IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29511

GUSTAV K. JOHNSON, as Personal Representative of the ESTATE OF SUSAN JANE MARKVE,

Plaintiff/Appellant,

vs.

KENNETH CHARLES MARKVE,

Defendant/ Appellee,

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Appellant Gustav "Gus" Johnson, who appeals as the personal representative for the Estate of Susan Markve, will be referred to as the "Estate" or "Appellant." The decedent Susan Markve will be referred to as "Susan." Appellee Kenneth Markve will be referred to as Appellee or as "Markve." The Clerks Index will be cited as CI followed by the page number. The trial court's memorandum decision will be Opinion, and its order granting summary judgment as Order. A reference to a hearing transcript, provided in the Appendix, will be "App." followed by the Appendix page number.

JURISDICTIONAL STATEMENT

This appeal of right is brought under SDCL 15-26A-3(2),(4), 15-26A-7, and 15-26A-11 from a final order titled Opinion and Order Regarding Markve's Motion for Summary Judgment both dated December 9, 2020 declaring Markve's Motion for Summary Judgment granted as to all counts. CI 728-748. The judgment entered by Hon. Robert Gusinsky was based upon a memorandum decision he issued on December 9, 2020, wherein he addresses all six counts brought by the Estate against Markve. *Id.* Notice of Entry of the Order was given by Markve on the same date, December 9, 2020. CI 749. Because the matter was heard upon a Motion for Summary Judgment, no Findings of Fact and Conclusions of Law, or objections thereto, were required. The Estate timely filed its Notice of Appeal on January 7, 2021. CI 782.

STATEMENT OF LEGAL ISSUES

1. Did the trial court err in granting summary judgment before Markve had to produce his court-ordered discovery responses?

   The Trial Court concluded "No."

   SDCL §15-6-56(f)
   Iverson v. Johnson Gas Appliance Co., 172 F3d 524 (8thCir.1999)
   Dakota Indus., Inc. v. Cabela's.com, Inc., 2009 S.D. 39, 766 N.W.2d 510.

2. Did the trial court err in granting summary judgment when material issues of fact exist regarding Susan Markve's mental capacity to execute the subject deed and power of attorney in question?

   The Trial Court concluded "No.".

   SDCL §53-2-1
   In Matter of Evans' Estate, 90 S.D. 126, 238 N.W.2d 677,
   In Matter of Estate of Perry, 1998 S.D. 85, 582 N.W.2d 29
   In re Melcher's Estate, 89 S.D. 253, 232 N.W.2d 442, (S.D. 1975)

3. Did the trial court err in granting summary judgment when material issues of fact exist as to whether Markve exercised undue influence over his wife?

   The Trial Court concluded "No".

   SDCL §53-4-7
   Hein v. Zoss, 2016 S.D. 73, 887 N.W.2d 62
   Matter of Estate of Gaaskjolen, 2020 S.D. 17, 941 N.W.2d 808

4. Did the trial court err in granting summary judgment when material issues of fact exist as to whether Markve committed fraud?

   The Trial Court concluded "No".

   SDCL §53-4-4
   SDCL §§55-2-1 to -6
   Gabriel v. Bauman, 2014 S.D. 30, 847 N.W.2d 537

5. Did trial court err in granting summary judgment when material issues of fact exist as to whether Markve converted the Estate's property?

   The Trial Court concluded "No".

   SDCL §15-6-14(a)
   SDCL §15-6-42(b)
   Chem-Age Indus., Inc. v. Glover, 2002 S.D. 122, 652 N.W.2d 756

6. Did the trial court err in granting summary judgment when material issues of fact exist as to whether the Estate's claim that an implied/constructive trust is necessary to protect Susan's Markve's assets?

   The Trial Court concluded "No".

   SDCL § 55-1-7
   Meyer v. Kneip, 457 N.W.2d 463 (S.D.1990)

STATEMENT OF THE CASE

The Estate filed its Complaint with six causes of action May 25, 2018. CI 2. Markve served his Answer on July 26, 2018. CI 34. On April 10, 2020, Markve sought summary judgment, serving the motion (CI 112) along with its Statement of Undisputed Material Facts (CI 114), and his supporting Affidavit (CI 120) and the affidavits of six other alleged witnesses. CI 124-132. On that day, Markve also served and filed his Brief in Support of Markve's Motion for Summary Judgment. CI 134. The Estate served its Response to Markve's Statement of Undisputed Material Facts and Plaintiff's Statement of Genuine Issues That Remain to be Tried on May 8, 2020 (CI 338), along with Brief: In Response to Markve's Motion for Summary Judgment. CI 297. The affidavits of Gustav K. Johnson (CI 280), Nancy Hanson (CI 274), and David S. Barari (CI 338) with attached exhibits were submitted by the Estate in support of its resistance. The telephonic hearing on the motion was held on May 22, 2020. A ruling was delayed with the filing of Rule 56(f)

affidavits by the Estate's counsel on May 27, 2020 and October 9, 2020, wherein it was contended that a forensic accountant's review of Markve's discovery production and issuance of a report was necessary for the trial court's consideration before a summary judgment ruling. CI 552; 616. The Estate filed a Motion to Compel Supplemental Answers to Interrogatories and Requests for Production of Documents on September 23, 2020. The trial court granted certain aspects of the Estate's motion to compel on October 27, 2020, and entered its Order on November 12, 2020 (CI 704), giving Markve 30 days to comply from the entry, which was noticed on November 13, 2020. CI 706. On November 20, 2020, the Estate filed a supplemental brief in opposition to Markve's motion for summary judgment, which Markve replied to on November 25, 2020. CI 718. On December 9, 2020, the trial court entered its Order in favor of Markve before Markve's deadline for discovery production. CI 728. On December 9, 2020, Markve served his Notice of Entry of Order. CI 749. On January 7, 2021 the Estate timely filed its Notice of Appeal. CI 782.

STATEMENT OF THE FACTS

The Estate appeals the Opinion and Order Regarding the Markve's Motion for Summary Judgment entered in Circuit Court, Seventh Judicial Circuit, 23CIV18-051, by the Honorable Robert Gusinsky on December 9, 2020. The Estate brought a Complaint against Markve alleging six causes of action relating to Markve's actions in managing Susan affairs after the detection and treatment of her brain cancer. The Circuit Court granted summary judgment to Markve on all six causes of action.

Susan and Markve met at a bridge club in 2011. CI 120 [Affidavit of Kenneth

Markve], they began dating and became engaged at the end of 2012. *Id.* They set a wedding date for October of 2013. *Id*. Markve persuaded Susan to move to Hot Springs, and they began looking for a house. *Id*. They ultimately found one they liked and signed a purchase agreement. *Id*. After doing so, a disagreement arose as to the titling of the house, which ultimately led to the wedding being called off by Susan. *Id*.

They reconciled around Christmas of 2012. *Id*. at p.121. In anticipation of their marriage, the parties agreed to enter into a prenuptial agreement. Rather than using attorneys, they decided to use a form agreement they found on the internet. *Id*. They downloaded the form and then made modifications to suit their situation. The agreement provided that each party's pre-marital property, as well as property acquired by either party during the marriage, would remain that party's separate property. CI 19-29. They prepared a schedule of each party's property, which was attached as schedules to the agreement. *Id*. In his property schedule, Markve set forth his property holdings and represented a net worth over two million dollars. *Id*. In her schedule, Susan valued her property at slightly more than one million dollars. *Id.* Section 2 of the agreement specifically provided that Susan's residence would remain her separate property and would be the parties' residence. *Id*.

Susan and Markve were married on January 23, 2013. CI 121. The parties decided to move to Hot Springs, where Susan had bought a house in August of 2013 with $250,000.00 of her separate property and directed that the new house be titled in the name of her existing trust, which she had created in 1997.

Throughout the Fall of 2013, members of Susan's family began noticing changes in

Susan's personality and some odd behavior. CI 274-275. The most severe episode of Susan's abnormal behavior occurred when she drove from Hot Springs to Rapid City for an event. After the event, she tried to return to Hot Spring but got disorientated driving and ended up in Wall, South Dakota, more than 100 miles away. *Id.*

On Thanksgiving Day of 2013, Susan and Markve traveled to the home of her brother, Gus Johnson, for a family gathering, which also included Gus' daughter Jessica, her fiancé, and his parents. CI 280-281. During the dinner, Susan's conduct became more and more erratic to the point that the persons there, except Markve, were pleading with Susan to go to the emergency room. *Id.* Susan and Markve rejected this idea and left to go back to Hot Springs, with Markve saying that he would take Susan to the emergency room in Hot Springs if she did not get better by the time they got home. *Id.*

The following Monday, Susan went to see a doctor at the Fall River hospital, who directed that a CAT scan of her brain be performed. This CAT scan revealed a large tumor in the frontal lobe of Susan's brain. Arrangements were made for Susan to receive further care at the Mayo Clinic in Rochester, Minnesota. Susan was first seen at Mayo on December 9, 2013. On December 12, she underwent brain surgery to remove the tumor. After recovering sufficiently to return home, Susan and Markve returned to Hot Springs. The Mayo Clinic made arrangements for Susan to receive additional care at the Cancer Center in the Rapid City Regional Hospital. This treatment commenced in early January of 2014 and went through the end of February, 2014. The treatment consisted of combined radiation therapy and chemotherapy.

On March 9, 2014, Susan was admitted to the Fall River Hospital for a urinary tract

infection. Her condition deteriorated, necessitating her transfer by ambulance to the Rapid City Regional Hospital. She stayed there until March 19, 2014, when she was transferred back to Fall River Hospital. Susan stayed at this facility until April 10, 2014, when she was transferred to a nursing facility in Crawford, Nebraska. She recovered enough to return home in June. 2014. Susan resided at her home until her death on April 12, 2016.

Further fact evidence will be referred to below in the context of the legal arguments to which they relate.

STANDARD OF REVIEW

Summary judgment is not intended as a substitute for a trial to either a court or jury where any genuine issues of material fact exist. *Ahl v. Arnio*, 388 N.W.2d 532, 533 (S.D.1986). It is an extreme remedy and should only be awarded when the truth is clear. *Estate of Ducheneaux*, 909 N.W.2d 730, 739, 2018 S.D. 26. Reasonable doubts touching upon the existence of a genuine issue of material fact are resolved against the movant. *Id.* Summary judgment requires not only that there be no material facts at issue, but also that there be no genuine issue on inferences to be drawn from those facts. *St. Onge Livestock Co., Ltd. v. Curtis*, 650 N.W.2d 537, 2002 S.D. 102. On appeal from a grant of summary judgment, the South Dakota Supreme Court determines *de novo* whether the moving party demonstrated the absence of any genuine issue of material fact and has shown entitlement to judgment on the merits as a matter of law.

Actions involving state of mind are not usually suited for summary judgment. *Ahl v. Arnio*, 388 N.W.2d at 534; *Stern Oil Co., Inc. v. Brown*, 817 N.W.2d 395, 402, 2012

S.D. 56; *see, e.g., Hanagami v. China Airlines, Ltd*., 688 P.2d 1139, 1145 (Haw.1984) (Because determination of state of mind usually entails drawing of factual inferences as to which reasonable men might differ, summary judgment will often be inappropriate means of resolving an issue of this character); *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 706 (Ind.Ct.App.1999) (Summary judgment must be denied if resolution hinges upon state of mind). Similarly, "[q]uestions of fraud and deceit are generally questions of fact and as such are to be determined by a jury." *Paint Brush Corp., Parts Brush Div. v. Neu*, 599 N.W.2d 384, 392, 1999 S.D. 120; *Tucek v. Miller*, 511 N.W.2d 832, 836 (S.D.1994); *Dede v. Rushmore Nat. Life Ins. Co*., 470 N.W.2d 256, 259 (S.D. 1991); *Laber v. Koch*, 393 N.W.2d 490 (S.D.1986).

The trial court implicitly found that no genuine issue existed as to any material fact.

ARGUMENT

1. Summary Judgment was premature because the Estate had neither received from Markve court-ordered discovery nor an adequate opportunity to conduct additional discovery.

SDCL 15-6-56(f) "provides that a party opposing a motion for summary judgment is entitled to conduct discovery when necessary to oppose the motion." *Dakota Indus., Inc. v. Cabela's.com, Inc*., 2009 S.D. 39, ¶6, 766 N.W.2d 510, 512. Under Rule 56(f) the facts sought through discovery must be "essential" to opposing summary judgment. *Id.* Facts are essential if the Rule 56(f) affidavit identifies the probable facts not available, what steps have been taken to obtain those facts, how additional time will enable the nonmovant to rebut the movant's allegations of no genuine issue of material fact, and why facts precluding summary judgment cannot be presented at the time of the affidavit. *Peters v.*

Great Western Bank, Inc., 2015 S.D. 4, ¶17, 859 N.W. 2d 618, 626.

In *Iverson v. Johnson Gas Appliance Co*., 172 F3d 524 (8thCir.1999), a case with substantive similarities to the present appeal, the Eighth Circuit reversed a grant of summary judgment noting that the trial court did not discuss the points raised in the Estate's Rule 56(f) affidavits as to why it would be premature to grant summary judgment, and why discovery was needed. *Id*. at 530. The Court observed, in this regard, that "[the Estate's] first attorney filed an affidavit highlighting the necessity for discovery, and his second attorney similarly filed a Rule 56(f) affidavit. Perhaps his discovery requests were overly broad and onerous, but the district court never discussed whether that was so or whether any part of the requested discovery had merit." *Id*.

Ultimately, the Eighth Circuit admonished that "[w]hen relevant information is entirely within one party's control, discovery requests must be enforced to ensure that the other party has access to adequate information to respond to a motion for summary judgment." *Id*. at 531. *See, e.g., Doe v. Abington Friends School*, 480 F3d 252, 258 (3rdCir.2007) ("If discovery is incomplete in any way material to a pending summary judgment motion, a district court is justified in not granting the motion. And whatever its decision, it is 'improper' for a district court to rule on summary judgment without first ruling on a pending Rule 56(f) motion."); *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F3d 1309, 1315 (3rdCir.1994) ("[The] district court should have resolved [the Estate's] Rule 56(f) motions before proceeding to the merits of the newspaper's summary judgment motion . . . Its ruling on the merits, in disregard of the Rule 56(f) motion, was improper.").

The Estate submitted two Rule 56(f) affidavits to the circuit court in support of the

Estate's request for additional discovery needed to respond to the motion for summary judgment. Attached as Exhibit 1 to the Estate's second affidavit filed on October 9, 2020, is the forensic report of accountant Nina Braun of Ketel Thorstenson, LLP. In her report, Ms. Braun identifies 29 cash withdrawals by Markve, totaling $86,017.71, from a joint bank account owned by Markve and Susan at Black Hills Federal Credit Union. CI 627. Ms. Braun reports that "[t]hese substantial cash transactions are unusual in nature and are not supported with documentation for the use of the cash[.]" CI 622.

Ms. Braun utilized *Ruble, Patton & Nelson Personal Consumption Table 2005-06*, together with a listing of costs of care and home health care costs provided by Markve, concluding that Susan Markve's accounts were depleted in the amount of $415,679, beyond the costs required for her support. CI 624.

At the outset of her report, Ms. Braun provides a caveat stating that:

> [T]he records [Estate] provided to me are lacking key documents which I would normally expect to examine. In particular, I would normally want (sic) to examine tax returns for at least 2 years prior to 2014 and 2 years after 2015. Further, given the extensive volume and amount of cash withdrawals from the [Black Hills Federal Credit Union] joint account, I would expect to examine receipts for the cash expenditures.

Id.

The Estate moved to compel supplemental responses to Interrogatory 41 which seeks the name and account number for each financial account in which Markve has held an ownership interest in the past ten years. CI 599. As stated previously, the Estate argued at the October 27, 2020 hearing on the Estate's motion to compel that this information was necessary to supplement the forensic report of accountant Nina Braun. App. A45. The circuit court agreed when overruling objections to Interrogatory 41,

stating "I will allow an expert to review that information as well . . . ." App. A46.

Interrogatory 42 seeks the identity, address, services provided, and dates of service of each financial planner, estate planner and/or tax expert utilized by Markve in the past 10 years. CI 606. At the hearing on the Estate's motion to compel, the Estate informed the circuit court that Markve's individual tax returns had not been provided. App. A47. Markve objected to the relevance of these tax returns, after which, the circuit court granted the motion to compel supplemental responses to interrogatory 42 under seal and subject to a signed confidentiality agreement. App. A48.

Attached as Exhibit 3 to the Estate's second Rule 56(f) affidavit, is the affidavit of Rapid City psychiatrist Dr. Stephen P. Manlove, M.D., who reports that he was engaged as an expert witness to testify on the expected effects of Susan Markve's brain tumor on her thought processes beginning in the Fall of 2013. CI 628. Dr. Manlove describes how a person's cognitive abilities can be affected by the type of cancerous brain tumor that afflicted Susan Markve, which in a relatively short time, led to her death. CI 629. Dr. Manlove's affidavit supplements what has already been noted in Susan Markve's medical records, that her brain cancer affected Susan Markve to such a degree that delirium had set in and was likely chronic, making it quite unlikely that she had the cognitive abilities "to make decisions involving significant items of property and [the] appointment of a legal agent." CI 630.

In his affidavit, however, Dr. Manlove also provides a caveat stating:

> At the present time I am not yet prepared to render a professional opinion in this matter because I need to review more factual evidence. In particular, if Susan had care takers who regularly interacted with Susan, I would want to review their sworn statements of what they observed. However, based on

> established medical knowledge and my review of Susan's medical records, my opinion is that it would be expected that Susan had a disability that significantly interfered with her ability to make responsible decisions regarding healthcare, food, clothing, shelter, or finances in the time frame of March 2014.

With regard to Susan Markve's caregivers, the circuit court granted the Estate's motion to compel supplemental answers to the Estate's interrogatories 35 and 36. Regarding home health care personnel, Interrogatory 35 seeks the name, address, telephone number, dates of employment, scope of employment, compensation rate, dates of payments, and the amount of each payment, for each caregiver. CI 605. Interrogatory 36 seeks the same information for caregivers providing house functions, including but not limited to, house cleaning, laundry, or cooking. Markve's responses to Interrogatories 35 and 36 are identical, stating: "Most of the caregivers were transient, but information on the others is contained in the attached documents. See Bates No. 1-4." When granting the motion to compel Interrogatories 35 and 36, however, the circuit court observed that "there's still a few things missing from the documents that were requested." [and] "So . . . to the extent that the information that [the Estate] requests is not provided in those documents, you have to provide them if you know it, and if you don't know it, you must specifically state unknown." App. 41.

In short, it must be noted that the Estate's discovery conducted before the filing of Markve's Motion for Summary Judgment consisted of deposing Susan's primary attending physician and a Certified Nurse Practitioner and the serving of one set of Interrogatories and Requests for Production.

The Estate was not satisfied with the responses Markve provided to its first round

of discovery, which led the Estate's prior attorney to try to resolve the discovery conflict informally. In January of 2020, Markve provided the Estate with financial documents consisting of approximately 1,500 pages. With the onset of the COVID-19 pandemic, the Estate's attorney's offices were closed during a significant part of early 2020. Markve filed a Motion for Summary Judgment on April 10, 2020. The trial court held a hearing on the Motion on May 22, 2020. In this hearing, the trial court asked whether the Estate wanted to file a Rule 56(f) affidavit and the Estate replied affirmatively. Following this hearing, the Personal Representative and his counsel of record agreed to part ways after counsel filed his Rule 56(f) affidavit. CI 552.

The Personal Representative retained new counsel in June of 2020, who also proceeded to try to resolve the discovery issues with Markve's counsel informally. This process proved unsatisfactory to the Estate, who then filed a motion to compel Markve to provide responsive answers to the original discovery. CI 599. The Estate's counsel also filed a supplemental Rule 56(f) affidavit setting forth his basis for asserting that further discovery was needed. CI 616.

The trial court held a hearing on the Motion to Compel on October 27, 2020 and entered an order on November 12, 2020, directing Markve to provide answers within 30 days. CI 704. Markve never complied with the order, probably because the trial entered its Order granting summary judgment on December 9, 2020, rendering any further discovery moot. The Estate asserts that the trial court erred in granting summary judgment before the Estate had completed discovery. In particular, the Estate was neither given the discovery Markve was ordered to provide, nor allowed to depose any of the

witnesses Markve presented in support of his motion for summary judgement.

In its opinion justifying its grant of summary judgment, the trial court repeatedly asserts that there is no evidence in the record supporting the Estate's assertions. CI 728. The Estate responds that the trial court did not give the Estate a reasonable opportunity to conclude the discovery, which would have produced much more evidence supporting its claims. Ultimately, the trial court implicitly ruled that the Estate was not entitled to conduct further discovery in granting Markve's motion for summary judgment, which was an apparent contradiction of its order to compel Markve's discovery responses. The Estate asserts that this was clear error requiring reversal of the trial court.

However, the Estate also asserts that the evidence it did produce in response to the motion for summary judgment is sufficient to avert summary judgment.

2. <u>Summary Judgment was improper because material issues of fact exist regarding Susan Markve's mental capacity to execute the subject deed and power of attorney in question.</u>

"Under South Dakota law, a contract entered into by someone who is mentally incompetent is either void or voidable depending on the extent of their mental unfitness at the time they contracted." *Lau v. Behr Heat Transfer System, Inc.*, 150 F.Supp.2d 1017, 1021 (D.S.D.2001) (citing *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 896 (S.D.1987). Notably, in South Dakota, the capacity required to execute a valid will is not as stringent as the capacity required to contract. *See, e.g., In re Estate of Berg*, 2010 S.D. 48, ¶ 44, 783 N.W.2d 831, 842 ("For purposes of testamentary capacity, we do not require the soundness of mind enjoyed by those in perfect health, or that required to 'make contracts and do business generally nor to engage in complex and intricate business

matters." (citations omitted).

The rule regarding the sufficiency of evidence to establish incompetency to contract in South Dakota is stated as follows:

> Impairment of the faculties by disease or old age will not invalidate a deed if the party executing it had sufficient mental capacity to understand his act. It must be shown that the grantor did not have sufficient mind and memory to comprehend the nature and character of the transaction. Mental weakness that does not amount to inability to comprehend and understand the nature and effect of the transaction is not sufficient to invalidate a deed.

Matter of Evans' Estate, 90 S.D. 126, 238 N.W.2d 677, 683 (S.D.1976) (citations omitted).

The Estate's claims against Markve turn for the most part, on the effect that Susan's contraction of the deadly brain cancer, Glioblastoma Multiform IV, had on her brain's functioning. But for this most unfortunate tragedy, the Personal Representative and everyone who had the pleasure of getting to know Susan throughout her life would agree that she was an intelligent, vivacious individual who was quite capable of managing her affairs, as she had done for all of her adult life. The Personal Representative would concede that he could not contest Markve's ownership of the house which Susan bought for $250,000.00 with her separate funds (CI 29), had she titled the property in joint tenancy with Markve with right of survivorship, and then died in a car accident the next day. CI 31. However, there certainly is no issue of the fact that Susan bought the house in August of 2013 and titled it in the name of her trust. It was only after Susan was afflicted with this terrible disease in March of 2014 while in a hospital bed suffering greatly from its effects, did Susan put her signature on a new deed, essentially conveying the house to Markve. Interestingly, on the signature line of this deed is an "X" before Susan's signature. The Estate would undoubtedly like the opportunity to question Mr. Markve about who put the

"X" on the document and why.

In this case, the finder's central question is whether the effects of cancer so damaged her brain function that she could not even know what she was doing. In its Response Brief to Markve's Motion for Summary Judgment, the Estate devoted nearly eight pages to refer the trial court to instances in Susan's medical records where her mental capacity was put in question. CI 297. Also, Dr. Stephen Manlove, a noted psychiatric expert in this state, examined Susan's medical records dealing with her cancer and set forth the following observations in paragraph 11 of his affidavit filed in the court proceeding.

> Susan Markve was diagnosed with a malignant brain tumor with a measured diameter of approximately 3.5 centimeters, the size of a large walnut. This tumor was located in the right frontal lobe of Susan's brain. It is accepted medical knowledge that different areas of the brain are responsible for various brain functions. The frontal lobe controls intelligence, reasoning, behavior, memory, personality, planning, decision making, judgment, initiative, inhibition and mood. A large tumor such as was found in Susan would have been expected to significantly affect her frontal lobe function. While the removal of the bulk of the tumor would have relieved much of the pressure caused by the tumor, it would be expected that the initial damage to the frontal lobe caused by the tumor, the trauma caused by the surgery, and the subsequent radiology and chemotherapy Susan received would have a lasting effect on the functioning of her frontal lobe.

CI 643.

The brain functions that Susan would need to utilize to convey a quarter of a million-dollar asset to Markve and give him control of all of her other financial assets would have taken place in the frontal lobe of her brain. A central question is why would Susan disrupt the plan of decent she had put into place by transferring to Markve almost one greater of her wealth when, as established in prenuptial agreement, Markve already possess more twice as much wealth as Susan. An inference can be drawn that Susan's brain was not working properly when she made this decision.

Starting on Page 14 of the Brief, the Estate presented argument questioning Susan's legal capacity to execute the deed and power of attorney Markve brought to her hospital bed on March 25, 2014. Subsequently, in November of 2020, the Estate filed a Supplemental Brief along with Dr. Manlove's Affidavit. CI 710. Despite this presentation, the trial court's written decision did not address the Estate's capacity argument and did not even acknowledge Dr. Manlove's affidavit. In page 3 of its opinion, the trial court mentioned in a single sentence the course of Susan's treatment, leaving out any discussion of the size and location of the tumor removed from Susan's brain nor the likely effect it likely had on her intelligence, reasoning, behavior, memory, personality, planning, decision making, judgment, initiative, inhibition, and mood. CI 731. It is difficult to see where the trial judge viewed the non-moving party's evidence in its most favorable light and yet concluded that there was no material issue of fact concerning Susan's legal capacity.

Against this litany of medical evidence, and in reliance on attorney Hagg's April 1, 2020 affidavit, the circuit court determined that "[t]here is no dispute of material fact that Susan [Markve] was competent when she had attorney Brian Hagg draft the quitclaim deed and power of attorney." CI 737. The Estate respectfully disagrees and submits that attorney Hagg's neutrality is called into question by his representation of Markve in the Estate of Susan Markve file. 23PRO16-000016. Concerning an attorney's neutrality, the South Dakota Supreme Court determined in the case of *In re Melcher's Estate*, 89 S.D. 253, 232 N.W.2d 442, 444 (S.D. 1975), as to an attorney's testimony regarding the decedent's competence in a will contest, that:

> Counsel thereby made it incumbent upon himself to testify as to the matter of

> competency in addition to execution and attestation of the will. Having successfully resisted the motion of opposing counsel to have him removed from the case following his testimony as to competency, his evidence is not entitled to that credence to which it would have been entitled if he had preserved that neutrality that a high sense of professional propriety would have demanded.

