a foregone conclusion that the attack on the credibility of Tony is already decided by Judge Trandahl. No, that's just evidence that comes in and this jury still has to decide the credibility of witnesses presented at this trial. That's what I was asking.

THE COURT: All right. So but those findings have been made in regard to the specific issues in reference to the findings and conclusions, the specific factual issues in regard to the findings and conclusions that are in the record. The jury will otherwise be instructed on the credibility of witnesses in this matter.

MR. HURLEY: Thank you.

10/16/23 HT 27-32.

Later on the day of October 16, 2023, Attorney Hurley moved to withdraw as counsel, and Tony moved for a continuance of the trial. Respondents objected. The Court granted the continuance. The trial was re-scheduled to commence on November 18, 2024.

At another pretrial hearing conducted on November 12, 2024, the issue of the Bennett County Findings of Fact and Conclusions of Law was raised again.

THE COURT: The Court previously -- when Mr. Schreiber was Mr. Tony O'Neill's counsel in this case, a motion was made to introduce a number of findings and conclusions and an order from a Bennett County case between the parties. Pursuant to the collateral estoppel doctrine and I think *res gestae*, I ruled on that matter far in advance I think of even the first time that this was scheduled for trial when Mr. Schreiber represented Mr. O'Neill. And at that point in time my order was that if there were additional objections to individual findings and conclusions, then I set a deadline that those had to be raised.

When Mr. Schreiber was terminated in this file by Mr. O'Neill and the matter was rescheduled for trial in 2023 of last year, I again scheduled the deadline for any additional objections to those findings and conclusions and nothing was filed by the deadline. And I determined at that time that those findings and conclusions which are referenced in the Court's Order Regarding Motion to Recognize Factual Findings in Bennett County case 12-22 as Conclusively Established Pursuant to Issue Preclusion Doctrine, that that order entered on January 14, 2022, was binding and that all the findings and orders referenced in that order would come in due to the failure of any additional objections to be filed.

And so we were ready to go with that ruling at the time that this was scheduled for trial in the fall of 2023, and Mr. Sargent e-mailed the Court and counsel today just in reminder of that and that those objections have been waived and the Court has already made its ruling in reference to that.

And so I guess, Mr. Sword, any -- you've read Mr. Sargent's e-mail. You obviously had -- you've been involved in this case for some time and had the opportunity to look through the entire file and so, I guess, any comments in reference to that?

MR. SWORD: My understanding of the Court's ruling is that that goes to the Court's Findings of Fact and Conclusions of Law and then order. I notice from the exhibit list that it also has letters from Judge Trandahl. And so I guess in addition to -- and I understand the Court's ruling and definitely appreciate the actions of prior counsel but I'd definitely reserve the right as to the non-court documents as to foundation and also relevance.

THE COURT: Well, let's get to the actual exhibit and witness list then. So Mr. Sargent, the actual findings and conclusions and I think it was a contempt order that I previously ruled that they come in, you've listed that as your Exhibits 108, 109 and 109-A; correct?

MR. SARGENT: Yes, Your Honor.

THE COURT: And so Mr. Sword, as I understand your -- as I understand your preserve objections, you're not talking about those, you're talking about the other potential exhibits listed on the Respondents' exhibit list; correct?

MR. SWORD: Right, Your Honor.

11/12/24 HT 9-11.

A jury trial was held November 18-20, 2024. Respondents put forth their evidence of undue influence, including Tony's misrepresentations to Judith about his lawsuit with Rick. The Bennett County Findings of Fact and Conclusions of Law were received into evidence as Exhibit 108. As expected, Tony denied that he and Rick had entered into a written separation agreement and still claimed that Rick forged the agreement presented at the Bennett County trial. TT 300. Tony denied remembering that a computer expert had concluded that the separation agreement Tony had offered at the previous trial was actually prepared on Tony's computer 73 days after Tony claims it was signed by Rick. TT 304-306. Tony still accused Rick of sneaking into his house and messing with his computer. TT 306. Tony still accused Rick and Dean of conspiring to violate Judge Trandahl's pretrial orders. TT 311. Exhibit 108 was used on cross-examination to show that Tony's statements on these matters – statements he was also making to Judith in an effort to alienate his mother from Rick – had been previously proven to be false.

