IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. #30645

ARLENE AGER, **Appellant,** **v.** **LINDA AGER COYLE, individually and as Power of Attorney of Fred Ager, now deceased; and WILLIAM COYLE, individually and as Power of Attorney of Fred Ager, now deceased,** **Appellees.**	

APPEAL FROM THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN
Circuit Court Judge

BRIEF OF APPELLANT ARLENE AGER

ATTORNEYS FOR APPELLANT, ARLENE AGER

Richard A. Pluimer
Richard Pluimer, PLLC
PO Box 988
Spearfish, SD 57783
Telephone (605) 641-3378
rpluimer@outlook.com

Erin Melling
Melling & Roseland Law, PC
1409 5th Avenue
Belle Fourche, SD 57717
Telephone (605) 723-1659
melling@mrlawpc.net

Filed: 4/19/2024 10:47 AM CST Supreme Court, State of South Dakota #30645

ATTORNEYS FOR APPELLEES LINDA AGER COYLE AND WILLIAM COYLE

Mr. Eric Nies
Mr. Dillon Karras
Nies, Karras & Skjoldal, PC
109 Main Street
Spearfish, SD 57783
Telephone (605) 642-2757
eric@spearfishlaw.com
dillon@spearfishlaw.com

Mr. Eric M. Schlimgen
Mr. Spencer R. Prosen
611 Dahl Road, Suite 1
Spearfish, SD 57783
eric@schlimgenlawfirm.com
spencer@schlimgenlawfirm.com

ATTORNEY FOR JEFF AGER, AN INTERESTED PARTY AND SON OF FRED AGER, DECEASED.

Ms. Lora A. Waeckerle
Waeckerle Law Prof., LLC
910 5th Street, Suite 102
Rapid City, SD 57701
lora@wlawsd.com

NOTICE OF APPEAL FILED: March 11, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This is an appeal from the Butte County Circuit Court, Fourth Judicial Circuit of a *Memorandum of Dismissal and Order* entered by the Hon. Eric J. Strawn on February 7, 2024. (Ager App. 017-027)

To avoid confusion, the facts in the underlying action appealed here are substantially similar to facts in a separate matter, *Estate of Fred Ager*, involved in Appeal #30501, which was previously dismissed by this Court on jurisdictional grounds and in a Notice of Review currently pending in Appeal #30604.

It is also understood that matters pending in Appeals #30590 and #30604 are currently being considered by the Court for dismissal as premature/untimely, and subject to entry of an Order for Complete Settlement under this Court Supervised probate provided for in SDCL 29A-3-1001.

This action was filed following the entry by Judge Fitzgerald in the probate action, *Estate of Fred Ager*, Butte County, South Dakota Pro. 09PRO23-00016 *Findings of Fact, Conclusions of Law and Order* on August 17, 2023, a copy of which is submitted herewith as Ager App. 001. That decision held that the personal representative, Linda Coyle, would not be removed as personal representative, and that the funds held by the Estate of Fred Ager as a result of removal of funds by Linda Coyle, owned by Arlene Ager, as joint tenant with right of survivorship, would be administered under the Last Will and Testament of Fred Ager.

This conversion action was brought against Linda Coyle and William Coyle, husband and wife, in their individual capacities and as co-agents acting under a power of attorney from Fred Ager under which they thereby obtained possession of some $286,000

of joint tenancy account funds owned by Fred and Arlene Ager, just prior to the death of Fred Ager.

This action also alleged that Linda Coyle, whether acting individually or as agent under the power of attorney also received an impermissible and personal benefit from such wrongful actions.

There was pending before Judge Strawn a motion to amend Plaintiff's complaint and add another count for a claim of unjust enrichment, at the time of the court's dismissal of the initial complaint. No rationale was provided by the court for its refusal to consider the motion to amend.

Appellant Oralia Garduna Ager, wife of decedent, Fred Ager, will be variously referred to as "Plaintiff," "Arlene Ager," "Arlene" or "Mrs. Ager". The Fred Ager Estate will be referred to as "Estate". Linda Ager Coyle will be referred to as "Linda" or "Agent". William Coyle will be referred to as "William" while acting as attorney in fact for his father-in-law. Jeff Ager will be referred to as "Jeff" where the context requires.

The Settled Record will be "SR." Documents in Appellant's Appendix will be "Ager App." followed by the appendix number.

JURISDICTIONAL STATEMENT

The Memorandum of Decision and Order was entered by Circuit Judge Eric Strawn on February 7, 2024 and Notice of Entry of Order was filed February 7, 2024.

Appellant Arlene Ager filed her Notice of Appeal on March 4, 2024.

STATEMENT OF LEGAL ISSUES

I. DID THE CIRCUIT COURT ERR IN DISMISSING PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED?

The Circuit Court held that Plaintiff's complaint failed to state a claim upon which relief could be granted as against Defendants in their capacities as individuals and co-agents acting under a power of attorney.

Estate of Thacker v. Timm, 2023 SD 2, ¶41
Wyman v. Terry Schulte Chevrolet, Inc., 1998 SD. 96, ¶ 32, 584 N.W.2d 103, 107

SDCL 59-7-1(3)
SDCL 59-12-9(1)(a)
SDCL 59-12-23(1)
SDCL 59-12-23 (1)(b)
SDCL 59-12-23(1)(c)

II. DID THE CIRCUIT COURT ERR IN DISMISSING PLAINTIFF'S COMPLAINT ON THE GROUNDS OF RES JUDICATA?

The Circuit Court held that Plaintiff's complaint was barred by the doctrine of res judicata based on the Findings of Fact, Conclusions of Law and Order of Circuit Court Judge John Fitzgerald in The *Estate of Fred Ager*, Butte County Probate 09PRO23-000016 on August 17, 2023. (Ager App. 001)

Detmers v. Costner, 2023 SD 40

SDCL 29A-3-1001

III. DID THE CIRCUIT COURT ERR IN DISMISSING PLAINTIFF'S COMPLAINT FOR LACK OF STANDING TO ASSERT CLAIMS AGAINST THE DEFENDANTS WHERE THE PLAINTIFF WAS THE OWNER OF THE FUNDS CONVERTED?

The Circuit Court *sua sponte* raised and decided that Plaintiff lacked standing to make her conversion claim on the basis that Plaintiff could not be harmed as Defendants acted as agents in the place of Decedent, and therefore the Court lacked jurisdiction to consider the case.

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

SDCL 59-12-23 (1)(b)
SDCL 59-12-23(1)(c)
SDCL 59-12-23(1)(d)
SDCL 59-12-23(3)

IV. DID THE CIRCUIT COURT ERR IN REFUSING TO CONSIDER PLAINTIFF'S MOTION TO AMEND PRIOR TO ENTRY OF ITS ORDER FOR DISMISSAL?

The Circuit Court appears to have simply ignored a previously filed Plaintiff's motion to amend to include an additional element involving William Coyle and a new and alternative claim for unjust enrichment and which would add an additional beneficiary party, Jeff Ager.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the decision of the Hon. Eric J. Strawn in Butte County, Fourth Judicial Circuit Case. No. 09CIV23-000124 dismissing Plaintiff's complaint for conversion against Linda Ager Coyle and William Coyle, husband and wife, in their individual capacities and as co-agents acting under a power of attorney for Fred Ager, Linda's father.

Plaintiff also raises in this appeal the total failure of the Circuit Court to consider an additional proposed, amended claim of unjust enrichment against Linda and William Coyle, as well as Jeff Ager, the son of Fred Ager and a beneficiary under his will.

The underlying facts of this case are not in material dispute, and are set forth in the Findings of Fact, Conclusions and Order of August 17, 2023, attached as Ager App. 001.

Fred Ager and Oralia Garduna Ager had been married for 21 years, prior to Fred Ager's death on April 16, 2023. Fred Ager had prepared and executed a Durable Power of

Attorney on July 8, 2022, naming his daughter Linda Coyle and her husband William Coyle as "co-attorneys-in-fact". (Ager App. 011)

Fred and Arlene established a joint checking and a joint savings account at Highmark Federal Credit Union in Belle Fourche, South Dakota on May 24, 2021. In March of 2023 the checking account carried a balance of approximately $93,000 and the savings account balance totaled approximately $194,000. Such accounts at Highmark Federal Credit Union housed the majority of the couples' liquid assets and were the primary accounts for payment of living expenses.

For some months prior to his death on April 16, 2023, Fred had been ill and under hospice care. Fred was not expected to live. On March 27, 2023, 20 days before Fred's death, Linda Coyle, acting as Agent under Fred's Power of Attorney withdrew $92,500 of the funds from the joint tenancy checking account and the entirety of the savings account of $194,302.22. The credit union issued a cashier's check to Linda Coyle, personally, for the funds Linda withdrew. These withdrawals left the Petitioner, 88-year-old Arlene Ager, with a total of $577.72 to cover her current and future living expenses. (Ager App. 016)

Agent Linda Coyle held the funds in her personal safe until May 18, 2023, more than one month following Fred's death. On that date, in her alleged capacity as Agent, Linda transferred the funds to herself as Personal Representative of the Fred Ager Estate for the purpose of administering those funds as part of Fred's Estate. Under the terms of Fred's Last Will & Testament, Linda and her brother, Jeff Ager, were to personally receive 50% of the savings account, or approximately $97,000.

Mrs. Ager was not advised of the depletion of either of the accounts.

Almost immediately following the transfer to the Estate, the Personal Representative began use of the former joint account funds for payment of administrative expenses and claims, including attorney's fees.

Petitioner filed a Petition requesting the Fred Ager Estate return $286,802.22 in joint funds improperly removed from the joint accounts and an Order of the Court removing Linda Coyle as Personal Representative for her actions. In its August 17, 2023, decision, the Court approved of the Agent/Personal Representative's actions and declined to remove the Personal Representative.

The Conclusions of Law drawn by the Circuit court in the probate proceeding are strongly disputed.

Mrs. Ager appealed the decision which was dismissed by this Court for failure to serve Jeff Ager as an interested person. The matter is currently before this Court by way of a Notice of Review and is pending determination of another appeal by Linda Coyle in an Order to Show Cause, Case #30590.

Judge Strawn, in his February 1, 2024, Memorandum of Decision dismissed Plaintiff's claims for (1) failure to state a claim upon which relief could be granted against Linda and William Coyle in both their individual capacities and as co-agents under the Fred Ager power of attorney, (2) for lack of standing, and (3) on the grounds of res judicata. Judge Strawn did not rule on either motion from the Plaintiff to file an amended complaint.

ARGUMENT AND AUTHORITY

STANDARD OF REVIEW

Initial discovery in this case had commenced in the form of Requests for Admission prior to entry of the order of dismissal in this case, but the Memorandum of Decision does not appear to have considered any matters outside of the pleadings, except on the issue of res judicata. The Court relies solely on statutory grounds and conclusions of law, which are reviewed under the de novo standard.

In *Mach v. Connors*, 2022 SD 48, this Court stated at ¶9:

"A motion to dismiss for failure to state a claim pursuant to SDCL 15-6-12(b)(5) tests the legal sufficiency of the pleading." *Wells Fargo Bank v. Fonder*, 2015 SD 66, ¶ 6, 868 N.W.2d 409, 412. The legal sufficiency of a pleading "is a question of law[.]" *Nooney v. StubHub, Inc.*, 2015 SD 102, ¶ 9, 873 N.W.2d 497, 499. Therefore, we review de novo whether Mach and Wags West's complaint fails to state a claim upon which relief could be granted. See *id.*; *Sisney v. Best Inc.* (Sisney I), 2008 SD 70, ¶ 8, 754 N.W.2d 804, 809.

"We review conclusions of law under a de novo standard, with no deference to the trial court's conclusions of law." *Harksen v. Peska*, 2001 SD 75, ¶ 9, 630 N.W.2d 98, 101 (citing *Mid Century Ins. Co. v. Lyon*, 1997 SD 50, ¶ 4, 562 N.W.2d 888, 890).

"It is well settled that a motion to dismiss under Rule 12(b)(5) tests the law of a plaintiff's claim, not the facts which support it." *Wojewski v. Rapid City Regional Hosp., Inc.*, 2007 SD 33, ¶ 11, 730 N.W.2d 626, 631. However, a motion to dismiss under this rule is "viewed with disfavor and rarely granted." *Fodness v. City of Sioux Falls*, 2020 SD 43, ¶ 9, 947 N.W.2d 619, 624. "Whether the complaint states a valid claim for relief

is viewed 'in the light most favorable to the plaintiff 'and examined 'to determine if the allegations provide for relief on any possible theory.'" *Id.* (quoting *Osloond v. Farrier*, 2003 SD 28, ¶ 4, 659 N.W.2d 20, 22).

While the Circuit Court's Order is couched in terms of a dismissal, going outside the pleadings to take judicial notice of and consider the August 17, 2023, estate decision (Ager App. 001) on removal of the Personal Representative suggests that the res judicata issue was treated akin to a summary judgement. In *Lakes' Byron Store, Inc. v. Auto-Owners Ins. Co.*, 589 N.W.2nd 608, (SD 1999) it is held:

"[¶ 4] Our standard of review on a motion for summary judgment is well established:

In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Walz v. Fireman's Fund Ins. Co., 1996 SD 135, 6, 556 N.W.2d 68, 70 (quoting *Lamp v. First Nat'l Bank of Garretson*, 496 N.W.2d 581, 583 (SD 1993) (citation omitted))."

I. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The essential elements of a conversion claim are found in case law, not statute. The South Dakota Supreme Court in the *Estate of Thacker v. Timm*, 2023 SD 2, ¶41 states, "Conversion is the act of exercising control or dominion over personal property in a manner that repudiates the owner's right in the property or in a manner that is inconsistent with such right." *Wyman v. Terry Schulte Chevrolet, Inc.*, 1998 SD. 96, ¶ 32, 584 N.W.2d 103, 107 (citing Ward, 1996 SD 113, ¶17, 553 N.W.2d at 251). A successful claim for conversion will meet four necessary elements:

(1) [plaintiff] owned or had a possessory interest in the property;

(2) [plaintiff's] interest in the property was greater than the [defendant's];

(3) [defendant] exercised dominion or control over or seriously interfered with [plaintiff's] interest in the property; and

(4) such conduct deprived [plaintiff] of its interest in the property.

W. Consol. Co-op. v. Pew, 2011 SD 9 ¶22, 795 N.W.2d 390, 397 (alterations in original) (quoting *First Am. Bank & Tr., N.A. v. Farmers State Bank of Canton*, 2008 SD 83,138, 756 N.W.2d 19, 31). *Estate of Thacker v. Timm*, 984 N.W.2d 679, (SD 2023), pg. 691.