In re Melcher's Estate concerned testimony as to a decedent's competence by an attorney who drafted the subject will and represented proponents of the will at trial. *Id*. In this matter, Attorney Hagg drafted the quitclaim deed and power of attorney in dispute. At the October 27, 2020 hearing, the circuit court inquired: "So this whole issue with Brian Hagg is a little unclear to me. Who did he represent in this case?" App.46. In response, Markve's counsel states: "It was not a joint representation. Mr. Hagg represented both Susan and Markve separately and individually." *Id*. It is submitted that Mr. Hagg's representation as stated by Markve above, and concerning Markve's interests in the Estate of Susan Markve, as expressed in Hagg's letters to the Estate, demonstrate a lack of neutrality as well. On this point, the Estate states that *but for* the quitclaim deed executed by Susan Markve in the Fall River Hospital on March 25, 2014, granting to Susan and Markve as joint tenants with the right of survivorship Susan's house and real property, the real estate would have passed to Susan's estate instead of Markve. Accordingly, it is submitted that Attorney Hagg's opinion as to Susan Markve's competence when she executed the deed and power of attorney "is not entitled to that credence to which it would have been entitled if he had preserved that neutrality . . ." *Melcher's Estate* at p.444. As to the credence of Mr. Hagg's observations concerning Susan Markve's competence on March 25, 2014, the Estate notes that the credibility of witnesses must be determined by the fact finder, not the trial court on summary judgment. *Continental Grain Co. v. Heritage*

Bank, 1996 S.D. 61, ¶ 16, 548 N.W.2d 507, 511.

Further, in summary judgment proceedings, it is well settled in South Dakota, that "[n]ot only must the facts not be in issue, but also there must be no genuine issue on the inferences to be drawn from those facts." *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 2002 S.D. 8, ¶15, 639 N.W.2d 192, 199 (citing *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968). But "summary judgment is not proper where state of mind is involved." *Garrett v. BankWest, Inc*., 459 N.W.2d 833, 848 (S.D.1990)(citing *Britt v. City of Sioux Falls*, 291 N.W.2d 784 (S.D.1980)); see, *Schultz v. Heritage Mut. Ins. Co*., 902 F.Supp. 1051, 1057 (D.S.D.1995). The reason for this rule is stated in *Bishop Trust Co., Ltd. v. Central Union Church of Honolulu*, 656 P.2d 1353, 1356 (Haw.1983) which explains that "[i]nasmuch as the determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ, summary judgment often will be an inappropriate means of resolving an issue of this character." *Id*. (citing 10 Wright & Miller, Federal Practice and Procedure, Civil §2730 (1973)).

The South Dakota Supreme Court has considered a case very similar to the present appeal. *In Matter of Estate of Perry*, 1998 S.D. 85, 582 N.W.2d 29, the Court considered issues involving a power of attorney and the transfer of assets between a husband and his incompetent wife. Like the present appeal, the wife in *Perry* was very ill, hospitalized, and met with an attorney regarding assets in contemplating her failing health. *Id.* at 31-32. A power of attorney executed by the wife, and subsequent powers of attorney and asset transfers were challenged by the wife's guardians. *Id.* at ¶10, 582 N.W.2d at 32. The trial court ruled that the wife was incompetent, thus invalidating all powers of attorney, and

the South Dakota Supreme affirmed this determination. *Id*. at ¶11, 582 N.W.2d at 32.

The medical evidence detailed above supports an inference that Susan Markve lacked the mental capacity to execute the quitclaim deed and power of attorney on March 25, 2014, thus rendering them invalid according to SDCL § 53-2-1. Indeed, the medical history, records, and testimony of Dr. Robbins show that Susan was suffering from significant mental and physical ailments at that time. This evidence, together with the reports from Susan's family concerning substantial issues with her mental health, supports a reasonable inference that Susan did not have sound mind and memory to comprehend the nature and character of these transactions.

3. <u>Summary Judgment was improper because material issues of fact exist as to whether Markve exercised Undue Influence over his wife.</u>

If it is ever determined that Susan could execute the power of attorney document and/or the deed on March 25, 2014, then the question becomes whether these documents were executed as a result of undue influence. *See* SDCL §53-4-1. Again, this is not a case concerning a will, so the legal standard is found under SDCL §53-4-7. *See Beals v. AutoTrac, Inc.*, 2017 S.D. 80, ¶21-23, 904 N.W.2d 765, 771-772.

Undue influence consists:

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

(3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

SDCL §53-4-7. Notably, these provisions are written in the disjunctive.

The factual background provided at the beginning of this document shows that Susan was in a state of a weakened mind. Susan and Markve had entered into a binding prenuptial agreement, which kept their property separate. During Susan's hospitalization, Markve sought to override her Living Will's expressed wishes, above the powers granted by the medical power of attorney. The March 25, 2014, execution of the deed and a power of attorney resulted in the transfer of significant assets from Susan's separate possession to joint ownership with Markve. This result contradicted the prenuptial agreement. Facts exist that support the Estate's claim of undue influence.

Here, a reasonable factfinder could find that Markve exploited the unfair advantage of his wife's physical and mental condition, her weakness of mind, and her necessities for care in her weakened state, to override the clearly expressed separate nature of the property in the prenuptial agreement. Summary judgment in Markve's favor is not permitted in these circumstances. *Beals,* at ¶23, at 772 ("The circuit court erred by granting summary judgment on Beal's undue-influence claim.").

The result is the same under the "testamentary" view of undue influence claims. The four elements of undue influence are:

> "(l) 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

showing the effects of such influence."

In re: Estate of Pringle, 2008 S.D. 38, ¶44, 751 N.W.2d 277,291.

As described above, Susan was in a greatly weakened condition, both mentally and physically, creating susceptibility to undue influence. Markve had the opportunity to exert such influence and the documents themselves created the ability to effectuate a wrongful result of transferring assets from separate to joint ownership. Markve had the disposition to do so, as evident from his effort to impose his desires over Susan with regard to the issues of her Living Will and his desire for "Full Code." In other words, Markve's "Full Code" argument is an admission that he "destroy[ed] the free agency of [Susan]" and substituted his will for hers. *See* Brief in Support of Motion for Summary Judgment, CI 142, p. 8, (quoting *In re Estate of Metz*, 100 N.W.2d 393,394 (S.D. 1960). Finally, Markve obtained an improper result, having overridden the prenuptial agreement and obtaining a joint interest in Susan's separate property, which was part of the reason the initial wedding was called off. *See* CI 280 *[*Affidavit of Gustav K. Johnson, ¶2-3]. Given this information, clearly there are disputed material facts that would defeat Markve's summary judgment request.

A. Self-Dealing/Breach of Fiduciary Duty

If Susan had the capacity, and the power of attorney document was not a result of undue influence, the question then becomes whether the deed and other transfers were impermissible "self-dealing." In such cases, South Dakota's law is well defined. Markve was Susan's fiduciary as of March 25,

2014. CI 120, ¶25.

> "[I]n South Dakota, as a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Estate of Duebendorfer,* 2006 S.D. 79, 26, 721 N.W.2d at 445. "A fiduciary is defined as 'a person who is required to act for the benefit of another person on all matters within the scope of their relationship.' " ... "A fiduciary must act with utmost good faith and avoid any act of self-dealing that places [his] personal interest in conflict with [his] obligations to the beneficiaries." ... "Thus, if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist."

Bienash v. Moller, 2006 S.D.78,114, 721 N.W.2d 431,435; *Hein v. Zoss,* 2016 S.D. 73, 18, 887 N.W.2d 62, 65-66 (additional citations omitted).

Nothing in the March 25, 2014 power of attorney allows for Markve to engage in self-dealing. CI 152. Consequently, Markve did not have the power to became owner, co-owner, or joint owner of any of Susan's separate assets. *Hein, supra.* Therefore, whenever Markve obtained an ownership interest in Susan's separate property, for example by depositing proceeds of a sale into a joint bank account, such an action breached not only the prenuptial agreement and the requirement of a writing to amend under SDCL §25-2-20, but also the fiduciary duty he owed to Susan as her attorney-in-fact.

Consequently, *any* transfer of Susan's separate assets to a joint account, without *specific* authorization in writing, is a wrongful action, or breach, of Markve's duty. *Hein, supra.* Markve's "comingling" of the assets in joint accounts was a breach of his fiduciary duty.

A significant number of assets were transferred by Markve from Susan's separate holdings to joint accounts at Wells Fargo Bank and Black Hills Federal

Credit Union. CI 338 [Barari Affd. Ex. P (Wells Fargo Combined Statement of Accounts)]. The "tracing" of these assets and transfers is a significant undertaking, which the Estate is attempting to complete. The Estate has hired a forensic accountant to "trace" these transactions. Discovery was not concluded and Markve was evasive in his discovery responses. *See generally,* CI 338 [Barari Affd., Ex. A, Answers to Interrogatories Nos. 33-36]. Before these issues can be adequately presented by the Estate and considered by the court, summary judgment is inappropriate. The Estate had asked that the summary judgment decision be held in abeyance until discovery could be completed. Moreover, this is why the Estate has requested that the Markve complete a full audit. *See* CI 15.

South Dakota has "adopted a 'bright-line rule' that an attorney-in-fact cannot present oral extrinsic evidence that a power of attorney gave the attorney-in-fact the power to self-deal when the power of attorney does not explicitly provide such." *Hein,* 2016 S.D. 73 10, 887 N.W.2d at 66 (citing *Bienash,* 2006 S.D. 78, ¶24, 721 N.W.2d at 437). Therefore, the affidavits of Markve and others are not permitted to explain transactions that resulted in Markve obtaining any ownership interest in Susan's separate property. Markve must provide documentation authorizing the conversion from individual to joint ownership. *See Hein.* In the absence of documentation, Markves' oral extrinsic evidence does not meet his burden of going forward with the evidence. Therefore, the transactions must be "unwound" and resolved so that the Estate may be closed

without the cloud of a failure to account for the Estate's assets.

In the absence of legitimate authorization to transfer assets from separate to joint ownership, Markve breached his fiduciary duty as a matter of law. Because of this, summary judgment should not have been entered in his favor.

B. Presumption of Undue Influence

The above discussion is punctuated by the strong presumption of undue influence that exists in South Dakota. Because of the fiduciary relationship of the Markve to Susan, under the power of attorney, a presumption of undue influence arises to transactions in which Markve obtained an interest in the separate property of his fiduciary through "self-dealing." *See e.g. Matter of Estate of Gaaskjolen,* 2020 SD 17, ¶23, 941 N.W.2d 808. Markve has "the burden to produce evidence that [he] 'took no unfair advantage of the decedent.'" *Id.* (quoting *In re Estate of Dokken,* 2000 S.D. 9, 128, 604 N.W.2d 487, 495." Here, however,

> a. Markve kept family away from obtaining information about Susan's medical care and otherwise isolated Susan by not bringing her to family functions. CI 274 [Affidavit of Nancy Hanson, ¶¶6, 13]; CI 280 [Affidavit of Gustav K. Johnson, ¶¶8-19]. Markve also had nurses contact security at the Rapid City Regional Hospital to have Gus separated from his sister of February 4, 2014, approximately a

month and a half before the signing of the power of attorney and the deed. *Id.; see also* CI 280 [Barari Affd. Ex. A, Answer to Interrogatory No 46, 24].

b. The transfers made under the power of attorney and the deed were inconsistent with the recent prenuptial agreement. *See supra*.

c. Susan did not have *independent* legal advice. Mr. Hagg met with "Ken and Susan to discuss Susan's health and options for her...." CI 105 [Affidavit of Brian Hagg, ¶2]. Susan and Markve went to meet with Attorney Hagg the same day that Gus Johnson was confronted by security at the Rapid City Regional Hospital, at Markve's request. CI 280 [Barari Affd. Ex. A, Answer to Interrogatory 24, 46]. Markve claims attorney client privilege for this meeting and for any information about discussions regarding Susan's estate plan. *Id.; see also* Answers to Interrogatory 25, 26, 27, 28, 29. CI 599. Thus, Mr. Markve is claiming that Attorney Hagg is *his* attorney and is claiming privilege in order to shield the contents of the discussions that were had with Attorney Hagg. Markve's position is clearly inconsistent with the conclusion that Susan had *independent* legal advice. Markve's responses in discovery "stonewalled" the Estate from obtaining information. Again, if Markve were as innocent as he claims, why is he preventing Susan's Estate from obtaining information relating to the legal advice *Susan* received?

> Markve continues to keep information from family and the Estate; this is simply a different approach to "isolating" Susan, by Markve's assertion of the attorney-client privilege. Moreover, Markve was represented in the probate proceedings by Attorney Hagg. C I 2 8 0 [Barari Affd., Exhibit T (Demand for Notice of Markve, filed in Fall River County, Seventh Judicial Circuit Court, Pro. File No.: 16-16, dated June 1, 2016.)]

The oral extrinsic evidence is insufficient to meet the burden of going forward with the evidence. *Hein*, 2016 S.D. 73, ¶10, 887N.W.2d at 66. In addition, the participation of Attorney Haag was merely perfunctory in this situation, because his meetings with Susan and Markve were not wholly independent. *See* CI 280 [Barari Affd., Ex. A, Answers to Interrogatories Nos. 24-29.] A conflict of interest existed in co-representation of Susan and Markve, due to the issues presented in the prenuptial agreement. In these circumstances, these issues needed to be addressed *separately* between the spouses. A joint meeting further reinforces the perception that undue influence was exerted by Markve in setting up an appointment with a new attorney, who was not Susan's long-time attorney, Attorney Mark Walters. Moreover, the position that Susan's mind was made up when she met with Attorney Haag might also indicate that the undue influence had already been effectuated, particularly here where Susan had just received chemotherapy and the incident with Markve having Rapid City Regional Hospital

security remove Susan's brother from the facility. *See Davies v. Toms,* 75 S.D. 273, 63 N.W. 2d 406, 408-09 (1954).

Moreover, the various affidavits submitted by Markve in this case should be read with a close eye. They omit key information. For example, Attorney Hagg states that Susan signed the two legal documents, but there has never been any indication that Attorney Hagg was present at the signing, made any assessment of her capacity at the time of the signing, etc. CI 105 [Affidavit of Brian Hagg, ¶¶7-8]. There were no "Witnesses" to the power of attorney document other than the notary, and there was no initialing at the bottom of the pages or on the final page of the paper. These sections of the document are blank. *See* CI 152 [Affidavit of Kristen E. Basham, Exhibit B].

The Affidavits of Susan Henderson, Joan Howard, and Irene Wells do not support the meaning that Markve would have the Court reach. For example, Susan Henderson claims that Susan Markve had the opportunity to complain but did not. CI 126 [Affidavit of Susan Henderson, ¶9]. That statement does not *prove* one way or the other that Susan was the victim of undue influence. Similarly, Markve's care or devotion to his wife does not prove that he was not exerting undue influence over Susan. *Id. ¶¶2-8; see also Perry, supra.* The same is true for Joan Howard's statements, who admits that Susan deteriorated and was "completely physically dependent." CI 128 [Affidavit of Joan Howard, ¶¶4-5]. Moreover, there are substantial questions of fact regarding whether or not Susan's discussions with her

acquaintances were a *result* of the undue influence of Markve, or even when some of these statements occurred. *See, e.g.* CI 130 [Affidavit of Irene Wells, ¶6].

The Affidavit of Dianna Stroh adds little to the issues; whether Susan was smiling or loved her husband is not the measure of the claims raised in this case. CI 132 [¶¶5-7]. Moreover, Dianna Stroh's credibility may be questionable, given that she currently resides with Markve as his "caretaker." CI 338 [Barari Affd. Ex. A, Answer to Interrogatory No. 5].

Notably, none of these people knew Susan as long as, or as well as, her family, who have significant concerns with what transpired. *See* CI 274; CI 280 [Affidavits of Nancy Hanson and Affidavit of Gustav K. Johnson]. Summary judgment is not warranted because there is clearly material issues of fact in dispute between the witnesses presented by the Estate and witnesses presented by Markve.

4. Summary Judgment was improper because material issues of fact exist as to whether fraud had been committed.

The issues regarding statutory and common law fraud are essentially the same as discussed above. As Susan's attorney in fact, Markve had a fiduciary duty to her. *See* SDCL §§55-2-1 to -6. As discussed above, sufficient facts exist that a reasonable factfinder could conclude that the power of attorney, quitclaim deed, or other subsequent transactions was a result of fraud committed by Markve as a "trustee" or under the common law. A fact finder could reasonably conclude that Susan's signature was obtained under improper circumstances, based on misrepresentations of Markve.

5. <u>Summary Judgment was improper because material issues of fact exist as to whether Markve converted the Estate's property.</u>

The law of conversion is well-established in South Dakota:

> Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right. *Ward v. Lange*, 1996 SD 113, ¶17, 553 N.W.2d 246. "Intent or purpose to do a wrong is not a necessary element of proof to establish conversion." *Rensch v. Riddle's Diamonds of Rapid City, Inc.*, 393 N.W.2d 269,271 (S.D.1986).

The trial court's perfunctory treatment of the Estate's claims for conversion deals solely with the Wells Fargo bank account. There is no mention whatsoever of this bank account in the Third Cause of Action – Conversion of the Estate's Complaint. Paragraph 50 of the Complaint deals with a diamond ring owned by Susan, which Markve admitted to keeping. Paragraph 51 refers to House Goods and Furnishings which were to be retained by Susan pursuant to the Parties Pre-nuptial Agreement, which the Complaint alleges Markve wrongly retained. The trial court neglected to address either of these claims, let along set forth any basis for why Markve would be entitled to keep this property when the pre-nuptial agreement would dictate that the property belonged to the Estate.

Paragraph 52 of the Complaint concerns the coin collection Susan listed in the pre-nuptial agreement and valued at $7,500.00. The trial court did deal with the coin collection in the section of the opinion dealing with the alleged breach of fiduciary duty by Markve. On Page 15 of the opinion the trial court states "(t)here is no question that this coin collection was sold by Markve for $1,414.00." The Estate would beg to differ considering all of the evidence in a light most favorable to the non-moving party. First, of

great interest to the Estate, but apparently overlooked by the trial court, is Check No. 3066 drawn on the Wells Fargo bank account. App. A55. This check was written by Markve on July 10, 2014 and made payable to Dakota Coin in the amount of $1,520.95. Markve made a notation on the check that it was for "sliver investment." The merchandise purchased by this check was never accounted for Markve and is much closer in value to the amount Markve claims he received from the sale of the pre-nuptial coin collection. Also of interest to the Estate is Markve's claim that the silver was sold to help pay for Susan's on-going care. This is curious in that at the time that Mr. Markve deposited the proceeds of $1,414.00 into the Wells Fargo account, the account had a balance in excess of $45,000.00.

In his affidavit, the Personal Representative stated the reasons for his belief that the prenuptial coin collection would have consisted of a bag of two thousand quarters minted prior to 1965. Bulk bags of pre-1965 silver coins are an actively traded commodity.1 Public records indicate that a bag of silver quarters having a face value of $500.00 would have had a market value of approximately $11,800.00 in January of 2013 when the prenuptial agreement was prepared. In January of 2016, when Markve claims he sold the coin collection for a total of $1,414.00, such a bag of quarters would have had a market value of approximately $6,350.00.

If the trial court was truly viewing the evidence in a light most favorably to the non-moving party, it is not possible that the trial court could have reached the conclusion that there was no issue of material fact concerning The Estate's claim that Markve

1 See the website monex.com, which provides a 10-year historical graphs for coins and serves as the resource for values cited herein.

converted the coin collection list by Susan in the prenuptial agreement. The Estate asserts that the trier of fact could find that the inferences drawn from the evidence presented lead to the conclusion that Markve bought the silver investment in July of 2014 with the intention of later selling it and claiming that the sale was of the coin collection specified in the pre-nuptial agreement, thereby allowing him to keep the actual coin collection.

In conclusion, between the three items asserted in the Complaint as having been converted by Markve, there are clearly issues of material fact which should have prevented summary judgment. In addition, given the concerns uncovered by the forensic accountant, relating to Markve's retention of the roughly $50,000 in the parties' joint account at Black Hills Federal Credit Union, should the case be reinstated, the Estate will seek to amend its Complaint to include these funds in its conversion claim.

6. <u>Summary Judgment was improper because material issues of fact exist as to whether the Estate's claim that an implied/constructive trust is necessary to protect Susan's Markve's assets.</u>

Citing SDCL § 55-1-7 through SDCL § 55-1-10, the South Dakota Supreme Court observed recently, that "[c]urrent remedies exist when inter vivos transfers of property arise from wrongful conduct by a third party." *Matter of Certification of Question of Law From United States District Court, District of South Dakota, Southern Division*, 2019 S.D. 37, ¶ 28, 931 N.W.2d 510, 517. SDCL §55-1-8 provides that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, is, unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it."

"Conceptually, the doctrine of constructive trust is remedial and flexible." *Meyer v. Kneip*, 457 N.W.2d 463, 467 (S.D.1990). In this regard, SDCL §55-1-11, grants a circuit court broad discretion to establish and declare an implied, constructive, or resulting trust based on "the facts and circumstances of a transaction." *DFA Dairy Fin. Servs. L.P. v. Lawson Special Tr*., 2010 S.D. 34, [para] 32, 781 N.W.2d 664, 672.

In Matter of Estate of Perry, discussed above, the South Dakota Supreme Court approved of the use and propriety of an implied or constructive trust when an invalid power of attorney was used to transfer assets out of a beneficiary's ownership or control. *Perry*, 1998 S.D. 85, ¶¶ 24-29, 582 N.W.2d at 34-35.

In *Perry*, the Court considered a husband's transfer of assets held jointly with his wife, out of joint ownership to his sole ownership. *Id*. Similarly, in the present appeal, Susan Markve's separate property, to-wit, her house and real property in Hot Springs, South Dakota, was converted, at a time when Susan was terminally ill, to a jointly held asset, which included Markve's right of survivorship.

Central to the application of a constructive trust to the real property at issue, is Susan's mental capacity to execute the subject quit claim deed on March 25, 2014. And as the Estate has advanced above, the issue of Susan's capacity requires consideration of not only the April 1, 2020 affidavit of attorney Hagg, but also, the plethora of medical evidence from which it may reasonably be inferred, that Susan Markve did not have sufficient mind and memory to comprehend the nature of the transaction.

Of consideration as well, to the application of an implied or constructive trust, is forensic accountant Nina Braun's report identifying 29 cash withdrawals by Markve

totaling $86,017.71, from a joint bank account owned by Markve and the late Susan Markve. Likewise, Ms. Braun's conclusion that Susan Markve's accounts were depleted in the amount of $415,679, support the application of a constructive trust.

Pivotal to these issues, of course, is the missing information discussed in Ms. Braun's forensic report, including Markve's responses to the Estate's interrogatories 41 and 42, which have never been supplemented. CI 622.

CONCLUSION

For all of the preceding reasons, the trial court's ruling should be reversed, and the matter remanded for further discovery and trial if need be, and to grant the Estate such other and further relief as is just and proper.

REQUEST FOR ORAL ARGUMENT

If this Court finds that oral argument would help determine the issues, the Estate seeks oral argument accordingly.

Dated this 18th day of March, 2021.

GEORGE J. NELSON LAW OFFICE, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the foregoing Appellant's Brief in the above-entitled action, upon the person herein next designated, all on the date below shown, by depositing said copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to the following addressee, to-wit:

Heather Bogard

Costello Porter
P.O. Box 290
Rapid City, SD 57709
hbogard@costelloporter.com

which address is the last address of the addressee known to the subscriber.

Dated this 18th day of April, 2021.

_____
George J. Nelson
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

George J. Nelson certifies that this Brief of Appellant complies with the type volume limitation of SDCL 15-26A-66(b), as it contains no more than 10,000 words. This Brief of the Appellants contains 9077 words as counted by the word count function of the word processing system used to prepare the brief, exclusive of the Table of Contents, Table of Authorities, Statement of Issues, Addendum Materials, and Certificates of Counsel.

Dated this 18th day of March, 2021.

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George J. Nelson

APPENDIX

Pages

APPENDIX

Pages

APPENDIX

STATE OF SOUTH DAKOTA,)
)SS.
COUNTY OF FALL RIVER.)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

GUSTAV K. JOHNSON, as Personal Representative of the ESTATE OF SUSAN JANE MARKVE,

Plaintiff,

vs.

KENNETH CHARLES MARKVE,

Defendant.

23CIV18-051

OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's Motion for Summary Judgment. On April 10, 2020, Defendant moved for summary judgment on all claims asserting that there no genuine dispute of material fact that the Defendant's wife, Susan Markve, desired documents drafted, and understood the nature and effect of the documents, which provided the Defendant an interest in her residence in Hot Springs, South Dakota, and appointed the Defendant as her power of attorney. On October 27, 2020, the Court held a motion hearing with Plaintiff, Gustav Johnson personally appearing and with counsel, George Nelson. Defendant Kenneth Markve, personally appeared with counsel, Heather Lammers Bogard. The Court being familiar with the entire file, and having considered the briefs, affidavits, and arguments of all parties; it is hereby **ORDERED**, that Defendant's Motion for Summary Judgment is **GRANTED** as to all counts, for the reasons set forth in this Order.

BACKGROUND

For Purposes of the Motion for Summary Judgment, the Court will rely on the following material facts, resolving questions of fact in favor of the nonmoving party.

Kenneth Markve and Susan Markve (Johnson) began dating in 2011 and married on January 23, 2013. As a wedding ring the couple used Susan's diamond ring. Kenneth purchased a wedding band which was soldered to the diamond ring.

Approximately eight days prior to the marriage, on January 15, 2013, the couple signed a prenuptial "Agreement." The parties found the agreement on the internet and modified it to fit their needs. The Agreement provides that property owned prior to the marriage will remain separate property. To that end, each party attached separate property sheets outlining the separate property. The Agreement also provides that nothing in the Agreement precludes the couple from providing each other interests in property as joint tenants with rights of survivorship. The Agreement also provides that if a party sustains either a partial or total disability that the other party will assume complete responsibility and necessary care for the other party and will only use the disabled party's assets for his or her care. The caring party is not obligated to use their own assets in supporting the care of the disabled party.

In the summer following the marriage, the couple were in Alaska and Susan returned to South Dakota, while Kenneth remained in Alaska to settle the sale of his property located there. While in Hot Springs, Susan purchased a

home on August 23, 2013, as trustee of the Susan J. Johnson Trust. Susan created the trust many years prior to her marriage with Kenneth. The couple moved into the home and lived in the home throughout the marriage.

Tragically, in December 2013, Susan was diagnosed with a brain tumor. As part of her initial treatment, Susan underwent extensive medical care through the end of 2013 and continuing into 2014. This treatment included brain surgery to try to remove the tumor, radiation/chemotherapy, and other holistic remedies. Dr. Christopher Robbins, a doctor at Fall River Health Services, treated Susan and noted that Susan had worsening short-term memory. *See Exhibit D: Deposition of Dr. Christopher Robbins, M.D. (Depo. Robbins)*, 15:3-21, *Affidavit of Kristen E. Basham* (filed April 14, 2020). Hospital staff also noted that Susan would have both good days and bad days in relation to her mental status. *See Exhibit C: Deposition of James V. Woehl (Depo. Woehl)*, 13:3-8; *Exhibit D: Depo. Robbins*, 31:16-25, *Affidavit of Kristen E. Basham* (filed April 14, 2020).

Throughout her treatment, Susan and Kenneth continued living in the marital residence. In order to maintain Susan's necessary level of care at home, Kenneth hired home health workers and caregivers for treatment. Kenneth generally managed and paid these home health workers and caregivers, and paid any outstanding bills related to Susan's care and treatment. *Exhibit H: Defendant's Responses to Plaintiff's Interrogatory No.35, Bates 1-4, Affidavit of Kristen E. Basham* (filed May 20, 2020); *see also Exhibits R-V, Second Affidavit of Kristen E. Basham* (filed June 3, 2020).