The sole issue raised by Tony in his Appellant's Brief is whether the trial court improperly admitted Exhibit 108.

## STANDARD OF REVIEW

This Court reviews a circuit court's application of collateral estoppel de novo. *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 34, 855 N.W.2d 855, 866 (citing *Am. Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 14, 787 N.W.2d 768, 774).

The “standard of review for evidentiary rulings ‘requires a two-step process[:] first, to determine whether the trial court abused its discretion in making an evidentiary ruling; and second, whether this error was a *prejudicial error* that ‘in all probability’ affected the jury's conclusion.” *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, ¶ 27, 946 N.W.2d 1, 8–9 (quoting *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 59, 764 N.W.2d 474, 491). “An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” *Id.* (quoting *Andrews v. Ridco, Inc.*, 2015 S.D. 24, ¶ 14, 863 N.W.2d 540, 546 (quoting *In re Jarman*, 2015 S.D. 8, ¶ 19, 860 N.W.2d 1, 9)).

## ARGUMENT

### **1. Tony Failed to Make Specific Evidentiary Objections to Ex. 108 – Issue Waived**

“It is well established that ‘[the Court] will not review a matter on appeal unless proper objection was made before the circuit court.’” *Weber v. Weber*, 2023 S.D. 64, ¶ 24, 999 N.W.2d 230, 236 (quoting *Osdoba v. Kelley-Osdoba*, 2018 S.D. 43, ¶ 23, 913 N.W.2d 496, 503 (quoting *Halbersma v. Halbersma*, 2009 S.D. 98, ¶ 29, 775 N.W.2d 210, 219)). “A proper objection to exclude offered evidence ... must be made in a timely fashion and must state the appropriate ground(s) therefore.” *Bakker v. Irvine*, 519 N.W.2d 41, 47 (S.D. 1994)(citing SDCL 19-9-3(1)). “An objection is not considered timely unless it is made as soon as the party objecting knows or reasonably should have known that the

evidence is objectionable.” *Id.*

In order to preserve the right to have a question reviewed, a party feeling aggrieved by any incident in the progress of a trial must make his objection known at the earliest opportunity, when the occasion therefor arises, or as soon as the potential objector has the opportunity to learn that the evidence is objectionable, unless there is some specific reason for a postponement.

*Bakker v. Irvine*, 519 N.W.2d 41, 47 (S.D. 1994)(quoting 75 Am.Jur.2d *Trial* § 401 (1991)). “The reason for this rule is to give the trial court the opportunity to take appropriate preventive or corrective action.”

Tony asserts in his Appellant’s Brief that he made objections to Exhibit 108 on the grounds of relevance or under Rule 403. However, the trial court rejected Tony’s blanket objections to Exhibit 108 and required Tony to submit written detailed objections to each finding and conclusion so opposing counsel had an opportunity to reply in writing and the trial court had sufficient opportunity to make a reasoned decision. 1/11/22 HT 12; 10/16/24 HT 28; SR 264, 274. Tony did not object to this procedure when it was ordered by the Court at the January 11 hearing. Tony failed to comply. Tony cannot now be heard to complain. Tony failed to make his specific objections known to the trial court at the time set by the court to take appropriate action. Tony has waived his right to contest the admission of Exhibit 108 on any basis other than the proper application of the doctrine of collateral estoppel and issue preclusion.

## **2. Test for Issue Preclusion and Collateral Estoppel Met**

Under the judicially-developed doctrine of [issue preclusion], once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. This doctrine “relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.” A party may invoke issue preclusion either offensively or

defensively. However, “there must have been ‘a full and fair opportunity to litigate the issues in the prior proceeding.’”

*Mendenhall v. Swanson*, 2017 SD 2, ¶ 10, 889 N.W.2d 416, 419–20 (internal citations omitted).