The factual elements of Plaintiff's claim are not in any real dispute:

- Arlene was a co-owner of a checking and savings account, with her husband Fred, at Highmark Federal Credit Union in Belle Fourche. Complaint ¶7

- The records of Highmark Federal Credit Union designated ownership of the accounts as a "Joint Account with Rights of Survivorship." Exhibit A to Complaint ¶7.
- Linda Coyle, ostensibly in her capacity as co-attorney-in-fact removed $286,000 from the JTWROS account prior to the death of Fred Ager. Complaint ¶12.
- Linda Coyle took possession of such funds in her personal and individual name. Complaint ¶20.
- Fred Ager passed away April 16, 2023. Complaint ¶14.
- The power of attorney terminated on the death of Fred Ager. SDCL 59-12-9(1)(a), SDCL 59-7-1(3).
- Linda Coyle retained possession of the $286,000 until May 18, 2023, at which time she deposited the funds in a new estate account which she created and was the only person authorized on the account. Complaint¶14.
- Linda has retained dominion and control over the joint account funds to this date. Complaint ¶21
- Linda, and her brother, Jeff, will personally benefit at least $100,000 by defeating Plaintiff's rights of survivorship. Complaint ¶15.
- The power of attorney did not authorize Linda to engage in self-dealing. ¶13 and Complaint Ex. C. See also SDCL 59-12-23(1).
- The power of attorney did not authorize Linda to make gifts, including gifts to herself. ¶13 and Complaint Ex. C. See also SDCL 59-12-23(1)(b).
- The power of attorney did not authorize Linda to make changes to rights of survivorship. ¶13. Complaint Ex. C. See also SDCL 59-12-23(1)(c).

It is difficult to see any aspect of pleading a claim for conversion absent from the complaint. While the Circuit Court treats each Defendant separately, as though all acts are alleged as person or representative, pleading the dual capacities is necessary. If Plaintiff is correct, while Defendants purported to act in a representative capacity as co-powers of attorney, bona fide issues will arise as to whether they acted jointly, as required by the Power of Attorney document, and whether they stepped away from the protection of that capacity by taking actions outside of their authority and contrary to law.

While *Healy Ranch Partnership v. Mines, supra,* discusses the weight factual "allegations" are given, Plaintiff would point to the Findings of Fact which the Circuit Court reviewed and relied upon in applying res judicata . In the *Estate of Ager*, Butte County, Fourth Circuit, Case #09PRO23-000016, Judge Fitzgerald made the following Findings of Fact which provide validity to Plaintiff's claims here:

- 11. "On March 27, 2023, less than a month prior to decedent's death, his daughter, Linda Ager, agent, withdrew all of the funds in the savings and checking accounts at the Highmark Federal Credit Union."
- 13. "The funds in both accounts were joint funds of the decedent and his wife, Arlene Ager. Ownership according to the credit union records was indicated to be a joint tenancy with a right of survivorship and not as tenants in common."
- 17. "The death of Fred Ager was the event that would have triggered title vesting the credit union funds to Arlene Ager; however, the withdrawal of funds occurred prior to that event."

- 18. "The exercise of authority by the agent to withdraw funds from the credit union having occurred before death negated the potential of title to the joint accounts being transferred at death to Arlene Ager."
- Conclusion of Law #10 held: "Prior to Fred Ager's death, *the joint tenancy (ownership) of the credit union accounts was overridden by the action of his agent....*" (Emphasis Supplied)

While Plaintiff disputes several conclusions of law adopted by Judge Fitzgerald, it is inconsistent that the Circuit Court here would find application of res judicata to a legal conclusion but not to the facts found and inconsistent legal conclusions which clearly support a conversion claim.

II. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT ON THE GROUNDS OF RES JUDICATA.

The Circuit Court properly identified the appropriate precedent for consideration of the doctrine of res judicata. *Detmers v. Costner*, 2023 SD 40 stated:

[¶13.] "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." Id. ¶ 40, 978 N.W.2d at 798 (quoting *Am. Family Ins. Grp. v. Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774). "Issue preclusion refers to the effect of a judgment in foreclosing re-litigation of a matter that has been litigated and decided." Id. (quoting *Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d at 774). "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit[.]" Id. (alteration in original) (quoting *Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d at 774). "What is prohibited . . . under claim preclusion is the cause of action itself, but under issue

preclusion, it 'is the particular issue or fact common to both actions.'" Id. ¶ 41, 978 N.W.2d at 798 (quoting *Bollinger v. Eldredge*, 524 N.W.2d 118, 122, (SD 1994)).

The "issue" arguably precluded in the prior litigation was the removal of Linda Ager as personal representative, and the obligation of the Fred Ager Estate to restore the JTWROS funds to their rightful owner, Arlene Ager. No personal claim was asserted against Linda Coyle, William Coyle or Jeff Ager. The "particular issue" (the personal liability of participants) was never determined in the underlying action, nor was the "claim" for conversion.

[¶14.] For an action to be barred by res judicata, four elements must be satisfied: (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication. Id. ¶ 42, 978 N.W.2d at 799 (quoting *Dakota, Minn., & E.R.R. Corp. v. Acuity*, 2006 SD 72, ¶ 17, 720 N.W.2d 655, 661). We apply these elements "under both issue preclusion and claim preclusion theories." Id. ¶ 43, 978 N.W.2d at 799. "However, as it relates to claim preclusion, ... 'our review is not restricted to whether the specific question posed by the parties in both actions was the same or whether the legal question posed by the nature of the suit was the same.'" Id. ¶ 44, 978 N.W.2d at 799 (quoting *Farmer v. S.D. Dep't of Revenue & Regul.*, 2010 SD 35, ¶ 10, 781 N.W.2d 655, 660). "For purposes of [claim preclusion], a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce. The test is a query into whether the wrong sought to be redressed is the same in both actions." Id. ¶ 45, 978 N.W.2d at 799 (alteration in original) (quoting *Glover v.*

Krambeck, 2007 SD 11, ¶ 18, 727 N.W.2d 801, 805). "If the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." Id. (quoting *Farmer*, 2010 SD 35, ¶ 10, 781 N.W.2d at 660).

The Circuit Court's holding is in err for the following reasons:

1. There is no identity of issues. The issue in the Estate proceeding was the removal of Linda Coyle as personal representative and for the estate to disgorge ill-gotten gain. No personal claim was asserted against Linda Coyle or William Coyle.

2. A further and clear distinction, as well as defeating other elements of res judicata, would have existed had the Circuit Court permitted the amendment of the complaint to include a separate claim of unjust enrichment and an additional beneficiary defendant, Jeff Ager. Defendants opposed the amendment on the ground that doing so would defeat the res judicata argument.

3. There is no final judgement on the merits. The decision of the probate court upon which the Circuit Court bases its res judicata holding is now before this Court in cases #30604 (N.O.R.) awaiting this Courts determination of jurisdictional issues.

4. Should the Court determine it lacks jurisdiction to hear those appeals at this time, the probate court's decision would yet be subject to appeal upon entry of an order for complete settlement under SDCL 29A-3-1001.

5. Until determined by this Court, there has not been a full and fair opportunity to litigate the issues in the prior adjudication.

6. There are or should be different parties to this proceeding. William Coyle has never been held to account for his activities as co-personal attorney in fact. Jeff Ager

(who would be a necessary party to the unjust enrichment claim) has not been a party to any proceeding. The Estate is not a party to this proceeding. Both William and Jeff are necessary parties for relief to be granted.

III. THE CIRCUIT COURT ERRED IN DISMISSING PLAINTIFF'S COMPLAINT FOR LACK OF STANDING TO ASSERT CLAIMS AGAINST THE DEFENDANTS WHERE THE PLAINTIFF WAS THE OWNER OF THE FUNDS CONVERTED.

With due respect to the Circuit Court, the conclusion that Plaintiff lacked standing to assert a claim to her own money is, at best, difficult to understand.

In that portion of the Memorandum of Decision labeled "Standing" the Circuit Court states: "Arlene was a joint account holder with Fred and therefore must show how Fred (principal) removing the money from the bank account via Linda (agent), would have harmed the Plaintiff."

The candid answer to the Circuit Court's required showing is that (1) Fred did not remove the money and (2) Linda was not authorized by Fred to remove the money for the purpose of "overriding" the law of joint tenancy (as found by Judge Fitzgerald in Conclusion of Law 10) and obtaining personal benefit by doing so.

The answer is found in South Dakota black letter and case law which the Trial Court apparently failed to consider.

1. An agent under a power of attorney may not make a gift to him/herself unless "the power of attorney expressly grants the agent the authority..." SDCL 59-12-23(1)(b).

2. An agent under a power of attorney may not "override"/ change rights of survivorship unless "the power of attorney expressly grants the agent the authority..." SDCL 59-12-23(1)(c).

3. Fred Ager's power of attorney expressly stated, "I do *not* authorize my attorney in fact to make gifts to any person, including my attorney-in-fact..." (Emphasis in original) (Ager App. 011)

4. Fred Ager's power of attorney *did not* "expressly grant" any authority to his agents to override or change rights of survivorship.

5. To the extent than a survivorship right is an effective beneficiary designation, Fred Ager's will *did not* "expressly grant" authority to his agents to either change or create a beneficiary designation. SDCL 59-12-23(1)(d).

The Circuit Court actually framed the issue and resolution properly in footnote 3 of the Memorandum of Decision.

"The court notes that acting outside the scope and acting improperly within the scope are distinctly different issues. *Acting outside the scope of a power of attorney will allow a person who is harmed a cause of action against the POA for their conduct outside the power of attorney.* However, if the person acts within the power of attorney the alleged victim cannot sue the POA because the harm occurred pursuant to the authority of the disclosed principal, not the agent." (Emphasis supplied)

That accounts for the specific allegations of Linda's conversion as occurring outside the scope of her authority under Fred's POA.

Unfortunately, both Circuit Judges who have handled these cases appear to have accepted Defendant's position that the broad grant of authority in the POA is unlimited, and in failing to recognize the limitations of SDCL 59-12-23(3) and multiple prior decisions of this Court.

Even prior to the Uniform Power of Attorney Act (which was in place at all relevant times to this proceeding) *Bienash v. Moller*, 2006 SD 78, 721 N.W.2d 431 addressed substantially identical issues.

[¶ 13.] This Court has held that "a power of attorney must be strictly construed and strictly pursued." *In re Guardianship of Blare*, 1999 SD 3, ¶ 14, 589 N.W.2d 211, 214 (citing 3 Am.Jur.2d Agency § 31 (1986); *Scott v. Goldman*, 82 Wash. App. 1, 917 P.2d 131, 133 (1996)) (stating powers of attorney are strictly construed). *"[O]nly those powers specified in the document* are granted to the attorney-in-fact." *Id.* (emphasis added); see also *In re Estate of Crabtree*, 550 N.W.2d 168, 170 (Iowa 1996) (citations omitted) (stating "a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified").

[¶ 14.] Additionally, we have held "a fiduciary must act with utmost good faith and avoid any act of self-dealing[.]" *Estate of Stevenson*, 2000 SD 24, ¶ 9, 605 N.W.2d 818, 821 (citing *American State Bank*, 458 N.W.2d at 811) (SD 1990). In order for self-dealing to be authorized, the instrument creating the fiduciary duty must provide "clear and unmistakable language" authorizing self-dealing acts. *See id.* ¶ 15. Thus, if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist."

Linda Coyle did not withdraw or use Arlene's funds for her father's care or comfort in his last days or use them for his benefit in any manner as anticipated by the Power of Attorney. Arlene was responsible for providing and paying for all costs associated with Fred's last illness. Linda hid her act from Arlene and kept the

funds securely in her individual name and in her personal home safe until well after Fred passed away. Only then were then funds handled in such a way so as to assure that she and her brother would receive 50% of the savings account balance of $197,000 plus other benefits.

Linda's final actions in transferring the withdrawn funds occurred only after any authority of the POA had expired, due to Fred's death a month earlier. Linda can claim no authority under the POA whatsoever for her post-death transactions.

Linda's actions are clearly beyond the scope of any authority granted by Fred. Fred, Linda and Arlene were affected by the acts of Linda, as agent. Arlene and only Arlene has standing to bring this action.

IV. THE TRIAL COURT ERRED IN WHOLLY FAILING TO CONSIDER PLAINTIFF'S MOTION TO AMEND

A quandary exists for this writer as to the appropriate manner of addressing this argument. Plaintiff filed a motion to amend, as well as the proposed amendment on two separate occasions and noticed the motion for hearing on two separate occasions. The amended complaint would have clarified the basis for naming William Coyle as a party[1], and added an additional claim for unjust enrichment and named Jeff Ager as a named defendant pursuant to his interest as a beneficiary of Fred's will and designation to receive a 50% interest in the JTWROS savings account. The addition of these two parties would have implications for the application of res judicata as urged by Defendants.

[1] William Coyle was a necessary party in determining the legality of any action taken by the co-attorneys in fact, as neither co-attorney in fact had authority to act individually while both were serving.

The first motion to amend was filed on December 22, 2023, and set for hearing on January 8, 2024[2]. (SR 166) Defendants objected on timeliness grounds, although an informal request for stipulation had been made a week prior to the filing date. (The emails sent to Defendant's attorney Prosen are attached as Exhibit B to Plaintiff's Reply to Defendant's Response to Motion for Leave to File Amended Complaint and Join Party Defendant and Notice of Hearing.) The second notice of hearing and proposed amended complaint and request to join additional defendant, Jeff Ager, was filed January 9, 2024, and noticed for hearing for February 15, 2024. (SR 219, 234, 235, 236) The February 15, 2024, hearing was "cancelled" by the court following entry of the Memorandum of Decision on February 1, 2024.

On February 12, 2024, Plaintiff filed a Motion to Clarify and Amend Order to determine if the February 1, 2024, Memorandum of Decision was intended as a "final order" or whether the court would still entertain the motion to amend. (SR 274) No response was given by the Court.

It is Appellant's view that the Circuit Court erred in failing to consider and grant a motion to amend and join parties that had been filed more than a month prior to its Memorandum of Decision and Order.

This matter should be remanded to the Circuit Court with directions to permit filing of the Amended Complaint.

---

[2] Plaintiff may not have been required to obtain leave of court to file the Amended Complaint, depending on whether Defendant's motion to dismiss is characterized as a "responsive pleading". SDCL 15-6-15(a). Plaintiff pursued leave based on the guidance of the statute that leave "shall be freely given when justice so requires."

CONCLUSION

This case, and the related Estate case which led to it, are replete with inexplicable contradictions.

Invariably intertwined in every portion of the Circuit Court's Memorandum of Decision and Order here are the echoes of false and contradictory theories which ignore the res judicata argument upon which Appellees must rely. How is it possible for the Circuit Court to rely on facts which are clearly contradicted by the very conclusions upon which the Court determined the action?

By example: The Circuit Court here found that William was absent the day the money was removed, and that Plaintiff alleged nothing to establish that William participated in removal of JTWROS funds. Yet the very document, Fred's power of attorney, required Linda and William to act jointly, or not at all. Memorandum of Decision at page 6. (Ager App. 011)

The Circuit Court held "...however, there must be at least one fact asserted in the complaint which shows how Linda acted outside the scope of the power of attorney." Memorandum of Decision at page 5. Yet, the Complaint alleges, at ¶ 13 " Linda Coyle was not given the power, according to the Power of Attorney, to act unilaterally, nor was she given ANY power to self-deal." Both allegations are substantiated by the very power of attorney document upon which the circuit court relies, and which was attached as Exhibit "C" to Plaintiff's Complaint. (Ager App. 011)

Similar inconsistencies abound throughout the Memorandum of Decision.

It should not be possible to apply res judicata to only selected determinations, without giving the same preclusive effect to the remainder.