In early March, 2014, Susan had a significant health episode which required her to be hospitalized. After initially being treated at Fall River Health Services in Hot Springs, Susan was transferred to Rapid City Regional Hospital in Rapid City, for additional care. Susan was transferred back to Fall River Health Services on March 19, 2014, and placed in a swing-bed unit at the hospital for further follow-up care. This care lasted until April 2014, when Susan was transferred to a nursing home and then to the Ministry of Health, both located in Crawford, Nebraska. *Exhibit K: Letter from Ministry of Health, Affidavit of Kristen E. Basham* (filed May 20, 2020).

Prior to entering the hospital in March 2014, Susan and Kenneth met with attorney Brian Hagg to discuss options regarding management of Susan's finances and medical decisions. *Affidavit of Brian Hagg*, ¶ 2, 1 (filed April 10, 2020). Mr. Hagg states that he met with Susan on two occasions to discuss drafting a power of attorney appointing Kenneth as her agent, and a quitclaim deed transferring her residence from her trust to both her and Kenneth. *Id.* ¶¶ 3-4. Mr. Hagg states that "Susan was competent and very clear on what she wanted to do with the couple's martial home and desiring Ken to be her agent." *Id.* ¶ 5.

On March 25, 2014, while in the swing-bed unit at Fall River Health Services, Susan signed a power of attorney, appointing Kenneth as her power of attorney. *Exhibit B: POA, Affidavit of Kristen E. Basham* (filed April 14, 2020). At the same time, Susan also signed a quitclaim deed which transferred the marital home from her trust to both herself and Kenneth as joint tenants with rights of

survivorship. *Exhibit A: Quitclaim Deed, Affidavit of Kristen E. Basham* (filed April 14, 2020).

Dr. Christopher Robbins noted that Susan will have good days and bad days and will be able to have two to three hours of orientation where she would sit up and be more interactive. *Depo. Robbins*, 31:16-25; 32:1-5. James Woehl, a treating Certified Nurse Practioner (C.N.P.) also noted that Susan would have good days and bad days. *Depo. Woehl*, 12:1-25; 13:1-8. According to Mr. Woehl, Susan had a good day on March 24, 2014, and was alert and oriented and visiting with staff and her husband. *Id.* 11:11-24. Woehl noted that Susan had "improved mental status" on March 24, 2014, and again noted that Susan also had "improved mental status" on March 25, 2014, as well. *Id.* 12:1-25; *see also Exhibit L: 3/25/14 Progress Note, Affidavit of David S. Barari* (filed May 8, 2020).

In Woehl's March 25, 2014 progress note, Mr. Woehl noted that on March 25, 2014, Susan had "improved mental status," however, Mr. Woehl also noted "Speech: not working with pt due to somulence." *Exhibit L: 3/25/14 Progress Note, Affidavit of David S. Barari* (filed May 8, 2020). Mr. Woehl also noted that "O2 sat decrease to the 60's-80's" and that "they work to keep O2 on pt." *Id.* According to Mr. Woehl, somulence means that the person is "not able to interact with their environment," and "not really with it." *Exhibit C: Depo. Woehl*, 5:22-25, *Affidavit of Kristen E. Basham* (filed April 14, 2020). When describing somulence, Woehl explains that the person is "not really able to comprehend." *Id.* Woehl also explains that O2 sat, which means oxygen saturation, for Susan

was dropping into the 60-80% range where the preferred saturation range is above 90%. *Id.* 6:10-20.

On April 12, 2016, over two years after signing the power of attorney and quitclaim deed, Susan passed away. After Susan's passing Kenneth compiled an inventory of Susan's property and provided this inventory to the Plaintiff. Prior to Susan's passing, Susan's coin collection was sold for approximately $1,414.00 to Heartland Auction Co. and Dakota Coin & Precious Metals and the proceeds were placed in the joint Wells Fargo account. *Exhibit Q: Copies of Checks, Affidavit of David S. Barari* (filed May 8, 2020). In the attached property sheets to the prenuptial agreement signed by both Susan and Kenneth, Susan valued this coin collection at $7,500.00. *Exhibit B: Prenuptial Agreement and Property Exhibits, Complaint* (filed May 25, 2018). Kenneth turned over Susan's accounts and property to the Plaintiff, the Personal Representative of Susan's estate, with the exception of Susan's wedding ring, which Kenneth kept for sentimental reasons. Kenneth stated the wedding ring is currently in his attorney's possession.

ANALYSIS

The Plaintiff, Gustav Johnson, as personal representative of Susan's estate, alleges six causes of action against the Defendant, Kenneth Markve which occurred over the course of his care of Susan Markve:

1. Implied Trust,
2. Undue Influence,
3. Conversion,
4. Breach of Fiduciary Duty,
5. Statutory Fraud, and

6. Common Law Fraud.

The Defendant requests the Court grant summary judgment regarding all of these causes of action on the basis that there is no genuine dispute of material fact that Susan wanted the quitclaim deed and power of attorney drafted and understood the effect of these documents when she signed them. The Defendant also argues that there is no genuine dispute of material fact that any expenses paid using Susan Markve's assets or property were solely related to her care and treatment and associated expenses, and these expenses were allowed under the prenuptial agreement.

Generally, "[s]ummary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Aqreva, LLC v. Eide Bailly, LLP*, 2020 S.D. 59, ¶ 15, ---N.W.2d---(quoting SDCL § 15-6-56(c)). "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that a reasonable jury could return a verdict for the nonmoving party." *Id.* (quoting *Gul v. Ctr. For Family Medicine*, 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633). The moving party has "the burden of clearly demonstrating an absence of any genuine issue of material fact and entitlement to judgment as a matter of law." *Id.* (quoting *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693). "All facts are viewed in the light 'most favorable to the nonmoving party.'" *Id.* (quoting *North Star Mutual Ins. Co. v. Rasmussen*, 2007 S.D. 55, ¶ 14, 734 N.W.2d 352, 356).

"The party resisting summary judgment must present 'sufficient probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.'" *Lammers v. State by and through Department of Game, Fish and Parks*, 2019 S.D. 44, ¶ 9, 932 N.W.2d 129, 133 (quoting *Schaefer v. Sioux Spine & Sport, Prof. LLC*, 2018 S.D. 5, ¶ 9, 906 N.W.2d 427, 431). "Mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment." *Id.* (quoting *Bordeaux v. Shannon Cty. Schs.*, 2005 S.D. 117, ¶ 14, 707 N.W.2d 123, 127).

The Court addresses Plaintiff's counts starting with Count 2 onward. Plaintiff's Count 1: Implied Trust is addressed last.

1. There is no factual basis supporting any undue influence exerted on Susan.

There is no factual basis which supports Plaintiff's undue influence claim under the law. The elements of undue influence are: "(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." *Matter of Estate of Gaaskjolen*, 2020 S.D. 17, ¶ 28, 941 N.W.2d 808, 816 (quoting *Pringle*, 2008 S.D. 38, ¶ 44, 751 N.W.2d at 291). "Susceptibility to influence does not mean mental or testamentary incapacity." *Id.* ¶ 29. There is an assumption that one is competent when evaluating undue influence. *Id.* "When considering whether an individual is susceptible to undue influence, 'evidence of physical and mental

weakness is always material . . . ." *Id.* ¶ 29 (quoting *In re Estate of Borsch*, 353 N.W.2d 316, 350 (S.D. 1984)).

Both parties agree that Susan's competency is not determined under the testamentary standard. "A person entirely without understanding has no power to make a contract of any kind . . . ." SDCL § 20-11A-1. "Entirely without understanding" does not require "proof of an entire lack of understanding on any subject, i.e., that the mind of the person is an absolute void, but such a degree of mental deficiency as to render [her] incapable of understanding a transaction of the nature involved." *Fischer v. Gorman*, 274 N.W. 866, 869 (S.D. 1937) (quoting *Fleming v. Consolidated Motor Sales Co. et al.*, 74 Mont. 245, 240 P. 376, 381 (Mont. 1925)).

There is no dispute of material fact that Susan was competent when she had attorney Brian Hagg draft the quitclaim deed and power of attorney. Attorney Hagg states: "I met with Ken and Susan to discuss Susan's health and options for her to assist her with managing her finances and medical decisions as she was going through her cancer treatment." *Affidavit of Brian Hagg*, ¶ 2 (filed April 10, 2020). Attorney Hagg also provides that he met with Susan two times to discuss the quitclaim deed and power of attorney, and that "Susan was competent and very clear on what she wanted to do with the couple's marital home and desiring Ken to be her agent." *Id.* ¶¶ 4-5. Hagg also recognized that Susan signed both of these documents. *Id.* ¶¶ 7-8. The Plaintiff provides no basis to dispute attorney Hagg's personal observations of Susan in their meetings.

While the March 25, 2014, medical reports regarding Susan, and the deposition testimony of James Woehl, C.N.P., and Dr. Christopher Robbins, provide conflicting accounts of Susan's competency on March 25, 2014. Both Woehl and Dr. Robbins acknowledge that Susan's competency varied on a daily basis with some days where she was aware and able to sit up and interact with staff, and other days where she was lethargic and struggled with recognizing simple facts, such as the date. Woehl does write that Susan had an "improved mental status" on March 25, 2014. *Exhibit L: 3/25/14 Progress Note, Affidavit of David S. Barari* (filed May 8, 2020). In the same report, Susan is described with the term "somulence," or according to Woehl, defined as "not able to interact with their environment," "not really with it," and "not really able to comprehend." *Exhibit C: Depo. Woehl*, 5:22-25, *Affidavit of Kristen E. Basham* (filed April 14, 2020).

Even if Susan's competency varied day to day, this does not automatically make her susceptible to undue influence regarding the quitclaim deed and power of attorney. The Plaintiff provides no basis that even alludes to the Defendant exerting power of Susan. By signing the couple's prenuptial agreement, Susan expressly intended on leaving open the possibility of sharing her real property with the Defendant, and having the Defendant act as her caregiver if she fell ill or incapacitated. There is no question as to the validity of the prenuptial agreement nor any question of undue influence regarding the agreement. When coupled with attorney Hagg's observations regarding Susan's understanding and wants regarding the quitclaim deed and power of attorney, this strongly supports

the Defendant's assertion that Susan was not susceptible to undue influence. But more importantly, Plaintiff fails to provide evidence that disputes Defendant's assertion.

The Plaintiff does not provide any basis to dispute attorney Hagg's personal observations while meeting with Susan in regards to drafting the quitclaim deed and power of attorney. The Plaintiff merely argues that Susan was not competent when she signed the documents on March 25, 2014, and therefore the Defendant must have exerted some sort of influence to get her to sign the documents. While there are disputes on Susan's capacity throughout March 25, 2014, there is no dispute of material fact that Susan understood what the purpose of the documents were and what effect they would have. There is no evidence the Defendant exerted any undue influence over Susan's decision to have attorney Hagg draft the documents.

The Defendant provided care for Susan and was regularly at her bedside, more consistent with a caring husband than with someone trying to exert influence over another. It is undisputed that the majority of Susan's actual day to day health care needs were provided by health care workers hired by the Defendant. There is no basis to support that the Defendant exerted any influence over Susan by providing health care workers to oversee Susan's care which led to Susan having attorney Hagg draft the documents.

There is no basis which supports or creates a genuine dispute of material fact regarding Plaintiff's undue influence claim. Therefore, Defendant's motion for summary judgment regarding Count 2: Undue Influence is **GRANTED**.

2. The validity of Susan's power of attorney appointment is not material to whether Kenneth breached a fiduciary duty to Susan.

While Susan's capacity is important to determining whether Kenneth's appointment as her power of attorney is valid, this is not material to determining whether Kenneth owed Susan a fiduciary duty. Even if Susan's power of attorney is deemed invalid, it does not exonerate Kenneth from scrutiny of his conduct regarding Susan's assets.

In order to recover for breach of fiduciary duty, it must be shown that the Defendant owed a fiduciary duty to the Plaintiff, the duty was breached, and the breach caused damages. *Slota v. Imhoff and Associates, P.C.*, 2020 S.D. 55, ¶ 26, 949 N.W.2d 869, 877 (quoting Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, *The Law of Torts* § 724 (2d ed. 2011)). "Fiduciary relationships are built on trust and reliance one places in another to faithfully act for the benefit of the other." *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 17, 935 N.W.2d 262, 267 (citing *Bienash v. Moller*, 2006 S.D. 78, ¶ 11, 721 N.W.2d 431, 434). While there is no hard and fast rule on what constitutes a fiduciary relationship, "it is manifest in all the decisions that there must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one advantage over the other." *Id.* Also, "as a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Id.* (quoting *Hein v. Zoss*, 2016 S.D. 73, ¶ 8, 887 N.W.2d 62, 65).

Kenneth does not dispute he cared for Susan's assets under his belief that he was in fact acting pursuant to Susan's power of attorney. To this day, Kenneth argues that he acted under a valid appointment and he owed Susan a fiduciary duty. This undisputed belief creates an implied fiduciary duty to protect Susan's assets within the scope of the power of attorney regardless whether his appointment is actually valid. The primary question is whether there is a genuine dispute of material fact regarding a breach in this fiduciary duty.

A fiduciary has three general duties: (1) duty of care; (2) duty of loyalty; and (3) duty of confidentiality. *See* SDCL § 55-19-16; *Slota*, 2020 S.D. 55, ¶ 25, 949 N.W.2d at 876-77. An evaluation of the duty of care is based on the skill and knowledge of an ordinary person with similar expertise as the fiduciary. *See Id.* (requiring an attorney to "exercise . . . the skill and knowledge ordinarily possessed by an attorney.")(quoting *Zhi Gang Zhang v. Rasmus*, 2019 S.D. 46, ¶ 28, 932 N.W.2d 153, 162). Every action taken by a fiduciary is not subject to strict scrutiny and even if a fiduciary violates a requirement or rule of conduct, this does not automatically establish a breach of fiduciary duty. *See Behrens v. Wedmore*, 2005 S.D. 79, ¶ 51, 698 N.W.2d 555, 575 (providing attorney's violation of a rule of professional conduct does not automatically establish breach of fiduciary duty).

The Plaintiff argues that there is a genuine dispute of material fact on whether Kenneth breached his duty of loyalty by placing Susan's assets, including money from investment accounts, into a Wells Fargo account he held

jointly with Susan. The Plaintiff also alleges that Kenneth violated his duty of care to Susan by selling Susan's coin collection substantially below the value determined by Susan.

While comingling funds in a joint account may enable self-dealing by the fiduciary, this does not automatically create a presumption of self-dealing. There is no breach of a fiduciary duty by transferring funds to a jointly held account as long as the fiduciary still abides by his duties to the beneficiary. In this case, there is nothing in the record which supports the Plaintiff's allegations that Kenneth acted in any way which was self-serving. Without some sort of basis to support the Plaintiff's claims of self-dealing, there is not a genuine dispute of material fact. While Kenneth did place Susan's assets into the jointly held Wells Fargo account, there is no genuine dispute of material fact that Kenneth used this account solely for Susan's benefit. This is shown by copies of almost 140 checks from this account, *see Exhibit V: Checks from Wells Fargo Acct #2224, Second Affidavit of Kristen E. Basham* (filed June 3, 2020), and from statements from Susan's Dodge & Cox investment account showing transfers into the retirement account. *See Exhibit D: Lammers Bogard Response Letter and Supporting Documentation*, 10-15, *Affidavit of Heather Lammers Bogard* (filed October 20, 2020). Also, there is no dispute that Kenneth turned this account over to the Plaintiff after Susan's passing.

While it is true that Susan valued her coin collection at $7,500.00 in the parties Agreement, there is nothing in the record which supports that this number is based on the market value of the coins. The Plaintiff provides that

this coin collection consists of approximately 2000 silver quarters. *Affidavit of Gustav K. Johnson*, ¶ 24, (filed May 8, 2020). There is no question that this coin collection was sold by Kenneth for $1,414.00, with $900.00 from Heartland Auction Co. and $514.00 from Dakota Coin & Precious Metals. *Exhibit Q: Lammers Bogard Letter and Supporting Documentation, 2, Affidavit of David S. Barari* (filed May 8, 2020). The proceeds of the coin collection were also placed in the jointly held Wells Fargo account. *Id.* As noted above, the proceeds of the coin sale, along with the other funds in the Wells Fargo account, were turned over to the Plaintiff after Susan's passing. There is no basis to support the Plaintiff's claim that Kenneth sold Susan's coin collection below market value.

The Plaintiff provides Nina Braun's forensic accounting report as evidence showing that there is a genuine dispute of material fact regarding whether Kenneth breached his fiduciary duty to Susan by withdrawing over $80,000.00 from her Black Hills Federal Credit Union (BHFCU) account. *Exhibit 1-2, Rule 56(f) Affidavit of George J. Nelson* (filed October 9, 2020). The exact same spreadsheet used as Exhibit 2 in the report is provided in a letter from Plaintiff's attorney to the Defendant requesting an explanation to these cash withdrawals. *Exhibit C: Goodsell's January 30, 2020, Correspondence and attached documents, Affidavit of heather Lammers Bogard* (filed October 20, 2020). In response, the Defendant provides accountings of both expenses and caregivers paid using the BHFCU funds. *Exhibit D: Lammers Bogard Response Letter and Supporting Documentation, Affidavit of Heather Lammers Bogard* (filed October 20, 2020). There is nothing in the record which genuinely disputes whether

these funds were used to pay Susan's at-home caregivers or expenses related to Susan's care. The Plaintiff also argues that if Susan's caregivers were paid in cash, then they should have been provided W-2's for the work. Whether Kenneth provided Susan's caregivers with tax documents is a separate issue which is not material to the use of the BHFCU funds.

There is nothing in the record which creates a genuine dispute of material fact regarding whether Kenneth breached any fiduciary duty owed to Susan. Therefore, the Defendant's motion for summary judgment regarding Count 4: Breach of Fiduciary Duty is **GRANTED**.

3. There is no factual or legal basis to support Plaintiff's conversion claim.

There is no factual basis which supports Plaintiff's conversion allegation. "Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." *First American Bank & Trust, N.A. v. Farmers State Bank of Canton,* 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31 (quoting *Chem-Age Industries, Inc. V. Glover,* 2002 S.D. 122, ¶ 20, 652 N.W.2d 756, 766).

The Plaintiff's conversion claim is almost identical to his breach of fiduciary duty claim, and uses the argument that Defendant converted Susan's assets by comingling her assets into the joint Wells Fargo account. The Defendant argues that this "self-dealing" constitutes conversion along with arguing that the cash withdraws from Susan's BHFCU are unaccounted for.

As noted above, there is no basis in the record which supports Plaintiff's allegations of self-serving behavior by the Plaintiff. While the Defendant

comingled Susan's assets into the joint Wells Fargo account, there is no evidence that Kenneth used any of the assets to benefit himself. The Plaintiff fails to provide any genuine dispute in material fact that the Defendant took unauthorized dominion or control over Susan's assets. Regardless of the validity of Susan's appointment as Kenneth as her power of attorney, there is no genuine dispute of material fact that Kenneth abided by his duties as required under the power of attorney. Thus, there is no basis to support Plaintiff's conversion claim as a matter of law. Accordingly, Defendant's motion for summary judgment regarding Count 3: Conversion is **GRANTED.**

4. There is no factual or legal basis which supports Plaintiff's fraud claims (Counts 5 and 6).

A. Statutory Fraud

The Plaintiff argues that since the Defendant was Susan's attorney in fact, he owed Susan a fiduciary duty and bases the statutory fraud argument on SDCL § 55-2-7. The statute provides that: "Every violation of the provisions of §§ 55-2-1 to 55-2-6, inclusive, is a fraud against the beneficiary of the trust." SDCL § 55-2-7. SDCL § 55-2-1 requires that a trustee act in good faith and "may not obtain any advantage therein over the [beneficiary] by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." A "Trustee" is defined as "any natural or legal person or persons acting as an original, substitute, added, or successor trustee of a testamentary or inter vivos trust, whichever in a particular case is appropriate." SDCL § 55-1A-2.

As stated above, there is a question regarding the validity of Kenneth's appointment as power of attorney. However, this question is not material to the

Plaintiff's statutory fraud claim. There is no evidence provided that Kenneth ever acted as Susan's trustee as defined under SDCL § 55-1A-2. Kenneth's role as power of attorney does not automatically create a trust which includes all of Susan's assets as its corpus. The power of attorney merely enables Kenneth to act as her agent. As Kenneth is not a trustee under SDCL Chapter 55-2, then this renders SDCL § 55-2-7 inapplicable. Therefore, as a matter of law, Defendant's motion for summary judgment is **GRANTED** regarding Count 5: Statutory Fraud.

B. Common Law Fraud

The elements of fraud are (1) that a representation was "made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made;" (2) that the representation was "made with intent to deceive and for the purpose of inducing the other party to act upon it;" and (3) "that he did in fact rely on it and was induced thereby to act to his injury or damage." *Aqreva*, 2020 S.D. 59, ¶ 56, ---N.W.2d--- (quoting *N. American Truck & Trailer, Inc. v. M.C.I. Comm. Servs., Inc.*, 2008 S.D. 45, ¶ 8, 751 N.W.2d 710, 713). "To avoid summary judgment, 'the essential elements' of fraud must be 'adequately supported by alleged facts.'" *Id.* (quoting *Ehresmann v. Muth*, 2008 S.D. 103, ¶ 22, 757 N.W.2d 402, 406). "Fraud is not to be presumed, but must be strictly proven." *Id.* ¶ 57 (quoting *Bruske v. Hille*, 1997 S.D. 108, ¶ 11, 567 N.W.2d 872, 876).

The Plaintiff's Complaint bases its common law fraud cause of action on Kenneth's alleged breach of fiduciary duty owed to Susan, and that "Ken acted

with the intent to induce Susan to relinquish her rights under the Power of Attorney, as well as in the transaction listed and unlisted, to change her ownership of assets and her rights, to her injury." *Complaint*, 13 (filed May 25, 2018). Plaintiff's brief argues that "[a] fact finder could reasonably conclude that Susan's signature was obtained under improper circumstances, based on misrepresentations of the Defendant." *Brief in Response to Defendant's Motion for Summary Judgment*, 30 (filed May 8, 2020) (Plaintiff also filed a brief under the same title on May 22, 2020, which restates their fraud argument verbatim as their May 8, 2020 brief).

The Plaintiff does not provide any evidence regarding a misrepresentation or concealment by Kenneth which prompted Susan to sign either the quitclaim deed or power of attorney. There are no facts which support the elements of fraud, therefore the Defendant's motion for summary judgment regarding Count 6: Common Law Fraud, is **GRANTED.**

5. An implied trust/constructive trust is remedial in nature.

The Plaintiff argues that because the Defendant obtained Susan Markve's property by taking advantage of Susan in her medically compromised position that an implied/constructive trust is necessary to protect her assets.

SDCL § 55-1-8 provides that "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, is unless he has some other and better right thereto, an implied trustee of the thing gained for the benefit of the person who would otherwise have had it." Generally, an implied or constructive trust is remedial in nature and is an equitable tool used

to restore the situation back to the *status quo* and to protect assets wrongfully obtained. *Matter of Estate of Perry*, 1998 S.D. 85, ¶ 28, 852 N.W.2d 29, 35 (quoting *Knock v. Knock*, 120 N.W.2d 572, 576 (S.D. 1963)); SDCL § 55-1-8.

In order for the Court to create an implied or constructive trust, some sort of wrongdoing must occur thus necessitating the equitable remedy to protect the assets. Therefore, the Plaintiff's cause of action on an implied trust is reliant upon proving that the Defendant acted wrongfully, such as with undue influence, breach of fiduciary duty, or through fraud. As is set forth above, the Court grants summary judgment regarding all the Plaintiff's claims. As there is no basis to support an implied or constructive trust as an equitable remedy, then the Court must also **GRANT** summary judgment on Count 1: Implied Trust.

CONCLUSION

For the above-mentioned reasons, the Defendant's Motion for Summary Judgment is **GRANTED** as to all of Plaintiff's Counts.

ORDER

For the reasons set forth above, it is hereby:

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** as to all counts.

Dated this 9 day of December, 2020.

BY THE COURT:

THE HONORABLE ROBERT GUSINSKY
CIRCUIT COURT JUDGE

ATTEST:
TAMMY GRAPENTINE
CLERK OF COURTS

By: _____ Deputy

(SEAL)

STATE OF SOUTH DAKOTA)ss COUNTY OF FALL RIVER	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
GUSTAV K. JOHNSON, as Personal Representative of the ESTATE OF SUSAN JANE MARKVE, DECEASED, Plaintiff, v. KENNETH CHARLES MARKVE, Defendant.	)	23CIV18-000051 **DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant, Kenneth Charles Markve, by and through its counsel of record, pursuant to SDCL § 15-6-56(b) and SDCL § 15-6-56(c)(1), submits the following Statement of Undisputed Material Facts as to which there is no genuine issue to be raised.

1. Susan Johnson [hereinafter Susan] and Ken Markve [hereinafter Ken] were to be married on October 22, 2012. Aff. Kenneth Markve ¶ 7.

2. Plaintiff and Susan's brother, Gustav Johnson, Trustee to the Susan J. Markve Trust and Personal Representative to Susan's Estate [hereinafter Plaintiff or Johnson], was opposed to Ken and Susan's marriage from the very start. After meeting with her brother, Susan broke off her engagement with Ken. Aff. Kenneth Markve ¶ 11.

3. At the time, Ken and Susan were in the process of purchasing a house, known as the Flock house, as joint tenants with rights of survivorship. Aff. Kenneth Markve ¶ 5 and 6.

4. Since the engagement was terminated, the purchase agreement for the Flock House was cancelled. Aff. Kenneth Markve ¶ 12.

5. Continuing to see each other and deciding once again to marry, on January 15, 2013, Ken and Susan entered into a prenuptial agreement they located on the internet with the

purpose of maintaining separately their property they owned prior to the marriage. Aff. Kenneth Markve ¶ 14.

6. On January 15, 2013, Ken and Susan entered into a prenuptial agreement. Aff. Kenneth Markve ¶ 14.

7. On January 23, 2013, Susan and Ken were married in front of the Justice of the Peace. Aff. Kenneth Markve ¶ 15.

8. For an engagement ring, Susan had a diamond ring and Ken bought a wedding band that was welded to the ring. Aff. Kenneth Markve ¶ 16.

9. While Ken was in Alaska, Susan looked for a house for sale in Hot Springs and made an offer. Aff. Kenneth Markve ¶ 20.

10. Susan purchased the house as Trustee of the Susan J. Johnson Trust. Aff. Kenneth Markve ¶ 21.

11. When Ken returned from Alaska, Ken and Susan moved into the home and lived there as a married couple. Aff. Kenneth Markve ¶ 22.

12. In late 2013, Susan was diagnosed with a brain tumor. Aff. Kenneth Markve ¶ 23.

13. Susan went through extensive medical care and treatment, including brain surgery to try to remove the tumor, radiation/chemotherapy, and holistic remedies. Aff. Kenneth Markve ¶ 24.