The collateral estoppel doctrine “bar[s] relitigation of an essential fact or issue involved in the earlier suit” if a four-part test is satisfied: “(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication?” *Estes v. Millea*, 464 N.W.2d 616, 618 (S.D.1990).

*Hamilton v. Sommers*, 2014 S.D. 76, ¶ 34, 855 N.W.2d 855, 866

Issue preclusion prevents relitigation of factual disputes common to both actions.

*Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 41, 978 N.W.2d 786, 798. Principles of issue preclusion can, and should, be applied “to prior factual findings” if the four-part test of collateral estoppel is satisfied. *Mendenhall*, 2017 SD 2, ¶ 10. Judge Trandahl’s factual findings from the Bennett County lawsuit contained in Exhibit 108 satisfy that four-part test.

***a. Part 1 - Factual Issues Were Identical to Prior Adjudication***

It was Respondent’s position at trial that Tony had devised a scheme to unduly influence Judith as early as 2011. Tony’s conduct in his business separation with Rick, Tony’s defiance of court orders and witness oaths, and Tony’s cascading financial condition were all so blended and connected with the elements of undue influence that



they were part of the *res gestae*<sup>1</sup> of Tony's overall scheme. Respondents were required to prove "(1) decedent's susceptibility to undue influence; (2) opportunity to exert such influence and effect the wrongful purpose; (3) a disposition to do so for an improper purpose; and (4) a result clearly showing the effects of undue influence." *In re Est. of Holan*, 2001 S.D. 6, ¶ 16, 621 N.W.2d 588, 591–92 (citations omitted). Bethany's trial testimony about Judith's belief in the lies Tony was telling about Rick was proof of Judith's susceptibility to undue influence, Tony's opportunity to exert undue influence and effect a wrongful purpose, and Tony's disposition to exert undue influence for an improper purpose.

To show Tony's purpose was wrongful and improper, Respondents needed to prove the falsity of Tony's statements to Judith, which included Tony's lies that Tony was the victim of Rick's wrongful conduct; that Rick was not doing any work for the farming operations, and Tony was doing it all; that Rick and Dean were defying court orders; that Rick forged the separation agreement and lied about it; that Rick snuck into Tony's house and messed with his computer; that Rick was getting an unfairly generous split of the partnership assets; that Rick owed Tony a "ton of money;" that Dean had completely sided with Rick and loaned Rick "hundreds of thousands of dollars;" and that Rick had simply made up that Tony was in bankruptcy. Each of these factual issues are identical to the issues that were litigated in the Bennett County trial. Ex. 108.

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<sup>1</sup> "The *res gestae* exception permits the admission of evidence that is 'so blended or connected' in that it 'explains the circumstances; or tends logically to prove any element of the crime charged.'" *State v. Wright*, 2009 S.D. 51, ¶ 55, 768 N.W.2d 512, 531 (quoting *State v. Owen*, 2007 S.D. 21, ¶ 15, 729 N.W.2d 356, 363).

The fact that Exhibit 108 may have contained some factual findings that were irrelevant to the will contest case does not diminish the admissibility of the relevant factual findings under the doctrine of collateral estoppel. Any irrelevant information was received solely because Tony failed to make his specific objections as ordered by the trial court. Moreover, Tony has failed to show how the admission of irrelevant findings of fact “was a *prejudicial error* that ‘in all probability’ affected the jury’s conclusion.”” *Johnson*, 2020 S.D. 39, ¶ 27.

***b. Parts 2, 3, and 4 of Test Clearly Met***

Exhibit 108 was the basis for a final judgment on the merits that was appealed to this Court. *O’Neill v. O’Neill*, 2016 S.D. 15, 876 N.W.2d 486. Only the findings of fact and conclusions of law that were affirmed by this Court on appeal were admitted; the portions of Exhibit 108 that related to matters reversed by this Court were redacted by order of the trial court. SR 264. There was a final judgment on the merits. Part 2 of the test is satisfied.