Judge Fitzgerald, in the Estate proceeding now on appeal, found in FOF #12: "This action in withdrawing the funds from the accounts was taken in accordance with specific authority granted by the power of attorney to the agent.", which is erroneous on its face. The same court concluded in COL #10: "Prior to Fred Ager's death, the joint tenancy (ownership) was overridden by the action of his agent...." Yet, there is a total absence of any such "clear and unmistakable language authorization" contained in the very document which the court purported to examine. See *Bienash* at ¶27. Where does the power of attorney "expressly grant the agent the authority" to "change rights of survivorship?" *It does not.* SDCL 59-12-23(1)(c). The power of attorney, in fact, states "I *do not* authorize my attorney-in-fact to make gifts to any person, including my attorney-in-fact...." (Empasis in original.)

One final and clear inconsistency. The estate proceeding, upon which the Circuit Court here relies, states in FOF ¶26 "...The agent has not engaged in self-dealing with the funds and did not benefit from the withdrawal." Yet, the court orders those funds withdrawn from a JRWROS account co-owned by Arlene Ager to "division in accordance with the terms of Fred Ager's Last Will and Testament." Article VI of that Will distributes the savings account, totaling $197,000, *one-fourth to Linda Ager and one-fourth to Jeff Ager*, just under a $100,000 benefit to Linda and her family. *The personal benefit cannot be disputed and is actually compelled by the court.*

Perhaps Appellees will explain how to accord res judicata effect to two trial courts each finding that Linda acted in accordance with her authority as a power of attorney, under a document which specifically denied her the authority to do what she did.

Affirming this case by applying res judicata would be tantamount to a reversal of *Bienash* and its antecedents and progeny and rupture the Uniform Power of Attorney Act.

REQUESTED RELIEF

Appellant requests this Court reverse the circuit court, hold that Plaintiff states a valid claim, permit the filing of the amended complaint, and hold that res judicata does not apply to this case, at least at this time.

REQUEST FOR ORAL ARGUMENT

Appellant, Arlene Ager, does not request oral argument in this matter. Appellant believes this case is appropriate for an expeditious ruling considering the hardship imposed on Mrs. Ager on these facts.

Respectfully submitted this 19th day of April, 2024.

MELLING & ROSELAND, PC

ERIN MELLING, Attorney for Appellant,
Arlene Ager
1409 5th Avenue
Belle Fourche, SD 57717
(605) 723-1659
melling@mrlawpc.net

RICHARD PLUIMER, PLLC

Richard A. Pluimer
RICHARD A. PLUIMER, On the Brief
PO Box 988
Spearfish, SD 57783
(605) 641-3378
rpluimer@outlook.com

APPENDIX

APPENDIX

STATE OF SOTH DAKOTA IN CIRCUIT COURT

COUNTY OF BUTTE FOURTH JUDICIAL CIRCUIT

****

ESTATE OF **FRED AGER**, 09PRO23-000016

DECEASED. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

****

This matter came on for hearing July 6th, 2023, before the Honorable John Fitzgerald, Circuit Court Judge. The estate appeared through its attorneys, Eric Neis and Dillon Karass. The personal representative of the estate, Linda Coyle, also appeared. Arlene Ager appeared with her attorney, Erin Melling. The Court heard the testimony of the witnesses: Linda Coyle, Arlene Ager, Jeff Ager, and Arthur Garduna. Having considered the briefs and arguments of the parties now makes its

FINDINGS OF FACT

1. Decedent Fred Ager and his wife, Arlene Ager, had a long-term marriage. Both have adult children as the result of prior marriages.

2. On July 8, 2022, decedent executed his Last Will and Testament. On that same date, decedent executed a Durable Power of Attorney (for business and health care). His daughter, Linda Ager, was appointed as his personal representative by his will

and attorney in fact/agent by the language of the power of attorney.

3. Decedent's will set forth that all his debts, funeral expenses and expenses from his last sickness were to be paid from a credit union checking account. That account was held jointly with his wife at the time he executed his will.

4. In accordance with his will, the rental home and storage units were to be devised to his two children, Linda Coyle and Jeff Ager, subject to a life estate of one-half of the net income to wife, Arlene Ager, during her life. The will directed that wife's life estate interest in that real property would terminate upon her death.

5. The will directed that the remainder of the credit union checking account funds, after payment of the decedent's debts, were bequeathed to his wife, Arlene Ager.

6. The funds in the credit union savings account and remainder of his estate was bequeathed one-half to Arlene Ager, and one-fourth to his daughter, Linda Coyle, and one-fourth to his son, Jeff Ager.

7. Decedent's will appointed daughter, Linda Coyle, as personal representative of his estate. The will provided that the personal representative acting in that capacity had the powers to sell, lease, mortgage or dispose of all real or personal property as the personal representative saw fit.

8. The Will incorrectly identifies the savings and checking accounts to be located at the Landmark Federal Credit Union when those funds were factually located in the Highmark Federal Credit Union.

9. This mistake in identifying and naming the wrong credit union was stipulated to as a scrivener's mistake and not at issue.

10. Decedent's appointments of his daughter as his agent during his life and his personal representative upon his death indicate a level of trust in his daughter's integrity and ability to manage his property during his lifetime and after his passing. Decedent's will and the power of attorney indicates how and to whom he wanted his property managed by during his life, and to whom he wished his property to pass to upon his death.

11. On March 27, 2023, less than a month prior to decedent's death, his daughter, Linda Ager, agent, withdrew all of the funds in the savings and checking accounts at the Highmark Federal Credit Union.

12. This action in withdrawing the funds from the accounts was taken in accordance with specific authority granted by the power of attorney to the agent.

13. The funds in both accounts were joint accounts of the decedent and his wife, Arlene Ager. Ownership according to the

credit union records was indicated to be a joint tenancy with a right of survivorship and not as tenants in common.

14. Arlene Ager was a co-owner of the credit union accounts. Arlene Ager could have withdrawn all the joint funds at any time prior to decedent's death, but that action did not occur.

15. On the date the agent withdrew the funds from the credit union, the agent was authorized by the power of attorney to act in this manner.

16. Fred Ager died on April 16, 2023.

17. The death of Fred Ager was the event that would have triggered title vesting the credit union funds to Arlene Ager; however, the withdrawal of the funds by the agent occurred prior to that event.

18. The exercise of authority by the agent to withdraw funds from the credit union having occurred before death negated the potential of title to the joint accounts being transferred at death to Arlene Ager.

19. The power of attorney is not ambiguous. It gave the powers that were exercised by Linda Coyle to her.

20. The power of attorney granted decedent's agent the power to withdraw all the funds from both credit union accounts. The indicated reason for their withdrawal was to preserve and protect the assets and estate of her father.

21. The withdrawals also guaranteed the estate had the funds to pay the decedent's debts, funeral expenses, and expenses from his last illness which were the directive of the decedent's last will. The decedent had debts and some insurance proceeds that came into existence due to a hailstorm that damaged property in Belle Fourche, South Dakota in June of 2022.

22. After withdrawing the funds, the agent kept those funds in a safe for approximately 20 days. Decedent's death occurred April 16, 2023, from an illness that had become progressively worse.

23. Upon decedent's death, the agent deposited the entirety of the funds withdrawn from the credit union accounts into the estate account.

24. Agent, Linda Coyle, made *no* claim to the credit union funds as her own separate property, nor did she spend the proceeds of those funds.

25. The funds withdrawn under the power of attorney by Linda Coyle were not commingled with her property.

26. The agent has not breached her fiduciary duties under the power of attorney that she exercised prior to decedent's death. The agent has not engaged in self-dealing with the funds and did not benefit from the withdrawal.

27. The agent did not commit improper acts in withdrawing the funds from the credit union acting with the power of attorney.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. The funds in the credit union accounts prior to March 26, 2023, were a joint account between decedent and his wife, Arlene Ager.

3. A joint account is defined by SDCL 29A-6-101(4) "as any account payable on request to one or more of two or more parties whether or not mentioned is made of any right of survivorship."

4. Both accounts are noted to include a right of survivorship. As such, when death of a co-owner(s) occurs, the funds in the joint account immediately vest ownership in the surviving co-owner(s).

5. The principle of joint tenancy with a right of survivorship is applicable to real or personal property. This principle is opposite to ownership by tenants in common which treats joint accounts as separate properties that vest title upon death of a co-owned property to that co-owner's heirs and not the remaining co-tenants (owners).

6. The principle of co-owned property with a right of survivorship is codified at SDCL 29A-6-104 which provides "that

the sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent." The statute helps to ensure that once death has occurred, co-owned joint property with a right of survivorship does not become an issue that is in conflict or overridden by an inconsistent clause in a will.

7. Death is an event that causes a transfer of title on a joint owned account.

8. The withdrawal of the joint account funds by the agent on March 26, 2023, terminated the existence of both joint credit union accounts.

9. On April 16, 2023, when Fred Ager's death occurred, the joint tenancy ownership of the two credit union accounts no longer existed.

10. Prior to Fred Ager's death, the joint tenancy(ownership) of the credit union accounts was overridden by the action of his agent. Fred Ager's power of attorney specifically granted his agent authority to withdraw the funds from both credit union accounts.

11. Arlene Ager had an equal right to withdraw the funds from the credit union prior to her husband's death. That action did not occur, and what might have occurred thereafter in that event would be speculative.

12. SDCL 29-6-104(5) provides that the right of survivorship arising from the express terms of the account or under this section or a beneficiary designation in a trust account or a POD payee designation cannot be changed by a will. In this action the joint account no longer existed at the date of Fred Ager's death.

13. The power of attorney gave Linda Ager the right to hold and possess all property of her father as his agent.

14. The will grants her as the personal representative of the estate powers to take actions in accordance with his estate plan.

15. There is a variance with the estate plan to pay debts from the saving account and the fact that unless action were taken by the agent, the joint funds would not be part of the assets of the estate at the time of death to pay those debts.

16. The event of death would effectively nullify the estate plan set forth in the will unless the agent acted. Without action, the funds would not have been part of the resources to pay the debts of the estate.

17. The transfer of title to joint property to a co-tenant by operation of law is dependent upon death. The funds herein were withdrawn prior to death. The withdrawal of the funds before death by the agent ended the joint tenancy by that act.

18. A fiduciary relationship exists whenever a power of attorney is created. *Estate of Thacker v. Timm, 2023 SD 2.* "As a matter of law, a fiduciary relationship exists whenever a power of attorney is created." *Estate of Stoebner v. Huether, 2019 SD 58.*

19. The existence and scope of a fiduciary duty is a question of law. Whether a breach of a fiduciary duty occurred, however, is a question of fact. *Smith Angus Ranch, Inc. v. Glover, 2002 SD 122.*

20. The agent in this action did not convert the funds to her own use or spend any of the funds on herself or third parties. The agent did not commingle those funds with her own. The Agent did not act beyond her authority. No breach of the agent's fiduciary duty has occurred. The acts were directly authorized by the power of attorney.

Based upon the foregoing Findings and Conclusions, now, therefore, it is

ORDERED that the motion to remove the personal representative is denied.

IT IS FURTHER ORDERED that the funds removed by the agent from the joint account are the property of the estate and are subject to management and division in accordance with the terms of Fred Ager's Last Will and Testament.

DATED this 17th day of August 2023.

BY THE COURT:

Attest:
Jensen, Alana
Clerk/Deputy

The Honorable John Fitzgerald
Fourth Circuit Court Judge

FILED
AUG 17 2023
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By _____

Prepared By:
Bennett Main Gubbrud & Willert, P.C.
618 State Street
Belle Fourche, SD 57717
Phone: 605.892.2011

DURABLE POWER OF ATTORNEY (FOR BUSINESS AND HEALTH CARE)

KNOW ALL BY THESE PRESENTS, that I, **FRED AGER**, the undersigned, of 2051 10th Avenue, Belle Fourche, South Dakota 57717, do hereby make, constitute, and appoint my daughter and son-in-law, **LINDA COYLE** and **WILLIAM COYLE**, of 1103 Walworth Street, Belle Fourche, South Dakota 57717 (Phone no. (605) 892-4700), as my true and lawful co-attorneys-in-fact, for me and in my name, place, and stead, and on my behalf, and for my use and benefit as follows:

1. To exercise or perform any act, power, duty, right, or obligation whatsoever that I now have, or may hereafter acquire in the legal right, power or capacity to exercise or perform, in connection with, arising from, or relating to tangible or intangible property, in any manner whatsoever;

2. To request, ask, demand, sue for, recover, collect, receive, and hold and possess all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension and retirement benefits, insurance benefits and proceeds, any and all documents of title, choses in action, personal and real property, intangible and tangible property and property rights, and demands whatsoever, liquidated or unliquidated, as now are, or shall hereafter become, owned by, or due, owing, payable, or belonging to, me or in which I have or may hereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for me, on my behalf, and in my name, all endorsements, acquittances, releases, receipts, or other sufficient discharges for the same;

3. To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any real or personal property whatsoever, tangible or intangible, or interest therein, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper;

4. To maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds of trust, and hypothecate, and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or

any interest therein, that I now own or may hereafter acquire, for me, in my behalf, and in my name and under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper;

5. To conduct, engage in, and transact any and all lawful business of whatever nature or kind for me, on my behalf, and in my name;

6. To make, receive, sign, indorse, execute, acknowledge, deliver, and possess such applications, contracts, agreements, options, covenants, conveyances, deeds, trust deeds, security agreements, bills of sale, leases, mortgages, assignments, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds, debentures, checks, drafts, bills of exchange, letters of credit, notes, stock certificates, proxies, warrants, commercial paper receipts, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit of, banks, savings and loan or other institutions or associations, proofs of loss, evidences of debts, releases, and satisfaction of mortgages, liens, judgments, security agreements and other debts and obligations and such other instruments in writing of whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

7. I further specifically grant to my attorney-in-fact the power and authority to make health care decisions for me if and when I am unable to make my own health care decisions. This gives my agent the power to consent to giving, withholding, or stopping any health care, treatment, service, or diagnostic procedure. However, any decisions regarding health care shall be made in accordance with accepted medical practice. My attorney-in-fact shall have the same access to my medical records that I have, including the right to disclose the contents to others.

If at any time I shall have an incurable injury, disease or illness resulting in a terminable condition for which there is no reasonable medical expectation of my recovery and where the use or application of artificial, extraordinary, extreme or radical medical or surgical means or procedures calculated to prolong my life would serve only to artificially prolong the moment of my death and where my physicians determine that my death is imminent, or there is no reasonable medical expectation of my recovery from extreme physical or medical disability whether or not life sustaining procedures are utilized, **which has persisted continuously for at least 48 hours,** I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally, including withholding or withdrawing of artificial nutrition and hydration. In addition to the health care provisions herein, my attorney-in-fact shall have full authority to implement and enforce my wishes regarding artificial nutrition and hydration. I would request under the provisions of this paragraph that medication, artificial nutrition, or hydration be administered only for my comfort or the relief of pain.

Organ Donation: I authorize the transfer and gift of all or part of my body, including my organs, upon my death.

HIPAA: My agent's authority to receive, at my agent's request, my individually identifiable health information shall satisfy state and federal laws, including the Health Insurance Portability and Accountability Act of 1996, 42 USC § 1320d, 45 CFR 160, *et seq.* ("HIPAA"). Any physician, health care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, covered health care provider, or any medical information clearing house, may give, disclose, and release my medical records and information to my agent without restriction. The authority given herein to my agent shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information.

8. I grant to said attorney-in-fact full power and authority to do, take, and perform all and every act and thing whatsoever requisite, proper, or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney-in-fact, or any substitute or substitutes, shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers herein granted.

9. This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, right, acts, or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to said attorney-in-fact.

