IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

THOMAS BRIGGS, No. 28647

Plaintiff,

vs.

JUDITH BRIGGS,

Defendant.

Certified Question from The United States District Court, District of South Dakota
Honorable Karen E. Schreier, Presiding Judge

Brief of Moving Party Judith Briggs, Defendant

Sheila S. Woodward
Paul T. Van Olson
Marlow, Woodward & Huff, Prof. LLC
PO Box 667
Yankton, SD 57078
(605) 665-5009
Attorneys for Moving Party

Daniel Fritz
Mary A. Akkerman
Ballard Spahr
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
(605)978-5204
Attorneys for Nonmoving Party

Certified Question Accepted July 16, 2018

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JURISDICTIONAL STATEMENT

This case is before this Court pursuant to SDCL 15-24A-1 on a certified question from the United States District Court for the District of South Dakota.

QUESTION CERTIFIED

According to the certified question, the following issue is before this Court:

Whether South Dakota recognizes the tort of tortious interference with inheritance or expectancy of inheritance?

Supporting case/statutory authority:

- SDCL 55-4-57 (statute of repose for claims against trusts)
- *In the Matter of Elizabeth A. Briggs Revocable Living Trust*, 2017 S.D. 40, 898 N.W.2d 465
- *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, 907 N.W.2d 785
- *Estate of Johnson by & through Johnson v. Weber*, 2017 S.D. 36, 898 N.W.2d 718

STATEMENT OF FACTS AND PROCEDURE

Because this matter is before the Court on a certified question from a motion to dismiss, the factual record is necessarily limited. For purposes of this brief only, the allegations made by Thomas Briggs ("Tom") in his Federal Complaint will be accepted as true. Tom's Federal Complaint essentially mirrors those brought before this Court in *In the Matter of Elizabeth A. Briggs Revocable Living Trust*, 2017 S.D. 40, 898 N.W.2d 465 ("*Briggs I*"). Appendix, Exh. 2. The United States District Court took judicial notice of the filings in *Briggs I*. Order Granting Motion to Certify and Granting Motion To Dismiss

Counts Two and Three at 1, *Briggs v. Briggs*, No. 4:17-CV-04167-KES (D.S.D. 2018) ("District Court Order"). Appendix, Exh. 1.

Procedurally, the facts are likely familiar to this Court. On April 18, 2015, Tom filed a *Petition for Accounting, Privacy of Court File, Determination of Grantor's Capacity, and Request for Documentation* (the "State Court Petition"). Federal Complaint ¶ 115. The State Court Petition alleged that Elizabeth's testamentary documents were invalid due to Defendant Judith Briggs' ("Judy") conduct and that Judy breached her fiduciary duties. Tom sought monetary damages as a result. *Briggs I*, 2017 S.D. 40, ¶ 5, 898 N.W.2d at 468. On June 15, 2016, the Circuit Court dismissed the State Court Petition pursuant to SDCL 55-4-57. Tom appealed, and this Court affirmed. *Id.*, 2017 S.D. 40, ¶ 13, 898 N.W.2d at 471.

Tom then filed the Federal Complaint, which alleges identical facts to the State Court Petition, but couches its claims for relief in terms of tortious interference with inheritance, fiduciary breach, and negligence. On June 27, 2018, Judge Karen Schreier dismissed Tom's negligence and breach of fiduciary duty claims and certified the question of whether South Dakota law recognizes Tom's claim for tortious interference with inheritance or expectancy of inheritance. *District Court Order* at 19.

ARGUMENT

A. Standard of Review

Questions of law are reviewed de novo. *In re Estate of Laue*, 2010 S.D. 80, ¶ 10, 790 N.W.2d 765, 768.

B. SDCL 55-4-57 – the Trust Statute of Repose – Establishes South Dakota's Public Policy On Inheritance Disputes

The South Dakota legislature enacted SDCL 55-4-57 to limit the time for bringing inheritance contests. SDCL 55-4-57 requires that any judicial proceeding to "contest whether a revocable trust or amendment thereto was validly created" must be brought no later than either the one year anniversary of the settlor's death, or 60 days after the trustee sends the person contesting the trust the required notice. SDCL 55-4-57 allows "an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death." *Briggs I*, 2017 S.D. 40, ¶ 9, 898 N.W.2d at 469.

Tom claims that even though *Briggs I* barred his claim that Elizabeth did not validly create her trust due to Judy's undue influence, he can still sue Judy on the same facts under a "tortious interference with inheritance" theory. Tom's underlying claim in both cases, however, is that "but for" Judy's alleged misdeeds, Elizabeth would have given Tom more inheritance. Tom's sole purpose in asserting the tortious interference claim is to avoid application of SDCL 55-4-57. Consequently, recognizing this new cause of action would effectively repudiate SDCL 55-4-57 and undermine the legislative policy supporting stability and finality in trust and estate matters that it embodies. *See, e.g., Briggs I*, 2017 SD 40, ¶ 13 ("the purpose of SDCL 55-4-57(a) is to facilitate the expeditious administration of trusts by limiting the time period to commence a trust contest."). Moreover, allowing this type of "dual track" litigation for disgruntled heirs would create uncertainty in South Dakota's probate and trust laws and "would risk

undermining the legislative intent inherent in creating the Probate Code as the preferable, if not exclusive, remedy for disputes over testamentary documents." *Wilson v. Fritschy*, 55 P.3d 997, 1002 (N.M. Ct. App. 2002).

SDCL 55-4-57 is not only a statute of limitations, but also a statute of repose that bars claims "contesting the validity of revocable and irrevocable trusts one year after the settlor's death, *regardless of when the injury arose or when the person received notice*." *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 27, 907 N.W.2d 785, 794 (quoting *Briggs I*, 2017 S.D. 40, ¶ 9 n.5 (emphasis by *Wintersteen* court)). Once a statute of repose bars a claim, it cannot later be brought back to life. *Clark Cty. v. Sioux Equip. Corp.*, 2008 S.D. 60, ¶ 27, 753 N.W.2d 406, 416. In fact, once the statute of repose is triggered, "liability will no longer exist and will not be tolled for any reason." *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 20, 878 N.W.2d 406, 414. "Put simply, statutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." *Wintersteen*, 2018 S.D. 12, ¶ 26, 907 N.W.2d at 793 (quotations omitted).

Permitting Tom to seek damages by alleging a new tort on the exact same facts on which he relied to file his trust contest would render this statute of repose meaningless. Statutes of repose "are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *Pitt-Hart*, 2016 S.D. 33, ¶ 21, 878 N.W.2d at 414 (quotation omitted). Elizabeth Briggs died in 2013. Willard Briggs died over a

decade ago. The South Dakota legislature determined, in the public interest, that any challenge to the disposition of assets by either Elizabeth and Willard needed to occur, at the very latest, within one year of their respective deaths. That public policy should not be thwarted by creation of a new tort.

C. South Dakota Law Already Provides a Remedy to Address Tom's Alleged Injury

Neither South Dakota law nor the common law recognize a right to inherit. Under South Dakota law, "mere possibility, such as the expectancy of an heir apparent, is not deemed an interest of any kind." SDCL 43-3-6. Similarly, there is no common law right to inherit. Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance-A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 Baylor L. Rev. 79, 87 (2003). Not surprisingly then, "[t]he nascent tort known as tortious interference with an expectancy has not to date been recognized or considered for recognition in South Dakota, either legislatively or by judicial fiat." Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175, 214–15 (2015).

In fact, there is no need for the tort because South Dakota law already provides a remedy for the alleged wrongs Tom claims to have suffered. For example, South Dakota law already permits will contests and trust contests alleging undue influence, lack of capacity, and other similar matters. *See, e.g.*, SDCL 29A-3-407; SDCL 55-4-57. *Wintersteen*, 2018 S.D. 12, ¶ 17, 907 N.W.2d at 791 (recognizing undue influence and lack of capacity claims contesting a trust); *In re Estate of Holan*, 2001 S.D. 6, ¶ 16, 621

N.W.2d 588, 591 (recognizing an undue influence claim against a will). In light of these available remedies, there is no need to recognize a new cause of action for Tom. Indeed, there is no reason to recognize the tort under any facts. *See, e.g.*, John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 365 (2013) (noting that the "interference-with-inheritance tort is at best a redundancy."). Tom had an adequate remedy at law but failed to timely exercise it. Equitable remedies are also therefore foreclosed to him. *Knodel v. Kassel Twp.*, 1998 S.D. 73, ¶ 8, 581 N.W.2d 504, 507 ("An essential element to equitable relief is the lack of an adequate remedy at law."). The Court should not therefore create a new legal cause of action where existing legislation and the principles of equity contradict it.

Additionally, the principles of res judicata preclude Tom from asserting a new cause of action. Although there is no case directly on point, this Court previously refused to consider a new cause of action where the facts supporting the new action had previously been adjudicated. *Estate of Johnson by & through Johnson v. Weber*, 2017 S.D. 36, ¶¶ 38-44 , 898 N.W.2d 718, 734, reh'g denied (July 28, 2017). This case presents a similar situation given that the facts supporting Tom's new claim for tortious interference with inheritance expectancy were already adjudicated (or could have been adjudicated) in the state court litigation.

"To invoke the doctrine of res judicata, four elements must be established: (1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding."

Estate of Johnson, 2017 S.D. 36, ¶ 41 (citation omitted). Res judicata even bars claims not pleaded in the first action, as long as the complaining party had a "fair opportunity" to raise them in the earlier action. *Farmer v. S. Dakota Dep't of Revenue & Regulation*, 2010 S.D. 35, ¶ 9, 781 N.W.2d 655, 659. Notably, even though Tom did not raise the tortious interference with expectancy claim in *Briggs I*, he had a "fair opportunity" to do so because the tort claim arises from the identical facts he alleged in the state court action as "undue influence."

> 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.

Id., 2010 S.D. 35, ¶ 10, 781 N.W.2d at 660.

As it did in *Estate of Johnson*, this Court should reject Tom's new legal theory because the facts supporting that theory were adjudicated in *Briggs I*. First, the State Court Petition was dismissed on its merits. Under South Dakota law, any dismissal "other than a dismissal for lack of jurisdiction, or for failure to join a party under § 15-6-19, operates as an adjudication upon the merits." SDCL 15-6-41(b). Thus, the dismissal of Tom's State Court Petition was a dismissal on its merits.

Second, the question decided in *Briggs I* is the same as presented by the Federal Complaint. To determine whether issues are identical, this Court must ascertain "whether the wrong for which redress is sought is the same in both actions." *Dakota, Minnesota & E.R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 18, 720 N.W.2d 655, 661. In both the present case and in *Briggs I*, the wrong claimed is Judy's alleged misconduct which allegedly caused

Tom to receive a smaller inheritance from their parents. *Briggs I,* 2017 S.D. 40, ¶ 1, 898 N.W.2d at 467; Federal Complaint ¶¶ 124, 130; State Court Petition ¶¶ 64, 66. In short, the wrong Tom alleged in *Briggs I* – i.e., Judy's misconduct – is the same wrong he alleges in the federal action. Thus, the state and federal complaints meet the identity of issue test.

Third, the parties in interest are the same in both the state and federal actions. In deciding who are parties for the purpose of determining the conclusiveness of prior judgments, the Court "look[s] beyond the nominal parties and treat[s] all those whose interests are involved in the litigation and who conduct and control the action or defense as real parties." *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc*., 336 N.W.2d 153, 157 (S.D. 1983) (citation omitted). Pertinently, even if a defendant was not an actual party to the previous litigation, the defendant can still raise the defense of res judicata when the plaintiff previously litigated the claims and lost them on the merits against another defendant. *Id.* at 159 (stating that multiple defendants need not be in strict privity with each other to assert a res judicata defense). Thus, merely naming Judy as a defendant personally in the federal action does not preclude a finding that the State Court Action is res judicata.

The decision in *Link v. L.S.I., Inc.* illustrates this rule. 2010 S.D. 103, ¶¶ 38-39, 793 N.W.2d 44, 55-56. Jay Link, a defendant in a Wisconsin contract action, counterclaimed in Wisconsin against the officers and directors of a company. He then brought similar claims in South Dakota, alleging breaches of fiduciary duties by two additional directors. 2010 S.D. 103, ¶ 2, 793 N.W.2d at 46. After the Wisconsin trial,

the South Dakota circuit court dismissed the breach of fiduciary duty claims action against the two directors who were not parties in the Wisconsin action. *Id*, 2010 S.D. 103, ¶ 33, 793 N.W.2d at 53. In upholding the circuit court, this Court observed:

> Jay had a full and fair opportunity to litigate the issue of breach of fiduciary duties by Smith and Walz as LSI directors in the Wisconsin action. Jay could have sued them as part of his counterclaim along with the other LSI directors. Jay argues that jurisdiction in Wisconsin over Smith and Walz was uncertain. However, no attempt was made to bring them in that action and Jay does not offer a credible explanation as to why he did not sue them in Wisconsin.

Id., 2010 S.D. 103, ¶ 39, 793 N.W.2d at 56. Similarly, even though Tom did not sue Judy personally in state court, he certainly could have done so. Consequently, as in *Link*, the third prong of the res judicata test is met. In both the federal and state actions, the real parties in interest have been and are Tom and Judy.

Finally, Tom had a full and fair opportunity to litigate his numerous complaints in the state court proceeding. A party has a full and fair opportunity to litigate a claim even when it has an opportunity to press a claim but instead allows the case to be dismissed on the merits. *Farmer*, 2010 S.D. 35, ¶ 13. Tom acknowledges receiving the required legal notice concerning his ability to challenge Elizabeth's Trust. Federal Complaint, ¶ 113. Thus, Tom had due notice and opportunity to litigate his claim within the statutorily mandated time.