14. Susan met and talked with Attorney Brian Hagg on two separate occasions to discuss Ken becoming Susan's power of attorney and the couple's marital home. Aff. Brian Hagg ¶ 4.

15. Brian Hagg drafted the power of attorney, appointing Ken as Susan's agent, and quit claim deed, conveying their marital home from Susan's trust to Susan and Ken as joint tenants. Aff. Brian Hagg ¶ 6.

16. On March 25, 2014, Susan signed the quit claim deed and the power of attorney. Aff. Kenneth Markve ¶¶ 25 and 26.

17. On March 24, 2014, Nurse Practitioner Woehl noted that Susan reported feeling better that day, had a good weekend, was alert and oriented and visiting with staff and her husband, and that Susan had an improved mental state. Aff. Kristen Basham (Exhibit C, Woehl Dep. 11:14-24, 12:1).

18. On March 25, 2014, the day the documents were signed, Susan's assessment was improved mental status. Woehl Dep. 12:18-22.

19. Susan was never diagnosed with dementia. Aff. Kristen Basham (Exhibit D, Robbins Dep. 66:19-21).

20. Ken and Susan continued to live in their married home while and after Susan received treatments. Aff. Kenneth Markve ¶ 28.

21. Caregiver Irene Wells was present when Susan discussed with Ken that she wanted Ken to have the house that they had resided in together as husband and wife. Aff. Irene Wells, ¶ 6.

22. Ken and Susan would even still host bridge club in their home. Aff. Kenneth Markve ¶ 29.

23. In 2014, Susan's Nurse Practitioner noted that Susan was able to play cards, like bridge. Woehl Dep. 15:13-17.

24. Dr. Robbins recalled that Susan could play cards longer and was impressed with how she could play at a higher level. Robbins Dep. 59:9-14.

25. For several months, Susan continued to play bridge with their friends. Aff. Susan Henderson ¶ 6.

26. Even though Susan became more physically dependent, Susan knew her own mind and maintained her own opinions. Aff. Joan Howard ¶ 5.

27. Even though Susan became sick, Ken and Susan supported each other and cared for each other very deeply. Aff. Dianna Stroh ¶ 6.

28. When Susan was in the hospital or had an appointment, Ken went with her virtually every time. Robbins Dep. 56:19-22.

29. Dr. Robbins testified that Ken was a very active participant in Susan's care. Robbins Dep. 63:15-16.

30. Ken even requested for Susan to be at Full Code which generally means all treatments wanted. Robbins Dep. 61:8-17.

31. Dr. Robbins was not suspicious at all of Ken's intentions during Susan's care and treatment. Robbins Dep. 65:19-21.

32. As soon as Susan became ill, Ken hired home health workers and care givers to assist in the care and treatment for Susan. Aff. Susan Henderson ¶ 4, Aff. Dianna Stroh ¶ 7.

33. One of the care givers, Irene Wells, would drive Susan to cancer treatments in Rapid City. Aff. Irene Wells ¶ 2.

34. On these drives, the two would discuss what Susan was thinking and feeling. During one trip to Rapid City, Susan told Wells that she was upset with her brother, Plaintiff, for asking Susan to change her will. Aff. Irene Wells ¶ 3. Susan did not change her will as her brother wanted, because she felt that there would never be enough money to satisfy her brother's needs. Aff. Irene Wells ¶ 4.

35. On April 12, 2016, Susan passed away. Aff. Kristin Basham (Exhibit F).

36. Ken took an inventory of the household goods and provided the inventory to Plaintiff. Aff. Kenneth Markve ¶ 30.

37. Prior to Susan's death, she sold her coin collection through Heartland Auction Co. and Dakota Coin & Precious Metal. Aff. Kenneth Markve ¶ 31.

38. Susan's nephew, Eric Hanson, came to Ken's and Susan's marital home and retrieved the vehicle Susan devised to him and was asked if he wanted to keep anything else of Susan's personal property which he declined. Aff. Brian Hagg ¶¶ 8 and 9.

39. The remaining personal property was delivered to Plaintiff. Aff. Brian Hagg ¶ 10.

40. Plaintiff has benefitted from Susan's Trust, receiving as the personal representative alone a minimum of $33,616.58 as net income from the Trust and $6,617.29 as commission. Aff. Kristen Basham (Exhibit E).

Dated this 10th day of April, 2020.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2020, a true and correct copy of the foregoing **Statement of Undisputed Material Facts** was served upon the following counsel of record, by placing the same in the service indicated, postage prepaid, addressed as follows:

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STATE OF SOUTH DAKOTA) SS COUNTY OF FALL RIVER	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
GUSTAV K. JOHNSON, as Personal Representative of the ESTATE OF SUSAN JANE MARKVE, DECEASED, Plaintiff, vs. KENNETH CHARLES MARKVE, Defendant.	)	23CIV18-000051 **RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF GENUINE ISSUES THAT REMAIN TO BE TRIED**

COMES NOW the Plaintiff, Gustav K. Johnson, as Personal Representative of the Estate of Susan Jane Markve, deceased, and submits this Response to Defendant's Statement of Undisputed Material Facts and Plaintiff's Statement of Genuine Issues that Remain to be Tried.

RESPONSE TO DEFENDANT'S STATEMNT OF UNDISPUTED MATERIAL FACT

1. Admit.
2. Deny as a mischaracterization. Gus Johnson was not "opposed" to the marriage, but was concerned about the speed at which the relationship was progressing. Affidavit of Gustav K. Johnson ("Johnson Affidavit"), ¶¶2-3.
3. Deny as a mischaracterization. Gus Johnson had conversations with his sister regarding the title to the Flock House, as to whether or not Mr. Markve would be on the title. Gus Johnson expressed to Susan that because Mr. Markve was not contributing to the purchase price, he should not be on the title. Susan expressed to Gus Johnson that she had been told the same thing from her attorney Mark Walters and George Chell. Susan later reported to Gus that Mr. Markve had become enraged

when she told him that she did not want to put his name on the title to the Flock House, and that she terminated the engagement as a result of his angry response. See Johnson Affidavit, ¶¶2-3.

4. Admit the engagement was terminated and the purchase was canceled.
5. Admit that the couple signed a prenuptial agreement for the purpose of maintaining separate property. Deny as a mischaracterization. Mr. Markve's Affidavit does not state that both Susan and Ken obtained the document together from the internet. Affidavit of Kenneth Markve, ¶ 14.
6. Admit.
7. Admit.
8. Admit.
9. Admit.
10. Admit.
11. Admit.
12. Admit.
13. Admit.
14. Deny as a mischaracterization. Susan *and Defendant Markve* met with Attorney Hagg. Affidavit of Brian Hagg, ¶2; Affidavit of David S. Barari ("Barari Affd."), Exhibit A, Answers to Interrogatories Nos. 46, 24-29. Defendant has refused to provide Plaintiff with the records from attorney Hagg, claiming the attorney client privilege for himself. *Id.*
15. Admit attorney Hagg drafted the documents.

16. Admit Susan signed the documents; deny she had capacity or that this was a product of her own will. To avoid unnecessary repetition, Plaintiff incorporates by reference the, Brief in Response to Defendant's Motion for Summary Judgment, Factual Background, pp. 1-13 and citations to the record provided therein.

17. Deny as mischaracterization. "Better" and "improved" are relative terms. Susan had significant deficits for a great deal of time prior to and after this entry. Barari Affd., Ex J, (Robbins Depo., Exhibit 9); Affidavit of Kristen E. Basham, Exhibit D ("Robbins Depo.") at 31:1 – 38:13; Barari Affd. Ex. K, (Robbins Depo., Exhibit 10); Barari Affd. Ex. M, (Robbins Depo., Exhibit 11), p. 1. Also, she was described as having "somnolence" and was oxygen deprived on March 25, 2014 by Nurse Woehl. Affidavit of Kristen E. Basham, Exhibit C, 3:24 – 4:14, 5:11 – 6:20. *See also* Barari Affd. Ex. L (Woehl Deposition, Exhibit 18). On March 21, 2014, Susan was lethargic and unresponsive. Affidavit of Kristen E. Basham, Exhibit C, 8:6 to 24; *id.* Robbins Depo., 48:1 – 49:1. On March 24, 2014, Susan was confused and it was recorded that Defendant Markve did not believe that she needed oxygen, until shown how low her oxygen levels were. *Id.* Robbins Depo., 49:2 to 17. Similarly, Susan was noted as confused and that she "pulls off her oxygen." *Id.*; *see also* Brief in Response to Defendant's Motion for Summary Judgment, Factual Background, pp. 1-13 and citations to the record provided therein.

18. Deny as mischaracterization. "Improved" is a relative term. Susan had significant deficits for a great deal of time prior to and after this entry. Barari Affd., Ex J, (Robbins Depo., Exhibit 9); Affidavit of Kristen E. Basham, Exhibit D ("Robbins Depo.") at 31:1 – 38:13; Barari Affd. Ex. K, (Robbins Depo., Exhibit 10); Barari

(Robbins Depo., Exhibit 11), p. 1. Also, she was described as having "somnolence" and was oxygen deprived on March 25, 2014 by Nurse Woehl. Affidavit of Kristen E. Basham, Exhibit C, 3:24 – 4:14, 5:11 – 6:20. *See also* Barari Affd. Ex. L (Woehl Deposition, Exhibit 18). On March 21, 2014, Susan was lethargic and unresponsive. Affidavit of Kristen E. Basham, Exhibit C, 8:6 to 24; *id.* Robbins Depo., 48:1 – 49:1. On March 24, 2014, Susan was confused and it was recorded that Defendant Markve did not believe that she needed oxygen, until shown how low her oxygen levels were. *Id.* Robbins Depo., 49:2 to 17. Similarly, Susan was noted as confused and that she "pulls off her oxygen." *Id.*; *see also* Brief in Response to Defendant's Motion for Summary Judgment, Factual Background, pp. 1-13 and citations to the record provided therein.

19. Deny and deny as mischaracterization. Susan was noted as having "residual dementia" on July 8, 2014. Barari Affd. Ex. U. In addition, she was described as having "delirium" Barari Affd. Ex. M, (Robbins Depo., Exhibit 11), pp 1, 2; *see also* Robbins Depo. 41:5 – 46:6; *see also* Barari Affd., Ex. O, (Robbins Depo., Exhibit 13) (discussing notes regarding Susan's neurological deficit, altered levels of consciousness, varying ability to speak coherently, delirium, confusion, poor memory, disorientation, non-responsiveness, etc.) Also, she was described as having "somnolence" and was oxygen deprived on March 25, 2014 by Nurse Woehl. Affidavit of Kristen E. Basham, Exhibit C, 3:24 – 4:14, 5:11 – 6:20. *See also* Barari Affd. Ex. L (Woehl Deposition, Exhibit 18). On March 21, 2014, Susan was lethargic and unresponsive. Affidavit of Kristen E. Basham, Exhibit C, 8:6 to 24; *id.* Robbins Depo., 48:1 – 49:1. On March 24, 2014, Susan was confused and it was recorded that

Defendant Markve did not believe that she needed oxygen, until shown how low her oxygen levels were. *Id.* Robbins Depo., 49:2 to 17. Similarly, Susan was noted as confused and that she "pulls off her oxygen." *Id.*; *see also* Brief in Response to Defendant's Motion for Summary Judgment, Factual Background, pp. 1-13 and citations to the record provided therein. Mr. Markve described Susan's condition as "dementia" in his letter to Attorney Mark Walters, dated January 28, 2014 (misdated as 2013). Affidavit of Gustav K. Johnson, Exhibit 2.

20. Admit.

21. Deny. Objection: Hearsay, Statute of Frauds.

22. Admit.

23. Admit that he noted that he was told Susan could play cards; deny that the nurse practitioner saw her playing cards.

24. Deny. Defendant is mischaracterizing the testimony. Dr. Robbins did not say he personally witnessed Susan playing cards or that *he* was impressed. His testimony is reporting what he was told by Defendant Markve. "Q: And *he* was pleased with how she was doing and noted that she was still playing Bridge; is that true? A: Yes. I do independently recall that she did play cards longer and *they* were impressed with how long she could play cards and that was a skill that she was able to maintain longer at a higher level." Affidavit of Kristen Basham, Exhibit D, 59:6 to 14. (emphasis added).

25. Admit.

26. Deny. *See* Affidavit of Nancy Hanson; Affidavit of Gustav K. Johnson.

27. Admit.

28. Admit.

29. Admit.

30. Admit. This fact illustrates Defendant Markve's efforts to override Susan's stated desires and wishes for her care. This fact admits opportunity, propensity, and intent to replace Susan's desires with Defendant Markve's. This fact essentially shows that Defendant is aware of and intended to use the powers granted to him by Susan to meet his own desires, rather than hers. On January 17, 2014, Susan signed a Living Will Declaration, noting that she did now wish to receive life sustaining treatment or artificial nutrition and hydration. Barari Affd. Ex. B. On February 25, 2014, Susan executed a Health Care Power of Attorney, nominating Defendant as her agent, and specifically limiting his authority, under Section 3 of the document, from acting against her wishes with regard to her directive to not prolong her life or use life-sustaining treatment, and also limiting the agent's power with regard to her desire not to receive nutrition and hydration. Barari Affd. Exs. C; O (Robbins Depo., Exhibit 13), p. 6; K (Robbins Depo., Exhibit 10), pp. 1-4.

31. Admit.

32. Admit.

33. Admit.

34. Deny. Objection: Hearsay, oral extrinsic evidence; Johnson Affd. Ex. 19, 27.

35. Admit.

36. Admit Defendant Markve provided a document, deny that it is a complete inventory. Johnson Affidavit, ¶¶21-26.

37. Deny. The Affidavit of Kenneth Markve, ¶31 does not show that Susan sold the coins. Moreover, records show that the coin collection was sold for far less than the

value assigned to in in the prenuptial agreement. Complaint, Exhibit B, Sub-Exhibit B. Defendant Markve deposited the proceeds into a joint account, where he obtained an ownership interest in the proceeds, contrary to the prenuptial agreement. Barari Affd., Ex. A, Answer to Interrogatory 40, Ex. P, Q.

38. Deny. Hearsay. See also Johnson Affidavit, ¶23. Moreover, this is not a basis not to return the personal property to the Estate. Defendant Markve and/or Eric Hanson are not the personal representative of the Estate. Therefore, they do not have the power to decide distributions. Again, this illustrates that Defendant Markve is asserting control over Susan's property, without a basis.

39. Deny. Brian Hagg did not complete the inventory and is without knowledge sufficient to testify that all of the items were accounted for. Moreover, the Personal Representative of the Estate does not believe the inventory was complete, based on his personal observations of the personal property at Susan's home. Johnson Affidavit, ¶¶21-26.

40. Deny and deny as irrelevant. The income distribution was a result of the tax implications of Defendant Markve's sale of significant assets while Susan was alive; the "commission" has not been distributed to Gustav K. Johnson. Johnson Affidavit, ¶28.

GENUINE ISSUES THAT REMAIN TO BE TRIED

1. Whether, in equity, a constructive trust should be utilized for the protection until determinations can be made regarding the assets of Susan Markve.
2. Whether Susan Markve was competent to sign the power of attorney or deed on March 25, 2014.

3. Whether Defendant Markve exerted undue influence over Susan Markve when the documents were signed on March 25, 2014.
4. Whether Defendant Markve breached his fiduciary duty to Susan Markve when he deposited proceeds of her separate assets, under the prenuptial agreement, into joint banking accounts.
5. Whether Defendant Markve otherwise engaged in "self-dealing" under the power of attorney.
6. Whether Defendant Markve committed fraud in the procurement of the power of attorney, deed, or other transactions relative to Susan Markve's separate assets, under either statutory or common law definitions of fraud.
7. Whether the Defendant misappropriated the separate funds of his fiduciary while he served as her attorney in fact.
8. Whether Susan Markve's diamond ring, the proceeds of the sale of the Fall River County home, difference in value of the coin collection, or other assets should be included in her Estate for distribution.
9. Whether Defendant converted any assets from Susan Markve.
10. Whether the actions of the Defendant violated the terms of the prenuptial agreement, relative to the above claims.
11. The amount of damages incurred by the Estate and the amount of punitive damages.

Dated this 8th day of May, 2020.

GOODSELL QUINN, LLP

BY: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of May, 2020, he served a true and correct copy of the ***Response to Defendant's Statement Of Undisputed Material Facts and Plaintiff's Statement Of Genuine Issues That Remain To Be Tried*** via Odyssey File and Serve, as follows:

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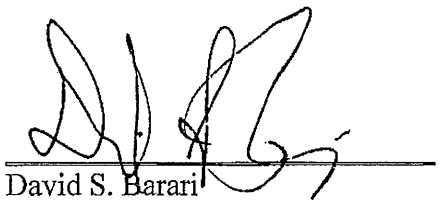

David S. Barari

STATE OF SOUTH DAKOTA)
) IN CIRCUIT COURT
COUNTY OF FALL RIVER) SEVENTH JUDICIAL CIRCUIT

GUSTAV K. JOHNSON, as Personal Representative of the **ESTATE OF SUSAN JANE MARKVE**,

Plaintiff,

vs.

KENNETH CHARLES MARKVE,

Defendant.

Motions Hearing

23CIV18-51

BEFORE: **THE HONORABLE ROBERT GUSINSKY**
Circuit Court Judge
Rapid City, South Dakota
October 27, 2020, at 2:45 p.m.

APPEARANCES:

For the Plaintiff: **MR. GEORGE NELSON**
Law Office of George Nelson
2640 Jackson Boulevard, #1
Rapid City, SD 57702

For the Defendant: **MS. HEATHER LAMMERS BOGARD**
Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter
704 St. Joseph Street
Rapid City, SD 57701

Also Present: **MR. GUSTAV K. JOHNSON**
MR. KENNETH CHARLES MARKVE

THE COURT: And to me, that has nothing to do with what he wishes to do with the property afterwards, so I'm going to sustain the objection to number 2.

I'm going to sustain the objection to number 3.

MR. NELSON: 23, Your Honor?

THE COURT: I'm sorry, 23, yes.

All right. So this whole issue with Brian Hagg is a little bit unclear to me. Who did he represent in this case?

MR. NELSON: Your Honor, it's my understanding it was a joint representation. So Susan and Mr. Markve show up at his office, get it scheduled, and he prepares a power of attorney which is executed for Mr. Markve to be the attorney-in-fact and it was joint representation so the attorney-client privilege does not apply to joint representation when I represent the personal representative who's in the shoes of Susan Markve.

MS. BOGARD: It was not a joint representation. Mr. Hagg represented both Susan and Ken separately and individually. Mr. Hagg will testify that there were times when he was meeting with Susan and he would say, "Would you like Ken to leave the room?" And she would say, "No, absolutely not, I want him in here." So to that extent, he would sometimes be in the room during their conversations but he, Mr. Hagg, represented Susan personally and separately from his

representation of Ken.

THE COURT: There's no dispute, though, that Mr. Johnson, as the personal representative, has a right to inquire as to attorney-client privilege matters that pertain to Susan.

MS. BOGARD: Correct, as to Susan.

THE COURT: So then interrogatory number 24, the objection is overruled. You'll have to say what kind of legal advice they went to see him.

All right. Number 25, then, the objection is also overruled. If he was present during discussions regarding Susan's estate plan, he'll have to tell them what he knows about it.

Interrogatory number 27, that objection is also overruled.

Interrogatory number 28, the objection is overruled.

I want to make it very clear, though, with all of these questions where you're asking what Ken knows about these things, he can only talk about what he overheard and what he knows. You may have to depose Mr. Hagg to get more.

Interrogatory number 29. Interrogatory number 29 is a little bit closer call for me because the way the question is phrased, I cannot tell from the phraseology of the question whether at this point Mr. Hagg is representing Ken individually or Susan. Do you wish to address that,

Mr. Nelson?

MR. NELSON: Yes, Your Honor.

So as I understand defense's perspective here or position is is that there was a representation of Mr. Markve individually by Mr. Hagg for things we have no knowledge of.

THE COURT: No, I understand that, but the way the question is phrased, it doesn't talk -- I mean, he could have gone in and just asked regarding, you know, Mr. Hagg's advice regarding, you know, fiduciary responsibilities pursuant to a power of attorney generally. There's nothing in the question that points it to Susan's. Do you see what I'm saying?

MR. NELSON: Yes. And that, to amend it, it would be to specifically state for Susan's power of attorney.

THE COURT: And so the way the question is phrased right now, I believe the objection is appropriate, but I'll leave it up to you. If he rephrases it and makes it subject to Susan, I will probably overrule any objection, so it's up to you whether you want him to go through the process of rewording the question and resubmitting it or whether you're willing to just answer it. But for the purposes of this one, this 29, the objection is sustained.

Do you see what I'm saying?

MR. NELSON: Yes.

THE COURT: You're going to have to rephrase it unless --
MR. NELSON: Unless there's a mutual agreement --
THE COURT: Right.
MR. NELSON: -- and defendant answers it voluntarily with the understanding of the pertaining to Susan.
THE COURT: Correct. To the power of attorney over Susan.

So normally interrogatory number 32 that seeks evidence to be presented, I generally don't require people to answer that until they, you know, submit -- until the case is ready for trial because you essentially are saying what evidence are you going to present. It's just the way that the question is phrased. Do you understand?

MR. NELSON: I understand.
THE COURT: We're not at the trial stage. I mean, if you reword it, it might be appropriate, but I'm going to sustain the objection to number 32.

So 35 and 36 I didn't quite understand. It seems like the question was answered. What is missing?

MR. NELSON: The response was a reference to Bates stamped documents.
THE COURT: Okay.
MR. NELSON: And as I provided the Court a copy of those Bates stamped documents, for example, Bates stamp at the bottom is Markve discovery responses number 1, it identifies Sharon Peterson's payments. So that's one

person. Then there's a Mavis on the right side of the page. Mavis who? For me, is there a full address, telephone number? These dates, I assume -- I don't know what year they're for. We've asked specifically what year they're for. Are they payments?

The point is is that the response is ambiguous at least. The questions were very specific and the response could have been specific. Like, for instance, Peterson worked on September 9th, the 3rd of September of 2014, and she was paid $280 on that day from a source of such and such account, and that could have been in the response to that interrogatory instead of incorporation by reference a Bates stamped document that is not an answer. It's just a document. So the responses being sought, we're asking for a response.

THE COURT: Okay. Ms. Bogard.

MS. BOGARD: Thank you, Your Honor.

I guess to be frank, I didn't feel it was necessary to spend my client's money to retype the information. Mr. Markve answered that many of these providers are transient. He doesn't have a lot of the information requested. But Bates 40 through 46 provide much more information, like Irene Wells' phone number and addresses for many of them. I don't know if counsel's attempted to contact these people, but this is the information we had

and all -- and have and all it would be is me retyping it into our answers when it's contained, to the best of our ability, in these Bates stamped documents.

THE COURT: Okay. So as a general matter, responses to interrogatories may reference documents if they do so specifically, which was done, but it seems like there's still a few things missing from the documents that were requested. So to that extent, there's no objection to these questions. They just, you know, you just claim -- Mr. Nelson claims they weren't answered fully.

So to the extent that the information -- you don't have to retype them, but to the extent that the information that he requests is not provided in those documents, you have to provide them if you know it, and if you don't know it, you must specifically state unknown.

MS. BOGARD: Okay.

THE COURT: So that applies to both 35 and 36.

Interrogatory 41. How is it relevant or likely to lead to relevant admissible evidence if all you have are account institution and number? I mean, how does that lead to any admissible evidence?

MR. NELSON: Your Honor, they could be subpoenaed, statements from those accounts. Statements from those bank institutions, those financial institutions, those institutions can be subpoenaed for those accounts.

MS. BOGARD: And, Your Honor, we'd move to quash the subpoena for the same reason set forth herein.

THE COURT: All right.

What do you think you would learn from these accounts?

MR. NELSON: Your Honor, I filed with the clerk the report from the forensic accountant and the report indicates that a loss of approximately $400,000 to the estate of Susan Markve and Nina Braun indicates that there have been a number of transfers out of the joint account, thousands and thousands of dollars, deposits, transfers. Where did that money go is what's unknown, and so we're trying to -- we're trying to understand how he had access to all this money and where it went.

THE COURT: Why don't you ask him? I mean, why don't you have interrogatories that ask him, based on the withdrawals that you have, where that money went?

MR. NELSON: We didn't -- well, part of the discovery, if you noticed, the last item on the interrogatories that was withdrawn pertained to checks, bank statements, and -- what number is that? 57.

THE COURT: I mean, I'm just trying to think this through. So you've got a transfer from the joint account and then you subpoena Ken's, Mr. Markve's personal accounts, and you see that the -- I mean, the best you'll see is that there was simply a transfer from one account to another account,

to a private account. Right?
MR. NELSON: Yes. Right. If there's a transfer. But also if -- you know, his position is a lot of these monies were spent for the benefit of the estate or benefit to Susan and we don't know that.
THE COURT: But I'm still trying to figure out how his personal accounts would likely lead to any admissible evidence in this case.
MR. NELSON: The causes of action here are breach of fiduciary duty and they had a prenuptial agreement. So the parties went into this marriage with the understanding what's yours is yours, what's mine is mine. So the question is: Why were there transfers during her illness from the joint account to pay for his bills, his line of credit, his -- his personal expenses? And how much of that $400,000 was there that was misappropriated that cannot be attributed to her benefit.
THE COURT: But how is having his accounts going to show you any of this? I mean, you've got the monies going out. Right?
MR. NELSON: Yes. Well, it's evidence that he has misappropriated. His money -- the monies that are transferred into his accounts as to versus -- you know, there's a lot of checks that were written for cash and so that's another issue. But he had access to her monies, her

assets, and they went somewhere. We don't know exactly where they all went to.

THE COURT: I'm going to overrule the objection for interrogatory number 41, but that information must be provided under seal, not to be distributed to anybody. And I want the parties to enter into a confidentiality agreement with respect to how that information can be used and if it's to be filed for any -- to support any kind of motion in court, it must be filed under seal.

MR. NELSON: Yes, Your Honor.

THE COURT: I will allow an expert to review that information as well and generally they -- you're familiar with these confidentiality agreements that require people who are subject to receiving confidential information to sign a confidentiality statement. Correct?

MS. BOGARD: Yes.

MR. NELSON: Yes, Your Honor.

THE COURT: That's essentially what I want here.

MR. NELSON: Understood.

THE COURT: Tell me why interrogatory 42 could lead to admissible evidence.

MR. NELSON: Your Honor -- well, Mr. Markve hasn't produced all of his tax returns. During their marriage there are joint tax returns and so there was tax planning and we would like to know who the tax planner was, what were the

goals for the parties in their tax planning. And he has not identified any tax preparer, a CPA or a financial adviser, that would help understand whether there was a joint effort by Susan and Mr. Markve in doing with her assets what, I guess, the parties --

THE COURT: Did they file joint returns during the marriage?

MS. BOGARD: It's my understanding that they did, Your Honor, but as the PR, I assume Mr. Johnson can get those.

MR. NELSON: He can get tax returns that were jointly filed.

MR. JOHNSON: I don't know where they are.

MR. NELSON: If there's an identified CPA who helped, you know, prepare those.

THE COURT: You don't know who it was?

MR. NELSON: We know one person.

THE COURT: Okay. So are you asking him to disclose the tax planners for their joint returns and planning or for his individual as well?