10. The rights, powers, and authority of said attorney-in-fact herein granted shall commence and be in full force and effect upon the execution of this document, and such rights, powers, and authority shall remain in full force and effect thereafter until written termination by me. Further, this power of attorney shall not be affected by my disability or incompetency in any way as contemplated by law.

11. I do not authorize my attorney-in-fact to make gifts to any person, including my attorney-in-fact, of any of my assets as my attorney-in-fact may determine, in my attorney-in-fact's sole discretion, to be appropriate; however, such transfer shall be in accordance with my estate plan.

12. I do not authorize my attorney-in-fact to assign ownership or change the beneficiary of my life insurance policy(s), annuity(s), and retirement account(s) to any person, including my attorney-in-fact.

13. If at any time it should be necessary for a guardian of my person or a conservator of my estate to be appointed, I nominate my daughter and son-in-law, **LINDA COYLE and WILLIAM COYLE,** to act as such co-guardians and/or co-conservators, to serve without bond. In the event that **LINDA COYLE or WILLIAM COYLE** shall be unable or unwilling to serve as my guardian and/or conservator, I nominate and appoint the remaining individual to act as such guardian and/or conservator, without bond.

14. I hereby revoke all previous general Powers of Attorney.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE PURPOSE AND EFFECT OF THIS DOCUMENT.

DATED this 8th day of July, 2022.

FRED AGER

STATE OF SOUTH DAKOTA)
) ss.
County of Butte)

On this the 8th day of July, 2022, before me, the undersigned officer, personally appeared **FRED AGER,** known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

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

DWIGHT GUBBRUD NOTARY PUBLIC SEAL STATE OF SOUTH DAKOTA

Dwight A. Gubbrud, Notary Public
My Commission Expires: 09/14/2026

NOTICE TO EMERGENCY MEDICAL PERSONNEL:

I. Fred Ager
(principal's name)

have executed a DURABLE POWER OF ATTORNEY FOR HEALTH CARE. If I am unable to make my own health care decisions, my designated agent has the legal authority to make those decisions on my behalf, including decisions concerning life-sustaining treatment. In such an event, the people listed on the reverse of this card have a copy of my Durable Power of Attorney and should be contacted immediately, in the order listed.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
(605) 692-2011

1. Agent's Name: Linda Coyle
Phone: 605-892-4700
Phone:

2. Agent's Name: William Coyle
Phone: 605-892-4700
Phone:

3. Agent's Name:
Phone:
Phone:

HIGHMARK™ CREDIT UNION
725 5th Street Rapid City, SD 57701

RETURN SERVICE REQUESTED
628203 9776 1/2 UNQ 04-03-23 CLT
000009775 1

FRED R AGER
2051 10TH AVE
BELLE FOURCHE SD 57717-2202

Statement of Account

605-716-4444 | www.highmarkfcu.com

Member Number xxxxxx060
Statement For 03/01/2023 - 03/31/2023
Page 1 of 1
Relationship Primary Member

My Credit Score - A Smart Way To Manage Your Credit

Your Account Balances as of 03/31

Primary Shares ID 0000	$115.89
Basic Checking ID 0020	577.72
Fred's Savings ID 0300	6.92
Account Balance Total	700.53
Total Dividends Paid Year-To-Date	$22.62

Need a Loan?

Call 800-672-6365 or apply online
www.highmarkfcu.com

PRIMARY SHARES ID 0000

Beginning Balance	$115.89
0 Total Deposits for	0.00
0 Total Withdrawals for	0.00
Ending Balance	115.89

Joint Owner: ORALIA GARDUNA AGER

BASIC CHECKING ID 0020

Beginning Balance	$91,143.78
2 Total Deposits for	2,548.00
4 Total Withdrawals for	93,114.06-
Ending Balance	577.72

Joint Owner: ORALIA GARDUNA AGER

Date	Transaction Description	Withdrawal	Deposit	Balance
03/07	Withdrawal ACH Medica TYPE: INS DEDUCT ID: 1411242261 CO: MEDICA Entry Class Code:	$86.00-		$91,057.78
03/08	Deposit ACH SSA Treas 310 TYPE: XXSOC SEC ID: 9031036030 CO: SSA TREAS 310 Entry		2,104.00	93,161.78
03/10	Deposit By Check		444.00	93,605.78
03/10	Withdrawal	444.00- 7		93,161.78
03/20	Withdrawal ACH Trustage Cmfg TYPE: LIFE INSUR ID: 001CMLIIPY CO: TruStage CMFG Entry	84.06-		93,077.72
03/27	Withdrawal By Check	92,500.00-		577.72

FRED's SAVINGS ID 0300

Dividend Rate is 0.050%

Beginning Balance	$194,120.44
2 Total Deposits for	188.70
1 Total Withdrawals for	194,302.22-
Ending Balance	6.92

Annual Percentage Yield earned 0.050% from 03/01/2023 through 03/31/2023
Joint Owner: ORALIA GARDUNA AGER

Date	Transaction Description	Withdrawal	Deposit	Balance
03/10	Deposit By Check		$181.78	$194,302.22
03/27	Withdrawal	194,302.22-		0.00
03/31	Deposit Dividend 0.050%		6.92	6.92

w/drew Total 286,802.22

We appreciate your membership.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT

ARLENE AGER, Plaintiff, v. **LINDA AGER COYLE**, individually and as Power of Attorney of Fred Ager, now deceased; and **WILLIAM COYLE**, individually and as Power of Attorney of Fred Ager, now deceased, Defendants.	**09CIV23-124** **MEMORANDUM OF DECISION**

This matter having come before this Court on Defendant, Linda Ager Coyle's, Motion to Dismiss, Monday, January 8, 2024, at 10:00 AM, Defendants appearing with counsel Spenser Porsen and Eric Schlimgen, and Plaintiff appearing in person and with counsel, Erin Melling, and co-counsel, Richard Plumier, the Court having heard the oral arguments of the parties, reviewed the briefs, exhibits, and affidavits, hereby, issues this Memorandum of Decision.

INTRODUCTION

This case appears before the Court because of a Motion to Dismiss by the Defendant. The Plaintiff has filed suit against her former stepdaughter and former step son-in-law claiming that their conduct constitutes conversion. Conversion in South Dakota is a common law tort for which South Dakota Codified Law supplements but does not expressly define.

The Defendant substantively argues that this proceeding should be dismissed for two reasons. First, the Defendant claims the Plaintiff has failed to state a claim for which relief may be

granted pursuant to SDCL 15-6-12(b)(5). Second, the Defendant claims that the doctrine of *res judicata* effectively resolves this dispute.

FACTUAL AND PROCEDURAL BACKGROUND

The controversy between the parties began in the probate of Fred Ager.[1] (herein after "Fred"). Based on a request by the parties this Court took judicial notice of that probate matter. Fred validly executed a will which provides that part of his estate shall go to his children and part go to his wife Arlene Ager. (herein after "Arlene"). Arlene was married to Fred for 21 years prior to his death. However, Arlene is not the mother of Defendant Linda Coyle. (herein after "Linda"). Rather, she was Fred's third wife. William Coyle (hereinafter "William") is the husband of Linda Coyle. This proceeding is an attempt at a second bite of a proceeding that has already occurred.

Specifically, this controversy arises from Linda's withdrawal of money from a jointly owned bank account ("the bank account") in Highmark Federal Credit Union ("HFCU")[2] a few weeks prior to Fred's death. There is no dispute that Fred and Arlene were the owner's of said account. Linda and William were co-power of attorneys for Fred at the time Linda removed the money from the bank account. William did not exercise his power of attorney authority for Fred during Linda's withdrawal from the bank account.

Fred died in April 2023 and informal probate was initiated May 2023. Two weeks after the Butte County Clerk of Courts issued the letters of personal representative to Linda, Arlene petitioned the Circuit Court to remove Linda as the personal representative. Pointedly, the issue Arlene presented to the Circuit Court in the probate was whether Linda engaged in self-dealing and whether that self-dealing was grounds to remove Linda as the personal representative of the

[1] 09PRO23-16, Estate of Fred Ager.

[2] Fred Ager's Last Will and Testament indicated that the bank account was at Landmark Federal Credit Union, however, the Circuit Court identified the correct bank account as Highmark Federal Credit Union. There is no dispute that the account in question is a bank account at Highmark Federal Credit Union.

probate of Fred's estate. The Court heard Arlene's arguments, briefs, and oral testimony June 2023. Two months later in August 2023, the Circuit Court issued its findings of fact and conclusions of law.

The Findings of Fact and Conclusions of Law issued by the Circuit Court determined that Linda "acted in accordance with specific authority granted"; further, the Circuit Court, John Fitzgerald noted the bank account was owned jointly by Fred and Arlene as joint tenants with rights of survivorship; Linda was authorized by the power of attorney to withdraw the money from the HFCU; the power of attorney granted unambiguous power that included Linda's conduct; Linda did not breach her fiduciary duties to Fred Ager in removing the money; and she did not engage in self-dealing. Finally, the Circuit Court found that Arlene wasn't credible, and Linda was credible. Finally, the Circuit Court found that Linda's conduct was not grounds to remove her as the personal representative. Most specifically, this Court notes Judge Fitzgerald heard testimony and argument regarding whether Linda acted outside the authority of her power of attorney position given by Fred. Judge Fitzgerald found she had not.

Arlene Ager now files this suit against both Linda Coyle and her husband William in both their personal capacity and capacity as power of attorneys. Arlene claims that both Linda and William have unlawfully converted her money when Linda removed the money from the HFCU bank account.

ANALYSIS

It is essential that legal analysis meticulously identify not just the actual individual who is being sued but the capacity in which that person is being sued. A person may engage in conduct in various capacities and the law applies differently depending upon the capacity in which the person acts. The analysis in this case can be divided into four parts. Two individuals alleged to

have acted in two different capacities. There are two parties each being sued in two different capacities. These capacities/individuals are each entitled to separate legal analysis.

(a) Motion to Dismiss as to William Coyle in his personal capacity.

The first issue is the failure to state a claim for which relief may be granted as to William Coyle in his personal capacity. A trial court tests a motion to dismiss for failure to state a claim for the legal sufficiency of the pleading, not the facts which support it; therefore, the court accepts the material allegations as true and construes them in a light most favorable to the pleader to determine whether the allegations allow relief. This Court looks to the Complaint when considering whether a dismissal is warranted if the complaint fails to state a claim for which relief may be granted.

In order to survive a motion to dismiss, Plaintiff must assert facts (not legal conclusions or naked assertions), which if assumed true, meet all four of the following elements of conversion. "(1) [Plaintiff] owned or had a possessory interest in the property; (2) [Plaintiff's] interest in the property was greater than the [Defendants']; (3) [Defendants'] exercised dominion or control over or seriously interfered with [Plaintiff's] interest in the property; and (4) such conduct deprived [Plaintiff] of [her] interest in the property." *W. Consol. Co-op. v. Pew*, 795 N.W.2d 390, 397 (2011).

Here, the first two elements of conversion can be satisfied, but the latter two are not satisfied. Facts have been complained of that show when the money was withdrawn from the bank account, Arlene was a joint account holder. A joint account holder means the holder has a possessory interest in the money. Furthermore, the complaint implies that William was not an account holder by asserting there were only two joint account holders (i.e., Arlene and Fred) which means Plaintiff had the greater interest. However, scant facts show William took any action in his

personal capacity to deprive Plaintiff of her legal right to the money in the bank account. On the contrary, the complaint alleges that William was *absent* the day the money was removed from HFCU. If no conduct has been asserted which, if assumed true, deprived Plaintiff of her lawful right to possession, the logical end is that the fourth element of conversion is not satisfied because William's conduct did not *actually* deprive Plaintiff of her interest.

Therefore, the Plaintiff has not asserted facts, which if this Court assumes to be true, could satisfy the four elements of conversion. In light of such a failure by the Plaintiff, the Court holds Plaintiff has failed to properly state a claim upon which relief may be granted and therefore dismisses William in his personal capacity.

(b) Motion to Dismiss as to Linda Coyle in her personal capacity.

As with William in his personal capacity, Linda in her personal capacity is very similar. The first two elements are satisfied because Plaintiff asserted facts which show an interest by Plaintiff and that interest was greater than that of Linda personally. However, the third element is not satisfied because—as the Plaintiff expressly asserts in paragraph 12—Linda was acting within, and only as, power of attorney for Fred Ager. The Plaintiff appears to blur the lines between the different capacities by enlisting what appears to be a personal conflict between the parties, however, there must be at least one fact asserted in the complaint which shows how Linda acted outside the scope of the power of attorney.[3] If a person acts in the capacity of a power of attorney, they are not acting in their individual capacity. Linda is not alleged to have entered Highmark Federal Credit Union and remove the money from the joint bank account of Arlene and Fred in

[3] The Court notes that acting outside the scope and acting improperly within the scope are distinctly different issues. Acting outside the scope of a power of attorney will allow a person who is harmed a cause of action against the POA for their conduct outside the power of attorney. However, if the person acts within the power of attorney the alleged victim cannot sue the POA because the harm occurred pursuant to the authority of the disclosed principal, not the agent.

any capacity other than under the authority of Fred through a power of attorney. The Plaintiff alleges that Linda's conduct was in violation of the power of attorney. Whether Linda acted outside the power of attorney is not for a third-party to dispute in court because the harm is to the principal, not the third-party. Meaning, Fred could object to Linda's unauthorized exercise of her granted power of attorney, but not Arlene. Furthermore, even though Plaintiff alleges that Linda Coyle kept the money in her name in the form of a teller check, the Plaintiff acknowledges the money was taken in her name (agent) to be placed in an estate account on behalf of Fred Ager, (principal). Linda's conduct was clearly exclusively within the scope of the power of attorney because it was in accordance with the Last Will and Testament of Fred Ager.[4] Therefore, Linda is dismissed from this proceeding because the Plaintiff failed to assert enough facts—which if assumed true—would meet all four elements of conversion by Linda Coyle in her personal capacity.

(c) Motion to Dismiss William Coyle in his capacity as a power of attorney.

As stated above, in the Plaintiff's complaint, William has not been accused of acting in *any* capacity let alone his capacity as the power of attorney for Fred. On the contrary, William is alleged to have failed to perform any function or engage in any conduct other than being noted as expressly absent when Linda removed the money from the Highmark Federal Credit Union. Therefore, William is dismissed in his capacity as a power of attorney for Fred Ager.

(d) Motion to Dismiss Linda Coyle in her capacity as a power of attorney.

The remaining issue to be resolved by this Court is whether Linda acted in accordance with her authority as a power of attorney. However, and as alluded to *supra*, there is an issue with whether the Plaintiff—the widow of the decedent—has standing to sue her former husband's

[4] Judicial notice was taken of the Probate of Fred Ager's Estate in case number 09PRO23-16 which includes Fred Ager's Last Will and Testament. The Last Will and Testament did not expressly order the personal representative to remove the money from HFCU. However, will was clearly written with the assumption the money in the bank account would be used for the purpose expressly stated in the will.

power of attorney. Additionally, if the Plaintiff has standing to sue Linda in her capacity as a power of attorney, the issue of Linda's conduct being improper has already been adjudicated in the probate proceeding barring the Plaintiff from getting a second bite at the apple. As explained above, granting this Court the authority to take judicial notice of another file doesn't impart appellate jurisdiction to review another circuit courts findings and determine error.