In short, Tom's Federal Complaint is substantially a recapitulation of the same facts, same claims, and same parties previously raised and dismissed in state court. Res judicata therefore applies, and Tom's assertion of a substantially identical but formally novel cause of action should not be permitted. *See, e.g., Estate of Johnson*, 2017 S.D.

36, ¶ 44, 898 N.W.2d at 734. Tom had fully adequate remedies under South Dakota law to address his claimed injuries. This Court should not excuse Tom's failure by creating a new tort cause of action.

D. Tortious Interference With Inheritance Claims Are Generally Disfavored, Particularly When Other Remedies Are Available

As a general rule, courts refuse to recognize new causes of action where existing remedies suffice. *See, e.g., Alabama Power Co. v. Laney*, 428 So. 2d 21, 23 (Ala. 1983); *Rees v. Smith*, 301 S.W.3d 467, 471 (Ark. 2009); *Botcher v. Botcher*, 2001 WL 96147, at *2 (Minn. Ct. App. Feb. 6, 2001); *Standard Pipeline Coating Co. v. Solomon & Teslovich, Inc.*, 496 A.2d 840, 843 (Pa. Super. 1985). This rule holds true with respect to other states considering recognition of the tort of tortious interference with inheritance.

As an initial matter, many states refuse to recognize the tort at all. *See, e.g., Holt v. First Nat. Bank of Mobile*, 418 So. 2d 77, 80 (Ala. 1982) ("[S]uch an action controverts the policy of several well-established principles of law."); *Jackson v. Kelly*, 44 S.W.3d 328, 331 (Ark. 2001) (rejecting the tort when "'there are sufficient other avenues, short of creating a new cause of action, that serve to remedy the situation for a plaintiff.'") (quotation omitted)); *Litherland v. Jurgens*, 291 Neb. 775, 779-80, 869 N.W.2d 92, 96 (2015) (declining to adopt the tort in Nebraska); *Vogt v. Witmeyer*, 665 N.E.2d 189, 190 (N.Y. Ct. App. 1996); *Anderson v. Archer*, 490 S.W.3d 175, 179 (Tex. App. 2016), review granted (June 16, 2017), *aff'd*, 2018 WL 3090810 (Tex. June 22, 2018).

Moreover, most states that do permit a claim under the tortious interference with

expectancy theory still "prohibit an interference action when the plaintiff already has an adequate probate remedy." *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1050, 141 Cal. Rptr. 3d 142, 151 (2012); *Moore v. Graybeal*, 843 F.2d 706, 711 (3d Cir. 1988) (applying Delaware law)*; DeWitt v. Duce*, 408 So.2d 216 (Fla.1981) (rejecting a claim for tortious interference with inheritance when "appellants had an adequate remedy in probate with a fair opportunity to pursue it."); *see also Botcher*, 2001 WL 96147, at *2 (Minn. Ct. App. Feb. 6, 2001); *Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 186, 454 N.E.2d 288, 294 (1983) (not allowing the tort claim after time for contesting will had expired because it "would permit the issue of undue influence... to be litigated years after the will was admitted to probate and immune from contest on this issue.").

Other states allow the tort only if, due to requirements or limitations of their probate proceedings, complete relief could not be provided by a will or trust contest. *See, e.g., Munn v. Briggs*, 185 Cal. App. 4th 578, 590, 110 Cal. Rptr. 3d 783, 792 (2010) ("The tort developed to protect valid testamentary expectancies *and to provide a remedy when the probate process is inadequate*.") (emphasis in original); *McGregor v. McGregor*, 101 F. Supp. 848, 850 (D. Colo. 1951), aff'd, 201 F.2d 528 (10th Cir. 1953); *In re Estate of Hoover*, 513 N.E.2d 991 (Ill. Ct. App. 1987); *Minton v. Sackett*, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996) ("A majority of the states which have adopted the tort of interference with an inheritance have achieved such a balance by prohibiting a tort action to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief."); *McMullin v. Borgers*, 761 S.W.2d 718, 720 (Mo. Ct. App. 1988); *Wilson*, 55 P.3d 997, 1003 (N.M. Ct. App. 2002).

As noted previously, South Dakota law already provides adequate remedies for Tom and other claimants in his position. Every wrong Tom claims he suffered could have been addressed via South Dakota's available trust and probate remedies had Tom complied with the law. Given South Dakota's strong public policy supporting the expeditious resolution of trust disputes, and because the proposed tort provides no relief not already provided by existing remedies, this Court should decline to recognize it.

CONCLUSION

South Dakota law already provides remedies for individuals like Tom who claim to have been denied their "fair share" of an inheritance due to the wrongful conduct or misdeeds of others. Consequently, there is no need to create a new "tort of tortious action" allowing recovery for the same alleged wrongs. In fact, creating such a tort would eviscerate the purpose of SDCL 55-4-57 and open the floodgates to trust litigation outside the legislatively mandated statute of repose. Moreover, Tom could have brought the same claims he brought in federal court in the prior state court proceeding and, therefore, there is no basis for this Court to create a new cause of action.

For all these reasons, this Court should answer the certified question in the negative and instruct the United States District Court that the claim for tortious interference with inheritance expectancy does not exist under South Dakota law.

Dated this 10th day of August, 2018.

/s/ Sheila S. Woodward

Marlow, Woodward & Huff, Prof. LLC
Sheila S. Woodward
Paul T. Van Olson
200 West Third St.
PO Box 667
Yankton, SD 57078
(605) 665-5009
sheila@mwhlawyers.com; paul@mwhlawyers.com
Attorneys for Moving Party, Defendant Judith Briggs

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

THOMAS BRIGGS, No. 28647

Plaintiff **APPENDIX OF MOVING PARTY JUDY BRIGGS**

vs.

JUDITH BRIGGS,

Defendant.

Moving Party Judith Briggs submits this Appendix in support of her brief in support of the certified question.

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Dated this 10th day of August, 2018.

/s/ Sheila S. Woodward
Marlow, Woodward & Huff, Prof. LLC
Sheila S. Woodward
Paul T. Van Olson
200 West Third St.
PO Box 667
Yankton, SD 57078
(605) 665-5009
sheila@mwhlawyers.com; paul@mwhlawyers.com
Attorneys for Moving Party, Defendant Judith Briggs

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

THOMAS BRIGGS, Plaintiff, vs. JUDITH BRIGGS, Defendant.	4:17-CV-04167-KES ORDER GRANTING MOTION TO CERTIFY AND GRANTING MOTION TO DISMISS COUNTS TWO AND THREE

Plaintiff, Thomas Briggs, filed a complaint alleging tortious interference with inheritance or expectancy of inheritance, breach of fiduciary duty, and negligence against defendant, Judith Briggs. Docket 1. Judith moves to dismiss all counts of the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), or in the alternative, certify whether South Dakota law provides for a claim of tortious interference with inheritance to the South Dakota Supreme Court. Docket 10. Under Federal Rule of Evidence 201, Judith also moves the court to take judicial notice of the petition filed by Thomas in *In re The Elizabeth A. Briggs Revocable Living Trust*, South Dakota Circuit Court, Third Judicial Circuit. Docket 8. Thomas does not oppose this request, so the court takes judicial notice of the state court petition. Thomas opposes Judith's motion to dismiss, or alternatively, opposes Judith's motion to certify. Docket 15. For the reasons that follow, the court grants Judith's motion to certify the tortious interference with inheritance claim, grants

Judith's motion to dismiss the breach of fiduciary duty claim, and grants Judith's motion to dismiss the negligence claim.

BACKGROUND

The facts alleged in the complaint, accepted as true, are as follows:

Thomas Briggs, a resident of Indiana, and Judith Briggs, a resident of South Dakota, are the children of Elizabeth Briggs and Willard Briggs. Elizabeth and Willard owned land in Sanborn County, South Dakota, individually or through their trusts, and owned land in Illinois. Elizabeth and Willard deeded the Illinois land to Thomas and Judith in equal shares, but reserved a life estate for themselves. While Thomas settled in Indiana, Judith, with the help of Elizabeth and Willard, spent time farming or ranching in South Dakota since 1978. Elizabeth and Willard indicated their intent to distribute assets to Thomas and Judith equally. Specifically, they stated that if they deeded South Dakota land to Judith, they would distribute an amount equal to the value of that land to Thomas.

In November 1995, Willard executed the Last Will and Testament of Willard T. Briggs (Docket 1-1) and the Willard T. Briggs Revocable Living Trust Agreement (Docket 1-2). The Willard Trust directed the trustee to distribute assets to Thomas and Judith after Elizabeth's death. Willard passed away in February 1997. Thomas did not receive any distribution, devise, or gift from Willard, the Willard Trust, or Willard's estate after Willard passed away. And while Elizabeth was named as the initial trustee of Willard's trust, Judith was named successor trustee.

Like Willard, Elizabeth executed the Elizabeth A. Briggs Revocable Living Trust Agreement in November 1995. Elizabeth executed the Elizabeth A. Briggs Revocable Living Trust Agreement (Amended and Restated) (Restated Elizabeth Trust) on January 16, 2009, when she was 89 years old. Docket 1-3. The Restated Elizabeth Trust removed Thomas as a beneficiary and instead stated, in part, that Judith would receive all the assets in Elizabeth's trust upon Elizabeth's death. On January 3, 2012, Elizabeth again amended the Restated Elizabeth Trust (First Amendment), which purposely omitted Thomas's daughter, Elizabeth's granddaughter, as a beneficiary. Docket 1-4. The First Amendment directed real property to the Wildlife Preserve Trust, which was established by Judith. Thomas alleges Elizabeth was unable to read both the Restated Elizabeth Trust and First Amendment when she signed them at ages 89 and 92, respectively, because of her poor eyesight.

Thomas and Judith were concerned about Elizabeth's capacity and competency as Elizabeth aged and her health deteriorated. Elizabeth suffered from poor eyesight, partial blindness, and possibly even complete blindness. Judith became the primary caretaker for Elizabeth after Willard passed away in 1997. Thomas alleges that Judith isolated Elizabeth from society, friends, and family members, including Thomas. Elizabeth relied on Judith for assistance, such as driving, attending doctor's appointments, paying bills, cleaning, responding to the mail, and purchasing groceries and prescriptions. Elizabeth also changed legal counsel to Judith's then-attorney sometime after Willard died. Judith managed Elizabeth's finances, had access to Elizabeth's bank

accounts, and maintained a confidential relationship with Elizabeth. And while Elizabeth relied on Judith to maintain her relationships with friends and family members, including Thomas, those relationships changed and declined after Judith began caring for Elizabeth.

In April 2006, Elizabeth called Thomas and asked him to deed the Illinois land back to her because she was in financial distress, even though Elizabeth indicated satisfaction with her finances a week earlier. Thomas heard Judith "coaching" Elizabeth on what to say. Docket 1 ¶ 61. Thomas declined to deed the land back to Elizabeth. In May 2006, he emailed Judith asking about Elizabeth's funds, but Judith never responded. About two weeks later, Thomas received a letter from Judith's attorney at the time, which directed Thomas not to ask any questions about the Willard Trust or financial situation of Elizabeth or Judith. Judith's attorney at the time told Thomas that he was "not entitled to receive any assets now or in the future from [his] father, [his] mother, or [his] sister." Docket 1 ¶ 31.

Thomas never saw Elizabeth after April 2006. He continued to reach out to her, but she became more distant and her contact with Thomas was supervised by Judith. After Elizabeth's death, Thomas learned that Judith had moved Elizabeth into a nursing home in Woonsocket, South Dakota. Elizabeth broke her hip and suffered from pneumonia in the weeks prior to her death, but Judith never told Thomas. Elizabeth passed away on July 16, 2013. Based on Judith's instruction, no obituary or notice of death was placed in the local newspaper. Thomas and his daughter, Elizabeth's only grandchild, were left

out of Elizabeth's funeral program. In fact, no one told Thomas that Elizabeth had passed away so he did not attend her memorial service.

Thomas learned of Elizabeth's death on or about August 15, 2013, when Elizabeth's former attorney sent Thomas a letter indicating that Elizabeth had died and disinherited him. Thomas alleges the letter disinheriting him was written in someone else's handwriting. Elizabeth's former attorney also provided Thomas with a Notice of Time for Commencing Judicial Proceedings, citing to SDCL § 55-4-57.

Thomas filed a Notice of Objection to the Trust Instrument for Elizabeth A. Briggs with the Sanborn County Clerk of Courts on October 15, 2013. He also filed a Petition for Accounting, Privacy of Court File, Determination of Grantor's Capacity, and Request for Documentation (Petition) in Sanborn County on April 18, 2015. Judith moved to dismiss the Petition for failure to comply with SDCL § 55-4-57, which the state court granted. On appeal, the South Dakota Supreme Court affirmed. *See In re Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d 465 (S.D. 2017). Under diversity jurisdiction, Thomas brings the present action against Judith in her individual capacity for tortious interference with inheritance or expectancy of inheritance, breach of fiduciary duty, and negligence.

LEGAL STANDARD

A court may dismiss a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a

claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

The court assesses plausibility by considering only the materials in the pleadings and exhibits attached to the complaint, drawing on experience and common sense, and reviewing the plaintiff's claim as a whole. *Whitney v. Guys, Inc.*, 700 F.3d 1118, 1128 (8th Cir. 2012). Materials that are part of the public record may also be considered in ruling on a motion to dismiss under Rule 12(b)(6). *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Inferences are construed in favor of the nonmoving party. *Id.* at 1129 (citing *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009)). A well-pleaded complaint should survive a motion to dismiss "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotations omitted).

