IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 29653

JULIE NIEMITALO,

Plaintiff and Appellant

VS.

RICHARD SEIDEL,

Defendant and Appellee

Appeal from the

Fourth Judicial Circuit

Perkins County, South Dakota

The Honorable Michelle Comer, Circuit Court Judge

APPELLANT'S BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	II, III.
PRELIMINARY STATEMENT	1.
JURISDICTIONAL STATEMENT	1.
STATEMENT OF LEGAL ISSUES AND AUTHO	RITIES1.
I. Whether the Circuit Court erred in granting a Judgment for Defendant and determining as that Plaintiff released her tort claims against executing the Property Distribution and Dive when divorcing Defendant	a matter of law Defendant by orce Agreement
II. Whether the Circuit Court erred in denying I Motion for Reconsideration	
STATEMENT OF THE CASE	2.
STATEMENT OF THE FACTS	2.
ARGUMENT	9.
A. Standard of Review B. The Circuit Court Erred in Granting Summary Ju on the Plain Language of the Property Divisi	dgment Based
Divorce Agreement	
include release of civil tort claims	elease23.
CONCLUSION	
REQUEST FOR ORAL ARGUMENT	27.
CERTIFICATE OF SERVICE	28.
CERTIFICATE OF COMPLIANCE	29

TABLE OF AUTHORITIES

Cases

All Star Constr. v. Koehn, 2007 S.D. 11, ¶ 33, 741 N.W.2d 736	21
Alverson v. Northwestern Nat.'l. Cas. Co., 1997 S.D. 9, ¶ 8, 559 N.W.2d 234	20
Aman v. Edmunds Cent. Sch.Dist.No. 22-5, 494 N.W.2d 198 (SD 1992)	16
Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc., 2011 S.D. 38, ¶ 13, 800 N.	W.2d
730	21
Berry v. Benner, 81 S.D. 610, 617, 139 N.W.2d 285 (1966)	12
Brookings Mall, Inc. v. Captain Ahab's, Ltd., 300 N.W.2d 259 (S.D. 1980)	21
Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 700 N.W.2d 729 (SD 2005)	23
Charlson v. Charlson, 2017 S.D. 11, ¶ 16, 892 N.W.2d 903, 907-08	11
Chord v. Pacer Corp., 326 N.W.2d 224, 226 (SD 1982)	12
Coffee v. Coffey, 888 N.W.2d 805, 809 (SD 2016)	15
Cole v. Wellmark of S.D., Inc., 2009 S.D. 108, \P 14, 776 N.W.2d 240, 246	12
Coleman v. Coleman, 566 So.2d 482, 485 (Ala. 1990)	8
Copeland v. Home Grown Music, Inc., 358 Ga. App. 743, 743, 856 S.E.2d 325, 32	8
(2021)	16
Detmers v. Costner, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151	11
Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 2018 S.D. 67, ¶ 15, 918 N.W.2d 39	
Fix v. First State Bank of Roscoe, 559 F.3d 803 (8th Cir. 2009)	
Gassman v. Gassman, 296 N.W.2d 518 (SD 1980)	
Henry v. Henry, 534 N.W.2d 844 (SD 1995)	
Hieb v. Opp, 458 N.W.2d 797, 798 (S.D. 1990)	
Hisgen v. Hisgen, 1996 SD 122, ¶ 4, 554 N.W.2d 494, 496	12
Holzer v. Dakota Speedway, Inc., 2000 SD 65, 610 N.W.2d 787 (S.D. 2000)	
Houser v. Houser, 535 N.W.2d 882 (SD 1995)	
Huffman v. Shevlin, 76 S.D. 84, 89, 72 N.W.2d 852 (1955)	12
In re Dissolution of Midnight Star Enters., L.P., 2006 S.D. 98, ¶ 12, 724 N.W.2d 3 15	
Janssen v. Muller, 38 S.D. 611, 614, 162 N.W. 393	12
Jensen v. Pure Plant Food Int'l Ltd., 274 N.W.2d 261 (S.D. 1979)	
Johnson v. Johnson, 291 N.W.2d 776 (SD 1980)	
LaMore Rest. Grp., LLC v. Akers, 2008 S.D. 32, ¶ 31, 748 N.W.2d 756	
Luther v. City of Winner, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339	
Malcolm v. Malcolm, 365 N.W.2d 863 (SD 1985)	
McKie Ford Lincoln, Inc. v. Hanna, 907 N.W. 795, 798 (S.D. 2018)	
Middleton v. Klinger, 410 N.W.2d 184, 185-86 (SD 1987)	
Muhlbauer v. Estate of Olson, 2011 S.D. 42, ¶ 7, 801 N.W.2d 446, 448	
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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant-Plaintiff, Julie Niemitalo, fka Julie Seidel will be referred to a "Julie;" Appellee-Defendant, Richard Seidel, will be referred to as "Seidel;" documents from the record of the Fourth Circuit Clerk of Court are cited as "R. ____;" the Appendix is cited as "APP ___;"

JURISDICTIONAL STATEMENT

This is an appeal from an Order Granting Summary Judgment in favor of Seidel dated May 3, 2021 by the Honorable Michelle Comer, and a subsequent Letter Opinion by Judge Comer dated May 27, 2021 in response to Julie's Motion for Reconsideration. The resulting orders were dispositive as to all of Julie's claims and were final orders pursuant to SDCL § 15-26A3(2). Notice of Appeal was filed in the Circuit Court on May 27, 2021. The referenced rulings are appealable and the present appeal is timely.

STATEMENT OF LEGAL ISSUES

- I. Whether the Circuit Court erred in granting Summary Judgment for Seidel and determining as a matter of law that certain language in a Property Distribution and Divorce Agreement served to release unpled civil tort claims.
- II. Whether the Circuit Court erred in denying Plaintiff's Motion for Reconsideration of its Summary Judgment ruling.

In both rulings, the Circuit Court determined on summary judgment that language set forth in a Property Distribution and Divorce Agreement served to release civil tort claims of Julie against Seidel.

Gassman v. Gassman, 296 N.W.2d 518 (SD 1980)

State v. Seidel, 953 N.W.2d 301 (SD 2020)

STATEMENT OF THE CASE

This is an appeal of dispositive rulings from the Fourth Judicial Circuit, the Honorable Michelle Comer. The case is a civil action brought by Julie against Seidel arising out of an attack in which Seidel kidnapped, raped and assaulted Julie. These parties had been married but were in the midst of divorce proceedings at the time of the attack. Seidel was criminally charged, tried and convicted of kidnapping in the first degree, rape in the second degree, commission of a felony while armed with a firearm and aggravated assault. This Court affirmed the conviction and sentence. At the conclusion of the divorce proceedings Julie commenced a civil action against Seidel alleging Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, False Imprisonment and Civil Battery, seeking compensatory and punitive damages. Seidel moved the Circuit Court for summary judgment claiming that Julie had released unpled civil tort claims against Seidel by virtue of certain language in the parties' Property Distribution and Divorce Agreement. The Circuit Court granted Siedel's motion, denied Julie's Motion for Reconsideration on the same issue, and this appeal followed.

STATEMENT OF THE FACTS

A. Marriage and Divorce

Julie and Seidel were previously married for twenty-three years. On September 27, 2017, Julie filed for divorce after finding Seidel in bed with another woman in their marital home. The stated grounds for divorce was adultery. The petition for divorce was never amended.

B. Siedel's attack of Julie

On November 2, 2017, Julie went to work at Bison Grain, a company that she and Seidel had owned and operated during the marriage. See *Complaint* § 5, R2. See also *State v. Seidel*, 953 N.W.2d 301, 305-308 (SD 2020). Julie had continued in her work on behalf of the company during the pendency of the divorce, as did Seidel. Seidel lured Julie from her office to the scale room of the elevator. *Id.* at ¶ 6. Once in the scale room, Seidel snuck up behind Julie and placed a zip tie around Julie's neck, choking her. *Id* ¶ 6. Seidel then shoved Julie to the floor. *Id.* As Julie begged for Seidel to stop, she noticed that Seidel had a gun in his hand. *Id.* Julie lost consciousness from lack of oxygen. *Id.*

When Julie awoke her hands and feet were bound with zip ties. Id. at \P 7. She had wet her pants and lost control of her bowels. Id. Seidel picked Julie up and threw her in the back seat of his pickup. Id. Julie again lost consciousness. Id. Seidel drove Julie to a home they owned outside of Bison, South Dakota. Id. at \P 8. While brandishing the gun, Seidel cut the zip tie from Julie's feet and made her walk upstairs to the master bedroom. Id. While Julie's hands were still zip tied and with a handgun nearby, Seidel cut Julie's clothes from her and made her shower. Id. at \P 9. Seidel then raped Julie. Id.

On that same date, with the assistance of her daughter-in-law, Julie contacted the Perkins County Sheriff and reported what had happened. *Id.* at ¶ 10. Seidel was arrested and ultimately charged with various offenses including Kidnapping in the First Degree,

3

¹ The following facts are taken as true for purposes of summary judgment. In addition, the heinous factual background supporting the criminal charges and conviction are set forth at length in *State v. Seidel*, 953 N.W.2d 301, 305-308 (SD 2020).

Rape in the Second Degree, Commission of Felony while armed with firearms, and Aggravated Assault – Domestic Violence. *Id.* at ¶ 11.

C. Property Distribution and Divorce Agreement

Subsequent to negotiations in the divorce proceedings, the parties on December 3, 2018, entered into a "Property Distribution and Divorce Agreement." APP 005. The language relied upon by Seidel in the summary judgment proceedings states in its entirety as follows:

The parties hereto, being husband and wife, and being unable to continue such relationship, hereby agree to an immediate separation and that Julie shall be granted a Judgment of Divorce on the grounds of Richards's adultery, and further agree to a full, complete and final *property* settlement of all the *property* of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim *against any property* of the Defendant either now held or afterwards acquired; and that the Richard shall have no claim *against any property* of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of *all the property rights of the parties*.

Id. (emphasis added).

The PDDA contained a single exhibit entitled "Property Exhibit A" which was a collection of marital property assets to be divided. APP 022. The document was on its face a settlement of property rights. APP 005. It is undisputed that there is no mention of Seidel's actions and conduct from November 2, 2017 in the PDDA; the only reference to fault is the stated divorce grounds for adultery. There is no reference to Julie releasing any civil causes of action against Seidel occurring during or arising out of the marriage, in fact, the word "release" is only used in later paragraphs pertaining to retirement accounts and estates, respectively. APP 015.

Based upon the parties' PDDA, the trial court overseeing the divorce entered a Judgment and Decree of Divorce on December 4, 2018. APP 024.² Therein, Judge Day found that "[t]he parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence and which appears to be a fair and equitable adjustment of the property rights and the parties." The Court ordered that the marriage be dissolved and incorporated the PDDA into its Judgment and Decree.

D. Seidel's Criminal Trial

Seidel's criminal case was jointly prosecuted by Perkins County State's Attorney Shane Penfield, South Dakota Attorney General Marty Jackley and Deputy Attorney General Scott Roetzel. The Defendant was represented by Timothy Rensch of Rapid City. During the criminal trial, Julie testified at length regarding the facts of the kidnapping, rape, and aggravated assault at the hands of Seidel. Likewise, she was extensively crossexamined by Seidel's attorney, Mr. Rensch.

Julie's attorney Michael Sabers was subpoenaed by the prosecution to testify at Seidel's criminal trial. Seidel in the summary judgment proceedings below made a significant issue of part of attorney Sabers' testimony regarding the PDDA, attempting to mislead the Circuit Court that Sabers testified that Julie had released civil claims against Seidel in the context of the divorce. On the contrary, Seidel's defense counsel's theme at trial was that Julie, in fact, *refused* to waive and release any civil claims in the divorce proceeding, and that her criminal complaint against Seidel should be not believed by the

² Due to a misspelling of Julie's name, a corrected but otherwise identical Amended Judgment and Decree of Divorce was entered March 13, 2019. APP 026.

jury as the charges were merely an effort to extract a monetary gain in an as-yet-filed lawsuit. Attorney Rensch introduced the PDDA into evidence at the criminal trial in furtherance of this theme. With reference to the same, and in the context of the divorce proceedings, he wanted to confirm through Sabers' testimony that Julie retained the ability to civilly sue Seidel:

Q [Mr. Rensch]: I asked if she reserved her right to file a civil claim against Mr. Seidel for what she's alleging in this case. Yes or no. A: [Mr. Sabers]No.

Q: She did not reserve the ability to sue him for that?

A: No. He didn't give up. He wanted to buy that [a release of civil claims], and he couldn't get it.

. . .

Q: Based upon the legal papers [PDDA and Divorce Decree], though, you reserved that, did you not, for her?

A: My recollection was that she wouldn't waive it [civil claims for Defendant's November 2, 2017 acts].

• • •

Q: If she did not waive the right to sue Richard for what happened here, she still had that right; isn't that correct?

A: She did not waive it. That's correct.³

(JURY TRIAL VOL. 4 AT 1004:4-40; 1004:23-25; 1005:12-15). APP 051-055.

³ As can be seen, Seidel's argument to the Circuit Court below that Mr. Sabers testified that the civil claims were released is misguided and belied by the very testimony he relied upon. The cited exchange reveals Seidel's misapprehension of the significance of the word "reserved," versus a claim being waived or released. When asked if Julie "reserved her right to file a civil claim against Mr. Seidel in the PDDA," Mr. Sabers truthfully responded in the negative - civil or tort claims were not expressly "reserved" in the PDDA because they were entirely beyond the scope of this property settlement document. There is no legal obligation to "reserve" claims which are entirely inapplicable to the property distribution settlement in a divorce action. Further, Mr. Sabers' testimony, to the extent relevant at all, confirms (as recognized unanimously by the Supreme Court) that Julie in the divorce proceedings "did not waive" the right to bring suit for tort claims against Seidel. *State v. Seidel*, 953 N.W.2d at 312-313.

With this record, and again with reference to the PDDA entered into during the divorce proceedings, Seidel's counsel in closing argument stressed the theme that Julie's criminal complaint was not credible and only made as a basis to extract a monetary recovery from Seidel in a future civil lawsuit:

Attorney Rensch: Pg. 1058; lines 23-25: "And they did it with stipulation [PDDA], and there was not a trial. And what does she retain? She still has the right to sue him for all of this."

Attorney Rensch Pg. 1059; lines 4-7: "She still has the right to sue him civilly for all of this. So you want to talk about bias and motivation and money coming into play. Money makes people do strange things.

APP 057 -059. (emphasis added).

On July 26, 2019, Seidel was found guilty of Kidnapping in the First Degree, Rape in the Second Degree, Commission of a Felony While Armed with a Firearm, and Domestic Abuse / Aggravated Assault of Julie. APP 028. Pursuant to a Judgment of Conviction and Sentence entered November 5, 2019, Seidel was sentenced to a cumulative sentence of 75 years in the South Dakota State Penitentiary for his crimes against Julie. APP 029.

Following sentencing, Defendant appealed his conviction to the South Dakota Supreme Court. The issue of waiver/release of Julie's civil claims in the context of the divorce proceeding, and an entirely unfounded claim of perjury made by Seidel's then-and-present counsel were addressed by this Court. The Court's unanimous decision affirming the conviction and sentence in *State of South Dakota v. Seidel*, 2020 SD 73, ¶ 29 noted and admonished:

Richard's additional claims – that the State "knowingly presented misleading and potentially perjured testimony from" J.S. and her divorce attorney – are likewise unfounded (FN6). Beyond appellate counsel's bald accusations, there is no evidence that the prosecution introduced perjured

testimony by either J.S. or her divorce attorney. Rather than outlining any prosecutorial misconduct, appellate counsel's critique of J.S.'s testimony is nothing more than a routine attack on a witness's credibility based on perceived inconsistencies in the evidence. Moreover, the alleged perjured testimony from J.S.'s divorce attorney was in fact *elicited by defense counsel*. Appellate counsel's argument <u>further overlooks the fact that J.S.'s divorce attorney ultimately acknowledged that J.S. would not waive her right to bring a civil suit against Richard and that nothing prevented her "from filing a lawsuit tomorrow[.]"</u>

FN 6. Allegations of suborning perjury are indeed serious and should only be made when based on a firm foundation. Appellate counsel's accusations here are disturbing, given their unfounded nature.

Id. at 312-313 (emphasis added); n.6 (APP/040).

E. Proceedings Below

Julie commenced this civil action on September 13, 2019, alleging Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, False Imprisonment, Civil Battery, and sought compensatory and punitive damages for Seidel's intentionally malicious acts.

In an abject 180 degree turn of position from his criminal proceedings, Seidel moved the court below for summary judgment claiming that the PDDA served to release Julie's civil claims. Upon briefing and hearing, the Court granted Seidel's motion, stating in part:

While this Court recognizes that the allegations in this action are egregious, the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that "Julie shall have **no claim** against any property of the defendant either now held or afterwards acquired ... and that this Agreement shall be in **full and final settlement** of all the property rights of the parties." (emphasis added); *see Henry v. Henry*, 534 N.W.2d 844, 847 (S.D. 1995) (holding that wife waived tort claims by signing a release in the parties' settlement agreement); *see also Coleman v. Coleman*, 566 So.2d 482, 485 (Ala. 1990) (holding that allowing a spouse "to use the fact that she may have been infected with a venereal disease by husband as leverage in her divorce settlement, and then [permitting] her to bring a subsequent tort

action, would seriously undermine the settlement of divorce actions in the future. To do so would, in the trial court's works cause confusion and lead to fraud, potential ambush, and a play on words within the settlement." *Id.* (quotations omitted)).

APP 001. (emphasis in original).

Julie moved the Court to reconsider on various grounds. Upon additional briefing and a hearing on the merits, the Court denied the motion by letter opinion dated May 20, 2021. APP 003, 004. The court based its decision on the fact that "nowhere in the Stipulation (sic) is a reservation of any further claims." The court also relied on provisions in the PDDA relating to medical bills, lump sum alimony, a standard integration clause and standard mutual statement of reasonableness. *Id*.

With due respect the Circuit Court erred as a matter of law in both rulings and this appeal followed.

ARGUMENT

Julie did not release any civil tort claims relating to Seidel's attack by virtue of the PDDA. By its plain terms, the intent of the parties and limit of the Agreement's scope and reach is plain. As the title makes clear, it is an agreement on the division of marital property and settlement "of all the property rights of the parties." The language of the Agreement is plain, as are its limitations. For the Circuit Court to expand these plainly-limited terms in a recital to include a complete release of unreferenced and unpled civil tort causes of action is error as a matter of law.

Alternatively, and to the extent the Court is of the belief that the PDDA is ambiguous in terms of its scope, the only evidence of intent of the parties unequivocally confirms that the document did not serve to be a release of Julie's civil tort claims.

Seidel knew this to be true and it was the foundation of his criminal defense. Seidel's

criminal defense counsel entered the PDDA into evidence and based thereon elicited testimony from Mr. Sabers at trial that Julie would not waive potential civil claims in the context of the divorce — a fact this Court recognized in unanimously affirming Seidel's criminal conviction ("Appellate counsel's argument further overlooks the fact that J.S.'s divorce attorney ultimately acknowledged that J.S. would not waive her right to bring a civil suit against Richard [in the context of the divorce] and that nothing prevented her "from filing a lawsuit tomorrow[.]"). The evidence of intent could not have been more clearly stated than by Seidel's counsel at closing argument — "And they [divorced] with a stipulation [PDDA], and there was not a trial. And what does she retain? She still has the right to sue him for all of this ... She still has the right to sue him civilly for all of this. So you want to talk about bias and motivation and money coming into play. Money makes people do strange things." APP 058-059. Given this record of the parties' intent, summary judgment in favor of Seidel based upon an alleged release of claims was in error.

Additionally and alternatively, Seidel should be estopped from taking a position on the PDDA and alleged release of civil claims in the present matter which is diametrically opposed to his stated position and principle theory in his criminal proceeding. For the sake of integrity of the legal system, the law rightfully provides limits in terms of prohibiting parties from asserting such entirely inconsistent positions.

Finally, SDCL § 53-9-3 would void any claimed release of intentional misconduct such that summary judgment was improperly granted.

For each or any of these reasons, the Circuit Court's grant of summary judgment should be reversed.

A. Standard of Review

This Court's standard of review on a grant or denial of summary judgement under SDCL § 15-6-56(c) is well settled.

Summary judgment is proper where, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. SDCL 15-6-56(c). We will affirm only when no genuine issues of material fact exist and the law was applied correctly. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. We make all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. *Paradigm Hotel Mortg. Fund v. Sioux Falls Hotel Co., Inc.*, 511 N.W.2d 567, 569 (S.D.1994). In addition, the moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Muhlbauer v. Estate of Olson*, 2011 S.D. 42, ¶ 7, 801 N.W.2d 446, 448.

McKie Ford Lincoln, Inc. v. Hanna, 907 N.W. 795, 798 (S.D. 2018) (quoting Hofer, ¶ 10, 870 N.W.2d at 661-62). The standard of review for the interpretation of a contract is also well settled:

"Contract interpretation is a question of law reviewed de novo." *Detmers v. Costner*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151. "When interpreting a contract, this Court looks to the language that the parties used in the contract to determine their intention." *Id.* "In order to ascertain the terms and conditions of a contract, we examine the contract as a whole and give words their plain and ordinary meaning." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191.

Charlson v. Charlson, 2017 S.D. 11, ¶ 16, 892 N.W.2d 903, 907-08 (citation omitted). "Questions of [contract] interpretation and application are reviewed under the de novo standard of review with no deference to the circuit court's decision." *Mckie Ford Lincoln, Inc. v. Hanna*, 907 N.W.2d 795, 798 (SD 2018) (citation omitted).