MR. NELSON: I think individual as well.

THE COURT: Right. So what's the relevance of that?

MR. NELSON: It gets to what was done with the monies that are not in her estate. Where did they go? Did this financial adviser, as he invested those for Mr. Markve, what is the loss to the estate because of those

investments, if any?

THE COURT: Ms. Bogard.

MS. BOGARD: And we have provided, Your Honor, all of the information with regard to the investments and now might be a good time to point out that contrary to what counsel says, from June of 2016 forward -- or sorry, backwards the estate value actually increased by $65,700. And so again, we've provided every single solitary document relating to Susan's accounts, Susan's trust, anything they had jointly, and to seek beyond that into Ken's financial, personal finances, I think is just an abuse of the process.

MR. NELSON: We have not received his tax returns.

MS. BOGARD: And I, again, I can't see what possible relevance his tax returns have to any claim.

THE COURT: All right. I'm going to overrule the objection to interrogatory number 42. But again, all that needs to be provided pursuant to a confidentiality agreement as I indicated prior.

So what's the problem with answering 53?

MS. BOGARD: Well, I think, Your Honor, he did. No, that's not it. Yes, he didn't.

Well, as we set forth in our response, I mean, whether Ken ever said that Gus likes him or doesn't like him, I just don't see what that has to do with any issues in this case.

THE COURT: What does it have to do with anything?
MR. NELSON: Well, the exercise of undue influence over the decedent who this defendant had a fiduciary duty to and whether or not -- okay. So the decedent had an estate plan. How was it that my client is going to benefit from it? He was the beneficiary, as were others, and was there animus between the parties and if so --
THE COURT: Well, how do you jump to undue influence from his belief that Gus doesn't like him?
MR. NELSON: If something is being done out of spite for this to get back at --
THE COURT: But the question is whether he believes that Gus doesn't like him. It would be different if the question was whether he didn't like Gus, but it's the other way around.
MR. NELSON: I'm stuck with the interrogatories.
THE COURT: I'm going to sustain 53, the objection.

With respect to 54, I believe that it was fully answered.

57. The answer is that he doesn't have any access to these checks that Susan wrote out after February 1, 2014, so I don't know how I can make him do any more.
MR. NELSON: I'm sorry, I was looking at 55.
THE COURT: Oh, I'm sorry, I jumped. You're right, 55. Well, 55 is fully answered.

What about 57?

MR. NELSON: We withdrew that, Your Honor.

THE COURT: Okay.

So then request number 1, defendant's income tax returns.

MS. BOGARD: I can't imagine how Ken's personal tax returns have anything to do with this case. I mean, the joint returns that Mr. Johnson should be able to obtain on his own may have some relevance but Ken's tax returns certainly don't go to undue influence or any breach of fiduciary duty or any of the other claims.

MR. NELSON: His personal income tax returns would identify what his personal financial wherewithal is, and if he had no need for the use of any of the funds in the joint account because he was financially able to pay those items himself, it gets into the issue of willfulness, wanton misbehavior, misconduct by Mr. Markve. We've asked for punitive damages. That's an issue of whether or not any monies that were misappropriated by Mr. Markve, if there's a -- an excuse, a legal excuse for, other than the necessities of life, Susan's welfare, her medical needs, and so forth.

THE COURT: I'm going to sustain the objection to number 6. Before we can get to any punitive damages we've got to have a hearing as to whether or not that should go forward. If

it's allowed to go forward you can raise request for production number 1 again at that point.

I'm going to deny sanctions. I don't think any of these disputes are really frivolous. I think they needed to be resolved.

All right. Does that cover the motion to compel?

MS. BOGARD: Yes.

THE COURT: Did I miss anything?

MS. BOGARD: May I ask for one clarification?

THE COURT: Yes. Sure.

MS. BOGARD: It was on interrogatory 41 and they're asking for ten years and Ken has lived in South Dakota and Alaska. I think to get the information they want for the last ten years may take an exceedingly long amount of time. I guess we'd ask for a reduction in that time frame, and certainly nothing would be relevant before he was married to Susan.

THE COURT: Well, they just want the information regarding the institution and the account. I mean, I don't know that that is that difficult to obtain.

MS. BOGARD: If that's all they want and not --

THE COURT: Well, that's what it's asking. For each financial account which you had an ownership interest in in the last 10 years, state the name of the institution and account number.

MS. BOGARD: Yes, he could get that.

THE COURT: Okay.

So then the only other issue that remains are the Rule 56(f) affidavits and whether or not the summary judgments -- the summary judgment motion that was filed is ripe for a decision.

I've reviewed the Rule 56(f) affidavits and taking into account the rulings that we have here today on the motion to compel and I do find that it is time for the Court to address the summary judgment motion so I will do that and get you an opinion out probably within two or three weeks or so.

Anything else we need to address here today?

MR. NELSON: Do you want to hear any further argument in regards to the summary judgment motion?

THE COURT: Well, to be fair, I probably should let you do that because you had a different lawyer when it was last argued. Right? Any objection to that?

MS. BOGARD: I have no objection.

THE COURT: Do you want to argue anything first? It's your motion.

MS. BOGARD: Oh, do you mean here today, Your Honor?

THE COURT: Yes.

MS. BOGARD: Oh, absolutely.

THE COURT: Or are you asking to brief?

MR. NELSON: Well, I was not expecting to proceed with an

argument either right now but I would ask the -- ask for the opportunity and -- an opportunity to supplement the brief in light of the filings that have been submitted.

THE COURT: Okay. I misunderstood you then.

Any objection to that?

MS. BOGARD: I have no objection to further argument but I would object to a supplemental brief.

THE COURT: How long will it take you to file a response?

MR. NELSON: A week. If I can have, you know, a week from today.

THE COURT: Okay. I think it is only fair since we've got a different lawyer on board representing the estate to give him some time to supplement the response. He's not totally bound by what his prior attorney did so I will give you -- are you sure you can do it in a week?

MR. NELSON: Well, you said three weeks you were going to --

THE COURT: Well, I mean, it's going to take me two or three weeks to decide it but.

MR. NELSON: Just to be fair to myself and opposing counsel.

THE COURT: Here's what I'm going to do, I'm going to give you two weeks, 14 days to file a response. You'll have seven days to file a reply, if you wish, supplemental reply, and then it will be two to three weeks after all the

pleadings are in and I'll try to get you a decision by then.

MS. BOGARD: Thank you, Your Honor.

MR. NELSON: Thank you.

THE COURT: Anything else?

MR. NELSON: No, Your Honor.

THE COURT: All right. It's your motion, Mr. Nelson. You prepare the order regarding the motion to compel and run it by Ms. Bogard first, please.

MR. NELSON: Yes, Your Honor.

THE COURT: Anything else?

MR. NELSON: No.

THE COURT: Anything else?

MS. BOGARD: No. Thank you, Your Honor.

THE COURT: Thank you.

MR. NELSON: Thank you.

(Proceedings concluded at 3:24 p.m.)

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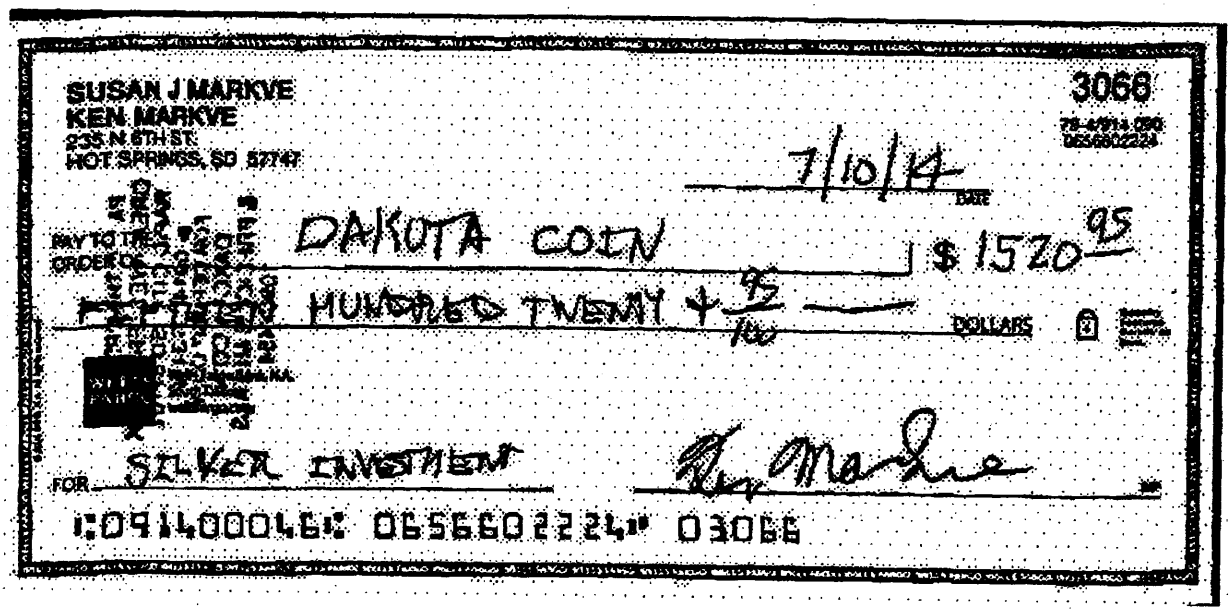

SUSAN J MARKVE
KEN MARKVE
235 N 6TH ST
HOT SPRINGS, SD 57747

3066

7/10/14
DATE

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FIFTEEN HUNDRED TWENTY + 95/100 DOLLARS

FOR SILVER INVESTMENT

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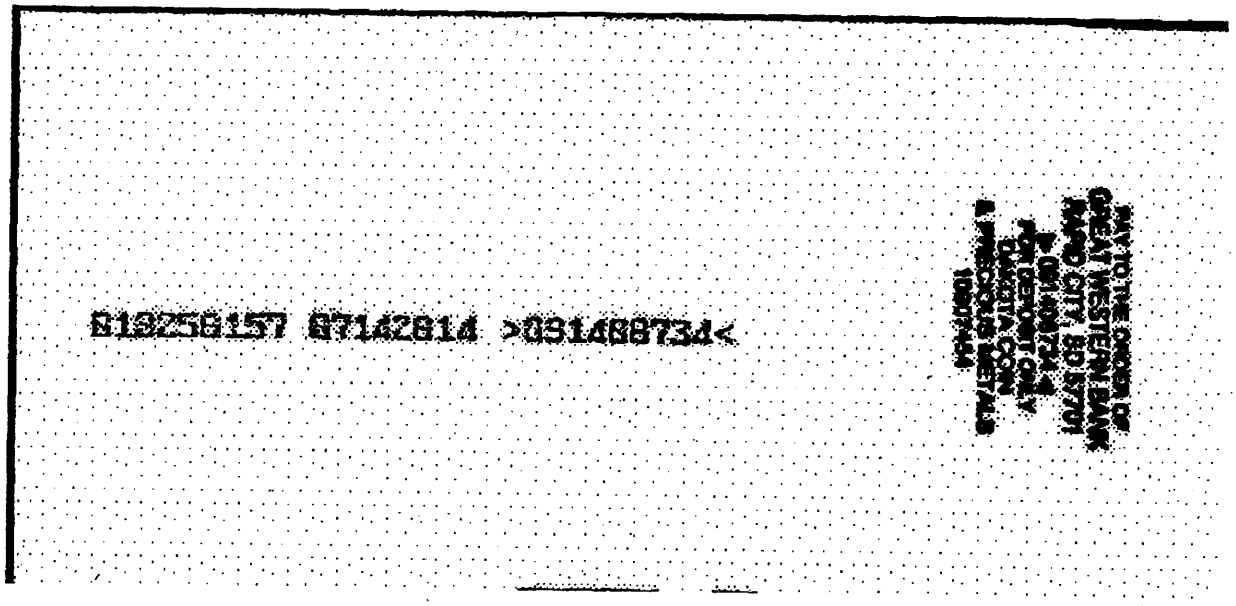

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IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29511
Notice of Appeal Filed January 7, 2021

GUSTAV K. JOHNSON, as Personal Representative of the ESTATE OF SUSAN JANE MARKVE,

Appellant,

vs.

KENNETH CHARLES MARKVE,

Appellee,

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY

APPELLEE'S BRIEF

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I. PRELIMINARY STATEMENT

Appellant Gustav Johnson will be referred to as "Johnson." Appellee Kenneth Markve will be referred to as "Ken" and his wife, Susan Markve, will be referred to as "Susan." The Clerk's Index will be cited as "Index" followed by the specific page number being referenced. The Appendix will be cited as "App" followed by the specific page number being referenced.

II. STATEMENT OF ISSUES

1. Did the Circuit Court err in granting summary judgment by granting it prematurely?

   The Circuit Court found, "No."

   SDCL § 15-6-56(c)
   Lammers v. State by and through Dep't of Game, Fish & Parks, 932 N.W.2d 129, 133 (S.D. 2019)
   Spenner v. City of Sioux Falls, 580 N.W.2d 606, 613 (S.D. 1998)
   Williams Ins. v. Bear Butte Farms Partnership, 392 N.W.2d 831, 833 (S.D. 1986)

2. Did the Circuit Court err in determining there were no material disputes of fact as to Susan's mental capacity?

   The Circuit Court found, "No."

   SDCL § 20-11A-1
   Fisher v. Gorman, 274 N.W. 866, 869 (S.D. 1937)
   First State Bank v. Hyland, 399 N.W.2d 894, 896 (S.D. 1987)
   Egan v. Shindelbower, 41 N.W.2d 225, 226 (S.D. 1950)

3. Did the Circuit Court err in determining there were no material disputes of fact as to whether Ken exercised undue influence over his wife?

   The Circuit Court found, "No."

SDCL § 53-4-7
In re Estate of Metz, 100 N.W.2d 393, 394 (S.D. 1960)
Schaefer v. Sioux Spine & Sport, Prof. LLC, 906 N.W.2d 427, 431-32 (S.D. 2018)
Smid v. Smid, 756 N.W.2d 1, 24-25 (S.D. 2008)

4. Did the Circuit Court err in determining there were no material disputes of fact as to whether Ken committed fraud?

   The Circuit Court found, "No."

   SDCL § 55-1A-2
   SDCL § 55-2-3
   Masloskie v. Century 21 Am. Real Estate, Inc, 818 N.W.2d 798, 803 (S.D. 2012)
   Aqreva, LLC v. Eide Bailly, LLP, 950 N.W.2d 774, 782 (S.D. 2020)

5. Did the Circuit Court err in determining there were no material disputes of fact as to whether Ken converted Susan's Estate property?

   The Circuit Court found, "No."

   First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton, 756 N.W.2d 19, 31 (S.D. 2008)
   Hall v. State, 712 N.W.2d 22, 26-27 (S.D. 2006)

6. Did the Circuit Court err in determining there were no material disputes of fact as to whether an implied or constructive trust was necessary?

   The Circuit Court found, "No."

   SDCL § 55-1-8
   SDCL § 43-2-12
   SDCL § 4-2-13
   Rosebud Sioux Tribe v. Strain, 432 N.W.2d 259, 264 (S.D. 1988)
   Matter of Estate of Perkins, 508 N.W.2d 597, 600 (S.D. 1993)
   Matter of Estate of Perkins, 508 N.W.2d at 601

III. STATEMENT OF CASE

Johnson sued Ken on May 25, 2018 for violation of an implied trust, undue

influence, conversion, breach of fiduciary duty, statutory fraud, and common law fraud. Index 9-15. After significant discovery, Ken filed a Motion for Summary judgment on April 10, 2020, along with a Statement of Undisputed Material Facts, Brief in Support of the Motion, Affidavit of Ken, Affidavit of Brian Hagg, Affidavit of Susan Henderson, Affidavit of Joan Howard, Affidavit of Irene Wells, Affidavit of Dianna Stroh, and Affidavit of Kristen Basham. Index 112-271. On May 8, 2020, Johnson filed an opposition to Ken's Motion, Response to Ken's Statement of Undisputed Material Facts, and other documents. Index 274-464. On May 20, 2020, Ken filed a Reply Brief in Support of his Motion for Summary Judgment, as well as an Affidavit of Kristen Basham. Index 465-518. A hearing was held on May 22, 2020, during which the Circuit Court invited Johnson to file a Rule 56(f) Affidavit which was then filed on May 27, 2020. Index 552; App. A19. Ken filed an opposition to the Rule 56(f) Affidavit on June 3, 2020, with an Affidavit of Kristen Basham. Index 555-90. Shortly thereafter, on June 9, 2020, Johnson's counsel filed a Motion to Withdraw. Index 591. With new counsel, Johnson filed a Reply to Ken's opposition to the Rule 56(f) Affidavit. Index 593.

Johnson then filed a Motion to Compel Supplemental Answers to Interrogatories on September 23, 2020. Index 599. A hearing on the Motion was held October 6, 2020, but the Motion was not addressed, as Johnson failed to give timely notice. App. A30.

Following the hearing, Johnson filed another Rule 56(f) Affidavit on October 9, 2020. Index 616. Again, Ken filed an objection to the Rule 56(f) Affidavit on October 20, 2020, as well as a Resistance to the Motion to Compel and Affidavit of Heather Lammers Bogard. Index 630, 636. Johnson then filed a Reply to Ken's Resistance to the Motion to Compel on October 20, 2020. Index 696. A hearing was held on October 27, 2020, during

which the Court addressed the Motion to Compel, but also inquired if the parties were prepared for arguments on the pending Motion for Summary Judgment. Johnson's Brief, App. A52. An agreement was made that Johnson would file a Supplemental Brief in fourteen days, or November 10, 2020. Johnson's Brief, App. A53. Subsequent to the hearing, on November 12, 2020, the Court entered an Order on the Motion to Compel. Index 704.

Meanwhile, Johnson filed his Supplemental Brief on November 20, 2020. Index 710. Ken filed his Supplemental Brief on November 25, 2020. Index 718. On December 9, 2020, the Court entered an Order in favor of Ken, along with a Memorandum Decision. Index 728.

IV. STATEMENT OF FACTS

In 2011, Susan and Ken found love at the bridge table making a golden age romance. Both Susan and Ken had successful lives, with Susan working in finance and Ken selling insurance. From their success, each accumulated their own property and wealth. After dating for a while, Ken and Susan began to discuss marriage. They were engaged in the fall of 2012 and sent out invitations for their wedding to occur on October 22, 2012, at the waterfall on North River Street, Hot Springs, South Dakota. Index 120 ⁋ 7. Prior to marriage and due to both Susan and Ken having their own assets accumulated throughout their lives, they decided to enter into a prenuptial agreement. *Id.* ¶ 8.

Susan's brother, Gustav Johnson [hereinafter "Johnson"], Trustee to the Susan J. Markve Trust and Personal Representative to Susan's Estate, was opposed to the marriage from the very start. Johnson took Susan out to dinner and, two days later, Susan asked Ken to meet with her. Index 121 ⁋ 10, 11. At the meeting, Susan broke off the engagement with

Ken, remarking that Ken had insufficient liquid assets. *Id.* ⁋ 11.

Prior to this, Ken and Susan were in the process of purchasing a house, known as the Flock house. The plan was to purchase the home under Ken's name, individually, and Susan as the Trustee of the Susan J. Johnson Trust, as joint tenants with rights of survivorship. Index 120 ⁋ 5, 6. Since the engagement was terminated, however, the purchase agreement for the Flock house was cancelled. Index 121 ⁋ 12.

Even though Susan broke off the engagement, Susan and Ken continued to talk and spend time together. They again decided to marry. Prior to the marriage, on January 15, 2013, they entered into a prenuptial agreement they located on the internet with the purpose of keeping their property they had prior to the marriage separate. *Id.* ¶ 14. Susan and Ken were married on January 23, 2013, in front of the Justice of the Peace. *Id.* ⁋ 15. Friends, Donna and Dale Steineke, were the attendants and witnesses to the wedding. *Id.* For an engagement ring, Susan had a diamond ring and Ken bought a wedding band that was welded to the ring. *Id.* ¶ 16.

Susan and Ken enjoyed married life and spent a great deal of time playing bridge with their friends in the Hot Springs area. *Id.* ⁋ 3. In the summer of 2013, Susan and Ken vacationed in Alaska. *Id.* ⁋ 18. Susan flew home to Hot Springs at the end of the vacation, while Ken stayed in Alaska to settle affairs associated with the sale of his cabin there. *Id.* ⁋ 19. While Ken was still in Alaska, Susan looked at a house for sale in Hot Springs and made an offer. Index 122 ⁋ 20. Since Ken was out of town, Susan purchased the house as trustee of the Susan J. Johnson Trust. *Id.* ⁋ 21. Once Ken returned from Alaska, Ken and Susan moved into the home and lived there as a married couple, including enjoying such activities as hosting bridge club with their friends. *Id.* ¶ 22.

In late 2013, Susan began to feel ill. Ultimately, she was diagnosed with a brain tumor. *Id.* ⁋ 23. Susan went through extensive medical care and treatment, including brain surgery to try and remove the tumor, radiation/chemotherapy, and holistic remedies. *Id.* ⁋ 24. Since Susan was going through extensive medical care, she and Ken met with a highly regarded, experienced attorney, Brian Hagg, concerning Ken becoming Susan's power of attorney. Index 124 ¶ 2, 3. Susan wanted Ken to be in control of her assets. Susan also expressed her desire to ensure Ken was on the deed to their home. When Susan met and talked with Brian Hagg, she was competent and knew what she wanted to do with the power of attorney, as well as the couple's marital home. *Id.* ¶ 5. She met with Brian Hagg on two separate occasions. *Id.* ¶ 4. Based on these meetings with Susan, Brian Hagg drafted the power of attorney and quit claim deed, conveying their marital home from Susan's trust to Susan and Ken as joint tenants. Index 124 ¶ 6.

On March 25, 2014, two years before her passing, while she was in the swing bed facility at the hospital, Susan signed the quit claim deed and the power of attorney appointing Ken to be Susan's agent. Index 122 ¶ 25, 26; 154-58. In addition to Mr. Hagg having full confidence in Susan's mental health at that time, the day before Susan signed the documents, on March 24, 2014, Nurse Practitioner Woehl noted that Susan reported feeling better that day, had a good weekend, was alert and oriented and visiting with staff and her husband, and that Susan had an improved mental state. Index 171-72, 11:14-24, 12:1. Also, on March 25, 2014, the day the documents were signed, Susan's assessment was improved mental status. Index 172, 12:18-22. It is further noted that according to Susan's family care provider, Dr. Christopher Robbins, Susan was never diagnosed with dementia. Index 246, 66:19-21.

The deed reflected Susan's intent for Ken to continue to live in and own their married home after she passed, and it was Susan's intent for Ken and her to share the home just as they would have shared the Flock house. Index 122 ⁋ 27. Caregiver Irene Wells was present when Susan discussed with Ken that she wanted Ken to have the house that they had resided in together as husband and wife. Index 130 ¶ 6.

Ken and Susan continued to live in their married home while and after Susan received treatments and was released from the swing bed facility. Index 122 ⁋ 28. They would even still host bridge club in their home. *Id.* ¶ 29. In 2014, Susan's Nurse Practitioner noted that Susan was able to play cards, like bridge. Index 173, 15:13-17. Dr. Robbins recalled that Susan could play cards longer and was impressed with how she could play at a higher level. Index 239, 59:9-14. For several months, Susan continued to play bridge with their friends at their home. Index 126 ¶ 6. Even though Susan became more physically dependent, Susan knew her own mind and maintained her own opinions. Index 128 ¶ 5.

Ken and Susan knew each other for five years and were married for three years before Susan passed away. Even though Susan became sick, Ken and Susan supported each other and cared for each other very deeply. Index 132 ¶ 6. When Susan was in the hospital or had a medical appointment, Ken accompanied her virtually every time. Index 236, 56:19-22. The only time that Ken was not with Susan was on November 20, 2015, because he was sick. Index 243, 63:5-11. Dr. Robbins testified that Ken was a very active participant in Susan's care. *Id.* at 63:15-16. Ken even requested for Susan to be at Full Code which generally means all treatments wanted. Index 241, 61:8-17. Dr. Robbins was not suspicious at all of Ken's intentions during Susan's care and treatment. Index 245,

65:19-21.

As soon as Susan became ill, Ken hired home health workers and care givers to assist in the care and treatment for Susan. Index 126 ¶ 4, 132 ¶ 7. One of the care givers, Irene Wells, was Susan's massage therapist and part time care giver. Index 130 ¶ 1. On occasion, Wells would drive Susan to cancer treatments in Rapid City. *Id.* ¶ 2. On these drives, the two would discuss what Susan was thinking and feeling. During one trip to Rapid City, Susan told Wells that she was upset with her brother, Johnson, for asking Susan to change her will. *Id.* ¶ 3. Susan did not change her will as her brother wanted, because she felt that there would never be enough money to satisfy her brother's needs. *Id.* ¶ 4.

After Susan passed on April 12, 2016, two years after having signed the power of attorney and deed, Ken began the process of providing information and property to the personal representative of Susan's Estate, Johnson. Ken took an inventory of the household goods and provided the inventory to Johnson. Index 123 ¶ 30. One of Susan's possessions had been a coin collection. Prior to her death, however, she sold the collection through Heartland Auction Co. and Dakota Coin & Precious Metals. *Id.* ¶ 31. The proceeds from the sale of the coin collection were placed in Susan's Wells Fargo Savings Account which was given to Johnson. *Id.* ¶ 32. In fact, all of the cash assets and lists of investments were returned to Johnson in June of 2016; there was virtually no shrinkage to the Estate, despite Ken having spent sums for the care and treatment of Susan.

Susan's nephew, Eric Hanson, came to Ken's and Susan's marital home and retrieved the vehicle Susan devised to him and was asked if he wanted to keep anything else of Susan's personal property, including furniture, which he declined. Index 124-25 ¶ 8,

9. The remaining personal property was delivered to Johnson. Index 125 ¶ 10. Additionally, Ken transferred and turned over all accounts and funds in Susan's name or in the name of the Susan J. Markve Trust. Index 123 ¶ 33. Ken wanted to keep his wife's wedding ring to which his ring was welded, but he offered to give the ring to Susan's niece, Johnson's daughter, after he had passed. Index 122 ¶ 17. Ken never received a response to his offer.

Subsequent to Susan's passing, Johnson brought claims against Susan's husband, including violation of an implied trust, undue influence, conversion, breach of fiduciary duty, statutory fraud, and common law fraud. Index 9-15. Johnson brought these claims despite having benefitted from Susan's Trust, receiving as personal representative of the estate a minimum of $33,616.58 as net income from the Trust and $6,617.29 as commission. Index 165. Moreover, Johnson, who was not there, visiting with and caring for Susan during the end of her life, sought damages from Ken, who was nothing more than a completely devoted husband to Susan.

Long after Ken filed his motion for summary judgment, Johnson filed two Rule 26(f) affidavits (being represented by two different lawyers), arguing that more discovery had to be made before the Court could entertain the motion. Index 552, 616. The discovery claimed necessary by Johnson, however, would have in no way established a material, disputed fact, preventing a ruling in Ken's favor. The undisputed facts show that Ken was a devoted husband to Susan and that Susan not only wanted Ken to be her attorney in fact, but also wanted Ken to live in their marital home that they shared together after she passed.

