

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 27530

**REBECCA HEIN; GOLDIE N. BURNHAM, individually, and
GOLDIE N. BURNHAM, as Personal Representative of the
ESTATE OF MARGARET L. ZOSS, Deceased,**

Plaintiffs and Appellees,

vs.

FRED M. ZOSS,

Defendant and Appellant,

**APPEAL FROM THE THIRD JUDICIAL CIRCUIT
SANBORN COUNTY, SOUTH DAKOTA**

THE HONORABLE JON R. ERICKSON, CIRCUIT JUDGE

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the pages of the settled record as reflected in the clerk's index are designated as "R." References to the appendix to this brief are designated as "App." There are two volumes of transcripts from the two-day jury trial held on May 20-21, 2015. References to the transcript from day one are designated as "T1" while references to the transcript from day two are designated as "T2." References to the trial exhibits are designated as "Ex."

There are five additional transcripts contained in the record. References to the transcript of the September 2, 2014 hearing on the plaintiffs' motion for partial summary judgment are designated as "SJ." There are no references to the transcript of the January 6, 2015 scheduling hearing. References to the transcript of the March 17, 2015 pretrial conference are designated as "PT." References to the transcript of the May 12, 2015 hearing on the plaintiffs' first motion in limine are designated as "MH." References to the transcript of the July 21, 2015 hearing on the defendant's motion for new trial are designated as "NT."

STATEMENT OF JURISDICTION

Fred Zoss respectfully appeals from two judgments entered against him: one in favor of his sisters, Goldie Burnham and Rebecca Hein, and the other in favor of the estate of his mother, Margaret Zoss. Fred also appeals from underlying rulings by the circuit court and the order denying his motion for a new trial. Notice of entry of judgment was served on June 15, 2015. (R. 1513). On June 29, 2015, Fred timely filed a motion for a new trial, terminating the appeal deadline. (R. 1521).

The circuit court filed an order extending the time for hearing pursuant to SDCL 15-6-59(b) and 15-6-62(b). (R. 1622). Following a hearing, the circuit court filed its order denying Fred's motion for new trial on July 24, 2015. (R. 1834; App. 1). Notice of entry of the order was served on August 14, 2015, thereby commencing the running of a thirty-day appeal deadline pursuant to SDCL 15-26A-6. (R. 1835).

Fred filed his notice of appeal on that same day. (R. 1838). Three days later, on August 17, 2015, he filed an amended notice of appeal. (R. 1868). This Court has appellate jurisdiction pursuant to SDCL 15-26A-3(1) & (2) and SDCL 15-26A-10.

REQUEST FOR ORAL ARGUMENT

Fred Zoss respectfully requests the privilege of appearing before this Court for oral argument.

STATEMENT OF THE ISSUE

I. Did the circuit court commit legal error in its interpretation or application of *Bienash v. Moller* or otherwise abuse its discretion in its exclusion of highly relevant and admissible evidence?

The circuit court granted the plaintiffs' motion in limine to prohibit the introduction of *any* extrinsic evidence of Margaret Zoss's intent and decades-long practice that her children could farm the family land without paying rent and excluded additional relevant and admissible evidence concerning her intent and practice that her son, Fred Zoss, was authorized to pay her expenses and their shared expenses out of their joint account.

The circuit court also denied Fred's motion for a new trial based upon those asserted errors of law related to the exclusion of relevant and admissible evidence.

- *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431
- *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874 (Wis. 2007)
- *Studt v. Black Hills Federal Credit Union*, 2015 S.D. 33, 864 N.W.2d 513
- SDCL 15-6-59(a)(7)

STATEMENT OF THE CASE

This appeal involves claims for monetary compensation brought by two sisters, Plaintiffs Goldie N. Burnham (“Goldie”) and Rebecca J. Hein (“Rebecca”), against their brother, Defendant Fred M. Zoss (“Fred”). Goldie and Rebecca contend that Fred breached his fiduciary duties to their mother, Margaret L. Zoss (“Margaret”), as Fred cared for her during the final two decades of her centenarian life. They have also brought an individual breach of contract claim for one year of rent they contend Fred owes to them for the use of farmland they inherited when Margaret passed away on January 5, 2013, at the age of one hundred and two years.

Breach of fiduciary duty and contract claims

On January 22, 2014, Goldie and Rebecca, individually, and Goldie as Personal Representative of the Estate of Margaret L. Zoss, filed their complaint against Fred in Sanborn County Circuit Court of the Third Judicial Circuit. (R. 2). Five days later, they filed an amended complaint. (R. 30). Goldie and Rebecca alleged that: (1) Fred owed them one year’s rent in the amount of \$23,600 for farming land they inherited in 2013; and (2) Fred breached fiduciary duties to his mother to the detriment of her estate. (R. 43, 48-49).

Plaintiffs’ motion for partial summary judgment

On July 9, 2014, Goldie filed a motion for partial summary judgment against Fred, asking the circuit court to hold as a matter of law that Fred breached a fiduciary duty to Margaret. (R. 73). In opposition to the motion, both Fred and his brother, Ben Zoss (“Ben”), filed affidavits that are excellent summaries of Fred’s position in

this lawsuit. (R. 149, 152; App. 13-17). A hearing on the motion was held before the Honorable Jon R. Erickson, Circuit Court Judge, at the Sanborn County Courthouse on September 2, 2014. (R. 317).

On January 22, 2015, the circuit court issued its memorandum decision. (R. 258; App. 9-12). The circuit court held that Margaret's grant of a durable power of attorney to Fred in 2005 created a fiduciary duty because "the mere existence of a power of attorney, whether accepted or not, creates a fiduciary relationship as long as the grantee is aware of its existence." (App. 11). The circuit court denied the plaintiffs' motion on the issue of whether Fred breached that fiduciary duty, however, explaining: "Fred argues in response that there is lots of evidence that Margaret gifted many of her properties to all of her children, he included, and that he had her permission to use her property. These present factual disputes." (App. 12). The circuit court's order on the plaintiffs' motion for partial summary judgment was entered on February 25, 2015. (R. 264; App. 7-8).

Plaintiffs' first motion in limine

On April 15, 2015, the plaintiffs filed a motion in limine to prohibit the introduction of "Any/all extrinsic evidence of Margaret L. Zoss' intent, when she named Fred Zoss as her agent in her 2005 Durable Power of Attorney." (R. 333). Fred filed his objection to the plaintiffs' motion in limine on May 5, 2015. (R. 374).

The circuit court heard argument on the plaintiffs' motion in limine at the May 12, 2015 motions hearing. (R. 1542). Fred contended that evidence that he was authorized to handle his mother's finances and pay their shared expenses from their

joint account before she created the power of attorney in 2005 and evidence that she rarely, if ever, charged any of her sons (Adolph, Fred, and Ben) any rent to farm the Zoss family land for the better part of twenty years did not constitute prohibited “oral extrinsic evidence” of Margaret’s intent in creating the power of attorney within the meaning of *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431. As Fred explained:

In this case, the evidence will be that my client took literal care of his mother, day in and day out, for twenty years. She wanted that. That he handled her finances. She wanted that. And that she didn’t want him to pay rent, as she hadn’t for him or his brothers, for that matter, for decades.

And so the fact situation in *Bienash* is very different than [the] facts will be in this case. For that reason – and for that reason, the evidence should be allowed.

Bienash talks specifically about self dealing and that the oral intrinsic [sic] evidence shouldn’t be allowed to [be] use[d] to raise a fact issue regarding gratuitous transfers of the principal’s assets.

In this case, the evidence will be that this is evidence the defendant continued a long standing tradition of handling his mother’s finances, taking care of her, etc. And I think that’s vastly different.

(MH 14-15). The circuit court, however, granted the motion. (MH 15).

On May 20, 2015, the circuit court entered its order holding that Fred could not introduce *any* extrinsic evidence – not simply oral extrinsic evidence as contemplated by the *Bienash* decision – regarding Margaret L. Zoss’ intent to allow Fred to self-deal or make gifts of Margaret’s property to himself:

Since Margaret Zoss’ written power of attorney does not, in clear and unmistakable language, authorize her attorney in fact (Fred Zoss) to make gifts to himself, and likewise does not expressly authorize self-dealing by Fred, this Court prohibits the introduction of any/all extrinsic evidence suggesting that such gifting and self-dealing **were** authorized by Margaret Zoss.

... This Court bases its ruling upon the holding of *Bienash v. Moeller*, 721 N.W.2d 431 (S.D. 2006).

(R. 444; App. 4) (emphasis in original). With that, the case was set for trial.

Jury trial

A jury trial was held on May 20-21, 2015. At a hearing in chambers, the following exchange occurred concerning the plaintiffs' first motion in limine:

PLAINTIFFS: ... I do want to again raise a concern. And I guess this is being brought on again because I've reviewed the witness list by the defendant. And it appears to me that there's going to be – or there may be an effort to try to bring in evidence of the decedent's intent – her intent at the time of the Power of Attorney making.

And it's our intention to simply submit the Power of Attorney as an exhibit and then to move forward as to the issues of whether there was a breach of those duties. And then there will be some testimony as to damages. But again, I just – I want –

THE COURT: Well, I made myself perfectly clear. If it comes in, we have a mistrial and we start over.

(T1 4-5). As a result of this ruling, Fred was essentially prohibited from introducing *any* evidence that his mother permitted and encouraged him and his two brothers to farm the family land following their father's death in 1989 without paying rent for the better part of twenty years and Fred was largely prohibited from introducing evidence that his mother wanted him to handle her financial affairs, including the sharing of expenses, before she executed the durable power of attorney in 2005. (T2 7, 23, 44).

On the second day of trial, Fred sought to introduce his mother's will as an exhibit and made an offer of proof to introduce it. (T2 46 – “Go ahead and make

your offer of proof”). Article VIII of Margaret’s will contained Margaret Zoss’s instruction that any debt owed to her by any of children was to be forgiven upon her death. (T2 46). As Fred’s sister Goldie was suing Fred on behalf of their mother’s estate to collect alleged debt owed in the form of past due rent for his use of family farmland in which Margaret owned a life estate (T2 4), it seemed exceedingly relevant, non-oral evidence of Margaret’s intent. The circuit court, however, denied admission of the will, ruling that it was an “affirmative defense” that was not pleaded. (T2 47).

After the plaintiffs rested, the circuit court ruled that Margaret’s estate could present a claim for punitive damages to the jury. (T1 150). The circuit court also denied the plaintiffs’ motions for directed verdict. (T1 161; T2 73).

At the close of the trial, the jury returned a verdict in favor of Margaret’s estate in the amount of \$188,415.00 in compensatory damages for breach of fiduciary duty and \$87,500.00 in punitive damages. (R. 448; T2 96). The jury also returned a verdict in favor of Goldie and Rebecca on their breach of contract claim in the amount of \$47,500.00 and awarded prejudgment interest. (R. 447; T2 96). On June 9, 2015, the circuit court entered judgment against Fred in the amount of \$275,915.00 on the breach of fiduciary claim brought by his mother’s estate and \$52,178.63 on the breach of contract claim brought by his sisters. (R. 1476-77; App. 2, 3).

Motion for new trial

On June 29, 2015, Fred filed a motion for a new trial based, in part, upon SDCL 15-6-59(a)(7) for errors of law and prejudicial abuse of discretion in the circuit court’s interpretation and application of the *Bienash* decision and its exclusion of

highly relevant and admissible evidence concerning Margaret's longstanding practice of not charging rent to any of her sons for farming the family land, evidence of her intent and practice predating the power of attorney that Fred was authorized to use funds from their joint account to pay their expenses, and evidence of her written testamentary intent to forgive any and all debts owed by her children. (R. 1521).

A hearing on the motion was held in Sanborn County Circuit Court on July 21, 2015. On July 24, 2015, the circuit court entered its order denying the motion. (R. 1834; App. 1). This appeal timely followed.

STATEMENT OF THE FACTS

This case is a dispute between three of Margaret's children about her finances during approximately the last ten years of her life. Sisters Goldie and Rebecca accuse their brother Fred, who lived with his mother from 1993 to 2013, of breaching his fiduciary duties to her in connection with a durable power of attorney she granted to him in 2005, when she was ninety-five years old and of unquestionably sound mind. They also claim that Fred owes them one year of rent for farming land they inherited from Margaret when she passed away in 2013.

Adolph Jr. and Margaret Zoss

Margaret Mae Lee Zoss and her husband, Adolph Zoss, Jr., lived out their lives on the Zoss family farmland south of Huron in rural Forestburg. (T1 29). They farmed several quarters of tillable land, produced some of the watermelons for which

the area is famous,¹ and raised cattle on pastureland. The Iowa State Spelling Bee champion in her youth, Margaret was extremely intelligent and well read. After they married, Adolph, Jr. farmed while Margaret took care of the home and raised their children. They had five children in all: Adolph III, Fred, Goldie, Rebecca, and Ben. (T1 29). As the children grew, Margaret taught school in Forestburg and other country schools in the area. (T1 38).

Margaret's husband Adolph Jr. passed away in 1989. (T2 6-7). Though almost eighty years old at the time (born on October 3, 1910), Margaret was still very independent, sharp, and had more than twenty percent of her unusually long, active, and productive life yet to live.

The Zoss siblings

Several of the Zoss siblings farmed family land either devised to them or still owned by their parents. Sons Adolph III and Ben each farmed and operated at least two quarters of Zoss family land in Sanborn County. (T1 31, 82). Rebecca lives with her husband in rural Fedora, only about eighteen miles from the Zoss homestead in Sanborn County, and rents out the quarter of Zoss family land she inherited. (T1 31, 82, 96). Goldie has lived in Sioux Falls since 2001 and also rents out the quarter plus another eighty acres of land that she inherited from her parents. (T1 29, 81).

¹ Forestburg is known as the "watermelon capital" of South Dakota and the Zoss family was once selected as having the "Best Melon Stand" in South Dakota.
http://www.bittnerfuneralchapel.net/index.php?pageID=931_2&personID=796.

Fred was born in 1940. (T1 135). Like his mother, Fred was a public school teacher for a long time, including teaching high school in Rapid City for almost eleven years and in Sioux Falls for the last twenty years of his career. (T1 135, T2 5-6). During the entire time he was teaching, however, Fred would return home every summer and most weekends and other breaks to help with the family melon and gourd business,² cultivate the farmland, harvest and stack hay for the cattle, and help out his mother, father, and brothers as much as he could. (T2 6).

With her eyesight beginning to fail and not wanting her to be alone on the farm after his father's passing, Fred moved back to live with his mother full time in 1993. (T2 135). At that time, Margaret was eighty-three years old and Fred fifty-three. For the next eight years, Fred commuted to his teaching job in Sioux Falls from the family homestead, a three-hour round-trip in his car every day. (T2 8). In 2001, he retired from teaching and began farming and raising cattle full time. (T2 8).

Sometime in the mid-1990s, Goldie stopped talking to her mother and had virtually no contact with her during the last twenty years of Margaret's life. (T1 84-85). Once during that time, she ran into her mother at a wedding but turned away and refused to speak with her. (T1 85-86). Goldie did not see or even speak her mother for the last fifteen years of Margaret's life. (T1 84-85).

² See *Zoss v. Schaefers*, 1999 S.D. 105, ¶ 2, 598 N.W.2d 550, 551 (“Fred Zoss owns twenty-five acres of land in rural Sanborn County, South Dakota, that was planted as a pumpkin patch in the summer of 1996”).

Rebecca only lived eighteen miles away from Margaret and Fred. (T1 117). Rebecca saw her mother about once a month, certainly more frequently than Goldie, but also did not see her much in her final years. (T1 99). Rebecca did not see her mother for the last fourteen months of Margaret's life until she was unconscious in the hospital near death. (T1 121-22).

Fred and his mother share their home and company

Margaret fervently wished to continue to live in the rural farmhouse in which she had spent most of her life. For the last twenty years of her life, Fred spent virtually every day with his mother. He cared for her, prepared her meals, took her to town and family events, birthday parties, weddings, anniversary parties, and funerals. (T1 112, 120; T2 8-9). He made sure she could attend china painting classes and teacher retirement meetings. (T1 119; T2 8-9). But Margaret was still very capable and independent until only a few years before her death. Well into her late nineties, Margaret would take the bus to town on her own. (T1 119). As Myrna Peterson, the Sanborn County bus driver testified:

A: Margaret was one of my riders. She generally rode every week. Most often to Mitchell. Thursdays she would ride in the morning and come into town and go to china painting class. And then I would pick her up at night and take her back home when I got done with my Huron run.

Q: For how many years did she do that?

A: Forever, I think. I would guess – I don't remember when – I started in '83 and it was shortly after that she started riding. And then she was probably, well, in her 90s when she finally had to give it up.

Q: And what were your observations of Margaret? Her intelligence?

A: She was very strong willed, and very, very independent.

Q: And prior to the very end there, physically, was she in pretty good shape?

A: Yeah, when she rode the bus she was in good shape. I mean she had to be to ride because I couldn't be with her all the time.

Q: And are you familiar with her relationship with her son Fred?

A: Yes, to some extent.

Q: Okay. What observations did you make of that relationship?

A: Well, as far as I understood, Fred took very good care of her.

(T2 49-50). Only Fred's two sisters, who are suing him and had largely excused themselves from any responsibility for their mother and her well-being over the previous twenty years, had any criticisms to offer of Fred's relationship with and care for Margaret during all of that time. All of the other Zoss relatives and others who had regular contact with Margaret had nothing but good things to say about Fred's relationship with his mother and care for her all of those years. (T2 43, 53, 55, 57). Even Rebecca admitted that the relationship between Fred and their mother was always good and beneficial to her. (T1 124). And Goldie admitted that, not having seen or even spoken to her mother for at least fifteen years, she was simply in no position to know. (T1 84).

And also their living expenses

Living alone with his elderly mother, Fred naturally took care of her, handled her finances, and pooled living expenses with her as she wanted him to do.

Beginning in 2004, when she was ninety-four years old and he was sixty-four, Margaret and Fred had a joint bank account at First National Bank of South Dakota in Mitchell. (T1 33, 83, 137; T2 9). At that time, Margaret had monthly income of approximately \$778 from social security and \$527.81 for her teacher's retirement. (T1 38). There were also automatic withdrawals from the joint account to pay for Margaret's supplementary health insurance and her telephone bill. (T2 10).

Fred also had his own account at the bank, referred to in the trial testimony as the "farm account" or "Account 5752." (T1 39). Fred's own social security checks were deposited into his farm account. (T1 90). Over the years, Fred would transfer some of the money deposited into Margaret's account by social security and her teacher retirement plan into his farm account. (T1 39, 41, 138). Fred would then use that money to pay all of his mother's expenses and their shared expenses from his farm account and other accounts. (T1 46). Fred also deposited most of his own earnings into his farm account and paid his own expenses from that account. (T1 138-39). Never expecting to be asked to do so, Fred did not keep many receipts for those things that he purchased for his mother over the past twenty years. (T1 139). He did, however, produce all of the available information from his accounts over the years that his banks were able to provide. (T1 139, 158).

October 25, 2005
Margaret executes a durable power of attorney

Though beginning to lose her vision, there is no doubt that Margaret was of sound mind, still physically active, and fairly independent in 2005 at the age of ninety-five. (T1 97-98, 135; T2 43). On October 25, 2005, Margaret executed a durable

power of attorney prepared by Attorney Jeff Larson of Woonsocket. (Ex. 1; T2 9). Margaret personally signed the power of attorney before notary public Connie Farris at the First National Bank of South Dakota branch in Woonsocket, located just across the street from the Sanborn County Courthouse, and it was filed with the Sanborn County Clerk at 2:45 p.m. on that same day. (Ex. 1; T1 25).³

The power of attorney granted Fred full power and authority to engage in transactions and conduct business on Margaret's behalf, but did not expressly refer to granting Fred the power to self-deal or make gifts to himself. (Ex. 1). That document is the source of all of the claims brought by Goldie in this case as the personal representative of her mother's estate.

After his mother executed the durable power of attorney – just as before – Fred continued to transfer money from the joint account with his mother to his farm account and use that money, as well as money from other accounts, to pay her other bills, including medical and prescription drug expenses, and their shared living expenses. (Exs. P, S; T2 10-13). And he continued to use that same farm account to pay his own expenses. (Exs. P, S; T2 10-13).

³The Sanborn County Register of Deeds, Lynelle Brueske, testified that, although she cannot specifically remember, she believes that Fred likely brought the document in to be recorded because she typically opened the mail in the mornings and because the receipt was addressed to Fred. (T1 25-27). But of course, Fred and Margaret lived together and had the same address. Fred believes that Margaret brought the POA she had just executed to the clerk's office because she was obviously in Woonsocket on that same day and signed it at the bank across the street from the courthouse and because Fred did not learn about the POA until later. (T1 137). In any event, who actually recorded the document at the courthouse matters little. Without question, Margaret was healthy and of sound mind in 2005.

Fred receives more than \$500,000 from independent sources

At trial, the plaintiffs pointed to two transactions by which Fred purchased two \$100,000 CDs using checks from his farm account that they deemed suspicious. Those are readily explained. In 2005, Fred sold some of his own land in 2005 for \$480,000. (T2 17).⁴ From the sale, Fred deposited \$423,307.99 in the investment section of his own account at First National Bank and then on May 12, 2008 transferred \$295,879.80 into his farm account. (Ex. I; Ex. R; Ex. 7 at p. 350; T2 17-19). Later in 2008, he used those funds in his farm account to purchase one \$100,000 CD at CorTrust Bank in Letcher and another \$100,000 CD at Dakotaland Federal Credit Union in Huron. (T1 140; T2 19-20; Ex. 7 at p. 360; Ex. 7 at p. 359). In other words, Fred's purchase of the two \$100,000 CDs using funds from his farm account can be traced directly to the nearly \$300,000 in funds from the sale of Fred's own land that he transferred into his farm account.

The Butler cemetery litigation

The plaintiffs also sought to cast suspicion on Fred for paying approximately \$37,000 in legal fees out of his farm account to attorneys representing Margaret and Fred in a legal action they brought involving their family cemetery. (T1 140; T2 15, 32). The testimony at trial, however, was that the case was instigated at the mutual request of both Margaret and Fred against the cemetery board regarding a trust created by the Zosses to preserve and maintain that cemetery near their land where

⁴ In 2002, as well, Fred was struck by a car and received a personal injury settlement from the tortfeasor in the amount of \$105,000. (T2 22).

their family had been buried for generations. (T2 15). It was one of Margaret's passions that her cemetery remain preserved and beautiful forever. (T2 15, 53).

Margaret's attorney, Casey Bridgman, testified that she was fully aware of and approved of the litigation and that he met with her several times about its progress. In fact, on October 1, 2010, two days before her one hundredth birthday, Margaret was prepared for deposition by Bridgman and then deposed in that case by Attorney Jack Theeler. (T2 60-61). Margaret was lucid and sharp under questioning and answered all of the questions posed by the attorneys. (T2 60-61).

After reaching the century mark, Margaret begins to decline

Fred married Cathy Zoss on August 1, 2009, when he was sixty-nine years old. Fred continued to farm and raise cattle on Zoss family land, as he had done for more than twenty years, and continued to care for his mother. (T2 36). From about 2009 on, Margaret spent the vast majority of her time at the home that Fred and Cathy had purchased in Minnesota, though Margaret would sometimes still visit the farm with Fred and Cathy because she loved being at her home there so much. (T2 34, 36).

Cathy had known Fred since 1998 and observed the loving relationship between Fred and his mother during all of those years. (T2 36). During all of those years until her death, Fred took care of his mother, made sure that she was dressed and fed, assisted her with bathing and using the restroom, kept her company, tucked her into bed, and paid the bills using his own funds and funds from the joint account that he shared with his mother. (T2 23, 53).

By the age of one hundred or so, Margaret was totally blind. (T1 98-99). In July 2011, she had a fall and began to go downhill after that. (T1 103). Cathy retired and she and Fred were essentially her full-time caretakers, helping her use the restroom, washing her, and everything else. (T2 37, 43). By December 2012, Margaret's health was beginning to fail badly. (T1 147). At that time, she was confined to a wheelchair. (T1 147). Margaret passed away on January 5, 2013 at the age of one hundred and two years old. (T1 32).

When Margaret died, she still had a life estate in a quarter of tillable land. (T1 34). Rebecca had the remainder interest in that land and inherited it upon Margaret's death. (T1 35, 67). Margaret also had a life estate in 240 acres of pasture land. (T1 34). Goldie had the remainder interest in that land and received it upon Margaret's death. (T1 35, 66; Ex. 5). With his mother's permission and encouragement, Fred had farmed the quarter that Rebecca eventually inherited since 1989 and raised cattle on the land that Goldie eventually inherited from 2000 forward. (T1 66, 67).

Goldie did not attend her mother's funeral. (T1 88). But 25 days after Margaret's death, Goldie signed the affidavit to have the life estate removed from her property and filed it at the county courthouse. (T1 88; Ex. 5). Rebecca signed her affidavit to have Margaret's life estate removed from the quarter of land she received on February 4, 2013. (T1 112-13; Ex. 15). Goldie had been designated as the personal representative of her mother's estate in Margaret's will when it was drafted in 1989, before Goldie cut off all contact with her mother approximately five years later. (T1 84-85). On April 29, 2013, Goldie filed an application for appointment as

personal representative of her mother's estate, an application that was granted. *See Estate of Margaret L. Zoss, Deceased*, Pro. 13-2 (Sanborn County 2013).

Fred did not pay rent to his sisters for farming and grazing his cattle on the land that they obtained upon their mother's death during the 2013 crop year.

Although they never sent a bill for rent, agreed to any rate, demanded that he vacate the land, or took care of the land themselves, Goldie and Rebecca instructed the jury to award them \$47,200⁵ in unpaid rent for Fred continuing to farm their inherited quarters in the 2013 crop year and the jury awarded them that amount on their breach of contract claims. (T2 81).