DISCUSSION

Count 1 of Thomas's complaint alleges Judith tortuously interfered with his inheritance or expectancy of inheritance, Count 2 alleges Judith breached her fiduciary duty, and Count 3 alleges negligence. Docket 1. Judith argues that all three counts in Thomas's complaint must be dismissed. Docket 11.

I. Tortious Interference with Inheritance or Expectancy of Inheritance

Judith argues Thomas's claim for tortious interference with inheritance must be dismissed because the doctrine of res judicata bars Thomas from relitigating this claim, and the South Dakota Supreme Court has not and would not recognize the tort. Docket 11. In response, Thomas argues res judicata does not bar him from pursuing the present action because the present action is between the parties in different capacities and seeks a different form of relief than what he sought in the state court trust contest, and the South Dakota Supreme Court indicated it would recognize this tort in *In re Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d 465 (S.D. 2017). Docket 15. If this court is unsure whether South Dakota would recognize the claim of tortious interference with inheritance, however, Judith requests the court to certify the issue to the South Dakota Supreme Court. Docket 11. Thomas claims that certification is not necessary because a federal court may recognize a tort claim that was not recognized by the state previously. Docket 15 at 8 (citing *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1018 (3d Cir. 1984)).

While the South Dakota Supreme Court has not recognized the claim of tortious interference with inheritance, it has not provided any indication of rejecting the cause of action either. Based on the court's research, the tort has surfaced in only two cases that have reached the South Dakota Supreme Court—*Niesche v. Wilkinson*, 841 N.W.2d 250 (S.D. 2013) and *Olson v. Olson Estate*, 751 N.W.2d 706, 707-09 (S.D. 2008)—and the South Dakota Supreme Court expressed no opinion on the existence of the tort in either case.

In *Niesche*, the plaintiff brought several causes of action against the defendant, including one for intentional interference with inheritance. 841 N.W.2d at 253. The circuit court granted summary judgment in favor of the defendant on all claims. *Id.* On appeal to the South Dakota Supreme Court, the plaintiff's claim for tortious interference with inheritance was listed as a cause of action, but in affirming the lower court's decision on all grounds, the South Dakota Supreme Court did not address the tortious interference with inheritance claim. *Id.* Rather, the law of property controlled the issues raised on appeal. *Id.* at 258. *See also Olson*, 751 N.W.2d at 707-09 (citing sources explaining loss of inheritance is a recoverable pecuniary loss under a wrongful death statute, but stating "[i]n this case, we need not decide whether recovery of a prospective inheritance will be recognized in South Dakota. The question need not be decided because, even if recognized, [the decedent's estate] could not have proved that she had such a claim.").

In the *Matter of Elizabeth A. Briggs Revocable Living Trust*, on the other hand, the South Dakota Supreme Court also did not indicate recognition of the tort like Thomas suggests. *See* Docket 15 at 6-7 ("While not identifying TIIEI by name, the [South Dakota Supreme Court] recognized the existence of a tort claim against an individual that wrongly used her position to interfere with an inheritance."). Rather, the portion of the South Dakota Supreme Court's opinion that Thomas relies on discusses Thomas's claim for breach of fiduciary duty:

> Thomas next contends that even if the foregoing claims are barred, the circuit court erred in dismissing his claim for damages against Judith for breach of fiduciary duty. We disagree. A claim for breach of fiduciary duty sounds in tort, and Thomas's petition is based on the theory that Judith wrongly used her position as Elizabeth's caretaker—not as the trustee—to unduly influence Elizabeth to execute the amendments. Because Thomas has not argued that the trust is liable for Judith's alleged tort, the threshold question is whether Thomas may assert his tort claim against Judith in this proceeding regarding the trust.

In re Elizabeth A. Briggs Revocable Living Trust, 898 N.W.2d at 471 (citations and footnote omitted). In fact, it does not appear that Thomas alleged tortious interference with inheritance as a cause of action in his state court petition. *See* Docket 12-1.

A. States are Split in Recognizing a Claim for Tortious Interference with Inheritance

In general, the tort for tortious interference with inheritance or expectancy of inheritance provides that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." Restatement (Second) of Torts § 774B (Am. Law Inst. 1979). While the tort is "widely recognized," *see Marshall v. Marshall*, 547 U.S. 293, 312 (2006), it is not recognized in every state.

"There is a jurisdictional split between the states that recognize intentional interference with an inheritance as a cause of action and those that do not." *Litherland v. Jurgens*, 869 N.W.2d 92, 96 (Neb. 2015). Courts in states that recognize the tort note that it is different from a petition to contest the

validity of a will in that it allows a plaintiff to seek money damages from the individual defendant rather than setting aside a will. *In re Estate of Ellis*, 923 N.E.2d 237, 241 (Ill. 2009); *see also Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992) (discussing Iowa's recognition of the tort).

Some states, however, do not recognize the tort at all. *See In re Estate of Stanley*, 2009 WL 4910852, at *7 (Minn. Ct. App. Dec. 22, 2009) (noting that Minnesota is "not inclined to embrace the tort of intentional interference with an inheritance."); *Hauck v. Seright*, 964 P.2d 749, 753 (Mont. 1998) (refusing to adopt tortious interference with an expectancy and noting the facts of the case instead presented a claim for undue influence). Other states do not allow the tort to proceed when the probate proceedings can provide a sufficient remedy. *See Litherland*, 869 N.W.2d at 96 (refusing to adopt the tort and citing several state courts that have concluded the tort is unavailable when probate remedies are sufficient); *DeWitt v. Duce*, 408 So.2d 216, 220 (Fla. 1981) (concluding that while tortious interference with inheritance is recognized, there was "an adequate remedy in the probate proceedings" to dispute the estate documents); *Smith v. Chatfield*, 797 S.W.2d 508, 509-10 (Mo. Ct. App. 1990) (noting that Missouri recognizes a claim for tortious interference with inheritance, but the will contest under the present set of facts provided "a complete remedy."). *But see Plimpton v. Gerrard*, 668 A.2d 882, 887 (Me. 1995) ("The theoretical possibility of adequate relief in the Probate Court does not compel [the plaintiff] to go there to pursue his tortious interference claim.").

Thus, when a state recognizes tortious interference with inheritance as a cause of action, states can limit the tort. *See Litherland*, 869 N.W.2d at 96 ("However, even among those states that recognize this tort, most have held that a claim may be brought only in limited circumstances."). On the other hand, a state cannot restrict the tort to the exclusive jurisdiction of that state's probate court. *See Marshall*, 547 U.S. at 313-14 ("It is clear, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that Texas law governs the substantive elements of [the plaintiff's] tortious interference claim. It is also clear, however, that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort.").

B. Certification to the South Dakota Supreme Court is Proper

Under SDCL § 15-24A-1, a federal court may certify a question of law to the South Dakota Supreme Court if there is a question of South Dakota law "which may be determinative of the cause pending" in the federal court and it appears "that there is no controlling precedent" in the South Dakota Supreme Court's decisions. "Whether a federal district court should certify a question of state law to the state's highest court is a matter 'committed to the discretion of the district court.' " *First Dakota Nat'l Bank v. BancInsure, Inc.*, 2013 WL 6901237, at *2 (D.S.D. Dec. 31, 2013) (quoting *Allstate Ins. Co. v. Steele*, 74 F.3d 878, 881-82 (8th Cir. 1996)).

Here, Thomas's claims under diversity jurisdiction require this court to apply the law of South Dakota. But without guidance as to the existence and parameters of the potential claim for tortious interference with inheritance

under South Dakota law and noting the variations among other states, an analysis by this court would be based on speculation. And an analysis on res judicata may not be necessary depending on how the South Dakota Supreme Court answers this court's certification question. *See Huffey*, 491 N.W.2d at 520-22 (noting that "there is no bright-line rule requiring that the two actions be brought together[,]" and concluding that the lower court erred in ruling that claim preclusion barred a second lawsuit for tortious interference with inheritance after a prior will contest because the two lawsuits did not present the same claim).

Thus, this court finds the question of the existence and scope of the claim of tortious interference with inheritance or expectancy of inheritance is determinative of the cause pending here. *See* SDCL § 15-24A-1. And in the "absence of controlling precedent . . . [that] would enable this court to reach a sound decision without indulging in speculation or conjecture," it is "better practice" to seek a definitive answer from the South Dakota Supreme Court. *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997) (quotation omitted). Thus, the court concludes certification of the issue to the South Dakota Supreme Court is proper.

II. Breach of Fiduciary Duty

In his complaint, Thomas alleges that Judith "was acting as Elizabeth's and/or [Thomas's] fiduciary" and she breached her fiduciary duties owed to Elizabeth and Thomas, which harmed Elizabeth and Thomas. Docket 1 ¶¶ 129-134. Judith argues this claim must be dismissed under the doctrine of res

judicata because Thomas raised a breach of fiduciary duty claim in his state court petition. Docket 11 at 9. In response, Thomas contends that the elements of res judicata are not met because the parties are different, the actions address different issues, and the actions seek different relief. Docket 15 at 4.

"Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "The law of the forum that rendered the first judgment controls the res judicata analysis." *Laase v. Cty. of Isanti*, 638 F.3d 853, 856 (8th Cir. 2011) (quotation omitted). Because the parties are contesting whether the South Dakota Supreme Court's decision in *In re Elizabeth A. Briggs Revocable Living Trust* precludes the present action, South Dakota's res judicata analysis applies in this case.

The South Dakota Supreme Court examines four elements to determine if res judicata applies:

> (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.

Dakota, Minnesota & E. R.R. Corp. v. Acuity, 720 N.W.2d 655, 661 (S.D. 2006) (citation omitted).

In the state court petition, Thomas brought claims contesting Elizabeth's trust amendments. *In re Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d at 468. The South Dakota Supreme Court noted:

> A claim for breach of fiduciary duty sounds in tort, and Thomas's petition is based on the theory that Judith wrongly used her position as Elizabeth's caretaker—not as the trustee—to unduly influence Elizabeth to execute the amendments. Because Thomas has not argued that the trust is liable for Judith's alleged tort, the threshold question is whether Thomas may assert his tort claim against Judith in this proceeding regarding the trust. He may not because the record does not reflect that he commenced an action against Judith in her individual capacity or moved to join her as a party defendant.

Id. at 471 (citations and footnote omitted).

In the present action, on the other hand, Thomas has sued Judith in her individual capacity. While Thomas alleged Judith breached her fiduciary duty in the state court proceeding contesting Elizabeth's trust, he did not sue Judith individually. Rather, he filed his petition to contest the validity of Elizabeth's trust amendments. Even if he had succeeded, his remedy would have been against Elizabeth's trust—not Judith. And Judith moved to dismiss Thomas's petition in her capacity as trustee.

Here, Thomas brings allegations against Judith under tort and seeks damages from Judith in her individual capacity. Thus, the parties in the two actions are not same. *See Schell v. Walker*, 305 N.W.2d 920, 922 (S.D. 1981) ("Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, and parties nominally different may be, in legal effect, the same."); *Keith v. Willers Truck Serv.*, 266 N.W. 256, 258 (S.D. 1936) ("It is settled law that a former judgment does not have the effect of res judicata . . . unless the second action is not only between the same parties, but also between them in the same capacity or character.").

The court finds that res judicata does not bar Thomas's breach of fiduciary duty claim because the third element is not met.

Judith also argues Thomas's breach of fiduciary duty claim must be dismissed because he has failed to establish the elements of the claim. Docket 11 at 10. Thomas asserts that he is the real party in interest, Judith had a confidential relationship with Elizabeth akin to a fiduciary relationship, and he is not barred by the statute of limitations. Docket 15 at 8-10.

A prima facie claim of breach of fiduciary duty under South Dakota law requires a plaintiff to show:

> (1) that the defendant was acting as plaintiff's fiduciary; (2) that the defendant breached a fiduciary duty to plaintiff; (3) that plaintiff incurred damages; and (4) that the defendant's breach of the fiduciary duty was a cause of plaintiff's damages.

Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 772 (S.D. 2002) (citation omitted).

The basis of Thomas's theory is that Judith, acting in a confidential relationship to Elizabeth, owed a fiduciary duty to Thomas in his position as a beneficiary before Elizabeth disinherited him. Docket 15 at 9; *see generally* Docket 1. Taking Thomas's complaint as true, Judith, as caretaker for Elizabeth, developed a confidential relationship with Elizabeth. Thus, Judith owed a fiduciary duty to Elizabeth. *See In re Estate of Duebendorfer*, 721 N.W.2d 438, 445 (S.D. 2006) (explaining that "a confidential relationship is generally synonymous with a fiduciary relationship[,]" and noting that a "fiduciary has a duty to act primarily for the benefit of the other." (internal quotations omitted)). And while Judith owed fiduciary duties to the

beneficiaries of Elizabeth's trust in her capacity as trustee, *see In re Estate of Moncur*, 812 N.W.2d 485, 488 (S.D. 2012), Thomas is presently suing Judith in her individual capacity and alleging that Judith owed a fiduciary duty to him.

But based on this confidential relationship with Elizabeth, Judith, in her individual capacity, did not owe Thomas, an expected beneficiary in the years leading up to Elizabeth's disinheritance of him, the same fiduciary duty that she owed Elizabeth. Elizabeth had the right to disinherit Thomas by amending her trust. *See In re Donald Hyde Trust*, 858 N.W.2d 333, 339-41 (S.D. 2014) (discussing a settlor's ability to amend or revoke a revocable trust during her lifetime). Whether Elizabeth disinherited Thomas because of Judith is one question, but it is a question that does not identify what fiduciary duty Judith owed to Thomas before Elizabeth's death. Thus, Thomas has not established a plausible claim for breach of fiduciary duty against Judith in her individual capacity. And he has not provided the court with any authority where a person—in her individual capacity—as caretaker for the settlor owes fiduciary duties to another person with facts similar to his claim. Because Thomas has failed to state a claim, his breach of fiduciary duty claim is dismissed.