Standing

Neither party has raised the issue of standing. However, the Court—sua sponte—raises the issue of standing because it invokes the Court's jurisdiction to adjudicate the case. See *Elliott v. Bd. of Cnty. Comm'rs of Lake Cnty.*, 703 N.W.2d 361, 368 (S.D. 2005) (providing that the question of standing as it relates to invoking the court's jurisdiction must be raised sua sponte when jurisdiction does not affirmatively appear from the record).

"In order to establish standing, a litigant must show: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains; and (3) the likelihood that the injury will be redressed by a favorable decision." *Cable v. Union County Bd. of County Com'rs*, 769 N.W.2d 825–26 (S.D. 2009); *Benson v. State*, 710 N.W.2d 131, 141 (S.D. 2006). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)[5].

Here, the Plaintiff fails in her claims against Linda. Arlene was a *joint* account holder with Fred and therefore must show how Fred (principal) removing the money from the bank account via Linda (agent), would have harmed the Plaintiff. A joint bank account is inherently an interest

[5] The Court notes that South Dakota precedent which cites these three elements is based upon U.S. Supreme Court cases interpretation of Art. III of the United States Constitution's "cases or controversies" jurisdictional limit on the federal judiciary. In South Dakota, "[t]he circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs. The circuit courts have such appellate jurisdiction as may be provided by law." S.D. Const. Art. 5 § 5 (emphasis added). This Court assumes that the interpretation of "cases" in Art. 5 § 5 is the same as "cases" federal courts are limited to by U.S. Const. Art. III § 2.

which is limited by the interest and actions of another. If one joint holder withdraws money, they do so under the standing express consent of the other joint holder because that is the nature of the joint bank account. Otherwise, it would be a joint bank account where neither could act unilaterally. Such was not the case here, either party could remove money at will from the bank account. It is through this power Linda removed the money in the first place. Further, based on the testimony in the probate action, Linda acted through the power of attorney by fulfilling his specific request to remove the money and further her belief that in so acting she was preventing Arlene from nullifying portions of Fred's will. The conduct of Linda removing the entire sum of money and ultimately depositing the amount into another bank account the Plaintiff did not have access to, did not injure Arlene, no more than had Fred taken the same action.[6] Arlene may have felt injured, but if one consents to another to take their money, they do not have a legally cognizable injury. By agreeing to hold their money in a joint account both parties understood that either could withdraw a dollar or the entire balance without need for agreement by the other account holder. Arlene could have averred a claim for contribution, but based on the information and testimony in the probate matter she may not have had a strong case; nonetheless, she didn't plead this in the probate case nor in this matter.

Furthermore, Plaintiff is essentially arguing that Fred Ager was harmed. When a third-party assert another's conduct was wrongful, the wrongful conduct must harm the complainer, not another person unless that person is in privity. The widow of a decedent does not have standing to sue the decedent's power of attorney on behalf of the decedent. In order to sue on behalf of another, there must be privity between the parties such as parent on behalf of a child or an agent authorized

[6] As explained above, this situation sounds in actions under contribution in a separate action or in the probate matter. SDCL 29A-6-103 *Estate of Thacker v. Timm*, 984 N.W.2d 679, 2023 S.D. 2; *Estate of Lynch v. Lynch*, 991 N.W.2d 95, 2023 S.D. 23,

to do so on behalf of his principal. In this case, Plaintiff was not an agent, in privity, or lawfully able to speak on behalf of him. Therefore, because Arlene does not have standing to sue Linda in her capacity as a power of attorney, Linda is dismissed because the Court lacks jurisdiction to hear the case.

Res Judicata

Even if Plaintiff possessed standing which this Court finds she lacks, res judicata bars the central issue of this claim rendering it moot. "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion. We have previously defined [issue preclusion] in the following terms: Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Healy Ranch, Inc. v. Healy*, 978 N.W.2d 786, 798 (2022) (internal citations omitted). Issue preclusion consists of four elements: "(1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication." *Detmers v. Costner*, 994 N.W.2d 445, 452 (S.D. 2023) (citations omitted).

The issue is whether Linda engaged in self-dealing contrary to the power of attorney granted by Fred. In the prior probate case Linda's conduct as power of attorney for Fred was the precise basis for which Arlene petitioned the Circuit Court to remove Linda as the personal representative of Fred's estate. Briefs were submitted, an evidentiary hearing was held, testimony was taken, Judge Fitzgerald was able weigh credibility as to the witnesses, and the Circuit Court made findings of fact and conclusions of law which addressed the issue of Linda's conduct as a power of attorney. Though the action in the probate was specifically directed to remove Linda as the personal representative, it fairly gave Arlene the opportunity to prove that Linda engaged in

self-dealing contrary to the power granted to her in the power of attorney, therefore the controversy is the same.

Arlene is the same person in the probate as she is in this current proceeding and Linda was in privity of the estate as the personal representative and is now in her own capacity here. As in the instant case, Arlene was given every opportunity to show that Linda had breached her fiduciary duties and engaged in self-dealing when she removed the same money in dispute in the probate. Arlene petitioned in the probate case for the same remedy she requests in this proceeding.

Finally, the judgment in the probate proceeding was final because there was nothing more in the proceeding to occur (specifically, the proceeding to remove Linda as the personal representative) despite the probate remaining open.[7] *In re Estate of Geier*, 809 N.W.2d 355, 358-59, 2012 SD 2 ¶11-15. The decision not to remove Linda addressed the merits of Arlene's contention that her conduct was wrongful because the proceeding evaluated all the facts surrounding the matter and the law as it was applied to those facts. Any other avenue to consider her actions, ie., conversion, should have occurred in the probate and been addressed during the evidentiary hearing. Therefore, this Court holds all the elements required to establish dismissal premised upon res judicate have been met and the issue of whether Linda engaged in self-dealing is barred.

[7] Issues resolved during a probate matter are deemed final orders so long as the petition/motion "frames the scope of the proceeding". *In re Estate of Geier*, 809 N.W.2d 355, 358-59, 2012 SD 2 ¶11-15. Here, like in *Geier*, the petition was specific to the removal of the personal representative, an evidentiary hearing was held regarding allegations Linda acted outside her powers as a power of attorney and personal representative by removing the funds from Fred's account. After rendering his decision on the merits, Judge Fitzgerald executed a final order specifically addressing the Linda's actions as power of attorney and or personal representative. This Court is precluded in exercising appellate jurisdiction to review Judge Fitzgerald's findings of fact and conclusions of law for error and will not engage in such review, absent statutory authority.

ORDER

It is hereby **ORDERED** that this case is dismissed because both Defendant's and their respective capacities have been dismissed and standing and/or res judicata bar litigation of the underlying claim.

Dated this 1st day of February, 2024.

BY THE COURT:

Honorable Eric J. Strawn
Circuit Court Judge

ATTESTED:

ALANA JENSEN

Clerk of Courts

By: _____
Deputy

FILED
FEB 01 2024
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 30645

ARLENE AGER,	)
	)
Appellant,	)
v.	)
	)
LINDA AGER COYLE, individually and as Power of Attorney of Fred Ager, now deceased; and WILLIAM COYLE, individually and as Power of Attorney of Fred Ager, now deceased, DECEASED.	)
	)
Appellees.	)

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

The Honorable Eric Strawn, Circuit Court Judge, presiding.

APPELLEE'S BRIEF

Attorneys for Appellant Arlene Ager

Erin Melling
Melling & Roseland Law, P.C.
1409 5th Ave.
Belle Fourche, SD 57717
(701) 567-2418

Attorneys for Appellees Linda Ager Coyle and William Coyle, individually and as powers of attorney for Fred Ager, now deceased

Eric M. Schlimgen
Spencer R. Prosen
Schlimgen Law Firm, LLC
611 Dahl Road, Suite 1
Spearfish, SD 57783
(605) 340-1340

Filed: 5/31/2024 4:25 PM CST Supreme Court, State of South Dakota #30645

Richard Pluimer
Pluimer Law, PLLC
PO Box 988
Spearfish, SD 57783
(605) 641-3378

Eric J. Nies
Nies Karras & Skjoldal, P.C.
PO Box 759
Spearfish, SD 57783
(605) 642-2757

ATTORNEY FOR JEFF AGER – INTERESTED PARTY

Ms. Lora A. Waeckerle
Waeckerle Law Prof., LLC
910 5th Street, Suite 102
Rapid City, SD 57701
(605) 791-5666

The notice of appeal was filed on the 4th day of March, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

PRELIMINARY STATEMENT

Throughout Appellee's Brief, Defendants/Appellees Linda Coyle and William Coyle are referred to as "Linda" or "William" individually and "Appellees," collectively. Appellant, Arlene Ager, will be referred to as "Appellant" or "Arlene" interchangeably. Fred Ager, deceased, will be referred to as "Fred." The settled record is denoted "SR," follow by the appropriate pagination.

JURISDICTIONAL STATEMENT

The trial court, Honorable Eric J. Strawn presiding, issued a Memorandum of Decision dismissing Appellant's Complaint on February 1, 2024. SR. 250-60. Appellees filed Notice of Entry thereof on February 7, 2024. SR. 261-62. Appellant timely filed her Notice of Appeal on March 4, 2024. SR. 277-78.

STATEMENT OF THE ISSUES

I. WHETHER APPELLANT'S COMPLAINT IS BARRED BY RES JUDICATA?

The trial court concluded Res Judicata bars Appellant's Complaint.

In re Estate of Smeenk, 2024 S.D. 23, --- N.W.3d –

Detmers v. Costner, 2023 S.D. 40, 994 N.W.2d 445

Healy Ranch, Inc. v. Healy, 2022 S.D. 43

In re Estate of Geier, 2012 S.D. 22, 809 N.W.2d 355

II. WHETHER APPELLANT HAS STANDING TO PROSECUTE THE CLAIMS IN HER COMPLAINT?

The trial court concluded Appellant does not have standing to prosecute her claim.

Cable v. Union County Bd. of County Com'rs, 2009 S.D. 59, 769 N.W.2d 817

SDCL § 29A-6-103

III. WHETHER APPELLANT'S COMPLAINT FAILS TO STATE CLAIM FOR RELIEF FOR CONVERSION?

The trial court concluded Appellant failed to sufficiently plead the elements of conversion.

Kaiser Trucking, Inc. v. Liberty Mutual Fire Insurance Company, 2022 S.D. 64, 981 N.W.2d 645

Johnson v. Markve, 2022 S.D. 57, 980 N.W.2d 662

Estate of Thacker v. Timm, 2023 S.D. 2, 984 N.W.2d 679

SDCL § 15-6-12

SDCL § 29A-6-103

IV. WHETHER THIS COURT HAS JURISDICTION TO CONSIDER APPELLANT'S ARGUMENT REGARDING HER PROFFERED MOTIONS TO AMEND?

The trial court issued no judgment, order, ruling, or determination on either motion to amend.

Ries v. JM Custom Homes, LLC, 2022 S.D. 52, 980 N.W.2d 217

LaCroix v. Fluke, 2022 S.D. 29, 975 N.W.2d 150

Mueller v. Cedar Shore Resort, Inc., 2002 S.D. 38, 643 N.W.2d 56

SDCL § 15-6-6

SDCL § 15-6-15

STATEMENT OF THE CASE AND THE FACTS

Appellees begin their statement of the case and the facts with an objection to Appellant's statement of the case and facts. Appellant's statement does not comply with the rules of appellate procedure. Specifically, SDCL § 15-26A-60(5) requires: "Each statement of a material fact shall be accompanied by a reference to the record where such fact appears." Additionally, SDCL § 15-26A-64 requires: "Whenever reference is made in the briefs to any part of the record it shall be made to the particular part of the record, suitably designated, and to the specific pages thereof." The "ultimate responsibility for

presenting an adequate record on appeal falls on the appellant." *Dakota Industries, Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶ 18, n. 4, 766 N.W.2d 510, 515 (citation omitted); *see also Hamerly v. City of Lennox Bd. of Adjustment*, 1998 S.D. 43, ¶ 9, n. 5, 578 N.W.2d 566, 568 (cautioning counsel against overbroad or vague references to the record). Appellant has failed to adequately cite to the record with her statement of the case and the facts.

This case is a civil matter brought in Butte County, Circuit Court for the Fourth Judicial Circuit in the State of South Dakota. SR. 2 (Complaint). The Honorable Judge Eric Strawn was assigned to this matter. SR. 30. The complaint was filed and served on October 11, 2023. SR. 26 (Sheriff's Return). Defendants/Appellees filed and served their motion to dismiss, along with a brief in support thereof, on November 9, 2023. SR. 37, 54 (Certificates of Service). A notice of hearing for the motion to dismiss was filed November 16, 2023. SR 91 (Certificate of Service). The hearing on the motion to dismiss was held January 8, 2024, at 10:00 a.m. SR. 316-54 (Transcript of Hearing). The trial court signed and filed its memorandum of decision on February 1, 2024, which ordered this case to be dismissed. SR. 250-60 (Memorandum of Decision). This appeal ensued.

The facts relevant on appeal are minimal. This case was dismissed on procedural grounds. There are no claims of insufficient evidence in Appellant's brief and the standard of review, as discussed in the Argument section, *infra*, is *de novo* for each issue raised by Appellant.[1] Further, there were no findings of fact presented in the trial court's memorandum of decision. The below facts are provided primarily for background but have minimal relevance to the legal questions presented to this Court. The facts herein are taken from the Complaint. *See Paul v. Bathurst*, 2023 S.D. 56, ¶ 11, 997 N.W.2d 644, 650

[1] The standard of review on a motion to amend is the abuse of discretion standard, but Appellee contends that the amendment issue is not properly before this Court, so that standard is not applicable.

("For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader."). However, "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190.

Fred and Arlene Ager were married on August 4, 2001. SR. 2. Fred had two children, Linda Ager Coyle and Jeff Ager. *Id.* Fred passed away on April 16, 2023. SR. 6. A probate was opened after his passing and Linda Coyle (his daughter) was appointed as the Personal Representative. *Id.*

On May 24, 2021, Fred and Arlene Ager set up a joint checking and savings account at Highmark Federal Credit Union ("Highmark Account"). SR. 3-4. Fred's social security payments were deposited into the Highmark Account. SR 4. Arlene's social security payments were deposited into a different account: the Wells Fargo account. *Id.*

On July 8, 2022, Fred executed a Last Will & Testament and a Durable Power of Attorney. *Id.* Fred named Linda and William Coyle as co-attorneys-in-fact. SR. 4, 18. On March 27, 2023, while Fred was still living, Linda Ager Coyle removed $286,802.22 from the Highmark Account. SR. 5. After Fred passed away, Linda deposited that amount into an estate account on May 18, 2023. SR. 6.

The trial court in this matter took judicial notice—without objection—of Estate of Fred Ager, 09PRO23-000016, Fourth Judicial Circuit, Butte County Circuit Court, State of South Dakota. SR. 319. In that file, Arlene filed a *Verified Petition to Remove Linda Ager Coyle as Personal Representative and Authorize the Appointment of an Alternate Personal Representative* ("Petition"). SR. 58-75 (Petition and Exhibits from probate file). That Petition was heard by the Honorable John Fitzgerald, on July 6, 2023. SR. 79. Judge Fitzgerald denied the motion to remove the personal representative on

August 17, 2023. SR. 87. Arlene attempted to appeal the denial. SR. 105-59 (Appellant's brief in Appeal no. 30501). That appeal was dismissed. SR. 331. The facts of this case mirror the removal efforts of Appellant in 09PRO23-16, where her Petition was denied and subsequently dismissed on appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANT'S COMPLAINT IS BARRED BY RES JUDICATA.