On behalf of their mother, Goldie sued Fred for breaching his fiduciary duties to her from 2006 to 2013 during the last seven years of her life. Goldie asked the jury to award their mother's estate \$140,000 (\$20,000 per year for seven years) as "unpaid rent" that Goldie claimed Fred owed his mother. (T2 78-79). Goldie also asked the jury to award \$83,415 that Fred transferred from the joint account with his mother into the farm account that Fred used to pay all of their shared living expenses over the course of seven years and \$3840 representing a rent check from Jerry Moody (who rented a portion of Margaret's land one year) that Fred endorsed for his mother and deposited into his farm account. (T2 78-80). The total amount sought by Goldie

⁵ In their amended complaint, Goldie and Rebecca averred that the unpaid rent for farming the land they inherited in 2013 for the remainder of that year amounted to \$23,600. (R. 43, 48-49). Somehow in the ensuing year, the amount of claimed unpaid rent supposedly owed to them by Fred for the 2013 crop year precisely doubled.

on behalf of her mother's estate was \$227,255, plus an award of punitive damages. (T2 80). The jury awarded the estate \$188,415 for breach of fiduciary duty and assessed \$87,500 in punitive damages. (T2 96).

STANDARD OF REVIEW

Among other circumstances, a new trial may be granted due to an “[e]rror of law occurring at the trial; provided, that in the case of claim of error [in the] admission [or] rejection of evidence, or instructions to the jury or failure of the court to make a finding or conclusion upon a material issue which has not been proposed or requested, it must be based upon an objection, offer of proof or a motion to strike.” SDCL 15-6-59(a)(7). Fred respectfully contends that a new trial is warranted under this section.

This Court reviews “a decision to admit or deny evidence under the abuse of discretion standard.” *JAS Enters. v. BBS Enters.*, 2013 S.D. 54, ¶ 21, 835 N.W.2d 117, 125 (quoting *Ferebee v. Hobart*, 2009 S.D. 102, ¶ 12, 776 N.W.2d 58, 62). This standard applies to decisions on motions in limine. *See id.* (citation omitted). “With regard to the rules of evidence, abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence.” *Kaiser v. University Physicians Clinic*, 2006 S.D. 95, ¶ 29, 724 N.W.2d 186, 194 (citation omitted). Significantly, “once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” SDCL 19–19–103(b).

This Court reviews the denial of new trial motions for an abuse of discretion. *See Casper Lodging, LLC v. Akers*, 2015 S.D. 80, ¶ 45, 871 N.W.2d 477, 492 (citing *Walter v. Fuks*, 2012 S.D. 62, ¶ 22, 820 N.W.2d 761, 767). “[A] new trial may follow only where the violation has prejudiced the party or denied him a fair trial. Prejudicial error is error which in all probability produced some effect upon the jury’s verdict and is harmful to the substantial rights of the party assigning it.” *Kjerstad v. Ravellette Publ’ns, Inc.*, 517 N.W.2d 419, 426 (S.D. 1994).

ARGUMENT

I. THIS COURT SHOULD REVERSE AND REMAND FOR A NEW TRIAL.

A. Fred Zoss is entitled to a new trial based upon prejudicial errors of law by the circuit court in excluding highly relevant and admissible evidence.

Pursuant to SDCL 15-6-59(a)(7), Fred respectfully contends that prejudicial errors of law occurred and his substantial rights were affected by the trial court’s exclusion of highly relevant evidence. As this Court has explained, “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 43, 764 N.W.2d 474, 487 (quoting SDCL 19-19-401).

Here, specifically, the circuit court erred in (1) excluding any and all evidence, not simply oral extrinsic evidence, offered by Fred regarding Margaret’s intent and practice for decades of allowing Fred and her other sons to farm the Zoss family land

without paying rent; (2) excluding evidence that Margaret wanted and allowed Fred to use her income deposited in their joint account to help pay their shared expenses and keep the farm and household running so that she could remain in her home on the farm; and (3) excluding her testamentary intent to forgive any debts to Fred and her other children. Viewed independently, each of these prejudicial errors excluding critically relevant evidence itself warrants a new trial. Collectively, they resulted in a warped and one-sided presentation of the evidence that unfairly prejudiced Fred, affected his substantial rights, and denied him a fair trial.

1. The circuit court erred in excluding evidence of Margaret's decades-long practice of not charging rent to Fred or her other sons who farmed the Zoss family land.

As set forth in the statement of the case, the circuit court relied upon an expansive and legally incorrect interpretation of *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431, in order to preclude Fred from introducing any evidence that Margaret wanted Fred and his brothers to be able to farm the Zoss family land without charging them rent and that it was her longstanding practice not to charge them rent for decades, long before her grant of a durable power of attorney to Fred in 2005.

In *Bienash*, 2006 S.D. 78, ¶¶ 5-9, 721 N.W.2d at 432-33, this Court examined the scope of admissible evidence in a case involving a power of attorney executed by Kenneth Duebendorfer, an elderly bachelor, in favor of his great niece and her husband, Kathy and Randy Moller. The POA did not contain any language giving the Mollers the power to self-deal. The Mollers then used the POA to make themselves the beneficiaries of Duebendorfer's bank accounts and certificates of

deposit. Maxine Bienash, a beneficiary of Duebendorfer's estate, filed breach of fiduciary duty and fraud claims against the Mollers seeking damages. The circuit court granted summary judgment to Bienash against the Mollers on those claims.

On appeal, this Court affirmed the grant of summary judgment and held that an attorney in fact may not self-deal unless the power of attorney from which his authority is derived expressly provides in clear and unmistakable language authorization for self-dealing acts. *See id.* ¶ 27, 721 N.W.2d at 437. As a matter of first impression, this Court then further held that “oral extrinsic evidence” was not admissible to raise a factual issue on whether the grantor of a power of attorney intended to allow the attorney in fact to use the POA to make gifts to himself or self-deal. *Id.*; *see also Studt v. Black Hills Federal Credit Union*, 2015 S.D. 33, ¶¶ 13-14, 864 N.W.2d 513, 516-17 (explaining that *Bienash* rule applies only to oral extrinsic evidence, including oral testimony reduced to writing in affidavit form).

In granting the plaintiffs' first motion in limine, the circuit court misinterpreted *Bienash* and stretched its limited holding beyond recognition to forbid the introduction of *any* evidence of Margaret Zoss's intent and longstanding practice of allowing and encouraging Fred and her other sons to farm the Zoss family land without paying rent. (R. 444; App. 4). That ruling was drilled into the heads of the witnesses and rigorously enforced at trial. (T1 4-5; T2 7, 23, 44). If permitted, both Fred and Ben Zoss would have testified that their mother almost never, with few exceptions, charged rent to them or their brother Adolph III for farming the Zoss family land because that is what she (and their father) wanted – they wanted their

children to succeed and preserve the family farming operation for the next generation of Zosses. (MH 14-15; R. 149, 152; App. 13-17). Significantly, Fred did not use the power of attorney in any way to excuse himself from paying rent or relieve himself of any legal obligation to pay rent. Rather, like his brothers, Fred simply did not pay rent to his mother for farming the Zoss family land because his mother did not charge him rent and never wished to do so. That was true long before she executed a power of attorney in his favor and true afterward. Her execution of that document in 2005 changed nothing.

That Fred did not actually use the POA to accomplish anything related to a supposed obligation to pay rent readily distinguishes this case from those such as *Bienash* and *Studt*, in which the POA itself was utilized or attempted to be utilized by an outsider as the instrument of self-dealing by the attorney in fact to make affirmative changes by designating himself the beneficiary of bank accounts and CDs in which he never previously had any interest.

In this case, conversely, the *status quo ante* simply continued unabated after the POA was put in place. The articulated policy behind the bright-line rule announced in *Bienash* has no application where, as here, the authority conferred by the power of attorney was not utilized and is not implicated by the challenged action of simply continuing not to pay rent that was never charged. Certainly, *Bienash* does not stand for the principle that a person in whose favor a power of attorney is executed may never defend or explain his actions at trial, particularly when those actions did not even involve using the power of attorney in any sense.

And surely, a history, pattern and practice of not charging rent to her sons for decades does not constitute “oral extrinsic evidence” of Margaret’s intent in creating a power of attorney in 2005 within the meaning of *Bienash*. Margaret’s longstanding practice not to charge Fred or any of her sons rent to farm the Zoss family land was supremely relevant to whether or not Fred breached a fiduciary duty to his mother, *Supreme Pork*, 2009 S.D. 20, ¶ 43, 764 N.W.2d at 487, and should have been admitted under a proper understanding of the scope of this Court’s holding in *Bienash*.

There is little doubt, moreover, that the circuit court’s broad misapplication of *Bienash* was prejudicial to Fred, denied him a fair trial, in all probability produced some effect upon the jury’s verdict, and thus was harmful to his substantial rights. *See Kjerstad*, 517 N.W.2d at 426. Indeed, when denying the plaintiffs’ motion for summary judgment on the issue of whether Fred breached his fiduciary duties to his mother’s estate, the circuit court relied upon the very evidence that it later prohibited the jury from hearing, explaining that “Fred argues in response that there is lots of evidence that Margaret gifted many of her properties to all of her children, he included, and that he had her permission to use her property. These present factual disputes.” (App. 12). But the true factual disputes identified by the circuit court at the summary judgment stage were never fairly presented to the jury.

At trial, Goldie was accusing Fred of taking advantage of and essentially stealing from his mother by not paying her rent to farm the Zoss family land from 2006 to 2013 and asked the jury to award \$140,000 (\$20,000 per year for seven years) as “unpaid rent” that Goldie claimed Fred owed his mother. (T2 78-79). In all, the

jury awarded the estate \$188,415 in compensatory damages for breach of fiduciary duty. (T2 96). It is certain, then, that at least some of that sum was intended to compensate the estate for “unpaid rent,” because the total amount of all other damages sought by the estate – the funds transferred from the joint account and rent paid by Jerry Moody – totaled only \$87,255. (T2 78-80).

Absent the order in limine, Fred would have been able to explain that his mother never charged him or his brothers rent to farm the family land she owned – either before or after the POA was executed – because she did not ever wish or intend to do so. Instead, Fred was muzzled by the circuit court’s order in limine and completely prevented from explaining his actions. His lack of an explanation, one that would have been backed up by his brother and other relatives, certainly was damning in the eyes of a jury prevented from hearing all of the relevant and admissible facts. Fred is entitled to a new trial on this basis alone.

2. The circuit court also erred in excluding evidence of Margaret’s intent and practice that Fred use the funds in their joint account to pay their expenses and keep the farm and household running so that she could remain in her home.

For similar but discrete reasons, the circuit court also committed legal error and abused its discretion in prohibiting the introduction of any extrinsic evidence that Margaret Zoss had a longstanding arrangement with Fred – predating the power of attorney – of sharing their expenses and that she desired and approved of him using her meager income to contribute to the payment of her substantial expenses and their shared expenses and thereby help sustain the life that she loved on the farm and avoid having to live out her final years in a nursing home. (T2 7).

As with the supposed “unpaid rent,” Fred never utilized the power of attorney that his mother granted to him in 2005 to accomplish anything related to his or his mother’s finances. Rather, he only actually used the POA a single time to make a decision regarding his mother’s medical care. (R. 151; App. 15). The regular transfers that Fred made from the account in which his mother’s social security and retirement checks were deposited to his farm account to pay her living expenses were possible because his mother had made him a joint owner of that account *before* she executed the power of attorney in October 2005. (T1 33, 83, 137; T2 9). As a result, Fred was legally authorized to make those transfers regardless of the POA.

Admittedly, the fact that one is a co-owner on an account does not automatically relieve one of his or her fiduciary duties that arise when a power of attorney is conferred. It does, however, alter the factual and evidentiary landscape when transactions involving the joint account are challenged. The Wisconsin Supreme Court considered just such a case in *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874 (Wis. 2007). In that case, as here, a son, Elliott, owned a joint checking account with his elderly mother, Johnnie, who later gave Elliott a durable power of attorney that did not expressly authorize self-dealing. *See id.* at 877. After executing the POA, Elliott transferred funds from the joint account, allegedly for his own use. *See id.*

The Wisconsin Supreme Court held that a joint account created before the execution of a POA creates a presumption of donative intent, meaning that the donor intended for the funds to belong to the donee, but that the transfer of funds from such an account by an agent *acting under a POA* for the agent’s own use creates a

countervailing presumption of fraud unless the POA explicitly authorizes self-dealing. *See id.* at 877, 885. The Wisconsin Supreme Court further held that “[u]nder such circumstances ... extrinsic evidence may be admissible to determine the intent of the parties. The prohibition against the admissibility of extrinsic evidence of the parties’ intent to allow the making of gifts, as set forth in *Praefke*, 257 Wis.2d 637, ¶ 20, 655 N.W.2d 456,⁶ would not apply in such cases.” *Russ*, 734 N.W.2d at 885.

After concluding that such extrinsic evidence was properly admitted, the Wisconsin Supreme Court upheld the circuit court’s factual findings that it was understood that Elliott’s mother had given him broad discretion before granting the power of attorney to use their joint account in any manner, that she intended that to continue after the signing of the POA, and that she willfully and voluntarily agreed to live with Elliott and relied on his willingness to take care of her, provide housing, food, clothing, health care, and other personal needs and in exchange created the joint account. *See id.* at 886.

The same distinction and principle is applicable here.⁷ Fred was authorized to transfer funds from their joint account before and independent of the POA and routinely made such transfers. Fred testified that he did so in order to pay for his

⁶ *Praefke v. American Enterprise Life Ins. Co.*, 655 N.W.2d 456 (Wis. 2002).

⁷ Indeed, the Wisconsin Supreme Court’s distinguishing of the *Praefke* decision and its bright-line rule excluding any extrinsic evidence (a rule much harsher than the prohibition only of *oral* extrinsic evidence adopted by this Court in *Bienash*) is particularly persuasive authority here because this Court expressly relied on *Praefke* when it decided *Bienash*. *See Studt*, 2015 S.D. 33, ¶ 13, 864 N.W.2d at 516 n.3; *Bienash*, 2006 S.D. 78, ¶¶ 19-24, 721 N.W.2d at 436-37.

mother's living expenses as well as their shared expenses. In contrast, Goldie contended that Fred transferred money in order to steal from their mother whom he had cared for over the previous twenty years (and to whom Goldie refused to speak) because Fred is nothing more than a heartless, common thief who only saw his beloved mother and closest friend as "cash flow" who he subjected to "elder abuse." (T2 74). Just as in *Russ*, Fred should have been permitted to explain that his mother – who no one disputes was competent through her 100th birthday – was fully aware that he was transferring money from their joint account to his farm account to pay their expenses and told him that was what she wanted him to do in exchange for him living with and caring for her over the final twenty years of her life. The circuit court's exclusion of such evidence thus was legal error and an abuse of discretion.

Again, there is little doubt that this error was prejudicial to Fred and affected his substantial rights to a fair trial. Without being able to explain his mother's knowledge of and intentions regarding his practice of transferring funds from their joint account to pay their expenses both before and after the execution of the POA, Fred was rendered incapable of establishing his legally valid defense to the breach of fiduciary duty claim brought against him. Goldie asked the jury to award \$83,415 – the entire amount that Fred transferred from the joint account – and the jury's \$188,415 compensatory damages award must have been intended to reimburse the estate for at least some of those funds, because the full amount of "unpaid rent" claimed by the estate amounted to a total of \$140,000. (T2 78-80). Fred is entitled to a new trial on this basis alone.

3. The circuit court compounded its error by excluding relevant evidence of Margaret’s testamentary intent to forgive any debts owed by any of her children.

At trial, Goldie admitted that she considered the rent that Fred supposedly owed to his mother but did not pay to farm the Zoss land to be a debt owed to the estate. (T2 4). The circuit court, however, refused to allow Fred to introduce his mother’s last will and testament, which clearly expressed her intention that any debts owed to her by any of her children be forgiven. (T2 46). At the hearing on the motion for a new trial, the circuit court stated that “the only issue that has any type of validity is this Will, and the forgiveness of all debts, but there was no offer of proof as to that. It came at the last minute.” (NT 16).

But that is not correct. (T2 46 – “Go ahead and make your offer of proof”). Nor can it reasonably be claimed that the existence of the terms of Margaret’s will was some sort of surprise sprung on the plaintiffs – Goldie was appointed as the personal representative of the estate pursuant to that very will executed by Margaret in 1989. Finally, the existence of the will is not properly deemed an “affirmative defense” where the will was offered, not as a defense in and of itself, but rather as extrinsic, non-oral *evidence* of Margaret’s intent. *See Bienash*, 2006 S.D. 78, ¶¶ 27, 721 N.W.2d at 437. For the reasons discussed above, Fred was prejudiced by the circuit court’s exclusion of this highly relevant evidence that his mother did not intend that he owe any debt to her estate and should be granted a new trial on this basis alone.

CONCLUSION

Benjamin Franklin is credited with the proverb: “A half-truth is often a whole lie.” In this trial, the jury was only permitted to hear half of the truth and rendered a decision based upon an unfairly cleaved portrait of reality. The evidence at trial indicated that Fred took care of his mother, stayed with her, provided for her, and allowed her to remain in her home for most of the final two decades of her life. Evidence prohibited by the circuit court’s erroneous rulings and order in limine would have further demonstrated that Margaret never charged or wanted to charge Fred or his brothers rent to farm the family land, asked and authorized Fred to handle her financial affairs and use their joint account to pay their expenses, and intended to forgive any debts that he might owe to her estate.

This case warrants a fresh look on a fair playing field. The jury should have been given all of the relevant and admissible evidence so that it could make an informed assessment of the situation, rather than hearing only an incomplete and selectively edited version of the facts favoring the plaintiffs and preventing Fred from defending himself by explaining his actions. Fred was unfairly prejudiced by the circuit court’s exclusion of this highly relevant evidence, severely impacting his substantial rights. A new jury should be permitted to examine a complete and developed rendition of the facts and arrive at its verdict unclouded by the absence of such critically relevant information.

WHEREFORE, Appellant Fred M. Zoss respectfully requests that this Honorable Court *reverse* and remand for a new trial.

Dated this 31st day of December, 2015.

**JOHNSON, JANKLOW, ABDALLAH, BOLLWEG
& PARSONS LLP**

BY /s/ Ronald A. Parsons, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief and all appendices were served via email upon the following:

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(605) 729-2552

Attorneys for Appellees

Dated this 31st day of December, 2015.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 7,871 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

APPENDIX

Order Denying Defendant’s Motion for New TrialApp. 1

Judgment in Favor of the Estate of Margaret L. Zoss and Against
Defendant Fred M. ZossApp. 2

Judgement in Favor of Plaintiffs Rebecca J. Hein and Goldie N.
Burnham, Individually, and Against Defendant Fred M. Zoss App. 3

Order Granting Plaintiffs’ First Motion in LimineApp. 4

Order Granting Plaintiff Estate’s Motion for Partial Summary
JudgmentApp. 6

Memorandum Decision on Plaintiff Estate’s Motion for Partial
Summary JudgmentApp. 8

Affidavit of Fred Zoss.....App. 12

Affidavit of Ben Zoss.....App. 15

Durable Power of Attorney (October 25, 2005)App. 17

Ex. P – Margaret Zoss’s yearly expenses (2008-13)App. 19

Ex. S – Margaret Zoss expenses paid by Fred (2008-13)App. 24



house
arts

FILED

MAY 21 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By _____

ORDERED that the Estate's Motion as to Count 4 of Plaintiff Estate's Complaint (alleging breach of fiduciary duty); specifically the estate's assertion that from and after October 25, 2005, Fred breached his fiduciary duty by conveying Margaret's funds and property to himself, by self-dealing, by commingling funds, by using his ward's property for his own purposes, by lending his ward's property to himself, by leasing his ward's property to himself, and by using his authority to effectuate gifts to himself, Plaintiff Estate's Motion for Partial Summary Judgment is denied.

Dated this 19th day of February, 2015.

BY THE COURT:



Honorable Jon R. Erickson
Third Judicial Circuit

ATTEST:


Clerk of Courts

By: _____
Deputy

(SEAL)

FILED

FEB 25 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By: _____

STATE OF SOUTH DAKOTA



CHAMBERS OF
JON R. ERICKSON
JUDGE

THIRD JUDICIAL CIRCUIT COURT

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MARIE H. FAWCETT
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January 22, 2015

55 CIV 14-4

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Mr. Jeffrey D. Larson
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**RE: Estate of Margaret M. Zoss, et. al. v. Fred Zoss—Motion for Partial
Summary Judgment**

Gentlemen:

Rebecca J. Hein (Rebecca), Goldie N. Burnham (Goldie) and Fred M. Zoss (Fred) are the children of Margaret L. Zoss (Margaret) and Adolf J. Zoss, Jr. (Adolf), both deceased. Adolf and Margaret have two other children, A. L. Zoss (A.L.) and Ben Zoss (Ben). Rebecca and Goldie bring suit against Fred for Breach of Contract; Undue Influence; Conversion; and Breach of Fiduciary Responsibility against Fred. They now request partial summary judgment with respect to two aspects of Count 2—Undue Influence and Count 4—Breach of Fiduciary Duty. Particularly they ask that the Court find:

Count 2:

- a. That from and after October 25, 2005 2005 (the date Margaret Zoss executed a Power of Attorney naming Fred as her attorney in fact) a confidential relationship existed between them.

Count 4:

FILED

JAN 26 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By Sharon Blankenship

App. 08

- a. That from and after October 25, 2005 (the date Margaret Zoss executed a Power of Attorney naming Fred as her attorney in fact) a fiduciary duty existed, which required Fred to act primarily for the benefit of Margaret Zoss, and to further act in the highest good faith, and without obtaining any undue advantage; and
- b. That from and after October 25, 2005, Fred breached his fiduciary duty by conveying Margaret's funds and property to himself, by self-dealing, by co-mingling funds, by using his ward's property for his own purposes, by lending his ward's property to himself, by leasing his ward's property to himself, and by using his authority to effectuate "gifts" to himself.

Fred argues that whether he breached a fiduciary duty or had a confidential relationship from which undue influence could be inferred are questions of fact. Further that the Plaintiffs fail completely to show these issues are undisputed.

Summary Judgment Standard:

[Partial] summary judgment is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issue as to any material fact, and that the moving party is entitled to a [partial summary] judgment as a matter of law.

DeSmet Farm Mut. Ins. Co. of South Dakota v. Gulbranson Development Co. Inc., 2010 SD 15, ¶19, 779 NW 2d 148 (SD 2010).

Facts:

In approximately 1993 Fred moved back to the farm to live with Margaret and commuted to work in Sioux Falls. Fred continued to live with Margaret for the next 20 years until she passed away. On October 25, 2005, Margaret executed a "Power of Attorney" to Fred.

Fred admits that the "Power of Attorney" was executed, but denies that he ever accepted the appointment or exercised any action based upon the power of attorney.

Analysis:

Plaintiffs argue that the fiduciary relationship is created once the power of attorney is signed by the grantor. No acceptance is required under South Dakota law. Citing: *Childress v. Currie*, 74 SW3rd 324 (Tenn. 2002).

Our Supreme Court has ruled that:

A fiduciary relationship is founded on a "peculiar confidence" and trust placed by one individual in the integrity and faithfulness of another. When such relationship exists, the fiduciary has "duty to act primarily for the benefit" of the other.

"Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary." South Dakota law reflects "the traditional view that fiduciary duties are not inherent in normal arm's-length business relationships, and arise only when one undertakes to act primarily for another's benefit. The law will imply such duties only where one party to a relationship is unable to fully protect its interests and the unprotected party has placed its trust and confidence in the other." We recognize no "invariable rule" for ascertaining a fiduciary relationship, "but 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."

Bienash v. Moller, 2006 S.D. 78, ¶11, 721 N.W.2d 431.

Further, our Supreme Court has said:

A fiduciary relationship is founded on a 'peculiar confidence' and trust placed by one individual in the integrity and faithfulness of another. When such relationship exists, the fiduciary has a 'duty to act primarily for the benefit' of the other. 'Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary.'" *Ward v. Lange*, 1996 S.D. 113, ¶12, 553 N.W.2d 246, 250 (citing *High Plains Genetics Research, Inc. v. JK Mill-Iron Ranch*, 535 N.W.2d 839, 842 (S.D. 1995)) (citations omitted). "The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Id.* **Therefore, in South Dakota, as a matter of law, a fiduciary relationship exists whenever a power of attorney is created.** [Emphasis provided].

Estate of Duebendorfer, 2006 S.D. 79, ¶28, 721 N.W.2d 438.

South Dakota has not adopted the Tennessee law. *Ibid.* Rather, the mere existence of a power of attorney, whether accepted or not, creates a fiduciary relationship as long as the grantee is aware of its existence. In this case, Fred admits he was aware of the power of attorney. And that makes sense. The very existence of a power of attorney is solid evidence that the grantor, Margaret, found peculiar confidence and trust in Fred's integrity and faithfulness to her.

Additionally, as Margret grew older, Fred took on more and more responsibilities caring for her. He took care of her properties; drove her to appointments; took care of her finances; and kept her home.

Based on all of the above the Court **grants** partial summary judgment on the issues of whether there was a fiduciary relationship and a confidential relationship between Margaret and Fred.

Plaintiffs go one step further and ask that the Court grant summary judgment in Count 4—breach of the fiduciary relationship, on the issue of whether Fred breached his fiduciary duty by conveying Margaret's funds and property to himself, by self-dealing, by co-mingling funds, by using his ward's property for his own purposes, by lending his ward's property to himself, by leasing his ward's property to himself, and by using his authority to effectuate "gifts" to himself.

These are serious allegations. Fred argues in response that there is lots of evidence that Margaret gifted many of her properties to all of her children, he included, and that he had her permission to use her property.