III. Negligence

Thomas's complaint alleges a claim of negligence. Docket 1 ¶¶ 135-140. In support of her argument that Thomas has failed to state a claim for relief, Judith contends that the economic loss doctrine under South Dakota law prohibits a negligence claim here. Docket 11 at 10. Thomas, in response, argues that the economic loss doctrine only applies when the duties owed are

created by contract, and here, Judith's duties arose under tort. Docket 15 at 10.

Under South Dakota law, the economic loss doctrine provides that purely economic losses are not recoverable under tort theories. *See City of Lennox v. Mitek Indus., Inc.*, 519 N.W.2d 330, 334 (S.D. 1994) (concluding that "economic damages are not recoverable under the tort theory of negligence"). The doctrine prohibits parties "from eschewing the more limited contract remedies and seeking tort remedies." *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 852 N.W.2d 413, 421 (S.D. 2014) (quotation omitted). Thus, "regardless of whether a tort duty may exist between contracting parties, the actual duty one party owes to another for purely economic loss should be based exclusively on the contract to which they agreed and assigned their various risks." *Id.*

Judith argues that because Thomas has not alleged personal injury or personal property damages, his claim is barred. Docket 11 at 10-11. The economic loss doctrine, however, assumes there is a contractual relationship between the parties and one party is attempting to circumvent the duties addressed in the contract. That is not the case here. The facts supporting Thomas's complaint are not derived from a contract between Thomas and Judith. So the economic loss doctrine does not bar Thomas's claim.

But Elizabeth's trust was a revocable trust, and in 2009 and 2012, Elizabeth amended her trust to expressly omit Thomas and Thomas's daughter as beneficiaries upon Elizabeth's death. *See* Dockets 1-3, 1-4. Judith, as the alternate trustee of Elizabeth's trust, did not begin to administer her trustee

duties until Elizabeth's death in 2013. Thomas's negligence cause of action suffers from the same issue as his breach of fiduciary duty cause of action discussed above. Thomas's complaint pleads facts to allege how Judith developed a confidential relationship with Elizabeth and unduly influenced Elizabeth in the years before Elizabeth passed away. And his negligence cause of action merely alleges that Judith owed Thomas a duty but she breached that duty.[1] But again, Thomas has not identified what duty Judith, in her individual capacity, owed Thomas during Elizabeth's lifetime based on Judith's confidential relationship with Elizabeth. Thus, Thomas has failed to state a plausible claim of negligence so that claim is dismissed.

CONCLUSION

Because it is unclear whether South Dakota will adopt the tort of tortious interference with inheritance or expectancy of inheritance and this issue of law is determinative of the action pending here, certification to the South Dakota Supreme Court is proper. As to the breach of fiduciary duty and negligence

[1] To the extent that Thomas pleads Judith owed a duty to Elizabeth and breached her duty to Elizabeth, Thomas has no standing to assert that claim on Elizabeth's behalf under either the breach of fiduciary duty claim or the negligence claim. To establish standing, one must be the real party in interest. *In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 813 N.W.2d 111, 121 (S.D. 2012) (quoting *Arnoldy v. Mahoney*, 791 N.W.2d 645, 653 (S.D. 2010)); *see also* SDCL 15-6-17(a) ("Every action shall be prosecuted in the name of the real party in interest."). A plaintiff must show he personally suffered an actual or threatened injury as a result of the defendant's conduct in order to meet the real party in interest requirement. *In re Florence Y. Wallbaum Revocable Living Trust Agreement*, 813 N.W.2d at 121 (quotations omitted). Here, Thomas cannot show he was personally injured because of Judith's breach of duty owed to Elizabeth.

claims, Thomas has failed to state a claim for which relief may be granted because he has failed to establish what duty Judith owed Thomas during Elizabeth's lifetime. Thus, it is

ORDERED that Judith's motion to dismiss count one is denied, but Judith's motion to certify (Docket 10) is granted. The following question will be certified to the South Dakota Supreme Court:

> Does South Dakota recognize the tort of tortious interference with inheritance or expectancy of inheritance?

IT IS FURTHER ORDERED that Judith's motion to dismiss (Docket 10) is granted as to count two and count three in the complaint.

IT IS FURTHER ORDERED that Judith's motion to take judicial notice (Docket 8) is granted.

IT IS FURTHER ORDERED that under SDCL § 15-24A-5, the Clerk of Court shall forward this certification order under official seal to the South Dakota Supreme Court.

Dated June 27, 2018.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

THOMAS BRIGGS,

Plaintiff,

v.

JUDITH BRIGGS,

Defendant.

Case No. 4:17-cv-4167

COMPLAINT

Plaintiff, by and through his counsel of record, Lindquist & Vennum LLP, hereby alleges and states for his Complaint against Defendant as follows:

PARTIES

1. Plaintiff Thomas Briggs ("Plaintiff" or "Tom") is a resident of Indiana and has been a resident of Indiana at all times relevant to this lawsuit.

2. Upon information and belief, Defendant Judith Briggs ("Defendant" or "Judy") resides at 23044 River Road, Forestburg, SD 57314 in Sanborn County, and has resided at that address or otherwise in Sanborn County, SD at all times relevant to this lawsuit.

JURISDICTION

3. This Court has jurisdiction over Plaintiff's Complaint pursuant to 28 U.S.C. § 1332 because Plaintiff and Defendant are citizens of different states and the matter in controversy exceeds the value of $75,000.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 as the Defendant is a resident of this District and Division, and a substantial part of the events giving rise to the claims alleged herein occurred in this District and Division.

FACTS

Willard Briggs' Trust

5. Elizabeth Briggs ("Elizabeth") and Willard Briggs ("Willard"), a married couple, had two children, Plaintiff and Defendant.

6. Elizabeth and Willard loved their children and tried to treat their children equally in all respects, including but not limited to providing fair and/or equal inheritances to their children.

7. Elizabeth and Willard individually or through their trusts owned at least ten parcels of land in Sanborn County, South Dakota, including pasture, farmland, and residential land, which included two homes.

8. Elizabeth and Willard also owned land in Illinois.

9. Prior to their deaths, Elizabeth and Willard deeded the Illinois land to Tom and Judy in approximately equal shares, reserving for themselves a life estate in the land.

10. Unlike Tom, Judy decided to farm and/or ranch in South Dakota as early as 1978, but needed financial help, training/assistance and support to do so. Judy, however, told other relatives that Judy's parents actually needed her assistance as a means to justify her financial reliance on Willard and Elizabeth.

11. Willard and Elizabeth desired to assist Judy in establishing herself as a farmer or rancher; such assistance, however, was never intended by Willard and/or Elizabeth to be to the detriment of Tom.

12. In a meeting with their attorney regarding their estate plan and in other conversations with Tom and Judy, Willard and Elizabeth described to Tom and Judy that if any of the South Dakota land owned by Elizabeth and Willard individually or through their trusts was deeded to Judy, that Tom would receive an inheritance or distribution from Elizabeth and/or

Willard, individually or through their trusts, equal to the value of any such land deeded to Judy (hereinafter, "intended equalization distribution").

13. Willard and Elizabeth's intended equalization distribution would be in addition to any assets, distributions, or inheritance that Tom would receive from any will and/or trust from Willard and/or Elizabeth.

14. As part of his estate plan, Willard executed the Last Will and Testament of Willard T. Briggs ("Willard's Will"), a copy of which is attached and incorporated herein as **Exhibit A.**

15. Willard also executed the Willard T. Briggs Revocable Living Trust Agreement dated November 28, 1995 ("Willard Trust"), a copy of which is attached and incorporated herein as **Exhibit B** (Exhibit B is the copy that Tom received, which appears to be incomplete).

16. On or about November 28, 1995, Elizabeth executed the Elizabeth A. Briggs Revocable Living Trust Agreement ("Elizabeth Trust").

17. Willard drafted his Trust to conform to his and Elizabeth's intent to treat their children equally and/or fairly: specifically, after Elizabeth's death, Willard directed the Trustee to distribute the Willard Trust assets as follows: (1) the Trustee was to pay Tom "[a]n amount equal to the date of death value of [Willard's] livestock, equipment, tools, fee and grain and other farm operation assets which was given to Judith"; and (2) the Trustee was to distribute the residue and remainder of the Willard Trust, if any, equally between Tom and Judy. *See* **Ex. B** at Art. 2(B)(2)(iii)(a), (b).

18. Tom eventually settled in Indianapolis, Indiana. Judy, after experiencing on-the-job employment difficulties in Illinois chose to remain and move with Willard and Elizabeth to South Dakota to learn the cattle ranching business with Willard and Elizabeth's necessary

financial help, training/assistance and support. Judy, however, to justify her financial reliance on Willard and Elizabeth and her move to South Dakota, told other relatives that Willard and Elizabeth needed her assistance.

19. On or about February 6, 1997, Willard passed away.

20. Prior to his death and in approximately November of 1995, Willard made a taxable gift to Judy of about 394.7 acres of land in South Dakota with a gift value of approximately $87,494.00.

21. The land Willard gifted to Judy is now worth significantly more than in 1995.

22. Tom did not receive any distribution, devise, or gift from the Willard Trust, Willard, or Willard's estate upon Willard's death.

23. The Willard Trust named Elizabeth as the initial trustee and Judy as the first successor trustee.

24. At some as-of-yet-unknown time and upon information and belief, Judy became the Trustee for the Willard Trust.

25. On or about April 7, 2006, Tom requested from Judy's then-attorney "a complete copy of the trust/will documents that your firm prepared for our family."

26. Judy's then-attorney never provided Tom with all such documents and, instead, provided him with an incomplete copy of Willard's Trust, and Exhibit C-1 from a South Dakota Inheritance Tax Report; the disclosure omitted the schedules to Willard's Trust and Elizabeth's Trust in its entirety.

27. Tom, who is not an attorney, believed that Judy's then-attorney provided him with all estate planning documents as requested, and he had no reason to believe that he had not been provided all pertinent information.

28. After Willard and Elizabeth's deaths, Tom again requested information from the Trustee of the Willard Trust, but received only the public probate file, an incomplete copy of the Willard Trust, and the Willard Will.

29. In the Willard Trust, Willard directed the Trustee to distribute the trust assets, after Elizabeth's death, as follows: (1) the Trustee was to pay Tom "[a]n amount equal to the date of death value of [Willard's] livestock, equipment, tools, fee and grain and other farm operation assets which was given to [Judy]"; and (2) the Trustee was to distribute the residue and remainder of the Willard Trust, if any, equally between Tom and Judy. *See* **Ex. B** at Art. 2(B)(2)(iii)(a), (b).

30. Tom requested more information from the Trustee of the Willard Trust and the Personal Representative of Willard's Estate because he was concerned about certain transactions, but, in May of 2006, Judy's then-attorney wrote Tom advising that he was not to contact Elizabeth or Judy regarding the distribution of assets from Willard's Trust and Estate and that Tom was not entitled to any further information.

31. In the 2006 correspondence, Judy's then-attorney also told Tom that he was "not entitled to receive any assets now or in the future from your father, your mother, or your sister."

32. Elizabeth, however, did not purportedly disinherit Tom until 2009 when she was over 89 years old.

Judy's Confidential Relationship with Elizabeth

33. After Willard's death, Judy became Elizabeth's caretaker.

34. Judy began isolating Elizabeth from society, certain friends, and some family members, including Tom. Such isolation resulted in Judy taking steps to conceal Elizabeth's admittance and presence in a nursing home, Elizabeth's serious injury at the nursing home,

Elizabeth's admittance to a hospital and her life-threatening illness there, Elizabeth's death, and Elizabeth's memorial service.

35. Starting in at least July of 1995, when Willard suffered a serious accident on the ranch, Judy had ample opportunity as Elizabeth's caretaker, agent, and/or fiduciary to unduly influence or otherwise override Elizabeth's will and desire in managing her finances and estate planning. Notably, Judy used Elizabeth's vulnerable condition to unduly influence Elizabeth to change legal counsel from someone who had, for many years, provided estate planning services to Willard and Elizabeth to Judy's then attorney.

36. Such opportunity continued and intensified after Willard's death and as Elizabeth's physical and mental health deteriorated.

37. Tom continued to regularly communicate with and visit Elizabeth and Judy in South Dakota, Indiana, and elsewhere.

38. On multiple occasions, Judy told Tom that Judy had concerns about Elizabeth's capacity, competency, and/or mental acuity.

39. Throughout the years, Tom also expressed concerns to others, including Judy, about Elizabeth's capacity, competency, and/or mental acuity after witnessing behavior and hearing statements made by Elizabeth that were entirely uncharacteristic for her.

40. To Tom's knowledge, Judy never took any protections to guard Elizabeth's capacity, such as seeking a guardianship or conservatorship.

41. In addition to her competency issues, Elizabeth also suffered from numerous health issues, including but not limited to extremely poor eyesight, partial blindness, and/or complete blindness.

42. Elizabeth's numerous health and competency issues are exemplified by Elizabeth's emergency hospital admittance for several days due to lack of hydration during the time when Elizabeth lived by herself following Willard's death. Elizabeth relied on Judy to provide care for her after that incident.