A. Standard of Review.

"A decision on the question of the application of res judicata is reviewed de novo." *Matter of Estate of Smeenk*, 2024 S.D. 23, ¶ 18, n. 6, --- N.W.3d --- (quoting *Nemec v. Goeman*, 2012 S.D. 14, ¶ 11, 810 N.W.2d 443, 446).

B. Elements of Res Judicata.

Res judicata "premised upon two maxims: a person should not be twice vexed for the same cause and public policy is best served when litigation has a repose." *Smeenk*, 2024 S.D. 23, ¶ 18 (quoting *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, ¶ 58, 978 N.W.2d 786, 802). This Court analyzes res judicata claims using a well-established four-part test:

> (1) the issue in the prior adjudication must be identical to the present issue, (2) there must have been a final judgment on the merits in the previous case, (3) the parties in the two actions must be the same or in privity, and (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Id.

C. Appellant waived any argument not raised or argued below.

For the first time, Appellant asserts that the issues in the two actions[2] are not identical and that she did not have a full and fair opportunity to litigate her claims in the probate proceeding. Appellant's Brief, p. 14. Below, Appellee submitted a brief in

[2] The two actions referenced are the underlying civil action (09CIV23-000124) and the probate action referred to throughout (09PRO23-000016).

support of her motion to dismiss, addressing each of the elements of res judicata. SR. 41-50. Appellant filed a Memorandum of Law in Resistance to Motion to Dismiss. SR. 98-102. In that responsive memorandum, Appellant resisted the res judicata argument on two grounds: 1) "Issue preclusion cannot apply in the absence of a final decision[,]" SR. 99 ; and 2) "The parties to the two actions are not the same, nor in privity[,]" SR. 100. No comment was made regarding the other two elements of res judicata. Accordingly, Appellee's reply brief emphasized only the two elements of res judicata opposed by Appellant. SR. 211-16. Additionally, during the hearing on Appellee's Motion to Dismiss, the parties primarily focused on the two elements that were in contention.[3] Appellant has never addressed the identity of claims issue, nor claimed she did not have a full and fair opportunity to litigate her claim in the probate action. Consequently, those arguments were waived because the litigants and circuit court did not have the opportunity to fully address or develop the record on those issues below but could have if appellant had raised the argument. *See Hall v. State ex rel. South Dakota Dept. of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26-27 ("Had the issue been raised below, the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration."); *In re Estate of Tank*, 2023 S.D. 59, ¶ 51, 998 N.W.2d 109, 126 ("When a party deprives the trial court of an opportunity to rule on the issue by failing to object to argument at the time the objectionable comments are made, he waives his right to argue the issue on appeal.").

[3] *Compare* SR. 322 where Appellee's counsel stated "there wasn't a response to our claim that they were the same underlying facts" and "[t]here wasn't a response regarding our claim that there was a full and fair opportunity to litigate[,]" *with* SR. 331-32 where Appellant's counsel stated "I do not believe it's a final determination[,]" and SR. 333 where Appellant's counsel stated "One of the other issues that . . . bar the res judicata claim would be that the parties in the two actions must be the same or in privity."

a. The issues in the two actions are identical

In analyzing whether the issues are identical for purposes of res judicata, this Court asks "whether the issues in the two cases address the same wrong sought to be redressed." *Smeenk*, 2024 S.D. 23, ¶ 19 (citation omitted); *see also Glover v. Krambeck*, 2007 S.D. 11, ¶ 18, 727 N.W.2d 801, 805 ("For purposes of res judicata, a cause of action is comprised of the facts which give rise to, or establish, the right a party seeks to enforce. The test is a query into whether the wrong sought to be redressed is the same in both actions.") (cleaned up). The thrust of this civil action is the allegation that Linda wrongfully withdrew funds from a Highmark Federal Credit Union bank account. *See generally* SR. 2-25 (Complaint and Exhibits). That core allegation was also the thrust of Arlene's petition to remove the personal representative in 09PRO23-000016. *See generally* SR. 58-75 (09PRO23-000016 Petition and Exhibits); SR. 44-45 (Appellee's Brief in Support of Motion to Dismiss comparing Petition and Complaint).

On June 5, 2023, Arlene filed a *Verified Petition to Remove Linda Ager Coyle as Personal Representative and Authorize the Appointment of an Alternate Personal Representative* ("Petition"). SR. 58-66. A comparison of the Petition in the probate action and the Complaint in this action demonstrates the identical factual issues in both proceedings. *Compare* SR. 58-66, *with* SR. 2-9. For brevity, Appellant identifies a few paragraphs in both documents that allege the same material facts; however, in short, Appellee is unable to identify any new or materially different facts in the Complaint when compared to the Petition. Both documents allege the following series of events:

- Fred Ager passed away. Complaint, ¶ 3; Petition, ¶ 1.
- Fred and Arlene were married at the time of his death. Complaint, ¶ 3; Petition, ¶ 2.

- Fred and Arlene opened joint checking accounts at Highmark Federal Credit Union. Complaint, ¶ 7; Petition, ¶ 4.
- Linda Coyle withdrew funds from the Highmark accounts, "under the guise" of a Power of Attorney for Fred Ager. Complaint, ¶ 12; Petition, ¶ 6; see also Complaint, Exhibit C.
- The funds were issued by cashier's check to Linda. Complaint, ¶ 12; Petition, ¶ 6.
- Linda's withdrawal of the funds constituted "self-dealing." Complaint, ¶ 13; Petition, ¶ 7.
- "Linda was concerned that Arlene would make the exact argument she is currently making—such funds were thus withdrawn to ensure the bank accounts would be considered estate assets and distributed pursuant to the terms of the Will as directed by Fred." Complaint, ¶ 16; Petition, ¶ 6.
- Arlene was unaware Linda withdrew funds from the Highmark account. Complaint, ¶ 17; Petition, ¶ 6.
- After Linda withdrew the funds, contractors were not paid for certain work done on residential property and rental property. Complaint, ¶ 17; Petition, ¶ 8.

The Honorable Judge John Fitzgerald issued Findings of Fact on these allegations in the Petition on August 17, 2023. SR. 79-88.

Judge Fitzgerald expressly found that Linda's "action in withdrawing the funds from the accounts was taken in accordance with specific authority granted by the power of attorney to the agent." SR. 81, FOF, ¶ 12. The court further found, on "the date the agent [Linda] withdrew the funds from the credit union, the agent was authorized by the power of attorney to act in this manner." SR. 82, FOF, ¶ 15.

The factual issues that were fully litigated and decided in the probate proceeding are the same underlying facts Appellant uses to support this civil proceeding. The first

element of *res judicata* is met. *See Detmers v. Costner*, 2023 S.D. 40, ¶¶ 15-17, 994 N.W.2d 445, 453-54 (discussing issues were different when second suit complained of conduct not discussed or litigated in first suit).

b. Appellant had a full and fair opportunity to litigate the factual basis of her claim.

The last element of res judicata—unchallenged by Appellee below—requires a showing that the parties had a "full and fair opportunity to litigate the issues in the prior adjudication." *Smeenk*, 2024 S.D. 23, ¶ 18. In *Smeenk*, this Court concluded that a party had a complete and fair opportunity to litigate their claim when the circuit court conducted a trial on the claim, "which featured a fully developed evidentiary record with testimony and exhibits." *Id.* at ¶ 21. Here, similarly, Appellant had a full and fair opportunity to litigate her claim on July 6, 2023, in front of the Honorable John Fitzgerald, during an evidentiary hearing where that circuit court heard testimony of multiple witnesses and considered the briefs and arguments of the parties. SR. 79; *see Healy Ranch*, 2022 S.D. 43, ¶ 56, 978 N.W.2d 786, 802 ("For a claim to be barred by res judicata, the claim need not have been actually litigated at an earlier time. Rather, the parties only need to have been provided a fair opportunity to place their claims in the prior litigation." (quotation marks omitted)).

D. Based on the record below, there are two questions of law for this Court to consider.

Appellant waived her right to contest the first and fourth elements of res judicata by failing to challenge them with the circuit court. Those elements are easily met in this case. The core legal issue below—and now on appeal—are the second and third elements of res judicata. Given this Court's recent ruling in *Smeenk*, the second element (requiring finality) is met. For purposes of res judicata, the primary question for this Court is whether the parties were the same in the two proceedings.

a. The ruling in the probate action was final for purposes of res judicata.

With respect to finality, Appellee raises two alternative arguments for this Court's consideration. First, under *In re Estate of Geier*, 2012 S.D. 22, 809 N.W.2d 355 and *Healy Ranch*, Judge Fitzgerald's August 17, 2023 order denying Appellant's petition was a final order for purposes of res judicata because it settled the rights and obligations of the parties. Second, under *Smeenk*, this Court's dismissal of Appellant's prior attempted appeal in 30501, was a final order for purposes of res judicata. Under either theory, the second element of res judicata is met.

In *Geier*, this Court adopted a "more expansive determination of the finality of probate orders" than prior decisions suggested. *In re Estate of Petrik*, 2021 S.D. 49, ¶ 16 963 N.W.2d 766, 770. Specifically, this Court "held that orders determining individual petitions for relief in probate actions can constitute final orders when they dispose of all issues relative to a particular petition and leave nothing for decision." *Id.* In the probate proceeding, the August 17, 2023 order ended any question relating to the petition to remove Linda Coyle as the personal representative for self-dealing. Though Appellant had other procedural avenues for relief (appeal or Rule 60(b) motion), any new claim based on the same facts—such as this civil suit—was barred by res judicata. *See Healy Ranch. Inc. v. Healy*, 2022 S.D. 43, ¶¶ 52-53, 978 N.W.2d 786, 801-02 (holding that a summary judgment based on a statute of limitations was a final judgment on the merits because "it settled the rights and obligations of the respective parties"); *Farmer v. South Dakota Dept. of Revenue and Regulation*, 2010 S.D. 35, ¶ 10, 781 N.W.2d 655, 660 ("If the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred . . . This is true regardless of whether there were different legal theories asserted or different forms of relief requested in a subsequent action.").

Based on this Court's statements in *Geier*, *Petrik*, and *Healy*, the August 17, 2023 Order was final for purposes of res judicata and the subsequent civil suit based on the same facts was barred. To hold otherwise would essentially encourage a litigant to file numerous successive lawsuits and request recusal of numerous judges until a litigant was satisfied with a result or until an appellate decision was rendered.

After the motions hearing in this case (and after Appellant submitted her brief in this appeal) this Court issued the *Smeenk* decision. That opinion seemed to more or less follow the same logic outlined above. In *Smeenk*, this Court explained that unsupervised probate actions represent a special class of cases because a single "case" can contain multiple "proceedings," each of which results in a final order. 2024 S.D. 23, ¶ 23. This Court went on to discuss how a "judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest." *Id.* at ¶ 29. This language suggests that the August 17, 2023 Order was final for purposes of res judicata.

However, this Court then concluded that the "effect of *Smeenk I* was to affirm the circuit court's denial of [appellant's] claim . . . In res judicata terms, *Smeenk I* was a final judgment on the merits." *Id.* ¶ 32. That statement appears to hold that the effect of the appellate opinion was the final judgment on the merits. Appellee respectfully submits that it remains unclear in South Dakota which order was final for purposes of res judicata when there was an order in an unsupervised probate proceeding. In this case, though, there has been an appellate decision.

Even if Appellee is incorrect with respect to the finality of the August 17, 2023 order, when this Court dismissed the appeal of that order in 30501, there was a final judgment preventing further litigation of the claim in new a civil suit. Even though the appeal was dismissed for procedural reasons, a litigant is not afforded the opportunity to

continue to press the same factual disagreement because they ineffectively prosecuted their appeal.

b. The parties are the same for purposes of Res Judicata.

The first, second, and fourth elements under res judicata are met in this action. The remaining question for this Court is whether the parties are the same in the two actions. The narrower question is whether a plaintiff can evade res judicata by merely adding a name to a caption, without any corresponding allegations against that party. It is axiomatic to the maxims of res judicata and notions of judicial economy to allow such gamesmanship. This issue is not clear under existing jurisprudence from this Court.

The United States Supreme Court, as a matter of federal common law, has addressed res judicata. *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (rejecting "virtual representation" exception); *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 400-01 (1981) (discussing "rigorous application" of res judicata); *Montana v. U.S.*, 440 U.S. 147 (1979) (concluding that privity between the government and the civil plaintiff in a prior action barred the government's subsequent suit).

Here, there is no question that Appellant, Arlene Ager, was the Petitioner in the probate action and is the Plaintiff in the civil action. There is also no question that Linda Coyle was the Personal Representative in the probate action and is a Defendant in the civil action. Those parties are the same. Those parties are the ones in controversy. But, Appellee concedes that a new name appears as a defendant in the civil action: William Coyle. William did not litigate any issues in the probate removal proceedings.

A review of the Complaint reveals that none of the allegations are focused on Mr. Coyle. SR. 2-10. This issue was discussed at the motions hearing. The circuit court asked Appellant's counsel "Where in your complaint does it allege that William Coyle converted?" SR. 348. Appellant's counsel was unable to identify a paragraph. The circuit

court asked additional questions on this topic and Appellant's counsel was unable to provide a paragraph with any allegation of wrongdoing against Mr. Coyle. *Id.*

Regarding the concept of nonparty preclusion, the United States Supreme Court has explained historically each person should have their own day in court. *Taylor*, 553 U.S. at 892-93. Accordingly, an individual is not bound by a judgment in litigation where they were not a party.[4] *Id.* at 893. This basic rule prohibiting nonparty preclusion is "subject to exceptions." *Id. Taylor* goes on to discuss six exceptions. *Id.* at 894-95. Notable here is the third exception, where a party is bound by a judgment because they were adequately represented by someone *with the same interests* who was a party. *Id.* at 894. In this case, there are no direct allegations of wrongful conduct or omissions on the part of William. But the Complaint does allege that Appellees were both "co-attorneys-in-fact." SR. 3 (Complaint, ¶ 10). Linda and William are also married. SR. 18 (Complaint, Exhibit C).[5] As husband and wife, and named co-attorneys-in-fact, Appellees had the same interest in the removal action of the probate.

As stated, the narrow legal question for this Court is whether a plaintiff can defeat res judicata by adding a party, without any corresponding allegations against that party. Appellee is unaware of any legal authority for that proposition. However, the federal courts have addressed res judicata and recognized situations where a nonparty to an action may nonetheless be bound by that prior action. Here, even though William Coyle was not a party, the ruling in the prior action should still prevent Appellant from relitigating her prior claim. Allowing a litigant to circumvent the principles of res judicata by adding a new defendant—with no corresponding allegations—would encourage frivolous

[4] Based on this reasoning, though William Coyle would not be bound by a judgment in the probate because he was not a party, Appellant would be bound because she was a party to the probate litigation.
[5] This is a citation to the Durable Power of Attorney Fred Executed. In that document, he identified Linda Coyle as his daughter and William Coyle as his son-in-law.

litigation, contravening this Court's statement that "public policy is best served when litigation has a repose." *Smeenk*, 2024 S.D. 23, ¶ 18. Appellee asks this Court to adopt the position that a husband and co-attorney-in-fact of a party to litigation that expressly contemplates conduct according to the authority granted in a power of attorney is bound by the prior litigation.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANT LACKS A CONCRETE INJURY WHEN SHE HAD AN EQUAL INTEREST IN FUNDS IN A JOINT BANK ACCOUNT.