These present factual disputes. As such, they are not ripe for summary judgment. As to Count 4—breach of the fiduciary relationship, the motion is **denied**. Whether Fred breached his fiduciary duty is a jury question.

Sincerely yours,

A handwritten signature in black ink, appearing to read "JRE", written in a cursive style.

Jon R. Erickson
Circuit Court Judge

STATE OF SOUTH DAKOTA

)
SS

IN CIRCUIT COURT

COUNTY OF SANBORN

)

THIRD JUDICIAL CIRCUIT

REBECCA J. HEIN AND
GOLDIE N. BURNHAM, Individually,
and GOLDIE N. BURNHAM, as
PERSONAL REPRESENTATIVE OF THE
ESTATE OF MARGARET L. ZOSS,

CIV. NO. 14-4

AFFIDAVIT OF FRED ZOSS

Plaintiffs,

v.

FRED M. ZOSS,

Defendant.

STATE OF SOUTH DAKOTA)

SS

COUNTY OF SANBORN)

COMES NOW Fred Zoss, and being first duly sworn on oath, deposes and states:

Throughout my adult life I dedicated myself to assisting my mother. I not only spent every summer at the farm, but from 1993 to the time of her death we lived together in the same residence. I had always raised melons, also helped with all aspects of farm work, including cultivating and haying, and I spent hundred hours on yard work.

My mother was very independent and very much desired to have me stay with her and to take care of her. My mother had been a teacher and could have used debit cards, credit cards, and computers if she so had desired. My mother did not want to go to a nursing home.

I enjoyed very much living and spending time with her. Nevertheless as she grew older, I sacrificed a lot of my personal time so I could be with her. I did this out of love and affection. I never had any desire or intention to take advantage of my mother, financially or otherwise. In 2004 my mother did add me as a joint owner of her checking account, which was prior to the creation of the Power of Attorney. Although we used the account, I never had to order new check blanks for the account.

I talked over everything with my mother and she was sound mentally until the end. She knew I used my checking account to deposit her money and mine. I paid "our" expenses out of that account, and frequently out of my own accounts, including my Dakotaland Account.

At the end of her life my mother's income from Social Security and teachers pension were approximately \$1,500.00 a month. Her expenses were not insignificant. It cost in excess of \$2,000 each month to provide for the house insurance, the house maintenance, utilities, food, gasoline, health expenses and medicines, in home care, Butler Cemetery legals fees and numerous miscellaneous items.

It's true she did not require me to pay rent, but again she did this knowingly and in exchange for my taking care of her. My brothers were farming land either owned by my parents or in which my mother held a life estate. My brother, Adolf, paid little or no rent from the 1980's on. Prior to 1989 my brother, Ben, would have paid virtually no rent. My mother gifted to me two quarters of land and made similar gifts of real estate for my siblings. I know my gift was partially in appreciation for my being there and taking care of her.

After having farmed the land my mother held a life estate in for so many years, my mother felt I had a great deal invested in the operation. Therefore, in the last years of my mother's life she was concerned that my sisters, should she pass away, make it difficult for me to farm the land one last year. My mother and I specifically talked about this and we decided that I would make rent payments. Therefore, I did make two rent payments, one in late 2011 and one in late 2012, for the following crop years. After my mothers death in January of 2013, I did use that same money to help pay for her funeral and other last expenses.

In April of 2005, I sold two quarters of land owned by me for \$480,000.00. After paying the liens and any other obligations I deposited approximately \$414,000.00 in the investment section of First National Bank South Dakota. In May of 2008 and in July of 2008, I asked the bank to withdraw \$100,000.00 from that investment. The bank automatically deposited those funds in my "farm

account". With the first withdraw, I purchased a CD with CorTrust Bank and with the second withdraw I purchased a CD with Dakotaland Federal Credit Union.

My sister, Becky, has engaged in actions which led to feuds within the family and although she occasionally assisted with our mother, she seldom saw her after 1998 and never saw her for the last year of her life, although she lived nearby.

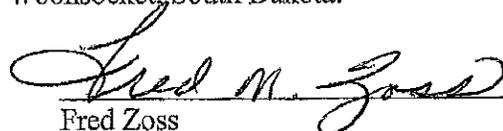
My sister, Goldie, didn't speak to our mother after 1995, and almost never saw here the last 18 years. Goldie was present at a couple of functions, such as funerals, that my mother attended, but she spoke not one word to her, she never acknowledged her presence. Neither her, nor any of her children attended her funeral.

I did not profit in any way in my dealings with my mother.

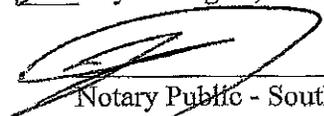
I did not use my mother's Power of Attorney for any financial purposes, I used it once when needed at a medical clinic or similar facility.

I not only took care of all of my mother's financial needs, but all of her physical needs as well. My mother lived to be 102 years old and in the last few years especially, I had to assist her physically everyday in many ways including using the bathroom. From 2009 until her death I hired in home help to assist in taking care of her.

Dated this 25th day of August, 2014, at Woonsocket, South Dakota.


Fred Zoss

Subscribed and sworn to before me this 25 day of August, 2014.


Notary Public - South Dakota
My commission expires: 6/2/17

(SEAL)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
 COUNTY OF SANBORN) THIRD JUDICIAL CIRCUIT

REBECCA J. HEIN AND :
 GOLDIE N. BURNHAM, Individually, :
 and GOLDIE N. BURNHAM, as : CIV. NO. 14-4
 PERSONAL REPRESENTATIVE OF THE :
 ESTATE OF MARGARET L. ZOSS, : AFFIDAVIT OF BEN ZOSS
 :
 Plaintiffs, :
 v. :
 FRED M. ZOSS, :
 :
 Defendant. :

STATE OF SOUTH DAKOTA)
) SS
 COUNTY OF SANBORN)

COMES NOW Ben Zoss, and being first duly sworn on oath, deposes and states:

I am a brother to Fred and Adolf Zoss, as well as Goldie Burnham and Rebecca Hein. I live one and a half miles from the home quarter where my mother lived until her death. I have had an opportunity to witness the relationship between my mother, Margaret Zoss, and my brother, Fred Zoss over the many years and decades.

Fred took excellent care of my mother. I do not believe Fred used his position as a son to any advantage in dealing with my mother. Our mother very much did not want to go to a nursing home, and she certainly wanted Fred to stay with her at her home. Fred did not take advantage of her financially or any other way. My mother told me she was in favor of having the monies from her account moved into Fred's account. My mother was specifically not afraid of Fred. My mother also wanted Fred to get an "extra quarter" of land for all he had done for her, so she gifted to him, the "home quarter" in about 1997. The so called "substation quarter" referred to in the litigation was never intended to go to Adolf by my parents, but in fact to me.

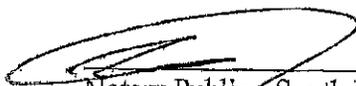
My mother also told me, Fred was to farm any of the land she had a life estate in rent free. In fact with regard to the transfer of land to Goldie Burnham, my mother insisted it be contingent on Fred not paying rent on the life estate interest. I took my mother to Attorney Greg Protsch, to get this accomplished and paid the legal bill myself. When confronted with any of these issues my mother would tell me repeatedly that Fred Zoss was not to have to pay rent. My brother, Adolf, also always rented the land he had a life estate in rent free. In 1993 when my brother, Fred, began to live permanently with my mother, my mother was attempting to get him going with his own farming operation, again so that he would stay on the farm with her.

My sister, Goldie Burnham, has long been estranged from the family. She has not spoken to me in the last 20 years. My mother told me that Goldie wasn't talking to her either in the last many years. My brother Adolf and I quit farming together because of a disagreement in 1989. The grain bins at the family farm became mine because the bank wanted our partnership assets separate.

Dated this 21st day of August, 2014, at Woonsocket, South Dakota.


Ben Zoss.

Subscribed and sworn to before me this 21st day of August, 2014.


Notary Public - South Dakota
My commission expires: 6/2/17

(SEAL)

State of South Dakota, Sanborn County
OFFICE OF REGISTER OF DEEDS - Fee \$12.00 Doc.#20050928
I certify the within instrument was filed for record
October 25, 2005 at 02:45 PM in Book 8W on pgs. 0232-0233
LYNN BRUESKE, REGISTER OF DEEDS

Lynn Brueske

Prepared by:
Jeffrey D. Larson of
Larson and Nipe
Attorneys at Law
P. O. Box 277
Woonsocket, SD 57385
(605) 796-4245

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That MARGARET ZOSS, of the County of Sanborn, State of South Dakota, has made, constituted and appointed, and by these presents does constitute and appoint Fred M. Zoss of the County of Sanborn, and State of South Dakota, my true and lawful attorney for me and in my name, place and stead. That I grant and give unto Fred M. Zoss, my said attorney, full authority and power to do and perform all and every act or thing whatsoever requisite and necessary to be done in the premises, as fully to all intents and purposes, as I might or could do if personally present, and with full power of substitution and revocation; hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue thereof.

I further grant authority to buy and sell any securities or any obligation of the United States, in a common stock or security traded on any national exchange, to give receipts or payments of money in my name and in my stead, to transact any business, to enter any safety deposit box or strong box in any institution, to remove any and all documents therefrom, to write checks upon any account, to draw money from any savings account or other account in any institution which I have, to transact and execute all documents with regard to the transaction of any business which I may be involved in.

This power includes all right whatsoever necessary to sell, transfer, convey, lease or mortgage real property described as:

The Northwest Quarter (NW $\frac{1}{4}$) of Section Fourteen (14), Township One Hundred Six (106)North, Range Sixty-one (61) West of the 5th P.M., Sanborn County, South Dakota and,

The Northeast Quarter (NE $\frac{1}{4}$) of Section Fifteen (15), Township One Hundred Six (106)North, Range Sixty-one (61) West of the 5th P.M., Sanborn County, South Dakota

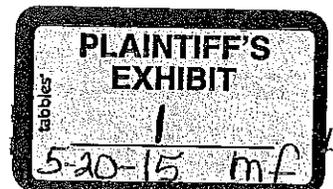
This power of attorney shall not be affected by disability of the principal.

FILED

MAY 28 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

PL



App. 17

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 25th day of October, 2005.

Margaret Zoss
MARGARET ZOSS

STATE OF SOUTH DAKOTA)
SS
COUNTY OF SANBORN)

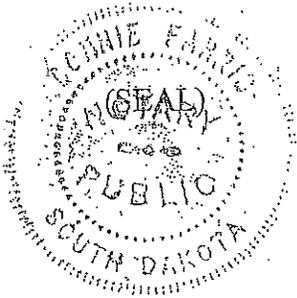
On this, the 25th day of October, 2005, before me, the undersigned officer, personally appeared Margaret Zoss, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Connie Farris

Notary Public - South Dakota

My commission expires: 11-16-2010



Automatic Deposits into Margaret's Account	Funds paid on Margaret's behalf						Margaret's Total Expenses
	First National Bank SD	Dakotaland FCU	Dawson Co-op Credit Union	Automatic Withdrawals	Less Fred's Expenses		
2008 \$ 17,224.39	\$ 15,583.22	\$ 3,078.94	\$ 12,162.24	\$ 3,165.19	\$ (9,457.65)	\$ 24,531.94	
2009 \$ 18,639.51	\$ 9,749.77	\$ 5,376.95	\$ 11,136.22	\$ 2,728.60	\$ (3,619.31)	\$ 25,372.23	
2010 \$ 18,519.34	\$ 7,331.73	\$ 18,230.55	\$ 2,141.72	\$ 3,118.33	\$ (1,258.25)	\$ 29,564.08	
2011 \$ 18,618.79	\$ 8,858.09	\$ 20,339.46	\$ 2,643.76	\$ 3,152.68	\$ (6,727.70)	\$ 28,266.29	
2012 \$ 18,882.91	\$ 8,569.66	\$ 12,542.53	\$ 7,526.14	\$ 3,854.63	\$ (5,468.62)	\$ 27,024.34	
2013 \$ 1,518.98	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	

Exhibit
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5-20-15 mf

FILED

MAY 28 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By _____

Reg Bal	SSA Treas	SD Retirement	Interest Payment	Customer Deposits / Cts Written	Op-Line Transfers 5752	Avera Health	Sentel	Maintenance Fee	Central Electric	End Bal
\$ 202.41	06/03/11 846.00	06/15/11 599.26	06/24/11 0.02		06/18/11 (475.00)	06/07/11 (167.45)	06/20/11 (92.43)	06/24/11 (5.00)		\$ 357.81
\$ 167.53	05/03/11 846.00	05/13/11 599.26	05/24/11 0.01		05/04/11 (750.00)	05/09/11 (167.45)	05/20/11 (87.94)	05/24/11 (5.00)		\$ 202.41
\$ 182.73	04/01/11 846.00	04/15/11 599.26	04/22/11 0.01		04/13/11 (400.00)	04/07/11 (167.45)	04/19/11 (88.02)	04/24/11 (5.00)		\$ 167.53
\$ 148.67	03/03/11 846.00	03/15/11 599.26	03/24/11 0.01		03/03/11 (450.00)	03/08/11 (167.45)	03/21/11 (88.76)	03/24/11 (5.00)		\$ 182.73
\$ 167.73	02/03/11 846.00	02/15/11 599.26	02/24/11 0.01		02/04/11 (600.00)	02/08/11 (167.45)	02/18/11 (81.88)	02/24/11 (5.00)		\$ 148.67
\$ 189.07	01/03/11 846.00	01/14/11 599.26	01/24/11 0.02		01/17/11 (650.00)	01/07/11 (167.45)	01/20/11 (94.17)	01/24/11 (5.00)		\$ 167.73
\$ 218.84	12/03/10 846.00	12/15/10 599.26	12/24/10 0.01		12/04/11 (550.00)	12/07/10 (167.45)	12/20/10 (102.59)	12/24/10 (5.00)		\$ 189.07
\$ 235.78	11/03/10 846.00	11/15/10 599.26	11/24/10 0.02		12/03/10 (750.00)	11/09/10 (167.45)	11/18/10 (88.77)	11/24/10 (5.00)		\$ 218.84
\$ 201.56	10/01/10 846.00	10/15/10 599.26	10/22/10 0.01	11/15/10 750.00	10/15/10 (400.00)	10/07/10 (167.45)	10/20/10 (88.60)	10/22/10 (5.00)		\$ 235.78
\$ 189.99	09/03/10 846.00	09/15/10 599.26	09/24/10 0.01		10/05/10 (750.00)	09/08/10 (167.45)	09/20/10 (91.19)	09/24/10 (5.00)		\$ 201.56
\$ 184.00	08/03/10 846.00	08/13/10 599.26	08/24/10 0.02		08/20/10 (400.00)	08/09/10 (167.45)	08/18/10 (86.80)	08/24/10 (5.00)		\$ 189.99
\$ 200.09	07/20/10 846.00	07/15/10 599.26	07/23/10 0.01	07/07/10 750.00	07/07/10 (800.00)	07/08/10 (167.45)	07/20/10 (88.85)	07/23/10 (5.00)		\$ 184.00
\$ 123.78	06/03/10 846.00	06/15/10 586.93	06/24/10 0.01		06/16/10 (500.00)	06/08/10 (167.45)	06/21/10 (84.24)	06/24/10 (5.00)		\$ 200.09
\$ 242.78	05/03/10 846.00	05/14/10 586.93	05/24/10 0.02		05/17/10 (100.00)	05/06/10 (167.45)	05/19/10 (79.50)	05/24/10 (5.00)		\$ 123.78
\$ 361.66	04/02/10 846.00	04/15/10 586.93	04/23/10 0.01		05/14/10 (500.00)	04/09/10 (167.45)	04/19/10 (79.37)	04/23/10 (5.00)		\$ 242.78
\$ 376.80	03/03/10 846.00	03/15/10 586.93	03/24/10 0.03		05/06/10 (700.00)	03/11/10 (167.45)	03/19/10 (80.65)			\$ 361.66
\$ 193.74	02/03/10 846.00	02/12/10 586.93	02/24/10 0.04		03/24/10 (900.00)	02/11/10 (167.45)	02/19/10 (82.46)			\$ 376.80
\$ 243.06	12/31/09 846.00	01/15/10 586.93	01/22/10 0.01		03/10/10 (900.00)	01/07/10 (167.45)	01/20/10 (114.81)			\$ 193.74
\$ 255.53	12/03/09 846.00	12/15/09 586.93	12/24/09 0.03		01/05/10 (700.00)	12/09/09 (167.45)	12/18/09 (77.88)			\$ 243.06
\$ 274.51	11/03/09 846.00	11/13/09 586.93	11/24/09 0.02		12/14/09 (700.00)	11/09/09 (167.45)	11/20/09 (84.28)			\$ 255.53
\$ 694.09	10/02/09 846.00	10/15/09 586.93	10/23/09 0.02		11/03/09 (800.00)	10/07/09 (167.45)	10/20/09 (85.28)			\$ 274.51
\$ 207.38	09/03/09 846.00	09/15/09 586.93	09/24/09 0.02		10/17/09 (500.00)	09/03/09 (167.45)	09/21/09 (78.79)			\$ 694.09
\$ 237.86	08/03/09 846.00	08/14/09 586.93	08/24/09 0.02		10/06/09 (1,100.00)	08/07/09 (167.45)	08/19/09 (95.98)			\$ 207.38
\$ 361.04	07/02/09 846.00	07/15/09 586.93	07/24/09 0.01	06/30/09 750.00	08/04/09 (700.00)	07/07/09 (167.45)	07/21/09 (88.67)			\$ 237.86

Begin Bal	SSA Trans	SD Retirement	Interest Payment	Customer Deposits / Cis Written	On-line Transfers \$/52	Avera Health	Santel	Maintenance Fee	Central Electric	End Bal
\$ 406.01	846.00	06/15/09	569.28	06/15/09	07/09/09 (1,500.00)	06/19/09 (167.45)	06/18/09 (92.82)			\$ 364.04
\$ 415.31	1,096.00	05/15/09	569.28	05/15/09 (6.00)	05/26/09 (200.00)	05/07/09 (167.45)	05/18/09 (99.16)			\$ 406.01
\$ 753.93	846.00	04/15/09	569.28	04/27/09 (6.00)	04/03/09 (1,000.00)	04/07/09 (167.45)	04/20/09 (86.47)			\$ 415.31
\$ 412.81	846.00	03/13/09	569.28	03/24/09	03/05/09 (800.00)	03/09/09 (167.45)	03/17/09 (106.73)			\$ 753.93
\$ 354.59	846.00	02/13/09	569.28	02/25/09	02/04/09 (500.00)	02/09/09 (167.45)	02/24/09 (89.65)			\$ 412.81
\$ 396.92	846.00	01/15/09	569.28	01/27/09	01/15/09 (500.00)	01/13/09 (167.45)	01/20/09 (80.13)			\$ 354.59
\$ 388.21	795.00	12/15/08	569.28	12/23/08	12/17/08 (500.00)	12/09/08 (167.45)	12/19/08 (88.14)			\$ 396.92
\$ 473.08	795.00	11/14/09	569.28	11/13/08 (300.00)	11/09/08 (600.00)	11/10/08 (162.55)	11/19/08 (86.62)			\$ 388.21
\$ 661.41	795.00	10/25/08	569.28	10/24/08	10/18/08 (1,300.00)	10/09/08 (162.55)	10/20/08 (90.11)			\$ 473.08
\$ 553.31	795.00	09/15/08	569.28	09/24/08	09/16/08 (1,000.00)	09/09/08 (162.55)	09/19/08 (93.66)			\$ 661.41
\$ 1,047.02	795.00	08/15/08	569.28	08/25/08	08/18/08 (1,000.00)	08/08/08 (162.55)	08/21/08 (95.49)			\$ 553.31
\$ 624.87	795.00	07/15/08	569.28	07/23/08 (60.00)	07/10/08 (500.00)	07/08/08 (162.55)	07/21/08 (99.16)			\$ 1,047.02
\$ 1,094.65	795.00	06/13/08	527.81	06/27/08 (33.71)	06/14/08 (1,500.00)	06/10/08 (162.55)	06/19/08 (85.38)			\$ 624.87
\$ 5,950.71	795.00	05/15/08	527.81	05/06/08 (1,137.55)	05/01/08 (2,500.00)	05/09/08 (162.55)	05/21/08 (101.65)			\$ 5,950.71
\$ 6,704.19	795.00	04/15/08	527.81	04/23/08 (129.40)	04/16/08 (500.00)	04/08/08 (162.55)	04/18/08 (94.15)			\$ 6,704.19
\$ 5,905.06	795.00	03/14/08	527.81	03/25/08 (149.05)	03/19/08 (1,500.00)	03/10/08 (162.55)	03/18/08 (89.28)			\$ 5,905.06
\$ 350.81	795.00	02/15/08	527.81	02/19/08 (5,600.00)	02/19/08 (400.00)	02/08/08 (162.55)	02/20/08 (83.19)			\$ 350.81
\$ 202.87	795.00	01/15/08	527.81	01/25/08	01/16/08 (900.00)	01/08/08 (162.55)	01/18/08 (88.76)			\$ 202.87

Req Bal	SSA Truss	SD Retirement	Interest Payment	Customer Deposits / Cle Written	On-Line Transfers 5752	Avera Health	Santel	Maintenance Fee	Central Electric	End Bal
\$ 1,765.76	12/03/07 778.00	12/14/07 527.81	12/25/07 0.06		12/14/07 (500.00) 12/08/07 (700.00)	12/10/07 (152.65)	12/18/07 (84.01)		12/17/07 (23.40)	\$ 202.67
\$ 618.75	11/09/07 778.00	11/15/07 527.81	11/27/07 0.08		11/18/07 (400.00) 11/05/07 (700.00)	11/03/07 (152.65)	11/26/07 (81.88)		11/15/07 (23.40)	\$ 1,786.76
\$ 304.51	10/03/07 778.00	10/15/07 527.81	10/24/07 0.08		10/24/07 (75.00)	10/10/07 (152.65)	10/18/07 (90.70)		10/15/07 (23.40)	\$ 618.75
\$ 152.44	08/31/07 778.00	08/14/07 527.81	08/26/07 0.06		08/26/07 (2,800.00) 08/14/07 (850.00)	08/10/07 (152.65)	08/19/07 (88.85)		08/17/07 (23.40)	\$ 304.61
\$ 270.16	08/03/07 778.00	08/15/07 527.81	08/23/07 0.05		08/03/07 (600.00) 08/15/07 (450.00)	08/08/07 (152.65)	08/20/07 (86.53)		08/20/07 (23.40)	\$ 153.44
\$ 323.41	07/03/07 778.00	07/15/07 527.81	07/25/07 0.09		07/16/07 (400.00) 07/05/07 (700.00)	07/10/07 (152.65)	07/18/07 (83.10)		07/16/07 (23.40)	\$ 270.16
\$ 696.79	06/01/07 778.00	06/15/07 511.94	06/25/07 0.13		06/16/07 (400.00) 06/03/07 (1,000.00)	06/08/07 (152.65)	06/16/07 (97.40)		06/15/07 (23.40)	\$ 323.41
\$ 215.02	05/03/07 778.00	05/15/07 511.94	05/23/07 0.11		05/07/07 (500.00) 05/18/07 (10.00) 05/11/07 (10.00) 04/30/07 (1,839)	05/09/07 (152.65)	05/18/07 (98.24)		05/15/07 (23.40)	\$ 696.79
\$ 884.35	04/03/07 778.00	04/15/07 511.94	04/24/07 0.17		04/23/07 (400.00) 04/05/07 (800.00)	04/10/07 (152.65)	04/18/07 (110.37)		04/16/07 (23.40)	\$ 215.02
\$ 146.97	03/02/07 778.00	03/15/07 511.94	03/23/07 0.13		03/02/07 (512.38) 03/15/07 (831.29)	03/08/07 (152.65)	03/19/07 (64.26)		03/16/07 (23.40)	\$ 884.35
\$ 279.19	02/02/07 778.00	02/15/07 511.94	02/26/07 0.11		02/08/07 (152.65)	02/20/07 (14.93)			02/16/07 (23.40)	\$ 146.97
\$ 566.88	01/03/07 778.00	01/12/07 511.94	01/25/07 0.15		01/11/07 (748.58)	01/10/07 (152.65)	01/18/07 (105.16)		1/15/2007 (23.40)	\$ 279.19

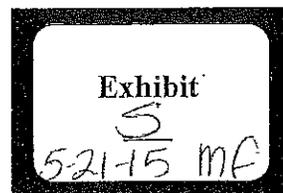
2008

COST OF EXPENSES FOR MARGARET ZOSS

1ST NATIONAL BANK OF SD - Checks

DATE	CHECKS	TRANSACTION	AMOUNT
1-8-08	12496	Shopko	\$ 17.99
1-9-08	12501	Penney's (clothes)	\$ 32.20
1-21-08	12577	Coborns	\$ 37.68
1-15-08	12506	Lawyer Lavrien (legal fees)	\$2000.00
1-19-08	12509	Brooks Oil	\$ 605.26
1-16-08	12514	Shopko Pharmacy	\$ 69.17
1-22-08	12517	Coborns	\$ 37.18
1-26-08	12523	County Fair	\$ 29.38
1-26-08	12525	Krall (eye vitamins)	\$ 57.24
2-9-08	12541	County Fair	\$ 82.67
2-13-08	12545	Coborns	\$ 14.83
2-14-08	12543	Shopko	\$ 7.60
2-18-08	12549	County Fair	\$ 28.87
2-8-09	12536	Fayes Shop	\$ 11.00
2-20-08	12551	UPS -- ship box	\$ 81.00
3-8-08		Columbia Ins. (phone withdrawal)	\$ 362.00
3-11-08	12557	Coborns	\$ 45.45
3-11-08	12556	Coborns	\$ 10.00
3-11-08	12495	Coborns	\$ 57.36
3-20-08	12558	Brooks Oil	\$ 1573.36
3-26-08	12562	Shopko	\$ 23.47
3-29-08	12567	NW Energy	\$ 172.48
3-26-08	12569	Shopko Pharmacy	\$ 77.05
3-29-08	12570	Lawyer Lavrien (legal fees)	\$ 285.00
4-2-08	12574	Shopko	\$ 25.49
4-15-08	12576	County Fair	\$ 35.54
4-15-08	12579	Menards (fuses, light bulbs)	\$ 16.85
4-22-08	12587	Krall (eye vitamins)	\$ 57.24
4-22-08	12589	County Fair	\$ 34.04
4-24-08	12595	Shopko	\$ 22.23
4-28-08	12599	NW Energy	\$ 175.25
5-3-08	12600	Shopko	\$ 22.25
5-10-08	12611	Fayes Shop	\$ 11.00
5-10-08	12612	Shopko Pharmacy	\$ 52.08
5-12-08	12620	Shopko	\$ 17.99
5-8-08	12608	Columbia Ins.	\$ 233.25
5-15-08	12624	County Fair	\$ 32.12