James Anthony O’Neill was a party in both the former and current litigation. Part 3 of the test is met.

Tony received a full and fair opportunity to litigate the issues in the prior proceeding. The factual issues raised in this case were at the heart of the previous litigation. Tony and Rick both employed counsel, conducted extensive discovery, engaged experts, participated in multiple pre-trial hearings, attended a multi-day court trial, and submitted Judge Trandahl’s factual findings and legal conclusions to this Court for review. Part 4 of the test is met.

## CONCLUSION

The circuit court correctly applied the doctrines of collateral estoppel and issue preclusion in admitting Ex. 108. Tony waived any additional objections to the evidence.

Appellees respectfully request this Court affirm the circuit court's Judgment and deny all relief sought by Appellant.

Respectfully submitted this 2<sup>nd</sup> day of June, 2025.

*/s/ Clint Sargent*

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Appellee's Brief was served via Odyssey File & Serve upon the following:

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### **CERTIFICATE OF COMPLIANCE**

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 6,007 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 2<sup>nd</sup> day of June, 2025.

/s/ Clint Sargent  
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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 30969

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ESTATE OF JUDITH ANN O'NEILL

JAMES ANTHONY O'NEILL,

Petitioner/Appellant,

vs.

SANDY LANG, BETH O'NEILL and RICHARD DEAN O'NEILL,  
Respondents/Appellees,

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APPELLANT'S REPLY BRIEF

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Appeal from the Circuit Court, Sixth Judicial Circuit,  
Todd County, South Dakota,  
The Honorable Bobbi J. Rank, presiding

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Notice of Appeal filed January 16, 2025

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## REPLY ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM A SEPARATE, UNRELATED CASE INVOLVING THE PETITIONER AND ONE OF THE RESPONDENTS.

- A. Findings of Fact and Conclusions of Law (Exhibit 108) were not properly admitted pursuant to the doctrine of collateral estoppel/issue preclusion.

The Findings of Fact and Conclusions of Law at issue were forty-three pages in length (Exhibit 108, SR 438) and involved substantial and voluminous detail concerning the litigation between James Anthony O'Neill ("Tony") and Richard Dean O'Neill ("Rick") and their farm and ranch operation. Exhibit 108 also contained Findings of Fact and Conclusions of Law directly relating to Tony's credibility, specifically that the Trial Court, Judge Kathleen F. Trandahl, in that case had found his testimony to be "not credible." Exhibit 108, SR. The Findings of Fact and Conclusions of Law further detailed incidents from the other case where Tony was found in contempt of court. See, Exhibit 108, TR 310.

These Findings of Fact and Conclusions of Law as set out in Exhibit 108 were essentially the Respondents' entire case as it concerns the claim of undue influence. Exhibit 108 was admitted based on the doctrine of collateral estoppel/issue preclusion. This decision was erroneous as the elements of issue preclusion do not apply to the Findings of Fact and Conclusions of Law and were not established.

The elements necessary to establish issue preclusion have been properly stated by Respondents: 1) the issue in the prior adjudication must be identical to the present issue, 2) there must have been a final judgment on the merits in the previous case, 3) the parties in the two actions must be the same or in privity, and 4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication. *Estate of Johnson v.*



*Weber*, 2017 S.D. 36, ¶ 41, 898 N.W.2d 718; see also, *Healy Ranch, Inc. v. Healy*, 2002 S.D. 43, ¶ 42, 978 N.W.2d 786, 799. The first element simply has not been met.

Tony did not attempt to re-litigate any aspect of the prior case against Rick from a decade earlier. That case involved claims and disputes over the existence and/or enforceability of an agreement between the brothers concerning their farm and ranch operation. In this Will contest alleging undue influence, on the other hand, the jury was instructed on the following issues: 1) decedent's susceptibility to undue influence; 2) opportunity to exert such influence and effect a wrongful purpose; 3) a disposition to do so for an improper purpose; and 4) a result clearly showing the effects of undue influence. *In re Estate of Holand*, 2001 S.D. 6, ¶ 16, 621 N.W.2d 588, 591-592.