B. The Circuit Court Erred in Granting Summary Judgment Based on the Plain Language of the Property Division and Divorce Agreement

This Court applies contract principles when interpreting a property settlement agreement incorporated into a divorce decree. *Steffens v. Peterson*, 503 N.W.2d 254, 258 (SD 1993). The interpretation of these agreements is a matter of law for the courts to decide. *Hisgen v. Hisgen*, 1996 SD 122, ¶ 4, 554 N.W.2d 494, 496 (citing *Houser v. Houser*, 535 N.W.2d 882, 884 (SD 1995)).

The Court's the procedure for analyzing a property settlement agreement is similar to contract interpretation, has been stated as follows:

First, in determining the proper interpretation of a contract the court must seek to ascertain and give effect to the intention of the parties. *Chord v. Pacer Corp.*, 326 N.W.2d 224, 226 (SD 1982); *Johnson v. Johnson*, 291 N.W.2d 776, 778 (SD 1980); *Huffman v. Shevlin*, 76 S.D. 84, 89, 72 N.W.2d 852, 855 (1955). In determining the intention of the parties, a court must look to the language that the parties used. *Johnson*, 291 N.W.2d at 778; *Berry v. Benner*, 81 S.D. 610, 617, 139 N.W.2d 285, 289 (1966).

* * *

If the intention of the parties is not clear from the writing, then it is necessary and proper for the court to consider all the circumstances surrounding the execution of the writing and the subsequent acts of the parties. *Janssen v. Muller*, 38 S.D. 611, 614, 162 N.W. 393, 394. The construction given by the parties themselves to the contract as shown by their acts, if reasonable, will be accorded great weight and usually will be adopted by the court. *Huffman*, 76 S.D. at 89, 72 N.W.2d at 855.

Malcolm v. Malcolm, 365 N.W.2d 863, 865 (SD 1985).

In determining the meaning of a contract, "effect will be given to the plain meaning of its words." *In re Dissolution of Midnight Star Enters.*, *L.P.*, 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337. Courts look "to the language that the parties used in the contract to determine their intention," and if the parties' intention is made clear by the language of the contract "it is the duty of this [C]ourt to declare and enforce

it." See *Pauley v. Simonson*, 2006 S.D. 73, ¶ 8, 720 N.W.2d 665, 667-68. "We will not create a forced construction or a new contract for the parties when the language is clear and we are able to ascertain the plain and ordinary meaning of the language used." *Cole v. Wellmark of S.D., Inc.*, 2009 S.D. 108, ¶ 14, 776 N.W.2d 240, 246.

"Ascertaining and giving effect" to the PDDA begins with the plain language of the title, to wit, "Property Division and Divorce Agreement." The "language used by the parties," relied upon by Seidel in his motion for summary judgment as "unambiguous and broad," such that Julie's civil tort claims against Seidel were unequivocally and forever released, is found in the recital paragraph of the PDDA and states as follows:

The parties hereto, being husband and wife, and being unable to continue such relationship, hereby agree to an immediate separation and that Julie shall be granted a Judgment of Divorce on the grounds of Richards's adultery, and further agree to a full, complete and final *property* settlement of all the *property* of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim *against any property* of the Defendant either now held or afterwards acquired; and that the Richard shall have no claim *against any property* of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of *all the property rights of the parties*.

APP 005. (emphasis added).⁴ It is undisputed that there is no mention anywhere in the PDDA of Seidel's actions and conduct from November 2, 2017. No civil case had been filed and thus no reference is made to a case number. The only reference to any conduct is Seidel's adultery as the stated grounds for divorce. There is no reference to Julie releasing any civil causes of action against Seidel, in fact, the word "release" is not used in the recital. The PDDA contained a single exhibit entitled "Property Exhibit A" which included various items of marital assets and property. APP 022. Judge Day's Decree of

13

⁴ Following the recital, the PDDA contains actual terms, separately-numbered.

Divorce echoed the limited scope of the parties' divorce agreement. Judge Day found that "[t]he parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence and which appears to be a fair and equitable adjustment of the property rights and the parties." APP 024. The Court ordered that the marriage be dissolved and incorporated the PDDA into its order. *Id*.

To state the obvious, as evidenced by the document title and the plain language in the recital quoted above, the parties were agreeing to a marital property settlement, with each of them in that context disclaiming any interest in or to the *property* awarded by stipulation to the other - nothing more. There is no other way in which to read the plain language of the PDDA including the nearly-incessant reference to "property" and "property rights" in the recital. Seidel's contention, and Circuit Court's ruling, that the PDDAs' recital language created a broad, all encompassing release of unfiled and unpled civil tort claims arising out of conduct during the marriage is simply not supported by any plain reading of the language. Rather than stating a "broad release" it is hard to imagine an agreement more specifically and intentionally narrow in language and scope. The use of the word "property" five times in the relied-upon recital paragraph is determinant of the extent, *and limits*, of the Agreement. There is no substantive provision in the PDDA for release of claims relating to conduct during the marriage. The recital does not even use the word "release" in any sense, much less with respect to unpled civil tort claims.

The Circuit Court's Order which is subject to this appeal provides that "the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that "Julie shall have **no claim** against any

property of the Defendant either now held or afterwards acquired... and that this Agreement shall be in <u>full and final settlement</u> of all the property rights of the parties." (emphasis in Court's Order) APP 001. The Circuit Court's Order violates a basic tenant of contract interpretation that select words and phrases are not to be over-emphasized or read in isolation. When determining the meaning of a contract, "effect will be given to the plain meaning of its words." *In re Dissolution of Midnight Star*, 2006 SD 98, P12, 724 NW2d 334, 337 (additional citation omitted). "We must give effect to the language of the entire contract and particular words and phrases are not interpreted in isolation." *Id.* (additional citation omitted).

In construing a contract, disproportionate or undue weight or emphasis should not be placed on particular words, parts, or provisions thereof, to the neglect or detriment of others such emphasis does not serve the object of interpretation, and no single part, sentence, or clause, when considered alone, will control.

Middleton v. Klinger, 410 N.W.2d 184, 185-86 (SD 1987) (citing 17A C.J.S. Contracts § 297, 127 (1963)).

The emphasized portions of the paragraph relied upon by the Circuit Court ("no claim" and "full and final settlement") have no legal significance whatsoever without the numerous references to the qualifying language regarding the parties' marital property and property rights. In addition to improperly relying upon isolated language, the Circuit Court's ruling requires that the five references to "property" and "property rights" in the operative recital paragraph be ignored.⁵ This is legal error in the proper construction of

15

⁵ Presumably not by accident, Judge Day echoed the parties' extensive reference to "property" and "property rights" in the PDDA in issuing the Decree of Divorce, stating in part: "[t]he parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence

contracts. "[W]e do not interpret language in a manner that renders a portion of the contract meaningless. Instead, we interpret the contract to give a reasonable and effective meaning to all its terms." *Coffee v. Coffey*, 888 N.W.2d 805, 809 (SD 2016) (citations and internal quotations omitted). Again, formatted in a manner to show the error of the Circuit Court's ruling, the parties chose and agreed to the following specific language in the PDDA recital:

- Julie shall be granted a Judgment of Divorce on the grounds of Richards's adultery,
- and further agree to a full, complete and final property settlement of all the property of the parties hereto;
- and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of the Defendant either now held or afterwards acquired;
- and that the Richard shall have no claim against any property of Julie either now held or afterwards acquired; and
- that this Agreement shall be in full and final settlement of all the property rights of the parties.

Respectfully, it was legal error for the Circuit Court to take this language and find that it "unambiguously" served to release as-yet-pled civil tort claims against Seidel.

There is no reference to marital conduct, injuries, damages, claims, or cases of action, nor even a mention of "release." The court simply, and improperly, re-wrote the parties' agreement to include a release of tort claims that is not stated or even implied by the plain language.

A well-known principle of construction, applicable to statutes and contracts alike, is *expressio unius est exclusio alterius*, or the express mention of one thing implies the exclusion of another, which requires courts to conclude that an omission of a contract

and which appears to be a fair and equitable adjustment of the property rights and the parties."

term was intentional. *Copeland v. Home Grown Music, Inc.*, 358 Ga. App. 743, 743, 856 S.E.2d 325, 328 (2021); *Aman v. Edmunds Cent. Sch.Dist.*No. 22-5, 494 N.W.2d 198, 200 (SD 1992). The parties' repeated use of the word "property" in terms of interests disclaimed or matters settled pursuant to the PDDA clearly indicates, by exclusion, that other interests, including civil tort claims were not part of the parties' Agreement.

The Circuit Court's citation and reliance upon the *Henry* case is misplaced. In Henry v. Henry, 534 N.W.2d 844 (SD 1995), the Court found a wife to have released her tort claim for battery and intentional infliction of emotional distress that arose after the filing for divorce, but before the signing of the judgment and decree for divorce. This Court noted, "despite the potential for entertaining such a claim [tort for inter alia assault by a spouse, ... Lois waived that opportunity by signing a release in the parties' settlement agreement." Id. at 847. The Court continued stating, "[t]he provision at issue in the decree provided that each party releases the other 'from any and all rights, claims, demands or obligations arising out of or by virtue the marital relation.' A clear reading of this agreement between the parties shows that they were settling all pre-divorce claims." *Id.* (emphasis added). Nowhere in the present PDDA does there appear language that "releases ... any and all rights, claims, demands or obligations arising out of or by virtue of the marital relation." In fact, the word "release" does not appear in the relied-upon recital at all. Henry's broad release language stands in stark contrast to the present Agreement which is plainly and expressly limited to marital property issues.

In interpreting the meaning of contracts, words matter. It is the specific language of an agreement that this Court has focused on in these cases to determine intent, not the mere fact that there was an agreement or stipulation signed in a divorce proceeding.

Henry's "release" of "any and all rights, claims, demands or obligations arising out of or by virtue of the marital relation" stands in stark contrast to the present Agreement which states in a mere recital that the same "shall be in full and final settlement of all the property rights of the parties." The obvious difference between "release of any and all rights, claims . . . arising out of . . . the marital relation" and "full and final settlement of all the property rights of the parties" demonstrates that *Henry* is neither controlling or even instructive.

In contrast of *Henry* stands the case of *Gassman v. Gassman*, 296 N.W.2d 518,522 (S.D. 1980) cited by this Court in *Henry*. The Court stated in *Henry* that, "[t]his court, in *Gassman v. Gassman*, acknowledged that a spouse can bring a civil suit for damages caused by tortious conduct of the other spouse. In *Gassman* the record was barren of a settlement agreement which was entered into by the parties containing a mutual release for pre-divorce conduct." *Henry*, 534 N.W.2d at 847. Here, like in *Gassman*, there is no language containing "a mutual release for pre-divorce conduct."

In the recital portion of the PDDA relied upon by Seidel and the Circuit Court, the parties agreed to "a full, complete and final *property* settlement of all the *property* of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim *against any property* of the Defendant either now held or afterwards acquired; and that the Richard shall have no claim *against any property* of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of *all the property rights of the parties*." Giving the parties' words their plain and ordinary meaning as required, the "complete and final property settlement of all of the property of the parties" means what it says – the

"settlement" was limited to the "all of the property of the parties." Julie agreed that she would have "no claim against any property" of Seidel. As the title to the agreement suggests ("Property Division and Divorce Agreement"), "property" and "property rights" means marital property and assets. The only exhibit was a list of property each was to receive. Julie's civil tort claims against Seidel arising out of his attack and assault are neither marital property/assets, nor marital property rights as those words are commonly understood and used in the PDDA. To interpret the PDDA as a broad and general release of civil tort claims is legal error.

Finally, although an issue for the Court as a matter of law, evidence of the parties' intent from a "plain reading" of the PDDA as preserving and not releasing Julie's civil tort claims can be found in statements and admissions from Seidel's counsel. The PDDA was introduced into evidence in the criminal trial to allow Seidel's counsel to advance Seidel's theory that Julie's criminal complaint was not credible and simply an effort to extract financial gain from Seidel.

Attorney Tim Rensch: Pg. 1058; lines 23-25: "And they did it with stipulation, and there was not a trial. And what does she retain? She still has the right to sue him for all of this."

Attorney Tim Rensch Pg. 1059; lines 4-7: "She still has the right to sue him civilly for all of this. So you want to talk about bias and motivation and money coming into play. Money makes people do strange things.

APP 058-059. Seidel's counsel was referring to the exact same PDDA before the Circuit Court. This is the reason Seidel did not submit the affidavit of Mr. Rensch to the Motion for Summary Judgment to support a supposed release in the PDDA. This is the reason Seidel did not submit the affidavit of Seidel's divorce attorney Ronda Miller. This is the

19

⁶ Even if somehow civil tort claim against Seidel were Julie's property right, nothing of the sort is identified or referenced in the PDDA or joint property exhibit.

reason there is no affidavit from Seidel himself claiming the PDDA was a general release. Seidel admitted, through his legal counsel, what everyone knew and knows based upon a plain reading of the language used by the parties - there was <u>no</u> release of civil claims arising out of Seidel's attack in the PDDA and Julie "still has the right to sue him civilly for all of this." *Id*.

For these reasons, the Circuit Court's Order granting summary judgment based on an alleged release of claims should be reversed.

C. To the extent the PDDA is ambiguous on the issue, the uncontroverted evidence is that the parties did not intend to include release of civil tort claims

Both parties below contended that the PDDA was unambiguous with respect to alleged release of tort claims. That said, the law regarding ambiguity of contracts supports reversal. "When the meaning of contractual language is plain and unambiguous, construction is not necessary." *Pesicka v Pesika*, 2000 S.D. 137, ¶ 6, 618 N.W.2d at 726 (citing *Alverson v. Northwestern Nat.'l. Cas. Co.*, 1997 S.D. 9, ¶ 8, 559 N.W.2d 234, 235). This is because "the intent of the parties can be derived from within the four corners of the contract." *Vander Heide v. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 37, 736 N.W.2d 824, 835 (citing *Spring Brook Acres Water Users Ass'n, Inc. v. George*, 505 N.W.2d 778, 780 n.2 (S.D. 1993)). However, "[i]f a contract is found to be ambiguous the rules of construction apply." *Pesicka*, 2000 S.D. 137, ¶ 6, 618.

"A contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract." *Vander Heide*, 2007 S.D. 69, ¶ 37, 736 N.W.2d at 836 (quoting *Pesicka*, 2000 S.D. 137, ¶ 10, 618 N.W.2d at 727). Instead, "a contract is ambiguous only when it is capable of more than one meaning

when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Id.* (quoting *Pesicka*, 2000 S.D. 137, ¶ 10, 618 N.W.2d at 727). Further, "whether the language of a contract is ambiguous is a question of law for the court, which is reviewable de novo." *LaMore Rest. Grp., LLC v. Akers*, 2008 S.D. 32, ¶ 31, 748 N.W.2d 756, 765 (citing *All Star Constr. v. Koehn*, 2007 S.D. 11, ¶ 33, 741 N.W.2d 736, 744).

If a writing is found to be ambiguous, parol evidence "is admissible to explain the instrument." *LaMore Rest. Grp.*, 2008 S.D. 32, ¶ 30, 748 N.W.2d at 764 (quoting *Jensen v. Pure Plant Food Int'l Ltd.*, 274 N.W.2d 261, 264 (S.D. 1979)). However, "parol or extrinsic evidence may not be admitted to vary the terms of a written instrument or to add or detract from the writing." *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 13, 800 N.W.2d 730, 734 (quoting *Brookings Mall, Inc. v. Captain Ahab's, Ltd.*, 300 N.W.2d 259, 262 (S.D. 1980)). Thus, parol evidence "is resorted to where the ambiguity may be dispelled to show what the parties meant by what they said but not to show that they meant something other than what they said." *Id.* (quoting *Brookings Mall*, 300 N.W.2d at 262).

To be clear, Julie does not believe the PDDA is ambiguous with respect to an alleged release of unpled civil tort claims arising out of Seidel's attack. As stated above, Julie believes the PDDA unambiguously limits any reference to settlement or disclaiming of the parties' interests to marital property and assets.

Conceivably, however, the PDDA language cited and relied upon the Circuit

Court – that "Julie shall have no claim against any property of the Defendant either now held or afterwards acquired...and that this Agreement shall be in full and final settlement

of all the property rights of the parties[]" – may be capable of more than one meaning. For the sake of argument only, the specific question would be whether the parties intended this language to be a general release of Julie's civil tort claims arising out of Richard's attack. The only evidence presented below regarding the parties' intent is as stated above, to wit, Julie retained any and all civil causes of action following the execution of the PDDA and Decree of Divorce incorporating the same. Specifically referring to the PDDA, Seidel's criminal defense attorney stated to the jury that the divorce was concluded "by stipulation," rather than trial, and that pursuant to that stipulation Julie "retain[ed]" the right under the PDDA "to sue him civilly for all of this [criminal charges including domestic assault, kidnapping and rape]." In addition to being uncontroverted evidence of the parties' intent, counsel's statement is tantamount to an admission. See Tunender v. Minnaert, 1997 SD 62, 563 N.W.2d 849, ¶ 21.

This undisputed record of the parties' intent was confirmed in this Court's unanimous affirmance of Seidel's criminal conviction and sentence. The Court noted that "[t]he overarching theory of the defense was the J.S. engaged in all of these acts in order to use them as a basis for obtaining a more favorable divorce settlement or a monetary award against Richard in a civil lawsuit." *State v Seidel*, 953 N.W.2d 301, 310 n5 (SD 2020). On the specific issue of release of claims in the PDDA, the Court upon review of the record confirmed:

Appellate counsel's argument further overlooks the fact that J.S.'s divorce attorney ultimately acknowledged that J.S. would not waive her right to bring a civil suit against Richard and that nothing prevented her "from filing a lawsuit tomorrow[.]"

This Court had the admission of counsel and the PDDA in front of it in criminal trial before these pronouncements. To the extent there is an ambiguity with respect to

release of civil tort claims in the PDDA, the only evidence of the parties' intent is in the negative. It is no surprise that not a single person, including Seidel himself, was willing in the summary judgment proceedings to swear out an affidavit supporting the contention of alleged release. To the extent resort to extrinsic evidence to determine the parties' intent is necessary, the undisputed evidence resolves the ambiguity in favor of Julie – the PDDA did not serve to release her civil tort claims. For these additional or alternative grounds, the Circuit Court should be reversed.

D. Judicial Estoppel Precludes Seidel's Claim of Release

As stated, Seidel took one position with respect to the PDDA in his criminal proceedings, and now is taking the exact opposition position in the present matter. In the criminal trial, Seidel used the PDDA and other testimony as part of his "overarching theory of the defense" that Julie's criminal complaint was a means "for obtaining a more favorable divorce settlement or a monetary award against [him] in a civil lawsuit[,]" and that per his counsel Julie could "sue him anytime" for civil torts despite the execution of the PDDA. In the present matter, Seidel is using the very same PDDA to claim that Julie's civil tort claims raised herein were released as a matter of law. This shocking about-face should not stand and Seidel should be estopped from putting forth an inconsistent position with respect to the PDDA.

Judicial estoppel cannot be reduced to an equation, but courts will generally consider the following elements in deciding whether to apply the doctrine: the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped.

Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 700 N.W.2d 729, 737 (SD 2005) (quoting Watertown Concrete Products, Inc. v. Foster, 2001 SD 79, ¶ 12, 630 N.W.2d 108, 112-13 (additional citations omitted). "Unlike collateral estoppel or equitable estoppel, judicial estoppel requires neither privity between the partis in the two proceedings nor detrimental reliance by the other party." Id. at 738. "The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather it is the intentional assertion of an inconsistent position that perverts the judicial machinery." Id., (quoting Rand G. Boyers, Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U. L. Rev 1244, 1249 (1986)).

The generally-considered elements support application of the doctrine in this case. First, Seidel obviously is taking a position in this matter with respect to the PDDA that is "clearly inconsistent" with his earlier position in the criminal proceeding. Second, Seidel's position that the PDDA did not serve to release civil tort claims and that he could be "sued any time for all of this" was fully allowed and accepted by the criminal trial court and this Court on appeal. Although ultimately convicted, Seidel was permitted to introduce the PDDA into evidence, examine witnesses on the record and make a closing argument all in furtherance of his "overarching theory" that Julie retained her right to sue him civilly for the conduct charged in the criminal case. In that sense, Seidel's position was very much accepted. Although not directly at issue, this Court in a published opinion recognized and confirmed Seidel's contention that nothing prevailed Julie "from filing a lawsuit tomorrow." It is highly inconsistent for the Circuit Court to dismiss Julie's civil tort claims based upon the exact same document. Julie was crossed examined extensively at the criminal trial. So too was her counsel questioned by Seidel's counsel at the criminal

trial who sought, successfully, to confirm that the PDDA did not serve to preclude civil claims by Julie. It is a perversion of justice and highly unfair to Julie for Seidel to attempt a complete about-face on the issue of release in the PDDA. Seidel's effort to assert such wildly inconsistent positions on the same document "serves to pervert the judicial machinery." Judicial estoppel should have been applied to deny Seidel's motion for summary judgment.