The circuit court raised—*sua sponte*—the question of whether Appellant has standing to bring her claim. SR. 256 (citing *Elliott v. Board of County Com'rs of Lake County*, 2005 S.D. 92, ¶ 17, 703 N.W.2d 361, 368). The circuit court analyzed the issue and correctly concluded that Appellant does not have standing to bring her claim. SR. 256-58.

A. Standard of Review.

Jurisdictional issues are "issues of law to be reviewed under the de novo standard of review." *Cable v. Union County Bd. of County Com'rs*, 2009 S.D. 59, ¶ 19, 769 N.W.2d 817, 825. Standing implicates subject matter jurisdiction. *Id.* at ¶ 21. "Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void." *Id.* at ¶ 20.

B. Elements of Standing Analysis.

"A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction." *Id.* ¶ 21.

> First, the plaintiff must establish that he suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, the plaintiff must show that there exists a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains. The causal connection is satisfied when the injury is fairly traceable to the challenged action of the defendant, and not the result of the

> independent action of some third party not before the court. Finally, the plaintiff must show it is likely, and not merely speculative, that the injury will be redressed by a favorable decision

Id. (citations and quotation marks removed for clarity).

C. Appellant failed to articulate a concrete or particularized injury.

In its Memorandum Decision, the circuit court explained that Appellant and Fred were *joint* account holders. SR. 256. Therefore, Appellant had the burden of establishing in her pleading that Fred removing funds through his agent harmed her. *Id.* The circuit court concluded that the widow of a decedent does not have standing to sue the decedent's power of attorney on behalf of the decedent. SR. 257. The circuit court further concluded that it lacked jurisdiction to hear the case. SR. 258.

To fully evaluate the circuit court's decision (and Appellant's standing to bring this lawsuit), this Court must consider the laws of joint tenancy with respect to bank accounts. "A joint account[6] belongs, during the lifetime of all parties,[7] to the parties in proportion to the net contributions by each to the sums on deposit,[8] unless there is clear and convincing evidence of a different intent." SDCL § 29A-6-103(1). Unquestionably, the bank accounts at issue were accounts subject to SDCL § 29A-6-103. Accordingly, the money in the account belonged to Fred and Arlene in proportion to their net contribution at the time the funds were withdrawn.

According to the Complaint, Fred passed away on April 16, 2023. SR. 6, ¶ 14. Appellee withdrew the funds on March 27, 2023. SR. 4, ¶ 12. Fred was alive when the

---

[6] For purposes of SDCL ch. 29A-6, "joint account" is defined as "any account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." SDCL § 29A-6-101(4).

[7] For purposes of SDCL ch. 29A-6, "party" is defined as "any person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account." SDCL § 29A-6-101(7).

[8] For purposes of SDCL ch. 29A-6, "sums on deposit" is defined as "any balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party." SDCL § 29A-6-101(13).

funds were withdrawn. Therefore, on March 27, 2023, the funds were owned in proportion to the net contributions of the parties. SDCL § 29A-6-103. As a matter law, Arlene did not have any greater interest in the funds than Fred on March 27, 2023. SDCL § 29A-6-109 ("Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded."); *see Estate of Lynch v. Lynch*, 2023 S.D. 23, ¶ 34, 991 N.W.2d 95, 107 (noting that being joint account holder permitted individual to issue checks from account).

Appellant makes no allegation regarding her contribution to the account. There is nothing in the Complaint that alleges any manner of ownership of the account wherein Fred did not have the right to withdraw funds on March 27, 2023. Because Appellant failed to establish a concrete and particularized injury, the circuit court correctly determined she does not have standing to pursue her claim and the circuit court lacked jurisdiction to hear the case.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANT FAILED TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED.

A. Standard of Review.

This Court reviews whether a complaint fails to state a claim de novo. *Paul v. Bathurst*, 2023 S.D. 56, ¶ 10, 997 N.W.2d 644, 650; *Kaiser Trucking, Inc. v. Liberty Mutual Fire Insurance Company*, 2022 S.D. 64, ¶ 13, 981 N.W.2d 645, 650. Though a complaint does not need detailed factual allegations, a plaintiff is obligated to provide the grounds which establish their entitlement to relief. *Kaiser*, 2022 S.D. 64, ¶ 13. Those grounds require more than labels and conclusions. *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* This Court tests "a motion to dismiss under SDCL 15-6-12(b)(5) for 'the legal sufficiency of the pleading, not the facts which support it.'" *Id.* quoting (*Hallberg v. South Dakota Bd. of Regents*,

2019 S.D. 67, ¶ 10, 937 N.W.2d 568, 572); *see Dakota, Minnesota & Eastern Railroad Corp. v. Acuity*, 2006 S.D. 72, ¶ 11, 720 N.W.2d 655, 659 ("Our standard of review of a trial court's grant or denial of a motion to dismiss is the same as our review of a motion for summary judgment: is the pleader entitled to judgment as a matter of law.")

Generally, the circuit court may not consider documents outside the pleadings when it considers a motion to dismiss for failure to state a claim. *Healy Ranch Partnership v. Mines*, 2022 S.D. 44, ¶ 35, 978 N.W.2d 768, 778. However, if a circuit court does consider matters outside the pleadings, the motion shall be treated as one for summary judgment. *Id.*

B. Elements of Conversion.

"Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." *Johnson v. Markve*, 2022 S.D. 57, ¶ 59, 980 N.W.2d 662, 678 (citation omitted). A plaintiff claiming conversion must prove:

> (1) [plaintiff] owned or had a possessory interest in the property; (2) [plaintiff's] interest in the property was greater than [defendant's]; (3) [defendant] exercised dominion or control over or seriously interfered with [plaintiff's] interest in the property; and (4) such conduct deprived [plaintiff] of [his or her] interest in the property.

Id. "The foundation for a conversion action rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results." *Id.* (quotation marks and citation omitted). However, "[c]onsent defeats a claim for conversion." *Estate of Thacker v. Timm*, 2023 S.D. 2, ¶ 41, 984 N.W.2d 679, 692.

To survive Defendant's motion to dismiss for failure to state a claim upon which relief may be granted, the Complaint must have alleged each of the four elements. Here, the Complaint failed to allege facts sufficient to establish elements two and four. Arlene

and Fred had an equal interest in the funds in their joint account while both persons remained living. The funds were withdrawn during Fred Ager's life. Arlene Ager and Fred Ager had an equal interest in the funds at the time they were withdrawn.[9]

C. As a matter of law, Appellant did not have a greater property interest in funds than Fred Ager.

As stated, *supra*, owners of a bank account own the account in proportion to the net contributions by each to the sums on deposit. SDCL § 29A-6-103. Relevant to this argument, Appellant alleged the following:

- Appellant was married to Fred Ager. SR. 2 (Complaint ¶ 3).
- Appellant and Fred Ager set up a joint checking and savings account at Highmark Federal Credit Union in Belle Fourche on May 24, 2021. SR. 3-4 (Complaint ¶ 7).
- Fred's social security payments were deposited into the Highmark account. SR. 4 (Complaint ¶ 8).
- Fred executed a durable power of attorney ("POA"), which named Linda Coyle and William Coyle ad co-attorneys in fact. SR. 4 (Complaint, ¶ 10).
- On March 27, 2023, Linda Coyle removed $286,802.22 from the joint checking and savings accounts at Highmark Federal Credit Union. SR. 5 (Complaint ¶ 12).
- Fred Ager died on April 16, 2023. SR. 6, (Complaint, ¶ 14).
- Linda deposited the funds from the Highmark joint checking and savings account into an estate account on May 18, 2023. *Id.*

[9] More factually accurate, Fred had a *greater* interest in the funds in the Highmark account because funds are owned in proportion to contribution. SDCL § 29A-6-103. According to the Complaint, Fred was the only owner of the account that made deposits. *See* SR. 4, *Complaint* ¶ 8 ("Fred's social security payments were deposited into the Highmark account and Arlene's social security payments continued to be deposited into the Wells Fargo account."). No other portion of the Complaint alleges Arlene contributed anything to the Highmark account.

Based on the foregoing factual allegations, Appellant and Fred, on March 27, 2023, both had an interest in the Highmark account. The only allegation regarding deposits alleged Fred as the depositor. There is no allegation whatsoever that Appellant ever deposited any funds in the account. Therefore, pursuant to SDCL § 29A-6-103, Appellant had zero claim to the funds in the account (while both account owners remained living) because she did not deposit any funds into the account (and ownership is in proportion to contribution). Consequently, on March 27, 2023, Fred had a greater—or at least equal—claim to ownership of the funds in the account.

D. As a matter of law, Appellant did not have a greater property interest than Fred Ager's agent, Appellee.

The POA authorized Linda Coyle and William Coyle to "exercise or perform any act, power, duty, right, or obligation whatsoever that I now have[.]" SR. 18, *Complaint*, Exhibit C, p.1, ¶ 1. The POA further granted authority to "conduct, engage in, and transact any and all lawful business of whatever nature or kind for me, on my behalf, and in my name." SR. 19, *Complaint*, Exhibit C, p. 2, ¶ 5. Finally, the POA granted authority to "receive . . . checks, drafts . . . commercial paper receipts, withdrawal receipts and deposit instruments relating to accounts or deposits in . . . banks, savings and loan or other institutions or associations . . . ." SR. 19, *Complaint*, Exhibit C, p. 2, ¶ 6.

The POA was intended "to be construed and interpreted as a general power of attorney." SR. 20, *Complaint*, Exhibit C, p. 3, ¶ 9. Given the broad grants of authority in the POA, when Appellee withdrew money from the accounts—during Fred Ager's lifetime—she was acting as Fred, not in her own capacity. She was acting as his attorney-in-fact, designated to act on his behalf. Therefore, when she withdrew the money from the accounts, on Fred Ager's behalf, she had an equal (or greater) interest in the Highmark account as Appellant. Appellant did not allege and could not prove that at the time of the

purported wrongful conduct Appellee had an inferior interest in the funds in the account, when Appellee's actions were in accordance with—and authorized by—Fred's POA. As a matter of law, Appellant could not have proven that she had a superior interest in the funds than Appellee and this claim was properly dismissed for being legally insufficient.

E. Appellant has not been deprived of the funds.

Appellant's Complaint must allege sufficient facts to conclude she was "deprived" of her interest in the funds. *First American Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 40, 756 N.W.2d 19, 31 (concluding no liability for conversion when the plaintiff was "never deprived of its interest"). Appellant has not been deprived of her interest in property when the property remains in existence. The money was deposited into an estate account on May 18, 2023. SR. 5, *Complaint*, ¶ 14; *see also* SR. 23, 159.[10]

As a matter of law, the well settled elements of conversion require deprivation *and* separately an exercise of dominion or control. *See Thacker*, 2023 S.D. 2, ¶ 41. Assuming, *arguendo*, that Appellant's Complaint sufficiently alleges that Appellee exercised "dominion or control over or seriously interfered with" Appellant's interest in the Highmark funds, it does not sufficiently establish the separate element of deprivation, when the funds still exist and are available to be distributed pursuant to the account opened for the Estate of Fred Ager. Once the supervised estate is completed, any funds Appellant is due are available to be paid out.

F. Appellant consented to withdrawal of funds by another account owner.

As the circuit court explained in its analysis on Standing:

[10] SR. 23 and 159 are the same document. SR. 23 is nearly illegible; SR. 159 is a better reproduction. The documents are a deposit slip from Highmark Federal Credit Union, dated May 18, 2023, showing the funds at issue were deposited into an estate account.

> A joint bank account is inherently an interest which is limited by the interest and actions of another. If one joint holder withdraws money, they do so under the standing express consent of the other joint holder because that is the nature of the joint bank account. Otherwise, it would be a joint bank account where neither could act unilaterally. Such was not the case here, either party could remove money at will from the bank account.

SR. 256-57. The very nature of a joint bank account is an account where either party can withdraw funds and therefore both parties' consent to the withdrawal by the other account owner. *See* SDCL § 29A-6-109 ("Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded."). As this Court has stated: "Consent defeats a claim for conversion." *Thacker*, 2023 S.D. 2, ¶ 41. The very nature of a joint account, coupled with the fact that the money was withdrawn by Fred's agent while Fred was living, results in a failure of the conversion claim as a matter of law because Appellant consented to the withdrawal of funds by Fred (or his duly appointed agent).

G. The circuit court did not—and was not required to—treat the motion as one for summary judgment.

Appellant argued below and asserts on appeal that Appellee's motion to dismiss is akin to a motion for summary judgment. SR. 101-02 (asserting Defendants' arguments are "much like a motion for summary judgment); Appellant's Brief, p. 8 ("res judicata issue was treated akin to a summary judgment"). The circuit court did not address this contention in its Memorandum of Decision and the parties did not argue this issue during the hearing, but Appellee would be remiss not to briefly address this contention that has been raised, though it is meritless.

If matters outside the pleadings are presented to and not excluded by the circuit court, the motion shall be treated as one for summary judgment. *Healy Ranch*, 2022 S.D. 44, ¶ 35. Failing to convert a motion to dismiss to a summary judgment can constitute reversible error. *Id.* at ¶ 36. However, if the "dismissal can be justified under § 12(b)(5)

standards without reference to matters outside of the pleadings" noncompliance may not require reversal. *Id.* Importantly, this Court has recognized that the "mandatory conversion" requirements of SDCL § 15-6-12(b) "may be waived when the parties neither object below nor allege an inadequate hearing." *Flandreau Public School Dist. No. 50-3 v. G.A. Johnson Const., Inc.*, 2005 S.D. 87, ¶ 6, n. 4, 701 N.W.2d 430, 434.

Here, though the circuit court took judicial notice of the probate file (09PRO23-000016) where Appellant's Petition was filed, neither party objected. SR. 319. In fact, Appellant's counsel is the one that asked the circuit court to "take judicial notice of the entire file." *Id.* The verified petition was made a part of the record and attached by affidavit. *See* SR. 55-89 (Exhibit 1: Verified Petition to Remove Linda Ager Coyle as Personal Representative, SR. 58-75; Exhibit 2: Motion Hearing Transcript Excerpt, SR. 76-78; Exhibit 3: 09PRO23-16 Findings of Fact, Conclusions of Law and Order, SR. 79-88; Exhibit 4: Letter from Appellant's attorney regarding recusal of Judge Fitzgerald, SR. 89). Appellant did not object below to the inclusion of documents by affidavit, has never alleged the hearing was inadequate, and specifically asked the circuit court to take judicial notice of the entire probate file. Appellant cannot now claim the motion should have been treated as one for summary judgment or Appellee's request was somehow akin to a motion for summary judgment.

IV. THE TRIAL COURT CORRECTLY CONCLUDED THAT APPELLANT'S MOTION TO AMEND WAS NOT PROPERLY PRESENTED TO THE TRIAL COURT.

Appellant noted that she has a "quandary" in raising her assertion of error with respect to the motion to amend. *See* Appellant's Brief, p. 18. The quandary exists because this issue was not preserved and therefore is not properly before this Court to consider. *See* SDCL §§ 15-26A-7, 15-26A-10; *First Bank of South Dakota (Nat. Ass'n), Miller, S.D. v. VonEye*, 425 N.W.2d 630, 638 (concluding issue of attorney fees waived when

there was no "adequate reference to the record for the trial judge's alleged ruling"). This appeal is from the "whole of the February 1, 2024 ***Memorandum of Decision and Order.***" SR. 277 (Notice of Appeal, emphasis in original). The Memorandum of Decision does not discuss or reference the Motion to Amend. This issue is not properly preserved for this Court's consideration.