To support the admission of Exhibit 108, Respondents argue that "Bethany's trial testimony about Judith's belief in the lies Tony was telling about Rick was proof of Judith's susceptibility to undue influence, Tony's opportunity to exert influence and effect a wrongful purpose, and Tony's disposition to exert undue influence for an improper purpose." *Appellees' Brief*, p. 19. Although that may very well be the Respondents' theory of the case, it does not support the conclusion that the issues are "identical" for the purposes of collateral estoppel or issue preclusion. The Trial Court erred in determining otherwise and in admitting Exhibit 108.

In *Nemec v. Goeman*, 2012 S.D. 14, ¶ 14-15, 810 N.W.2d 443, 446-447, this Court observed that res judicata "consists of two preclusion concepts: issue preclusion and claim preclusion." *Id.* at ¶ 14, (quoting *Link v. L.S.I., Inc.*, 2010 S.D. 103, ¶ 34, 793 N.W.2d 44, 54.) Issue preclusion, which is also known as collateral estoppel, "refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and

decided.” *Id.* at ¶ 14 (quoting *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56(1984)). “Issue preclusion only bars ‘a point that was *actually and directly in issue* in a former action and was judicially passed upon and determined by a domestic court of competent jurisdiction.’ ” *Id.* at ¶ 15 (quoting *Am. Family Ins. Group v. Robnik*, 2010 S.D. 69, ¶ 18, 787 N.W.2d 768, 775).

In *Nemec*, a father sought custody of the parties three children born out of wedlock. The issue that Mother sought to have judicially established based on issue preclusion was her “parental fitness.” Mother in that case had previously been a party to a guardianship proceeding involving the same children and their paternal grandmother. This Court held, however, that her parental fitness was not an issue to be precluded because the circuit court never made a finding on Mother’s fitness. *Id.* at ¶ 15. Therefore, no court has ever “judicially passed upon and determined” Mother’s fitness and the issue is not precluded in this case. Because the issues were not identical, issue preclusion did not apply.

Similarly, the Montana Supreme Court in the case of *Reisbeck v. Farmers Insurance Exchange*, 467 P.3d 557 (MT 2020), refused to apply the doctrine of issue preclusion in connection with a claim to recover underinsured motorist benefits based on a lack of identical issues. *Reisebeck*, involved a car accident resulting in injuries to Farmer Insurance Exchange’s insured. The liability claim against the tortfeasor went to trial and a verdict in the amount of \$10,000 was entered. The case was thereafter settled for the policy limits. Reisbeck then proceeded to collect under his under insured motorist coverage through Farmers. Farmers alleged that issue preclusion prevented Reisbeck from “relitigating” the issue of damages. The Montana Supreme Court disagreed, and

held that a contract claim for UIM benefits is wholly distinct and separate from the underlying third-party tort claim. *Id.* at 467 P.3d at 562 at ¶ 17. The fact, according to the Court, was “fatal” to Farmers’ issue preclusion argument. *Id.* at ¶ 17. Specifically, the Court observed that it “need look no further than the first element of issue preclusion to conclude that Farmers’ argument fails.

Issue preclusion requires that the issue decided in the prior adjudication is *identical* to the issue raised in the action in question. (citation omitted). Farmers argues that the jury’s assessment of damages in the tort action is identical to the issue in the current contract dispute between it and Reisbeck. But such an argument runs directly contrary to our repeated pronouncements, as summarized in *Braun*, that a UIM claim “presents a controversy between an insurer and an insured over the interpretation of an insurance contract” and consequently “should be resolved by contract law.” *Braun*, 243 Mont. at 127, 793 P.2d at 254. Obviously, the jury in the tort action did not resolve the damages issue in that action by application of contract law; thus, the damages issue in the tort action cannot be *identical* to the damages issue in the contract action.

*Reisbeck*, 467 P.3d at 562 at ¶ 17. Again, because the issues in the two cases were not identical, issue preclusion did not apply.