E. SDCL § 53-9-3 Precludes Seidel's Claim of Release.

As interpreted by the Circuit Court, the PDDA and the Court's Amended Judgment and Decree of Divorce would constitute an illegal contract. SDCL § 53-9-3 provides, "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law." Based on such, Defendant's attempt to utilize the PDDA as a contract to release him from his willful and intentional torts of intentional infliction of emotional distress, false imprisonment, and civil battery, would create a contract not contemplated by the parties and which is otherwise void as a matter of law. That was precisely the holding in Fix v. First State Bank of Roscoe, 559 F.3d 803 (8th Cir. 2009). The facts of Fix are lengthy, but the timeline of when the alleged tort occurred and when the release was signed sheds light on the application of this statute. The Eighth Circuit Court of Appeals found that SDCL § 53-9-3 would prohibit release language from affecting the viability of intentional tort claims, concluding:

[I]t is necessary to address whether the release she signed in favor of the Bank as part of the fraud settlement bars that claim. We conclude the release does not apply to this alleged tort claim. South Dakota law prohibits a release which attempts to "exempt anyone from responsibility

for his own fraud or willful injury to the person . . . of another[.]" S.D. Codified Laws § 53-9-3; see also *Holzer v. Dakota Speedway, Inc.*, 2000 SD 65, 610 N.W.2d 787, 793 (S.D. 2000) ("[R]eleases that are construed to cover . . . intentional torts are not valid and are against public policy."). A claim for intentional infliction of emotional distress is an intentional tort claim, and thus would not be affected by the release *Fix* signed.

Id. at 810. Fix is instructional for a number of reasons. First, both here and in Fix, intentional torts exist. Similarly, here, like in Fix, the torts occurred before the signing of a release, or in this case the PDDA (which is not a release). Unlike the facts in this case, the release language in Fix was broad and sweeping wherein Fix "releases, acquits and forever discharges [Bank] and all of [Bank's] officers, directors, employees, representatives, agents and assigns, past or present, from any and all liability whatsoever, whether presently existing, known or unknown, contingent or liquidated, including all claims, demands, and causes of action of every nature which [Fix] has, or may claim to have, by reason of any transactions occurring between [Fix] and the above institution or persons." Fix, supra. Despite the broad sweeping release language, the Eighth Circuit Court of Appeals found that SDCL § 53-9-3 would prohibit the release from affecting the intentional tort claims. See also Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 2018 S.D. 67, ¶ 15, 918 N.W.2d 396, 401 ("[i]t is well settled that '[a] contract provision contrary to an express provision of law or to the policy of express law . . . is unlawful." (citing SDCL § 53-9-3)); see also *Hieb v. Opp*, 458 N.W.2d 797, 798 (S.D. 1990) (Any contract which directly or indirectly exempts anyone from violation of the law, whether willful or negligent, is deemed to be against the policy of the law, S.D. Codified Laws § 53-9-3, and any contract provision which is contrary to an express statute or to the policy of an express statute is unlawful). Based upon both statute and case precedent Seidel cannot use the PDDA as a release to exempt his intentional conduct. Applying the facts

of *Fix* to the facts of this case, it is clear that South Dakota law prohibits the use of the PDDA as a release of the intentional torts claims. For this further and additional ground, the Circuit Court's order granting summary judgment should be reversed.

CONCLUSION

For the reasons stated, Julie respectfully requests that the Circuit Court's Order granting summary judgment in favor of Seidel be reversed, that this Court declare that the PDDA did not serve to release Julie's herein claims as a matter of law, and remand this matter for further proceedings.

REQUEST FOR ORAL ARGUMENT

Julie hereby requests oral argument.

Dated this 5th day of August, 2021.

CLAYBORNE, LOOS & SABERS, LLP

/s/ Michael C. Loos

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Rapid City, SD 57709-9129
(605) 721-1517
Attorneys for the Appellant/Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of August, 2021, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at <u>SCClerkBriefs@ujs.state.sd.us</u>, and further certifies that the foregoing document was also emailed and mailed via U.S. Mail, postage prepaid thereon, to:

TIM BARNAUD Barnaud Law Firm P.O. Box 2124 Belle Fourche, SD 57717

STACY R. HEGGE Gunderson, Palmer, Nelson & Ashmore, LLP 111 West Capitol Avenue, Ste 230 Pierre, SD 57501

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

/s/ Michael C. Loos

MICHAEL C. LOOS

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Michael K. Sabers, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 27 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 8,269 words, and 41,602 characters (no spaces) in the body of the Brief.

/s/ Michael C. Loos

MICHAEL C. LOOS

APPELLANT APPENDIX

TABLE OF CONTENTS

<u>Description</u>	Page Number:
Order on Defendant's Motion for Summary Judgment	1-2.
Letter Opinion on Plaintiff's Motion for Reconsideration	3-4.
Property Distribution and Divorce Agreement	5-23.
Judgment and Decree of Divorce	24-25.
Amended Judgment and Decree of Divorce	26-27.
Seidel's Criminal Verdict	28.
Judgment of Conviction and Sentence	29-31.
State v. Seidel, 953 N.W.2d 301 (SD 2020)	32-43.
Criminal Trial Transcript (Michael Sabers' Testimony)	44-56.
Criminal Trial Transcript (Rensch Closing Argument)	57-59.

APPELLANT APPENDIX

TABLE OF CONTENTS

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Order on Defendant's Motion for Summary Judgment	1-2.
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STATE OF SOUTH DAKOTA)

SS.

COUNTY OF PERKINS)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JULIE NIEMITALO,

52CIV19-000031

Plaintiff,

٧.

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND MOTION FOR
SUBSTITUTION OF COUNSEL;
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGEMENT

RICHARD SEIDEL

Defendant.

On April 7, 2021, a hearing was held on Defendant's Motion for Summary Judgment and Motion for Substitution of Counsel and Plaintiff's Motion for Partial Summary Judgment. The Plaintiff, Julie Niemitalo, appeared by and through her attorneys, Travis Jones and Michael Sabers of Clayborne, Loos & Sabers, LLP. The Defendant, Richard Seidel, appeared by and through his attorneys, Timothy Barnaud of Barnaud Law Firm and Stacy Hegge of Gunderson Palmer Nelson & Ashmore, LLP. This Court, having heard arguments of Counsel, and having considered the briefs from both parties, with good cause showing, it is hereby:

ORDERED that Defendant's Motion for Summary Judgment is GRANTED. While this Court recognizes that the allegations in this action are egregious, the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that "Julie shall have no claim against any property of the Defendant either now held or afterwards acquired... and that this Agreement shall be in <u>full and final settlement</u> of all the property rights of the parties." (emphasis added); see Henry v. Henry, 534 N.W.2d 844, 847 (S.D. 1995) (holding that wife waived tort claims by signing a release in the parties' settlement agreement); see also Coleman v. Coleman, 566 So.2d 482, 485 (Ala. 1990) (holding

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

APP 001

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that allowing a spouse "to use the fact that she may have been infected with a venereal disease by her husband as leverage in her divorce settlement, and then [permitting] her to bring a subsequent tort action, would seriously undermine the settlement of divorce actions in the future. To do so would, in the trial court's words cause confusion and lead to fraud, potential ambush, and a play on words within the settlement." *Id.* (quotations omitted)).

This ruling finds support in policy. See, e.g., SDCL 25-4-1 (explaining that "the effect of [a divorce] judgment is to restore the parties to the state of unmarried persons); Henry v. Henry, 534 N.W.2d 844, 846 ("After the decree of divorce is entered, the parties no longer have any legal strings attached relating to the marital relationship.").

As this Court has resolved this case on summary judgment in favor of the Defendant, it need not address the Plaintiff's Motion for Partial Summary Judgment or the Defendant's Motion for Substitution of Counsel.

Dated this 29th day of April, 2021.

BY THE COURT:

Hon, Michelle K, Comer Circuit Court Judge

ATTEST:

Trish Peck Clerk of Courts



Deputy Clerk of Courts

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7



Fourth Judicial Circuit Court

Michelle K. Comer Circuit Court Judge P.O. Box 626 Deadwood, SD 57732 Phone: 605-578-2044 Fax: 605-578-3613 Sandra Semerad Court Reporter

May 20, 2021

Mr. Sabers Mr. Jones 2834 Jackson Blvd. Ste 201 Rapid City, SD 57702

Mr. Tim Barnaud 704 7th Avenue- Ste 201 PO Box 2124 Belle Fourche, SD 57717

Ms Stacy Hegge 111 W. Capitol Ave #230 Pierre, SD 57501

Dear Counsel:

A hearing was held on Plaintiff's Motion for Reconsideration on Wednesday May 19, 2021. Defense Counsel objected to the Motion for Reconsideration and moved that the record be stricken. Defendant reasoned that Plaintiffs arguments not be considered because it was new information different than the Plaintiff's original response to Defendant's Motion for Summary Judgment. The Court took the objection under advisement.

After, much consideration the Court will not reconsider the Defendant's Motion for Summary Judgment. Initially both Parties agreed that the divorce stipulation was unambiguous and was controlled by the four corners of the document.

The Court previously granted the Defendant's Motion for Summary Judgment finding the document unambiguous. The Court specifically notes that nowhere in the Stipulation is a reservation of any further claims. In fact, the Stipulation is replete with language that this was a release. Specifically but not limited to the provisions that Plaintff agrees to pay all of her medical bills for her treatment without reservation. Further, Plaintiff received a lump sum nonmodifiable alimony amount of \$750,000 "intended as a final adjustment of mutual rights and obligation and is an absolute judgment." Next, there is language under the heading "ENTIRE AGREEMENT" that this "constitutes the sole, exclusive and entire agreement between the parties....." Under the heading MODIFICATION AND PERFORMANCE of the Agreement the language provides "each party acknowledges that this Agreement has been entered into of his or her own volition, with full knowledge of the facts and full information as to the legal rights and liabilities of each. Each party believes the Agreement to be reasonable under the circumstances."

The Court stands by its previous Order Granting Summary Judgment to the Defendant. Due to this ruling it is unnecessary for the Court to make further ruling on the other motions.

Filed on:05/20/2021 Perkins

County, South Dakota 52 CIV 19-000031

Sincerely Mulle

Judge Michelle Comer 4th Circuit Judge

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT		
COUNTY OF BUTTE) SS.)	FOURTH JUDICIAL CIRCUIT		
JULIE SEIDEL, Plaintiff,	š)) Div. No. 17-32		
vs.		PROPERTY DISTRIBUTION AND		
RICHARD SBIDBL, Defendant.		DIVORCE AGREEMENT)		

COMES NOW, Richard Seidel ("Richard") and Julie Seidel ("Julie") the above-named parties, and do hereby stipulate and agree as follows, intending the following Property

Distribution and Divorce Agreement ("Agreement") to be an Agreement for a divorce and the division of all property owned by the above-named parties.

WITNESSETH:

The parties hereto, being lusband and wife, and being unable to continue such relationship, hereby agree to an immediate separation and that Julie shall be granted a Judgment of Divorce on the grounds of Richards's adultery, and further agree to a full, complete and final property settlement of all the property of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of the Defendant either now held or afterwards acquired; and that the Richard shall have no claim against any property of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of all the property rights of the parties. It is hereby specifically agreed and understood as follows:

- CHILDREN: The parties have no minor children.
- 2. PERSONAL PROPERTY:



- A. The parties acknowledge that they have fully informed the other of the existence, nature and extent of the personal property owned either jointly or severally by them, and that they have agreed on a fair and equitable division of property.
- B. Richard shall be entitled to possession and title to the items listed in Richard's column on the attached PROPERTY EXHIBIT A.
- C. Julie shall be entitled to possession and title to the items listed in Julie's column on the attached PROPERTY EXHIBIT A.
- D. Richard shall pay Julie a property equalization payment of one million twenty five thousand dollars (\$1,025,000.00). Of this amount, \$25,000.00 shall be paid concurrent with signing of this Agreement. The remaining \$1,000,000.00 shall be paid on or before January 31, 2019. If Richard fails to pay such amount within the time period specified it shall accrue interest at the category b statutory interest rate of ten percent simple. Such interest shall in no way prevent Julie from seeking any other type or kind of remedy associated with collection of such amount. The parties agree that the timely payment of such equalization payment is a material factor in the entering into of this Agreement. The parties agree that this property division payment shall not be considered alimony, but rather shall constitute a Section 1041 tax free transfer under 26 U.S.C. §1041.
- E. The parties own certain personal items and furniture that is located in a home (the "Hitzel" house or property) which is owned by RJ Seldel, Corporation. Unless set forth otherwise herein, Richard shall be entitled to ownership and possession of all furniture and personal property located in the "Hitzel" property.



- F. Unless set forth otherwise herein, Julie shall be entitled to ownership and possession of all furniture and personal property located in the "Arizona House", which real property will also be transferred to Julie as further set forth below in this Agreement
- G. If located, Richard shall provide Julie with the scrap-booking materials that have been requested
- H. The parties continue to have a 529 College account for their adult child, Madelyn. The amount of \$9,821 remains in such account. Richard shall continue to have control over this account but shall have an obligation to account for all such funds. The account shall be used for reimburse for college or other post-secondary education that qualify under the plan. The bills or invoices shall be presented to either Richard or Julie. Payment by Richard shall occur within 20 days after presentation of the bill. In the event that Madelyn does not utilize all of the funds for college or other post-secondary education purposes, the remaining amount less the tax liability shall be distributed to Madelyn no later than four years after this Agreement is reached.
- I. The parties shall cooperate, through their attorneys, in making the designated personal and real property available to the other party. Each party shall make arrangements to obtain their property on or before May 1, 2019.
- I. The parties have divided all other personal property. By the inclusion of this Agreement in the Judgment and Decree of Divorce, each party shall be awarded the property each party respectively is in possession of as of the date and signing of this Agreement. The exception to this is the personal property located at the Hitzel property, which Julie shall remove, and have the parties children remove, no later than December 21, 2018.

3. REAL ESTATE:

All

The parties personally own four tracts of real property which include the following:

Series,

1) Bison Land - 160 acres;

Township 18 North Range 15 B BHM. Perkins County, SD

Section 16: NW1/4 Less Highway Lot H1

Richard shall receive full title and ownership of the Bison Land. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement.

Richard shall be responsible for all mortgage, taxes, insurance, utilities, and maintenance of this property.

2) Miller Land;

Township 18 North Range 12 East BHM, Perkins County, SD

Section 19: Government lots 1, 2, 3, and 4;

E1/2W1/2; and NE1/4.

Richard shall receive full title and ownership of the Miller Land. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement.

Richard shall be responsible for all taxes, insurance, utilities, and maintenance of this property.

3) New Lelpzig Bulk Plant property;

West Seventy-five (75) Feet of Lot Four (4), Block Three (3), Railway Second Addition, City of New Leipzig, Grant County, North Dakota.

It consists of real and personal property located upon the above described real property.

Richard shall receive full title and ownership of the New Leipzig Bulk Plant. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement. Richard shall be responsible for all taxes, insurance, utilities, and maintenance of this property.

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4) Bison Lot;

Township 18 North Range 13 East BHM, Perkins County, SD

Section 13: Block X of Tract D of Outlot 27X of the Northeast Quarter, the same being a tract of land 140' x 310'.

Richard shall receive full title and ownership of the Bison Lot. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement. Richard shall be responsible for all mortgage, taxes, insurance, utilities, and maintenance of this property.

4. MARITAL BILLS AND OBLIGATIONS:

Richard shall be responsible for the following personal debt for so long as any balance remains owing and agrees to both hold harmless, and indemnify, Julie from the following personal debts and liabilities, to include but not be limited to any attorney's fees and costs incurred in any action regarding any of the liabilities identified below:

- The full amount owing to Farm Credit Services secured by the Miller Land and Bison Land;
- The full amount owed on Capital One Credit Card ending in 3570. Upon payment in full, this account shall be closed. Richard shall receive all reward points on this card;
- 3. The full amount owed to Bison Grain Corp. for crop services or any other services which exist as of the date of the signing of this Agreement;
- 4. All debt held solely in Richard's name including but not limited to all credit cards, lines of credit, or other revolving loan payments.

Julie shall be responsible for the following debt for so long as any balance remains owing and agrees to both hold harmless, and indemnify, Richard from the following personal debts and liabilities, to include but not be limited to any attorney's fees and costs incurred in any action regarding any of the liabilities identified below

- All debt held solely in Julie's name unless set forth otherwise herein, including butnot limited to credit cards;
- 2. All medical bills incurred for treatment to Julie;





3. Full amount owed to Ally Financial for auto loan co-signed with daughter, Beth. Any debts or obligations incurred prior to or subsequent to the parties' separation and not set forth herein shall be the solely responsibility of the party who incurred the same, which party hereby covenants to hold the other harmless therefrom.

As to the Issue of health insurance, Richard shall continue to maintain and pay for the parties' children's health insurance for so long as Richard's plan permits the children to be covered under Richard's insurance. This obligation shall end no later than a child reaching age 26. Julie has heretofore been provided health insurance coverage as a spouse of a "covered employee" under Bison Grain Company's group health insurance plan. Pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and acts amendatory thereto, Julie is entitled to certain notice and rights of continued coverage as set forth in the Act. Divorce constitutes a "qualifying event" for the former spouse of a covered employee and notification of rights must be given as provided by federal law. Julie is responsible for notifying the employer's plan administrator that a "qualifying event" has occurred and the parties agree that the signing of this Stipulation qualified as such notice. Richard shall take all reasonable steps to ensure that timely notification is provided to the employer's plan administrator and that the requirements of federal law and regulation are met in compliance with Julie's rights under COBRA.

5. BISON GRAIN COMPANY (BGC):

The parties hold a majority interest in Bison Grain Company, Richard owns 4,768 shares solely in Richard's name. Julie owns 400 shares solely in Julie's name. The parties jointly own 131 shares. Richard shall retain all shares held solely in Richard's name as well as his interest in all jointly owned shares. Julie shall transfer her 400 shares in BGC along with her interest in

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the jointly owned shares in BGC to BGC. In exchange, Julie shall receive the Escalade and Yukon in addition to real property legally described below (the Arizona House):

Sec / Lot 82, Seville Parcel 29 MCR 774-39

And has a physical address of 3383 East Sports Drive, Gilbert, AZ. Julie shall also receive the home furnishings in the AZ house. The parties agree that a material consideration to this Agreement is that Julie shall have no income tax liability for this initial transfer. Richard agrees that any tax liability that arises for Julie from such initial transfer will either be borne by BGC or that he will personally hold harmless, indemnify, and pay Julie any tax liability that could arise as a result of the transfer of this Arizona property to Julie. Any subsequent tax consequences that may arise based upon Julie decision to sell such Arizona property shall be Julie's responsibility.

Concerned with execution of this Agreement, Richard shall cause a deed to be transferred to Julie from BGC. Commencing January 1, 2019, Julie shall be responsible for all taxes, utilities, maintenance, and insurance on the Arizona House. Richard affirms, however, that BGC has paid the existing property taxes due and that the next property tax payment would not be due until 2019. Further, Richard shall provide Julie with contact information for the lawn, pool service, and other maintenance persons known to Richard. He will also provide Julie with all known passwords associated with the wireless system that controls some of the home utilities as well as any other reasonable and necessary information incidental to ownership of the same. Once the stock transfer occurs, Julie shall have no further liability for any BGC debt or obligations and Richard agrees that he will hold harmless and indemnify, including attorney's fees and costs, Julie from any such liabilities as well as any actions or claims which could or may arise out of the same. It is the intent and purpose of this provision and section that Julie shall divest herself of all ownership interest, if any, in the above named entity (BGC) and enterprises

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in favor of Richard, subject to any and all debt, obligation, or liability, whether personal or otherwise, related to such entities and enterprises, which Richard shall assume as his separate responsibility. Further, in the event any corporate debt, obligation, or liability shall identify Julie as an obligor, debtor, or guarantor, Richard shall cause Julie's name to be removed from any such indebtedness, obligation, or liability upon the renewal of each debt and no later than December 1, 2020. Under no circumstances shall Julie be responsible for any business debt, obligation, or liability, including federal, state, or local taxes related to BGC. By this provision, Julie hereby resigns and withdraws any position she may have heretofore held as an officer, director, employee, or agent of BGC and makes no claim for damages or compensation related thereto.

6. RISEIDEL, CORPORATION:

Richard and Julie equally own all shares in RJ SEIDEL, CORPORATION. ("RJ"). Julie shall transfer her shares in RJ to Richard. After such transfer of shares occurs, Julie shall receive the 2016 Chevy Silverado and stock trailer from RJ. The parties agree that Julie shall have no income tax liability for these initial transfers from RJ and Richard agrees that if any tax liability arises for Julie from such transfer it will either be borne by RJ or that he will personally hold harmless, indemnify, and pay Julie any tax liability that could arise as a result of the transfer. Julie shall be responsible for all subsequent tax consequences. Richard and / or RJ shall retain all ofher assets owned by RJ unless set forth otherwise herein. Julie shall provide Richard with all corporate books including but not limited to the stock certificates, bylaws, and articles. Once the stock transfer occurs, Julie shall have no further liability for any RJ debt or obligations.

It is the intent and purpose of this provision and section that Julie shall divest herself of all ownership interest, if any, in RJ in favor of Richard, subject to any and all debt, obligation, or



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Filed: 12/3/2018 6:95 PM CST Butte County, South Dakota 09DIV17-000032

liability, whether personal or otherwise, related to such entities and enterprises, which Richard shall assume as his separate responsibility. Further, in the event any corporate debt, obligation, or liability shall identify Julie as an obligor, debtor, or guarantor, Richard shall cause Julie's name to be removed from any such indebtedness, obligation, or liability upon the renewal of each debt and no later than December 1, 2020. Under no circumstances shall Julie be responsible for any business debt, obligation, or liability, including federal, state, or local taxes related to RJ. By this provision, Julie hereby resigns and withdraws any position she may have heretofore held as an officer, director, employee, or agent of RJ and makes no claim for damages or compensation related thereto.