43. Elizabeth relied on Judy to assist her in completing the majority of her personal and business affairs, including but not limited to driving, attending doctor's appointments, making medical decisions, paying bills, cleaning, some personal hygiene tasks, collecting and responding to mail, and purchasing groceries and prescriptions.

44. Elizabeth also relied on Judy to assist her in maintaining her relationship with Tom and, upon information and belief, other family members and/or friends, but those relationships changed and declined after Judy began assisting Elizabeth.

45. For example, Elizabeth and Tom had always written one another letters and shared cards with thoughtful, handwritten messages.

46. Beginning in at least 2004, however, the cards and letters took a radically different tone, style, and character compared to all of Elizabeth's prior writings to Tom and other family members and friends. Beginning in 2005, no holiday or anniversary cards or letters were even again received from Judy or Elizabeth.

47. In 2004, for example, Judy wrote Elizabeth's Christmas letter to Tom because Elizabeth was unable to see well enough to write the letter. The 2004 letter acknowledged Elizabeth's health issues, namely her macular degeneration.

48. Upon information and belief, Judy acted as Elizabeth's agent.

49. Tom never had any input into how Elizabeth's medical and personal care should be handled.

50. Upon information and belief, Judy was listed as a surviving owner on some, if not all, financial institution accounts owned by Elizabeth.

51. Upon information and belief, Judy managed Elizabeth's finances.

52. Upon information and belief, Judy paid for household expenses incurred by both Judy and Elizabeth and unnecessary home remodeling from Elizabeth's financial resources.

53. Judy had a confidential relationship with Elizabeth.

Judy Exercised Control over Elizabeth's Financial Decisions

54. Upon information and belief, Judy had access to Elizabeth's bank accounts after Willard's accident and resultant hospital confinement, for several reasons including but not limited to the following: Elizabeth's diminishing vision, Elizabeth's health and competency issues, and Elizabeth's dealing with the stress of Willard's declining health and hospital confinement.

55. In the beginning of 2006, Judy asked Tom to research like-kind exchanges as Judy expressed a desire to sell some South Dakota farmland but wanted to avoid the significant capital gains taxes she would have incurred.

56. On or about April 16, 2006, Tom visited Elizabeth and Judy in Forestburg, SD.

57. During the April 16 2006 visit, Tom observed Judy making statements about her entitlement to a greater portion of the inheritance from Willard and/or Elizabeth than as described by the family's estate planning attorney and as described by Willard to Tom and Judy.

58. On or about April 23, 2006, Elizabeth and Judy visited Tom in Indiana.

59. During the April 23, 2006 visit, Elizabeth expressed to Tom her complete satisfaction with her financial condition and receipt of bi-yearly farm rental income.

60. Given Elizabeth's satisfaction with her financial condition, Tom was surprised when, on or about April 27, 2006, Elizabeth called Tom, told Tom that Judy had already deeded the Illinois land back to her, and asked if Tom would deed back the previously-gifted Illinois land to Elizabeth because she was in financial distress, almost all trust assets had been depleted, and she needed the land.

61. During the April 27, 2006, conversation, Tom heard Judy in the background coaching Elizabeth on what to say to Tom.

62. The only compensation offered by Elizabeth to Tom for deeding the Illinois land back to Elizabeth was the repayment of his outstanding student loans in the amount of $34,000. The Illinois land was worth an estimated fifteen times that sum.

63. Elizabeth gave Tom two weeks to decide, but on April 30, 2006, called back and demanded an answer.

64. Tom declined to deed the land back as he felt that Judy might be behind Elizabeth's insistence that he do so, especially as she had shortly before inquired about a like-kind exchange involving the South Dakota and Illinois land.

65. On May 2, 2006, Tom emailed Judy to inquire, among other discussions in the email, what had happened to Elizabeth's funds.

66. Judy never replied to the May 2, 2006, email.

67. Shortly thereafter, on May 16, 2006, Tom received a letter from Judy's attorney at the time stating that Tom was not to ask any questions about the Willard Trust or the financial assets of Elizabeth or Judy, even though Elizabeth had contacted Tom purportedly for assistance for her alleged "financial distress."

Judy Isolated Elizabeth

68. Upon information and belief, Judy began laying the groundwork prior to Willard's death to influence Elizabeth to disinherit Tom, but, after Willard's death, Judy began increasing such influence and fraud.

69. Upon information and belief, after Willard's death, Elizabeth did not venture out in public without Judy.

70. Beginning on or about May of 2006, with the May 16, 2006, letter, and continuing until Elizabeth's death, Tom's contact with Elizabeth was supervised and limited by Judy, and Tom never saw his mother again.

71. Tom loved his mother, and tried to keep in touch with his mother.

72. Tom continued to call his mother, but Elizabeth became distant and cold to Tom, which was completely contradictory to the fondness that Elizabeth had shown him his entire life.

73. Judy berated Elizabeth in front of other people, including Tom, and made derogatory comments about Elizabeth, such as commenting on Elizabeth's mental state in a negative manner in front of other people.

74. On at least one occasion, Judy berated Tom in front of Elizabeth.

75. Upon information and belief and according to conversations with his cousins, Judy spoke negatively about Tom to their family members, including but not limited to Elizabeth, family members in the various states that Judy and Elizabeth travelled to after Judy became Elizabeth's caretaker, and to Tom's wife, Susan Joiner.

76. At some point in time prior to Elizabeth's death, Judy moved Elizabeth into a nursing home in Woonsocket, South Dakota.

77. Tom only learned about Elizabeth's move to a nursing home after Elizabeth's death.

78. Judy never consulted with Tom prior to moving Elizabeth to the nursing home.

79. After Elizabeth's death, Tom learned that when Judy moved Elizabeth into the nursing home in Woonsocket, South Dakota, Judy instructed the nursing home to keep Elizabeth's admittance to the home private.

80. For example, Judy did not allow the home to take pictures of Elizabeth, either individually or in a group, identifying her by name, did not allow the publishing of items in the local newspapers with Elizabeth's name, did not allow Elizabeth's' name on the board as being a resident, and Judy did not tell Elizabeth's close neighbors and friends that she had been moved to the home.

81. Judy failed to inform Tom that Elizabeth broke her hip and had pneumonia in the weeks just prior to her death.

82. Had Tom known, Tom would have offered assistance to Elizabeth and Judy, and he would have visited his mother.

83. On or about July 16, 2013, Elizabeth passed away.

84. A memorial service was held for Elizabeth on or about July 19, 2013.

85. Tom learned after Elizabeth's death that Judy had instructed the funeral home not to place an obituary or notice of death for Elizabeth in the local paper.

86. No obituary or notice of death was placed for Elizabeth in the local paper.

87. Judy omitted Tom from the funeral program; no mention was made that Tom was Elizabeth's other child or that Tom's daughter was Elizabeth's only grandchild.

88. No one notified Tom that Elizabeth passed away until on or about August 15, 2013, when Tom received a phone call and then a letter from Elizabeth's former attorney informing Tom that Elizabeth had died and that Elizabeth had disinherited Tom.

89. Judy denied Tom the opportunity to attend his mother's memorial service.

90. Had Tom known about his mother's death prior to the memorial service, he would have attended the service.

91. After denying Tom the opportunity to grieve the loss of his mother and attend her memorial service, Judy then disparaged Tom to family members stating that Tom did not attend his mother's memorial service and implying that Tom's absence was intentional.

Elizabeth Trust and the amendments thereto

92. On or about November 28, 1995, Elizabeth executed a trust agreement in which Tom and Tom's daughter, Elizabeth Ann Briggs, possessed a beneficial interest ("Elizabeth Trust").[1]

93. On or about January 16, 2009, Elizabeth executed the Elizabeth A. Briggs Revocable Living Trust Agreement (Amended and Restated) ("Restated Elizabeth Trust Agreement"), which, upon information and belief, restated the November 28, 1995 Elizabeth Trust in its entirety. A true and correct copy of the Restated Elizabeth Trust Agreement is attached and incorporated hereto as **Exhibit C**.

94. Elizabeth was 89 years old at the time she executed the Restated Elizabeth Trust Agreement in 2009, and, as of 2004, was no longer able to see well enough to write the letters and cards she used to write to Tom.

95. Upon information and belief, Elizabeth was unable to read the Restated Elizabeth Trust Agreement due to her poor eyesight and/or partial or complete blindness when she signed the same.

[1] Unless described expressly otherwise, the term "Elizabeth Trust" shall include all subsequent amendments.

96. The Restated Elizabeth Trust does not provide Tom with any beneficial interest in the Restated Elizabeth Trust Agreement.

97. Instead, the Restated Elizabeth Trust Agreement provided that Judy received all of the Elizabeth Trust's assets upon Elizabeth's death, and if Judy predeceased Elizabeth, then Tom's daughter, Elizabeth Ann Briggs, was to receive $25,000.

98. There is no provision for Tom to receive any amount from the Elizabeth Trust pursuant to the Restated Elizabeth Trust Agreement regardless of whether Judy predeceased Elizabeth.

99. The Restated Elizabeth Trust Agreement further named Jeff Hinker as the alternate trustee; Mr. Hinker is the son of Judy's primary land tenant.

100. The use of Mr. Hinker as the alternate trustee is more aligned to the intent of Judy than that of Elizabeth.

101. On or about January 3, 2012, Elizabeth again amended the Restated Elizabeth Trust in a document entitled First Amendment to Trust Agreement (Elizabeth A. Briggs Revocable Living Trust Agreement (Amended and Restated)) ("First Amendment"). Attached and incorporated herein as **Exhibit D** is a true and correct copy of the First Amendment.

102. The First Amendment also excluded Tom, and further disinherited Tom's daughter and Elizabeth's only known grandchild and her namesake, Elizabeth Ann Briggs: "Grantor has also purposely omitted her granddaughter Elizabeth Ann Briggs and any of her issue from any provisions hereunder." **Ex. D** at Art. B(5).

103. Elizabeth was 92 years old when she executed the First Amendment in 2012, and still suffered from severe macular degeneration.

104. Upon information and belief, Elizabeth was unable to read the First Amendment due to her poor eyesight and/or partial or complete blindness when she executed the same.

105. The First Amendment directs real property to the Wildlife Preserve Trust, which Judy established, and this provision is indicative of Judy's will and intent, not that of Elizabeth.

106. After Elizabeth died, Tom received the letter referenced in the Restated Elizabeth Trust Agreement from Elizabeth's counsel ("Disinheritance Letter").

107. The Disinheritance Letter is not dated.

108. Tom is familiar with his mother's writing style and believes that someone other than his mother drafted the Disinheritance Letter or directed that the same be drafted.

109. The Disinheritance Letter contains many factual errors and misrepresentations.

110. Despite Judy's attempts to isolate Elizabeth from him, Tom continued to love his mother.

111. Tom believes that his mother continued to love him, and he is unaware of any actions he or his daughter took that would have caused his mother to disinherit him, or his daughter.

112. Excluding the pre-death gift of the Illinois land, Tom did not inherit anything from either Willard or Elizabeth.

Procedural History of the Case

113. On or about August 15, 2013, in the same letter in which the attorney for Judy informed Tom of his mother's death, the attorney provided Tom with a *Notice of Time for Commencing Judicial Proceedings* and cited SDCL 55-4-57.

114. On or about October 15, 2013, and within the time stated in SDCL 55-4-57, Tom filed a *Notice of Objection to the Trust Instrument for Elizabeth A. Briggs* with the Sanborn County Clerk of Courts and served the same on the then-attorney for Judy.

115. On or about April 18, 2015, Tom filed a *Petition for Accounting, Privacy of Court File, Determination of Grantor's Capacity, and Request for Documentation* ("Petition") with the Sanborn County Clerk of Courts, and served the Petition on Judy.

116. On or about June 16, 2015, Judy moved to dismiss the Petition in its entirety for failure to comply with SDCL 55-4-57.

117. Almost a year later, on or about June 15, 2016, the state court issued an Order granting the Motion to Dismiss.

118. On June 23, 2016, Tom moved for reconsideration based on what he believed to be a factual error in the June 15, 2016, Order, which the state court denied.

119. On or about September 21, 2016, the Notice of Entry of Order Granting the Motion to Dismiss and Denying the Motion for Reconsideration was filed.

120. Tom timely appealed to the South Dakota Supreme Court.

121. The South Dakota Supreme Court affirmed, but specifically indicated that the circuit court's dismissal and its affirmance of the same do not preclude Tom from pursuing tort actions against Judy in her individual capacity. *In the Matter of: The Elizabeth A. Briggs Revocable Living Trust*, 898 N.W.2d 465 (S.D. 2017).

COUNT ONE: TORTIOUS INTERFERENCE WITH INHERITANCE OR EXPECTANCY OF INHERITANCE

122. Plaintiff reincorporates the above-stated paragraphs as if fully set forth herein.

123. Plaintiff had a valid expectancy of an inheritance from his parents.

124. Upon information and belief, Defendant interfered with Plaintiff's expectancy of inheritance by unduly influencing Elizabeth to change the Elizabeth Trust, committing fraud upon Elizabeth, or otherwise interfering with Plaintiff's expectancy.

125. Plaintiff would have had an expectancy of inheritance from Elizabeth but for Defendant's tortious interference.

126. Plaintiff has suffered damages as a result of Defendant's tortious interference.

127. Defendant's conduct was intentional, willful and wanton, and/or was the result of oppression, malice, and/or fraud such that Plaintiff is entitled to punitive damages.