Respondents argue that the Findings and Conclusions (Exhibit 108) support the elements of undue influence and establish that Tony lied to his mother, Judith, about Rick and his other siblings and convinced her to divorce Dean and to draft her Last Will and Testament and Codicil. *Appellees’ Brief*, p. 5. In addition to not encompassing an “identical issue,” a review of Exhibit 108 reveals that this explanation of alleged relevance is entirely incorrect. For example, there are no Findings or Conclusions in Exhibit 108, that Tony lied to Judith about anything. See, Exhibit 108. Nor are there any Findings or Conclusions about the circumstances under which Judith decided to divorce Dean. Nor are there any Findings or Conclusions touching upon or even remotely addressing the drafting of Judith’s Last Will and Testament or her Codicil. There are no

Findings about Judith's alleged susceptibility to undue influence, Tony's alleged opportunity to exert undue influence, or the ultimate disposition of Judith's estate.

In other words, there are no Findings or Conclusions in Exhibit 108 that contradict the testimony of Judith's attorneys, Angela Colbath<sup>1</sup> and Robert Galbraith, that Judith knew exactly what she was doing and that she wanted a divorce from Dean. TR 180-183. There are no Findings to contradict that Judith wanted to divorce Dean after years of emotional and physical abuse, even having her teeth knocked out by Dean. TR 144, 222. There are no Findings to dispute that Judith correctly believed that Dean would leave his estate to Rick and Beth, and so that initially she wanted to leave what property she had to Tony and Sandy. TR 190-192, Exhibit 1. There are no Findings that address the gamesmanship that delayed Judith's divorce from Dean, which involved Sandy filing Guardianship and Conservatorship pleadings "on the eve" of Judith's divorce trial which resulted in additional unwanted delay and claimed that Judith was incompetent to manage her own affairs. There is nothing in Exhibit 108 to contradict that Judith hired attorney Michael Sabers to defend her in that proceeding, and that the Guardianship and Conservatorship petition filed by Sandy further delayed her divorce and made Judith very "angry" (TR 149-151) thus explaining why she directed her attorney Robert Galbraith to draft a Codicil to her Will removing Sandy. TR 157-158, 170.

Because the issues in the cases were not identical, the first element required in the issue preclusion analysis was not satisfied. Accordingly, the trial court erred in ruling

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<sup>1</sup> Respondents state that "on August 20, 2016, Tony took Judith to a lawyer in Rapid City, at which time and place, Judith executed a Durable Power of Attorney appointing Tony as her attorney in fact." *Appellees' Brief*, p. 5. Judith was living in Rapid City. The attorney was Angela Colbath, the same lawyer Judith who was representing Judith in her divorce at the time.

that Exhibit 108 was admissible and in instructing the jury that the matters contained in that exhibit were conclusively established.

- B. Appellant objected to the Findings of Fact and Conclusions of Law (Exhibit 108) on the grounds of relevance and Rule 403.

Exhibit 108 was also irrelevant and unfairly prejudicial. Any probative value this Exhibit held was substantially outweighed by the danger of unfair prejudice and a confusion of the issues.

“Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means which results in one party having an unfair advantage.” *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 30, 764 N.W.2d 474, 484. SDCL 19-19-403 provides that the Court may exclude relevant evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Thus “even helpful, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury.” See, *State v. Logue*, 372 N.W.2d 151, 157 (S.D. 1985). Evidence which is not relevant is not admissible. SDCL 19-19-402.

Many of the “facts and conclusions” set out in Exhibit 108 are entirely irrelevant. Tony objected on the grounds of relevance and SDCL 19-19-403. See, e.g. *January 6, 2022, Transcript of Pretrial Hearing* p. 15-16; *October 26, 2023, Transcript of Pretrial Conference*, p. 27-29. Irrelevant evidence is inadmissible. This is a Will contest case involving an allegation of undue influence. The prior case and as set forth in Exhibit 108 contain numerous findings relating to ownership of certain real property, the location of the certain real property, where certain pivots are located, which pivots are more

productive than the others, the existence of an agreement entered into between Rick and Tony, and their versions as to the terms of said agreement, none of which tends to make a fact at issue in this litigation more or less probable. SDCL 19-19-401.