7. LUMP SUM NON-MODIFIABLE ALIMONY:

As for spousal support, Richard shall pay to Julie Jump-sum, non-modifiable alimony in the gross total amount of \$750,000.00 to be paid in installment payments. Based on South Dakota law, this is intended as a final adjustment of mutual rights and obligation and is an absolute judgment. Such lump sum non modifiable alimony shall be paid in one hundred twenty (120) consecutive monthly installment payments each in the amount of \$6,250.00 due on or before the 1st day of each month commencing on November 1, 2018. Such alimony obligation shall not bear interest so long as it is timely and fully paid on a monthly basis. All such payments shall be made in direct deposit form and by electronic funds transfer into an account specified by Julie. Such alimony shall be taxable to WIFE in accordance with 26 U.S.C. Sec. 71 and deductible to HUSBAND in accordance with 26 U.S.C. Sec. 215. It is expressly understood and agreed by the parties that the taxability and deductibility of the alimony payments shall be determined by the actual installment payments paid and received in the taxable year. The alimony described herein shall not cease or terminate upon the death or disability of Richard nor

636



shall it cease or terminate upon the remarriage or cohabitation of Julie and shall be paid to either.

Julie as provided for herein or to her estate. The fact that the parties have agreed to hump sum,
non-modifiable alimony in the gross amount identified above is a material consideration to
entering into this Agreement.

The total gross amount of lump sum non-modifiable alimony in the amount of \$750,000.00 shall be secured by a letter of credit obtained by Richard from Bison Grain Company. The letter of credit shall be a non-revocable. This letter of credit shall guarantee Richard's obligation to Julie to pay the lump sum alimony identified above. An updated letter of credit may be supplemented annually, with the guaranteed amount being reduced commiserate with the installment payments made by Richard. Nothing about this letter of credit shall in any way prohibit, hinder, or limit Julie's right to seek enforcement or collection of the remaining amount due and owing from either Richard or Bison Grain should payment not be made pursuant to the terms of this Stipulation. If Julie is required to make any such claim, or to initiate any type of action, Richard agrees that he shall be responsible for the payment of the reasonable attorney's fees and costs incurred by Julie in having to either make a claim, or initiate any type of action, associated with collection of the remaining amount of the total gross sum of lump sum alimony as identified above.

8. INCOME TAX RETURN:

The parties shall file separately for 2018 and all subsequent tax years. Julie shall be responsible for taxes owed on her personal employment and income received from BGC.

Richard shall be responsible for all taxes owed on his employment income, farm income, and the RJ and BGC distributions and gains which were issued or made to either party in 2018. The purpose of this provision is to make certain, when read in coordination with all other provisions

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of this Stipulation, that Julie shall receive the property equalization payment, personal and real property, and other assets without tax liability. The parties contemplated, in reaching the amount of the property equalization payment, as well as the division of various real and personal property, that Julie would receive such items without a tax liability associated with the same. As set forth herein, and other than Julie's personal income and income from BGC, the parties agree that any other tax liability that is ultimately imposed upon Julie from the initial transfers identified in this Agreement shall be paid by Richard and that Richard shall further indemnify and hold harmless, including attorney's fees, Julie from any such tax claims.

9. PENSION AND RETIREMENT:

Richard has retirement plans through Dreyfuss, First Interstate, and Thrivent. Richard shall retain his retirement plans free and clear of any claim by Julie

Julie has retirement plans through Thrivent Financial. Julie shall retain her retirement plans free and clear of any claim by Richard.

Each party hereto waives, releases and relinquishes any and all rights that he or she may have or may hereafter acquire to the retirement and/or pension plans or funds in which either party may now or hereafter acquire, unless set forth above.

10. WAIVER OF ESTATES:

That except as otherwise set forth in this Agreement, Plaintiff and Defendant hereby mutually release and waive any and all right, title and interest accruing by operation of law or under any statute now or hereafter enforced, or otherwise, to participate in the separate estates and property of each other, whether such property be real or personal or wheresoever located, and whether acquired before or subsequent to their marriage, and whether acquired before or subsequent to the date hereof, including any right of election to take against any last will and

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testament of each other, and any right to the administration of the estate of each other, except only as provided by will or codicil executed after the date of this Agreement.

11. WAIVER OF DISCOVERY:

Both parties acknowledge that they have been fully advised that depositions, interrogatories, and requests for admissions may be served upon the other party, or taken, in order to more fully determine and make a record of their respective property rights and interests.

The parties have conducted discovery and hereby waive any right to pursue further discovery.

12. WAYVER AND INCORPORATION:

Each of the parties hereto hereby waives findings of fact and conclusions of law in this action, and further waives any notice of hearing or notice of trial herein, and consents to the entry of a Judgment and Decree of Divorce without further notice, upon the Court's determination that there is a just cause for divorce existing in the moving party's favor.

It is further stipulated and agreed by and between the parties hereto that all provisions of this Agreement shall be incorporated by reference into any Decree of Divorce which may be issued herein; and that if the Court refuses to accept any part or paragraph of this Agreement or wishes to modify the same, this Agreement shall be deemed null and void by the parties hereto and no Decree of Divorce may be entered by default herein without Notice of Application of Default Judgment and completion of all of the requirements of iaw relative to the taking and entry of a default judgment, and to this end, the provisions of this Agreement are not deemed to be severable.

13. FULL DISCLOSURE:

The parties agree, represent, and warrant to the other that each party has made a full and complete disclosure of all financial matters, and that no assets or liabilities have been secreted or

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hidden from the other party. Each party has had full opportunity to review the terms and conditions contained herein.

14. MILITARY SERVICE:

Neither of the parties is serving on active duty in the armed forces of the United States and/or its allies and neither party claims any rights or privileges under the Service Members' Civil Relief Act as amended (50 U.S.C. App. s. 501 et seq.).

OTHER INSTRUMENTS:

Both of the parties hereto agree to execute any and all formal documents which may be necessary and needed in order to effectuate the purposes of this Agreement, including instruments of waiver, renunciation, release transfer or conveyance. Bach party shall provide the other with any designated vehicle titles. The receiving party shall be responsible for transferring the title into his/her name within five days of receipt of the Title. The receiving party shall be responsible for the cost of transfer of the title and payment of licensing and transfer taxes/fees. Pive days after provided to the receiving party, the providing party may cancel insurance on the transferred vehicles.

16. ATTORNEY'S FEES:

Each party shall pay their own attorney's fees.

RESTORATION OF MAIDEN NAME

The parties agree that Plaintiff shall be restored to her maiden name of Julie Niemitalo and that the Judgment and Decree of Divorce so shall state the same.

18. ENTIRE AGREEMENT:

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The parties hereto agree that this Property Distribution and Divorce Agreement constitutes the sole, exclusive and entire Agreement between the parties hereto; and that there are

no other oral or collateral agreements existing between them. To this end, the parties hereby agree and declare that this Agreement shall supersede all prior written or contemporaneous oral agreements between them.

19. BINDING EFFECT:

This Agreement shall bind and inure to the benefit of the parties and their respective heirs, assigns, next of kin, devisees, legatees, executors, administrators and assigns.

20. INDEMNIFICATION:

The Plaintiff agrees to hold the Defendant harmless from any and all indebtedness hereby assumed by the Plaintiff. Should the Defendant become obligated and make payment upon any of said indebtedness, the Plaintiff agrees to pay to the Defendant that amount which the Defendant was obligated to expend toward the indebtedness assumed by the Plaintiff, said payment to be made upon demand. Similarly, the Defendant agrees to hold the Plaintiff harmless from any and all indebtedness hereby assumed by the Defendant. Should the Plaintiff become obligated and make payment upon any of said indebtedness, the Defendant agrees to pay to the Plaintiff that amount which the Plaintiff was obligated to expend toward the indebtedness assumed by the Defendant, said payment to be made upon demand. Nothing about this paragraph otherwise limits or modifies the obligations of Richard to Julie as otherwise set forth in this Agreement.

21. MODIFICATION AND PERFORMANCE OF THE AGREEMENT:

This Agreement shall not be modified or annulled by the parties hereto except by a written instrument, executed in the same manner as this instrument. The failure of either party to insist upon the strict performance of any provision of this Agreement shall not be deemed as a waiver of the right to insist upon the strict performance of any other provision of this Agreement

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at any other time. Any breach of any of the terms and conditions of this Agreement shall be deemed to be a breach of the entire Agreement. The obligations incurred under this Agreement may be enforced by specific performance.

Each party acknowledges that no representations of any kind have been made to him or her as an inducement to enter into this Agreement other than the representations set forth herein, and that this Agreement contains all of the terms of the contract between the parties. Each party acknowledges that this Agreement has been entered into of his or her own volition, with full knowledge of the facts and full information as to the legal rights and liabilities of each. Each party believes the Agreement to be reasonable under the circumstances.

22. REPRESENTATION:

Plaintiff is represented by Attorney Michael Sabers. Defendant is represented by Attorney Ronda Miller. Both parties have been advised that they should seek the advice of an accountant regarding all tax issues related to this matter and both parties have either sought the advice of an accountant regarding all Issues related to this matter or have had the opportunity to do so. Based on such, the parties agree and understand that certain tax liabilities or risks may be inherent to this Agreement as provided for herein and that each party agrees to assume those risks associated with the same.

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Julio Stidel

State of South Dakota

) ss.

County of Tennington

On this the <u>S</u> day of <u>Decamber</u>, 2018, before me the undersigned Notary Public, personally appeared Julie Seldel, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same for the purposes therein contained.

In Wilmess Whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

My Commission Exp:_

My Commission Expires



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Richard Soidel

State of Joseph) ss.

On this the Bridgy of ________, 2018, before me the undersigned Notary Public, personally appeared Richard Seidel, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal

(SEAL)



My Commission Exp:_

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PROPERTY EXHIBIT A SEIDEL V. SEIDEL

	ltem	Richard	Julie
_	All Bank Accounts held in Richard's name	X	
	All Bank Accounts held in Julie's name		x
-125	Jt. Bank Account	х	
	Crops	x	
	vacant mobile home in Bison	х	
	02 Corvette	х	
	1990 Corvette		x
	Transam (02' Pontiac)		x
	05 Harley Davidson	x	
	13 Avalanche		x
	Horses		x
	93' Kawasaki	х	
	05' Boat Baha and Trailer	x	
	1984 8x12 Circle L Trailer		x
	GUNS .		
	Ruger Red Hawk	X	
	Pollet gun Rifle	х	
	Walthers 22	x	
	Ruger 380	X	
	3 rifles	X	
	22 pistol	X	

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STATE OF SOUTH DAKOTA))SS:	IN CIRCUIT COURT
COUNTY OF BUTTE)	FOURTH JUDICIAL CIRCUIT
JULIE SEIDEL,)	09DIV17-000032
Plaintiff,))
v,)	JUDGMENT & DECREE
RICHARD SEIDEL,)	OF DIVORCE
Defendant.)	

This matter came before the Honorable Circuit Court Judge Michael Day on the __4th day of __December__, 2018, via a Property Distribution and Diverce Agreement (*PDDA**) as well as Affidavits of Jurisdiction of the parties. Plaintiff and Defendant both appeared by way of the referenced Affidavits of Jurisdiction and have waived Findings of Fact and Conclusions of Law through the Affidavits and terms of the PDDA. The Plaintiff was represented by attorney of record Michael K. Sabers and the Defendant was represented by his attorney of record Ronda Miller.

It appears to the Court that the Summons and Complaint were properly served, as shown by the service documents on file herein, and more than sixty days have elapsed since such service and that the Court has jurisdiction of this matter and the parties. The parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence and which appears to be a fair and equitable adjustment of the property rights of the parties. The Court finds that the parties have stipulated to grounds for divorce based on Defendant's adultery. Therefore, based upon the PDDA, and the record in this matter, it is hereby:

ORDERED, ADJUDGED AND DECREED that the marriage heretofore existing between the parties be, and the same hereby is, dissolved and set aside, and that the parties be, and each of them is, restored to the status, conditions and rights of single persons and that each party is hereby granted an absolute divorce from the other on the grounds of Defendant's adultery; and it is further

Filed on: 12/04/2018 BUTTE County, South Dakota 09DIV17-000

ta 52CIV19-000031

EXHIBIT

Filed: 3/31/2021 5:01 PM CST Perkins County, South Dakota

ORDERED, ADJUDGED AND DECREED that the PDDA signed by the Plaintiff on the 3rd day of December, 2018 and by the Defendant on the 30th day of November, 2018, which is filed in the Court File, be and hereby is incorporated into this Judgment and Decree of Divorce as is set forth in its entirety herein and shall be enforceable as an Order and Judgment of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff, based upon her request, is hereby returned to her maiden / former name known as Julie Niematalo. Plaintiff's date of birth is December 6^{th} , 1964; and it is further

ORDERED, ADJUDGED AND DECREED that each party shall, at the request of the other, execute and deliver any such instruments as may be required in order to carry out the intentions and provisions of this Judgment and Decree of Divorce and the PDDA incorporated herein. In the event either party shall fail to execute deeds, titles, or other appropriate instruments of conveyance as required by this Judgment and Decree of Divorce, this Judgment shall not in lieu of such conveyance; and it is further

ORDERED, ADJUDGED AND DECREED that as may be necessary, this Court will enter any such further Orders as may be needed to carry out the terms and conditions of the PDDA which is incorporated herein.

Dated this 4th day of December , 2018.

BY THE COURT:

Signed: 12/4/2018 9:11:02 AM

Honorable Judge Michael Bay

Circuit Court Judge

Altest: Schmoker, Laura Clerk/Deputy



(SEAL)

STATE OF SOUTH DAKOTA))SS:	IN CIRCUIT COURT
COUNTY OF BUTTE)	FOURTH JUDICIAL CIRCUIT
JULIE SEIDEL,) • 09DIV17-000032
Plaintiff,)
V.) AMENDED JUDGMENT
RICHARD SEIDEL,) & DECREE OF DIVORCE
Defendant.))

This matter came before the Honorable Circuit Court Judge Michael Day on the 4th day of December, 2018, via a Property Distribution and Divorce Agreement ("PDDA") as well as Affidavits of Jurisdiction of the parties. Plaintiff and Defendant both appeared by way of the referenced Affidavits of Jurisdiction and have waived Findings of Fact and Conclusions of Law through the Affidavits and terms of the PDDA. The Plaintiff was represented by attorney of record Michael K. Sabers and the Defendant was represented by his attorney of record Ronda Miller.

It appears to the Court that the Summons and Complaint were properly served, as shown by the service documents on file herein, and more than sixty days have elapsed since such service and that the Court has jurisdiction of this matter and the parties. The parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence and which appears to be a fair and equitable adjustment of the property rights of the parties. The Court finds that the parties have stipulated to grounds for divorce based on Defendant's adultery. Therefore, based upon the PDDA, and the record in this matter, it is hereby:

ORDERED, ADJUDGED AND DECREED that the marriage heretofore existing between the parties be, and the same hereby is, dissolved and set aside, and that the parties be, and each of them is, restored to the status, conditions and rights of single persons and that each party is hereby granted an absolute divorce from the other on the grounds of Defendant's adultery; and it is further

Filed on: 3/15/2019 BUTTE

County, South Dakota 09DIV17-00

EXHIBIT PAPP 1/26

Filed: 3/31/2021 5:01 PM CST Perkins County, South Dakota

ORDERED, ADJUDGED AND DECREED that the PDDA signed by the Plaintiff on the 3rd day of December, 2018 and by the Defendant on the 30th day of November, 2018, which is filed in the Court File, be and hereby is incorporated into this Judgment and Decree of Divorce as is set forth in its entirety herein and shall be enforceable as an Order and Judgment of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff, based upon her request, is hereby returned to her maiden / former name known as Julie Niemitalo. Plaintiff's date of birth is December 6th, 1964; and it is further

ORDERED, ADJUDGED AND DECREED that each party shall, at the request of the other, execute and deliver any such instruments as may be required in order to carry out the intentions and provisions of this Judgment and Decree of Divorce and the PDDA incorporated herein. In the event either party shall fail to execute deeds, titles, or other appropriate instruments of conveyance as required by this Judgment and Decree of Divorce, this Judgment shall act in lieu of such conveyance; and it is further

ORDERED, ADJUDGED AND DECREED that as may be necessary, this Court will enter any such further Orders as may be needed to carry out the terms and conditions of the PDDA which is incorporated herein.

Dated this 13th day of March, 2019 mino pro tune December 4th, 2018.

BY THE COURT:

Signed: 3/16/2019 11:23:22 AM

Honorable Judge Michael Day

Circuit Court Judge

ATTEST:

Clerk of Courts

Attest: Brill, Klmberly Clerk/Deputy

(SEAL)

Deputy

Filed on: 3/15/2019 BUTTE

County, South Dakota 09DIV17-000032

Filed: 3/31/2021 5:01 PM CST Perkins County, South Dakota 52C(V19-00031

STATE OF SOUTH DAK		IN CIRCUIT COURT	
COUNTY OF PERKINS) SS.)	FOURTH JUDICIAL (CIRCUIT
STATE OF SOUTH DAK	OTA,	PILE NO: CRI 17-34	
Piai	ntiff,)	VERDICT	
vs.	į	· minici	
RICHARD SEIDEL,)		*16*
Defe	endant.		LED
We, the jury, find the Defe	ndant, RICHARI	AT THE TIME THE PARTY.	L 2 6 2019 UNIFIED JUDICIAL SYSTEM INTOLERICOF COURT
As to the offense charged in the Indictment:		By	AT OLERACOF COURT
Please check only one)	NOT GUILTY	of COUNT 1: KIDNAPPING - 1 ST	DEGREE
-	GUILTY, of C	DUNT 1: KIDNAPPING – 1 st DEGI	REE
In the ALTE	RNATIVE:		
(NOT GUILTY.	of COUNT 2: KIDNAPPING – 1 st i	DEGREE
	GUILTY, of Co	UNT 2: KIDNAPPING – 1 st DEGI	REE
	NOT GUILTY,	of COUNT 3: SECOND DEGREE 1	RAPE
X	GUILTY, of CO	UNT 3: SECOND DEGREE RAPE	ŗ
NOT GUILTY, of COUNT 4: COMMISSION OF FELONY WHILE ARMED WITH FIREARMS			
	GUILTY, of CO ARMED WITH	UNT 4: COMMISSION OF FELOI FIREARMS	NY WHILE
	NOT GUILTY, DOMESTIC VI	of COUNT 5: AGGRAVATED A	SSAULT -
X.,	GUILTY, of COMESTIC VI	COUNT 5: AGGRAVATED AS DLENCE	SSAULT -
Dated this 26 day	of July Fo	Marie M. On dess, reperson	n)



STATE OF SOUTH DAKOTA))SS	IN CIRCUIT COURT
COUNTY OF PERKINS)	FOURTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA, Plaintiff, -vs)	CRI 17-34
RICHARD SEIDEL, Defendant.)	JUDGMENT OF CONVICTION AND SENTENCE

A Criminal Indictment was filed with this Court charging the Defendant with the crimes of Count I: Kidnapping – 1st Degree, SDCL 22-19-1(2), or in the alternative, Count II: Kidnapping – 1st Degree, SDCL 22-19-1(3); Count III: Rape – 2nd Degree, SDCL 22-22-1(2); Count IV: Commission of Felony While Armed with Firearms, SDCL 22-14-12; and Count V: Aggravated Assault – Domestic Violence, SDCL 22-18-1.1(8), committed on or about the 2nd day of November, 2017. The Defendant was arraigned on said Indictment on the 19th day of December, 2017. The Defendant and the Defendant's attorney, Timothy J. Rensch, appeared and Shane C. Penfield, prosecuting attorney, appeared at the Defendant's arraignment. The Court advised the Defendant of all constitutional and statutory rights pertaining to the charges that had been filed against the Defendant. The Defendant pled not guilty to all charges contained in the Indictment.

A jury trial was held July 22nd, 2019 through July 26th, 2019, the Honorable Eric J. Strawn presiding. The Defendant and the Defendant's attorney, Timothy J. Rensch appeared, and Shane C. Penfield, Perkins County State's Attorney, and Scott A. Roetzel, South Dakota Assistant Attorney General, appeared at the Defendant's jury trial. The jury returned a unanimous verdict of guilty of Count II: Kidnapping – 1st Degree; a unanimous verdict of guilty of Count IV: Commission of Felony While Armed with Firearms; and a unanimous verdict of guilty of Count V: Aggravated Assault – Domestic Violence.

It is, therefore, the JUDGMENT of this Court that the Defendant is guilty of Count II: Kidnapping - 1st Degree in violation of 22-19-1(3); guilty of Count III: Rape - 2nd Degree, in violation of SDCL 22-22-1(2); guilty of Count IV: Commission of Felony While Armed

JUDGMENT OF CONVICTION AND SENTENCE Page 2

with Firearms, in violation of SDCL 22-14-12; and guilty of Count V: Aggravated Assault – Domestic Violence, in violation of SDCL 22-18-1.1(8), said offenses having been committed on or about the 2nd day of November, 2017.

SENTENCE

A sentencing hearing was held on the 5th day of November, 2019, the Honorable Eric J. Strawn presiding. The Defendant and the Defendant's attorney, Timothy J. Rensch, appeared and Shane C. Penfield, Perkins County State's Attorney, and Scott A. Roetzel, South Dakota Assistant Attorney General, appeared at Defendant's sentencing hearing.