(1)



FILE

MAY 28 2015

SOUTH DAKOTA UNIFIED JUDICIAL
3RD CIRCUIT CLERK OF CC

By App. 24

5-24-08	12636	Coborns	\$ 26.97
6-6-08	12650	Krall (eye vitamins)	\$ 57.20
6-6-08	12652	County Fair	\$ 23.12
6-6-08	12654	Dimock Dairy	\$ 117.76
6-9-08	12664	Coborns	\$ 15.61
6-9-08	12665	Shopko	\$ 52.08
6-30-08	12675	Brooks Oil	\$ 1610.46
7-21-08	12694	Lovrien (legal fees)	\$ 1112.16
7-23-08	12699	Coborns	\$ 71.18
8-7-08	12707	Coborns	\$ 38.71
8-7-08	12708	Shopko Pharmacy	\$ 120.82
8-11-08	12712	County Fair	\$ 55.24
8-14-08	12723	County Fair	\$ 24.67
8-12-08	12718	Columbia Ins.	\$ 518.00
8-22-08	12728	Krall - (eye vitamins)	\$ 57.24
8-22-08	12729	County Fair	\$ 47.00
8-28-08	12732	County Fair	\$ 81.49
9-2-08	12738	Coborns	\$ 66.37
9-2-08	12740	Coborns	\$ 20.32
9-3-08	12741	Lisa Zoss (purchased clothes for Margaret)	\$ 100.00
9-4-08	12745	Faye's Shop	\$ 13.00
9-8-08	12747	Penney's (clothes)	\$ 29.66
9-11-08	12754	Coborns	\$ 78.38
9-17-08	12764	Krall (eye vitamins)	\$ 57.24
9-22-08	12769	Fair City Foods (Huron)	\$ 22.53
9-30-08	12776	Coborns	\$ 50.47
10-1-08	12779	NW Energy	\$ 144.06
10-2-08	12781	Faye's Shop	\$ 60.00
10-9-08	12793	County Fair	\$ 39.05
10-9-08	12795	Shopko Pharmacy	\$ 249.88
10-11-08	12797	Brooks Oil	\$ 1675.60
10-11-08	12798	Lovrien (legal fees)	\$ 1241.92
10-14-08	12800	Shopko Pharmacy	\$ 48.83
10-14-08	12801	Coborns	\$ 26.29
10-12-08	12803	Columbia Ins.	\$ 106.00
11-6-08	12811	County Fair	\$ 59.26
11-10-08	12815	Coborns	\$ 80.39
12-5-08	12819	Faye's Shop	\$ 13.00
12-5-08	12818	Coborns	\$ 20.32
12-9-08		Columbia Ins. (phone withdrawal)	\$ 233.05
12-10-08	12824	Coborns	\$ 29.51
12-24-08	12411	County Fair	\$ 47.52
12-24-08	12420	Coborns	\$ 65.85
12-24-08	12421	Ophthalmology	\$ 60.00
12-24-08	12424	Brooks Oil	\$ 404.17
12-24-08	12426	Krall (eye vitamins)	\$ 57.24

2008 1st National Bank of SD - Visa Card

DATE	TRANSACTION	AMOUNT
1-10-08	Walgreens	\$ 86.06
1-15-08	Herbergers – Watertown (clothes)	\$ 75.25
1-25-08	Shopko	\$ 209.90
1-26-08	Walgreens	\$ 15.87
1-26-08	Walgreens	\$ 26.47
2-1-08	Wal-mart	\$ 119.56
2-2-08	Econo Foods – Watertown	\$ 96.28
2-15-08	Wal-mart	\$ 96.28
2-27-08	Wal-mart	\$ 33.26
3-24-08	Columbia Ins. (debit transfer)	\$ 233.25
4-17-08	Wal-mart	\$ 76.78
5-7-08	Wal-mart	\$ 89.86
5-9-08	Columbia Ins. (misc. deduction)	\$ 362.00
5-19-08	Wal-mart	\$ 85.43
5-27-08	Wal-mart	\$ 137.07
6-10-08	Wal-mart	\$ 14.76
6-14-08	Wal-mart	\$ 74.67
7-9-08	Wal-mart – Huron	\$ 45.29
7-10-08	Wal-mart	\$ 54.86
7-10-08	Wal-mart	\$ 21.16
7-11-08	Walgreens	\$ 21.18
7-12-08	Wal-mart	\$ 28.02
7-18-08	Wal-mart	\$ 78.14
8-11-08	Wal-mart	\$ 152.09
8-15-08	Walgreens	\$ 20.12
8-18-08	Wal-mart	\$ 71.10
8-19-08	Wal-mart	\$ 76.79
9-4-08	Shopko	\$ 9.05
9-10-08	Shopko	\$ 99.28
9-17-08	Wal-mart	\$ 153.77
9-22-08	Shopko	\$ 91.81
9-24-08	Wal-mart – Huron	\$ 38.15
9-29-08	Shopko	\$ 93.24
9-30-08	Wal-mart	\$ 74.21
10-14-08	Wal-mart	\$ 117.93

2008 DAKOTALAND FCU - CHECKS

DATE	CHECK	TRANSACTION	AMOUNT
1-29-08	1979	NW Energy	\$ 178.05
2-27-08	1984	Coborns	\$ 134.24
2-20-08	1985	Lovrien (legal fees)	\$2516.00
3-1-08	1992	Coborns	\$ 26.19
3-1-08	1994	Coborns	\$ 97.33
3-1-08	1997	NW Energy	\$ 182.54
3-3-08	1999	Shopko Pharmacy	\$ 100.90
3-7-08	2000	Coborns	\$ 12.71
3-22-08	2043	Faye's Shop	\$ 65.00
4-8-08	2046	Coborns	\$ 72.46
4-10-08	2047	Schwesers (clothes)	\$ 22.26
4-30-08	2054	Wal-mart	\$ 170.94
5-2-08	2056	Sears (grill)	\$ 527.05
5-4-08	2059	Tracy Ludson (home care)	\$ 250.00
5-23-08	2061	Brooks Oil	\$1529.20
6-2-08	2074	NW Energy	\$ 246.17
6-6-08	2075	Lovrien (legal fees)	\$ 419.79
6-13-08	2076	Brooks Oil	\$1209.60
6-14-08	2079	Walgreens	\$ 19.06
6-14-08	2084	Shopko	\$ 26.47
6-17-08	2082	Shopko	\$ 17.99
6-18-08	2087	County Fair	\$ 43.35
6-25-08	2092	Faye's Shop	\$ 45.00
6-30-08	2093	Wal-mart	\$ 56.39
7-8-08	2096	NW Energy	\$ 158.22
7-12-08	2103	County Fair	\$ 23.80
7-14-08	2112	Coborns	\$ 23.52
7-24-08	2117	Mabee Eye Clinic (sunglasses)	\$ 68.90
7-30-08	2121	Coborns	\$ 39.06
8-5-08	2126	NW Energy	\$ 259.99
8-8-08	2127	Columbia Ins.	\$ 233.25
10-11-08	2130	Mabee Eye Clinic	\$ 20.00
10-27-08	2143	Brooks Oil	\$ 734.74
10-27-08	2146	County Fair	\$ 48.05
10-27-08	2147	Krall (eye vitamins)	\$ 57.24
10-27-08	2148	Coborns	\$ 39.29
10-29-08	2144	Wal-mart	\$ 116.25
10-31-08	2154	NW Energy	\$ 135.48
11-13-08	2160	County Fair	\$ 28.59
11-17-08	2159	Wal-mart	\$ 56.96
11-20-08	2169	Brooks Oil	\$ 1004.12

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2010 1st NATIONAL BANK OF SD - VISA

DATE	TRANSACTION	AMOUNT
1-8-10	Tim's Food Pride	\$ 89.29
1-9-10	Walmart - Monte	239.21
1-9-10	Walmart - Monte	24.48
1-9-10	Geyermans - Dawson (clothes)	60.20
1-16-10	Walmart - Monte	110.22
1-21-10	County Market - Monte	120.29
2-1-10	Tim's Food Pride	33.03
2-11-10	Walmart - Monte	235.49
2-15-10	Walmart - Monte	88.32
2-18-10	Walmart - Monte	11.88
2-20-10	Walmart - Monte	93.86
2-24-10	JC Penney's- Sioux Falls (clothes)	104.89
2-25-10	Tims Food Pride	34.19
3-19-10	Walmart - Monte	88.27
3-23-10	Tims Food Pride	37.04
3-31-10	Walmart - Monte	179.38
4-3-10	Walmart - Monte	76.69
4-2-10	Tims Food Pride	20.57
4-14-10	Tims Food Pride	11.11
4-16-10	Tims Food Pride	58.02
4-23-10	Walmart- Watertown	104.59
4-26-10	Tims Food Pride	58.02
4-27-10	Coborns	39.81
4-27-10	Coborns	26.45
4-28-10	Shopko	4.33
5-3-10	Walmart - Monte	58.91
5-4-10	Walmart- Monte	5.00
5-8-10	Walmart - Monte	22.64
5-14-10	Walmart - Monte	59.88
5-16-10	Walmart - Mitchell	29.05
5-16-10	Coborns	9.59
6-1-10	Walmart	90.53
6-1-10	Shopko	17.62
6-1-10	Shopko	6.35
6-5-10	Coborns	55.40
6-7-10	Shopko	50.84
6-13-10	Walmart	60.37
6-13-10	Coborns	41.49
6-21-10	Coborns	19.03
6-23-10	Walmart - Monte	191.51

Continued - Dakotaland FCU checks

11-22-08	2174	EFEL Club Dues	\$ 15.00
11-22-08	2177	Coborns	\$ 79.24
11-30-08	2182	County Fair	\$ 28.59
12-2-08	2183	Wal-mart	\$ 140.84
12-2-08	2188	NW Energy	\$ 250.48
12-10-08	2197	Brooks Oil	\$ 588.20
12-18-08	2208	Coborns	\$ 43.74

Total Brooks Oil	\$ 10934.71	Farm Fuel & House Fuel
	<u>1642.93</u>	House Fuel Paid by Margaret
	\$ 9291.78	Farm Fuel Paid by Fred

Total Fred's medicine deducted from total - \$165.87

2009
COST OF EXPENSES FOR MARGARET

1st National Bank of SD - Checks

DATE	CHECKS	TRANSACTION	AMOUNT
1-2-09	2829	Dennis Wingen (Furnace Repair)	\$270.84
1-15-09	2840	Shopko (TV-Nursing Home Rm)	\$411.88
1-27-09	2843	Larry Jones (furnace Repair)	\$ 80.47
1-27-09	2845	Shopko	\$ 67.97
1-29-09	2846	County Fair	\$ 38.95
2-11-09	2856	Brooks Oil	\$708.90✓
2-11-09	2857	NW Energy (2months)	\$435.33
2-6-09	2558	Coborns	\$ 50.62
2-7-09	2859	Terry Raye (roof repair)	\$450.00
2-9-09	2861	Shopko	\$131.18
2-10-09	2862	J.C. Penny's (clothes)	\$143.06
2-11-09	2867	Karl's (TV Converter Box)	\$ 25.92
2-11-09	2868	Wal-mart	\$113.45
3-5-09	2875	Faye's Shop (hair cut)	\$ 15.00
3-27-09	2883	Coborns	\$ 47.48
3-27-09	2884	Columbia Ins.	\$215.75
4-3-09	2885	Brooks Oil	\$339.41✓
4-3-09	2887	Wal-mart	\$159.89
4-3-09	2889	County Fair	\$ 31.94
4-3-09	2890	Shopko	\$ 18.80
4-15-09	2894	Shopko	\$132.09
4-15-09	2896	Krall (eye vitamins)	\$ 57.24
4-16-09	2900	County Fair	\$ 40.28
4-27-09	2907	County Fair	\$ 34.88
5-4-09	2916	NW Energy	\$296.55
5-25-09	2934	County Fair	\$ 34.43
6-8-09	2939	Business Products	\$ 37.08
6-10-09	2940	Coborns	\$ 28.07
6-8-09	2941	Shopko	\$207.95
6-17-9	2951	Wal-mart	\$ 53.94
7-4-09	2961	Brooks Oil	\$1264.90✓
7-7-09	2966	Coborns	\$ 48.13
7-8-09	2968	Shopko	\$147.35
7-8-09	2969	Krall (eye vitamins)	\$ 57.24

2009 1st National Bank of SD - Visa card

DATE	TRANSACTION	AMOUNT
1-1-09	Wal-mart (Huron)	\$ 54.57
1-15-09	Wal-mart	\$ 132.02
1-25-09	Wal-mart	\$ 118.22
1-25-09	Coborns	\$ 26.72
1-25-09	County Fair	\$ 41.20
2-1-09	Wal-mart	\$ 89.28
2-15-09	Wal-mart	\$ 113.45
3-18-09	Wal-mart	\$ 132.60
4-9-09	Herbergers (Watertown -clothes)	\$ 73.79
4-11-09	Thrifty White Drug	\$ 27.96
5-19-09	County Fair	\$ 98.03
5-25-09	Wal-mart	\$ 48.94
7-3-09	Wal-mart	\$ 68.54
7-11-09	Macys (clothes)	\$ 25.12
7-11-09	Kohls (clothes)	\$ 60.00
7-31-11	Walmart - Monte	\$ 24.75
8-10-09	Wal-mart - Monte	\$ 149.17
8-12-09	Walgreens	\$ 61.06
5-15-09	County Fair	\$ 32.28
8-19-09	County Fair	\$ 16.83
9-5-09	Tim's Food Pride	\$ 75.73
9-11-09	County Fair	\$ 48.89
9-11-09	Shopko	\$ 29.36
9-14-09	Coborns	\$ 42.69
9-14-09	Shopko	\$ 25.42
9-15-09	County Fair	\$ 16.83
9-18-09	Walgreens	\$ 31.77
9-18-09	Wal-mart	\$ 19.35
9-22-09	County Fair	\$ 33.42
9-22-09	County Fair	\$ 49.23
10-3-09	K-mart	\$ 10.57
10-7-09	Sara Lee Bakery	\$ 30.21
10-8-09	County Fair	\$ 32.11
10-13-09	Tim's Food Pride	\$ 49.31
10-14-09	Wal-mart - Monte	\$ 138.28
10-15-09	Wal-mart	\$ 68.90
10-15-90	County Fair	\$ 63.94
10-21-09	Tim's Food Pride	\$ 38.56
11-1-09	Walmart - Monte	\$ 113.61
11-5-09	Tim's Food Pride	\$ 31.32
11-12-09	Walmart - Monte	\$ 189.55
11-14-09	Walmart - Monte	\$ 24.48

11-16-09	Walmart – Monte	\$ 64.39
11-16-09	Walmart – Monte	\$ 34.39
11-17-09	Walmart – Monte	\$ 253.87
11-22-09	County Fair	\$ 79.64
12-8-09	Wal-mart	\$ 84.20
12-14-09	Coborns	\$ 126.57
12-23-09	Walmart – Monte	\$ 262.42
12-26-09	Tim's Food Pride	\$ 89.26

2009 Dawson Co-op Credit Union – checks

DATES	CHECKS	TRANSACTION	AMOUNTS
3-13-09	1002	Casey Bridgman (legal fees)	\$4000.00
5-29-09	1008	Howard Locker (butcher)	\$1031.38
7-22-09	1020	Rexall Drug	\$ 14.48
7-23-09	1023	Herbergers (clothes)	\$ 53.97
7-29-09	1025	JC Penney's (clothes)	\$ 33.99
7-29-09	1029	Dimock Dairy (cheese)	\$ 65.71
7-28-09	1031	Faye's Shop (perm)	\$ 65.00
7-28-09	1032	Menards (repairs for house)	\$ 156.62
7-29-09	1035	Sara Lee Bakery	\$ 52.65
8-5-09	1041	Columbia Ins.	\$ 215.75
8-4-09	1043	NW Energy	\$ 204.65
8-19-09	1074	Columbia Ins.	\$ 179.50
8-31-09	1075	Larson Melons	\$ 30.00
9-4-09	1080	NW Energy	\$ 89.44
9-3-09	1083	Cabelas (clothes)	\$ 43.59
9-17-09	1107	Avera Brady	\$ 200.00
9-17-09	1109	Shopko	\$ 17.69
9-17-09	1110	Coborns	\$ 8.01
9-22-09	1112	Fayes Shop	\$ 13.00
9-22-09	1113	Larson Melons	\$ 20.00
9-25-09	1116	Sears (clothes)	\$ 64.11
10-7-09	1126	NW Energy	\$ 90.92
10-14-09	1129	Avera Health & Rehab.	\$ 574.00
10-22-09	1137	Rexall Drug	\$ 28.55
10-30-09	1140	Mary Zoss (home care for Margaret)	\$ 400.00
12-4-09	1142	Doug Nornberg (electrical -house)	\$ 15.00
12-2-09	1145	Brooks Oil	\$ 1023.00
12-21-09	1149	Larry Jones (adjust furnace)	\$ 143.31
12-22-09	1150	Brooks Oil	\$ 982.90
12-8-09	1151	Ann Yackley (home care for Margaret)	\$ 400.00

12-15-09	1152	Ann Yackley	"	"	\$ 342.00
12-21-09	1153	Ann Yackley	"	"	\$ 350.00
12-22-09	1154	Diane Kruger (home care for Margaret)			\$ 86.00
12-24-09	1155	Ann Yackley	"	"	\$ 171.00

2009 Dakotaland FCU, Huron, SD - checks

1-14-09	2215	Fayes Shop (perm)			\$ 60.00
1-14-09	2214	Wingen (furnace repair)			\$ 52.50
2-24-09	2216	Larry Jones (furnace repair)			\$ 167.54
2-24-09	2218	Campbell Supply (fustat)			\$ 11.65
2-25-09	2220	Krall (eye vitamins)			\$ 57.24
2-25-09	2221	Wal-mart			\$ 129.12
2-25-09	2222	County Fair			\$ 28.64
2-25-09	2223	Coborns			\$ 21.38
2-27-09	2225	Columbia Ins.			\$ 290.00
2-27-09	2229	NW Energy			\$ 299.46
3-3-09	2231	Dimock Dairy			\$ 145.58
3-3-09	2235	County Fair			\$ 35.33
3-25-09	2240	Shopko Pharmacy			\$ 141.23
3-25-09	2243	Wal-mart			\$ 108.89
3-28-09	2247	NW Energy			\$ 194.54
4-22-09	2250	Evelyn Walters (take to retired teachers)			\$ 20.00
4-22-09	2254	County Fair			\$ 48.80
4-26-09	2266	Coborns			\$ 21.38
5-25-09	2274	Shopko			\$ 22.78
5-26-09	2276	NW Energy			\$ 200.29
5-26-09	2282	Brooks Oil			\$ 501.16
6-11-09	2293	Columbia Ins.			\$ 215.75
6-19-09	2299	Coborns			\$ 39.45
7-1-09	2307	County Fair			\$ 136.08
7-10-09	2316	NW Energy			\$ 136.52
9-12-09	2327	Larson Melons			\$ 65.00
10-26-09	1755	Shopko			\$ 63.48
10-26-09	1756	Columbia Ins.			\$ 203.75
10-26-09	1758	NW Energy			\$ 87.10
10-26-09	1759	Columbia Ins.			\$ 169.50
11-06-09	2329	Curl Up-N-Dye (perm)			\$ 50.00
11-6-09	2330	Ann Yackley			\$ 110.00
11-13-09	2335	Ann Yackley			\$ 290.00
11-19-09	2337	Rexall Drug			\$ 21.00
11-20-09	2338	Ann Yackley			\$ 300.00

11-23-09	2339	Ann Yackley	\$ 280.00
11-22-09	2352	NW Energy	\$ 84.00
11-23-09	2354	Phil Hinker (water pump)	\$ 79.00
11-25-09	2356	Sara Lee Bakery	\$ 8.87
11-29-09	2359	County Fair	\$ 47.38
12-5-09	2365	Shopko	\$ 16.00
12-15-09	2371	Dimock Dairy	\$ 214.56
12-20-09	2375	Doug Nurnberg (electrical work)	\$ 200.00

2009

Total Brooks Oil	\$ 4319.11	Farm Fuel & House Fuel
	<u>*1084.30</u>	House Fuel Paid by Margaret
	\$ 3234.81	Farm Fuel Paid by Fred

Total Fred's medicine deducted from total - \$ 384.50

2010 DAKOTALAND OF – FCU - checks

DATE	CHECK	TRANSACTION	AMOUNT
2-3-10	2380	Postmaster	\$ 43.43
2-9-10	2381	NW Energy	462.86
2-5-10	2383	Faye's Shop	70.00
2-14-10	2384	Brooks Oil	489.83
2-14-10	2385	Columbia Ins.	315.00
3-4-10	2388	NW Energy	424.63
3-5-10	2390	Nelson Drug	21.40
3-23-10	2397	Columbia Ins.	212.50
3-22-10	2396	Faye's Shop	13.00
3-29-10	2392	Paulson Sheet Metal (furnace)	119.28
3-30-10	2399	NW Energy	219.45
5-20-0	2410	NW Energy	261.91
5-24-10	2420	Walmart – Monte	210.74
5-26-10	2421	Walgreens	17.55
5-20-10	2418	Columbia Ins.	212.50
7-13-10	2434	Columbia Ins.	132.00
8-3-10	2447	NW Energy	200.16
9-20-10	2452	NW Energy	133.90
9-29-10	2462	Faye's Shop	80.00
10-5-10	2467	Shopko	52.51
10-9-10	2468	County Fair	53.46
10-9-10	2469	County Fair	102.55
10-19-10	2475	NW Energy	140.14
10-26-10	2476	NW Energy	100.53
11-2-10	2481	1 st Nat. Ins.	338.00
11-3-10	2483	Humana	93.00
11-12-10	2487	Dimock Dairy	151.90
11-19-10	2494	Fayes Shop	15.00
11-18-10	2491	Brooks Oil	469.76
12-1-10	2498	Casey Bridgman	12116.86
12-7-10	2496	NW Energy	69.64
12-22-10	2502	Dimock Dairy	182.36
12-23-10	2504	Sara Lee Bakery	42.30
12-23-10	2505	Fayes Shop	53.00
12-28-10	2506	Brooks Oil	609.40

6-26-10	Walmart -- Monte	37.08
6-26-10	Tims Food Pride	23.84
6-29-10	Shopko	18.01
6-30-10	Walmart	46.53
6-30-10	Coborns	10.70
6-30-10	Shopko	16.95
7-1-10	Walmart	43.36
7-7-10	Walmart	39.05
7-8-10	Coborns	56.99
7-10-10	Coborns	78.47
7-20-10	Walmart	61.02
7-23-10	Walmart	60.20
7-25-10	Shopko	6.34
7-29-10	Humana	232.50
7-31-10	Walmart -- Monte	55.77
7-31-10	Thrifty White -- Monte	91.51
8-3-10	County Market	69.05
8-5-10	Sara Lee Bakery -- Marshall	27.11
8-6-10	Walmart -- Monte	161.65
8-10-10	Walmart	41.37
8-11-10	Shopko	2.99
8-21-10	County Fair	74.08
8-25-10	JC Penney's (clothes)	63.59
8-28-10	Coborns	47.06
8-30-10	Walmart	104.40
9-1-10	Walmart -- Huron	32.22
9-7-10	Walmart	82.60
9-10-0	Columbia Ins. (misc. deduction)	338.00
9-10-10	County Fair	51.00
9-14-10	Shopko	16.95
9-15-10	Walmart -- Monte	41.00
9-16-10	County Market	59.86
9-25-10	Walmart	138.76
9-25-10	County Fair	45.39
9-27-10	Browns Shoe Fitco (shoes)	97.47
9-27-10	Walmart	79.49
9-27-10	Walmart	116.08
9-27-10	Schwesers (clothes)	130.38
10-2-10	Tims Food Pride	53.48
10-3-10	Walmart -- Monte	56.50
10-3-10	Tims Food Pride	14.35
10-6-10	Walmart	62.14
10-6-10	Shopko	78.62
10-9-10	Walmart	119.32

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2010 - 1st NATIONAL BANK - continued