V. ARGUMENT

A. Standard of Review.

"Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Estate of Lien v. Pete Lien & Sons, Inc.*, 740 N.W.2d 115, 119 (S.D. 2007) (quotations and citations omitted) (citing SDCL § 15-6-56(c)). "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that a reasonable jury could return a verdict for the nonmoving party." *Aqreva, LLC v. Eide Bailly, LLP*, 950 N.W.2d 774, 782 (S.D. 2020) (quotation omitted). Although the moving party has the burden of demonstrating the absence of a material, disputed fact, the "party resisting summary judgment must present sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Lammers v. State by and through Dep't of Game, Fish & Parks,* 932 N.W.2d 129, 133 (S.D. 2019) (quotation omitted).

B. Summary Judgment Was Proper

1. Granting Summary Judgment Was Not Premature.

In his Brief, Johnson argues that summary judgment was premature, because he had not received certain discovery by the time of the ruling. Johnson's Brief at 11. Absent from his Brief, however, is an explanation from Johnson as to how any of the discovery would arguably create a question of material fact, preventing summary judgment. Information argued by Johnson to be outstanding consisted of the names and numbers of Ken's personal financial accounts for the past ten years and identities of Ken's personal financial planners used in the last ten years and Ken's tax returns; he claimed this discovery would "supplement" the report of Nina Braun. *Id.* at 13. Ms. Braun's forensic report

addressing the spending of Ken on caring for Susan was addressed by the Circuit Court when it acknowledged that the withdrawal of money from the Black Hills Federal Credit Union account questioned by Braun was unequivocally explained by Ken when he provided "accountings of both expenses and caregivers paid using the BHFCU funds." Index 742. The Court went on to hold that there was "nothing in the record which genuinely disputes whether the funds were used to pay Susan's at-home caregivers or expenses related to Susan's care." Index 742-43.

Further, Johnson failed to identify which claim, if any, for which this forensic report and "supplement" were needed. "Failure to brief [a] matter supported by case or statutory authority constitutes a waiver of that issue." *Spenner v. City of Sioux Falls,* 580 N.W.2d 606, 613 (S.D. 1998) (citing *Weger v. Pennington County,* 534 N.W.2d 854, 859 (S.D. 1995); *Tjeerdsma v. Global Steel Bldgs. Inc.,* 466 N.W.2d 643, 644 n.2 (S.D. 1991)). The fact remains that, as to Ken's ability to spend funds on caring for Susan, the prenuptial agreement expressly stated that one was completely responsible for the care of the other, if disability arises.[1] Index 19. In addition, Ken was appointed power of attorney for Susan in March of 2014 (drafted by attorney Brian Hagg), giving him the right to make decisions concerning Susan's healthcare. Index 155. Moreover, Ken provided to Johnson every financial document in his possession relating to the care and treatment of Susan, in addition to every financial document relating to Susan, Susan's Trust, and Susan and Ken jointly. Index 646. Thus, there is no basis for Ms. Braun to review any "supplemental" documentation, including the names and account numbers of all of Ken's personal financial accounts.

[1] Johnson failed to appeal any issue relating to the validity of the prenuptial agreement.

Johnson also asserted that the identity of all persons employed to care for Susan, the amount paid and their functions were yet to be provided. Johnson's Brief at 14-15. Again, however, Johnson failed to identify for this Court how this information would create a dispute of fact, waiving the issue. *Spenner, supra.* Multiple spreadsheets of expenses and payments to caregivers had already been provided. Index 562-67. Copies of checks from Ken and Susan's joint account had been provided. Index 568-90. As stated by the Circuit Court, "there is no genuine dispute of material fact that Ken used this account solely for Susan's benefit." Index 741.

While Johnson referenced the Affidavit of Dr. Manlove, addressing Susan's mental state, he did not connect how the functions that each caregiver provided to Susan would prevent summary judgment. In fact, Johnson quoted from Dr. Manlove's Affidavit (dated October 9, 2020), wherein he stated that the only information he desired to review were statements from Susan's caregivers. Johnson's Brief at 14; Index 615. The record is clear that Johnson failed to supply to Dr. Manlove the four affidavits from Susan's caregivers and friends that were provided to him on April 20, 2020, along with Ken's motion for summary judgment, six months before Dr. Manlove executed his affidavit. Index 126-33, 615. These affidavits set forth the caregivers' and friends' observations and opinions of Susan's mental state, as well as her relationship with Ken. Index 126-33. No doubt Johnson purposefully withheld these statements, as they unequivocally show that Susan knew exactly what she was doing and that Ken was completely devoted to Susan's well-being. *Id.*

A case cited by Johnson for his argument that summary judgment was premature, *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524 (8th Cir. 1999), has an entirely

different set of facts than those at hand. In *Iverson,* only a month passed between Plaintiff filing the Complaint and Defendant removing the case to Federal Court, along with filing a Motion to Dismiss which was converted to Summary Judgment. *Id.* at 526-27. Although no discovery had been conducted, the Court granted summary judgment on the very same day that Plaintiff filed a Rule 56(f) Affidavit. *Id.* at 527. Here, of course, the case had been pending since 2018; Johnson filed discovery requests in February of 2019 that were answered in April of 2019; Johnson filed a second set of discovery requests in February of 2020 which were answered in March of 2020; Ken filed discovery requests in September of 2018 that were answered in November of 2018; depositions of medical providers were taken in November of 2019. Index 2, 62-63. Thus, in contrast to *Iverson,* extensive discovery was completed prior to Ken filing his motion for summary judgment on April 14, 2020.

In addition, Johnson filed a brief in response to the Motion, not a Rule 56(f) Affidavit, on May 8, 2020; Ken filed a reply brief on May 20, 2020. Index 297, 465. The record reflects that, during the hearing on May 22, 2020, it became apparent to the Court that Johnson desired additional discovery and questioned whether counsel desired to file a Rule 56(f) Affidavit which was then filed on May 27, 2020. Index 552; App. A1. In the Affidavit, Johnson argued that he needed more time to consider Susan's financial documents, however, those documents were reviewed by Johnson's counsel six months prior to the Rule 56(f) Affidavit being signed. Index 643. In fact, in December of 2019, Ken disclosed the entire file relating to any transactions involving Susan, Susan's Trust, and Susan and Ken jointly. Index 646. Even though months had passed, Johnson filed on June 16, 2020, an Affidavit of Nina Braun, stating that she was reviewing the financials

and anticipated a report by July 17, 2020. Index 595. No such report was received by Ken on July 17, 2020. During a hearing on October 6, 2020, Johnson's counsel advised the Court that he had the Braun report in his possession, but did not provide a valid reason for the report not being disclosed to Ken. App. A30.

Meanwhile, Johnson filed a Notice of Substitution of Counsel on June 23, 2020, as well as a Motion to Compel on September 23, 2020. Index 597, 599. The above-referenced October 6, 2020, hearing was set on the Motion to Compel, however, inadequate notice was provided to address the merits of the Motion. Following the hearing, Ms. Braun's report dated August 20, 2020, was provided to counsel as an attachment to yet another Rule 56(f) Affidavit, filed October 9, 2020, nearly 3 months after promised. Index 621. However, Johnson failed to set forth in his Second Rule 56(f) Affidavit why this report should delay the Court's ruling on the Motion for Summary Judgment. Index 616. A Resistance to the Motion to Compel was filed on October 20, 2020, along with an Opposition to the Second Rule 56(f) Affidavit. Index 636, 630.

A motions hearing was ultimately held on October 27, 2020, resulting in an Order compelling Ken to respond to a few minor discovery requests which was entered November 12, 2020. Index 704. During this hearing, the Court inquired whether additional submissions by the parties in support of their positions were necessary to which both parties affirmatively responded. Johnson's brief, A52. The Court directed that Johnson file his brief on November 10, 2020. *Id.* A53. After an extension was granted, Johnson filed his brief on November 20, 2020; Ken filed his brief on November 25, 2020. Index 710, 718. The Court, after considering a total of three briefs from Ken and two from Johnson on the Motion for Summary Judgment over the course of seven months, had ample evidence and

authority to rule in favor of Ken. Thus, unlike *Iverson*, significant discovery had been completed and many months had passed from the time the motion filed to the date of the Court's ruling, in addition to the fact that the matter had been pending for over two years.

The same is true for the other cases cited by Johnson. In *Doe v. Abington Friends Sch.*, 480 F.3d 252, 254 (3rd Cir. 2007), there had been no discovery by the Plaintiff prior to granting summary judgment in favor of the Defendant. Similarly, in *St. Surin v. V.I. Daily News*, 21 F.3d 1309, 1314 (3rd Cir. 1994), two depositions had been noticed, but never taken, prior to the Court entering summary judgment. In any event, this Court need not look to the Third Circuit Court of Appeals on this issue. The South Dakota Supreme Court has long held that there may be no need for further discovery when the filings "show the facts surrounding the controversy" and support summary judgment in favor of a party. *Williams Ins. v. Bear Butte Farms Partnership*, 392 N.W.2d 831, 833 (S.D. 1986).

Moreover, a determination made by a Circuit Court on whether a Rule 56(f) Affidavit prevents the entry of summary judgment is reviewed by applying the abuse of discretion standard. *Id.; see also Stern Oil Co. v. Border States Paving, Inc.*, 848 N.W.2d 273, 281 (S.D. 2014) (additionally holding that the Rule 56(f) Affidavit must show how the discovery will defeat a motion for summary judgment). It is abundantly clear that the Court did not abuse its discretion when determining that the matter was ripe for summary judgment. The Court delayed ruling on the summary judgment for purposes of Johnson's first Rule 56(f) Affidavit, significant time had passed, extensive discovery was exchanged, and Johnson failed to establish that any information not yet disclosed would raise a dispute of material fact. In no way did Johnson submit "sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy."

Lammers, 932 N.W.2d at 133. Summary judgment should be affirmed.

2. <u>Susan was Fully Capable of Executing the Quitclaim Deed and Power of Attorney.</u>

As he did with the Circuit Court, Johnson devoted a great deal of effort in his brief outlining Susan's medical history once she was diagnosed with a brain tumor in 2013. Johnson's Brief at 17-20. Notwithstanding Susan's medical condition, however, "[t]here is no dispute of material fact that Susan was competent when she had attorney Brian Hagg draft the quitclaim deed and power of attorney." Index 736. Quoting from Mr. Hagg's Affidavit concerning his opinion that Susan was "competent and very clear" as to what she wanted done with the deed and power of attorney, the Circuit Court noted that Mr. Hagg met with Susan twice. *Id.* Further, Mr. Hagg's observations are undisputed. Thus, not only is it undisputed that Susan was fully capable of executing the power of attorney and quitclaim deed when they were signed, but it is also significant that during the two years after Susan executed these documents, she never revised her wishes or in any way indicated that she regretted her decision.

As far as the medical aspect of Susan's brain tumor was concerned, the Circuit Court stated that while Susan's competency may have varied through the years, there was no evidence "that even alludes" to Ken exercising influence over Susan. Index 737. In fact, there was a valid prenuptial agreement in place, providing for Ken to care for Susan if she became incapacitated and allowing for Susan the possibility to share her real property with Ken. *Id.* The Circuit Court held, "There is no question as to the validity of the prenuptial agreement nor any question of undue influence regarding the agreement." *Id.*

The undisputed facts show that, in addition to the validity of the prenuptial agreement, Susan was competent to execute the quitclaim deed and power of attorney.

Susan's competency is examined by the standard of whether she was a "person entirely without understanding" to sign a contract. SDCL § 20-11A-1. "Entirely without understanding" does not require "proof of an entire lack of understanding on any subject, i.e., that the mind of the person is an absolute void, but such a degree of mental deficiency as to render [her] incapable of understanding a transaction of the nature involved." *Fisher v. Gorman,* 274 N.W. 866, 869 (S.D. 1937) (quoting *Fleming v. Consolidated Motor Sales Co. et al.,* 240 P. 276, 381 (Mont. 1925)); *see also First State Bank v. Hyland,* 399 N.W.2d 894, 896 (S.D. 1987) (referring to a promissory note and holding that a person "entirely without understanding" is one who did not "possess the mental dexterity required to comprehend the nature and ultimate effect of the transaction in which he was involved."); *Egan v. Shindelbower,* 41 N.W.2d 225, 226 (S.D. 1950) (citing *Meyer v. Russell,* 214 N.W. 857, 869 (N.D. 1926)) (stating that mental weakness is not enough to establish inability to execute a deed; rather one must show the person could not understand the nature and effect of the transaction).

The facts show that Ken hired caregivers to help Susan as soon as she became ill. Susan's caregivers, home health workers and friends had more than sufficient opportunity to observe Susan and give opinions as Susan's state of mind. One of the care givers, Irene Wells, was Susan's massage therapist and part time care giver. Index 130 ¶ 1. Ms. Wells was present when Susan discussed with Ken that she wanted Ken to have the house that they had resided in together as husband and wife. *Id.* ¶ 6. Dianna Stroh, one of Susan's caregivers, stated that, even though Susan became sick, she and Ken supported each other and cared for each other very deeply. Index 132 ¶ 6. A friend of Susan's, Susan Henderson, stated that, for several months, Susan continued to play bridge with her friends. Index 126

¶ 6. Likewise, another friend, Joan Howard, noted that, although Susan became more physically dependent, she knew her own mind and maintained her own opinions. Index 128 ¶ 5. There was no testimony from any of Susan's caregivers or friends that supports Johnson's position that Susan lacked capacity to sign a deed or power of attorney.

Similarly, the testimony of Susan's medical providers supports that she had adequate capacity to execute a quitclaim deed and power of attorney. On the day before she signed the documents, March 24, 2014, Nurse Practitioner Woehl noted that Susan reported feeling better that day, had a good weekend, was alert and oriented and visiting with staff and her husband, and that Susan had an improved mental state. Index 169-70. On the day she signed the documents, March 25, 2014, Susan's assessment was improved mental status. Index 170. Later, after Susan returned home, Mr. Woehl noted that Susan was able to play cards, like bridge. Index 173. Susan's physician, Christopher Robbins, MD, recalled that after Susan returned home, she could play cards longer and was impressed with how she could play at a higher level. Index 239.

In addition to Susan's medical providers, home health care personnel, and friends, her lawyer fully evaluated Susan's mental health. Well-respected, experienced attorney Brian Hagg opined that Susan was competent and "very clear" on what she wanted to do with the marital home, as well as desiring Ken to be her agent. Index 124 ¶ 5. Mr. Hagg made this determination after meeting with Susan on two different occasions. *Id.* ¶4. Johnson failed to assert any evidence to dispute Mr. Hagg's personal and professional observations.

Thus, the undisputed, material evidence supports that, per *Fisher*, 274 N.W. at 869, Susan was fully capable of understanding the nature of the quitclaim deed and power of

attorney not only upon their execution, but also during the following two years that Susan lived life to its fullest, sharing time with Ken, including playing bridge with him and friends. Summary judgment on the issue of Susan's capacity should be confirmed.

3. <u>There is no evidence of Ken exerting any influence on Susan.</u>

Equally as important as Susan's clear capacity to contract is that there is no dispute that Ken did not exert any undue influence on Susan. To the contrary, as stated by the Circuit Court, Ken acted "more consistent with a caring husband than with someone trying to exert influence over another." Index 738. Caregivers indicated that Ken and Susan supported each other and cared for each other. Index 132 ¶ 6. Medical providers, such as Dr. Robbins, noted that when Susan was in the hospital or had an appointment, Ken went with her virtually every time; he was a very active participant in Susan's care. Index 236, 243. Dr. Robbins was not suspicious at all of Ken's intentions during Susan's care and treatment. Index 245.

South Dakota law is well-established. "Influence, to be undue, must be of such character as to destroy the free agency of the testator and substitute the will of another person for his own." *In re Estate of Metz*, 100 N.W.2d 393, 394 (S.D. 1960) (citing *In re Armstrong's Estate*, 65 S.D. 233, 272 N.W. 799 (S.D. 1937)). Its essential elements are (1) a person susceptible to such 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 effect of such influence. *Schaefer v. Sioux Spine & Sport, Prof. LLC,* 906 N.W.2d 427, 431-32 (S.D. 2018) (citing *In re Estate of Metz*, 100 N.W.2d at 394). "For influence to be undue it must be of such a character as to destroy the free agency of the testator and substitute the will of another for that of the testator." *In re Estate of Schnell,*

683 N.W.2d 415, 421 (S.D. 2004) (citing *Matter of Estate of Elliot*, 537 N.W.2d 660, 662 (S.D. 1995)).

The burden to establish the elements of undue influence is on Johnson, the contestant. *See Schaefer,* 906 N.W.2d at 432. He did not and cannot meet this burden, whether the elements set forth herein are applied or the standard set forth by Johnson, citing to SDCL § 53-4-7 which provides, in part, that undue influence occurs when one person takes "unfair advantage of another's weakness of mind." Johnson's Brief at 23.[2]

First, as to whether Susan was susceptible to undue influence in her testamentary capacity, as stated repeatedly herein above, Susan was fully capable of executing the quitclaim deed and power of attorney. She was also fully able to change her mind during the following two years before she passed away. According to close friends and caretakers, Susan knew her own mind and maintained her opinions, even if having some physical difficulties. Index 128 ¶ 5. Attorney Brian Hagg opined that Susan was competent and "very clear" on what she wanted to do with the marital home, as well as desiring Ken to be her agent. Index 124 ¶ 5. Further, Susan's physician was not suspicious of Ken. Index 245, 65:19-21. Susan's physician also testified that when Susan was in the hospital or had an appointment, Ken accompanied her virtually every time. Index 236, 56:19-22. Further, this

[2] Although Johnson urged this Court to apply SDCL § 53-4-7 to determine whether Susan was unduly influenced, he later cited to *In re Estate of Gaaskjolen,* 941 N.W.2d 808 (S.D. 2020), arguing that there was a presumption that Ken unduly influenced his wife. Johnson's Brief at 26-27. Johnson ignored, however, the holding by the Court that "the ultimate burden remains on the contestant to prove the elements of undue influence by a preponderance of the evidence." Even if the Court were to find that there was a presumption here, there can be no doubt that Ken produced ample evidence to support that he "took no unfair advantage of" Susan. *Gaaskjolen,* 941 N.W.2d at 816. He provided, for example, every document in his possession relating to their joint accounts, Susan's accounts, and her trust accounts. He also presented evidence from medical providers and caregivers to support his true love for Susan and that he was in no way attempting to take advantage of her.

physician testified Ken was a very active participant in Susan's care. Index 243, 63:15-16.

As to the second element, Ken did not have an opportunity to exert such influence on Susan. After Susan became sick and went through treatments, Ken hired home health workers and caregivers to assist in the care and treatment for Susan. Index 126 ¶ 4, 132 ¶ 7. Susan was not isolated from others and was able to voice her thoughts and feelings to individuals outside of Ken's presence. She was able to convey her feelings and not be easily swayed to do anything she did not want to do. As stated by the Circuit Court, Ken was a "caring husband" and not "someone trying to exert influence" over Susan.[3] Index 738.

Johnson did not likewise meet the third and fourth elements, showing there was exertion of undue influence for an improper purpose and a result of such influence. The conveyance of the house in Hot Springs was made by Susan with the intent to have Ken, her husband, to continue to live in their married home. Index 130 ¶ 6. Additionally, this was the intent all along when the house was purchased, as it was to be shared as the Flock house would have been owned as joint tenants. Index 120 ¶ 5, 6.

Susan's situation is opposite of that in a recently decided South Dakota Supreme Court case, *In re Estate of Gaaskjolen,* 941 N.W.2d 808, 816 (S.D. 2020). In *Gaaskjolen,* the Circuit Court found that Ms. Gaaskjolen was susceptible to undue influence by one of her daughters. Medical evidence supported findings that Gaaskjolen was susceptible to undue influence based several doctors' medical evaluations and interviews with

[3] If anyone were attempting to unduly influence Susan, it was Johnson. Susan commented to one of her caregivers that she was upset with her brother, Johnson, for asking her to change her will. Index 130 ¶ 3. Susan did not change her will as requested by her brother, because she felt that there would never be enough money to satisfy her brother's needs. *Id.* ¶ 4.

Gaaskjolen where one doctor stated, "She suffers from moderate to severe memory, orientation, problem solving, and information processing deficits which are further complicated by her expressive aphasia . . . ." *Id.* Of course, Johnson presented no testimony from any medical provider opining that Susan was "very impaired from a neuropsychological perspective" as in *Gaaskjolen.* Also, unlike *Gaaskjolen,* Susan was not isolated from others, but instead was with caregivers and friends frequently.

This case is more akin to *Smid v. Smid,* 756 N.W.2d 1, 24-25 (S.D. 2008), wherein the Court reviewed undue influence per SDCL § 53-4-7 and noted that the elements set forth in *In Re Estate of Schnell, supra,* had to be proven by the Plaintiff. The Court held that there was no evidence that the widow "was susceptible to undue influence," no testimony that her dying husband "had a disposition to exert undue influence over" her or had an opportunity to do so. *Id.* at 25-26. Further, there was not a result that had a wrongful purpose, given that it was not unusual for a person to want his children to receive ownership of the home that was purchased by their mother. *Id.*

Like *Smid,* there was no evidence that Susan was susceptible to undue influence, no testimony that Ken had a disposition to exert undue influence over her or even had an opportunity to do so. Last, as in *Smid,* the result was not for a wrongful purpose, as it is not at all unusual to desire one's spouse to maintain the home in which the wife and husband resided together. It is likewise not at all unusual for a wife to sign a power of attorney, appointing her husband to be in charge of medical and financial matters should she become incapacitated.

Johnson did not raise any material, disputed question of fact to prevent summary

judgment from being entered in Ken's favor on the issue of undue influence.[4] Summary judgment should be affirmed.

4. <u>No Evidence of Fraud Exists.</u>

While Johnson appealed the issues of statutory and common law fraud, his brief merely directs this Court to other arguments contained in his brief. Johnson's Brief at 31-32. The "[f]ailure to brief [a] matter supported by case or statutory authority constitutes a waiver of that issue." *Spenner,* 580 N.W.2d at 613. Nevertheless, there is no material, disputed fact that supports Ken was fraudulent in any manner.

A. Statutory Fraud

The Circuit Court addressed both statutory and common law fraud. Index 744-46. As to statutory fraud, the Court held that there was no evidence that Ken acted as Susan's trustee under SDCL § 55-1A-2, rendering SDCL § 55-2-7 inapplicable. Index 745. The Court found that Ken, acting as Susan's power of attorney, did not "automatically create a trust[;]" rather, the "power of attorney merely enable[d] [Ken] to act as her agent." *Id.* The undisputed record supports this holding.

SDCL §55-1A-2 defines "trustee" as a person "acting as an original, substitute, added, or successor trustee of a testamentary or inter vivos trust, whichever in a particular case is appropriate." Ken was never appointed as Susan's trustee. At the time of Susan's

[4] It is noted that Johnson improperly attempted to address Ken's alleged breach of fiduciary duty within the issue set forth to this Court as undue influence, arguing that Ken was self-dealing by transferring assets to their joint account. Johnson's Brief at 26. To the extent that this Court will address his argument, there is no evidence to support self-dealing. The Circuit Court held, "There is no breach of a fiduciary duty by transferring funds to a jointly held account as long as the fiduciary still abides by his duties to the beneficiary." Index 741. The Court found there was no evidence to support self-serving acts by Ken; although Ken placed some of Susan's assets in the jointly held account, there was no dispute that Ken used those funds "solely for Susan's benefit" and turned the account over to Johnson after Susan died. Index 741-43.

passing, Great Western Bank was the trustee of her trust.

Even if there were evidence that Ken acted as a trustee, there is nothing to support that he acted in any way adverse to Susan. *See* SDCL § 55-2-3. Fraud against the beneficiary of the trust occurs when: the trustee uses property for his own benefit; the trustee engages in transactions involving interest of the trustee adverse to beneficiary; if the trustee uses his influence for his advantage; or if a trustee assumes a trust adverse to the interest of the beneficiary. *See* SDCL §§ 55-2-2 through 55-2-6. As set forth throughout this Brief, there is no evidence to support that Ken acted in any manner contrary to Susan's best interests. Moreover, Ken was permitted to take the actions he did, because Susan had full knowledge of the transactions occurring prior to her death. *See* SDCL § 55-2-3(1).

As provided herein, Susan had the capacity to contract with full knowledge of the facts. The conveyance of the house was made by Susan with the intent to have Ken to continue to live in their married home. Index 130 ¶ 6. Susan knew what the deed meant. Index 124. Johnson did not submit any evidence to support that Ken was a trustee or even that he acted in any manner contrary to Susan's interests. Therefore, the Court should be affirmed on the issue of statutory fraud.

B. Common Law Fraud

As to common law fraud, the Circuit Court held that Johnson failed to submit "any evidence regarding a misrepresentation or concealment by [Ken] which prompted Susan to sign either the quitclaim deed or power of attorney." Index 746. Likewise, Johnson failed to set forth any facts in his Brief to support any such act by Ken. Johnson's Brief at 32.

The elements of fraud include: "a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made;"

it was "made with intent to deceive and for the purpose of inducing the other party to act upon it;" and Susan "did in fact rely on it and was induced thereby to act to [her] injury or damage." *Masloskie v. Century 21 Am. Real Estate, Inc.*, 818 N.W.2d 798, 803 (S.D. 2012) (citing *North Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 751 N.W.2d 710, 713 (S.D. 2008)). Fraud must be "strictly proven" and to avoid summary judgment, must be "adequately supported by alleged facts." *Aqreva*, 950 N.W.2d at 791.

Johnson did not set forth in his Brief any material facts that meet the elements of common law fraud. Johnson's Brief at 32. There is no evidence in the record to support that Ken misrepresented any fact to Susan, concealed any fact, or had any nefarious intentions. The power of attorney was made when Susan became sick as a way for Ken to be able to care for Susan. The funds were used to pay for the expenses for Susan's medical care and treatment and home health care. Index 123 ¶ 34. All of the funds that were left were transferred to Johnson. *Id.* ¶ 33. And once again, the house was transferred into an ownership interest that was always intended for the couple. Index 130 ¶ 6, 120 ¶ 4, 5.

Summary judgment on the issue of fraud should be affirmed.

5. <u>There is No Evidence of Conversion.</u>

The Circuit Court correctly held that there was "no factual basis which supports [Johnson's] conversion allegation." Index 743. Without evidence of self-serving behavior on the part of Ken, this claim fails as recognized by the Circuit Court. *Id.*

In order to prove conversion, Johnson must show "(1) [he] owned or had a possessory interest in the property; (2) [his] interest in the property was greater than [Ken's]; (3) [Ken] exercised dominion or control over or seriously interfered with [Johnson's] interest in the property; and (4) such conduct deprived [Johnson] of [his]

interest in the property." *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 756 N.W.2d 19, 31 (S.D. 2008). Conversion is the "unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." *Id.* (quoting *Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 766 (S.D. 2002)).