The Court asked if any legal cause existed to show why judgment should not be pronounced. There being no cause offered, the Court thereupon pronounced the following sentence:

COUNT II: KIDNAPPING - 1ST DEGREE:

IT IS ORDERED that the Defendant, Richard Seidel, be incarcerated in the South Dakota State Penitentiary for a term of forty-five (45) years and receive credit for one hundred eleven (111) days previously served;

That the Defendant pay court costs in the amount of \$104.00 to the Perkins County Clerk of Courts;

That the Defendant pay prosecution costs in the amount of \$13,501.86 to the Perkins County Clerk of Courts;

That the Defendant pay \$6,175.69 to the Perkins County Clerk of Courts. The Clerk is authorized to distribute payment to Crime Victim Compensation Program, 118 West Capitol Avenue, Pierre, South Dakota, 57501.

COUNT III: RAPE - 2ND DEGREE:

IT IS ORDERED that the Defendant, Richard Seidel, be incarcerated in the South Dakota State Penitentiary for a term of twenty-five (25) years and receive credit for one hundred eleven (111) days previously served;

That the Defendant pay court costs in the amount of \$104.00.

IT IS FURTHER ORDERED that this sentence shall run consecutive to Count

Π.

COUNT IV: COMMISSION OF FELONY WHILE ARMED WITH FIREARMS:

IT IS ORDERED that the Defendant, Richard Seidel, be incarcerated in the South Dakota State Penitentiary for a term of five (5) years and receive credit for one hundred eleven (111) days previously served.

IT IS FURTHER ORDERED that court costs are hereby waived.

IT IS FURTHERED ORDERED that this sentence shall run consecutive to Count II and Count III.

COUNT V: AGGRAVATED ASSAULT - DOMESTIC VIOLENCE:

IT IS ORDERED that the Defendant, Richard Seidel, be incarcerated in the South Dakota State Penitentiary for a term of fifteen (15) years and receive credit for one hundred eleven (111) days previously served.

IT IS FURTHER ORDERED that court costs are hereby waived.

IT IS FURTHER ORDERED that this sentence shall run concurrent to Count II, Count III, and Count IV.

BY THE COURT:

Signed: 11/6/2019 11:51:27 AM

Attest: Peck, Trish Clerk/Deputy

ERIC J. STRAWN Circuit Court Judge

State v. Seidel

Supreme Court of South Dakota

August 24, 2020, Considered on Briefs; December 30, 2020, Opinion Filed #29182

Reporter

2020 SD 73 *; 953 N.W.2d 301 **; 2020 S.D. LEXIS 149 ***; 2020 WL 7779018

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, v. RICHARD <u>SEIDEL</u>, Defendant and Appellant.

Subsequent History: As Amended March 16, 2021.

Prior History: [***1] APPEAL FROM THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT PERKINS COUNTY, SOUTH DAKOTA. THE HONORABLE ERIC J. STRAWN Judge.

Disposition: Affirmed.

Core Terms

sentence, neck, zip, rape, asphyxiation, erotic, tie, defense counsel, marks, circuit court, kidnapping, gun, divorce, pickup, aggravated assault, closing argument, assault, bedroom, sex, law enforcement, firearm, wrists, grossly disproportionate, prosecutorial misconduct, commission of a felony, abuse of discretion, credibility, asserts, noticed, limine

Case Summary

Overview

HOLDINGS: [1]-The circuit court did not abuse its discretion when it granted the State's motion in limine regarding erotic asphyxiation during defendant's criminal trial because he was not prevented from presenting the central theory of his defense to the jury. Defense counsel was allowed, over the State's objection, to argue to the jury that the victim had consented to being bound; [2]-There was no error in denying defendant's motion for judgment of acquittal with regard to his kidnapping conviction under <u>S.D. Codified Laws § 22-19-1(3)</u> because there was sufficient evidence for the jury to conclude that defendant removed the victim from the business for the purpose of inflicting bodily injury upon her or to terrorize her.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Trials > Closing Arguments > Fair Comment & Fair Response

HN1[2 Closing Arguments, Evidence Not Admitted

In closing argument, counsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented. However, closing arguments are not evidence, and courts may limit arguments to the facts in evidence and reasonable inferences flowing therefrom.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Motions in Limine

HN2 Standards of Review, Abuse of Discretion

A circuit court's decision to grant the State's motion in timine is reviewed for an abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN3 2 Plain Error, Burdens of Proof

Under <u>S.D. Codified Laws § 23A-44-15</u>, plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court. To establish plain error, an appellant must show (1) error, (2) that is plain, (3) affecting substantial rights; and only then may the Supreme Court of South Dakota exercise its discretion to notice the error if (4) it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Criminal Law & Procedure > Trials > Closing Arguments > Evidence Not Admitted

Criminal Law &
Procedure > Appeals > Prosecutorial
Misconduct > Prohibition Against Improper
Statements

HN4[♣] Closing Arguments, Evidence Not Admitted

In closing argument, counsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented. Therefore, he or she may discuss the evidence, pointing out discrepancies and conflicts in the testimony, and argue that the evidence in the record supports and justifies a conviction. However, a prosecutor may not seek a conviction at any price. As such, prosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods.

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Perjury > Elements

HN5[♣] Perjury, Elements

Allegations of suborning perjury are serious and should only be made when based on a firm foundation.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of

Witnesses

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > Trials > Motions for Acquittal

Evidence > Weight & Sufficiency

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN6 2 Province of Court & Jury, Credibility of Witnesses

A denial of a motion for judgment of acquittal is reviewed de novo. In measuring the sufficiency of the evidence, the Supreme Court of South Dakota asks whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. It is well settled that the supreme court will not resolve conflicts in the evidence, assess the credibility of witnesses, or evaluate the weight of the evidence. Rather, the courts accept the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict. Moreover, the jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Evidence > Inferences & Presumptions > Inferences

HN7[&] Province of Court & Jury, Credibility of Witnesses

The Supreme Court of South Dakota will not set aside a jury verdict unless the evidence and all reasonable inferences to be drawn therefrom fail to sustain a rational theory of guilt. Moreover, when a conviction turns in large part upon the credibility of witnesses, a circuit court properly leaves to the jury the pervasive issue of credibility and considering the evidence as a whole.

Evidence > Weight & Sufficiency

HN8 2 Evidence, Weight & Sufficiency

The Supreme Court of South Dakota does not reweigh evidence or pass on the credibility of witness testimony.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law &
Procedure > ... > Appeals > Standards of
Review > Abuse of Discretion

HN9[2] Fundamental Rights, Cruel & Unusual Punishment

There are generally two types of sentence challenges an Eighth Amendment violation and an abuse of discretion.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

Criminal Law &
Procedure > Sentencing > Appeals > Proportionality
& Reasonableness Review

<u>HN10</u>[♣] Fundamental Rights, Cruel & Unusual Punishment

With regard to Eight Amendment challenges, in answering the threshold guestion of disproportionality the gravity of the offense refers to the offense's relative position on the spectrum of all criminality. Similarly, an examination of the harshness of the penalty looks to the penalty's relative position on the spectrum of all permitted punishments. This comparison rarely leads to an inference of gross disproportionality and typically marks the end of review. However, if the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then the Supreme Court of South Dakota will compare the sentence to those imposed on other criminals in the same jurisdiction as well as those imposed for commission of the same crime in other jurisdictions.

Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN11[2] Standards of Review, Abuse of Discretion

Before sentencing a defendant, the court is to acquire a thorough acquaintance with the character and history of the person before it. In doing so, the court should consider the defendant's general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime. Iife, family, occupation, and previous criminal record, as well as the rehabilitative prospects of the defendant. On appeal, the Supreme Court of South Dakota will reverse a sentence upon a showing of an abuse of discretion—a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.

Counsel: JASON R. RAVNSBORG, Attorney General, PAUL S. SWEDLUND, Assistant Attorney General, Pierre, South Dakota Attorneys for plaintiff and appellee,

TIMOTHY J. BARNAUD, Belle Fourche, South Dakota, Attorney for defendant and appellant.

Judges: DEVANEY, Justice, GILBERTSON, Chief Justice, and KERN, JENSEN, and SALTER, Justices, concur.

Opinion by: DEVANEY

Opinion

[**305] DEVANEY, Justice

[*P1] Richard *Seidel* appeals his convictions for kidnapping, rape, aggravated assault, and commission of a felony with a firearm. He claims that the circuit court abused its discretion in limiting defense counsel's closing argument; that the prosecutor engaged in misconduct during closing argument; and that the circuit court erred in denying his motion for judgment of acquittal. He also claims that his sentence is cruel and unusual in violation of the *Eighth Amendment*. We affirm.

Factual and Procedural Background

[*P2] J.S. separated from her husband, Richard Seidel, sometime in 2015 after he had an affair, and in September 2017, she filed for divorce. While they were separated, J.S. continued to work as a bookkeeper for a company owned by Richard—Bison [***2] Company. On November 2, 2017, when J.S. arrived at Bison Grain, Richard and an employee, Doug Lewton, were present. At around 11:45 a.m., Richard told Doug to take his lunch break "like [he] normally do[es]." Doug later explained that he thought Richard's statement was odd because he did not take a lunch break at a set time, but he nevertheless left Bison Grain. Richard disputes what happened next; however, we restate the evidence and testimony "in a light most favorable to the jury's verdict." See State v. Huber, 2010 S.D. 63, ¶ 2, 789 N.W.2d 283, 286.

[*P3] After Doug left, Richard and J.S. were alone at Bison Grain, and according to J.S., Richard asked her to help him process a transaction on the computer in the scale room. J.S. complied, and as she was typing, Richard slipped a zip tie **[**306]** around her neck, tightened it, and began choking her. She begged him to stop making it tighter. Richard then pushed J.S. to the ground and took her cell phone. J.S. blacked out shortly thereafter.

[*P4] When J.S. awoke, she realized she was on her stomach on the floor of the scale room and the zip tie was still around her neck. She noticed that she had urinated and defecated, and her wrists and ankles were bound with zip ties. J.S. saw that Richard had a [***3] gun, and she thought he was going to kill her. According to J.S., Richard stood her up and put her in the backseat of his pickup, after which she blacked out again.

[*P5] When J.S. awoke, she could hear the pickup traveling down a gravel road. Richard drove J.S. to their marital home outside of Bison where he continued to live after the couple had separated. He parked the pickup in the garage, then cut the zip tie from J.S.'s ankles and had her walk into the house while he pointed a gun at her back. As the two walked to the bedroom, J.S. noticed a white garbage bag with black draw strings on the kitchen counter. In the bedroom, J.S. noticed a rope tied to the bottom part of the headboard. Although Richard did not use the rope on J.S., she feared that he planned to rape and kill her.

[*P6] Once in the bedroom, Richard used a utility knife

to cut off J.S.'s coat, shirt, and bra. He also removed her jeans and underwear and took her into the master bathroom to shower and clean off the urine and feces. After the shower, Richard shaved J.S.'s pubic area with an electric razor. He then had J.S. perform oral sex on him at gunpoint. Next, he returned J.S. to the bedroom and bent her over the bed. She asked [***4] him to use a lubricant if he was going to do anything anally. J.S. explained that Richard used lubrication from a tube in a bag under the bed and penetrated her both vaginally and anally. During the anal penetration, J.S. defecated. which upset Richard, so he took her to the shower again. Afterward, Richard told her that she needed to listen to him about their divorce. J.S. promised that she would stop the divorce, hoping this would prevent Richard from killing her. Richard then appeared to calm down. He cut the zip ties from her wrists but reminded her he had a gun and told her to put on other clothing.

[*P7] J.S. walked from the bedroom to the laundry room to get dressed. At some point, she placed part of a zip tie that had been cut from her wrist on top of the refrigerator. According to J.S., Richard put her cut-up clothing in a white garbage bag and placed her underwear and the bedding in the washing machine. Thereafter, they left the house and drove to the airport where Richard stored his private plane. When they arrived, J.S. noticed that the door to the hangar was open and the blocks were removed from the plane's tires, neither of which were typical. At the airport, Richard cut the [***5] zip tie from J.S.'s neck and placed it in the white garbage bag. He got out of the pickup, taking the bag with him, and told J.S. to return in 20 minutes. He warned her that if she told the sheriff what happened he would shoot himself.

[*P8] J.S. left the airport in the pickup after she saw Richard fly away in the plane. She then went to Bison Grain to get her cell phone. J.S. sent a snapchat message to her daughter-in-law Kristen <u>Seidel</u> around 1:30 p.m. informing her that she was "scared" and if she was "not back by 2," Kristen should "come look for [her]." J.S. testified that she returned to the airport to pick up Richard and drove him to another house they owned by Bison Grain. She explained that after she dropped Richard off, he got into his Cadillac and drove off. In an attempt to have things appear [**307] normal, J.S. got into her own vehicle (a red dually pickup) and drove to the post office and bank.

[*P9] At approximately 1:50 p.m., J.S. returned to Bison Grain, and Kristen was there waiting for her. Kristen described J.S. as "pretty distraught" and noted

that she was crying, J.S. told Kristen what had happened. Despite Kristen's urging, J.S. resisted telling law enforcement, claiming she did [***6] not want Richard to kill himself. Doug came in from the shop at this point, and both he and Kristen convinced J.S. to report what had occurred. Kristen took J.S. to the police station in Doug's pickup because J.S. did not want Richard to see her pickup leave Bison Grain or see it parked outside the police station.

[*P10] J.S. was too afraid to go into the police station, so Kristen went inside. After learning that the sheriff was not in town, Kristen asked a deputy to speak to J.S. outside in Doug's pickup. When Deputy Matthew Kindsvogel first approached J.S., he observed that she was crying and frantic in her movements and that she had a red mark on her neck. The deputy recorded his conversation with J.S. wherein she related what Richard had done to her. Deputy Kindsvogel photographed the marks on J.S.'s neck, wrists, and elbow and determined that J.S. should be seen by medical personnel. Kristen then took J.S. to a medical clinic in Bison. A physician assistant at the clinic observed that J.S. had broken blood vessels in her eyes, petechiae (pinpointed, round spots caused by broken capillaries) on her right forehead, abrasions on her elbow, and ligature marks on her wrists and neck. He [***7] also observed that J.S. had bloody post nasal drip in her throat, and because of the trauma to her neck, he recommended that J.S. be taken to the emergency room at the hospital in Spearfish for an examination.

[*P11] At approximately 5:30 p.m., Kristy Schumacher, a nurse specially trained in conducting examinations of sexual assault victims, examined J.S. During her initial assessment, Nurse Schumacher observed a ligature mark on J.S.'s neck which had "several stripes going vertically within it" consistent with the teeth of a zip tie. She also observed that the whites of both of J.S.'s eyes were red from "hemorrhaging in the eye sclera." The nurse further observed broken capillaries on the right side of J.S.'s forehead and eye. Although the nurse did not observe visible injuries to J.S.'s vagina or anus, she noted that J.S.'s vaginal and anal openings were very tender based on J.S.'s reaction of holding onto the bed railing tightly and crying during the examination.

[*P12] While at the Spearfish hospital, Dr. Matthew Finke also examined J.S.'s injuries. Dr. Finke reported that J.S. had a subconjunctival hematoma on the lateral part of her left eye. He also reported that because of the hemorrhaging [***8] in her eye and J.S.'s reported tenderness around "the laryngeal cartilage, which is kind

of the Adam's apple" part of the neck, he ordered a CT angiogram of the head and neck to rule out airway and vessel issues. The test indicated normal vessels and no fracture of the laryngeal cartilage.

[*P13] After law enforcement's initial contact with J.S., officers located Richard as he was driving toward Bismarck, North Dakota. Law enforcement also obtained search warrants for Richard's residence. airplane, pickup, and Bison Grain. During a search of the residence, law enforcement found J.S.'s jeans and undergarments in the dryer and bed linens in the washing machine. They also found a bag containing sex paraphernalia and lubricant on a shelf in the closet of the master bedroom. Officers found a box of white garbage bags with black draw strings in a closet and a [**308] portion of a zip tie on the top of the refrigerator. Although the officers did not find the specific garbage bag taken by Richard when he flew away in his airplane, they did uncover a portion of a zip tie on the floor inside the plane. Various items were submitted for testing at the South Dakota Forensic Laboratory. Forensic examiners identified [***9] J.S.'s DNA on swabs from Richard's penis, from the partial zip tie located on top of the refrigerator, and from an electric razor head found in the master bathroom. They also determined that Richard could not be excluded as a source of the DNA obtained from the vaginal swabs collected from J.S.

[*P14] On November 14, 2017, a grand jury indicted Richard with alternative counts of kidnapping, and one count each of rape, aggravated assault, and commission of a felony with a firearm. He pled not guilty, and a jury trial was held on July 22-26, 2019. The State called numerous witnesses, including J.S., Kristen, Doug, multiple law enforcement officers, Dr. Finke, and Nurse Schumacher. Richard's defense theory centered on his claim that his entire interaction with J.S. on November 2 was consensual, including the sex acts. 1 Defense counsel's opening statement alluded to a history between Richard and J.S. of rough but consensual sex. Defense counsel called multiple witnesses to testify about J.S.'s demeanor and behavior within an hour of the alleged incident, and within several days and months after the incident, to suggest that her behavior was not consistent with someone who had been violently attacked [***10] and raped.

[*P15] After the State rested, Richard moved for

¹The trial transcript refers to "J.N." rather than "J.S." because by the time of trial, Richard and J.S. were divorced and she was no longer using her married name.

judgment of acquittal on all counts. The court denied the motion. Richard renewed the motion after the defense rested, but the court denied it again. Before closing argument, the State filed two motions in limine-one to preclude defense counsel from arguing that Richard and J.S. had engaged in consensual sex on the date in question, and the other to specifically preclude any mention of Richard and J.S. engaging in "erotic asphyxiation." The latter motion pertained to defense counsel's comment to the jury during his opening statement that Richard and J.S. had previously "engaged in something called 'erotic asphyxiation', where a person's breath is held by a small cord-type deal that was actually a pet collar to enhance an orgasm." The State asserted that defense counsel should be precluded from making such an argument in closing because no evidence had been admitted at trial to support this suggestion. The court denied the State's motion to preclude defense counsel from arguing the acts were consensual but granted the State's motion precluding defense counsel from referring to erotic asphyxiation.

[*P16] Ultimately, the jury found Richard **[***11]** guilty of first-degree kidnapping, rape, aggravated assault, and commission of a felony with a firearm. The circuit court sentenced him to 45 years for the kidnapping, 25 consecutive years for the rape, five consecutive years for the commission of a felony with a firearm, and 15 concurrent years for the aggravated assault.

[*P17] Richard appeals, asserting the following issues for our review:²

- 1. Whether the circuit court abused its discretion when it granted the State's motion in limine regarding erotic asphyxiation.
- [**309] 2. Whether prosecutorial misconduct occurred, depriving Richard of his right to a fair trial, 3. Whether the circuit court erred in denying
- Richard's motion for judgment of acquittal.
- Whether cumulative error occurred, denying Richard of his right to a fair trial.
- 5. Whether Richard's sentence is grossly disproportionate in violation of the <u>Eighth</u> Amendment.

Analysis and Decision

1. Whether the circuit court abused its discretion when it granted the State's motion in limine regarding erotic asphyxiation.

[*P18] Richard claims he "was deprived of a key argument in his case when the [circuit] court granted the State's motion in limine regarding erotic asphyxiation." He asserts that there was sufficient evidence [***12] in the record to allow the jury to consider this defense. In particular, he argues that the jury could have reasonably inferred that the marks on J.S.'s neck were the result of erotic asphyxiation because there was a lack of evidence, testimony or otherwise, to support J.S.'s claim that she was violently attacked. He also claims that the inference is reasonable because, in his view, the red marks on J.S.'s neck were not consistent with her claim that the zip tie was so tight that she blacked out, or with her claim that Richard cut the zip tie off with a utility knife.3 Finally, he asserts that although J.S. denied engaging in erotic asphyxiation on prior occasions, his contrary argument is supported by the bag of sex toys found in the Bison residence.4

[*P19] Richard posits his claim as a denial of his right to present his theory of the defense. However, the circuit court did not bar Richard from presenting evidence in support of his theory that J.S.'s injuries were the result of consensual sexual acts, nor did the court prohibit defense counsel from arguing the same. The court only precluded defense counsel from specifically referring to erotic asphyxiation. The court's ruling was based on [***13] a finding that there were no facts introduced at trial to support the suggestion that Richard and J.S. had engaged in erotic asphyxiation either before or during the charged offenses. The court noted that although "there was mention of sex toys . . . there was no buildup of facts with regard to previous uses of those items" or "any testimony with regard to [] the erotic asphyxiation."

[*P20] HN1[*] It is well settled that in closing

² Richard's counsel on appeal is different than his counsel at trial.

³ In response to similar arguments defense counsel made to the circuit court, the State pointed to defense counsel's failure to account for the fact that a gun was used, and that J.S. had passed out, had injuries to her neck, petechiae on her face, and blood in her eye. More importantly, the State noted that her wrists were bound and injured. The State asserted that defense counsel cannot "make up facts" or "throw things out to confuse the jury. [or] prejudice the jury."

⁴ The only identifiable items in a photo of the bag of sex toys introduced at trial are a dildo and a tube of lubricant.

argument, "[c]ounsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented." State v. Patterson, 2017 S.D. 64, ¶ 20, 904 N.W.2d 43, 50 (quoting State v. Smith, 1999 S.D. 83. ¶ 42. 599 N.W.2d 344, 353). However, [c]losing arguments are not evidence", see Smith, 1999 S.D. 83. ¶ 48, 599 N.W.2d at 354, and courts may limit arguments "to the facts in evidence and reasonable inferences flowing therefrom", see Richardson v. Bowersox, 188 F.3d 973, 980 (8th Cir. 1999) (citation omitted). [**310] HN2[1] We review the circuit court's decision to grant the State's motion in limine for an abuse of discretion. See Fix v. First State Bank of Roscoe, 2011 S.D. 80, ¶ 23, 807 N.W.2d 612, 619 (reviewing the court's evidentiary ruling related to closing argument for an abuse of discretion); State v. Bausch, 2017 S.D. 1, ¶ 12. 889 N.W.2d 404, 408 (reviewing an in limine ruling for an abuse of discretion).