10-10-10	Walmart	185.00
10-14-10	Walgreens	12.99
10-14-10	Coborns	10.47
10-20-10	Walmart	58.88
10-21-10	Walmart Pharmacy	1.71
10-26-10	Walmart -- Monte	5.00
10-28-10	Walmart Pharmacy	51.79
10-28-10	Tims Food Pride	30.81
11-2-10	Walmart	64.32
11-20-10	Columbia Ins.	212.50
11-10-10	Sara Lee Bakery -- Huron	13.02
11-10-10	Walmart -- Huron	55.13
11-12-10	Walmart	38.01
11-12-10	County Fair	26.97
11-15-10	Walmart	27.49
11-16-10	Walmart	94.84
11-16-10	County Fair	33.78
11-16-10	Shopko	39.39
11-24-10	Hyvee -- Watertown	89.16
11-27-10	Tims Food Pride - Dawson	28.04
11-29-10	Walmart -- Monte	74.69
12-1-10	County Fair	89.46
12-1-10	Walmart	75.68
12-10-10	Coborns	65.42
12-22-10	Walmart	41.91
12-23-10	Coborns -- Huron	51.75
12-26-10	Tims Food Pride	32.57
12-28-10	County Market	69.88

Total Brooks Oil

\$

1539.76

Farm Fuel & House Fuel

House Fuel Paid by Margaret

Farm Fuel Paid by Fred

Total Fred's medicine deducted from total for 2010 - 21.25

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ADDITIONAL EXPENSES FOR 2010

DAWSON CO-OP CREDIT UNION - Checks

DATE	CHECKS	TRANSACTION	AMOUNT
1-29-10	1176	Rexall Drug	\$ 22.41
2-11-10	1181	Ann Yackley (home health care)	80.00
2-24-10	1186	Ann Yackley " "	80.00
3-10-10	1189	Jim Yackley (hearing aid repair)	300.00
4-9-10	1194	Demock Dairy	123.81
6-11-10	1205	Brooks Oil	495.00
6-16-10	1207	Fayes Shop	65.00
9-6-10	1211	Brooks Oil	742.00
8-13-10	1215	Columbia Ins.	212.50
8-24-10	1223	Larsons Melons	21.00

2011 1st NATIONAL BANK OF SD - VISA

DATE	TRANSACTION	AMOUNT
1-7-11	Walmart – Monte	\$ 109.38
1-8-11	Walmart – Monte	115.55
1-13-11	Humana	93.00
1-23-11	Tim's Food Pride	20.99
1-26-11	Walmart	246.60
1-27-11	County Fair	30.89
1-28-11	Walmart - Huron	29.43
1-30-11	Walmart Pharmacy	10.00
2-1-11	Walmart Pharmacy	36.00
2-9-11	Walmart - Brookings	63.46
2-9-11	Walmart	113.74
2-19-11	County Fair	38.26
2-19-11	Walmart	57.46
2-24-11	Walmart	70.25
2-26-11	Tim's Food Pride	22.34
3-6-11	Walmart	116.07
3-6-11	Walgreens	29.65
3-5-11	Walmart Pharmacy	10.80
3-10-11	Columbia Ins. (misc. deduction)	632.00
3-11-11	Walmart – Monte	128.57
3-14-11	Walmart	105.28
3-15-11	Coborns	86.33
3-22-11	Walmart	126.22
3-24-11	Walmarat Pharmacy	7.00
3-29-11	Coborns	63.99
4-3-11	Walmart	65.85
4-3-11	Coborns	37.08
4-5-11	Walmart Pharmacy	10.80
4-9-11	County Fair	122.74
4-12-11	Walmart	117.28
4-12-11	Sanborn Weekly Journal (enjoyed read articles to Margaret)	38.25
3-25-11	Columbia Ins. (misc. deduction)	214.25
4-20-11	Darin's Market	12.90
4-27-11	Walmart	88.41
4-27-11	Walmart Pharmacy	136.40
4-30-11	Walmart – Watertown	120.77
5-13-11	Walmart Pharmacy	7.00
5-18-11	Walmart	79.49
5-29-11	Walmart	28.75
5-31-11	Walmart	28.34

2011 – 1st NATIONAL BANK OF SD - continued

6-3-11	Walmart	98.84
6-13-11	Walmart	217.53
6-16-11	Walmart Pharmacy	10.80
6-18-11	Sara Lee Bakery	23.74
6-18-11	Coborns – Huron	55.67
6-21-11	Walmart	62.47
6-23-11	Shopko	18.54
6-30-11	Walmart	121.58
6-30-11	Walgreens	36.01
6-30-11	County Fair	37.90
7-4-11	Walmart	28.37
7-4-11	Coborns	79.65
7-5-11	Coborns	32.44
7-10-11	Walmart	41.59
7-10-11	Shopko	38.14
7-11-11	Walmart Pharmacy	126.40
7-14-11	Walmart	43.85
7-14-11	Coborns	89.85
7-15-11	Nepstads (flowers)	30.21
7-16-11	Coborns	31.26
7-17-11	Shopko	38.44
7-18-11	Coborns	19.89
7-23-11	Walmart	66.46
7-27-11	Walmart Pharmacy	10.80
7-27-11	County Fair	57.12
7-27-11	Coborns	20.35
7-28-11	Walmart	56.54
7-28-11	Schwesers (clothes)	54.27
8-1-11	Shopko	16.95
8-4-11	Coborns	15.96
8-8-11	Walmart	59.68
8-9-11	Walmart – Monte	43.70
8-12-11	Columbia Ins. (misc deduction)	176.50
8-16-11	Walmart	59.60
8-15-11	Walmart Pharmacy	36.00
8-21-11	Shopko	16.95
8-24-11	Walmart	59.60
8-25-11	Coborns	46.59
8-29-11	Walmart	54.96
9-1-11	Walmart	34.37
9-2-11	Coborns – Huron	27.76
9-2-11	Walmart – Huron	73.49
9-3-1	Sara Lee Bakery - Huron	15.21
9-4-11	Walmart	47.22

2011 – 1st NATIONAL BANK OF SD - continued

9-8-11	Coborns	56.30
9-8-11	Walmart Pharmacy	27.33
9-11-11	Walmart Pharmacy	10.80
9-15-11	Walmart – Huron	47.56
9-17-11	Walmart	80.57
9-17-11	Coborns	49.31
9-17-11	Walmart Pharmacy	35.00
9-26-11	Darin's Market – Woonsocket	15.96
9-28-11	Walmart	127.04
10-25-11	Walmart	99.62
10-8-11	Shopko	16.95
10-13-11	Walmart	155.06
10-13-11	Walmart Pharmacy	191.17
10-18-11	County Fair	115.62
10-19-11	Walmart – Huron	45.78
10-19-11	Sara Lee Bakery – Huron	30.34
10-20-11	Walmart	88.77
10-21-11	Walmart	108.32
10-27-11	County Fair	33.88
10-27-11	Coborns	75.27
10-31-11	Walmart – Huron	63.48
10-31-11	Sara Lee Bakery – Huron	11.63
11-3-11	Walmart	55.08
11-8-11	Walmart	64.89
11-8-11	Walmart	4.00
11-8-11	Coborns	85.14
11-12-11	Walmart Pharmacy	10.80
11-15-11	Walmart (TV)	638.41
11-19-11	Coborns	58.07
11-22-11	Coborns	55.74
11-26-11	Walmart	158.16
11-26-11	K-mart (clothes)	33.88
11-28-11	Walmart	74.04
11-30-11	County Fair	54.65
12-3-11	Coborns – Huron	45.94
12-10-11	Walmart	109.98
12-17-11	Walmart	52.03
12-17-11	Coborns	52.66
12-26-11	Tim's Food Pride	13.71

2011 DAKOTALAND FCU - CHECKS

DATE	CHECK	TRANSACTION	AMOUNT
1-4-11	2507	NW Energy	\$ 133.81
1-10-11	2515	Faye's Shop	15.00
1-9-11	2515	Retail Services	292.94
1-13-11	2520	Humana	93.00
3-1-11	1236	NW Energy	197.86
3-1-11	1237	Brooks Oil	657.92
6-18-11	1248	Brooks Oil	936.80
3-29-11	2539	NW Energy	155.71
4-4-11	2546	Cabela's (clothes)	66.70
4-21-11	2551	Faye's Shop	65.00
4-26-11	2554	Brooks Oil	1504.70
4-27-11	2557	Mabee Clinic	222.00
5-3-11	2555	NW Energy	133.39
6-1-11	2568	1 st Nat. Bank Car Ins.	252.00
6-7-11	2569	NW Energy	87.20
6-4-11	2575	Faye's Shop	15.00
4-4-11	2577	NW Energy	102.10
7-18-11	2579	Menards (refrigerator)	221.42
8-12-11	2583	Shopko	29.32
7-21-11	2585	Avera Brady	100.00
8-13-11	2591	Coborns	59.52
8-13-11	2592	County Fair	53.70
7-29-11	2595	Coborns	38.79
8-15-11	2596	Faye's Shop	15.00
8-5-11	2597	Nepstads	53.00
8-5-11	2598	Coborn	65.88
8-2-11	2602	NW Energy	225.76
8-4-11	2608	Coborns	58.97
8-30-11	2611	1 st Nat. Bank Ins.	363.08
8-30-11	2613	Brooks Oil	1714.70
9-1-11	2618	County Fair	26.04
9-15-11	2623	Coborns	156.01
8-17-11	2626	Larson Melons	20.00
8-27-11	2628	Fayes Shop	55.00
10-20-11	2635	Shopko	3.99
11-1-11	2641	NW Energy	256.65
11-1-11	2642	Casey Bridgman (legal fees)	5000.00
11-26-11	2649	NW Energy	75.22
12-22-11	2652	Sara Lee Bakery	68.05
12-23-11	2653	Walmart	166.49

2011 DAWSON CO-OP CREDIT UNION – CHECKS

2-24-11	1235	Faye's Shop	\$ 15.00
3-1-11	1236	NW Energy	197.86
3-1-11	1237	Brooks Oil	657.92
5-8-11	1244	Walmart	72.00
5-13-11	1245	Casey Bridgman	4702.16
6-18-11	1248	Brooks Oil	936.80

Total Brooks Oil	\$ 6408.84	Farm Fuel & House Fuel
	<u>949.00</u>	House Fuel Paid by Margaret
	\$ 5459.84	Farm Fuel Paid by Fred

Total Fred's medicine deducted from total - \$158.40

(5)

ADDITIONAL EXPENSES FOR 2011

DAWSON CO-OP CREDIT UNION - CHECKS

DATE	CHECKS	TRANSACTION	AMOUNT
1-20-11	1264	Brooks Oils	\$1109.46
2-7-11	1272	Country Care Services LLC	769.23
		Home Health Care	
7-26-11	1250	Dakota Hearing	200.00
		(hearing air repair)	
10-3-11	1356	Menards (refrigerator)	510.07
12-29-11	1402	Kathy Golden (perm)	55.00

2012 DAKOTALAND FCU - CHECKS

DATE	CHECK	TRANSACTION	AMOUNT
12-27-11	2660	Avera Brady Health and Rehab	\$ 199.50
12-29-11	2856	Omnicare of SD	65.22
1-20-12	Counter check #1	Brooks Oil	680.80
1-3-12	2658	NW Energy	111.02
2-28-12	2702	NW Energy	299.65
2-28-12	2703	Columbia Ins.	348.50
3-31-12	2707	Pat Fredlund	40.00
4-18-12	2670	Columbia Ins.	348.50
4-10-12	2671	NW Energy	143.99
4-19-12	2669	NW Energy	65.05
4-20-12	2685	Casey Bridgman	3000.00
4-24-12	2682	NW Energy	105.30
5-4-12	2695	Brooks Oil	988.26
5-17-12	2727	1 st Nation Bank (insurance)	217.00
5-19-12	2729	Coborns	90.85
5-29-12	2733	Brooks Oil	966.00
6-15-12	2741	Brooks Oil	952.40
6-25-12	2745	Walmart	58.37
7-31-12	2756	Casey Bridgman	500.00
8-1-12	2762	NW Enegy	140.97
8-9-12	2765	Columbia Ins.	217.00
8-16-12	2768	Walmart	296.16
9-20-12	2774	Casey Bridgman	500.00
9-26-12	2776	NW Energy	262.02
10-2-12	2781	NW Energy	247.93
10-5-12	2782	Coborns	47.21
10-30-12	2798	Mabee Eye Clinic	20.00
11-1-12	2803	Phillip Hinker (plumbing)	450.00
12-17-12	2810	NW Energy	262.53
12-17-12	2811	Brooks Oil	712.000
12-21-12	2813	Dimock Dairy	206.30

2012 1st NATIONAL BANK OF SD - CHECKS

3-25-12	Counter Check	Pat Fredlund (home care)	1000.00
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(1)

2012 DAWSON CO-OP CREDIT UNION

1-20-12	1404	Herbergers (clothes)	\$ 35.53
4-7-12	1324	Brooks Oil	645.86
4-20-12	1449	JC Penney's	49.14
7-13-12	Debit	Herberger's	34.99
8-22-12	Debit	Geyermans	34.20
9-27-12	1535	Pat Fredlund (home care)	125.00
10-18-12	1556	Smart Choice Hearing (hearing aids for Margaret)	4690.00
10-30-12	1567	Brooks Oil	1481.25
11-15-12	1561	Joe Kallhoff (building repair)	825.31
11-27-12	1562	Brooks Oil	949.86

Half of the hearing aides should be considered in Margaret's expenses as she only used them a short period of time. Early in 2014 Fred took them in and had them adjusted for his use. These could be appraised if felt necessary.

2012 1st NATIONAL BANK OF SD - VISA

DATE	TRANSACTION	AMOUNT
1-2-12	Walmart Pharmacy	\$ 102.42
1-12-12	Coborns	39.19
1-12-12	Coborns	56.39
1-12-12	Wal-mart	153.88
1-26-12	Coborns	44.69
2-8-12	Walmart	157.60
2-8-12	County Fair	32.15
2-8-12	Coborns	49.80
2-10-12	Walmart	114.40
2-14-12	Sara Lee Bakery	12.62
2-23-12	Walmart	102.74
2-23-12	Walmart Pharmacy	148.42
3-1-12	Walmart	143.57
3-5-12	Walgreens	56.12
3-5-12	Walmart	80.11
3-7-12	Walmart Pharmacy	10.00
3-7-12	Walmart Pharmacy	31.08
3-14-12	Coborns	60.67
3-15-12	Columbia Ins.	217.00
3-28-12	Walgreens	25.40

1ST NATIONAL BANK OF SD - continued

3-28-12	Walmart	99.98
3-28-12	County Fair	3.73
4-5-12	Walmart	\$ 51.16
4-9-12	Wal-mart - Huron	60.05
4-10-12	Walmart	107.02
4-10-12	Coborns	39.02
4-13-12	Coborns	77.10
4-13-12	Wal-mart	68.57
4-13-12	Shopko	15.95
4-19-12	Walmart Pharmacy	297.88
4-20-12	Coborns	78.41
5-3-12	Coborns	74.62
5-15-12	Coborns	150.70
5-27-12	Walmart	61.99
5-27-12	Walmart	75.11
5-27-12	Coborns	59.75
5-27-12	Shopko	15.89
5-30-12	County Fair	64.40
6-3-12	Wal-mart	67.65
6-8-12	Wal-mart	81.67
6-11-12	Walmart	117.69
6-12-12	Coborns	74.31
6-17-12	Walmart	93.45
6-22-12	Coborns	36.94
7-2-12	Coborns	36.99
7-6-12	Walmart	50.12
7-10-12	Coborns	55.49
7-10-12	County Fair	53.58
7-12-12	Shopko	24.57
7-16-12	Walmart	84.04
7-18-12	Sara Lee Bakery	22.76
7-23-12	Coborns	57.40
7-24-12	Coborns	38.89
7-30-12	Coborns	37.15
6-20-12	County Fair	131.41
6-22-12	Walmart	83.14
6-28-12	Walmart	75.82
6-28-12	Coborns	51.32
7-2-12	Walmart	97.34
7-24-12	County Fair	22.22
7-24-12	Walgreens	34.95
7-30-12	Walmart	115.08
8-7-12	Walmart	186.59
8-19-12	Walmart	126.75

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2012 1st NATIONAL BANK OF SD - continue

8-19-12	Coborns	18.56
8-26-12	Walmart	153.06
8-26-12	Coborns	61.61
8-31-12	Sara Lee Bakery	45.52
9-6-12	Walmart – Brookings	76.29
9-6-12	Walmart	85.74
9-7-12	Shopko	15.89
9-12-12	Walmart	110.91
9-12-12	Walmart	10.00
9-18-12	Columbia Ins.	333.00
9-20-12	Coborns	51.99
9-20-12	Walmart	43.09
9-22-12	Walmart	47.54
9-26-12	Walmart	24.90
10-31-12	Coborns	29.46
10-31-12	Columbia Ins.	333.00
10-31-12	Columbia Ins.	217.00
10-2-12	Walmart	25.42
10-9-12	County Fair	45.24
10-11-12	K-mart	41.95
10-19-12	Walmart	122.90
10-19-12	County Fair	43.82
10-23-12	Walmart	35.34
10-23-12	Walmart Pharmacy	60.32
10-31-12	Walmart	62.26
11-4-12	Walmart Pharmacy	72.66
11-19-12	County Fair	51.85
11-20-12	Walmart	191.93
11-21-12	Walmart	142.19
11-23-12	Walmart – Brookings	87.06
11-28-12	Walmart	139.94
12-3-12	Coborns	78.86
12-30-12	Walgreens	38.13
11-30-12	Walmart	38.61
12-11-12	Walmart	196.06
12-11-12	County Fair	13.08
12-12-12	Walmart Pharmacy	215.54
12-8-12	Shopko	5.08
12-18-12	Walmart	43.40
12-21-12	Walmart	129.16
12-21-12	Walmart Pharmacy	64.32
12-27-12	Walmart	61.12
12-27-12	Walmart Pharmacy	8.96

Total Brooks Oil	\$ 7376.43	Farm Fuel and House Fuel
	<u>2016.10</u>	House Fuel Paid by Margaret
	5360.33	Farm Fuel Paid by Fred

Total Fred's medicine deducted from total - \$108.29

(5)

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 27530

REBECCA HEIN; GOLDIE N. BURNHAM,
Individually, and GOLDIE N. BURNHAM,
As Personal Representative of the ESTATE OF
MARGARET L. ZOSS, Deceased
Appellees,

vs.

FRED M. ZOSS,
Appellant.

Appeal from Circuit Court
Third Judicial Circuit, Sanborn County, South Dakota
Honorable Jon R. Erickson, Circuit Court Judge

BRIEF OF APPELLEES

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Notice of Appeal Filed August 14, 2015
Amended Notice Filed August 17, 2015

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PRELIMINARY STATEMENT

The Appellant, Fred Zoss, will be referred to as Fred. Goldie Burnham and Rebecca Hein will be referred to as Goldie and Rebecca. Their mother, Margaret Zoss, will be referred to as Margaret.

The Clerk's record is designated "R". There are two volumes of trial transcripts and Volume 1 will be referred to as "T1" and Volume 2 will be referred to as "T2". The summary judgment hearing transcript will be referred to as "SJ". The pretrial conference transcript will be referred to as "PT". The transcript from the May 12, 2015 hearing on the motions in limine is referred to as "MT". The transcript from the hearing on Fred's new trial motion on July 21, 2015 is referred to as "NT".

JURISDICTIONAL STATEMENT

Fred appeals from two Judgments entered against him after a jury trial. Goldie and Rebecca, along with Margaret's Estate, were awarded judgment against Fred on June 9, 2015, with Notice of Entry of Judgment being served on June 15, 2015. (R 1476-77; 1514) Fred filed a Motion for New Trial on June 29, 2015, obtained an Order extending time for hearing on such Motion, and the trial court ultimately denied the Motion for New Trial at the July 21, 2015 hearing on the Motion. (R 1521, 1668, NT 16) The trial court's Order denying the Motion for New Trial was filed July 24, 2015 and Notice of Entry was served on August 14, 2015. (R 1834-35) Fred filed his Notice of Appeal on August 14, 2015 and an Amended Notice of Appeal on August 17, 2015. (R. 1838, 1868) This Court has jurisdiction of this appeal pursuant to SDCL 15-26A-3 and 15-26A-7.

STATEMENT OF THE ISSUE

1. Whether the trial court acted within its discretion in refusing to allow Appellant to submit extrinsic evidence to attempt to excuse his breach of fiduciary duty?

The trial court, pursuant to this Court's directive in *Bienash v. Moller*, properly refused to allow Fred to present extrinsic evidence of Margaret's claimed intent to allow Fred, her fiduciary, to take her money and use her land rent-free.

Legal Authority:

Bienash v. Moller, 2006 SD 78, 721 N.W.2d 431

In re Estate of Duebendorfer, 2006 SD 79, 721 N.W.2d 438

SDCL 29A-6-103

SDCL 55-2-9

STATEMENT OF THE CASE

This action involves a son's fiduciary fraud committed against his mother. Fred, Goldie and Rebecca are Margaret's children. Fred made himself a joint owner of Margaret's bank account in 2004 and became her attorney in fact under a power of attorney in 2005. (T 137, R 1474) While serving as Margaret's fiduciary until her death in January 2013, Fred took substantial sums from Margaret by transferring her retirement funds from her joint account to his own individual bank account. (R 522 –Ex. 4) He also used Margaret's land rent-free and would later use that same land for another year without paying rent, after the land passed to his sisters, Goldie and Rebecca. (T2 141, 67, 68)

Margaret passed away on January 5, 2013, at the age of 102. (T1 32) Goldie was appointed as the personal representative of her mother's estate. (T1 32) Goldie, as

personal representative of Margaret's Estate, and Goldie and Rebecca individually, commenced this action through a Summons and Amended Complaint served on Fred on January 29, 2014. (R 30, 49-50) The Estate sought recovery for breach of fiduciary duty, undue influence, and conversion, while Goldie and Rebecca brought a breach of contract action for rent owed them by Fred for his rent free use of their land in 2013. (R 30-47)

On July 9, 2014, Margaret's Estate filed a Motion for Partial Summary Judgment requesting that the trial court enter a partial summary judgment ruling that Fred was Margaret's fiduciary after she executed the power of attorney on October 25, 2005, that Fred breached the fiduciary duty he owed to Margaret, and that a confidential relationship existed between Fred and Margaret. (R 73-74) A hearing on the Motion was held before the Honorable Jon R. Erickson, Circuit Court Judge, on September 2, 2014. (SJ 1-2) The trial court ruled in favor of Margaret's Estate, concluding that Fred was a fiduciary after he became Margaret's attorney in fact and that he was also in a confidential relationship with her. (R 264) The trial court, however, concluded that Fred's claimed breach of his fiduciary duty was for the jury to determine. (R 265)

The trial court set this matter for jury trial on May 20-21, 2015. (R 256) On April 15, 2015, Goldie, Rebecca and the Estate filed their first Motion in Limine to preclude extrinsic evidence and hearsay evidence of Margaret's claimed intentions. (R 333) Fred filed his Objection, claiming he should be allowed to present extrinsic evidence in contravention to this Court's directive in *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431. (R 374-76) Fred did not inform the Court in his objection that he intended to offer Margaret's 1989 Will as evidence. *Id.* The trial court held a hearing on the Plaintiffs' First Motion in Limine on May 12, 2015. (MT 1-2) During the hearing,

Fred did not argue he was going to rely on any written extrinsic evidence and certainly did not refer to Margaret's 1989 Will. (MT 11-15) The trial court, concluding that the written Power of Attorney did not allow gifting or self-dealing, granted Plaintiffs' First Motion in Limine and precluded Fred from presenting extrinsic evidence to claim his gifting and self-dealing was authorized. (R 444)

The jury trial was held on May 21, 2015 and May 22, 2015, before the Honorable Jon R. Erickson. (R 227) After plaintiffs' evidence in chief was presented, the trial court held a hearing on the issue of punitive damages, allowing that claim to go forward, and denied Fred's motion for directed verdict. (T1 149-151) On the second day of trial, Fred attempted to introduce Margaret's 1989 Will, apparently in a last ditch effort to claim that Margaret's Will somehow forgave his fiduciary fraud. (T2 46-47) This issue had never been argued or presented to the trial court and was presented to the trial court at a recess mid-morning on the second day of trial. (T2 47) The trial court concluded that the Will would not come into evidence at that late juncture. (T2 47)

The jury returned verdicts in favor of Margaret's Estate awarding compensatory and punitive damages, and in favor of Goldie and Rebecca individually for rent owed. (R 447-48) The trial court entered judgment on the jury verdicts. (R 1466-67) Fred obtained new counsel and filed a Motion for New Trial on June 29, 2015. (R 1509, 1511, 1521) The trial court heard the Motion on July 21, 2015 and denied the Motion for New Trial by its Order entered on July 24, 2015. (NT 16, R 1834) Fred appealed on August 14, 2015 and filed an Amended Notice of Appeal on August 17, 2015. (R 1838, 1868)

STATEMENT OF FACTS

Margaret was born in 1910. (T1 32) Margaret was married to Adolph Zoss, Jr. until his death in 1989. (T1 29, T2 6-7) During Adolph's life, they farmed and lived together near Forestburg, South Dakota. (T1 29) Margaret was a teacher. (T1 38) She and Adolph Jr. had five children together: Adolph III ("Toto"), Fred, Goldie, Rebecca and Ben. (T1 29-30) Goldie worked as a nurse and lives with her husband Bob Burnham in Sioux Falls. (T1 30) Rebecca lives in Fedora with her husband Louis Hein. (T1 31, 96) Toto and Ben both farmed on their own farms. (T1 31) Fred was a teacher in Sioux Falls until he retired in 2001. (T2 8)

Margaret stayed on the farm after Adolph Jr. passed away in 1989. (T2 6-7) Fred moved in with his mother in 1993, while he was going through a divorce with his first wife. (T1 31, T2 8) Margaret was 83-years old at that time. He then continued to live with his mother after his divorce and until she passed away on January 5, 2013, at the age of 102. (T2 8, T1 32)