COUNT TWO: BREACH OF FIDUCIARY DUTY

128. Plaintiff reincorporates the above-stated paragraphs as if fully set forth herein.

129. Upon information and belief, Defendant was acting as Elizabeth's and/or Plaintiff's fiduciary.

130. Defendant breached the fiduciary duties she owed to Elizabeth and/or Plaintiff by, among other actions, causing or allowing Elizabeth to alter her previous intentions to provide for Elizabeth's son, the Plaintiff.

131. Elizabeth was harmed as a result of Defendant's breach, including but not limited to the fact that Elizabeth's testamentary intent was not honored.

132. Plaintiff was harmed as a result of Defendant's breach, including but not limited to his disinheritance from Willard and Elizabeth's estate plan and/or the Elizabeth Trust.

133. Defendant's breach of fiduciary duty caused harm to Elizabeth and to Plaintiff.

134. Defendant's conduct was intentional, willful and wanton, and/or was the result of oppression, malice, and/or fraud such that Plaintiff is entitled to punitive damages.

COUNT THREE: NEGLIGENCE

135. Plaintiff reincorporates the above-stated paragraphs as if fully set forth herein.

136. Defendant owed a duty to Plaintiff and/or Elizabeth as a result of Defendant's relationship and role as Elizabeth's daughter, caretaker, companion, fiduciary, agent, and/or trustee of the Willard Trust and/or the Elizabeth Trust.

137. Defendant failed to perform the duties she owed to Elizabeth and/or Plaintiff.

138. Elizabeth was harmed as a result of Defendant's failure to perform her duties, including but not limited to the fact that Elizabeth's was robbed of her right to express her testamentary intent through her estate plan.

139. Plaintiff was harmed as a result of Defendant's failure to perform her duties, including but not limited to his disinheritance from Elizabeth's estate plan.

140. Defendant's conduct was intentional, willful and wanton, and/or was the result of oppression, malice, and/or fraud such that Plaintiff is entitled to punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court issue the following relief:

1. For judgment against Defendant and in favor of Plaintiff on all counts alleged herein;
2. For an award of compensatory and punitive damages, attorneys' fees as allowed by law, and prejudgment and post-judgment interest; and
3. For all other legal or equitable relief to which Plaintiff may be entitled.

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE

Dated this 8th day of December, 2017.

LINDQUIST & VENNUM LLP

By: _____

Daniel R. Fritz, Jr.
Mary A. Akkerman
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
Telephone: (605) 978-5200
Email: dfritz@lindquist.com
makkerman@lindquist.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

THOMAS BRIGGS,

Plaintiff,

v.

JUDITH BRIGGS,

Defendant.

App. No. 28647
4:17-cv-04167-KES

Certified Question from the United States District Court, District of South Dakota

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The Honorable Karen E. Schreier

RESPONSE BRIEF OF NONMOVING PARTY THOMAS BRIGGS, PLAINTIFF

Daniel R. Fritz
Mary A. Akkerman
Timothy R. Rahn
Ballard Spahr, LLP
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
(605) 978-5200

Attorneys for Nonmoving Party

Sheila S. Woodward
Paul T. Van Olson
Marlow, Woodward & Huff, Prof. LLC
PO Box 667
Yankton, SD 57078
(605) 665-5009

Attorneys for Moving Party

Certified Question Accepted July 16, 2018

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JURISDICTIONAL STATEMENT

The United States District Court for the District of South Dakota, Southern Division, pursuant to SDCL 15-24A-1, certified a question to the South Dakota Supreme Court in its Order dated June 27, 2018. The South Dakota Supreme Court issued an Order Accepting Certification on July 16, 2018. The Court has authority to answer the certified question under SDCL Ch. 15-24A, *et seq*.

REQUEST FOR ORAL ARGUMENT

Thomas Briggs respectfully requests the privilege of appearing before this Court for oral argument on the issues set forth herein.

STATEMENT OF LEGAL ISSUE

The certified question for this Court's consideration is as follows:

> Whether South Dakota recognizes the tort of tortious interference with inheritance or expectancy of inheritance?

Most relevant authorities:

- Restatement (Second) of Torts §§ 766, 774B (1979)
- *In re Matter of Elizabeth A. Briggs Revocable Living Tr.*, 898 N.W.2d 465 (S.D. 2017)
- *Gruhlke v. Sioux Empire Fed. Credit Union, Inc*., 756 N.W.2d 399 (S.D. 2008)
- *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978)

STATEMENT OF THE CASE AND FACTS

Thomas Briggs ("Tom") and Judith Briggs ("Judy"), in her fiduciary capacity, were previously before this Court in *In re Matter of Elizabeth A. Briggs Revocable Living Tr.*, 898 N.W.2d 465 (S.D. 2017) ("Trust Contest"). In that case, Tom contested the validity of their mother, Elizabeth Briggs' ("Elizabeth") trust and brought a claim against Judy in her fiduciary capacity. The Court held that Tom's trust contest was untimely and that the trial court lacked in personam jurisdiction over Judy because Tom did not "commence an action against her in her individual capacity." *Id.* at 468.

On or about December 8, 2017, Tom commenced this action against Judy in her individual capacity in the United States District Court, District of South Dakota, Southern Division. Among the claims brought against Judy was a claim for tortious interference with inheritance or expectancy of inheritance. On February 6, 2018, Judy brought a Motion to Dismiss or to Certify Question to State Court seeking dismissal of Tom's claims or, in the alternative, to certify the question of the validity under South Dakota law of a claim for tortious interference with inheritance or expectancy of inheritance. On June 27, 2018, the Honorable Karen E. Schreier issued an Order Granting Motion to Certify and Granting Motion to Dismiss Counts Two and Three, which this Court accepted on July 16, 2018.

The Certified Question before the Court is a question of law, and it is untethered to factual allegations made by Tom in his Complaint. As such, a recitation of the facts in this case is unnecessary. However, Tom offers the facts in his Complaint as a contextual basis for a tortious interference with inheritance claim. Such facts are contained in

Exhibit 2 to Judy's Appendix, Complaint, Thomas Briggs v. Judith Briggs, United States District Court (4:17-cv-04167-KES).

STANDARD OF REVIEW

Although this Court does not technically sit as an appellate court in this case because the matter came to the Court as a certified question from the District Court, the Court employs the same legal standard that it would use when reviewing an appellate case. *Unruh v. Davison County*, 744 N.W.2d 839, 841–42 (S.D. 2008). Questions of law are reviewed de novo. *In re Est. of Laue*, 790 N.W.2d 765, 768 (S.D. 2010).

LEGAL ARGUMENT

I. Absent Recognition of a Cause of Action for Tortious Interference with Inheritance or Expectancy of Inheritance, Conduct Which Should Be Discouraged in South Dakota Will Be Allowed and Victims of Such Conduct Will Be Left Without Recourse.

A. No common law or statutory remedy exists in South Dakota to adequately address the harm inflicted by one who tortiously interferes with another's inheritance or reasonable expectancy of an inheritance.

All recognized torts in South Dakota require the existence of a duty owed to the injured party and a corresponding breach of that duty by the tortfeasor. Such breach, with nearly all recognized torts in South Dakota, consists of some action, inaction or communication directed toward the injured party by the tortfeasor.

In a few cases, South Dakota has recognized the existence of a tort cause of action when the action, inaction or communication of the tortfeasor is directed not toward the injured party but rather to a third person. *See Tibke v. McDougall*, 479 N.W.2d 898, 901 (S.D. 1992). For instance, with "tortious interference" claims (tortious interference with business relations or interference with contractual relations) the offending conduct or

communication is generally directed to someone other than the injured party but, nonetheless, causes harm to the injured party. *Id.* In such circumstances, it is only by legislative act or judicial decree that a duty is created to form the basis of a cause of action and the same has only been done when the offending conduct has been found to be of the type that should be discouraged and when the resulting harm is of the type that should remedied. Situations in which one wrongfully interferes with another's inheritance or expectancy of the same present just such circumstance. Yet, South Dakota law has not specifically recognized a cause of action to address such conduct and resulting harm. Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. Rev. 175, 214 (2015). As such, an individual harmed by tortious conduct aimed at wrongfully disrupting that individual's inheritance has, under the current state of South Dakota tort law, no adequate remedy. Tom respectfully requests that this Court create such remedy.

B. South Dakota's Probate Proceedings Do Not Adequately Punish or Deter Wrongful Interference With an Expectancy of an Inheritance, Nor Do They Provide Adequate Remedies for Harm Caused by the Same.

Not all claims against wrongdoers who interfere with an inheritance or expectancy of inheritance fit in probate. Probate leaves victims of certain wrongful interfering conduct without remedy and the perpetrators of such conduct undeterred and unpunished. This is particularly true in circumstances in which: 1) the wrongful conduct involves *inter vivos* gifts or transfers; 2) the prosecution of the wrongful interfering conduct is impractical or impossible within probate's statutes of limitations or repose; or 3) formal testacy proceedings are inadequate in remedying wrongful conduct not contemplated by SDCL 29A-3-407. This Court should answer the Certified Question in

the affirmative so that the victims of the wrongful interfering conduct, particularly in the aforementioned circumstances, can be adequately compensated for their losses and the wrongdoers committing such conduct can be punished and deterred.

1. Probate and tort proceedings differ fundamentally in purpose and jurisdiction.

As a general matter, tort claims do not fit in probate because tort laws and probate codes have different goals and serve different purposes. Tort claims compensate victims for losses, deter undesirable behavior to prevent future losses, and foster individual responsibility by punishing wrongdoers. *See* Restatement (First) of Torts § 901 (1939). The purpose of probate codes, however, is to discover and make effective the intent of a decedent in the distribution of his property and ensure the same is done in an efficient and timely manner. *See* Unif. Probate Code § 1-102 (1969); SDCL 29A-1-102. In short, tort laws seek to regulate people and their conduct while probate codes seek to regulate property and its distribution.

Because probate proceedings are concerned with property of a decedent and the persons who have rights to that property, the jurisdiction of such proceedings is limited to the same. *In re Meyer's Est.*, 10 N.W.2d 516, 517 (S.D. 1943.) As this Court recognized in the Trust Contest, such in rem jurisdiction does not extend to an individual's tortious conduct, holding:

> A claim for breach of fiduciary duty sounds in tort, and Thomas's petition is based on the theory that Judith wrongly used her position as Elizabeth's caretaker—not as the trustee—to unduly influence Elizabeth to execute the amendments. Because Thomas has not argued that the trust is liable for Judith's alleged tort, the threshold question is whether Thomas may assert his tort claim against Judith in this proceeding regarding the trust. He may not because the record does not reflect that he commenced an action against Judith in her individual capacity or moved to join her as a party defendant. Because Thomas did not commence an action against Judith in

> her individual capacity, the court did not err in dismissing Thomas's breach-of-fiduciary-duty claim.

In re Matter of Elizabeth A. Briggs Revocable Living Tr., 898 N.W.2d 465, 471 (S.D. 2017) (internal citations omitted). In so holding, this Court gave a strong implication that one's remedies for tortious conduct regarding an inheritance not be limited to an in rem probate proceeding.

In addition to general differences in purpose and jurisdiction between tort and probate, there are specific circumstances in which there is no remedy for wrongful conduct interfering with an inheritance or expectancy of an inheritance. The recognition of a claim for tortious interference with inheritance or expectancy of inheritance would provide a remedy for such wrongful conduct in these circumstances and would punish and deter the same.

2. Probate proceedings do not provide adequate remedies for wrongful *inter vivos* gifts or transfers.

South Dakota's probate proceedings provide no remedy for an individual harmed by wrongful *inter vivos* transfers and no punishment for those that are responsible for and benefit from such wrongful transfers. The desired remedy, punishment, and deterrence of wrongful *inter vivos* transfers can only be accomplished in tort. Therefore, this Court should recognize such a tort by answering the Certified Question in the affirmative.

Many courts have justified tortious interference with inheritance claims, in part, because probate proceedings are inadequate in addressing wrongful *inter vivos* gifts or transfers. *Huffey v. Lea*, 491 N.W.2d 518, 524 (Iowa 1992); *Est. of Jeziorski*, 516 N.E.2d 422, 426 (Ill. App. 1st Dist. 1987) (noting that because most of the probate assets were outside of the estate due to *inter vivos* transfers, plaintiff would not be provided with

adequate relief in a will contest proceeding); *In re Est. of Luccio*, 982 N.E.2d 927, 935 (Ill. App. 1st Dist. 2012) (justifying an interference with an inheritance claim because a will contest would not have extended to *inter vivos* transfers); *In re Est. of Ellis*, 923 N.E.2d 237, 243 (Ill. 2009) (holding that a probate contest would not have provided sufficient relief because it would not have extended to *inter vivos* transfers); *Plimpton v. Gerrard*, 668 A.2d 882, 887 (Me. 1995).

Here too, South Dakota's probate laws do not adequately remedy victims of wrongful *inter vivos* transfers and do not deter such transfers. Such inadequacies, however, can be accomplished by tort claims for interference with an inheritance.

3. The discovery of some wrongful interfering conduct is impractical or impossible under the time limitations set forth in SDCL 55-4-57.

As discussed above, a primary purpose of in rem probate proceedings is the expeditious distribution of the property in estates. This purpose is reflected in SDCL 55-4-57 and its 60-day statute of limitation upon notice and 1-year statute of repose upon the death of the settlor. Such limitations, however, are impractical or impossible when the claim arises in tort. Legally sufficient tort claims simply take longer to investigate, develop, and plead. It follows then that without a tort remedy, any wrongful conduct interfering with an inheritance not discovered within the restrictive time limitations of probate proceedings would go unpunished and victims of such conduct would be without relief.