[*P21] A review of the trial record supports the circuit court's observation that Richard did not present any evidence to support his erotic asphyxiation theory. The only mention of erotic asphyxiation [***14] during the entire trial was when defense counsel posed the following questions and received the following responses from J.S.:

Q: And you engaged in erotic asphyxiation because that's something the two of you had done before; isn't that true?

A: Never.

Q: And he used a small little cat collar around your neck that you wanted him to use; isn't that true?

A: No.

Q: And you're the one who brought those zip ties in there; isn't that correct?

A: No.

Richard did not testify at trial, so J.S.'s testimony denying such conduct was not refuted. Defense counsel tried to broach the general topic of erotic asphyxiation by asking Dr. Finke if "there are ways for people to engage in manual strangulation to enhance the sexual pleasure," but the State objected to the guestion as "[b]eyond the scope of this witness", and the court sustained the objection. Defense counsel was nevertheless allowed to elicit from Dr. Finke that he could not "tell by looking at a person's neck whether they engaged in the activity willingly or not[.] However, no witness provided testimony supporting a claim that Richard and J.S. had previously engaged in such willing activity, and defense counsel conceded in his argument to the [***15] court that he was "not allowed to talk about cat collars because that did not come in."

Because there was simply no evidence in the record from which the jury could reasonably infer that Richard and J.S. engaged in erotic asphyxiation, the court did not abuse its discretion in precluding such an argument.

[*P22] Despite the circuit court's ruling, defense counsel was allowed, over the State's objection, to argue to the jury that J.S. had consented to being bound. Counsel asserted that "one would not expect to see defensive marks . . . [b]ecause that would mean she was going along with it." He then noted that because there were no claw marks on J.S.'s neck and her long fingernails were all intact, the evidence suggested she was not being choked involuntarily. In addition, defense counsel pointed out that by the time the doctor saw J.S. later in the evening on the day of the alleged assault. the striation marks from the zip tie on her neck were no longer visible. In counsel's view, the fading marks would be "consistent with [J.S] going along with this." Finally, counsel pointed to the evidence in the record suggesting that J.S. had gone back to the marital home after the alleged assault and [***16] suggested this was inconsistent with someone who had just been raped at this location.5 Therefore, we conclude that Richard was [**311] not prevented from presenting the central theory of his defense to the jury.

2. Whether prosecutorial misconduct occurred, depriving Richard of his right to a fair trial.

[*P23] Richard contends the prosecutor committed misconduct during closing argument by telling the jury that Dr. Finke had testified it would not be possible for J.S. to inflict these wounds upon herself. Richard asserts this was a misrepresentation of the doctor's testimony. Richard also claims that the prosecutor "deceptively described" a letter Richard had written to J.S. by characterizing it "in a way that was likely to mislead the jury as to its contents." He acknowledges that the letter was admitted at trial, but claims the prosecutor committed misconduct because he "plainly insinuated that a letter tantamount to a confession was among the evidence in the record" when the letter "had

⁵ Defense counsel suggested that the reason J.S. went back to the house was to plant evidence, namely the zip tie on the refrigerator and a ziplock bag of bullets in the pocket of Richard's jeans found in a clothes hamper. The overarching theory of the defense was that J.S. engaged in all of these acts in order to use them as a basis for obtaining a more favorable divorce settlement or a monetary award against fitting a civil lawsuit.

barely been mentioned during the course of the trial, and its contents were never laid out for the jury[.] Finally, Richard asserts that the prosecutor knowingly proffered false testimony from J.S. about the gun [***17] she claimed Richard had used, and also proffered misleading testimony from J.S.'s divorce attorney regarding a civil suit she filled—after the trial was concluded—against Richard for the same acts for which he was being tried in the criminal case.

[*P24] Richard's trial counsel did not object to any of these alleged instances of prosecutorial misconduct. Richard therefore requests that we review these claims for plain error. HN3[*] Under SDCL 23A-44-15, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of a court." "To establish plain error, an appellant must show '(1) error, (2) that is plain, (3) affecting substantial rights; and only then may this Court exercise its discretion to notice the error if (4) it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Bausch. 2017 S.D. 1, ¶ 27, 889 N.W.2d at 412 (alteration in original) (quoting State v. Buchhold, 2007 S.D. 15, ¶ 22, 727 N.W.2d 816, 822).

[*P25] HN4[*] It is well established that in closing argument, "[c]ounsel has a right to discuss the evidence and inferences and deductions generated from the evidence presented." Smith, 1999 S.D. 83, ¶ 42, 599 N.W.2d at 353. Therefore, "[h]e or she may 'discuss the evidence, pointing out discrepancies and conflicts in the testimony, and argue that the evidence in the [***18] record supports and justifies a conviction[.]" Id. ¶ 46. 599 N.W.2d at 354 (citation omitted). However, a prosecutor "may not seek a conviction at any price." Id. ¶ 42. 599 N.W.2d at 353. As such, "[p]rosecutorial misconduct implies a dishonest act or an attempt to persuade the jury by use of deception or by reprehensible methods." State v. Bariteau. 2016 S.D. 57, ¶ 23, 884 N.W.2d 169, 177 (citation omitted).

[*P26] Here, a review of the record does not support Richard's characterization of the prosecutor's conduct, let alone show that prosecutorial misconduct occurred. First, the prosecutor did not misrepresent Dr. Finke's testimony. Rather, the prosecutor explained the doctor's responses to defense counsel's cross-examination regarding hypothetical scenarios where similar injuries could result from activities other than someone being unwillingly strangled.

[*P27] During trial, in response to defense counsel's question about kids holding their breath under water and

bursting blood vessels in their eyes, Dr. Finke stated, "I personally am not aware of that, but it could be possible." Defense counsel also [**312] asked Dr. Finke whether coughing, sneezing, or vomiting could burst a blood vessel in the eye, and he agreed that could happen. But on redirect, the State asked Dr. Finke if these types [***19] of activities would result in marks on the neck, and he responded, "No." During closing argument, the prosecutor's full commentary on Dr. Finke's testimony, without focusing solely on one statement in isolation, was as follows:

He testified about his examination of her, and he said that based on everything, even looked at the video - - or the picture, which he said he didn't recall from that day, is consistent with a sexual assault and consistent with manual strangulation. But what he also said is, "You can't do that to yourself." Petechiae in the eye - or on the forehead, excuse me, the redness in the eye, the throat, that takes pressure. That takes force. Defense even threw out a hypothetical to him about children holding their breath and breaking blood vessels in their eye. Doctor said, "No. That's not really it." But, again, that wouldn't cause a zip tie mark to your neck. That wouldn't cause marks to your wrists. So, again, it is consistent with what her version of events were that day.

A review of the prosecutor's statements as a whole, particularly considering the context of the underlying trial testimony, does not support Richard's contention that the State misrepresented Dr. [***20] Finke's testimony.

[*P28] Next, there is no merit to Richard's claim that the prosecutor used "deceptive innuendo" and "patently deliberate" deception when referring, during rebuttal, to letters found in Richard's desk at Bison Grain. These writings appeared to have been written by Richard to J.S. prior to the incident at issue. In them, Richard expressed sorrow and regret for his drinking and adultery. He promised to change and proposed certain changes to save the relationship before either of them filed for divorce. The prosecutor accurately noted that one letter contained a statement that the letter was written against his lawyer's advice. It further expressed that despite his efforts as detailed in the letter, Richard knew he was losing the battle because J.S. had moved out and filed for divorce. The prosecutor argued that this evidence showed Richard had a motive to perpetrate these acts upon J.S. This was a fair argument in response to defense counsel's suggestion that J.S. either set up or exaggerated the whole incident in an attempt to extract a more favorable property settlement

in the divorce.

[*P29] Richard's additional claims—that the State "knowingly presented misleading and potentially [***21] perjured testimony from" J.S. and from her divorce attorney--are likewise unfounded.6 Beyond appellate counsel's bald accusations, there is no evidence that the prosecution introduced perjured testimony by either J.S. or her divorce attorney. Rather than outlining any prosecutorial misconduct, appellate counsel's critique of J.S.'s testimony is nothing more than a routine attack on credibility witness's based on perceived inconsistencies in the evidence. Moreover, the allegedly perjured testimony from J.S.'s divorce attorney was in fact elicited by defense counsel Appellate counsel's argument further overlooks the fact that J.S.'s divorce attorney ultimately acknowledged that J.S. would not waive her right to bring a civil suit against Richard and [**313] that nothing prevented her "from filing a lawsuit tomorrow[.]"

[*P30] Because Richard's prosecutorial misconduct claims are unfounded, he has failed to establish even the first prong of plain error.

3. Whether the circuit court erred in denying Richard's motion for judgment of acquittal.

[*P31] Richard argues that the State failed to present sufficient evidence to support a conviction on each offense. In regard to the kidnapping conviction, he claims that [***22] the evidence is insufficient because the State only presented J.S.'s uncorroborated testimony that Richard took her from Bison Grain without her consent. Richard contends the evidence is similarly insufficient to prove aggravated assault because the State failed to present evidence corroborating J.S.'s account of the alleged assault, such as trace evidence of fecal or urine matter on the floor at Bison Grain. In regard to the rape conviction, Richard argues that no trier of fact could conclude beyond a reasonable doubt that he raped J.S. because the medical professionals did not find evidence of injuries to her vagina or anus; law enforcement did not find evidence of fibers on the bedroom or bathroom floor to support her statement that he cut off her clothing; and

the marks on J.S.'s wrists and neck were not sufficiently probative to establish nonconsensual sex. Finally, Richard contends that J.S.'s uncorroborated testimony that he used a gun to commit the offenses was insufficient given her allegedly conflicting statements as to whether she could describe the gun, and because no such gun was found during the investigation.

[*P32] HN6[*] "We review a denial of a motion for judgment of acquittal [***23] de novo." State v. Armstrong, 2020 S.D. 6, ¶ 12, 939 N.W.2d 9, 12, "In measuring the sufficiency of the evidence, we ask 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Brim, 2010 S.D. 74, ¶ 6, 789 N.W.2d 80, 83 (quoting State v. Klaudt, 2009 S.D. 71. ¶ 14, 772 N.W.2d 117, 122). It is well settled that we "will not resolve conflicts in the evidence. assess the credibility of witnesses, or evaluate the weight of the evidence." Id. Rather, "we accept the evidence and the most favorable inferences fairly drawn therefrom, which will support the verdict." State v. Jensen, 2007 S.D. 76, ¶ 7, 737 N.W.2d 285, 288 (quoting State v. Lewis, 2005 S.D. 111, ¶ 8, 706 N.W.2d 252, 255). "Moreover, the jury is . . . the exclusive judge of the credibility of the witnesses and the weight of the evidence." Id. (citations omitted).

a. Kidnapping

[*P33] The jury found Richard guilty of first-degree kidnapping in violation of <u>SDCL 22-19-1(3)</u>, which defines this crime as follows:

Any person who, either unlawfully removes another person from the other's place of residence or employment, or who unlawfully removes another person a substantial distance from the vicinity where the other was at the commencement of the removal, or who unlawfully confines another person for a substantial period of time, with any of the following purposes:

(3) To inflict [***24] bodily injury on or to terrorize the victim or another

[*P34] A review of the record reveals sufficient evidence for the jury to conclude that Richard removed J.S. from Bison Grain for the purpose of inflicting [**314] bodily injury upon her or to terrorize her. J.S.

⁶ HN5 1 Allegations of suborning perjury are indeed serious and should only be made when based on a firm foundation. Appellate counsel's accusations here are disturbing, given their unfounded nature.

testified in detail regarding Richard's act of forcefully removing her from Bison Grain. Further, Doug testified that Richard told him to leave for his lunch like he normally does when, according to Doug, he does not take lunch during the normal lunch hour. The jury could therefore infer that Richard ordered Doug to leave so he could be alone with J.S. to perpetrate these unlawful acts. J.S.'s testimony regarding the events that transpired later at the marital home further supports the jury's finding that Richard removed her from her place of employment to another location to injure or terrorize her.

b. Aggravated Assault

[*P35] "Any person who . . . [a]ttempts to induce a fear of death or imminent serious bodily harm by impeding the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck, or by blocking the nose and mouth[] is guilty of aggravated assault," SDCL 22-18-1.1(8). Richard's argument on this [***25] charge centers on the State's failure to produce evidence corroborating J.S.'s claim that she urinated and defecated after Richard strangled her. Even though such evidence is not necessary to sustain the conviction, and the jury-not this Courtmust evaluate the weight, if any, to give to the asserted lack of corroborating evidence, Richard's argument overlooks the fact that there was evidence corroborating many aspects of J.S.'s testimony. The jury heard testimony from law enforcement who found J.S.'s jeans and underwear in the dryer at the marital home where the events had transpired. Several witnesses also described the ligature marks on J.S.'s neck as appearing consistent with the markings from a zip tie. These, along with the broken blood vessels on J.S.'s face and in her eye, supported the State's argument that Richard had placed a zip tie around J.S.'s neck and impeded her normal breathing to induce a fear of death or imminent serious bodily harm.

c. Rape

[*P36] The jury found Richard guilty of second-degree rape under <u>SDCL 22-22-1(2)</u>, which provides that "[r]ape is an act of sexual penetration accomplished with any person under any of the following circumstances: ... Through the use of force, coercion, [***26] or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution[.] <u>HN7</u>[*] Although Richard claims more evidence of injury or

other corroboration was necessary to prove beyond a reasonable doubt that he raped J.S., on appeal, we will not set aside a jury verdict unless "the evidence and all reasonable inferences to be drawn therefrom fail to sustain a rational theory of guilt." <u>State v. Berhanu. 2006 S.D. 94. ¶ 7, 724 N.W.2d 181. 183</u> (citation omitted). Moreover, when a conviction turns in large part upon the credibility of witnesses, a circuit court properly leaves "to the jury the pervasive issue of credibility and considering the evidence as a whole[.] <u>State v. Guthrie. 2001 S.D. 61, ¶ 50, 627 N.W.2d 401, 422.</u>

[*P37] Here, J.S.'s testimony alone, if believed by the jury, was sufficient to establish the elements of rape. But in addition, the jury heard testimony that law enforcement located several items in the house consistent with her explanation of what had occurred there—pubic hairs in the bathroom, J.S.'s DNA on the razor, lubricant in the bedroom, the partial zip tie on top of the refrigerator, the bed linens in the washing machine, and J.S.'s jeans and undergarments in the dryer. Further, Nurse Schumacher testified [***27] that based on [**315] her observations during J.S.'s medical exam, J.S.'s vaginal and anal openings were very tender. This evidence is sufficient to support a finding of the elements of rape beyond a reasonable doubt.

d. Commission of a Felony with a Firearm

[*P38] The jury convicted Richard of violating <u>SDCL 22-14-12</u>, which provides: "Any person who commits or attempts to commit any felony while armed with a firearm . . . is guilty of a Class 2 felony for the first conviction." Richard maintains that aside from J.S.'s testimony, "[t]here is no other evidence that the gun allegedly used even exists, except the bullets that were recovered at the residence." He further contends J.S. gave contradictory statements, raising questions as to the reliability of her description of the gun he allegedly used during the events in question.

[*P39] HN8[*] Contrary to Richard's suggestion, we do not reweigh evidence or pass on the credibility of witness testimony. See <u>Brim. 2010 S.D. 74. ¶ 6. 789 N.W.2d at 83</u>. Like the other charges, the jury could reasonably have concluded based on J.S.'s testimony alone, wherein she described the gun and how it was used, that Richard used a gun while perpetrating the felonies at issue. The jury could also rely on the fact that law enforcement [***28] discovered bullets at the scene in the pocket of a pair of Richard's jeans located in a

clothes hamper, consistent with the type of bullet used in the gun described by J.S. (a .357 magnum revolver).

[*P40] Because our review of the evidence in the light most favorable to the prosecution supports that the jury could have found the essential elements of the crimes beyond a reasonable doubt, the circuit court did not err in denying judgment of acquittal on all counts on which Richard was convicted.

4. Whether cumulative error occurred, denying Richard of his right to a fair trial.

[*P41] Richard restates the errors alleged in the previous issues and claims that the cumulative effect of these errors denied him of his constitutional right to a fair trial. Because Richard has not established an error on any of the above issues, we need not address this argument. <u>State v. Hemminger. 2017 S.D. 77, ¶ 41, 904 N.W.2d 746. 759</u> (declining to review a claim of cumulative error based on the Court finding a lack of error on the other issues raised).

5. Whether Richard's sentence is grossly disproportionate in violation of the <u>Eighth</u> Amendment.

[*P42] Richard challenges the constitutionality of his sentence for multiple reasons. He claims that his 75sentence is grossly disproportionate because [***29] the circuit court, in effect, gave him a life sentence. He also contends that his 45-year sentence for kidnapping-nearly twice as long as that received for rape and aggravated assault-is grossly disproportionate because the court did not consider what he describes as the incidental nature of the kidnapping in the commission of his other crimes. Regarding his total sentence, Richard asserts that the "court effectively ignored all mitigating factors" and "summarily disregarded any and all evidence of" his good character. Finally, in his view, the court erroneously inferred without evidentiary support that he executed his crimes with premeditation, and then used that erroneous determination to impose a severe sentence.

[*P43] <u>HN9</u>[*] There are generally two types of sentence challenges—an <u>Eighth Amendment</u> [**316] violation and an abuse of discretion. Although Richard characterizes his challenge to the circuit court's sentence as an <u>Eighth Amendment</u> claim and quotes

our law governing proportionality review, his arguments only dispute the appropriateness of the court's particular sentence based on the facts of this case and Richard's unique characteristics. The State's brief likewise seems to conflate the two types of sentence challenges. The [***30] State first identifies our law governing proportionality review. tud then—within constitutional analysis-quotes language from State v. Bonner, 1998 S.D. 30, ¶ 19, 577 N.W.2d 575, 580, setting forth what a court is to consider in exercising its discretion when imposing a sentence. Because Richard characterized his sentencing challenge as an Eighth Amendment claim, we address that claim first, although we also review the sentence for an abuse of discretion.

a. Eighth Amendment

[*P44] HN10[*] "In answering the threshold question of gross disproportionality" "the gravity of the offense refers to the offense's relative position on the spectrum of all criminality." State v. Chipps. 2016 S.D. 8. ¶ 35, 874 N.W.2d 475, 487. Similarly, an examination of the harshness of the penalty looks "to the penalty's relative position on the spectrum of all permitted punishments." Id. ¶ 37, 874 N.W.2d at 488. "This comparison rarely 'leads to an inference of gross disproportionality' and typically marks the end of our review[.] Id. ¶ 38, 874 N.W.2d at 489 (citation omitted). However, "filf the penalty imposed appears to be grossly disproportionate to the gravity of the offense, then we will compare the sentence to those 'imposed on other criminals in the same jurisdiction as well as those 'imposed for commission of the same crime in other jurisdictions," Id. (quoting Solem v. Helm. 463 U.S. 277, 291, 103 S. Ct. 3001, 3010, 77 L. Ed. 2d 637 (1983)).

[*P45] Richard's attempt [***31] to minimize the gravity of his offenses ignores that the jury found him guilty of multiple acts: kidnapping J.S. to inflict bodily injury or to terrorize her; assaulting her by cutting off her oxygen supply; and raping her-all while armed with a gun. These crimes indisputably sit on the more serious end of the spectrum of all criminality and "often warrant severe penalties." See, e.g., State v. Traversie, 2016 S.D. 19. ¶ 17. 877 N.W.2d 327, 332 (reviewing sentences for kidnapping and assault); State v. Yeager, 2019 S.D. 12, ¶ 6. 925 N.W.2d 105, 109 (explaining that "[r]ape is a heinous crime"). In regard to the harshness of the penalties imposed, Richard has not established that the circuit court violated his constitutional right to be free from cruel and unusual punishment. He faced a life sentence for the kidnapping conviction and received a

45-year sentence. He faced a maximum possible sentence of 50 years for the rape conviction and received a 25-year consecutive sentence. His remaining sentences (15 years for aggravated assault and five years for commission of a felony with a firearm) were ordered to run concurrent to the first two sentences.

[*P46] When the gravity of the offenses is compared to the harshness of the penalties, Richard's sentences do not appear grossly disproportionate. Because [***32] Richard has not met the threshold requirement of gross disproportionality, our review under the <u>Eighth Amendment</u> ends.

b. Abuse of Discretion

[*P47] HN11[*] "Before sentencing a defendant, the court is to 'acquire a thorough acquaintance with the character and history [**317] of the [person] before it." State v. Diaz, 2016 S.D. 78, ¶ 47, 887 N.W.2d 751, 765 (alteration in original) (quoting State v. Lemley, 1996 S.D. 91, ¶ 12. 552 N.W.2d 409, 412). In doing so, the court should consider the defendant's "general moral character, mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime. life, family, occupation, and previous criminal record[,]' as well as the rehabilitative prospects of the defendant." State v. Overbey, 2010 S.D. 78, ¶ 36, 790 N.W.2d 35, 44 (quoting State v. Blair, 2006 S.D. 75. ¶ 27, 721 N.W.2d 55. 63). On appeal, we will reverse a sentence upon a showing of an abuse of discretion-"a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." State v. Holler, 2020 S.D. 28, ¶ 10, 944 N.W.2d 339, 342 (citation omitted).