Also, the motion to amend was never properly before the circuit court because it was not timely filed to be considered at the hearing on Appellee's motion to dismiss. To the extent this issue is properly preserved for this Court's consideration, the trial court correctly declined to address the motion at the January 8, 2024 hearing. Subsequent attempts to file and set for hearing were mooted by the Memorandum of Decision dismissing the Complaint. There is no ruling on either Motion to Amend and therefore no error to assert.

Finally, no Amended Complaint was ever filed or served on the Parties. *See* SR. III (alphabetical index of filings in settled record and non are titled Amended Complaint"). Appellee acknowledges that there were exhibits to the motions to amend, with a proposed amended complaint, however no amended complaint was filed and served on the parties to the proposed amendments. SR. 171 (Amended Complaint marked as "EXHIBIT A"); SR 222 (Amended Complaint marked as "EXHIBIT A").

A. Brief review of filings related to the Motions to Amend and Standard of Review.

Prior to presenting legal arguments, this section is devoted to a summary of filings that are relevant to the timing of the motions to amend. The Document Title is the title in the caption of the filed document and the date filed will be the date on the file stamp at the bottom of the page of the document.

Document Title	Date Filed	SR. Page
Complaint	October 21, 2023	2

Motion to Dismiss	November 9, 2023	35
Notice of Hearing [on motion to dismiss]	November 16, 2023	90
Motion for Leave to File Amended Complaint and Join Party Defendant and Notice of Hearing	December 22, 2023	166
Response to Motion for Leave to File Amended Complaint and Join Party Defendant and Notice of Hearing	December 28, 2023	197
Motions Hearing	January 8, 2024	316
Second Motion for Leave to File Amended Complaint and Join Party Defendant	January 9, 2024	219
Notice of Hearing [on second motion to amend for Feb 15, 2024]	January 11, 2024	235
Memorandum of Decision	February 1, 2024	250

At the January 8, 2024 hearing, Appellant attempted to address the first motion to amend. SR. 353-54. The following colloquy occurred:

> MS. MELLING: Your Honor, one other question for clarification. With our motion for leave to file amended complaint, can we address that or need to address that?
>
> THE COURT: Has it been done within ten days for the notice?
>
> MS. MELLING: No, Your Honor. I will say that, as indicated in my response, we requested -- I sent it to Mr. Prosen, who failed to acknowledge and return the indication as to whether or not he was going to stipulate to it, apparently, in an effort to defeat that. We are, apparently, one day short.
>
> THE COURT: Okay. So why don't you just get it set up for a hearing and then we'll review that as well?
>
> MS. MELLING: Perfect. Thank you, Your Honor.

SR. 353-54.

As stated, Appellee's position is that the Motion to Amend was never properly before the trial court and is not properly before this Court. However, if this Court disagrees and were to construe the circuit court's comments at the hearing as a denial of the Motion to Amend, this Court will "review the circuit court's decision to grant or deny a motion to amend pleadings using the abuse of discretion standard of review." *Ries v. JM Custom Homes, LLC*, 2022 S.D. 52, ¶ 11, 980 N.W.2d 217, 221.

B. Neither motion to amend was ever properly before the trial court, so no judgment, order, determination, or ruling was ever rendered on either motion; this Court lacks jurisdiction to consider this issue.

a. The first motion to amend was not timely filed.

In her first motion to amend, Appellant stated "a party may amend pleadings by leave of the court and that leave of the court shall be freely given when justice so requires." SR. 167. SDCL § 15-6-15(a) provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has neither been placed upon the trial calendar, nor an order made setting a date for trial, he may so amend it at any time within twenty days after it is served. Otherwise a *party may amend his pleading only by leave of court or by written consent of the adverse party*; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(italics added). The emphasized portion is presumably the portion of the statute Appellant was referring to in her first motion. SR. 167. Appellant's motion recognizes that she needed leave of court to amend her complaint.

Appellant filed and served her *Motion for Leave to File Amended Complaint and Join Party Defendant and Notice of Hearing* on December 22, 2023. SR. 170. Appellee's response identified why the first motion to amend was not timely. SR. 197-98 (quoting SDCL § 15-6-6(d))[11]. Appellant agreed that she was "one day short." SR. 354. Given that Appellant agreed at the hearing she was one day short, there is no dispute that the first motion to amend was not filed in time to be considered at the January 8, 2024 hearing. *See Zahn v. Musick*, 2000 S.D. 26, ¶ 27, 605 N.W.2d 823, 829 (stating attorney admissions are binding upon their client and " relieves the opposing party of the duty to

[11] SDCL 15-6-6(d) provides: "A written motion . . . shall be served not later than ten days before the time specified for the hearing."

present evidence on that issue"). Appellant's statement at the hearing nullifies any argument that the trial court erred by not considering the motion January 8, 2024. Appellant agreed she did not comply with the statute.

b. The second motion to amend was not heard by the Court because this action was dismissed, and the hearing was cancelled.

The second motion to amend was noticed for hearing on February 15, 2024. SR. 235. But, the Memorandum of Decision was filed February 1, 2024, prior to the February 15, 2024 hearing. SR. 250. The Memorandum of Decision ordered that the case was dismissed, SR. 260. Therefore, there was no longer a complaint to amend and no reason for the trial court to hold a hearing on February 15, 2024.

Appellant filed *Plaintiff's Motion to Clarify and Amend Order* on February 12, 2024. However, Appellant never set that motion for a hearing, and there is no order on that motion. Also, that motion did not address either prior motion to amend or object to the trial court not issuing a ruling on either motion to amend.

c. There is no error to assert when there is no judgment, order, ruling, or determination on either motion to amend.

There is no judgment or order on either motion to amend, within the meaning of SDCL § 15-26A-3. There is also no "order, ruling, or determination of the trial court" "necessarily affecting the judgment and appearing on the record" within the meaning of SDCL § 15-26A-7. And finally, this issue is not "relevant to the question of whether the order appealed from is erroneous." SDCL § 15-26A-10. There is no statutory vehicle for Appellant to ask this Court to reverse her filing error. *LaCroix v. Fluke*, 2022 S.D. 29, ¶ 16, 975 N.W.2d 150, 158 ("the right to an appeal is purely statutory and no appeal may be taken absent statutory authorization").

The failure to file a motion in accordance with the statutory timeline mandated in SDCL § 15-6-6(d) is an error on Appellant's part, not an error of the trial court. Thus,

there is no error to raise for this Court's consideration. Any purported error with respect to the first motion to amend is not preserved or properly before this Court. There is no judgment, order, ruling, or determination on the first motion to amend and therefore nothing to appeal. SDCL § 15-26A-7.

The second motion to amend was mooted by the dismissal of the action and therefore the trial court did not err by not giving the second motion to amend additional consideration. Similar to the first motion to amend, there is no judgment, order, ruling, or determination to appeal with respect to the second motion to amend.

This Court need not consider Appellant's last assertion of error. There is no order to affirm or reverse. The motions to amend were not addressed in the Memorandum of Decision, which is the only issue presented in the Notice of Appeal. *See, e.g., Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 33, 643 N.W.2d 56, 67 (concluding issue was not before this Court when notice of appeal did not include specific order of dismissal, citing SDCL § 15-26A-4.).

C. Appellant never filed an amended complaint.

Despite the foregoing, in candor to this Court, Appellees recognize the first part of the amendment statute a party to "amend his pleading once as a matter of course at any time before a responsive pleading is served[.]" SDCL § 15-6-15(a). Here, A complaint was filed on October 21, 2023. SR. 2. Appellees filed a Motion to Dismiss on November 9, 2021. SR. 37. Appellees did not file an Answer to the Complaint.

A motion pursuant to SDCL § 15-6-12(b) is arguably not a "responsive pleading." "A *motion* making any of these defenses shall be made before pleading if a further *pleading* is permitted." SDCL § 15-6-12(b) (emphasis added). Rule 12 appears to contemplate motions under Rule 12(b) as a filing distinct from a "pleading" which is referenced separately in the same statute.

If a motion pursuant to 12(b) is not a responsive pleading, then Appellant could have amended her complaint "once as a matter of course" at any time prior to the dismissal of the action because no "responsive pleading" cut off the opportunity to file as a matter of course. SDCL § 15-6-15(a). A review of the record, however, shows that Appellant did not file her amended complaint. To be sure, there are two filings in the record captioned "amended complaint," but both documents are filed as exhibits to the motions to amend, rather than as distinct and separate pleadings. SR. 171 (Amended Complaint marked as "EXHIBIT A"); SR 222 (Amended Complaint marked as "EXHIBIT A"). There is no certificate of service in the record establishing service of an amended complaint on the parties. *See* SDCL § 15-6-5(b)(4) ("An attorney's certificate of service, the written admission of service by the party or his attorney, or an affidavit of service are sufficient proof of service.").

Appellee recognizes the technical distinction being made here, but believes it is an important and relevant distinction. An exhibit to a motion is not an amended pleading. No document in the Index of the settled record is titled "Amended Complaint." *See* SR. I-IV. No "Amended Complaint" was ever filed and served on all the parties. Appellant did not comply with the procedural requirements to amend her complaint. Either 1) she did not file an amended complaint when she could have as a matter of course because an exhibit to a motion is not a distinct and separate pleading or 2) she was required to obtain leave of court and did not file the motion in time to be heard at the already set motions hearing. In either case, there is no error on the part of the trial court for this Court to "reverse, affirm, or modify[.]" SDCL § 15-26A-12. Finally, the Notice of Appeal does not make any reference to a judgment, order, ruling, or determination on either motion to amend. SR. 277. *See* SDCL 15-26A-3.

CONCLUSION

Appellant filed a verified petition to remove a personal representative in the Estate of Fred Ager, 09PRO23-000016, Fourth Judicial Circuit, Butte County, South Dakota. SR. 58-75. The Honorable Judge Fitzgerald denied that request. SR. 79-88. Unhappy with that result, Appellant filed the Complaint in the present action. The Honorable Judge Strawn correctly concluded Appellant's complaint is barred under three legal doctrines: res judicata, standing, and failure to state a claim. SR. 250-60 (Memorandum of Decision). Appellee respectfully requests this Court see the clear attempt to relitigate the same issues in a new forum and affirm the dismissal of this action, with prejudice.

Dated May 31, 2024

SCHLIMGEN LAW FIRM, LLC

By: _____

Spencer R. Prosen
Eric M. Schlimgen
Attorneys for Appellant
PO Box 659
Spearfish, SD 57783
611 Dahl Road, Suite 1
Spearfish, SD 57783
(605)340-1340
(605)340-1420 (fax)
eric@schlimgenlawfirm.com
spencer@schlimgenlawfirm.com

Eric J. Nies
Nies Karras & Skjoldal, P.C.
PO Box 759
Spearfish, SD 57783
(605) 642-2757
eric@spearfishlaw.com

ORAL ARGUMENT IS HEREBY RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, Spencer R. Prosen, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 37 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The footnotes are Times New Roman 10 point. The word processor used to prepare this brief indicates that there are a total of 29 pages, 10,746 words, including footnotes, and 53,175 characters (no spaces) in the body of the Brief.

SPENCER R. PROSEN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 31, 2024, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also emailed to:

Ms. Erin Melling
Melling & Roseland Law, P.C.
PO Box 390
Hettinger, ND 58639
melling@mrlawpc.net

Mr. Richard Pluimer
Pluimer Law, PLLC
PO Box 988
Spearfish, SD 57783
rpluimer@outlook.com

Ms. Lora A. Waeckerle
Waeckerle Law Prof., LLC
910 5th Street, Suite 102
Rapid City, SD 57701
(605) 791-5666
lora@wlawsd.com

The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date written above.

SPENCER R. PROSEN

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. #30645

ARLENE AGER, **Appellant,** **v.** **LINDA AGER COYLE, individually and as Power of Attorney of Fred Ager, now deceased; and WILLIAM COYLE, individually and as Power of Attorney of Fred Ager, now deceased,** **Appellees.**	

APPEAL FROM THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE ERIC J. STRAWN
Circuit Court Judge

REPLY BRIEF OF APPELLANT ARLENE AGER

ATTORNEYS FOR APPELLANT, ARLENE AGER

Richard A. Pluimer
Richard Pluimer, PLLC
PO Box 988
Spearfish, SD 57783
Telephone (605) 641-3378
rpluimer@outlook.com

Erin Melling
Melling & Roseland Law, PC
1409 5th Avenue
Belle Fourche, SD 57717
Telephone (605) 723-1659
melling@mrlawpc.net

ATTORNEYS FOR APPELLEES LINDA AGER COYLE AND WILLIAM COYLE

Mr. Eric Nies
Mr. Dillon Karras
Nies, Karras & Skjoldal, PC
109 Main Street
Spearfish, SD 57783
Telephone (605) 642-2757
eric@spearfishlaw.com
dillon@spearfishlaw.com

Mr. Eric M. Schlimgen
Mr. Spencer R. Prosen
611 Dahl Road, Suite 1
Spearfish, SD 57783
eric@schlimgenlawfirm.com
spencer@schlimgenlawfirm.com

ATTORNEY FOR JEFF AGER, AN INTERESTED PARTY AND SON OF FRED AGER, DECEASED.

Ms. Lora A. Waeckerle
Waeckerle Law Prof., LLC
PO Box 27
Rapid City, SD 57709
lora@wlawsd.com

NOTICE OF APPEAL FILED: March 11, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

PRELIMINARY STATEMENT AND CONCLUSION

SDCL 15-26A-62 requires "the reply brief must be confined to new matter raised in the brief of the appellee....." This brief is abbreviated as no "new matter" has been raised.

Appellee's brief contains 43 references to res judicata and preclusion including issue preclusion.

Simply, there is no "final decision" to which res judicata or issue preclusion can attach. It is this Court who will determine the final decision, not the trial court. The merits of the trial court's decision in the probate action are currently pending in Supreme Court Case #30604 (N.O.R.). Should this Court determine that #30604 and #30590 are jurisdictionally premature, the appeals will return following the entry of an Order for Complete Settlement required by SDCL 29A-3-1001.

Appellant stands by its initial brief.

REQUESTED RELIEF

Appellant requests this Court reverse the circuit court, hold that Plaintiff states a valid claim, permit the filing of the amended complaint, and hold that res judicata does not apply to this case, at least at this time.

REQUEST FOR ORAL ARGUMENT

Appellant, Arlene Ager, does not request oral argument in this matter. Appellant believes this case is appropriate for an expeditious ruling considering the hardship imposed on Mrs. Ager on these facts.

Respectfully submitted this 21ST day of June, 2024.

MELLING & ROSELAND, PC

ERIN MELLING, Attorney for Appellant,
Arlene Ager
1409 5th Avenue
Belle Fourche, SD 57717
(605) 723-1659
melling@mrlawpc.net

RICHARD PLUIMER, PLLC

Richard A. Pluimer

RICHARD A. PLUIMER, On the Brief
PO Box 988
Spearfish, SD 57783
(605) 641-3378
rpluimer@outlook.com