While Johnson claims that the Circuit Court failed to specifically address the wedding ring, household goods and coin collection, he still cannot set forth a material fact that would require that his conversion claim proceed. Johnson's Brief at 32-34. The Court determined that Johnson failed "to provide any genuine dispute in material fact that [Ken] took unauthorized dominion or control over Susan's assets." Index 744. The Court further held that there was "no genuine dispute of any material fact that [Ken] abided by his duties as required under the power of attorney." *Id.*

Concerning the wedding ring, Johnson merely regurgitated language from his Complaint in his Brief, asserting that Ken should not have retained the ring. Johnson's Brief at 32. Perhaps Johnson glazed over the issue of the ring, because his claim to the same is absurd. Ken was following the intentions and directions of Susan. The diamond ring was Susan's wedding ring to which a wedding band that Ken had purchased was welded. Index 121 ¶ 16. In addition, Ken offered to give the wedding ring to Susan's niece, Johnson's daughter, after he had passed, even though he had no obligation to do so. *Id.* ¶ 17. Certainly, Johnson did not and cannot show a material fact that supports Ken had no authority to have a wedding band welded to his wife's ring which Susan wore for over three years.

As for the household goods, Ken provided an inventory of the goods in the house in

Hot Springs to Johnson and turned over the property to the Estate. Index 123 ¶ 30. Further, Eric Hanson, Susan's nephew, retrieved the car devised to him in Susan's will. Index 125 ¶9. Hanson was also asked if he wanted anything else of Susan's property and he declined. *Id.* The remaining property was all then delivered by Ken to Johnson. *Id.* Again, Johnson must admit he has no material fact to support any unauthorized act of Ken, as he fails to set forth such a fact in his brief. Johnson's Brief at 32.

Johnson instead focused on the coin collection. *Id.* at 33-34. The coin collection was addressed by the Circuit Court in reference to Johnson's breach of fiduciary duty claim which notably was not appealed by Johnson. Index 765-66. The Court found that clear evidence supported that the proceeds from the sale of the coins which occurred while Susan was still living were deposited into Ken and Susan's joint Wells Fargo account. Index 742. Again, this account was turned over to Johnson upon Susan's passing. *Id.;* 123 ¶ 31, 32.

Johnson made reference to a check drawn, again while Susan was still living, on July 10, 2014, to Dakota Coin. Johnson's Brief at 33. First, the issue of this check was never brought to the attention by Johnson to the Circuit Court in either brief filed. Index 297, 710. As this Court has repeatedly stated, issues not raised below will not be addressed for the first time on appeal. *Hall v. State,* 712 N.W.2d 22, 26-27 (S.D. 2006).

Nevertheless, Johnson failed to cite any evidence that shows this payment was in any manner unauthorized by Susan. The payment was made two years prior to her death from their joint account. It is no different than the check copied on the same page of the discovery (along with around 130 other checks) to China Buffet. Index 590. Johnson certainly cannot be arguing to this Court that Ken converted Susan's property when the two

of them presumably enjoyed dinner at the China Buffet.

Johnson also argued that there was evidence to support a different value of the coins that Ken sold. Johnson's Brief at 33. The Circuit Court addressed this issue, stating, "There is no basis to support [Johnson's] claim that [Ken] sold Susan's coin collection below market value." Index 765. In support of his argument, Johnson referenced his own affidavit, wherein he stated that the coins consisted of 2,000 quarters. Johnson's Brief at 33. In his affidavit, however, Johnson merely stated, "I believe this property to be a bag of 2,000 silver quarters." Index 284 ¶ 24. He provided no support or evidence for this "belief."

Johnson went on in his Brief to present the value of this alleged bag of 2,000 quarters, applying a website: monex.com. Johnson's Brief at 33. Again, this information was never presented to the Circuit Court and should be rejected. *Hall, supra.* In addition, the prenuptial agreement's attachment merely lists the assets as "Coin Collection" with an estimate of $7,500.00. Index 28. As stated by the Circuit Court, "While it is true that Susan valued her coin collection at $7,500.00 in the parties Agreement, there is nothing in the record which supports that this number is based on the market value of the coins." Index 764. In any event, the proceeds from the sale of the coins, again during Susan's lifetime, were deposited into the joint account that was ultimately turned over to Johnson.

Johnson failed to establish any material fact that disputes the Court's holding that no conversion occurred. Summary judgment should be affirmed.

6. <u>No Implied Trust Was Created</u>

Last, Johnson appeals the Circuit Court's rejection of his argument for constructive or implied trust, but failed to set forth any material fact that supports this claim. Johnson's

Brief at 34-36. The Circuit Court held "[t]hat in order for the Court to create an implied or constructive trust, some sort of wrongdoing must occur thus necessitating the equitable remedy to protect the assets." Index 770. There was, of course no such wrongdoing shown by Johnson on the part of Ken. As provided many times herein, Ken was nothing but a loving, caring husband to Susan.

The law is clear that a Court may impose a constructive trust against one who acquires title to property "by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act." SDCL § 55-1-8. For a Court to impose a constructive trust, the evidence of the wrongful act must be clear and convincing. *Rosebud Sioux Tribe v. Strain,* 432 N.W.2d 259, 264 (S.D. 1988). The evidence must show:

> (1) the constructive trustee gained; (2) that gain was by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act; (3) the constructive trustee had no superior right to the thing gained; and (4) the party seeking the constructive trust would have otherwise had the thing gained.

Matter of Estate of Perkins, 508 N.W.2d 597, 600 (S.D. 1993).

As has been established, Ken received the marital home in Hot Springs through the quitclaim deed Susan signed to them as joint tenants on March 25, 2014. Johnson must show by clear and convincing evidence that Ken received the marital home by fraud, accident, mistake or undue influence or another wrongful act. *Id.* Clear and convincing evidence is not found when the grantor is competent, understands the document signed, and intends it to be her disposition. *See generally Matter of Estate of Perkins,* 508 N.W.2d at 601; *Knock v. Knock,* 120 N.W.2d 572, 576 (S.D. 1963); *Kelly v. Gram,* 38 N.W.2d 460, 463-66 (S.D. 1949); *Jones v. Jones,* 291 N.W. 579, 581-82 (S.D. 1940). The record here clearly demonstrates that while Susan had physical limitations due to having cancer and

undergoing treatments, she was competent and understood what she wanted.

Susan was adamant about her intentions. Independent, unbiased witness Irene Wells was present when Susan discussed with Ken that she wanted Ken to have the house that they had resided in together as husband and wife. Index 130 ¶ 6. Ken knew that Susan was competent, understood the documents signed, and intended it to be her disposition that they were going to have the home together as joint tenants. Index 120 ¶ 5, 6. Susan's medical providers and attorney agreed, as set forth herein.

Of course, per South Dakota law, as a result of the quitclaim deed, Susan's interest in the home was conveyed to Ken when she passed. *See generally* SDCL §§ 43-2-12, 4-2-13, 21-44-27. Susan rightfully conveyed the home when she was competent, according to her husband, lawyer, medical providers, caregivers, and friends. Further, Susan had two years to change her mind and never did so. Johnson, thus, cannot show by clear and convincing evidence that Ken gained the home by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act.

It is further noted that factor four, above, requires that the party seeking the constructive trust to show that he would have otherwise had the thing gained. If Susan had not signed the quitclaim deed on March 25, 2014, the marital home would have gone to the Susan J. Markve Trust, and not to the Estate of Susan Jane Markve to which Johnson was a beneficiary.

Johnson, failing to present any evidence that Ken gained by fraud, accident, mistake undue influence, in violation of a trust or wrongful act, cannot establish constructive trust. *See Matter of Estate of Perkins*, 508 N.W.2d at 601. Summary judgment should be affirmed.

VI. Conclusion

Johnson failed to establish any material, disputed fact that prevents summary judgment being entered in Ken's favor. The evidence is clear that Ken was a devoted, caring husband to Susan. When Susan became ill, she had every right to sign the quitclaim deed to ensure that her husband stayed in their home. Likewise, Susan appointing her husband as her agent for purposes of financial and medical decisions was not only within her right, but fully expected. Having met no elements of any of his claims, Johnson's action fails. Summary judgment should be affirmed.

Dated this 3rd day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2021, a true and correct copy of the foregoing **Appellee's Brief** was served upon the following counsel of record, by placing the same in the service indicated, postage prepaid, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Heather Lammers Bogard certifies that this Brief of Appellee complies with the type volume limitation of SDCL 15-26A-66(b), as it contains no more than 10,000 words. This Brief of the Appellee contains 9,299 words as counted by the word count function of the word processing system used to prepare the brief, exclusive of the Table of Contents, Table of Authorities, Statement of Issues, Addendum Materials, and Certificates of Counsel.

Appendix

APPENDIX

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF FALL RIVER) SEVENTH JUDICIAL CIRCUIT

GUSTAV K. JOHNSON, as Personal Representative of the **ESTATE OF SUSAN JANE MARKVE,**

Plaintiff,

vs.

KENNETH CHARLES MARKVE,

Defendant.

Motions Hearing

23CIV18-51

BEFORE: **THE HONORABLE ROBERT GUSINSKY**
Circuit Court Judge
Hot Springs, South Dakota
May 22, 2020, at 2:30 p.m.

APPEARANCES:

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- and -
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(WHEREUPON, the following proceedings were duly had:)

THE COURT: Appearances, please.

MS. BOGARD: Heather Bogard for the defendant.

MR. BARARI: David Barari and Verne Goodsell for the plaintiff.

THE COURT: Good afternoon everyone. How are you?

MR. BARARI: Doing well, Your Honor. Thank you.

THE COURT: Okay. So we're here on Johnson versus Markve and Ms. Bogard, it's your motion. Go ahead, please.

MS. BOGARD: Thank you, Your Honor. This is Heather Bogard again and I represent Ken Markve, the defendant.

I first thank you for letting us appear by phone. I do appreciate it. I'll try to go slow for the court reporter.

Of course, what we rely primarily upon are our submissions with the Court but just a few general comments.

This is not a case of a caretaker allegedly taking advantage of someone or a niece or nephew or someone in that capacity. These are allegations against a husband allegedly taking some kind of advantage of his wife.

And Ken and Susan Markve knew each other for five years. They were married for three years. As the testimony by affidavit shows, they were your typical elderly loving couple.

And this is also not a case of someone on their death bed signing a last minute will. This is a case where Susan Markve signed the quit claim deed and the power of attorney almost two years before she died. She had been released from the hospital. She was living at home and she had some caretakers, but they were largely for some of her physical disabilities towards the end.

But all of the friends and caretakers, as the Court can see by the affidavits, indicated that they were a loving couple and that she knew what she wanted. She knew what she was doing. She was still able to play a complex game of Bridge with her friends, which was something that she and Ken had done for years and, in fact, that's how they met.

And as the Court also saw, attorney Brian Hagg met with Susan Markve twice before she signed the quit claim deed and the power of attorney that he prepared and as he testified to by affidavit, Susan knew exactly what she wanted to do; that she wanted Ken to be her power of attorney which, of course, makes sense having her husband take that role, and that she wanted her husband to have their house together. I think common sense is getting lost in this case because it simply makes sense for a woman to want her husband to have their house that they lived in together upon her death.

And, Your Honor, when you look at the various counts set forth in the complaint, the six different counts, I won't go through all of those and waste the Court's time, but if I could just point out that all of those counts, they either rely on Susan having some sort of diminished capacity or of Ken committing some wrongdoing.

And as far as Susan is concerned, the undisputed material evidence supports that she did not have diminished capacity when she signed off on those two documents. Again, she met with Mr. Hagg twice. The day before she signed the two documents her medical provider noted that she was alert, oriented, visiting with staff and her husband. The day of signing there was a note that she had improved mental status. And again, she lived nearly two more years and never changed her mind, although she could have.

And again, her caregivers support that Susan wanted Ken to have the home. Irene Wells said she specifically heard Susan say that she wanted her husband to have the home.

And the other affidavits show they were hosting Bridge and that she knew what she was doing; that the other Bridge players said she may have had some physical disabilities but she could play the game and she knew what she wanted and she knew what she was doing. It's simply true that the

plaintiff cannot point to any fact that disputes that that is in any way material. And the same is true as far as Ken is concerned.

But with regard to Susan and her abilities, the only evidence that the plaintiff can come up with are some medical records dating back to her original brain cancer diagnosis through the time that she was in the swing bed. But again, she had two years of recovery after signing these documents.

And the plaintiff himself admits that he did not have substantial communication with Susan after early 2014, and the only other affidavit that the plaintiff could muster was from Susan's sister who admitted she saw her in October of '13 and the end of March. Certainly those two affidavits pale in comparison to the multiple unbiased affidavits that were submitted on behalf of Ken Markve.

So there's no question under any of those six different counts that the undisputed material facts support that Susan knew exactly what she was doing when she was signing those documents making Ken entitled to summary judgment.

But then onto the alleged wrongdoings of Ken. Again, the undisputed material facts show that, first of all, he was her husband. And also it's important to note that they did sign a prenuptial agreement and within that agreement

it set forth that Ken or Susan, they could sell each other's property, transfer property. It specifically says that. It says that they use their own money, respective monies, for medical bills and that they would care for each other when disabled. Those are all things that Ken was doing during Susan's death consistent with the prenuptial agreement.

The evidence shows that Ken accompanied Susan to all of her medical appointments and again, that they had your typical loving marriage according to caregivers and friends and even the medical providers.

Ken also acted as permitted under the power of attorney which was consistent with the prenuptial agreement. The power of attorney allowed him to pay the medical bills with cash or however he decided he wanted to pay those bills and that he could sell property such as the coins that have been referenced.

And as stated in our reply, Your Honor, we provided the entire financial file involving Susan's funds and we provided that in December of 2019. The plaintiff has had ample time to go through all of those documents and they were able to come up with only two so-called questionable transactions that were referenced in their brief. But as the Court could see from our reply, those could be explained as well. The Wells Fargo joint account went to

the estate. The Hennessy funds went back to the original amount of $400.

And, Your Honor, those are the only two points that the plaintiff could make that could even possibly be considered as a dispute of facts. But again, not only did we explain those, in any event, they would be considered immaterial at best.

The plaintiff can't show any evidence that Ken did anything outside of the parameters of the prenuptial agreement and of the power of attorney. And again, since all six counts of the plaintiff's complaint revolve around either Ken's alleged wrongdoing or Susan allegedly being unable to execute the documents, none of them can be proven, and based on what we've submitted and the arguments here today, Ken is entitled to summary judgment in his favor.

Thank you.

THE COURT: All right. Thank you.

Who wants to respond?

MR. BARARI: I will, Your Honor. This is David Barari.

THE COURT: Go ahead, please.

MR. BARARI: Thank you.

First I wanted to point out that as I was reviewing the documents, I noticed that page 28 of our brief somehow didn't get scanned into the PDF that was sent out. I don't

know how we want to address that. There weren't really any citations there other than some discussion about some of the other affidavits. I just wanted to draw that to the Court's attention and I didn't want to clutter up the record by filing it incorrectly.

THE COURT: No. I do see that and when I read it, it seemed odd but I never looked at the page numbers, but now I see that.

MR. BARARI: It was like our document feeder just ate two pages at once when it was scanning and so it just missed that page. I don't know if we want a single PDF of that page, if you want us to resubmit the whole brief.

THE COURT: Have you had a chance to look at page 28, Ms. Bogard?

MS. BOGARD: I have not.

THE COURT: Okay. So you didn't get that either, then, page 28.

MS. BOGARD: Correct.

THE COURT: All right. What I would prefer is that simply the entire brief be refiled. I think that would make a better record.

MR. BARARI: We will do that this afternoon, Your Honor.

The only major points on that page is we switched to the conversion discussion or the guideposts and missing.

Anyway, going back to the issues in front of the

Court.

This is a motion for summary judgment and therefore all the factors construe in the plaintiff's favor and that all reasonable inferences are construed in our favor. Primarily we're relying on our brief and the documents submitted with it that clearly presents significant medical issues regarding Susan's capacity during this period of her life, particularly at the time of the signing of the documents.

There's also significant medical documentation discussing how Mr. Markve was not comprehending the situation, perhaps the significance of his wife's inabilities, her capacities, those sorts of things. You know, I won't belabor the argument here. The Court has all of these documents available to it.

There are multiple issues that support our version of the facts throughout the case, including the affidavit of Mr. Johnson as well as of Nancy. Nancy explains how she called her sister at one point and her sister explained that Ken wasn't there because he was out doing his favorite thing and when asked what that was, Susan said it was killing people, which we all know is absurd.

These sorts of delusions, we'll say, influence how we have to look at what Ken is saying was true, what other people were saying is true, what is the result of undue

influence, what is the result of delusion.

I will note that apparently they've overlooked the references in my exhibit U, my affidavit where there is specific reference to dementia as well as the letter from Mr. Markve in which he explains Susan is having dementia. There are significant factual issues supporting our version of the case.

Moreover, when we're talking about the financial transactions, those sorts of things, as the defendant says on page 3 of his reply brief, they acknowledge that there's approximately $112,000 in cash that was spent. Now, that isn't substantiated by checks. That isn't substantiated by anything else. This is all cash transfers. And so when the defendant prepares a spreadsheet describing what these payments were, that is effectively his own oral extrinsic evidence of this.

The defendants refer to the spreadsheet that was provided with the Basham affidavit, exhibit 8, it's a spreadsheet that says what he's claiming to have paid but there's no documents substantiating that. And that is some of the issues we need to get into because we can't just take him at his word. Some of these things are very confusing how these things are phrased.

Along those lines, they're now back-peddling from the full code discussion that we provided quite a bit of

discussion about in our brief and he understood what full code was. We talked about that in there. But they're explaining now ignorance of that. Well, if he's ignorant of his responsibilities in what he's doing, isn't he also potentially ignorant of what he was doing with these financial transactions? Isn't he making the same -- doing things incorrectly? That is why we need to go in and examine these transactions.

THE COURT: What about Ms. Bogard's argument that you've been provided with all the financial transactions and you've had them for a while?

MR. BARARI: Well, we are trying to work our way through that. We have hired an expert in order to do that but there are several shifts in things that are occurring here. When we look at exhibit G to the Basham affidavit, we have this letter that is written to Ms. Bogard from Ken where he's explaining that he's made capital improvements of $50,000. If you look at the next page, it's saying April of 2016 talking about how he's made these improvements. Apparently he's crediting all of these payments from Susan's death, not recouping. What this is is a wealth transfer.

Now, that led me to question what is going on with these transfers. If Susan has to pay for all these capital improvements to the home that is ultimately going to

Mr. Markve, the house is operating as a wealth transfer because improvements paid for by Susan then upon her death become an asset.

What that caused me to thinking was I had to question, okay, how do we explain these transactions? What I realized was that I misunderstood what was being said to us in exhibit Q of my affidavit and that is Ms. Bogard's letter of March 6, 2019.

She says -- this is in regard to the coin collection -- Attached are records showing that two checks were received for the collection and deposited in Susan's account. We look on the next page. That is the two checks. A $900 check to Ken Markve for merchandise. That merchandise is the coin collection according to the letter that was provided to us as well as the $514 check to Susan.

So essentially two thirds of the value of the coin collection, Susan's private property, separate property, is being drawn to Ken as the seller. What is going on here is these sort of cash transactions, these subtle transactions are very difficult to understand, particularly when you look at defendant's brief where they say that Susan sold the coins. He sold the coins.

Then referencing Mr. Markve's affidavit, paragraph 31, where he doesn't say who sold the coins and until you piece that together and look at those checks, you don't

understand that Ken sold the coins and received $900 on February 8th of 2016 and the check was drawn to Susan on February 10, 2016.

Because all of these transactions are very difficult to understand without Mr. Markve's input as expressed by this letter of the capital improvements and other things, it's very difficult to understand what happened here because we don't have receipts. We don't have checks. We only have his spreadsheet and word and we're trying to get these records.

THE COURT: Excuse me. And maybe -- I hope I'm not confused about this, but did you, in your response, also say that you need further discovery?

MR. BARARI: We did.

THE COURT: Are you moving, then, under rule 56 for more time to respond?

MR. BARARI: We are, Your Honor. We need to be able to get a complete accounting so that we can understand this.

We don't allege that every single transaction was not -- was wrongful. We're trying to understand which ones were, which ones weren't. The estate needs to do that. The estate needs to account to the beneficiaries. The estate needs to be able to do this.

We need essentially an accountant for Mr. Markve that is more than just his word saying, "Oh, I paid this

transient worker" some amount of money. We don't have 1099's for people who were paid in excess of the taxable amount. We need this sort of information so that we can actually put this together and come to some sort of conclusion about what is payable, what is not payable, what is wrong.

THE COURT: Mr. Barari, I'm sorry, I apologize for doing that, but to me, this appears to be two separate issues. Are you seeking a ruling on the -- on the plaintiff's -- on the defendant's motion for summary judgment or are you seeking additional time for discovery so that you can further respond and therefore asking the Court to hold the motion in abeyance?

MR. BARARI: Well, we're -- I suppose we're asking for both because --

THE COURT: I don't think I can give you both, can I? I mean, I either rule on it based on the information that I have or I give you additional time to provide me with everything you wish me to consider before I rule. But I'm not -- maybe I'm wrong, but I'm not sure that I can do both for you.

MR. BARARI: Okay. Right. We would be asking for the time, then, to complete this for a response.

THE COURT: How much time do you think you need to complete your discovery to properly respond then?

MR. BARARI: Let me turn that over to Verne. He's the one who's working with the expert.

THE COURT: Sure.

MR. GOODSELL: Good afternoon, Judge.

THE COURT: Good afternoon, Mr. Goodsell.

MR. GOODSELL: We have -- we have Ketel Thorstenson, they have all the materials that we have gotten through discovery at this point in time and we've asked them to review it for, one, what additional materials do we need in order to make sure we have a full accounting to the estate of the assets of Susan and how they were transferred or not transferred in relationship to discovery, and so we can go ahead and pursue that.

They're going to tell us one of two things, if they've got enough documents so they can identify and show exactly what happened with the funds or they're going to come back to us and say some of these are missing.

And the reason why we haven't moved to compel is that we weren't quite sure what was missing so that's why we have gained the forensic evaluation of this so that we know is there material missing that is needed to account for these funds of Susan to the estate.

Now, as to your question of how long, Judge, is that they have the materials and I can expedite it but with this hearing coming up, we put that on hold until we got

direction.

THE COURT: Ms. Bogard, what's your position regarding the request for additional time to be able to respond to your motion?

MS. BOGARD: Thank you, Judge. Our position is that plaintiff has had the material for five months, which is more than ample time to have an accountant review it. But in any event, as indicated, we provided the entire files. So to the extent that they claim things are missing, you know, nothing's missing because they received everything.

Anything that could be considered missing would be receipts for cash transactions but those don't exist so it's -- in addition to it just being an extraordinarily, I guess, just too long of a time, Judge, for them. They've had it five months. I don't know. I think it would be unfair to my client to permit them to have even more time and delay this case that he's been defending, particularly when there's no basis for the counts in the complaint and I feel like it's a fishing expedition.

And, you know, they can see from the documents provided that my client was doing everything above the line and that was permitted, you know, in the prenuptial agreement and the power of attorney, and so giving them more time to go line by line to find $10 that we can't account for seems like an abuse of the process.

Thank you.

THE COURT: All right. So under Rule 56(f) there needs to be an affidavit seeking additional time. You did state, however, if I recall correctly and that's why I asked the question, in your response, Mr. Barari, that the discovery is still ongoing. Is that correct?

MR. BARARI: That's correct, Your Honor.

THE COURT: All right. Go ahead.

MR. GOODSELL: Well, I hate to respond, Judge, there are two attorneys responding to the Court, but just so the Court knows, there is outstanding discovery that I have that I have not had a formal response on. I've had an informal response.

In reviewing the file, one of the things I'm looking to send to the defendant is I need a formal response to outstanding discovery so that I could then move either to resolve it with counsel or move to compel.

THE COURT: Okay.

MR. BARARI: Your Honor, if I might add.

THE COURT: Go ahead.

MR. BARARI: Defense counsel just acknowledged that there are no receipts for the cash transactions. It's over a hundred thousand dollars worth of transactions and without those receipts in a situation where someone's operating as a power of attorney, that is simply his oral

representation. The presumption is against him for that.

In addition, we know that there is at least some question about the validity of the deed and the deed is a, it's real estate, so a valuable property where assets are being used and that's where I was talking earlier about this $50,000 worth of capital improvements that are coming from what appears to be Susan's separate assets that are sold and then reinvested into the house which then passes on her death or sale. Because he has sold that.

And that's how this scheme apparently works. He used her separate assets to improve the value of the capital assets which he then received upon her death. Now it's sold and he wants to keep the entire value of the improvement.

We have presented sufficient evidence to show that there are significant dollar amounts out there that are not entitled to summary judgment. We cannot give you a complete dollar by dollar line by line transaction by transaction accounting due in large part to the defendant's failure to fulfill his duty as the power of attorney to account for these things and that is slowing down the process.

THE COURT: All right. Well, I'm still trying to make sure I understand exactly before I give you my ruling. Are you seeking a ruling on the summary judgment as it is briefed

in front of the Court right now or do you still need additional time to be able to respond as you just indicated, Mr. Barari?

MR. BARARI: We would prefer and request the additional time to complete the accounting, complete discovery, and be able to complete some of these questions that are lingering.

THE COURT: All right. I just want to make sure that I understand where you're coming from and I heard -- I heard the defendant's opposition to that.

So there's no affidavit pursuant to Rule 56(f) seeking it but the explanation provided by the plaintiff as to why he needs additional time to properly respond to the summary judgment leads the Court to believe that that additional discovery is essential in being able to respond properly to the defendant's motion for summary judgment.

So what I'll tell you, and it's a little bit unusual, but if you file your Rule 56(f) motion, certainly I would allow the defense to respond to it, but based on what I heard, unless anything changes, I would grant that. And if I grant it -- but I do reserve the right to review the defendant's formal opposition to that as well.

But if I grant it, my intent would be to give you four weeks to inform the Court and opposing counsel how much time you specifically need to respond to the motion for

summary judgment.

Would it be, then, your intention to file a Rule 56(f) affidavit?

MR. BARARI: Yes, that would be our intention.

THE COURT: Okay. And let's see here. One second. Ms. Bogard, I would give you -- if I give you ten days to respond to the affidavit, is that sufficient time?

MS. BOGARD: Oh, sure. Thank you.

THE COURT: All right. And I don't want to -- I mean, I truly mean it. I'm not prejudging this matter, but I'm just telling you based on what I hear from the plaintiff and the defendant that Rule 56(f) affidavit would be granted unless something in the response is novel to me and leads me to believe otherwise.

So when I have that -- there's no need to set a hearing. Just provide me with a courtesy copy of the affidavit as well as the response and I'll give you my ruling fairly quickly.

MR. BARARI: Do you want that accompanied by a motion as well, Your Honor, or simply the affidavit?

THE COURT: My understanding from reading the rule is that it just requires an affidavit.

MR. BARARI: All right.

MS. BOGARD: Your Honor, may I clarify just a couple of things on the record?

THE COURT: Certainly.

MS. BOGARD: Thank you.

Counsel mentioned that discovery is pending and they have not received formal responses and I'm assuming they're talking about the second set of discovery requests. We did provide formal responses. They were signed by Mr. Markve March 11th of 2020 and served on March 12th. Now, they may not be the answers that counsel wants, but I just wanted the Court to be aware that we have responded formally.

And with regard to plaintiff making argument about what Mr. Markve understood or didn't understand about full code or those type of matters, it's immaterial. We're not talking about Ken's capacity. We're talking about Susan's capacity when she signed those documents.