The Zoss family dynamic was strained due to Fred's poor behavior and poor treatment of other people. He was self-absorbed and mistreated his nephews. (T1 94). He would hire his nephews to do work and then have the audacity to tell them "well, your dad already owes me money so I don't need to pay you." (T1 94) His bad behavior unfortunately limited Rebecca and Goldie's contact with their mother while she lived with Fred. (T1 94, 99) Fred would not listen to Rebecca about care suggestions. (T1 112) Goldie was scared of a confrontation with him because he would approach her and

not be very nice. (T1 87) He also mistreated her son. (T1 87) This made it difficult for her to communicate with her mother. (T1 87-88)¹

The jury also heard evidence that Fred limited phone contact with Margaret. She had a phone near her chair hooked to her lifeline, but that was cancelled. (T1 100) The other phone was in the kitchen, but it was set so the answering machine would pick up after two rings and Margaret could not answer it in time. (T1 100, 117-18) Rebecca even bought her mom a phone with large numbers and a flashing light, but Fred later unplugged it claiming “he did not want [Margaret] talking to his bull buyers.” (T1 101-02)

Margaret was by no means destitute. She had a bank account at First National Bank of South Dakota. (T1 33) Her social security and teacher’s retirement were deposited monthly into her account. (T1 38) She also had monthly automatic withdrawals for her Medicare supplement, Santel Communications and Central Electric. (T1 44-45) Margaret also held a life estate in a quarter of tillable land and 240 acres of pastureland. (T1 34)

In 2004, when Margaret was 94, Fred obtained joint ownership of Margaret’s account. (T1 137) On October 25, 2005, when Margaret was 95, she executed a power of attorney naming Fred as her attorney in fact. (R 1474; T1 135) Fred then filed the Power of Attorney with the Sanborn County Register of Deeds. (T1 26) It did not contain a provision that allowed gifting or self-dealing by the fiduciary. (R. 1474) When Fred obtained the power of attorney, Margaret’s vision was failing, she had difficulty

¹ Fred points out that Goldie did not attend Margaret’s funeral, but fails to point out that she did not attend because she had vascular necrosis of her hip and was unable to attend. (Appellant’s Brief at 18, T1 88)

signing checks, could not operate a computer, and could not perform an electronic funds transfer. (T 135-36)

While Fred served as Margaret's attorney in fact, he held a joint ownership interest in her bank account, used her land rent free, and lived with Margaret, his care of Margaret and the home was lacking. The bathroom ceiling in the home was falling in and mold was growing. (T1 100; R 536-37 – Ex. 14) The contents of the house were old. (T1 101) She had a television that her niece hooked to cable, but the cable was discontinued. (T1 101) Fred unplugged the large button phone Rebecca had bought for her. (T1 102) Margaret loved people and Rebecca never ran into any friends visiting her at home. (T1 126)

Fred did not spend a lot of money for Margaret's care. (T1 103) Her everyday clothes were from Goodwill. (T1 101) Margaret was in need of hearing aids; her hearing aids worked poorly. (T1 102-03) Sadly, Margaret, on her deathbed, had no hearing aids and could not hear Rebecca because Fred claimed he had not picked them up yet. (T1 103, 109-10)

Fred was also gone much of the time. (T1 104) He met Catherine, his second wife, in 1998 and they eventually married in 2009. (T1 36) She lived in Minnesota. (T1 20) They eventually purchased a \$280,000 house together in Dawson, Minnesota in 2006. (T2 33, 34)

Rebecca would visit her mom and Fred was nowhere to be found. (T104) For example, Rebecca testified that in 2005, when Margaret was 95, Fred went to Minnesota and left his mom alone in the Sanborn County house during an ice storm. (T1 103) The ice storm knocked out the power and Margaret was left in the house without heat and

power for a day and a half. (T103-04) She finally was rescued by her other son, Toto, and his wife. (T1 104)

In July 2011, when Margaret was 101, she fell and her condition declined. (T1 103) By 2011, her condition had deteriorated and she was blind and nearly deaf, but Fred did not hire a home health care worker to assist in her care.² (T1 105-06) Instead, Fred's cost saving care measure was to strap her in a chair using two leather belts tied together with Gorilla tape. (T1 106-08) One day in 2011, Rebecca stopped by to drop off muskmelon and squash, only to find her mom belted to a chair and asking to go to the bathroom. (R 533-35 - Ex. 11, 12, 13, T1 106-08) Rebecca peeled off the Gorilla tape holding the belts together, took off the belts and took her to the bathroom. (T1 106, 109) Rebecca then talked to a cousin, who then called social services. (T1 109) She also confronted Fred and told him their mother could not be left alone and that she needed hearing aids. (T1 109) He told Rebecca if there were a fire mom "would probably burn any way if I was there." (T1 109) As to the hearing aids, Fred told her he had ordered her new ones, but Rebecca never saw them on her mother. (T1 110) Rebecca felt their mother would be better off in a nursing home, but Fred was aware of the cost. (T1 110) He refused to put her in a nursing home. (T1 122-23)

Interestingly, Fred, in his Brief, claims that "Margaret fervently wished to live in the rural farmhouse . . ." in an apparent attempt to claim that Margaret would not leave the house for a nursing home. (Appellant's Brief at 12) There is no citation to the record and nothing in the transcript from the trial to support this claim. The testimony at trial

² Fred's wife, Catherine Zoss, testified that they would sometimes hire help to care for Margaret, but she recognized that was very sporadic. (T2 37)

was that the nursing home would have been better for Margaret and that Fred did not even hire a home health care aid to assist Margaret. (T1 105-06, 110)

After Margaret's death in January 2013, Goldie was appointed as the personal representative of Margaret's estate. (T1 32) In her duties as personal representative, she investigated her mother's finances by obtaining bank statements from First National Bank of South Dakota. (T1 33) She was able to obtain bank statements going back to 2007. (T1 37) In reviewing Margaret's bank statements, she became curious about certain transfers to another account. (T1 38-39) From that information, she put together a document that organized the various deposits and withdrawals from Margaret's account from 2007 through 2013. (T1 40, R 522 -Ex. 4 – App. at 3-7) That document became a powerful exhibit at trial and it was very telling as to Fred's defalcation.³

For clarification, Margaret had a bank account in Woonsocket at First National Bank of South Dakota. (T1 33) This was Margaret's bank account in which Fred was listed on jointly sometime in 2004. (T1 137) Fred admitted that the money in this account belonged solely to his mother. (T1 137) Fred had his own personal account in Mitchell at First National Bank of South Dakota that was commonly referred to as his "farm account" or account 5752. (T1 39, 138, R597 – Ex. 7) From 2007 through 2013, Fred engaged in a course of conduct where he transferred money from Margaret's account into his farm account, 5752. (T1 44, 138, R 522 – Ex. 4 – App. at 3-7) Fred would perform online transfers removing money out of his mom's account and putting it into his account. On average, he did this two to three times a month and the amount of

³ The record copy of Exhibit 4 has portions that were cut off in the scanning process. Appellees are providing a true copy of that document in the Appendix.

each transfer varied, but it was usually at least \$400.00 or more each time. (R 522- Ex. 4 – App. at 3-7). In summary, Fred, while acting as Margaret’s fiduciary, was taking his mom’s money from her account, which he admitted was solely her money, and then commingling it with money in his individual account, the farm account.⁴ (T 137, 138) In approximately six-years, Fred’s various online transfers from Margaret’s account to his farm account totaled \$136,215.89. (R 538 - Ex. 4, App 3-7)

Although Fred claimed that he was using the money he was removing from Margaret’s account to pay her expenses, he produced no receipts. (T1 139) He was issued a subpoena to produce the bills and receipts for Margaret’s care and did not bring any receipts or bills to Court. (T2 24-25) He did produce a listing of checks, claiming all of the checks on the list were for his mother’s expenses. (T2 26 – R 1448 – Ex. S) However, there was simply nothing to show that these checks from his farm account were for Margaret’s expenses and he did not know what he purchased on a specific date. (T2 26) For example, at trial, Fred claimed that he bought Margaret hearing aids. (T2 28) He then claimed he could not obtain the records for the hearing aids. (T2 29) Counsel for Goldie and Rebecca obtained the billings for the hearing aids and, on cross-examination, it was revealed that Fred had purchased the hearing aids for himself. (T2 30-31; R 582-96 - Ex. 18)

In addition to Fred taking his mother’s money from her bank account, he also used his mother’s land without paying her any rent. From 2006 through 2013, Fred

⁴ Fred in his Brief, claims he had an established practice of transferring money from Margaret’s account to his account before Margaret executed the power of attorney. (Appellant’s Brief at 15) However, the record does not support such claim. Margaret’s bank account information is limited to transfers beginning in 2007, this was two years after Fred became Margaret’s attorney in fact. (R 525 – Ex. 4; R 1271 – Ex. 6; R 1474-75 – Ex. 1)

farmed his mother's quarter of tillable land. (T1 143, 67) He also used all his mother's 240-acre pasture from 2006 to 2008 and from 2010 to 2013 without paying rent. (T1 143, 67) In 2009, a portion of Margaret's pastureland was rented to Jerry Moody. (T1 131) Jerry Moody paid part of the rent for the land through a check written to Margaret. (T1 132, 143, R 539 - Ex. 16) However, Fred endorsed his mother's name to the check from Mr. Moody and put the rent money due to his mother into his own farm account. (T1 141-42)

One of the most devious things Fred did was to make it look like he paid his mother rent for the 2012 and 2013 crop years, in order to farm her land for free the year after she died. He did this first in late 2011 when Margaret fell and her health was declining. (T1 103) Aware of this, and knowing that his sisters (the remainder interest holders) would own Margaret's life estate land after she died, Fred transferred \$19,600.00 out of his farm account and deposited the funds into Margaret's account on December 29, 2011. (T1 144-45) Although he later claimed that this was rent for the 2012 crop year, Fred listed this payment as a rent expense on his 2011 tax return. (T1 146) When Margaret's condition improved, he then electronically transferred \$18,000.00 from her account on March 6, 2012, and transferred it into his account. (T1 145, R 522 – Ex. 4, App. 3-7)

On December 31, 2012 (with Margaret now on her death bed), Fred electronically transferred \$23,600.00 from his farm account into Margaret's account. (T1 147) He claimed this was payment for the 2013 rent, even though he listed this payment as a 2012 rent expense on his tax return. (T1 147) Fred then electronically withdrew \$24,400.00 from Margaret's account on January 5, 2012 – which is the day Margaret died – and

returned the funds to his farm account. (T1 148, R 522 – Ex. 4, App. 3-7) Fred claimed the December 31, 2012 payment secured his rental of the land for the 2013 crop year. (T1 114, 68-69) He claimed he used the money taken out of Margaret’s account to pay for Margaret’s end of life expenses. However, he could not even produce any receipts for those expenses. (T1 148, T2 24)

In short, both times when it appeared that Margaret’s demise was near, Fred electronically transferred funds to Margaret’s account and claimed (to Goldie and Rebecca) that these payments were for the next year’s rent, but in his tax returns, he listed those payments as expenses for the year in which the transfers were made. And, both times, he then ultimately withdrew the money from Margaret’s account shortly thereafter, and placed it back into his farm account.

Goldie held the remainder interest in Margaret’s pastureland and Rebecca held the remainder interest in the tillable quarter. (T1 35, R 527 – Ex. 5) After Margaret died, Fred’s lawyer, Jeffrey D. Larson, contacted Rebecca and Goldie and told them that Fred would rent Rebecca’s farmland back to her for \$80.00 an acre and that Fred would rent Goldie’s pastureland back to her for \$40.00 an acre. (T1 114, 68-69) They did not agree to this. (T1 114, T1 68-69) As a result, Fred farmed the land himself without paying any rent in 2013. (T1 69, 114)

Fred suggests that Goldie and Rebecca inflated their rental claim for 2013. The Amended Complaint used the initial figure of \$23,600.00, which was the amount Fred electronically transferred into Margaret’s account in December 2012, before removing that money and transferring it back into his account in January 2013. (R 41, T1 147) However, the evidence at trial established that both Goldie and Rebecca rented their

respective land in 2014 to someone else. Goldie was paid \$17,000.00, but her tenant deducted expenses for necessary maintenance of the property required because of a lack of prior maintenance. (T1 127-28) Rebecca rented her land in 2014 to someone else and she received rent of \$30,000.00. (T1 114) The jury simply considered this evidence of the rental value of the land for 2013 and the verdict was entirely consistent with the evidence. (R 447)

STANDARD OF REVIEW

This Court makes a very limited review of the trial court's denial of a motion for a new trial. "The decision to grant a new trial is left in the sound judicial discretion of the trial court' and the 'decision will not be disturbed absent a clear showing of abuse of discretion.'" *Surgical Institute of South Dakota, P.C. v. Sorrell*, 2012 SD 48, ¶ 9, 816 N.W.2d 133, 136-37 (quoting *Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 2011 SD 45 ¶ 18, 801 N.W. 2d 752, 757 (quoting *Sherburn v. Patterson Farms, Inc.*, 1999 SD 47 ¶ 8, 593 N.W. 2d 414, 416)). "All inferences are indulged in favor of the nonmoving party; if competent evidence exists to support the verdict, it will be upheld." *Id.* (quoting *Baddou v. Hall*, 2008 SD 90, ¶ 33, 756 N.W. 2d 554, 562). This Court has recognized that "[i]n reviewing the court's decision to deny a new trial, we 'interfere only when[,] from an examination of the entire record, [we are] convinced that there has been a miscarriage of justice.'" *Casper Lodging, LLC v. Akers*, 2015 SD 18, ¶60, 871 N.W.2d 477, 496 (citing *Schoon v. Looby*, 2003 SD 123, ¶18, 670 N.W.2d 885, 891 (quoting *Roth v. Farner-Bocken Co.*, 2003 SD 80, ¶ 37, 667 N.W.2d 651, 664)).

Similarly, this Court "affords broad discretion to circuit courts in deciding whether to admit or exclude evidence." *Surgical Institute of South Dakota, P.C., supra*,

2012 SD 48, ¶16, 816 N.W.2d at 138 (quoting *Ronan v. Sanford Health*, 2012 SD 6, ¶8, 809 N.W.2d 834, 836). “The trial Court’s evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion. An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.” *Id.* (quoting *St. John v. Peterson*, 2011 SD 58, ¶10, 804 N.W.2d 71, 74). In regard to evidence at trial, “abuse of discretion occurs when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence.” *Kaiser v. University Physicians Clinic*, 2006 SD 95, ¶29, 724 N.W.2d 186, 195 (internal citations omitted).

Finally, “[t]he party alleging error on appeal must show such error affirmatively by the record and not only must the error be demonstrated but it must also be shown to be prejudicial error.” *City of Sioux Falls v. Kelley*, 513 N.W.2d 97, 104 (1994)(citing *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (S.D. 1976). “Prejudicial error is that without which the jury would have probably returned a different verdict.” *Id.* (citing *Shaull v. Hart*, 327 N.W. 2d 50, 53 (S.D.1982)).

LEGAL ARGUMENT

1. Whether the trial court acted within its discretion in refusing to allow Appellant to submit extrinsic evidence to attempt to excuse his breach of fiduciary duty?

A. Overview.

This case presents the unfortunate situation where a relative uses his fiduciary position to obtain large sums of money and rent free use of land from an elderly person. More unfortunate is that his family members must later bring suit to rectify his

misconduct and face claims of not caring for their own mother. As one commentator aptly recognized:

Financial exploitation of older persons, including the systematic depletion of bank accounts or other resources for the benefit of the abuser, has been tagged the “crime of the 90s.” The number of financial exploitation cases will only continue to rise with the arrival of the millennium, as the population continues to age. Despite the increase in financial abuse cases, law enforcement officials remain reluctant to pursue perpetrators of abuse, traditionally viewing the situation as a family matter best resolved by civil litigation.

* * * *

Sadly, in more than eighty percent of cases, those abused by an agent under a durable power of attorney are victimized by relatives, most of whom are immediate family members. Although financial elder abuse is often viewed as involving vulnerable victims, more often than not, the victims are competent. One national study of abuse patterns by agents under a durable power of attorney for finances revealed that 57 percent of the principals were competent when the abuse occurred. The agents in those cases misappropriated more than half of the principals' assets in 70 percent of the cases. Whether or not the victim is competent, and whether or not the abuser is a family member, it is critical that abusers be vigorously pursued. Financial abuse is not only immoral; it is often criminal.

Michele Hughes, *Remedying Financial Abuse by Agents Under a Power of Attorney for Finances*, Marquette Elder's Advisor, Vol 2: Iss 4, Article 7 (2001).⁵

In *Bienash v. Moller*, 2006 SD 78 ¶ 12, fn. 7, 721 N.W.2d at 434, this Court held that the holder of a power of attorney who breached his fiduciary duty to benefit himself committed fraud against the beneficiary. *See*, SDCL 55-2-3, SDCL 55-2-7. In *Bienash*, this Court also established a bright line rule that: fiduciaries under a power of attorney could not utilize oral extrinsic evidence to excuse the fiduciary's fraud. *Id.* at . The Court noted the policy reason behind the bright line rule:

⁵ Available at: <http://scholarship.law.marquette.edu/elders/vol2/iss4/7>.

When one considers the manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney—of which outright transfers for less than value to the attorney-in-fact [himself or] herself are the most obvious—the justification for such a flat rule is apparent. And its justification is made even more apparent when one considers the ease with which such a rule can be accommodated by principals and their draftsmen.

Id. at ¶22 (quoting *Kunewa v. Joshua*, 83 Hawaii 65, 924 P.2d 559, 565 (1996)).

Fred spends much time in his brief describing the competence of his mother, Margaret. The Power of Attorney, however, does not condition Fred’s appointment upon Margaret’s incompetence or inability to handle her affairs. (R 1474 – Ex. 1 App. 1, 1) By its terms the Power of Attorney is an outright appointment of Fred as Margaret’s attorney-in-fact. *Id.* “[I]n South Dakota, as a matter of law, a fiduciary relationship exists whenever a power of attorney is created.” *In re Estate of Duebendorfer*, 2006 SD 79 ¶ 26, 721 N.W.2d 438, 445.

In this appeal, Fred raises three arguments to claim the trial court abused its discretion and should have allowed extrinsic evidence. 1) Fred claims that the trial court abused its discretion in refusing to admit Margaret’s 1989 Will because he claims it was *written* extrinsic evidence that should have been considered. 2) Fred argues that the trial court should have created an exception to the bright line rule established in *Bienash* because Fred made himself a joint owner on Margaret’s account and this allows the jury to consider extrinsic evidence. 3) Fred finally argues that the trial court abused its discretion in refusing oral extrinsic evidence concerning his claim that his mother wanted him to use her land for free. The trial court correctly interpreted and applied the *Bienash* decision and refused to allow Fred to excuse his conduct through this extrinsic evidence. Fred’s arguments are fully addressed in turn below.

B. The trial court did not abuse its discretion in refusing to admit Margaret's 1989 Will.

On appeal, Fred points to Margaret's Will as a very important piece of evidence that the trial court should have received at trial. (Appellant's Brief at 30) Unfortunately for Fred, he failed to raise the Will's debt forgiveness clause in any pleading. (R 57-58, 374-76) In fact, when faced with the Motion in Limine, Fred never informed the trial court that he had *written* extrinsic evidence in his written objection or at the hearing. (R 374-76, MT 11-15) Instead, he waited until a break at 10:00 a.m. on the second day of the two-day trial to raise this new issue. (T2 46-47)⁶ It would seem that if this evidence was as earth shattering as Fred now claims on appeal, he would have raised it before the last day of trial. The trial court did not abuse its discretion in refusing to allow Fred to introduce Margaret's 1989 Will.

Fred raised no affirmative defenses in his Answer. (R 57-58) His counsel admitted the Will's forgiveness clause was not raised as an affirmative defense. (T2 47) The trial court concluded that this was an affirmative defense; it was not pled and the Will would not come into evidence. (T2 47) Interestingly, during the offer of proof, Fred did not mention anything about this document being offered as extrinsic, non-oral evidence of Margaret's intent, as Fred now claims in his Brief. (Appellant's Brief at 30, T2 46) Instead, he presented it as a way to avoid paying back the rent, a debt owed Margaret, and the trial court considered it to be an affirmative defense.

The trial court's interpretation of this evidence being an affirmative defense was correct. On the morning of the second day of trial, Fred called Goldie as a witness and

⁶ The trial court, at the hearing on the Motion for New Trial, recognized that the Will was brought up at the last moment with no prior notice to the Court. (NT 10)

questioned her about being the personal representative of the estate. The exchange went as follows:

DIRECT EXAMINATION [Goldie]

BY MR. LARSON:

Q You were appointed the personal representative of the Margaret Zoss estate, correct?

A That is correct.

Q And as the personal representative of the Estate, I presume that you consider the rents that you claim Fred did not pay, to be debt owed to the Estate?

MR. FINK: Objection, Your Honor. Relevance.

THE COURT: Where are we going with this that we didn't ask yesterday?

MR. LARSON: It's foundation for an exhibit, Your Honor.

THE COURT: Okay. Overruled.

THE WITNESS: We - - would you repeat the question please?

BY MR. LARSON:

Q As the personal representative of the Estate, do you consider the rent that you say Fred didn't pay to be debts owed to the Estate?

MR. FINK: I'm going to object again, Your Honor. That's a legal issue.

THE COURT: Overruled. Answer it.

THE WITNESS: The rents that he didn't pay? Yes

MR. LARSON: That's all the questions I have, Your Honor.

(T2 3-4)

As Fred's counsel noted, he wanted Goldie to testify that the rent was a debt owed to Margaret for purposes of an exhibit he wanted to offer later, the Will. (T2 3-4) During a hearing in chambers shortly after this testimony, the trial court was provided with Margaret's Will, executed in 1989, containing a provision that provided for the forgiveness of debts Margaret's children owed to her. (T2 46-47) Having just heard this testimony and Fred's Counsel's reasoning for the need for such testimony, the trial court, when faced with this evidence at the last minute, concluded Fred was going to attempt to claim the forgiveness clause in Margaret's Will excused him from paying Margaret's estate any rent.

SDCL 15-6-8(c) list several affirmative defenses specifically, and then requires that "any other matter constituting an avoidance or affirmative defense" be pled affirmatively. *See e.g., Century 21 Associated Realty v. Hoffman*, 503 N.W.2d 861 (S.D. 1993)("Although cancellation is not specifically listed, it is clear that cancellation is also a matter constituting an avoidance or affirmative defense.") Clearly, Fred was attempting to raise this forgiveness clause to avoid paying rent, which he claimed was a debt of Margaret's estate. It was an affirmative defense.

"Affirmative defenses must be specifically pled. A defendant has a duty to plead affirmative defenses and failure to do so would result in the defense being barred." *Id.* (citing *Schecher v. Shakstad Elec. & Mach. Works*, 414 N.W.2d 303 (S.D. 1987)) The trial court did not abuse its discretion when it ruled the forgiveness clause in the Will was an avoidance or affirmative defense that had not been specifically pled. "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence." *Surgical Institute of South Dakota, P.C., supra*,

2012 SD 48, ¶16, 816 N.W.2d at 139. Contrary to Fred’s unsupported argument, the trial court’s conclusion was not “against reason and evidence” as is required for him to establish an abuse of discretion. *Id.* Quite to the contrary, the trial court’s ruling made sense and had a sound legal basis.

Fred now argues on appeal that the Will was not offered as an affirmative defense but instead as extrinsic *written* evidence of Margaret’s intent.⁷ (Appellant’s Brief at 30) As previously discussed, this is not correct because it was presented as an affirmative defense or avoidance of the rent that was owed. (T2 46-47) This new claim (that the Will was written extrinsic evidence) was not brought to the attention of the trial court in Fred’s offer of proof at trial. In fact, in Fred’s offer of proof, he did not mention anything about Margaret’s Will being written extrinsic evidence that would alter the meaning of the Power of Attorney. (T2 46) Given Fred’s failure to properly bring this to the trial court’s attention in his offer of proof, he did not preserve for review his claim the Will should come in as written extrinsic evidence. *See, City of Sioux Falls, supra*, 513 N.W.2d at 108 (recognizing failure to make offer of proof fails to preserve issue for appeal).

Regardless, this argument also fails because Margaret’s 1989 Will does not constitute clear written evidence that would allow self-dealing under the Power of Attorney executed sixteen years later. *Bienash*, 2006 SD 78, ¶27, 721 N.W.2d at 437. Putting this in perspective, Fred argues that Margaret’s 1989 Will established her intent to allow him to self-deal by not paying any rent after accepting his position as her attorney in fact in 2005. Similar to the writing rejected in *Bienash*, the debt forgiveness

⁷ In *Bienash*, this Court noted that: “We leave for another day the issue of whether extrinsic evidence in the form of *writing* should be admitted . . .” 2006 SD 78, ¶ 24, 721 N.W.2d at 437.

clause in the Will reviewed by the trial court mentions nothing about Fred being allowed to self-deal and gift himself money sixteen years later, when he undertook the duty to become Margaret's fiduciary. This Court in *Bienash* observed:

The "written document" Mollers claim for their authority is vague; the document does not authorize self-dealing and does not approve of the specific changes Randy made at the bank. Rather, the document, in its entirety, says:

I, Kenneth Duebendorfer, wish to notify the State Bank of Alcester that I am fully aware of the changes to be made on the CD's that I have at the State Bank of Alcester by my Power of Attorney Randall R. Moller.
We have discussed the changes and I authorize Randy Moller to make them on my behalf.

This document does not give Randy authority to make himself and Kathy POD beneficiaries on Duebendorfer's accounts. It does not even give him authority to make changes to the POD beneficiaries. Nothing in this writing indicates that Duebendorfer was permitting Mollers to engage in self-dealing. The way the document is written there is no way to know what "specific" changes Duebendorfer wanted made.