A number of jurisdictions recognize the impracticality and inapplicability of a probate contest statute of limitations to actions outside of probate, including claims for tortious interference with an inheritance. *Barone v. Barone*, 294 S.E.2d 260, 264 (W. Va.

1982) (collecting cases). Wrongdoers that interfere with an inheritance often, of course, conceal such interference and the evidence of their conduct is not discovered until well after the probate contest statutes of limitation or repose had run. *In re Est. of Luccio*, 982 N.E.2d 927 at 930; *In re Est. of Ellis*, 923 N.E.2d 237 at 934. As such, probate remedies are inadequate and a tortious interference action accordingly should lie where it is impractical or impossible to discover the wrongful conduct within the probate period. *Gianella v. Gianella*, 234 S.W.3d 526 (Mo. Ct. App. E.D. 2007), *reh'g and/or transfer denied*, (Aug. 29, 2007) *and transfer denied*, (Oct. 30, 2007); *see also* 36 Causes of Action 2d 1 (Originally published in 2008).

Valid claims in tort should not be barred by the restrictive time constraints of a probate contest. Therefore, this Court should answer the Certified Question in the affirmative.

4. South Dakota's formal testacy proceedings are inadequate to remedy wrongful conduct not contemplated by SDCL 29A-3-407.

Because of the fundamental differences discussed above, claims for tortious interference with inheritance are not redundant of the statutory grounds for challenging the validity of a will or trust as set forth in SDCL 29A-3-407. Even if such redundancy existed, SDCL 29A-3-407 does not encompass all wrongful conduct resulting in the interference with an inheritance. The recognition of this tort would allow for wrongful conduct not contemplated by the statute to be remedied and punished. Therefore, this Court should answer the Certified Question in the affirmative.

As an initial matter, Judy's Brief argues that a new tort need not be recognized because South Dakota's probate laws provide an adequate remedy for claims of undue

influence and lack of capacity (Brief of Moving Party Judith Briggs, Defendant at p. 5). She then devotes considerable attention to Tom's circumstances and whether his claims are now barred by the principles of res judicata (Brief of Moving Party Judith Briggs, Defendant at pp. 6-10). Tom's claims, however, are not at issue in the Certified Question before this Court. As such, Judy's arguments in that regard and relating to res judicata can be ignored.

SDCL 29A-3-407 sets forth the grounds for invalidating a will, namely establishing a "lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." Very recently, the lack of capacity and undue influence grounds have been used in trust contests as well. *See In re Wintersteen Revocable Tr. Agreement*, 907 N.W.2d 785 (S.D. 2018). In order to contest a will or trust under the statute, a challenger must first have standing to do so. A disinherited beneficiary would likely not have such standing if he is not an heir of the testator and does not possess a previous trust or will naming him as a beneficiary. As discussed above, the wrong conduct described in the statute does not extend to *inter vivos* gifts or transfers.

In addition to *inter vivos* transfers, SDCL 29A-3-407 fails to adequately remedy many other claims involving interference with an inheritance. Further examples of conduct not remedied by SDCL 29A-3-407 include but are not limited to: wrongful disparaging statements about a beneficiary that do not rise to the level of a false statement in a probate contest; beneficiary conduct that wrongfully isolates a testator from other beneficiaries so that the testator disinherits the isolated beneficiaries; and other controlling behavior that interferes with inheritance rights but is not directed specifically to the invalidation of a testamentary document.

Simply put, South Dakota probate laws are inadequate to adjudicate tortious conduct that interferes with inheritance or expectancy of inheritance. Such claims should be brought in tort to compensate victims of wrongful conduct, punish wrongdoers committing the conduct, and deter future wrongdoers from committing the same. Therefore, this Court should answer the Certified Question in the affirmative.

II. An Answer to the Certified Question in the Affirmative Would Be Consistent with South Dakota's Sound Practice of Following the Restatement (Second) of Torts in Recognizing Interference Torts.

The Restatement (Second) of Torts (1979) ("Restatement") recognizes interference torts where traditional causes of action in contract or probate fail to provide adequate remedies for wrongful conduct. South Dakota has followed the Restatement in recognizing torts for interfering with a contract or business expectancy on those grounds and this Court should do the same by recognizing tortious interference with inheritance or expectancy of inheritance.

Section 766A of the Restatement sets forth tort liability for improperly interfering with the performance of a contract. Restatement (Second) of Torts § 766A (1979). Section 766B of the Restatement sets forth tort liability for intentionally and improperly interfering with another's prospective contractual relation. Restatement (Second) of Torts § 766B (1979). South Dakota has adopted the Restatement as its statement of the business interference torts set forth in § 766. *Cutter v. Lincoln Nat'l Life Ins. Co*., 794 F.2d 352, 356 (8th Cir.1986) (citing *Johnson v. Schmitt*, 309 N.W.2d 838 (S.D. 1981)); *Groseth Int'l, Inc. v. Tenneco, Inc*., 410 N.W.2d 159, 172 (S.D. 1987); *State of S.D. v. Kansas City S. Industries, Inc*., 880 F.2d 40, 50 (8th Cir. 1989). This Court has held that Section 766 of the Restatement should be closely followed to protect the interests

involved. *Gruhlke v. Sioux Empire Fed. Credit Union, Inc*., 756 N.W.2d 399, 405–06 (S.D. 2008); *Tibke v. McDougall*, 479 N.W.2d 898, 908 (S.D. 1992).

Section 774B of the Restatement sets forth tort liability for one who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift. Restatement (Second) of Torts § 774B (1979). States that have adopted torts for tortious interference with inheritance have relied on § 774B of the Restatement for such adoption. *Keith v. Dooley*, 802 N.E.2d 54, 57 (Ind. App. 2004) (looking at Florida, Illinois, Iowa, and Texas, "all of whom had adopted the approach of [§ 774B]"); *Firestone v. Galbreath*, 616 N.E.2d 202, 203 (Ohio 1993) (finding the Restatement "particularly instructive" in answering the certified question in the affirmative that Ohio recognizes the tort of intentional interference with expectancy or inheritance); *see also Est. of Hollywood v. First Nat. Bank of Palmerton*, 859 A.2d 472, 477 (Pa. Super. 2004) (collecting cases).

As demonstrated by the Supreme Court in neighboring Iowa, it logically follows that if a court adopts the Restatement on business interference torts, it should also adopt the Restatement's recognition of a tort for interference with an inheritance. *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795 (Iowa 1978). In *Frohwein*, the Court concluded:

> We have recognized the existence of actions in tort for wrongful interference with business advantage. We can see no compelling reason for us to decline to extend this concept to a non-commercial context. Directed by the foregoing rationale, and in the light of the above cited authorities we are persuaded that an independent cause of action for the wrongful interference with a bequest does exist…

Id. (internal citations omitted).

Here, South Dakota follows the Restatement in recognizing business interference torts where remedies in traditional contract law are inadequate. South Dakota should also

follow the Restatement's recognition of a claim for tortious interference with an inheritance where remedies in probate law are inadequate. Therefore, this Court should answer the Certified Question in the affirmative.

III. The Recognition of Tortious Interference with an Inheritance Would Not Frustrate the Purpose of SDCL 55-4-57 or Any Other Aspect of South Dakota's Probate Law.

The recognition of a tort for interference with an inheritance would not disturb the public policy of South Dakota's probate law to expeditiously administer trusts and estates. Such a tort seeks liability from a wrongdoer personally, not from an estate or its property. As such, the property in an estate is unencumbered by tortious interference claims and can be freely administered.

While Judy is correct that some jurisdictions limit the tort when the dispute at issue is over the validity of testamentary documents, tortious interference with inheritance claims are not generally disfavored. What is telling in this regard, is the absence of legal authority finding that a legislature has abrogated or otherwise prohibited a previously recognized tortious interference with inheritance claim. If fears that such a tort would frustrate the purpose of probate laws or create "duel track" and "redundant" litigation, why has there not been legal authority evidencing legislative abrogation or prohibition of the tort?

Tort law and probate law each serve important purposes and such purposes, as they relate to wrongful conduct that interferes with an inheritance, do not conflict. Therefore, it is in the interest of the public policy of South Dakota to recognize the claim for tortious interference with an inheritance or expectancy of inheritance.

CONCLUSION

For all of the foregoing reasons, Plaintiff Thomas Briggs respectfully requests the Court answer the Certified Question in the affirmative.

Dated this 31st day of August, 2018.

Ballard Spahr LLP

/s/ Daniel R. Fritz

Daniel R. Fritz
Mary A. Akkerman
Timothy R. Rahn
101 S. Reid St., Ste. 302
Sioux Falls, SD 57103
(605) 978-5200
Attorneys for Nonmoving Party, Plaintiff Thomas Briggs

CERTIFICATE OF COMPLIANCE

I, Daniel R. Fritz, hereby certify that pursuant to SDCL 15-26A-66(b)(4) the *Response Brief of Nonmoving Party Thomas Briggs, Plaintiff* complies with the specifications set forth in SDCL § 15-26A-66(b)(2), containing 18,525 characters not including spaces, or 3,437 words, and does not exceed thirty-two (32) pages and was typed in Times New Roman font, 12 point, left-justified.

Ballard Spahr LLP

/s/ Daniel R. Fritz
Daniel R. Fritz
Mary A. Akkerman
Timothy R. Rahn
Attorneys for Nonmoving Party, Plaintiff Thomas Briggs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of August, 2018, two (2) true and correct copies of the foregoing *Response Brief of Nonmoving Party Thomas Briggs, Plaintiff* were served by prepaid U.S. Mail and electronic mail upon the following:

Sheila S. Woodward & Paul T. Van Olson
Marlow, Woodward & Huff, Prof. LLC
200 W. Third St., PO Box 667
Yankton, SD 57078
sheila@mwhlawyers.com; paul@mwhlawyers.com
Attorneys for Moving Party, Defendant Judith Briggs

Ballard Spahr LLP

/s/ Daniel R. Fritz
Daniel R. Fritz
Mary A. Akkerman
Timothy R. Rahn
Attorneys for Nonmoving Party, Plaintiff Thomas Briggs

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

THOMAS BRIGGS, No. 28647

Plaintiff,

vs.

JUDITH BRIGGS,

Defendant.

Certified Question from The United States District Court, District of South Dakota
Honorable Karen E. Schreier, Presiding Judge

Reply Brief of Moving Party Judith Briggs, Defendant

Sheila S. Woodward
Paul T. Van Olson
Marlow, Woodward & Huff, Prof. LLC
PO Box 667
Yankton, SD 57078
(605) 665-5009
Attorneys for Moving Party, Judith Briggs

Daniel Fritz
Mary A. Akkerman
Ballard Spahr
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
(605) 978-5204
Attorneys for Nonmoving Party, Thomas Briggs

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INTRODUCTION

Tom had a legal remedy to challenge the distributions of his parents' estates. He did not timely exercise those remedies and, as a result, SDCL 55-4-57 barred them. Existing remedies, both legal and equitable, adequately protect Tom and the litany of hypothetical plaintiffs referenced in his brief. The legislature enacted SDCL 55-4-57 to provide a clear process for resolving claims such as those raised by Tom. That process, and the legislative policy contained in SDCL 55-4-57, should not be undermined by creating a new tort to circumvent it.

ARGUMENT

I. All Actual or Hypothetical Plaintiffs Have Existing Remedies in Law or Equity

Contrary to Tom's assertions, no victim of wrongful conduct in South Dakota is without remedy for wrongful acts depriving them of a reasonably expected gift. This is particularly true under the facts pleaded by Tom. SDCL 55-4-57 sets out the process for making a claim for fraud or undue influence with respect to a trust distribution. Moreover, for those situations where there is no legal remedy available, anyone who claims a diversion of property by intentional misconduct has an existing remedy on the equitable grounds of unjust enrichment: "An implied trust is used by the courts as a remedial device to restore the status quo and is therefore utilized when 'a person owning title to property is under an equitable duty to convey it to another because he would be unjustly enriched if he were permitted to retain it.'" *Banner Health Sys. v. Long*, 2003 S.D. 60, ¶ 26, 663 N.W.2d 242, 247 (quoting *Knock v. Knock*, 80 S.D. 159, 166, 120

N.W.2d 572, 576 (1963)). Fatally for Tom's current claims, however, equitable remedies are not available when an adequate remedy exists at law. *Knodel v. Kassel Twp.*, 1998 S.D. 73, ¶ 8, 581 N.W.2d 504, 507.

Tom had a completely adequate remedy at law until his own inaction eliminated it. The chief purpose of probate and trust law is to provide procedures for ensuring the just and expeditious donative distribution of property. SDCL 29A-1-102; *Matter of Elizabeth A. Briggs Revocable Living Tr.*, 2017 S.D. 40, ¶ 9, 898 N.W.2d 465, 469. Where, as here, it is alleged that the donor's documents do not accurately reflect the donor's intent as a result of undue influence or fraud, existing law provides the remedy. SDCL 29A-3-407; SDCL 55-4-57. The remedy provided, however, has been limited by a statute of repose for sound legislative reasons. *In re Wintersteen Revocable Tr. Agreement*, 2018 S.D. 12, ¶ 26, 907 N.W.2d 785, 793.

Moreover, if for some reason under any hypothetical situation urged by Tom the legal remedies already available are inadequate, equity provides alternative remedies. For example, the doctrines of restitution and unjust enrichment are available to plaintiffs in South Dakota.

> The Restatement of Restitution declares that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." The comment to this section explains that "[a] person is enriched if he has received a benefit. A person is unjustly enriched if the retention of the benefit would be unjust."

Hofeldt v. Mehling, 2003 S.D. 25, ¶ 15, 658 N.W.2d 783, 788 (quoting RESTATEMENT OF RESTITUTION § 1 (1937)).