Also, the reference to dementia. Dr. Robbins was clear in his deposition that Susan was never diagnosed with dementia and Dr. Robbins was her primary care provider.

And last, Judge, I just want to point out that Mr. Markve, Ken did account for the cash payments and they were paid to the caregivers and he had a spreadsheet on that. So there may not be receipts but there's a spreadsheet and he kept very close track of how the cash was spent so there just simply wasn't any wrongdoing on his part.

But that's all I wanted to clarify. Thank you.

THE COURT: All right. I appreciate it. Thank you.

Anything else from anyone?

MR. BARARI: No, Your Honor.

MS. BOGARD: No, thank you.

THE COURT: Okay. So I'll hold the motion in abeyance for now.

MR. BARARI: Thank you.

MS. BOGARD: Okay. Thank you, Judge.

THE COURT: Have a nice weekend everybody.

MS. BOGARD: You too.

MR. BARARI: You too.

THE COURT: Thank you.

(Proceedings concluded at 3:06 p.m.)

* * * * * * * * * * *

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, Cynthia M. Weichmann, Registered Professional Reporter and Notary Public, State of South Dakota, do hereby certify that I reported in stenotype the proceedings of the above-entitled action; that I thereafter transcribed said stenotype notes into typewriting; and that the foregoing pages 1 - 23, inclusive, are a true, full and correct transcript of my stenotype notes.

IN TESTIMONY WHEREOF, I hereto set my hand and official seal this 1st day of February, 2021.

/s/ Cynthia M. Weichmann

_____
Cynthia M. Weichmann, RPR
Registered Professional Reporter
Notary Public
My Commission Expires: 11-10-21

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
)		
COUNTY OF FALL RIVER)		SEVENTH JUDICIAL CIRCUIT
_____	)	
GUSTAV K. JOHNSON, as Personal Representative of the **ESTATE OF SUSAN JANE MARKVE,**	)	
Plaintiff,	)	Status Hearing
vs.	)	23CIV18-51
KENNETH CHARLES MARKVE,	)	
Defendant.	)	
_____	)	

BEFORE: **THE HONORABLE ROBERT GUSINSKY**
Circuit Court Judge
Rapid City, South Dakota
October 6, 2020, at 3:00 p.m.

APPEARANCES:

For the Plaintiff: **MR. GEORGE NELSON**
Law Office of George Nelson
2640 Jackson Boulevard, #1
Rapid City, SD 57702

For the Defendant: **MS. HEATHER LAMMERS BOGARD**
Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter
704 St. Joseph Street
Rapid City, SD 57701

Also Present: **MR. KENNETH CHARLES MARKVE**

(WHEREUPON, the following proceedings were duly had:)

THE COURT: Okay. Johnson versus Markve. I think it's just a status hearing at this point.

MR. NELSON: Yes, Your Honor. I had set this for a motions hearing on a motion to compel and was not timely with producing for Ms. Bogard my pleadings and so we stipulated to having this as -- just as a status hearing and then we've got this matter scheduled for the 27th on your calendar as well.

THE COURT: So what do you want to do?

MS. BOGARD: I was hoping, Your Honor, if we could, I just thought I'd save this, since we had it on your calendar, if we could get some deadlines. My client is, you know, obviously very concerned about the case and he's, you know, to be frank, he's not getting any younger, so we'd like to push it along if we could.

And I know that you never want to ask a judge for an answer unless you know or hope what that answer might be but I was going to ask the Judge or ask you, Your Honor, if you wouldn't mind reviewing the motion for summary judgment.

If you'll recall, we filed a motion for summary judgment and at the hearing, that's when Mr. Goodsell was counsel and he wanted to provide more information. So they

filed the affidavit on May 27th asking for time for their accountant to look at the financials. We filed an objection and they replied to that with an affidavit of Nina Braun saying that she would have her accounting completed by July 17th. And we have never received anything, Your Honor.

So as far as we see it, the motion is still sitting there and if they aren't going to provide any more information, then it's ripe for decision.

THE COURT: What's your position, Mr. Nelson?

MR. NELSON: Your Honor, I think the motion to compel is the basis for my argument against that. Discovery was not completed.

THE COURT: Well, the only way you can get more time on a motion for summary judgment is if you filed an affidavit pursuant to Rule 56(f) stating why you need more time. Isn't that correct?

MS. BOGARD: Yes, Your Honor.

THE COURT: Was that done?

MR. NELSON: I think Mr. Goodsell had done so.

THE COURT: Well, I thought, just like you just said, he was going to provide more information but then didn't.

MS. BOGARD: Correct. And the information they provided said it would be July 17th and we haven't received anything.

MR. NELSON: I do have that report, Your Honor, from Nina Braun so I will file that.

But again, I'm asking -- well, I could file the motion for -- my own affidavit for additional time based upon my motion to compel on discovery in that my review of the case and what was produced was inadequate for a response to the motion for summary judgment.

THE COURT: I wasn't exactly sure what we were going to do here today so I didn't prepare by reading the summary judgment, but if my recollection serves me correctly, the only reason I denied it or held it in abeyance was because of the extension request. Correct?

MS. BOGARD: That was my understanding, yes.

THE COURT: And so -- I know you are coming in kind of late into this dance, Mr. Nelson, but the only way that I know of that you can hold off or hold up the motion for summary judgment is with an affidavit under Rule 56(f). When can you have that done?

MR. NELSON: I could have it filed tomorrow.

THE COURT: What do you think is missing and why do you think you need more time?

MR. NELSON: Well, Mr. Markve hasn't been deposed yet. He hasn't been deposed because the responses to the discovery requests are completely inadequate and the production of documents that were related to his interrogatories would

obviously help us in deposing Mr. Markve. He's a party and he should be deposed. He wasn't deposed before I came on board. That would be one of the first things to do in proceeding.

THE COURT: It seems to me that in your affidavit you must state exactly what it is that you need from the deposition of Mr. Markve that prevents you from fully responding to the motion for summary judgment. When you get it, then if you're dissatisfied, then I suggest, Ms. Bogard, that you set it on for a hearing again stating that it's insufficient to hold this up and I'll make a decision.

MS. BOGARD: Okay. Thank you.

In the meantime would it be possible to get some deadlines?

THE COURT: Like what kind of deadlines?

MS. BOGARD: I was hoping for expert deadlines and discovery.

THE COURT: I prefer that you guys discuss those amongst yourselves and see if you can reach an agreement. If you can't, just e-mail me what you think you need and what the other side thinks they need and I'll make a ruling via e-mail. There's no reason to have a hearing on that. I just think it's better if you guys can sit down and do this on your own.

MS. BOGARD: Sure.

THE COURT: Again, if you can't reach an agreement, let me know.

MS. BOGARD: Will do.

THE COURT: Anything else?

MR. NELSON: Just to make sure I understand what the Court's procedure here is, I file an affidavit to extend the summary judgment motion deadline. We have the matter set for hearing on the 27th of October which was noticed for my motion to compel or was stipulated to as being the date for my motion to compel.

The affidavit that I file to extend the deadline for the motion for summary judgment, is that going to be heard or is there going to be a hearing in regards to that or is that going to be addressed on the 27th of October?

THE COURT: Well, there's been an affidavit filed by Mr. Goodsell's firm on May 27th. As I read it, the affidavit says it's unknown when the expert would complete their work. Where did you get the July date from?

MS. BOGARD: There should be filed, Your Honor, an affidavit of Nina Braun and in her affidavit she said she'd have it completed by July 17th.

THE COURT: There's an affidavit from Kristen Basham, a lengthy one. I don't see it but, you know, to be perfectly candid, based on the fact that you just wanted a status, I didn't go back and go through the file.

MS. BOGARD: Right.
THE COURT: So, you know, at some point I need to rule on that motion for summary judgment and you need to let us know what additional information you need in an affidavit to respond, Mr. Nelson.
MR. NELSON: Yes, Your Honor.
THE COURT: So we have a hearing set for October 27th. What do you expect that hearing to be?
MS. BOGARD: I anticipated that being on the motion to compel.
THE COURT: Okay.
MS. BOGARD: But just so the Court is aware, we've provided literally every document that Mr. Markve has. The information that they desire pertains to Mr. Markve's personal farm and so that hasn't been provided and I suspect that's what the Court will be addressing.

But if possible, of course, we'd love our motion for summary judgment to be heard on the 27th.

THE COURT: Well, I'm going to see what the affidavit says and if you want to respond to the affidavit and provide me with a courtesy copy as to your position, then we'll go from there.
MS. BOGARD: Sounds good.
MR. NELSON: I hope to get that filed tomorrow.
THE COURT: Okay. Well, make sure it's detailed enough,

not just a summary.

MR. NELSON: This week, to be fair to myself, I'll get it filed this week.

THE COURT: All right, Mr. Nelson.

Anything else?

MS. BOGARD: No. Thank you, Your Honor.

THE COURT: Thank you.

MR. NELSON: Thank you.

(Proceedings concluded at 3:10 p.m.)

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STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, Cynthia M. Weichmann, Registered Professional Reporter and Notary Public, State of South Dakota, do hereby certify that I reported in stenotype the proceedings of the above-entitled action; that I thereafter transcribed said stenotype notes into typewriting; and that the foregoing pages 1 - 9, inclusive, are a true, full and correct transcript of my stenotype notes.

IN TESTIMONY WHEREOF, I hereto set my hand and official seal this 1st day of February, 2021.

/s/ Cynthia M. Weichmann

_____
Cynthia M. Weichmann, RPR
Registered Professional Reporter
Notary Public
My Commission Expires: 11-10-21

IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29511

GUSTAV K. JOHNSON, as Personal Representative of the ESTATE OF SUSAN JANE MARKVE,

Plaintiff/Appellant,

vs.

KENNETH CHARLES MARKVE,

Defendant/ Appellee,

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT GUSINSKY

APPELLANT'S REPLY BRIEF

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COMES NOW the Appellant, and, for his Reply Brief pursuant S.D.C.L. § 15-26A-62 and § 15-26A-66(b), states the following:

SUMMARY OF ARGUMENT

This case involves the actions of a fiduciary,[1] subject to a preexisting prenuptial agreement barring access, control or authority of premarital property owned exclusively by the decedent, who subsequently obtained his authority over the decedent's premarital property through a power of attorney executed while the principal was hospitalized with an inoperable brain tumor, under medication and suffering seriously degraded mental capacity, as acknowledged by her attending physician, an attending nurse practitioner, hospital staff and potentially other private caregivers.

The trial court acknowledged that, "there is a question regarding the validity of Kenneth's (fiduciary and consensual party to the preexisting prenuptial agreement) appointment as power of attorney." (Trial court's December 9, 2020 Opinion and Order, pp. 17-18 of 21; 728, 745-46).[2] The trial court committed clear, reversible error by failing to analyze whether the Appellee Kenneth obtained *any* valid, contractual power under the circumstances allowing him to take *any* actions in the first place. *See SDCL § 20-11A-1*. For if Kenneth improperly exercised power given him under improper circumstances and a void power of attorney, *all* of the actions were ultra vires and otherwise wrongful. His conduct after appointment through an arguably void or voidable power of attorney ignores the material fact that even the trial court acknowledged the initial analysis must address the "validity of Kenneth's appointment." However, this critical analysis was not completed or sufficiently addressed by the trial court; constituting plain,

[1] The Opinion and Order states that Appellee admitted "[Kenneth] owed Susan a fiduciary duty," and the court found Kenneth created an "implied fiduciary duty to protect Susan's assets." (Op. at 13 of 21; CI 741).

[2] *See also* previous trial court opinions which erroneously attempts to issue its findings by prefacing rulings by distinguishing them favoring summary judgment from the "dispute on Susan's (decedent) capacity" (Op., p. 11 of 21; CI 739) and "[r]egardless of the validity of Susan's appointment as Kenneth as her power of attorney." (Op., p. 17; CI 745).

reversible error.

However, the trial court compounded its material errors by issuing its opinion and order by prematurely doing so when discovery was pending and otherwise incomplete. Kenneth's deposition was never taken by Appellant, as written discovery was still outstanding, the answers to which Appellant would utilize to question him in such a deposition. This error goes to the fundamental fairness and due process afforded Appellant by failure to permit complete pending discovery and allow the deposing of the Defendant before issuing summary judgment, and then commenting almost 20 times in the opinion to "no factual basis," "no evidence," "nothing in the record," and other similar language.[3] Viewing that the trial court condoned the erroneously truncated discovery, but nevertheless issued an opinion stating Plaintiff possessed no evidence or factual basis on any of the six counts, it was, in effect, a self-fulfilling prophecy subsumed in the opinion and order.

As a direct consequence of these two discrete categories of material, reversible error, the entire opinion and order was tainted across all six counts the Court overruled. This appeal further requests this Court reverse and remand its opinion to allow completion of discovery and complete judicial review sufficient to answer the trial court's observation that there was a "question regarding the validity of Kenneth's appointment as power of attorney."

ARGUMENT

1. The trial court committed reversible error as both genuine issues of fact exist and the

[3] *See* trial court's December 20, 2020 Opinion and Order (hereinafter "Opinion" or "Op.") CI 728-748; "[N]o factual basis," (Op. 8 of 21); "no dispute of material act," (Op. 9 of 21); "no basis," (Op. 9 of 21); "no basis," (Op. 10 of 21); "fails to provide evidence," (Op. 11 of 21); "does not provide any basis," (Op. 11 of 21); "no dispute of material fact," (Op. 11 of 21); "no evidence," (Op. 11 of 21); "no basis," (Op. 11 of 21); "nothing in the record," (Op. 14 of 21 [twice stated]); "no basis," (Op. 15 of 21); "nothing in the record," (Op. 15 of 21); "nothing in the record," (Op. 16 of 21); "no factual basis," (Op. 16 of 21); "no basis," (Op.16 of 21); ("no basis," (Op. 17 of 21); "no evidence," (Op. 18 of 21); "Plaintiff does not provide any evidence," (Op. 19 of 21); "no facts," (Op. 19 of 21); "no basis," (Op. 20 of 21).

court failed to correctly apply the law in its December 9, 2020, Opinion and Order

This Court's "well settled" judicial role in this appeal is to "determine only whether a genuine issue of material fact exists and whether the law was correctly applied." *Brandt v. Pennington Cnty*., 2013 S.D. 22, ¶ 7, 827 N.W.2d 871, 874. In essence, however, there are two, discrete tasks required of this Court: determining whether, in this appeal, a genuine issue of material fact exists and a separate analysis whether the trial court correctly applied the law. *Id*. The Plaintiff's facts are "viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." *De Smet Farm Mut. Ins. Co. of S.D. v. Busskohl*, 2013 S.D. 52, ¶ 11, 834 N.W.2d 826, 831. The Plaintiff respectfully submits that the facts and evidence presented in the record, particularly as set forth in Appellant's opening brief, meet the genuine issue of material fact standard of review.

However, the Defendant Appellee's brief erroneously ignores the latter issues of law which will primarily determine this appeal. The issues of fact give way to the issues of law, which this Court must resolve for the facts to have any significance. As will be discussed in this reply brief, two particular legal issues were erroneously determined by the Court; resulting in material, prejudicial error, which compels reversal of the December 9, 2020 Opinion and remand of the case back to the trial court in the first instance. These two legal errors render the factual issues largely irrelevant for this appeal, as they each significantly transcend this appeal. These legal issues are reviewed by this Court utilizing a "de novo" standard of review concerning the circuit court's conclusions of law. *Peterson v. Issenhuth*, 2014 S.D. 1, ¶ 15, 842 N.W.2d 351, 355. The Appellee's brief relies primarily on the issues of fact, while it only superficially deals with, or ignores, the prerequisite legal issues.

(a) The Trial Court Improperly Weighed the Facts In Reaching Its Opinion

As a preliminary matter concerning the presence of a genuine issue of fact, the Appellant/Plaintiff notes that South Dakota cases from this Court prohibit the trial court from weighing the evidence in deciding a motion for summary judgment. "The judge's function at the summary judgment stage, however, is not to weigh the evidence and determine the matters' truth." *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 42, 855 N.W.2d 855, 868 (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). This Court has held that "parties opposing summary judgment need only 'substantiate [their] allegations with sufficient probative evidence that would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.' " *Powers v. Turner Co. Bd. of Adjustment*, 2020 S.D. 60, ¶ 22, 951 N.W.2d 284, 293-94.

Yet, the record reflects the trial court weighed the evidence in its Opinion. The trial court noted "conflicting accounts of Susan's competency on March 25, 2014," (Op. at 10; CI 738), but ultimately relied upon a compensated attorney's opinion from when he was present to have her sign the POA and a deed to the fiduciary *while she was in the hospital*, rather than the "conflicting" accounts of attending medical personnel providing Susan's daily medical care. The court likewise concluded that the attorney's observations "strongly supports" that the bedridden decedent "was not susceptible to undue influence." (Op. at 10-11;CI 738-39). The court admitted that "there are disputes on Susan's capacity throughout March 25, 2014;" but concluded "no dispute of material fact" about what Susan understood that same day. (Op. at 11; CI 729). There are other examples of the court's impermissibly weighing the evidence in order to grant the summary judgment for the Defendant fiduciary, but space limitations prohibit further enlargement. Appellant submits that he substantiated his allegations with sufficient probative evidence that would permit a finding in his favor on the merits, but for the trial court's improper weighing of the

evidence. However, the two looming legal issues moot the Court's erroneous weighing of the facts to come to its Opinion.

(b) The Trial Court Failed to Correctly Apply the Law Applicable to the "Question Regarding the Validity of Kenneth's Appointment as Power of Attorney"

The trial court was understandably moved in its opinion to note several times that "there is a question regarding the validity of Kenneth's appointment as power of attorney." (Op. at 17;CI 745). Even if the court were correct in finding the "question is not material to the Plaintiff's statutory fraud claim," which issue is taken, the Appellant submits that the legal question of the validity of Kenneth's appointment as power of attorney could reasonably taint and otherwise detrimentally affect the entirety of the case. *Id*. (Op. at 17-18;CI 745-746).

The Appellant agrees with the trial court's observation that the circumstances surrounding execution of the prenuptial agreement are undisputed. The agreement, executed before the cloud of uncertainty surrounding the hurried execution of the power of attorney and deed transfer to fiduciary Kenneth while the decedent was in the hospital, stands in stark contrast to the thoughtfully and consciously drafted prenuptial agreement by Susan to protect assets collected over a lifetime. The decedent used an internet form, which reflected her deepest personal wishes, and those wishes were reduced to a quasi-contractual agreement executed by the parties long before her terminal illness was discovered. (See Ex.# B Complaint; CI 18). Its importance cannot be overstated in this appeal, as it provided that "[n]either party shall...acquire for himself...any interest in the separate property of the other party." (*Id*.). Against this backdrop, this appeal should properly focus upon subsequent circumstances and events that rendered the prenuptial agreement a de facto nullity, and gave the Appellee rights and powers expressly forbidden by the preexisting contract.

The trial court was correct that the legal validity of Kenneth's appointment was questionable.

Unfortunately, it was never adequately resolved. As described below, the Court's failure to adequately resolve the legal question was plain error. For if the power of attorney and deed were legally insufficient, regardless of the reason, the power of attorney and deed were at least void or voidable, as a matter of law. *Wambole v. Foote*, 2 Dakota 1, 2 N.W. 239, 240 (1879); *Hauck v. Crawford*, (S.D.1953) 62 N.W.2d 92.

(c) The Trial Court Abused Its Discretion In Granting Summary Judgment Before the Close of A Discovery Order and Otherwise When Discovery Was Pending as a Matter of Law

It is undisputed that the trial court entertained Appellee's summary judgment motion while discovery was still ongoing. Furthermore, it is undisputed that the court's Opinion was issued while a discovery-related order compelling discovery was still in effect, but not complied with by Appellee. The Appellee's brief spends considerable effort in unsuccessfully attempting to explain away this significant intrusion upon the Appellant's legal rights. The trial court erroneously failed to deal with the legal issue, and to the extent it did affirmatively act, the court abused its discretion in ignoring its own discovery order and improperly truncated Appellant's case to issue a summary judgment.

The consequences of these judicial actions to deny the Plaintiff court-ordered discovery were material, and provided the court with an erroneous Opinion narrative that there was no basis or evidence for a prima facie case on the six counts pled in the complaint. The Appellant details below the significant legal impact of the trial court's prematurely issuing a summary judgment, and the prejudicial legal errors in South Dakota law resulting from the actions.

2. The Trial Court did not apply any law to resolving the "question regarding the validity of Kenneth's appointment as power of attorney," and committed reversible error in improperly assuming the power of attorney and deed executed in the hospital by decedent was valid.

As stated, this Court's standard of review for "entry of summary judgment [is] under the de

novo standard of review." *Estate of Stoebner v. Huether*, 2019 S.D. 58, ¶ 16, 935 N.W.2d 262, 266. Under such review standard, this Court "give[s] no deference to the circuit court's decision[.]" *Id.*, citing *Oxton v. Rudland*, 2017 S.D. 35, ¶ 12, 897 N.W.2d 356, 360.

Perhaps in a stroke of irony, the Appellant seeks this Court's non-deferential review of the trial court's failure to directly and clearly address the legal "question" of the validity of Kenneth's power of attorney appointment, in the face of at least 20 or more trial court references in the Opinion to the Plaintiff's evidence as lacking support in the record.[4] Yet, the circuit court improperly and prematurely granted summary judgment when the record was still being developed and material discovery was pending, including the deposition of the Defendant, as discussed below. Review of the court's Opinion evidences that the trial court failed to address, much less resolve, the legal "question regarding the validity of Kenneth's appointment as power of attorney." In other words, the circuit court failed to articulate a legal basis to support its decision on the validity of the fiduciary's appointment under the power of attorney. *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174. (This Court "will affirm a circuit court's decision so long as there is a legal basis to support its decision."). However, it is equally clear that, even though it committed reversible error in failing to do so, as the issue permeates the entirety of the circuit court's December 9, 2020, Opinion, the court nonetheless issued a summary judgment order which at the very least implies resolution of the "question" favoring the judgment at issue.

This implied resolution favoring the judgment is not a just and equitable resolution at all, and results in material prejudice to the Appellant from the trial court's failure to specifically and clearly resolve a critical legal question that arguably touches and substantially concerns the entirety of the court's Opinion at issue. For, if the appointment under the circumstances either creates a question of material fact and/or an improper application of prevailing law, the Appellant

[4] See Footnote 3.

suggests that, at a constitutionally adequate due process minimum, this appeal must be reversed and remanded, if not resulting in a finding requiring denial of summary judgment on the issue as a matter of South Dakota law, with attendant collateral estoppel and law of the case implications for the Appellee.

It is undisputed that a properly executed and otherwise valid power of attorney, under South Dakota law, creates a fiduciary relationship and concurrent fiduciary duties per se. *Estate of Stoebner, Id.*, 935 N.W.2d at 267 (quoting *Hein v. Zoss*, 2016 S.D. 73, ¶ 8, 887 N.W.2d 62, 65). "The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Wyman v. Bruckner, Id., 9*08 N.W.2d at 178, ¶ 26. The trial court rejected out of hand the Appellant's causes of action in the Opinion principally due to alleged absence of evidence. But, a non-deferential review by this Court, which finds a question of material fact and/or an erroneous application of the law as urged by Appellant, casts a review of the "question" in a different context than addressed by the circuit court. In that event, if the question deserves further development than contemplated by the trial court; resulting in a future resolution by this Court, the question will undoubtedly arise: what is the ramification of the invalidity of Kenneth's appointment upon the actions he took as putative power of attorney? The Appellee understandably fails to examine the potential impact of such a ruling. Appellant suggests that this appeal is based upon both unresolved questions of material fact and the trial court's errors in applying the law, including, the failure to articulate a reasoned application of South Dakota law to the "question."

3. The South Dakota Rules Regarding Plaintiff's Proper Opposition to the Defendant's Summary Judgment Motion Did Not Apply As Adequate Time For Discovery Was Improperly and Prejudicially Disallowed

The trial court abused its discretion and committed reversible error by disregarding two Rule 56(f) (SDCL § 15-6-56(f)) affidavits and granting Defendant summary judgment while discovery matters, including a discovery order against the Defendant, were outstanding. 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." *Thurman v. CUNA Mut. Ins. Soc'y,* 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616.

This Court has often utilized federal authorities interpreting South Dakota's similar summary judgment procedural rules. In *Costello, Porter, Hill, Heisterkamp & Bushnell v. Providers Fidelity Life Ins. Co*., 958 F.2d. 836 (8th Cir.), the 8th Circuit stated, "[t]he Supreme Court has been careful to state that the rules regarding the proper opposition to a summary judgment motion apply only after adequate time for discovery has been allowed. *Id*., 958 F.2d at 839 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)). "The rule is clearly set forth in *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986): "[T]he [non-movant] must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the [movant] as long as the [non-movant] has had a full opportunity to conduct discovery." *Costello, Id.*, (citing *Anderson*, 477 U.S. at 257, 106 S.Ct. at 2514. Appellant's argument that the summary judgment was premature is further supported by secondary authority. In Wright and Miller's *Federal Practice and Procedure*, the stated objective of the summary judgment rules is to provide "a reasonable opportunity to prepare the case." 10B Fed. Prac. & Proc. Civ. § 2741 (4th ed.). This "philosophy" has resulted in finding material error in granting summary judgment "when discovery is not yet completed," (citing cases at n. 3) and a dispositive motion denied "as premature when the trial court determines that discovery is not yet finished." (citing cases at n. 4). *Id*. In both instances, the record reflects that the circuit court recognized that discovery was not yet completed and was likewise premature because the court had issued discovery orders for which the production deadline had not yet come.

Based upon these rules and standards, the circuit court acted unreasonably and arbitrarily in

granting summary judgment to Defendant, and therefore abused its discretion as a matter of law. *Thurman, Id.*

CONCLUSION

The trial court should not have granted summary judgment where the pleadings, and all supporting documents, demonstrate that there is a genuine issue of material fact and movant is not entitled to judgment as a matter of law. *Aetna Life Insurance Co. v. McElvain*, 363 N.W.2d 186 (S.D.1985). *See also SDCL § 15-6-56(c).*

In this appeal, the Appellant has met his burden to establish that the circuit court committed prejudicial error; compelling reversal of the court's summary judgment and remand of this matter back to the trial court. First, the court materially erred in failing to find any genuine issue of material fact. Further, the trial court misapplied, or did not apply, South Dakota law to significant legal issues. *Brandt, Id.* Finally, the court's Opinion contained rulings of plain error.

The Appellant respectfully requests reversal of the circuit court's December 9, 2020 summary judgment opinion and order for the reasons set forth herein and for such other and further reasons as this Court deems just, equitable and proper.

Dated this 7th day of July, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of July, 2021, I caused to be served via U.S. mail, postage prepaid, two true and correct copies of *Appellant's Reply Brief* to:

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/s/ George J. Nelson
George Nelson

CERTIFICATE OF COMPLIANCE

George J. Nelson certifies that this Brief of Appellant complies with the type volume limitation of SDCL 15-26A-66(b), as it contains no more than 10,000 words. This Brief of the Appellants contains 3319 words as counted by the word count function of the word processing system used to prepare the brief, exclusive of the Table of Contents, Table of Authorities, Statement of Issues, Addendum Materials, and Certificates of Counsel.

Dated this 7th day of June, 2021.

/s/ George J. Nelson
George J. Nelson