[*P48] Contrary to Richard's characterization of the circuit court's sentencing decision, the court carefully addressed each of the penological factors of retribution, deterrence, incapacitation, and rehabilitation. In doing so, the court considered the mitigating factors, including his lack of criminal history, his contributions to his [***33] community, and the multitude of letters submitted in support of Richard. The court also considered that Richard had recently married, which suggested to the court that he is able to take on responsibility. However, "in the midst" of these mitigating factors, the court identified a common thread—attempts to justify why Richard did what he did. The court recounted one particular letter written in support of Richard explaining the combative and

contentious nature of J.S. and Richard's relationship and alleging J.S. was the aggressor and someone with a goal to destroy Richard. In the court's view, even if both Richard and J.S. "had engaged in button-pushing in the past, no one deserves to be kidnapped, bound with zip ties around their neck, pass out, lose consciousness, urinate themselves, be thrown into the back of a pickup truck with the door slammed, only to have the pressure released so they can endure a brutal rape vaginally and anally upon being revived." The court noted that the many letters from the community in support of Richard failed to understand his "dual persona" and "Jekyil and Hyde" nature.

[*P49] Ultimately, the court considered Richard's prospects for rehabilitation unlikely [***34] based on the heinous nature of the crimes in this case. The court also disagreed with the psychosexual assessment that Richard would be safe in the community in light of the calculation and deliberation required to perpetrate these crimes against J.S. After considering everything presented, including the testimony, presentence investigation report, psychosexual assessment, letters of support, victim impact statement, and considerations relevant to rehabilitation, the court imposed a "significant sentence." Based on our review of the record, the court did not abuse its discretion in imposing a total sentence of 75 years.

[*P50] Affirmed.

[*P51] GILBERTSON, Chief Justice, and KERN, JENSEN, and SALTER, Justices, concur.

End of Document

1	STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
2	COUNTY OF PERKINS	FOURTH JUDICIAL CIRCUIT
3		
4	STATE OF SOUTH DAKOTA,)
5	Plaintiff,)
6	*	Jury Trial
7	VS.	Volume 4 of 5 (pgs 823 - 1014)
8	RICHARD SEIDEL,	Crim. 17-34
9	Defendant,	
10		
11		ERIC J. STRAWN
12	Circuit Court Deadwood, Sout	th Dakota
13	July 25, 2019,	at 8:00 a.m.
14	APPEARANCES:	
15	APPEARANCES:	
16	For the State: MR. SHANE	C. PENFIELD
17	MS. CASEY	DEIBERT ounty State's Attorney's Office
18	P.O. Box 1	.78 Outh Dakota 57638
19		A. ROETZEL
20	Assistant	Attorney General lation Plaza Dr
21		, South Dakota 57709
22	For the Defendant: MR. TIMOTH	Y J. RENSCH
23	Rensch Law P.O. Box 8	Office
24		, South Dakota 57709
25		
Į		

	1	selected?
	2	MR. PENFIELD: Yes, Your Honor.
	3	THE COURT: Mr. Rensch?
	4	MR. RENSCH: Yes, Your Honor.
	5	THE COURT: State may proceed.
	6	MR. ROETZEL: Thank you, Your Honor. The State has one
1.5	7	more witness to call. We call Mike Sabers.
8	3	THE COURT: Thank you.
9)	MIKE SABERS,
10		called as a witness, being first duly sworn, testified as
11		follows:
12	1	DIRECT EXAMINATION
13	1	BY MR. ROETZEL:
14	1	2 And adjust the microphone there a little bit as we go.
15	2	It works.
16	5	Would you please introduce yourself to the jury.
17	A	My name is Mike Sabers. I'm an attorney in Rapid City,
18	1	South Dakota.
19	Q	And how long have you been so employed?
20	A	Coming up on 20 years. I would have graduated from law
21		school in 2000. Worked for a judge in Pierre for a year,
22		and then I moved to Rapid City with my family.
23	Q	And you're a member of the South Dakota Bar?
24	A	I am.
25	0	So you're legally licensed to practice have

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1
        A I am.
        Q And where specifically do you practice in Rapid City?
    2
        A My -- like the location of my office?
    3
    4
        Q What firm?
       A Clayborne, Loos & Sabers. So myself and two partners.
    5
          We've got some other lawyers in the office, but it's our
    6
   7
          firm.
       Q And what area of law do you focus on?
   8
       A I do almost exclusively divorce work at this point in my
          practice. I've done other types of practice, but in the
  10
          last ten years all I've really done is divorce.
  11
      Q And just so we're clear, you've been subpoensed to be here
  12
 13
         today?
 14
      A Yep. The State issued me a subpoena.
      Q And you drove up just this afternoon here?
 15
 16
      A I did.
     Q Now, I'd like to turn your attention to 2017. In that
 17
        capacity, did you come into contact on a business level
 18
19
        with Julie Seidel?
20
     A I did.
     Q And do you recall when that happened?
21
     A I think my first contact with Julie, who was my client, was
22
        in September, middle of September 2017.
    Q And that was regarding a divorce situation?
24
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A Yeah. She retained me to represent her in a divorce.

25

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Q And without having you violate any attorney-client
         privilege, but was a divorce filed?
  2
      A Yes, it was.
      Q And when was it filed?
     A My recollection is that the paperwork was drafted in the
         end of September of 2017, and I think Mr. Seidel was served
        with the paperwork October 2nd. Somewhere in the very
  7
        beginning of October of 2017.
     Q And, ultimately, was the divorce final?
10
     A Yeah.
11
     Q And when did it become final?
    A That's a good question, and I was trying to remember that
12
       on the way up here. But it got finalized last year in
       December at some point. Prior to the beginning of 2019.
    Q So finalized in the end of the year 2018?
    A Yes.
    Q Now, we're discussing an event that allegedly happened on
       November 2nd of 2017.
   A Yes.
   Q Now, with that, were you in a business relationship,
      attorney-client relationship with Ms. Seidel at that time?
   A Yes.
   Q And around that time, did you have an occasion to meet with
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Ms. Seidel?

A Yes.

Q And where did that occur? 1 A That occurred at my office. 2 Q Do you recall how long after November 2nd? 3 4 A I do. 5 Q And when was it? A I met with Julie on November 7, 2017. And probably would 7 have done so earlier, but I was in trial. Q And at this point did you learn of something that had 8 9 happened? 10 A Yeah. I had learned about it earlier, but that's why I 11 wanted to meet with her, Q And during this meeting, did you notice anything about 12 13 Julie? 14 A I certainly observed things. 15 Q And what was that? A Her eyes is what, I guess, sticks out the most. Her eyes 16 had blood in them. She kind of looked like a zombie. I 17 don't know how to explain it any other way. I observed red 18 marks on her neck, and she was -- hands were visibly 19 20 shaking during the conversation. Q And based on that, did you direct her to do anything? 21 22 A I did. Q What did you ask her to do? A I told her that she should contact the DCI agent. 24 Q Now, in your divorce proceedings then, we had this event 25

that happened on November 2nd. Did that affect how you were handling the divorce?

- A You know, it really didn't.
- Q And why is that?
- A Just talking generalities. I've been practicing divorce for it seems like forever, but quite some time. And my experience is that when anyone comes to see me, if you've been married more than ten years, oftentimes -- you know, you can do a lot of things in a divorce, but after ten years, the judges usually divide things equally.

After 20 years — and Richard and Julie had been married for 22 years. I don't know if I've ever had luck getting anything other than an equal division of what people have after 20 years, and they'd been married 22 years. So that's how I evaluated the case, and honestly it didn't change much after what happened.

- Q What did you ultimately decide to do as your approach in the divorce after this situation came up?
- A Generally, I needed to change the way I was approaching it.
 With the uncertainty of what could happen with obviously
 what's going on right here, we changed what we were asking
 for and how.
- Q Explain that.
- A Ultimately, I didn't know what would happen here, and so what I tried to do is get Julie more liquid or more assets

1 2 3

upfront just in case whatever the jury does here today. The easiest way of saying it is I didn't know what was going to happen to Mr. Seidel, and so I couldn't plan that there could be a long period of time to try to equalize what the parties had. I had to do -- try to do more of it upfront, and honestly we took a discount.

5 6

1

Q So you left some on the table because of this?

7

A Because there was more upfront; yes.

Q And, now, we've heard earlier that during this process, Julie gave a gun to Mr. Seidel's attorney.

10 11

A I remember that.

12

Q Okay. And what is your understanding of that situation?

13 14

A That honestly was unique in a divorce case like this. My client wanted some of her personal effects back. If I recall --

15

16

MR. RENSCH: I guess I would object as to hearsay as to what he's stating, Your Honor.

17 18

THE COURT: Overruled.

19

A My client wanted some stuff back. Some picture albums,

20

some of her personal effects that were still up here. For

21

some reason, Mr. Seidel wanted a gun back. My first

22

response was, "You've got to be kidding me." My second

23

response was, "Heck no."

24

And ultimately what happened was -- is Ms. Miller, who represented Mr. Seidel in the divorce, told me that it

25

would not go to him. That it would go to someone else who 1 could have it, who could legally have it. 2 MR. RENSCH: Your Honor, I would renew the objection, and 3 ask that the jury be admonished to disregard the hearsay. 4 THE COURT: On the last few sentences I'm going to sustain 5 your objection. I'm going to advise the jury not to 6 consider the last two sentences that Mr. Sabers has 7 discussed. 8 9 Mr. Roetzel, you may proceed. (BY MR. ROETZEL, continuing) But in any event, the turning 10 over the gun was part of this divorce process? 11 12 A Right. And the reason why --MR. RENSCH: Objection. He's narrating. 13 Q (BY MR. ROETZEL, continuing) So it was just part of the 14 15 process; correct? MR. RENSCH: Leading. 16 17 THE COURT: Sustained. Q (BY MR. ROETZEL, continuing) So the gun was exchanged; 18 correct? 19 A I instructed my client to take the gun back and -- because 20 she was in Spearfish, and I didn't really want to bill my 21 client to drive to Ms. Miller's office in Belle Fourche to 22 return it. So yes. And I thought it was safe because it 23 24 was Ronda and my client, and Ronda --MR. RENSCH: Objection. He's narrating. 25

```
THE COURT:
    1
                       Sustained.
        Q (BY MR. ROETZEL, continuing) But, ultimately, the criminal
    2
           case, the case we're dealing with here did have a negative
    3
           impact on the divorce proceeding?
    4
       A In my opinion, we took a discount.
   5
          MR. ROETZEL: Thank you. No further questions.
   6
          THE COURT: Thank you.
   8
               Mr. Rensch?
   9
                               CROSS-EXAMINATION
  10
      BY MR. RENSCH:
      Q Why were you worried the defendant would be gone?
  11
      A Because if he gets convicted, he'll be gone.
 12
 13
      Q Where?
 14
      A Jail.
         MR. ROETZEL: And I'll object. That's not for the jury to
 15
 16
         consider.
         THE COURT: Thank you. And, unfortunately, the answer has
 17
18
         been answered, so...
19
        THE WITNESS: Sorry, Judge.
20
        THE COURT: That's okay.
     Q (BY MR. RENSCH, continuing) And, of course, when this
21
        matter is resolved, Julie signs a divorce stipulation
22
        that's presented to the judge so a divorce decree can be
23
24
        entered; true?
25
     A That was done.
```

	Q Sure. So she has to agree to anything that's in this.
	divorce, as does Richard; correct?
1	A Both parties have to. Otherwise we try the case.
d,	Q Sure. And she got \$1,025,000 in cash upfront, didn't she?
5	A She did.
6	MR. RENSCH: Nothing further.
7	THE COURT: Thank you.
8	Mr. Roetzel?
9	REDIRECT EXAMINATION
10	BY MR. ROETZEL:
11	Q But, again, that was less than she would have gotten had
12	this event, this criminal event not had happened in your
13	opinion?
14	A Yeah. She got less than half.
15	MR. ROETZEL: Thank you. No further questions.
16	. THE COURT: Mr. Rensch?
17	RECROSS-EXAMINATION
18	BY MR. RENSCH:
19	Q When you say she got less than half, she reserved her right
20	to file a civil claim against Mr. Seidel for these matters,
21	did she not?
22,	MR. ROETZEL: I'd object, Your Honor. This is completely
23	out of this witness's testimony, and he's on to a new area.
24	THE COURT: Overruled. We're at the end of the you may
25	answer the question if you can.

THE WITNESS: 1 I can. THE COURT: Okay. Go ahead and answer it. 2 A No. Mr. Seidel tried to get out of it, and --3 Q (BY MR. RENSCH, continuing) I asked if she reserved her 4 right to file a civil claim against Mr. Seidel for what 5 she's alleging in this case. Yes or no. 6 A No. Q She did not reserve the ability to sue him for that? 8 A No. He didn't give up, He wanted to buy that, and he 9 10 couldn't get it. Q So does she still have the right to file a lawsuit against 11 12 him over all of this? MR. ROETZEL: And I'll object as asked and answered. 13 THE WITNESS: I haven't looked at that issue, Your Honor. 14 THE COURT: Give me a few moments to digest the question as 15 it relates to the previous question. 16 Overruled. You may answer it if you can, Mr. Sabers. 17 Q (BY MR. RENSCH, continuing) Does she still have the right 18 19 to sue him for all of this? A I haven't talked to Julie since after the divorce. 20 21 Q I'm talking ---A As I'm sitting here, I don't know, Tim. 22 Q Eased upon the legal papers, though, you reserved that, did 23 24 you not, for her? A My recollection was that she wouldn't waive it. 25

```
Q Okay. So then that would be consistent with you reserving
     1
            the right for her to do that, would it not?
     2
        A No, I don't see it that way.
     3
        Q If she wouldn't waive it, that is wouldn't waive the
     4
           ability to sue Richard for what she claims happens, that
    5
           means she still has the right to do it, doesn't it?
    6
          MR. RCETZEL: I'd object. I'll object. I believe he's
    7
          asked this, and now he's just trying to rephrase.
   8
          THE COURT: Overruled. If you can -- well, and I think he
   9
          was midway through the question, so Mr. Rensch, let's
  10
          formulate one question that he can answer.
  11
  12
       Q (BY MR. RENSCH, continuing) If she did not waive the right
          to sue Richard for what happened here, she still had that
  13
 14
         right; isn't that correct?
      A She did not waive it. That's correct.
 15
      Q Okay. And that means she still has the right; true?
 16
      A I imagine so. I haven't looked at it.
 17
      Q Well, if she didn't waive it, she still has it?
 18
     A I've answered that question, Tim.
19
     Q Right. And if she still has it, that means we can walk out
20
        of this courtroom today and she can file a lawsuit against
21
22
        him tomorrow; isn't that true?
     A I'm not in a position to answer that. I don't know.
23
24
     Q Well, you're her lawyer, are you not?
     A I represented her in her divorce, Tim. That's the only
25
```

matter I represented her in. 1 Q And you understand how when you enter into a stipulation 2 for a divorce, to resolve the matters, generally that 3 resolves any and all controversies between the husband and 4 5 the wife; isn't that true? A As it pertains to the divorce. The answer is yes. 6 Q As it pertains to any cause of action which arises during 7 the marriage; isn't that true? 8 A No. Q And, of course, the claim here that she would be making is 10 that this cause of action would arise during the marriage; 11 12 true? 13 MR. ROFTZEL: I would object. Calls for speculation. 14 THE COURT: Sustained. Q (BY MR. RENSCH, continuing) Okay. You know of nothing 15 which prevents her from filing a lawsuit tomorrow; is that 16 fair? 17 MR. ROETZEL: I'll object. Asked and answered. 18 19 THE COURT: Overruled. A I haven't looked at the -- as I sit here right now, no. 20 MR. RENSCH: All right. Nothing further. Thank you. 21 22 MR. ROETZEL: Nothing further. THE COURT: Thank you. Mr. Sabers, thank you so much for 23 traveling up here.

THE WITNESS: You're welcome, Judge.

24

25

1	STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
2	COUNTY OF PERKINS	FOURTH JUDICIAL CIRCUIT
3		
4	STATE OF SOUTH DAKOTA,)
5	Plaintiff,)) Jury Trial
6	vs.) Volume 5 of 5) (pgs 1015 - 1087)
7	RICHARD SEIDEL,) Crim. 17-34
8	Defendant.	/ CLIM. 17-34
9	Detendant,)
10		
11	BEFORE: THE HONORAR	LE ERIC J. STRAWN
12	Circuit Cour Deadwood, So	outh Dakota
13	July 26, 20	19, at 8:00 a.m.
14	APPEARANCES:	
15	AFFEARANCES:	
16	For the State: MR. SHAN	NE C. PENFIELD
17	MS. CASE	EY DEIBERT
18	P.O. Box	County State's Attorney's Office k 178 South Dakota 57638
19		
20	Assistar	TT A. ROETZEL nt Attorney General
21	Rapid Ci	Indation Plaza Dr .ty, South Dakota 57709
22	For the Defendant: MR. TIME	
23	Rensch I	WITHY J. RENSCH aw Office
24	P.O. Box Rapid Ci	ty, South Dakota 57709
25		

1 2

 And I say to you, if actions are such that they can be looked at and every action has an equal and opposite reaction, can you imagine anybody saying to somebody who had sodomized them against their will at gunpoint, "Here. You can have these guns"? It is impossible. It would never happen. That is a reasonable doubt, folks. That should cause you to pause or hesitate in connection with her contentions.

Also, money is a very valuable motivator. It's a powerful motivator. A million dollars is a lot of money. 750,000 in alimony is a lot of money. These various properties and vehicles and all of these other things, that's worth a lot of money. You heard her lawyer get up and say, "Well, I think we took a little less money because we wanted to get most of it on the front end because Richard might go to jail," is basically what he was saying. That made that a whole lot easier for them than any regular divorce ever would have been.

MR. ROETZEL: I'll object. Assumes facts not in evidence.

THE COURT: Sustained.

MR. RENSCH: Well, they didn't have to go through a divorce trial and have a big long, strung out battle the evidence will show. And they did it with stipulation, and there was not a trial. And what does she retain? She still has the right to sue him civilly for all of this.

MR. ROETZEL: I'll object. Again, I don't believe that's 1 2 what the witness said. THE COURT: Overruled. 3 4 MR. RENSCH: She still has the right to sue him civilly for all of this. So you want to talk about bias and motivation 5 and money coming into play. Money makes people do strange 6 7 things. She cried. I don't like to cross-examine a witness 8 and make her cry, but I noticed she cried right when I got 9 up to the tough questions each time. Kind of like a child 10 will cry when they don't want to answer your questions. 11 She's fully capable of acting. She's admitted it because 12 she said she went into the post office to make things look 13 normal. She also said that she made phone calls to her 14 daughters to make things look normal. And we don't know 15 whether or not she is confabulating and exaggerating what 16 17 happened to make it worse and is then committed to get even with this guy for all of his philandering and for the way 18 she feels about him and to make money on the whole thing. 19 In the end, when you're looking at what Julie had to 20 gain by all of this, it was very substantial. And no one 21 really knows what they're getting into when they levy a 22 23 false allegation. MR. ROETZEL: I'd object. There's no evidence of that, 24

25

Your Honor.

IN THE SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

No. 29653	

JULIE NIEMITALO,

Appellant/Plaintiff,

v.

RICHARD SEIDEL,

Appellee/Defendant.

Appeal from the Circuit Court Fourth Judicial Circuit Perkins County, South Dakota

The Honorable Michelle Comer Circuit Court Judge

BRIEF OF APPELLEE RICHARD SEIDEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF LEGAL ISSUE AND AUTHORITIES	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
ARGUMENT	8
CONCLUSION	28
REQUEST FOR ORAL ARGUMENT	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE	31

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellee Richard Seidel will be referred to as "Richard"; Appellant Julie Niemitalo will be referred to as "Julie"; documents from the record of the Perkins County Clerk of Court for 52CIV19-31 are cited as "R.___"; the Order on Defendant's Motion for Summary Judgment and Motion for Substitution of Counsel, which is found at R. 572-73 (App. 20-21), is referred to as "Order Granting Summary Judgment"; the May 20, 2021 Letter Opinion denying Plaintiff's Motion for Reconsideration, which is found at R. 756-58 (App. 22-24), is referred to as "Denial of Motion for Reconsideration"; and the Appendix is cited as "App. ____". All citations are followed by appropriate page and paragraph designations.

JURISDICTIONAL STATEMENT

The Circuit Court of the Fourth Judicial Circuit, through the Honorable Michelle Comer, entered the Order Granting Summary Judgment in favor of Defendant Richard Seidel on April 29, 2021. R. 572-73 (App. 20-21). A Motion for Reconsideration filed by Plaintiff Julie Niemitalo was denied on May 20, 2021 through a letter opinion of the Court. R. 756-58 (App. 22-24). Notice of Entry of the Order Granting Summary Judgment was filed with the Clerk of Court and served upon counsel on May 3, 2021, and Notice of Entry of the May 20, 2021 Denial of Motion for Consideration was filed with the Clerk and served upon counsel on May 27, 2021. R. 574-77, 759-62. Julie filed a Notice of Appeal on May 27, 2021. R. 763-64. The Order Granting Summary Judgment is a final, appealable order and this Court has jurisdiction pursuant to SDCL 15-26A-3(1) and (2).

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

ISSUE: Whether the circuit court correctly granted summary judgment in favor of Richard by determining that parties' divorce settlement agreement entered into between Richard and Julie barred Julie's current lawsuit.

The circuit court correctly granted Richard's Motion for Summary Judgment because the divorce settlement agreement bars Julie from bringing the current lawsuit that seeks Richard's property and is predicated upon facts occurring over one year prior to Julie's signing of the divorce settlement agreement.