If assets that would otherwise have passed by donative transfer to the

> claimant are diverted to another recipient by fraud, duress, undue influence, or other intentional misconduct, the recipient is liable to the claimant for unjust enrichment. The misconduct that invalidates the transfer to the recipient may be the act of the recipient or of a third person.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 46 (2011). In this specific instance, Tom does not and cannot dispute that he had an adequate remedy at law. While that means he cannot look to equity to resolve his grievances, other hypothetical plaintiffs in the future could do so. *Cf. Knodel*, 1998 S.D. 73, ¶ 8, 581 at 507.

II. Neither Tom Nor His Hypothetical Plaintiffs Have an Existing Right To Inherit, a Requirement for an Action in Tort

The inappositeness of Tom's proposed remedy is more fully demonstrated by examining the legal basis for tort claims. Torts exist to provide a plaintiff a remedy for violation by the defendant of a *present right* of the plaintiff. Equitable remedies, on the other hand, operate in the absence of appropriate remedies in law.

> In this state the distinction between actions at law and suits in equity is abolished by statute. All relief is administered through one proceeding termed a civil action. However, this statutory abolition of distinctions applies only to the form of action, and not to the inherent substantive principles which underlie the two systems of procedure. In other words, the essential and inherent differences between legal and equitable relief are still recognized and enforced in our system of jurisprudence.

Holzworth v. Roth, 78 S.D. 287, 290–91, 101 N.W.2d 393, 394 (1960).

Tom acknowledges that torts require the existence of a duty owed to the injured party and a breach of that duty by the tortfeasor. *Tom's Brief* at 3. The Court determines whether a duty exists. *Tipton v. Town of Tabor*, 1997 S.D. 96, ¶ 12, 567 N.W.2d 351, 357. Significantly, a plaintiff cannot claim injury in tort unless the tortfeasor violates an *existing right* of that plaintiff. *Darnall v. State*, 79 S.D. 59, 70, 108 N.W.2d 201, 207 (1961). As noted by one of the seminal cases in tort, "the plaintiff sues in her own right

for a wrong personal to her, and *not as the vicarious beneficiary of a breach of duty to another*." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 342, 162 N.E. 99, 100 (1928) (emphasis added).

South Dakota law protects the intent of the donor, not the prospective hope of the donee who has no enforceable right at law to an expected, or even promised, gift. SDCL 29A-3-407; 43-3-6; 43-36-2; 55-4-57. Until a gift is conveyed by delivery or operation of a testamentary document, the prospective donee has no legal title and no legal right to the property. *O'Gorman v. Jolley*, 34 S.D. 26, 147 N.W. 78, 80 (1914); *see also* SDCL 43-3-6, 43-36-2. Under South Dakota law then, there is no basis for establishing a tort protecting an "expectancy" of an inheritance because the potential donee has no existing right to the inheritance, only a mere hope of receiving it at some point. *Id.*.

This Court previously recognized a tort claim for interference with business expectancy. But that claim protects an existing right because the legal right to contract is a present vested right while the hope of a gift is not. *Lien v. Nw. Eng'g Co.*, 73 S.D. 84, 88–89, 39 N.W.2d 483, 486 (1949). Protecting the vested right to advance one's own business enhances the overall welfare of society, and courts have long protected that right against the unjust interfering actions of others. *Keeble v. Hickeringill*, (1706) 11 East 574, 103 Eng.Rep. 127. The essence of the cause of action of tortious interference with a business relationship is the finding that "valid business relationships and expectancies are entitled to protection from unjustified interference." *St. Onge Livestock Co. v. Curtis*, 2002 S.D. 102, ¶ 16, 650 N.W.2d 537, 541–42 (quoting *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 81, 561 N.W.2d 1, 18).

To the contrary, the prospect of future inheritance or gift represents no present legal interest or right. In fact, the notion that the potential future interest of an heir or other prospective donee is cognizable by courts at all is entirely a creation of equity. *Henrich v. Newell*, 59 S.D. 372, 240 N.W. 327, 331 (1932). Under South Dakota law, "[a] mere possibility, such as the expectancy of an heir apparent, is not deemed an interest of any kind." SDCL 43-3-6. Thus, potential future inheritance, unlike that of a contract, is not a vested right capable of tort protection as a matter of South Dakota law. A contract to make a will is not enforceable in law, but rather in equity. *Lass v. Erickson*, 74 S.D. 503, 506, 54 N.W.2d 741, 743 (1952). As Tom acknowledges, the only right recognized by law is the active and ongoing right of the property owner to direct the disposition of his property. *Tom's Brief* at 5. Without some legal right of his own to the property or to receipt of the property, a disappointed heir or potential donee has no claim of legal injury to support a claim in tort.

Probate and trust laws exist to protect the legally recognized intent of donors, not the expectation interests of aspiring donees. "Although the competing claimants advance their own interests in the sense that each asserts a right to the donor's property, those claims are derivative of the donor's right to freedom of disposition." John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 344 (2013). Trust or will contests on grounds of fraud or undue influence challenge whether the document contested accurately reflects the intent of the donor. The legislature enacted the probate and trust contest provisions – including SDCL 55-4-57 – to provide finality in resolving these questions. *In re*

Wintersteen, 2018 S.D. 12, ¶ 16, 907 N.W.2d at 791. The resolution of these questions is binding on all parties given the opportunity to contest them at that time. *Link v. L.S.I., Inc.*, 2010 S.D. 103, ¶ 39, 793 N.W.2d 44, 56.

Tom asserts that unjust actions can result in the corruption of a donor's intent leaving an intended donee without standing to bring an action to contest a will or trust. *Tom's Brief* at 6. But it is precisely for those cases that the equitable remedies of restitution and constructive trust are available. Tom presents the false dichotomy that all claims must be resolved either in tort or in probate, ignoring the central role of equity in litigating claims related to estates.

> While equity has the power to pierce rigid statutory rules to prevent injustice, where substantial justice can be accomplished by following the law, and the parties' actions are clearly governed by rules of law, equity follows the law" and "[a]ccordingly, under the doctrine, courts of equity cannot modify or ignore an unambiguous statutory principle in an effort to shape relief."

Highmark Fed. Credit Union v. Wells Fargo Fin. S. Dakota, Inc., 2012 S.D. 38, ¶ 7, 814 N.W.2d 814, 817. Because the interest Tom asserts arises from a gratuitous expectancy arising in equity, the remedies Tom seeks are essentially equitable and not the basis for a legal claim in tort. Where a legal remedy is available, it should not be the role of equitable relief, under whatever name, to circumvent the applicable statutes of limitation and repose. *Peterson v. Hohm*, 2000 S.D. 27, ¶ 18, 607 N.W.2d 8, 14.

III. Tom's Cited Cases Rely on Equitable Principles

Tom argues that his new claim should be recognized because there is no remedy in probate for wrongful inter vivos transfers. *Tom's Brief* at 6. But Tom assumes, rather than demonstrates, that plaintiffs possess an independent individual right in tort to the gift they seek. Under South Dakota law, an expectancy of a gift is not a vested right. SDCL 43-3-6. Moreover, none of the cases Tom cites in which fraudulent inter vivos transfers were alleged demonstrate that right. Instead, those cases demonstrate that situations exist in which an equitable remedy, such as unjust enrichment as described above, may be required. *See, e.g., Huffey v. Lea,* 491 N.W. 2d 518, 520 (Iowa 1992) (noting that only Iowa and Colorado courts would allow the claim without demonstrating that probate remedies were inadequate); *Estate of Jeziorski*, 162 Ill. App. 3d 1057, 1061, 516 N.E.2d 422, 425 (1987) (finding that essence of plaintiffs' claims were in fraud upon the testator); *In re Estate of Ellis*, 236 Ill. 2d 45, 54, 923 N.E.2d 237, 242 (2009) (not recognizing the tort claim where plaintiffs chose not to seek a will contest, but permitting the claim where the plaintiff had been denied knowledge of prior wills from which they would have benefitted by alleged actions of the defendant); *Plimpton v. Gerrard*, 668 A.2d 882, 885 (Me. 1995) (finding that a constructive trust action was available for the claims of improper inter vivos transfers).

Likewise, Tom's argument that discovery of wrongful conduct may not be practical or possible under the time limitations of SDCL 55-4-57 is a political argument, not a legal one. The chief case cited by Tom, *Barone v. Barone*, involved an allegation of fraudulent concealment not discovered until the statutory time for contest of wills had

passed. *Barone v. Barone*, 294 S.E.2d 260, 262 (W. Va. 1982). *Barone* is inconsistent with South Dakota law because it found that the plaintiff had both the right to a constructive trust, an equitable remedy, as well as a legal remedy on precisely the same facts arising in tort. By contrast, in South Dakota, "[a]n essential element to equitable relief is the lack of an adequate remedy at law." *Knodel*, 1998 S.D. 73, ¶ 8, 581 N.W.2d at 507. South Dakota law, when it separated probate from the general legal and equity powers of circuit courts, recognized the right of equity courts to fashion necessary equitable remedies before restoring any balance of the case to the county probate court for resolution with the requirements of probate law. *Lass,* 54 N.W.2d at 743.

States that have recognized this new tort have done so without analyzing the difference between tort and equity. Consequently, it is easy to distinguish the cases cited by Tom. For example, in *Barone*, the judicially coherent remedy was an equitable action in fraud for the concealment as the court itself indicated. *Barone*, 294 S.E.2d at 262. Likewise, in *In re. Est. of Luccio*, the plaintiffs were without notice of the alleged fraud until after the limitation time had run and had an action in equity for fraudulent concealment. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 24, 982 N.E.2d 927, 933. The case Tom cites from Missouri, *Gianella v. Gianella,* confirms rather than refutes this point: in *Gianella*, the plaintiff was barred from her claim for failure to seek her available legal remedy in probate. *Gianella v. Gianella*, 234 S.W.3d 526, 530 (Mo. Ct. App. 2007). These cases demonstrate that this "tort" remedy as adopted in other states is really an equitable remedy, not a tort claim created to address an *existing* legal right of a plaintiff. Since South Dakota already has a legal remedy to address these claims, another

equitable remedy is unnecessary.

IV. The Restatement of Torts' Remedy Is an Equitable, not a Legal, Solution

Finally, Tom's appeal to the Restatement of Torts (Second) § 774B is likewise an appeal to equitable sensibilities transplanted into tort law. As an initial matter, only twenty states had adopted the Restatement's formulation of the tort of interference with an inheritance expectancy as of 2013. Goldberg & Sitkoff, 65 STAN. L. REV. at 361. Notably, most states adopting the Restatement have separate systems of probate and civil law, and permit the claim only when adequate relief is unavailable to a particular plaintiff in a probate proceeding. *Wilson v. Fritschy*, 132 N.M. 785, 55 P.3d 997, 1001 (N.M. Ct. App. 2002). By contrast, South Dakota no longer has separate probate courts, and plaintiffs can obtain full legal relief within the probate or trust system without the need for creation of a new tort.

The Texas Supreme Court recently rejected this potential cause of action, highlighting the issues inherent in the Restatement's conception of the proposed new tort as a combination of legal and equitable principles. *Kinsel v. Lindsey*, 526 S.W.3d 411, 423 (Tex. 2017), reh'g denied (Sept. 22, 2017). In *Kinsel*, the Court determined there was no reason to recognize the new tort when an equitable remedy – in that case the concept of a constructive trust – was or could be available to address the alleged wrong. *Id.* at 424 ("we see no compelling reason to consider a previously unrecognized tort if the constructive trust proved to be an adequate remedy."). Similarly, the Indiana case cited by Tom – in addition to misstating present Texas law – also demonstrates the incoherence of the Restatement formulation by its holding that the cause of action "will not lie, however,

where the remedy of a will contest is available and would provide the injured party with adequate relief." *Keith v. Dooley*, 802 N.E.2d 54, 58 (Ind. Ct. App. 2004). *Keith* demonstrates that the actual relief being provided by the "tort" of interference with expectancy is equitable, since it operates only upon the default of the actual black-letter probate law and only when the probate remedy is inadequate. *Id*.

The remaining cases cited by Tom provide no further support for his theory. For example, *Firestone v. Galbreath* merely cites the Restatement as authority for recognition of the tort and explicitly declined to analyze the question of the exhaustion or validity of other remedies. 616 N.E.2d 202, 203 (Ohio 1993). Tom's citation to the cases collected by the Supreme Court of Pennsylvania indicate that by 2001 only eleven states had adopted the relevant section of the Restatement. *Estate of Hollywood v. First Nat. Bank of Palmerton*, 859 A.2d 472, 477 (Pa. Sup. 2004). Pennsylvania was not one of them, although it, like four other states, recognized a similar cause of action. *Id*. Thus, rather than supporting Tom's claims, these cases simply demonstrate that the "tort" urged by Tom is at its core an equitable remedy, particularly when, as under South Dakota law, a prospective heir or donee has no cognizable present right to a gift. SDCL 43-3-6.

CONCLUSION

Because South Dakota's trust and probate laws provide legislatively determined limits for determining the validity of trusts and wills, and because South Dakota's available equitable relief is adequate to fill in any gaps in the legal remedy, this Court should not adopt the proposed tort of tortious interference with inheritance or expectancy of inheritance.

Dated this 17th day of September, 2018.

/s/ Sheila S. Woodward

Marlow, Woodward & Huff, Prof. LLC
Sheila S. Woodward
Paul T. Van Olson
200 West Third St.
PO Box 667
Yankton, SD 57078
(605) 665-5009
Attorneys for Judith Briggs