Bienash, 2006 SD 78, ¶ 25, 721 N.W.2d at 437. The same can be said here. There is nothing in the Will's debt forgiveness clause reviewed by the trial court that would permit Fred to self-deal or give himself gifts when acting as Margaret's attorney in fact. Quite like the writing in *Bienash*, this writing is inadequate as a matter of law to be considered as written extrinsic evidence altering the plain language of the Power of Attorney. *Id.* at ¶27.

Fred has not even established that this debt forgiveness clause could apply to excuse Fred's fiduciary failings. Fred cited no legal authority to the trial court to establish this debt forgiveness clause would apply to forgive the rent money he failed to pay Margaret as her fiduciary. (T2 46-47) The trial court expressed the difficult position it was in due to Fred providing the Will at the last minute, while the trial court was sitting

in chambers with a jury waiting to hear testimony. (NT 10) Even at this late stage, Fred has not cited any legal authority to establish that this clause would extend to forgive him for failing to account for rents he should have obtained as Margaret's fiduciary.

A provision in a will releasing a debt is strictly construed. *In re Argue's Estate*, 92 N.W.2d 233, 235 (Wis. 1958); 97 C.J.S. Wills § 1965 (Westlaw 2015). The debt forgiveness clause applies to the personal debts of the person so forgiven and should not extend to forgive money an heir owes to the decedent as the decedent's fiduciary. *See e.g., In re Napier's Will*, 299 N.Y.S. 675, 677 (N. Y. Sur. Ct. 1937). A defalcating heir should be prevented from using a will's debt forgiveness clause absolving his liability for fiduciary fraud committed while acting as a trusted fiduciary when the decedent was alive.

The trial court did not abuse its discretion when it refused to allow Margaret's Will into evidence. This decision was not clearly against reason and evidence. The trial court in fact ruled correctly under the law.

C. The trial court did not abuse its discretion in refusing to admit extrinsic evidence that Margaret wanted Fred to take money out of her joint account for his personal use.

Fred argues that the trial court did not allow him to present extrinsic evidence of what he claims was Margaret's long standing practice of sharing expenses. (Appellant's Brief at 26) In fact, the trial court's Order Granting Plaintiffs' First Motion in Limine simply precluded Fred from presenting extrinsic evidence to claim that Margaret allowed Fred to make gifts to himself or self deal. The trial court's Order provided:

ORDERED that Plaintiff's First Motion in Limine is granted. No party shall be permitted to introduce extrinsic evidence regarding Margaret L. Zoss' intent to allow Fred Zoss to self-deal or make gifts of Margaret's property to himself. Since Margaret Zoss' written power of attorney does

not, in clear and unmistakable language, authorize her attorney-in-fact (Fred Zoss) to make gifts to himself, and likewise does not expressly authorize self-dealing by Fred, this Court prohibits the introduction of any/all extrinsic evidence suggesting that such gifting and self-dealing *were* authorized by Margaret Zoss. Such excluded evidence would include any (claimed) statements made by Margaret Zoss (deceased) regarding her intent to allow Fred Zoss to self-deal or effectuate gifts to himself. Such excluded evidence would also include any claims that Margaret wanted Fred to make gifts to himself or to self-deal. In making this ruling, the Court determines that SDCL 19-16-34 does not apply to this motion. This Courts bases its ruling upon the holding in Bienash v. Moeller, 721 N.W. 2d 421 (S.D. 2006).

(R 444)

Contrary to Fred's argument, he was provided ample opportunity and latitude to explain what he used Margaret's money for. In his opening statement, Fred's attorney explained:

They – obviously, they are mother and son, but it operated almost like a husband and wife. They ate together. They did things together. And the bills were just taken care of.

* * * *

And the evidence is going to show that Fred pretty much, from that point on, took care of an awful lot of things. He paid everything.

* * * *

The account that we will often refer to as Margaret's though, from that point on was Margaret and Fred's. And that's right, after that time and after 2005, during those times it became common with electronic things we do these days, and Fred becoming 100 percent responsible for the financial affairs that he transferred, and Margaret's pension, which was a teacher retirement, Social Security came in he transferred it into his account. He paid her bills.

* * * *

I think what you're going to find out is that what Fred was doing was taking care of his mother. That her income was largely insufficient. And it cost Fred some of his money to do so.

(T1, 19, 20, 22). Fred later testified about his transfers of Margaret's funds to his account as follows:

Q. I think it was 2004, you became a joint owner on her account; is that correct?

A. Yes, sir.

Q. And then Power of Attorney the next year?

A. Yes, sir.

Q. Were you familiar with the automatic deposits that were made to her checking account?

A. Yes, sir.

* * * *

Q. And from time to time, did you transfer these monies into your farm account?

A. Yes, sir.

Q. Why did you do that?

A. I transferred those monies into my farm account to pay her bills.

* * * *

Q. And these were household bills, correct?

A. Yeah. Well, household bills, medical bills, pharmaceutical, medicine all of her bills.

(R 9, 10, 11) Fred was not prevented from presenting his case. It was very clear he was claiming that he was using the money he took out of Margaret's account to pay for expenses. He even presented exhibits to attempt to explain all his claimed expenditures for Margaret from his individual account. (T2 26 – R 1448 – Ex. S; R 1445 – Ex. P) The jury simply did not believe his largely unsupported claim that he was using the money he was taking from Margaret to pay for her expenses.

The only thing Fred was prevented from doing under the trial court's in limine Order was presenting extrinsic evidence to claim that he could use Margaret's money for his own benefit. (R 444) The trial court's ruling was proper under this Court's ruling in *Bienash*.

Fred states, with no support in the record, that he made transfers from Margaret's account to his account after he was listed on her account and before he was appointed as her Power of Attorney. He then attempts to argue that since he could legally (insofar as the bank was concerned) make such transfers from the joint account, this evidence should somehow have been considered to absolve him from the breach of fiduciary duty claim. Yet, in his own brief he acknowledges the failing of this argument:

Admittedly, the fact that one is a co-owner of an account does not automatically relieve one of his or her fiduciary duties that arise when a power of attorney is conferred.

(Appellant's Brief at 27) The money in the joint account was Margaret's. (T1 137) Transfers from that account to his account before the power of attorney conferred fiduciary duties on him, cannot relieve him of violations of those duties after the power was conferred.

Fred, however, now argues on appeal that because he held a joint account with Margaret he should be allowed to present extrinsic evidence to justify what he did. In his argument, Fred relies entirely on the Wisconsin Supreme Court decision of *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874 (Wis. 2007). As fully explained below, the *Russ* decision is inapplicable because Wisconsin law on joint accounts (Wis. Stat. § 705.03) is different from South Dakota law on joint accounts (SDCL 29A-6-103).

In *Russ*, the attorney in fact held a joint account with his principal and the fiduciary used money from this account for his own benefit. *Russ, supra*, 734 N.W.2d at 879. The attorney in fact argued that because the funds were held in a joint account he was entitled to spend the money, basing his argument on Wis. Stat. § 705.03, which provides a presumption that the money in the account belonged to both accountholders without regard to their respective contribution. *Id.*

The *Russ* Court concluded that it was faced with competing presumptions. *Id.* at 884. First, there was a presumption of fraud against the attorney in fact because he did not have written authority to transfer the funds. *Id.* However, there was also a presumption of donative intent under Wis. Stat § 705.03 because the funds were in a joint account. *Id.* The *Russ* Court then concluded:

We hold that a joint checking account established under Wis. Stat. § 705.03 prior to the execution of a POA creates a presumption of donative intent. We further hold that when an agent acting under a POA transfers funds deposited by the principal from such joint account, but for the agent's own use, a presumption of fraud is created. When these two conflicting and inconsistent presumptions coexist, the circuit court is then free to make a determination based upon the facts and the credibility of the witnesses. *In re Estate of Harms*, 177 Ill.Dec. 256, 603 N.E.2d at 44. Under such circumstances, as well as in cases where a power of attorney agent actively uses his or her authority to create a joint account with the principal, thereby triggering a presumption of fraud, extrinsic evidence may be admissible to determine the intent of the parties. The prohibition against the admissibility of extrinsic evidence of the parties' intent to allow the making of gifts, as set forth in *Praefke*, 257 Wis.2d 637, ¶20, 655 N.W.2d 456 would not apply in such cases.

Id. at 885.

There are no such competing presumptions under South Dakota law. Wis. Stat. § 705.03, provides that when a joint account is formed it belongs to both parties during their lifetime *without regard to their respective contribution*. Wisconsin law, thus,

creates a presumption of donative intent between the account holders. Unlike Wisconsin, the law on joint accounts in South Dakota is different and provides for a presumption that the money in the account belongs to parties *in proportion to the net contribution of each to the sums on deposit*. SDCL 29A-6-103.

The difference in the law in each state is clear. Wis. Stat. § 705.03 provides:

Unless there is clear and convincing evidence of a different intent:

A joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment. The application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability, except that the spouse of one of the parties may recover under § 766.70. No financial institution is liable to the spouse of a married person who is a party to a joint account for any sum withdrawn by any party to the account unless the financial institution violates a court order.

(Wis. Stat. § 705.04) (italics added) This is in direct contradiction to South Dakota law on joint accounts. SDCL 29A-6-103 provides in relevant part:

A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent.

Id. (italics added)

In South Dakota, unlike in Wisconsin, putting one's money in a joint account with another person does not create a presumption of donative intent during the lifetime of the accountholders. Quite to the contrary, there is a presumption that the money belongs to each accountholder in proportion to each accountholder's respective contribution.

Further, here, Fred testified that the money in Margaret's account was not his:

Q. And you acknowledge that even though Margaret's First National Bank account was converted to this joint account, the money in that account still belonged to her, right?

A. Yes the money went in of hers, belonged to her, correct.
(T1 137)

Fred's reliance on the Wisconsin decision of *Russ* provides no support for the creation of an exception to the bright line rule this Court established in *Bienash*. In South Dakota, unlike Wisconsin, there is no presumption of donative intent through the creation of a joint account and this Court is not faced with competing presumptions. The only applicable presumption is that Fred committed fiduciary fraud by taking money for his own use without written authority.

Fred also fails to recognize that he was not depositing his income or money into Margaret's joint account and then paying expenses from that shared account. He admitted at trial he could have written checks out of Margaret's joint account. (T1 137) Yet he removed, by electronic transfer, on average, at least several hundred dollars or more a few times a month. (T1 138, R 525 - Ex. 4) He then commingled that money with his funds in his farm account. (T1 138)

SDCL 55-2-9 provides that: "A trustee who willfully and unnecessarily mingles the trust property with his own so as to constitute himself in appearance its absolute owner is liable for its safety in all events." By transferring Margaret's money into his own account he commingled funds and made it difficult to track expenses. Yet, he chose to do that while acting as a fiduciary and while charged with a duty to keep Margaret's property safe. His claim at trial was that he was just paying Margaret's expenses from the numerous random transfers, but he produced no receipts or bills to support his claim. (R 9-11, T1 139) In the end, the jury simply did not believe his claim that he was using

the money to pay Margaret's expenses and entered an appropriate verdict. He clearly could have paid Margaret's expenses out her (the joint) account. There was no need to transfer money from her account to his.

D. The trial court did not abuse its discretion in precluding Fred from introducing extrinsic evidence to claim he could use his mother's land rent-free.

Fred argues that he should have been allowed to tell the jury that his mother wanted him to use her land rent-free. In his argument, he even claims that he “ did not actually use the POA to accomplish anything related to a supposed obligation to pay rent. . . .” (Appellant's Brief at 24) This is not correct.

The Power of Attorney gave Fred the broad power to “transact any business” on behalf of Margaret, and more importantly it provided that “[t]his power includes all right whatsoever necessary to sell, transfer, convey, lease, or mortgage real property described” (R 1474 – Ex. 1 – App 1-2)(underlining added) *Id.* Fred was specifically empowered to lease land and transact business through Margaret's Power of Attorney. *Id.* He even himself filed the Power of Attorney with the Sanborn County Register of Deeds when it was executed. (T1 26) His conduct of obtaining the land rent-free was an act done under the powers granted to him in Margaret's Power of Attorney. Fred breached the fiduciary duty he owed to Margaret under her Power of Attorney by using her land and not paying rent. *See e.g., Ward v. Lange*, 1996 SD 113, ¶ 15, 553 N.W.2d 246, 251.

The trial court's order that precluded Fred from presenting extrinsic evidence to claim Margaret wanted him to use her land rent-free was entirely consistent with this Court's directive in *Bienash*. The Power of Attorney did not contain clear and

unmistakable language authorizing self-dealing. Therefore, self-dealing was not authorized under *Bienash*. The powers granted under Margaret's Power of Attorney gave Fred the power to transact business and the power to lease land. (R 1474 – Ex. 1 – App 1-2) He received a substantial financial benefit by not paying rent on the approximately 400-acres of Margaret's land, which is clearly self-dealing.

Fred claims that he should have been permitted to present oral extrinsic evidence that he had a longstanding practice of using his mother's land without paying rent. He argues that he should have been permitted to offer this evidence to support his claimed right to self-deal after the power of attorney was executed. He then claims that he never really used the power of attorney to accomplish anything with respect to his obligation to pay rent. He argues he simply continued his practice of not paying his mother rent after the power of attorney was signed.

While Margaret had the right to not charge him rent when she controlled the property, that changed when Fred became her fiduciary. “[A] fiduciary relationship exists whenever a power of attorney is created.” *In re Estate of Duebendorfer*, 2006 SD 79, ¶26, 721 N.W.2d at 445. His claim that he never used the power of attorney with respect to his obligation to pay rent is specious.⁸ What he did was ignore his fiduciary duty to pay rent, a duty that arose with the execution of the power of attorney.

Quite frankly, if Fred, when he became Margaret's attorney in fact, wanted to use Margaret's land rent free, and Margaret so agreed, he could have met with his mother and the attorney who drafted the Power of Attorney and had this authority placed in the written Power of Attorney. Margaret's Power of Attorney was drafted by the attorney

⁸ Curiously, the power of attorney authorized him to lease the real property. Moreover, the power of attorney was recorded with the Register of Deeds.

who was Fred's lawyer at trial. The Power of Attorney contained specific legal descriptions when it granted Fred the power to lease farmland. It could have certainly been drafted to contain a provision allowing self-dealing. However, it did not contain such a provision. His attempt to provide testimony to claim that there was a prior practice of not paying Margaret rent is exactly the type of oral extrinsic evidence that is not admissible under this Court's bright line rule established in *Bienash*. Such extrinsic evidence served as an effort to alter the clear language of Margaret's Power of Attorney. The trial court did not abuse its discretion in refusing to allow such oral extrinsic evidence.

CONCLUSION

Throughout the trial, Fred claimed that he used the money he took from Margaret's account to pay for her expenses. The trial court provided Fred with ample opportunity to provide testimony and evidence about what he did with Margaret's money. However, he did not provide any bills or receipts to support his claim that he used this money to pay for Margaret's expenses and the jury rejected his claim through its verdict.

He now claims that his hands were tied because he could not present extrinsic evidence to excuse his fiduciary fraud and self-dealing. The trial court's rulings were correct. This Court established a bright line rule in *Bienash* that clearly precludes the fiduciary from presenting extrinsic evidence to claim his principal allowed gifting or self-dealing under the power of attorney. This Court in *Bienash* recognized that the policy behind the bright line rule is grounded in the fact that a power of attorney is easily abused and the authority for self-dealing and gifting can be provided for very easily in the written power of attorney.

The Appellees respectfully request that this Court Affirm the trial court's Judgments entered on the jury verdicts, and further Affirm the trial court's Order denying Appellant's Motion for New Trial.

Dated this 3rd day of March, 2016.

SCHAFFER LAW OFFICE, PROF. LLC

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REQUEST FOR ORAL ARGUMENT

Appellees respectfully request that they be granted the privilege of appearing before this Court for an oral argument in this appeal.

/s/ Paul H. Linde

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Brief of Appellees* complies with the type volume limitation provided for in SDCL 15-26A-66. *Brief of Appellees* contains 9277 words. Such word count does not include the table of contents, table of cases, jurisdictional statement, statement of legal issues, or certificates of attorneys. I have relied on the word and character count of our word processing system used to prepare *Brief of Appellees*. The original *Brief of Appellees* and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
“Brief of Appellees” was served by email service to the following attorney in PDF format
on March 3, 2016, before 11:59 p.m. on that date:

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APPENDIX

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State of South Dakota, Sanborn County
OFFICE OF REGISTER OF DEEDS - Fee \$12.00 Doc.#20050928
I certify the within instrument was filed for record
October 25, 2005 at 02:45 PM in Book 8W on pgs. 0232-0233
LYNN BRUESKE, REGISTER OF DEEDS

Lynn Brueske

Prepared by:
Jeffrey D. Larson of
Larson and Nipe
Attorneys at Law
P. O. Box 277
Woonsocket, SD 57385
(605) 796-4245



POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That MARGARET ZOSS, of the County of Sanborn, State of South Dakota, has made, constituted and appointed, and by these presents does constitute and appoint Fred M. Zoss of the County of Sanborn, and State of South Dakota, my true and lawful attorney for me and in my name, place and stead. That I grant and give unto Fred M. Zoss, my said attorney, full authority and power to do and perform all and every act or thing whatsoever requisite and necessary to be done in the premises, as fully to all intents and purposes, as I might or could do if personally present, and with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue thereof.

I further grant authority to buy and sell any securities or any obligation of the United States, in a common stock or security traded on any national exchange, to give receipts or payments of money in my name and in my stead, to transact any business, to enter any safety deposit box or strong box in any institution, to remove any and all documents therefrom, to write checks upon any account, to draw money from any savings account or other account in any institution which I have, to transact and execute all documents with regard to the transaction of any business which I may be involved in.

This power includes all right whatsoever necessary to sell, transfer, convey, lease or mortgage real property described as:

The Northwest Quarter (NW¼) of Section Fourteen (14), Township One Hundred Six (106)North, Range Sixty-one (61) West of the 5th P.M., Sanborn County, South Dakota and,

The Northeast Quarter (NE¼) of Section Fifteen (15), Township One Hundred Six (106)North, Range Sixty-one (61) West of the 5th P.M., Sanborn County, South Dakota

This power of attorney shall not be affected by disability of the principal.

FILED

MAY 28 2015

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

By *(Signature)*

- Page 1474 -



\$ 606.78	01/03/13	888.00	01/15/13	630.81	01/24/13	0.15	12/31/12	23,600.00	01/05/13	(24,400.00)	01/09/13	(186.50)	02/18/13	(92.14)			\$ 606.78
\$ 159.56	12/03/12	877.00	12/14/12	630.81	12/24/12	0.02			12/17/12	(650.00)	12/07/12	(186.50)	12/20/12	(83.57)			\$ 159.56
\$ 182.90	11/02/12	877.00	11/15/12	630.81	11/23/12	0.02			12/08/12	(600.00)	11/07/12	(181.10)	11/20/12	(83.69)			\$ 182.90
\$ 1,544.86	10/03/12	877.00	10/15/12	630.81	10/24/12	0.04			11/15/12	(650.00)	10/10/12	(181.10)	10/19/12	(84.21)			\$ 1,544.86
\$ 302.32	08/31/12	877.00	09/14/12	630.81	09/24/12	0.02			10/22/12	(350.00)	09/07/12	(181.10)	09/20/12	(84.17)			\$ 302.32
\$ 159.76	08/03/12	877.00	08/15/12	630.81	08/24/12	0.02			09/05/12	(750.00)	08/07/12	(181.10)	08/20/12	(84.72)			\$ 159.76
\$ 234.48	07/03/12	877.00	07/13/12	630.81	07/24/12	0.02			08/19/12	(650.00)	07/09/12	(181.10)	07/20/12	(83.46)			\$ 234.48
\$ 159.73	06/01/12	877.00	06/15/12	611.84	06/22/12	0.02			07/17/12	(500.00)	06/07/12	(181.10)	06/19/12	(83.01)			\$ 159.73
\$ 159.94	05/03/12	877.00	05/15/12	611.84	05/24/12	0.01			06/18/12	(550.00)	05/08/12	(181.10)	05/21/12	(88.96)			\$ 159.94
\$ 1,528.07	04/03/12	877.00	04/13/12	611.84	04/24/12	0.02			05/15/12	(475.00)	04/09/12	(181.10)	04/20/12	(84.89)			\$ 1,528.07
\$ 18,596.99	03/02/12	877.00	03/15/12	611.84	03/23/12	0.29			04/05/12	(950.00)	03/07/12	(181.10)	03/19/12	(84.06)			\$ 18,596.99
\$ 18,024.58	02/03/12	877.00	02/15/12	611.84	02/24/12	1.35			03/25/12	(1,200.00)	02/09/12	(181.10)	02/21/12	(86.68)			\$ 18,024.58
\$ 202.68	01/03/12	877.00	01/13/12	611.84	01/24/12	1.18		12/29/11	19,600.00	01/20/12	(1,700.00)	01/11/12	(181.10)	01/20/12	(87.02)		\$ 202.68
\$ 170.90	12/02/11	846.00	12/15/11	611.84	12/23/11	0.01			01/16/12	(500.00)	12/07/11	(181.10)	12/21/11	(89.97)			\$ 170.90
\$ 775.55	11/03/11	846.00	11/15/11	611.84	11/23/11	0.03			12/02/11	(750.00)	11/08/11	(167.45)	11/23/11	(95.07)			\$ 775.55
\$ 224.75	10/03/11	846.00	10/14/11	611.84	10/24/11	0.03			11/22/11	(660.00)	10/07/11	(167.45)	10/20/11	(89.52)			\$ 224.75
\$ 1,153.52	09/02/11	846.00	09/15/11	611.84	09/23/11	0.02			10/07/11	(650.00)	09/17/11	(167.45)	09/19/11	(89.68)			\$ 1,153.52
\$ 209.70	08/03/11	846.00	08/15/11	611.84	08/24/11	0.01			09/08/11	(800.00)	08/09/11	(167.45)	08/19/11	(91.58)			\$ 209.70
\$ 157.81	07/01/11	846.00	07/15/11	611.84	07/24/11	0.01		07/20/11	200.00	08/16/11	(450.00)	07/07/11	(167.45)	07/20/11	(85.51)		\$ 157.81
									07/19/11	(198.00)							\$ 209.70
									07/17/11	(400.00)							
									07/04/11	(750.00)							

Appendix

Reg Bal	SSA Trans	SP Retirement	Interest Payment	Customer Deposits / Cts Written	On-line Transfers 5752	Avera Health	Smbel	Maintenance Fee	Central Electric	End Bal
\$ 202.41	06/09/11 846.00	06/15/11 599.26	06/24/11 0.02		06/18/11 (475.00)	06/07/11 (167.45)	06/20/11 (92.43)	06/24/11 (5.00)		\$ 137.81
\$ 167.53	05/03/11 846.00	05/13/11 599.26	05/24/11 0.01		05/15/11 (450.00)	05/09/11 (167.45)	05/20/11 (87.94)	05/24/11 (5.00)		\$ 202.41
\$ 182.73	04/07/11 846.00	04/15/11 599.26	04/22/11 0.01		04/18/11 (400.00)	04/07/11 (167.45)	04/19/11 (88.02)	04/24/11 (5.00)		\$ 167.53
\$ 148.67	03/03/11 846.00	03/15/11 599.26	03/24/11 0.01		04/04/11 (800.00)	03/08/11 (167.45)	03/21/11 (88.79)	03/24/11 (5.00)		\$ 182.73
\$ 167.73	02/03/11 846.00	02/15/11 599.26	02/24/11 0.01		03/03/11 (450.00)	02/08/11 (167.45)	02/18/11 (91.88)	02/24/11 (5.00)		\$ 148.67
\$ 189.07	01/03/11 846.00	01/14/11 599.26	01/24/11 0.02		02/02/11 (750.00)	01/17/11 (650.00)	01/20/11 (94.12)	01/24/11 (5.00)		\$ 167.73
\$ 218.84	12/03/10 846.00	12/15/10 599.26	12/24/10 0.01		01/04/11 (550.00)	12/07/10 (167.45)	12/20/10 (102.59)	12/24/10 (5.00)		\$ 218.84
\$ 235.78	11/03/10 846.00	11/15/10 599.26	11/24/10 0.02	11/15/10 (500.00)	12/03/10 (750.00)	11/09/10 (167.45)	11/18/10 (89.77)	11/24/10 (5.00)		\$ 235.78
\$ 201.56	10/07/10 846.00	10/15/10 599.26	10/22/10 0.01		10/16/10 (400.00)	10/07/10 (167.45)	10/20/10 (88.60)	10/22/10 (5.00)		\$ 201.56
\$ 169.93	09/03/10 846.00	09/15/10 599.26	09/24/10 0.01		10/05/10 (750.00)	09/15/10 (400.00)	09/20/10 (91.19)	09/24/10 (5.00)		\$ 169.93
\$ 184.00	08/03/10 846.00	08/13/10 599.26	08/24/10 0.02		09/07/10 (750.00)	08/09/10 (167.45)	08/18/10 (86.90)	08/24/10 (5.00)		\$ 184.00
\$ 200.03	07/20/10 846.00	07/15/10 599.26	07/23/10 0.01	07/07/10 750.00	07/07/10 (800.00)	07/08/10 (167.45)	07/20/10 (88.83)	07/23/10 (5.00)		\$ 200.03
\$ 123.78	06/03/10 846.00	06/15/10 586.93	06/24/10 0.01		06/16/10 (500.00)	06/08/10 (167.45)	06/21/10 (84.24)	06/24/10 (5.00)		\$ 123.78
\$ 242.78	05/03/10 846.00	05/14/10 586.93	05/24/10 0.02		06/04/10 (600.00)	05/06/10 (167.45)	05/19/10 (79.50)	05/24/10 (5.00)		\$ 242.78
\$ 361.66	04/02/10 846.00	04/15/10 586.93	04/23/10 0.01		05/17/10 (100.00)	04/09/10 (167.45)	04/19/10 (79.37)	04/23/10 (5.00)		\$ 361.66
\$ 376.80	03/03/10 846.00	03/15/10 586.93	03/24/10 0.03		05/14/10 (500.00)	03/11/10 (167.45)	03/19/10 (80.55)			\$ 376.80
\$ 193.74	02/03/10 846.00	02/12/10 586.93	02/24/10 0.04		03/06/10 500.00	04/05/10 (950.00)				\$ 193.74
\$ 243.06	12/31/09 846.00	01/15/10 586.93	01/22/10 0.01		03/24/10 (300.00)	04/09/10 (167.45)				\$ 243.06
\$ 255.53	12/03/09 846.00	12/15/09 586.93	12/24/09 0.03		03/10/10 (500.00)	03/11/10 (167.45)				\$ 255.53
\$ 274.31	11/03/09 846.00	11/13/09 586.93	11/24/09 0.02		03/08/10 (500.00)	03/11/10 (167.45)				\$ 274.31
\$ 694.09	10/02/09 846.00	10/15/09 586.93	10/23/09 0.02		03/05/10 (900.00)	03/11/10 (167.45)				\$ 694.09
\$ 207.38	09/03/09 846.00	09/15/09 586.93	09/24/09 0.02		10/17/09 (500.00)	10/07/09 (167.45)				\$ 207.38
\$ 237.86	08/03/09 846.00	08/14/09 586.93	08/24/09 0.02		10/06/09 (1,100.00)	09/09/09 (167.45)				\$ 237.86
\$ 361.04	07/02/09 846.00	07/15/09 586.93	07/24/09 0.01	06/30/09 1,000.00	08/04/09 (790.00)	08/07/09 (167.45)				\$ 361.04
					07/15/09 (300.00)	07/07/09 (167.45)	07/21/09 (88.67)			\$ 237.86
					07/03/09 (500.00)					