Clearly, the main reason that Respondents offered Exhibit 108 and argued the same to the jury was to impact Tony's credibility. The jury was instructed that Tony's credibility was conclusively established in Exhibit 108. See, *Jury Instruction 25*, SR 552. It has been held that a credibility assessment made for the purposes of determining a dispositive issue is not itself an adjudicated issue upon which collateral estoppel or issue preclusion can rest. See, *Rao v. Rao*, 927 So.2d 356, 361 (La.App. 1 Cir. 11/4/05).

Tony was also cross-examined on credibility Findings of Judge Trandahl as it relates to other witnesses, such as Dean, Kari and Rick. See, TR 301 ("Kari credibly testified she first saw a copy of the signed Land Separation Agreement . . ."); ("the judge found that Dean credibly testified he also saw a copy of the signed Separation Agreement . . ."). Kari never testified in this case and Dean is deceased. The credibility of these witnesses was "conclusively established" even though neither of them testified in this case.

Tony was further cross-examined on matters pertaining to creating another corporation and guaranteeing loans using O'Neill Farms, Inc. and O'Neill Cattle Company. TR 307-308. Tony was questioned on the Findings of Judge Trandahl concerning his strategy in dealing with Rick as being "one of dishonesty and malicious mischief" and whether he committed fraud on the court. TR 310. ("Q: Did you dispute the judge's finding that you committed fraud on her court? A: That's what she said. I

probably don't agree with it." TR 310.

Objections were made on behalf of Tony.

Mr. Schrieber: And I'm just going to use an example and I'm going to take it from their brief, is on number 40 on number 4 it says, "Tony took the original Exhibit C with him at the conclusion of the meeting. Tony's testimony to the contrary is not credible." I have no idea why that would come in. However, it says not credible and I think there are several of these where Judge Trandahl said Tony is not credible.

There's other ones. For example, on page six of their brief at the bottom, number 13 says, "Tony failed to comply with a lawful order of the court." Well, those are conclusions by the judge is what they are. Those are certainly issues of credibility in that proceeding, not in this proceeding.

*January 6, 2022, Transcript of Pretrial Hearing, p. 15-16.*

So I think basically what we're coming down to, Judge, is, is this stuff even relevant? But I don't see anything in here that has been identified as being relevant except that it sounds to me like there's more of an issue of credibility. And I don't know that this is a proper means of challenging credibility in a trial until my client testifies and then you've got to pull specific information out of findings of fact or something like that to challenge the credibility.

Id. p. 16; see also, *October 16, 2023, Transcript of Pretrial Conference, p. 27-29*, see also, TR 267, 269, 271, 274, 276, 288, 297, 312, 314.

Respondents argue that these are evidentiary objections have been "waived" based upon the trial court's ruling setting a time frame and deadline to provide additional objections. Tony maintains that the issue preclusion question was wrongly decided at the outset, and that Exhibit 108 does not set out relevant findings that should have been provided preclusive effect. Although the Trial Court did set deadlines for additional evidentiary objections, there were objections relating to relevance and SDCL 19-19-403 that are clearly stated and articulated in record, especially as it relates to those Findings

and Conclusions pertaining to Tony's credibility.

### CONCLUSION

Based on the foregoing and the erroneous orders concerning issue preclusion, Appellant respectfully requests this Court reverse the Judgment and remand to the Trial Court.

Dated this 2nd day of July, 2025.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This reply brief is submitted under SDCL § 15-26A-66(b). I certify that the reply brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this reply brief was prepared, the reply brief contains 2692 words and 15,984 characters, excluding the table of contents, table of cases, and any certificates of counsel.

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## CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy via eFileSD, and the original of the above and foregoing Appellant's Reply Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

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