Reg Bal	SMA Trans	SD Retirement	Interest Payment	Customer Deposits / Written	On-line Transfers 5752	Avera Health	Santel	Maintenance Fee	Central Electric	End Bal
\$ 406.01	06/03/09 846.00	06/15/09 569.28	06/23/09 0.02	06/19/09 1300.00 08/08/09 (400.00)	07/09/09 (1,500.00)	06/19/09 (167.45)	06/18/09 (92.82)			\$ 361.04
\$ 415.31	06/01/09 1,096.00	05/15/09 569.28	05/26/09 0.03	05/25/09 300.00 04/27/09 (8.00)	05/25/09 (200.00)	05/07/09 (167.45)	05/18/09 (96.16)			\$ 406.01
\$ 753.93	04/03/09 846.00	04/15/09 569.28	04/23/09 0.02		04/15/09 (500.00)	04/10/09 (167.45)	04/20/09 (86.47)			\$ 655.31
\$ 412.81	03/03/09 846.00	03/13/09 569.28	03/24/09 0.02		03/09/09 (800.00)	03/09/09 (167.45)	03/17/09 (106.73)			\$ 383.93
\$ 354.59	02/03/09 846.00	02/13/09 569.28	02/25/09 0.04		02/24/09 (600.00)	02/09/09 (167.45)	02/24/09 (89.65)			\$ 412.81
\$ 396.92	01/02/09 846.00	01/15/09 569.28	01/27/09 0.02		01/15/09 (500.00)	01/13/09 (167.45)	01/20/09 (90.18)			\$ 354.59
\$ 388.21	12/03/08 795.00	12/15/08 569.28	12/23/08 0.02		01/02/09 (700.00)	12/17/08 (500.00)	12/09/08 (88.14)			\$ 396.92
\$ 473.08	11/03/08 795.00	11/14/09 569.28	11/26/08 0.02	11/13/08 300.00	12/03/08 (600.00)	11/10/08 (162.55)	11/19/08 (86.62)			\$ 388.21
\$ 661.41	10/03/08 795.00	10/15/08 569.28	10/24/08 0.05		10/19/08 (1,300.00)	10/08/08 (162.55)	10/20/08 (80.11)			\$ 473.08
\$ 553.31	09/03/08 795.00	09/15/08 569.28	09/24/08 0.03		09/16/08 (1,000.00)	09/09/08 (162.55)	09/19/08 (93.66)			\$ 661.41
\$ 1,047.02	08/01/08 795.00	08/15/08 569.28	08/25/08 0.05		08/18/08 (1,000.00)	08/08/08 (162.55)	08/21/08 (95.49)			\$ 553.31
\$ 624.87	07/03/08 795.00	07/15/08 569.28	07/24/08 0.04	07/23/08 (60.00) 06/30/08 (20.46)	07/10/08 (600.00) 07/09/08 (600.00)	07/08/08 (162.55)	07/21/08 (99.16)			\$ 1,047.02
\$ 1,084.65	06/03/08 795.00	06/13/08 527.81	06/24/08 0.05	05/27/08 (83.71)	06/14/08 (1,500.00)	06/10/08 (162.55)	06/19/08 (86.38)			\$ 624.87
\$ 5,950.71	05/02/08 795.00	05/15/08 527.81	05/23/08 0.11	05/06/08 (2,137.55) 05/05/08 (763.83)	05/01/08 (2,500.00) 05/01/08 (500.00)	05/09/08 (162.55)	05/21/08 (101.65)			\$ 1,084.65
\$ 6,704.19	04/03/08 795.00	04/15/08 527.81	04/23/08 0.26	03/27/08 (129.40) 03/26/08 (16.36) 03/26/08 (150.69)	04/16/08 (500.00) 04/12/08 (1,000.00)	04/08/08 (162.55)	04/18/08 (94.15)			\$ 5,950.71
\$ 9,905.06	03/03/08 795.00	03/14/08 527.81	03/25/08 0.60	03/25/08 (49.05)	03/19/08 (1,500.00) 03/11/08 (1,000.00) 03/04/08 (1,700.00)	03/10/08 (162.55)	03/18/08 (89.28)			\$ 6,704.19
\$ 350.81	02/01/08 795.00	02/15/08 527.81	02/26/08 0.58	02/19/08 9,600.00	02/19/08 (400.00) 02/05/08 (700.00)	02/08/08 (162.55)	02/20/08 (83.19)			\$ 9,905.06
\$ 202.67	01/03/08 795.00	01/15/08 527.81	01/25/08 0.04		01/16/08 (900.00)	01/08/08 (162.55)	01/18/08 (88.76)			\$ 350.81

2013	2012	2011	2010	2009	2008	2007	Reg Bal	SSA Trans	SD Retirement	Interest Payment	Customer Deposits / Written	On-Line Transfers 5752	Avera Health	Symbol	Maintenance Fee	Central Electric	End Bal
							\$ 568,88	888.00	630.81	0.17	23,600.00	(24,400.00)	(186.60)	(175.58)			\$ 522.96
								10,524.00	7,455.90	3.01	19,600.00	(34,392.89)	(2,178.70)	(1,018.44)	(30.00)		End Bal
								10,152.00	7,266.60	0.19	470.50	(14,723.00)	(2,023.05)	(1,084.63)	(45.00)		
								9,306.00	6,530.21	0.19	250.00	(13,250.00)	(1,841.95)	(854.12)	(45.00)		
								11,248.00	7,524.19	0.28	592.00	(16,200.00)	(2,176.85)	(1,190.80)			
								9,540.00	6,562.54	1.85	6,538.95	(19,300.00)	(1,955.50)	(1,095.59)			
								9,336.00	6,238.50	1.23	1,120.74	(13,950.00)	(1,841.70)	(390.18)			
								60,994.00	42,228.75	6.92	52,172.19	(136,215.89)	(12,204.95)	(6,510.34)	(120.00)	(397.80)	
								103,222.75	Income								

took opt
 (14,993.14) net of \$1.8K

Appendix 7

- KEY**
- Land Rent Dep
 - Land Rent Dep into acct:825
 - Land Rent Trans
 - into acct:5752
 - Transfers from 825 to 5752
 - Transfers from 5752 to 825
 - Written checks
 - Customer Deposit
 - Phone Funds Transfer Debit
 - Phone Funds Transfer Credit
 - Misc Deduction



FILED

MAY 21 2015

**SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT**

By _____

West's Wisconsin Statutes Annotated

Property (Ch. 700 to 710)

Chapter 705. Multiple-Party and Agency Accounts; Nonprobate Transfers at Death; Transfer on Death Security Registration (Refs & Annos)

Subchapter I. Multiple-Party and Agency Accounts

W.S.A. 705.03

705.03. Ownership during lifetime

Currentness

Unless there is clear and convincing evidence of a different intent:

(1) A joint account belongs, during the lifetime of all parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit and without regard to the number of signatures required for payment. The application of any sum withdrawn from a joint account by a party thereto shall not be subject to inquiry by any person, including any other party to the account and notwithstanding such other party's minority or other disability, except that the spouse of one of the parties may recover under s. 766.70. No financial institution is liable to the spouse of a married person who is a party to a joint account for any sum withdrawn by any party to the account unless the financial institution violates a court order.

(2) A P.O.D. account belongs to the original payee during the original payee's lifetime and not to the P.O.D. beneficiary or beneficiaries. If 2 or more parties are named as original payees, during their lifetimes rights as between them are governed by sub. (1); and a surviving original payee may revoke or amend the P.O.D. beneficiary designation at will.

(3) A marital account belongs, during the lifetime of both parties, to the parties without regard to the proportion of their respective contributions to the sums on deposit or to the number of signatures required for payment. A party to a marital account may name one or more P.O.D. beneficiaries for that party's interest. No person may inquire about the application of any sums withdrawn from a marital account by a party to the account, except that if the parties are married to one another the other party to the account may recover under s. 766.70.

Credits

<<For credits, see Historical Note field.>>

Notes of Decisions (9)

W. S. A. 705.03, WI ST 705.03

Current through 2015 Act 150, published 02/13/2016

End of Document

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South Dakota Codified Laws

Title 29a. Uniform Probate Code (Refs & Annos)

Chapter 29A-6. Non-Probate Transfers (Refs & Annos)

Part 1. Multiple-Party Accounts

SDCL § 29A-6-103

29A-6-103. Ownership of joint account, P.O.D

Currentness

(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(2) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (1) of this section.

(3) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

Credits

Source: SL 1987, ch 208, § 3; SL 1991, ch 230, § 1C; SDCL § 30-23-45; SL 1995, ch 167, § 172.

Notes of Decisions (1)

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S D C L § 29A-6-103, SD ST § 29A-6-103

Current through the 2015 Regular Session, Exec.Order 15-1, and Supreme Court Rule 15-72

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
APPEAL NO. 27530**

**REBECCA HEIN; GOLDIE N. BURNHAM, individually, and
GOLDIE N. BURNHAM, as Personal Representative of the
ESTATE OF MARGARET L. ZOSS, Deceased,**

Plaintiffs and Appellees,

vs.

FRED M. ZOSS,

Defendant and Appellant,

**APPEAL FROM THE THIRD JUDICIAL CIRCUIT
SANBORN COUNTY, SOUTH DAKOTA**

THE HONORABLE JON R. ERICKSON, CIRCUIT JUDGE

REPLY BRIEF OF APPELLANT

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Amended Notice of Appeal Filed on August 17, 2015

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REPLY ARGUMENT

I. THIS COURT SHOULD REVERSE AND REMAND FOR A NEW TRIAL.

A. Fred Zoss is entitled to a new trial based upon prejudicial errors of law by the circuit court in excluding highly relevant and admissible evidence.

The trial strategy employed by the plaintiffs in this case essentially was to portray Fred Zoss as “the face of elder abuse,” who abused his mother as he took care of her for more than two decades by systematically stealing from her because he saw her only as “cash flow.” (T2 74). It is an effective strategy when it works. And it is pretty much guaranteed to work when the “accused” is prevented by the circuit court’s pre-trial evidentiary rulings from fully explaining his actions and telling the truth about what happened.

The appellees’ brief contains several errors. Many ultimately are not important but others beg correction. On page two, the plaintiffs state that “Fred made himself a joint owner of Margaret’s bank account in 2004[.]” But of course that is not correct and could not be so. Rather, in April 2004, when everyone concedes she was of sound mind and fully in control of all of her faculties, *Margaret* made Fred a joint owner of her account before she later granted him a power of attorney. (App. 12; T1 33, 83, 137; T2 9).

On page seven, the plaintiffs revive their suggestion made at trial that Fred “stole” his mother’s hearing aids and that is the reason that Margaret could not hear Rebecca when Margaret was near death. The suggestion that Fred stole his mother’s hearing aids is not credible. Margaret always had hearing aids. (T2 28, 34, 40). She

could not hear Rebecca on her deathbed because she was in the end stage of dementia and comatose. More to the point, neither Goldie nor Rebecca helped to financially support or take care of their mother's needs for the last twenty years of her life. Rebecca testified that she never purchased hearing aids for her mother because "I need them myself." (T1 119). Fred was the only child willing to take responsibility for caring for his mother over her final two decades. It is very easy to stand on the sidelines and criticize others, particularly after the fact, for assuming responsibilities and burdens that the critics were unwilling to share.

On page eight, the plaintiffs also repeat the ridiculous suggestion put forward at trial that, instead of hiring a home health care worker for Margaret, "Fred's cost saving care measure was to strap her in a chair using two leather belts tied together with Gorilla tape." This is a reference to one occasion in 2011 in which Fred had stopped at the old family farm with Margaret. From about 2009 forward, Margaret lived at Fred and Cathy Zoss's home in Minnesota, where they cared for her every day. (T2 34-35, 36, 43). They also hired home health care workers to help with Margaret's care. (T2 37). And she stayed at nursing home facilities when recovering from illness or injury. (T1 99). But Fred would still occasionally take Margaret on short trips to the farm because she loved being there so much. (T2 34, 36).

In 2011, Margaret (who by that time was blind, 101 years old, and beginning to suffer from dementia) had a serious fall at the farm in which she tumbled down the stairs and broke her hip. (T1 103, 106, 122). Later that year, Fred stopped at the farm with his mother and realized he had to go outside for a few minutes. To

prevent Margaret from getting up and falling, as she was prone to do and had severely injured herself doing earlier that year, Fred secured her in her plush recliner with two leather belts clipped together so they would comfortably fit around the recliner. (T1 108). Rebecca came over, immediately took photographs, and called the Department of Social Services, which concluded that Margaret was fine and very well cared for. (T1 109, 122). Rebecca apparently was so concerned about her mother that she never checked in on or spoke with her again over the last fourteen months of her life. (T1 122) (“I never went back. The Social Services lady called and said that they would keep track of it. So I don’t know”). The plaintiffs’ use of this incident to suggest that Fred routinely kept his mother tied up like some kind of ISIS hostage was purely an attempt to inflame the jury. (T2 74 – “She spent a significant amount of her time tied to a chair. So if we think that this is a violation or offense that has no victim, I’d ask you to think again because this is the victim of elder abuse. This is the face of elder abuse”).

In truth, Fred and his mother had a wonderful relationship and his mother was very active and independent until only a few years before her death. (T1 124; T2 8, 43, 49-50, 55, 57). Even Rebecca Hein was forced to admit that on the stand. (T1 124). This incident should never have been admitted into evidence, but Fred’s counsel at the time did not object. It has no relevance to the claims presented at trial or the issues raised in this appeal.

On page eight, as well, the appellees state: “Interestingly, Fred, in his Brief, claims that ‘Margaret fervently wished to live in the rural farmhouse...’ in an apparent

attempt to claim that Margaret would not leave the house for a nursing home. There is no citation to the record and nothing in the transcript from the trial to support this claim.” In fact, that is part of the point. If permitted, Fred would have testified that this was his mother’s desire and, in fact, was the basis for their living arrangement on the family farm from 1993 until about 2009 when she moved full-time to Fred and Cathy’s home in Minnesota. That is what Fred’s affidavit in the record states. (App. 12-14). That is what Ben Zoss’s affidavit in the record states. (App. 15-16). But the circuit court inexplicably ordered that no extrinsic evidence of anything that Margaret Zoss wanted or desired could be admitted into evidence and sustained the appellees’ objections on that basis at trial:

FRED ZOSS: I guess the reason that I moved in with my mom, my mom was – she was a people person. And she was there at the farm all by herself. I loved my mom very dearly. And it was her desire –

PLAINTIFFS’ COUNSEL: Objection, Your Honor.

THE COURT: Sustained.

(T2 7). Having opposed the plaintiffs’ motion in limine prior to trial, moreover, Fred was not obligated to continue to antagonize the judge and prejudice the jury by continuing to attempt to introduce evidence that the circuit court clearly was not going to allow. *See* SDCL 19-19-103(a).

The bottom line is that there are two sides to every anecdote put forward by the plaintiffs to impugn Fred, two sides to the tragic rift between Margaret and her daughters, and two competing versions of Margaret’s financial practices and plans for

her income and property during the last two decades of her life. Such conflicts in the evidence are, of course, for the trier of fact to resolve and the disbelieved party must accept the jury's assessment when the terms of the presentations were fair. But the jury cannot make a fair assessment when one party is prevented from fairly presenting its side of the story. That is what happened during this trial.

1. The circuit court erred in excluding evidence of Margaret's decades-long practice of not charging rent to Fred or her other sons who farmed the Zoss family land.

For some reason, the plaintiffs have addressed the issues raised in Fred's opening brief in reverse order. This reply brief will address them as originally framed. The plaintiffs' brief primarily attempts to deal with the first evidentiary issue raised on appeal by restating it differently. The plaintiffs' brief states that "Fred claims that he should have been permitted to present *oral* extrinsic evidence that he had a longstanding practice of using his mother's land without paying rent." (Brief at 30). But evidence that Margaret Zoss never charged any of her sons rent to farm the Zoss family farmland does not constitute oral extrinsic evidence. Rather, it is non-oral evidence of a longstanding practice of the decedent, supremely relevant to the issues in this case and concretely illustrative of her intent, that neither Fred nor any of her other children pay her rent to farm the land on which she owned a life estate. As explained by Fred's counsel at the hearing on the motion in limine:

In this case, the evidence will be that my client took literal care of his mother, day in and day out, for twenty years. She wanted that. That he handled her finances. She wanted that. And that she didn't want him to pay rent, as she hadn't for him or his brothers, for that matter, for decades.

And so the fact situation in *Bienash* is very different than [the] facts will be in this case. For that reason – and for that reason, the evidence should be allowed.

Bienash talks specifically about self dealing and that the oral intrinsic [sic] evidence shouldn't be allowed to [be] use[d] to raise a fact issue regarding gratuitous transfers of the principal's assets.

In this case, the evidence will be that this is evidence the defendant continued a long standing tradition of handling his mother's finances, taking care of her, etc. And I think that's vastly different.

(MH 14-15). The root of the problem here is the circuit court's overly broad interpretation of *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431. This Court's decision in *Bienash* was intended to *promote* the truth-seeking process, not banish the underlying facts from the courtroom in every case involving a standard durable power of attorney.

From its context, *Bienash* appears justifiably aimed at situations in which a durable power of attorney is granted under suspicious circumstances to an interloper who, for example, uses the instrument to change the beneficiary designation on certificates of deposit from the natural beneficiaries of the decedent's bounty to himself and then attempts to introduce evidence that he did so only because that is what the decedent verbally told him to do. Because the decedent in such situations cannot speak for herself, and because it is easy for someone to falsely claim to have received such oral instructions, the bright-line rule delineated in *Bienash* and *Studt v. Black Hills Federal Credit Union*, 2015 S.D. 33, 864 N.W.2d 513, was drawn. *See e.g., Estate of Hemphill*, --- So.3d ---, 2016 WL 492392 * 12 (Miss. Ct. App. Feb. 9, 2016) (quoting *Praefke v. Am. Enter. Life Ins.*, 655 N.W.2d 456, 461 (Wis. Ct. App. 2002))

(summarizing rule as “[g]iven these concerns, these courts have held that a principal’s alleged oral statements to her attorney-in-fact cannot modify or ‘negate [her] formal expression of her intent as embodied in the power of attorney agreement”).

But there are critical distinctions between the “oral extrinsic evidence” of the kind contemplated in *Bienash* and non-oral evidence of a longstanding pattern and practice. There is the difference, for example, between actions and words. The historical fact that Margaret Zoss did not charge any of her three sons rent to farm any of the Zoss family land for decades is non-oral, highly relevant evidence that she did not suddenly intend for Fred to start paying rent on that same land by executing a durable power of attorney on his behalf in 2005. That non-oral evidence of Margaret’s longstanding practice precisely explains why Fred did not pay his mother rent that she never charged. But the jury was never permitted to consider that evidence or Fred’s explanation for his actions. A jury should be permitted to hear the full truth and then decide whether Fred’s failure to suddenly begin paying rent to his mother for farming their family land constituted a breach of fiduciary duty for which he must pay compensatory and punitive damages to his sisters in this action.

2. The circuit court also erred in excluding evidence of Margaret’s intent and practice that Fred use the funds in their joint account to pay their expenses and keep the farm and household running so that she could remain in her home.

The same rationale applies to the circuit court’s exclusion of evidence that Margaret had for years authorized and permitted Fred to pay her expenses and their mutual expenses so that she could remain on the farm and out of a nursing home as long as possible and that she eventually made him a joint owner on her bank account

for that express purpose. (MH 14-15; App. 12-14, 15). Contrary to the suggestion in the plaintiffs' brief, the circuit court sustained attempts to introduce such evidence and no further attempts were made as the result of the circuit court's definitive and legally erroneous pre-trial ruling that no extrinsic evidence of any kind, not simply oral extrinsic evidence, could be introduced regarding Margaret's wishes. (T2 7, 23). It is understood that Fred was not permitted under *Bienash* to introduce oral extrinsic evidence that Margaret intended Fred to use the power of attorney to make gifts to himself where the instrument does not expressly grant that power. But a proper application of the *Bienash* rule does not prohibit Fred from introducing otherwise admissible evidence – whether extrinsic, oral, or non-oral – regarding why she made him a joint owner on her bank account.

As set forth in the opening brief, the Wisconsin courts have clarified such misunderstandings about the similar rule established in *Praefke* when parties have attempted to prevent attorneys-in-fact from explaining their actions and the donor's intentions in making them an owner on a joint account. See *Russ ex rel. Schwartz v. Russ*, 734 N.W.2d 874 (Wis. 2007). In their brief, the plaintiffs attempt to distinguish *Russ* by pointing out the different presumptions regarding the ownership of money placed in a joint account under Wisconsin and South Dakota law. It is a good effort at trying to distinguish *Russ*, but ultimately misses the Wisconsin court's point.

The *Russ* decision makes clear that when there is a pre-existing joint account, all relevant evidence regarding the intent of the donor in establishing that joint account should be considered if it otherwise meets the standards of admissibility,

notwithstanding the subsequent execution of a durable power of attorney. Although Wisconsin and South Dakota have slightly different presumptions regarding the ownership of money placed in joint accounts, ownership in both contexts depends upon the evidence presented. Indeed, that is the very essence of a legal presumption – it establishes a default position that can be rebutted by evidence. Thus, South Dakota law presumes that a joint account belongs to the parties in proportion to their donations “unless there is clear and convincing *evidence of a different intent.*” SDCL 29A-6-103 (emphasis supplied). As explained in *Russ*, where, as in the present case, the intent in creating a joint account is at issue, “extrinsic evidence may be admissible to determine the intent of the parties. The prohibition against the admissibility of extrinsic evidence of the parties’ intent to allow the making of gifts, as set forth in *Praefke*, 257 Wis.2d 637, ¶ 20, 655 N.W.2d 456, would not apply in such cases.” *Russ*, 734 N.W.2d at 885.

Fred never used the POA to transfer any money from Margaret’s account. He did, with Margaret’s full awareness and permission, use his status as an owner of their joint account to pay some of their expenses using those funds. The circuit court’s exclusion of any and all evidence regarding Margaret’s intent in making Fred a joint owner of her account was prejudicial error that misunderstood and overstepped this Court’s holding in *Bienasb*. Just as in *Russ*, Fred should have been permitted to explain that his mother was fully aware that he was transferring money from their joint account to his farm account to pay their expenses and told him that was what she wanted him to do in exchange for him living with and caring for her over the

final twenty years of her life, and that was why she had made him the joint owner of her account. The circuit court's exclusion of such evidence was legal error and a prejudicial abuse of discretion.

3. The circuit court compounded its error by excluding relevant evidence of Margaret's testamentary intent to forgive any debts owed by any of her children.

Finally, there is the issue of the will. Both trial court and plaintiffs peculiarly describe Fred as having sought to introduce Margaret's will, the very basis for the plaintiffs' authority to bring a complaint on behalf of Margaret's estate, at a "late juncture" in the trial. (Brief at 4). That complaint is hard to swallow. This was a two-day jury trial. The plaintiffs' case consumed the entire first day. Fred sought to introduce the will during the morning of the second day after the plaintiffs rested. It is confusing that the circuit court and plaintiffs would complain that attempting to introduce the will during the testimony of the first witness that one calls in their case somehow constitutes an impermissible "late juncture." If not then, just when was Fred supposed to try to introduce this evidence?

In any event, it is not disputed that the intent expressed by Margaret in her will regarding alleged debts owed to her estate by any of her children constituted *non-oral* extrinsic evidence of her intent. It therefore was not precluded by the *Bienash* bright-line rule concerning oral extrinsic evidence and should have been considered by the jury along with all of the other evidence. Fred was prejudiced by the exclusion of this highly relevant evidence that his mother did not intend that he owe any debt to her estate and should be granted a new trial on this basis alone.

CONCLUSION

WHEREFORE, Appellant Fred M. Zoss respectfully requests that this Honorable Court *reverse* and remand for a new trial.

Dated this 23rd day of March, 2016.

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