- Aggregate Construction, Inc. v. Aaron Swan & Associates, Inc., 2015 SD 79, 871 N.W.2d 508
- *Henry v. Henry*, 534 N.W.2d 844 (S.D. 1995)
- Richardson v. Richardson, 2017 S.D. 92, 906 N.W.2d 369

STATEMENT OF THE CASE

On September 13, 2019, Plaintiff Julie Niemitalo filed a Complaint alleging four causes of action against Richard Seidel and requesting an amount exceeding \$10,000,000 in compensatory and punitive damages, as well as medical expenses and other fees and costs. R. 2-6. On January 15, 2021, Julie filed a Motion for Partial Summary Judgment, arguing that Richard's liability for two of her civil claims and her entitlement to punitive damages had been established through his prior criminal convictions of certain crimes.

See R. 69-72, 73-89. Richard filed a competing Motion for Summary Judgment as to his affirmative defense of release, contending that his and Julie's divorce settlement agreement (which had been entered into after the alleged incident upon which Julie's causes of action are based) barred this civil lawsuit. R. 371-421. The circuit court granted Richard's Motion, ruling that the plain language of the Agreement foreclosed Julie's civil suit. R. 572-73 (App. 20-21). Julie filed a Motion for Reconsideration, which the circuit court denied and expanded upon its initial ruling that the divorce

settlement agreement was unambiguous. R. 630-45, 756-58 (App. 22-24). Julie now appeals the circuit court's Order Granting Summary Judgment.

STATEMENT OF THE FACTS

In September 2017, Plaintiff Julie Niemitalo contacted Attorney Michael Sabers to pursue a divorce against her husband, Richard Seidel and a Complaint was filed later that month. R. 446-47. While the divorce proceeding was ongoing, in November 2017, Julie contacted law enforcement and alleged that Richard had kidnapped and physically and sexually assaulted her. *See generally State. v. Seidel*, 2020 SD 73, 953 NW.2d 301. Richard was indicted for charges of rape, aggravated assault, commission of a felony while armed with a firearm, and alternative counts of kidnapping. *Id.* ¶ 14. Richard pleaded not guilty and exercised his right to a jury trial on these charges. *Id.* Perkins County State's Attorney Shane Penfield, along with Scott Roetzel, Assistant Attorney General, prosecuted the action on behalf of the State of South Dakota. *See* Appellant's Appendix p. 044.

The parties reached a settlement in the divorce proceeding. *See* R. 664-82 (App. 1-20). On December 3, 2018, Julie and Richard entered into a Property Distribution and Divorce Agreement ("Agreement") and their divorce was finalized shortly thereafter. *Id.* The Agreement addressed a number of general divorce matters, including but not limited to the grant of divorce, alimony, the division of property, restoration of maiden name, and releases. *Id.* The Agreement specifically set forth the following:

The parties hereto, being husband and wife, and being unable to continue such relationship, hereby agree to an immediate

¹ Contrary to Julie's contention (lacking record citation) that the case was prosecuted by former Attorney General Marty Jackley, he did not participate in that prosecution. *See* Appellant's Appendix p. 044.

separation and that Julie shall be granted a Judgment of Divorce on the grounds of Richard's adultery, and further agree to a full, complete and final property settlement of all the property of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of [Richard] either now hold [sic] or afterwards acquired; and that the [sic] Richard shall have no claim against any property of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of all the property rights of the parties.

R. 664 (App. 1) (emphasis added). Pursuant to the terms of the Agreement, Julie agreed to:

both hold harmless, and indemnify, Richard from the following personal debts and liabilities, to include but not be limited to any attorney's fees and costs incurred in any actions regarding any of the liabilities identified below

- 1. All debt held solely in Julie's name unless set forth otherwise herein, including but not limited to credit cards;
- 2. All medical bills incurred for treatment to Julie; . . .

R. 668 (App. 5) (emphasis added). Later within the Agreement, Julie and Richard "agree[d], represent[ed], and warrant[ed] to the other that each party has made a full and complete disclosure of all financial matters, and that no assets or liabilities have been secreted or hidden from the other party." R. 675-76 (App. 12-13). Julie also received a lump sum alimony payment. *See* R. 672-73 (App. 9-10).

In July 2019, a jury trial was held on the criminal charges against Richard. *See Seidel*, 2020 SD 73, ¶ 14, 953 NW.2d 301, 308. Julie's divorce attorney, Mr. Sabers, was subpoenaed to testify as the State's witness and was the last witness to speak to the jury during the criminal trial. *See* R. 445-64. Attorney Sabers testified that because of the pending criminal charges against Richard, Attorney Sabers "changed what we were asking for and how[,]" for purposes of the divorce proceeding. R. 449. Attorney

Sabers stated that "what I tried to do is get Julie more liquid or more assets upfront just in case whatever the jury does here today." R 449-50. According to Attorney Sabers, "the easiest way of saying it is I didn't know what was going to happen to Mr. Seidel, and so I couldn't plan that there could be a long period of time to try to equalize what the parties had." R 450. In response to the question "So you left some on the table because of this?" Attorney Sabers replied, "Because there was more upfront, yes." R. 450. The following exchange clarified Attorney Sabers' response:

Q: (**BY MR. ROETZEL, continuing**) But, ultimately, the criminal case, the case we're dealing with here did have a negative impact on the divorce proceeding?

A: In my opinion, we took a discount.

R. 452. Attorney Sabers testified that ultimately, Julie "got less than half" of what she would have received if the criminal event had not happened. R. 453. While the jury returned a not guilty verdict on Count 1- Kidnapping First Degree, it returned a guilty verdict as to the alternative kidnapping count as well as the other charges. *See Seidel*, 2020 SD 73, ¶ 16, 953 N.W.2d at 306.

Prior to Richard's sentencing, and after her divorce attorney's testimony that

Julie "left [money] on the table" in the divorce settlement because of the criminal

charges against Richard, Julie (through the same attorney) initiated this civil action,

alleging Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional

Distress, False Imprisonment, and Civil Battery, and requesting not less than

² Richard appealed to the South Dakota Supreme Court, which affirmed his conviction and sentence on December 30, 2020. *See State v. Seidel*, 2020 SD 73, 953 N.W.2d 301. Richard continues to maintain his innocence, and for that reason, he uses the term "allegations" throughout this Brief.

\$10,000,000 in compensatory and punitive damages, as well as past and future medical expenses among other things. R. 2-6, 450. Julie subsequently filed a Motion for Partial Summary Judgment, arguing that Richard's liability has already been established for purposes of this civil case through the criminal convictions and that the sole question remaining is damages. R. 69-89.

Richard filed his own Motion for Summary Judgment, arguing that the unambiguous plain language of the Agreement foreclosed this civil action. *See* R. 371-421. Richard also filed a Motion to Remove Julie's counsel from this matter based upon the fact that Julie's counsel, who had also served as Julie's divorce counsel, is a necessary witness in this proceeding. *See* R. 296-99, 520-24. Richard noted that if the Court were to find the language of the Agreement ambiguous, parol evidence - including Julie's counsel's knowledge of the underlying circumstances of the Agreement – is crucial. *See* R. 520-24. Julie, through her counsel, objected to the Motion, R. 491-501.

After a hearing and supplemental briefing, the circuit court granted Richard's Motion for Summary Judgment, which in turn, rendered moot the Motion to Remove Julie's divorce counsel as well as Julie's own Motion for Partial Summary Judgment.

R. 562-74, 579-629. The court concluded that the Agreement unambiguously precluded Julie's civil suit. R. 572-73 (App. 20-21). Specifically, the court concluded that "the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that 'Julie shall have no claim against any property of the Defendant either now held or afterwards acquired . . . and that this Agreement shall be in full and final settlement of all the property rights

of the parties." R. 572 (App. 20).

In her initial response to Richard's Motion for Summary Judgment, Julie had solely argued that the Agreement was unambiguous in not foreclosing her civil claim.

R. 484, 757 (App. 23). After receiving the ruling not in her favor, Julie filed a Motion for Reconsideration. R. 630-45. In her Motion for Reconsideration, Julie presented the new arguments of judicial estoppel and illegal contract but provided no reason as to why those arguments were not, or could not have been, presented in her initial response. R. 632-45. While Richard responded to the Motion for Reconsideration, Richard objected to any consideration of new argument and evidence as it was submitted in violation of the Court's summary judgment procedure. R. 686-91. The court held a hearing on Julie's Motion for Reconsideration but ultimately declined to reconsider its Order Granting Summary Judgment in favor of Richard. R. 756-58 (App. 22-24). Julie appeals the circuit court's ruling and submitted her Appellant's Brief to this Court on August 5, 2021. Richard now responds, requesting this Court to affirm the circuit court's decision.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

ARGUMENT

ISSUE: Whether the circuit court correctly granted summary judgment in favor of Richard when determining that Julie's civil case is barred through the unambiguous language in the Agreement.³

While Julie seems to take an impassioned jury trial approach in her argument to this Court, today's case is simply one of contract interpretation controlled by the plain language of the Agreement and established legal precedent. The Agreement bars Julie's civil lawsuit seeking Richard's property (to the tune of at least \$10,000,000 and for past and future medical expenses) based upon events allegedly occurring prior to the Agreement.⁴ As stated by the circuit court, "the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that 'Julie shall have **no claim** against any property of [Richard] either now

While the Court's reasoning in its Letter Decision denying reconsideration certainly expands upon its initial reasoning, and such supplemental reasoning is certainly appropriate for review by this Court, Julie provides no independent basis for a challenge.

³ Julie listed the following as a second issue in her Statement of Legal Issues: "Whether the Circuit Court erred in denying Plaintiff's Motion for Reconsideration of its Summary Judgment ruling." *See* Appellant's Brief at 1. A court's ruling on a motion for reconsideration is reviewed under an abuse of discretion standard. *See Jenco, Inc. v. United Fire Group*, 2003 SD 79, ¶¶ 21-22, 666 N.W.2d 763, 768. The denial of the Motion for Reconsideration was appropriate because Julie already had an opportunity through the summary judgment procedure to present the arguments made in her later Motion for Reconsideration. The arguments and evidence submitted along with Julie's Motion for Reconsideration were readily available to Julie at the time the summary judgment pleadings were filed and at the time of the hearing. *See* R. 686-90. Allowing previously available argument and evidence to be presented through a motion for reconsideration of a summary judgment decision would allow parties to circumvent the summary judgment procedure set forth in SDCL 15-6-56.

⁴ The court's interpretation of the Agreement is reviewed de novo as a question of law. *See Coffey v. Coffey*, 2016 S.D. 96, ¶ 8, 888 N.W.2d 805, 808 ("Divorce stipulations are governed by the rules of contract; their interpretation is a matter of law for the courts to decide" and "[c]ontract interpretation is a question of law reviewed de novo").

settlement of all the property rights of the parties." R. 572-73 (App. 20-21) (emphasis in original). The court later emphasized that the Agreement did not contain a reservation of claims and that it "is replete with language that this was a release[,]" specifically pointing out that Julie had agreed to pay all of her medical bills and that Julie "received a lump sum nonmodifiable alimony amount of \$750,000 'intended as a final adjustment of mutual rights and obligation and is an absolute judgment." See R. 757 (App. 23). The court also highlighted that the Agreement included language that it "constitutes the sole, exclusive and entire agreement between the parties. " and that "each party acknowledges that this Agreement has been entered into of his or her own volition, with full knowledge of the facts and full information as to the legal rights and liabilities of each. Each party believes the Agreement to be reasonable under the circumstances." Id. Ultimately, the court correctly concluded that Julie's lawsuit was barred and its decision should be upheld. Id.

A. The plain language of the release unambiguously bars Julie's lawsuit.

"A release is a contract, and if a contract is unambiguous, [the Court is to] rely on the language of the contract to ascertain and give effect to the parties' intent." *Gores v. Miller*, 2016 S.D. 9, ¶ 8, 875 N.W.2d 34, 36-37 (citing *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 8, 676 N.W.2d 390, 393). "If the language [of a release] is unambiguous, neither the releasor's subjective intent nor the failure to obtain full satisfaction in the settlement governs: the terms of the release control." *Gores*, 2016 SD 9, ¶ 8, 875 N.W.2d at 37 (citing *Flynn v. Lockhart*, 526 N.W.2d 743, 746 (S.D. 1995)); see also Aggregate Const. Inc. v. Aaron Swan & Assoc., Inc., 2015 SD 79, ¶ 13, 871

N.W.2d 508, 512 reh'g denied (Dec. 7, 2015); Frost v. Williams, 2 S.D. 457, 50 N.W. 964 (1892). A party who pleads a release as an affirmative defense only bears the burden to plead and prove the existence of a valid release and does not need to "prove separate consideration to avail [themselves] of the release." Flynn, 526 N.W.2d at 745; SDCL 15-6-8(c). In addition, summary judgment is an appropriate tool to dismiss claims barred by a release. Nelson v. Schellpfeffer, 2003 S.D. 7, ¶ 14, 656 N.W.2d 740, 744; Aggregate Const. Inc., 2015 S.D. 79, 871 N.W.2d 508.

South Dakota law provides that a written contract "supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." *See* SDCL 53-8-5. A party may not use parol evidence to vary, contradict, or add to a contract, including a release, which has been reduced to a writing that is clear, definite, and complete. *Northwestern Public Service Co. v. Chicago* & *N. W. Ry. Co.*, 210 N.W.2d 158, 484 (S.D. 1973). In fact, the Supreme Court has noted that a party to an <u>unambiguous</u> release cannot offer his or her attorney's alleged remarks about the release's effect so as to vary the terms of the release. *Flynn*, 526 N.W.2d at 746. Rules of contract interpretation apply to releases, including that courts

⁵ In *Flynn v. Lockhart*, 526 N.W.2d 743 (S.D. 1995), a party attempted to avoid a release by claiming that "her attorney failed to explain all its consequences, noting that she never would have signed it had she known [the other party] would be discharged." *Id.* at 746. In rejecting her efforts, this Court pointed to the general principle that "one who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by *another contracting* party." *Id.* (emphasis in original). It seems to follow that this general principle would be even more forceful if the attorney's alleged remarks came from the attorney that had drafted, or was involved in the drafting of the agreement. *Cf. Coffey v. Coffey*, 2016 SD 96, ¶ 9, 888 N.W.2d 805, 809 (quoting *Advanced Recycling Sys.*, *LLC v. Se. Props. Ltd. P'ship*, 2010 S.D. 70, ¶ 19, 787 N.W.2d 778, 785)) ("This Court has said that 'ambiguities arising in a contract should be interpreted and construed against the scrivener."").

are to give a reasonable and effective meaning to all terms of a release. *Nelson*, 2003 S.D. 7, ¶ 14, 656 N.W.2d at 744; *see also Henry v. Henry*, 534 N.W.2d 844, 846 (S.D. 1995) ("[W]hen asked to interpret a property settlement agreement, a trial court applies contract principles."). Notably, a contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. *See Coffey*, 2016 S.D. 96, ¶ 9, 888 N.W.2d at 809 (quoting *Dowling Family P'ship v. Midland Farms*, 2015 S.D. 50, ¶ 13, 865 N.W.2d 854, 860 (quoting *Pesicka v. Pesicka*, 2000 S.D. 137, ¶ 10, 618 N.W.2d 725, 727)).

Julie's primary position in arguing that the circuit court erred in its interpretation is that the release in the Agreement is not a release at all and that the Agreement was merely a division of property between the parties. Appellant's Brief at 13-16. The plain meaning of the language within the Agreement, however, confirms that Julie has released Richard from this civil lawsuit based upon events allegedly occurring prior to the release. As stated above, the Agreement provides: "Julie shall have **no claim** against any property of [Richard] either now hold [sic] or afterwards acquired[.]" Yet, Julie has yet to address how a lawsuit seeking at least \$10,000,000 from Richard is not a claim against Richard's funds, assets, or any other property either owned by Richard at the time of the divorce or later acquired.

⁶ In support of her argument that the scope of the Agreement is very narrow, Julie points out that the Agreement, and this phrase in particular, does not contain the word "release", stating that "[t]here is no reference to Julie releasing any civil causes of action against Seidel[.]" *See* Appellant's Brief at 13. *See also* Appellant's Brief at 16 ("There is no reference to marital conduct, injuries, damages, claims, or cases of action, nor even a mention of 'release.""), 17 ("In fact, the word 'release' does not appear in the relied-upon recital at all."). Under Julie's position, it is unclear what, if any, effect would be given to the provision that "Julie shall have no claim against the property now held or afterwards acquired[.]" *See* R. 664 (App. 1).

The Agreement's use of "shall have no claim" needs no further explanation.

Also, "property" is defined as "something owned or possessed[.]" *See* "Property", 2a,

Merriam Webster Online Dictionary, available at https://www.merriam
webster.com/dictionary/property (last visited Sept. 19, 2021). This lawsuit is precisely

that: Julie is seeking Richard's property for alleged events occurring prior to her of

signing the Agreement. As an example, through the Agreement, Julie specifically

"divest[ed] herself of all ownership interest [of certain entities] in favor of Richard[,]" but

a \$10,000,000 or more judgment against Richard would certainly reverse that negotiated

term of the Agreement. *See*, *e.g.*, R. 670 (App. 7), 671 (App. 8).

Julie contends that the Agreement simply divided the marital property owned by the parties, providing that "[t]o state the obvious, . . . the parties were agreeing to a marital property settlement, with each of them in that context disclaiming any interest in or to the *property* awarded by stipulation to the other – nothing more." Appellant's Brief at 14. That contention, however, continues to ignore the language within the Agreement, which states that Julie shall have no claim against any property of the Defendant either now held or afterwards acquired." R. 664 (App. 1) (emphasis added); *Accord Tveidt v. Zandstra Const.*, 2007 S.D. 120, ¶7, 742 N.W.2d 55, 58 (quoting *In re Dissolution of Midnight Star Enterprises, L.P. ex rel. Midnight*, 2006 SD 98, ¶12, 724 N.W.2d 334, 337) ("An interpretation which gives a reasonable and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable or of no effect.") (emphasis added). Thus, while Julie points to Exhibit A of the Agreement as containing a list of the only property affected by the Agreement, her contention is contrary to the actual terms of the Agreement. *See* Appellant's Brief at 13-14, 19.

The implications of the word "property" in a release analyzed by this Court in *Richardson v. Richardson*, 2017 S.D. 92, 906 N.W.2d 369, supports the circuit court's decision in this case. In *Richardson*, the parties were divorced on "the grounds of irreconcilable differences, reserving by stipulation the right to bring other nonproperty causes of action against him." *Id.* ¶ 1 (emphasis added). Yet in this case, there is no discussion of "property" or "nonproperty" causes of action in the Agreement. Instead, the Agreement requires that Julie "shall have no claim against any property" of Richard. There is an important distinction between a *property cause of action* and a *claim against property now owned or afterwards acquired by Richard*. Here, Julie released Richard from the latter. Julie's efforts to now seek a claim against Richard's property must be rejected.

B. The Agreement as a whole supports the interpretation of the release.

Contrary to Julie's position that the Agreement was limited to dividing property between Julie and Richard, the Agreement addressed a number of other topics, including but not limited to the grant of divorce, alimony, restoration of maiden name, and releases. R. 664-82 (App. 1-19). And as addressed by the circuit court, not only does the plain language of the release within the Agreement bar this case, the overarching theme of the Agreement supports that this civil case is barred. The Agreement was to be a "full and final settlement of all the property rights of the parties." See R. 572 (App. 20) (emphasis in original). The Agreement also indicated that Julie and Richard "hereby mutually release and waive any and all right, title and interest accruing by operation of law or under any statute now or hereafter enforced, or otherwise, to participate in the separate estates and property of each other, whether such property be real or personal or

wheresoever located, and whether acquired before or subsequent to their marriage, and whether acquired before or subsequent to the date hereof, " R. 674 (App. 11).

Importantly, a prime example of Julie's disregard of the plain language of the Agreement is found in Section 4 of the Agreement. Pursuant to Section 4, Julie agreed to:

both hold harmless, and indemnify, Richard from the following personal debts and liabilities, to include but not be limited to any attorney's fees and costs incurred in any actions regarding any of the liabilities identified below

- 3. All debt held solely in Julie's name unless set forth otherwise herein, including but not limited to credit cards;
- 4. All medical bills incurred for treatment to Julie;

R. 668 (App. 5) (emphasis added). Yet directly contrary to that provision, Julie is now suing for "past and future medical expenses[.]" See R. 6. In addition, the Agreement provides that "[a]s for spousal support, Richard shall pay to Julie lump-sum, nonmodifiable alimony in the gross total amount of \$750,000.00 to be paid in installment payments. Based on South Dakota law, this is intended as a final adjustment of mutual rights and obligation and is an absolute judgment[.]" R. 672-73 (App. 9-10). Julie should be held to that "final adjustment of mutual rights and obligations[.]" R. 672 (App. 9).

Importantly, it is undisputed that Julie did not reserve any right to bring this lawsuit based upon the alleged events prior to the executed Agreement. *See* Appellant's Brief at 6 n.3. In *Richardson*, this Court upheld a former spouse's ability to bring a lawsuit for intentional infliction of emotional distress against her husband for events occurring during the parties' marriage. *See Richardson*, 2017 SD 92, 906 N.W.2d 369.

Notably, while the parties in *Richardson* had entered into a divorce settlement agreement after the conduct upon which the subsequent lawsuit was predicated, the *Richardson* divorce settlement agreement provided an exception to the mutual release that allowed the parties to "pursue nonproperty causes of action against the other." *See id.* ¶¶ 6-7. Here, unlike *Richardson*, there is no language in the Agreement where Julie reserved certain causes of action existing at the time of the executed Agreement.

C. The Agreement bars this lawsuit in which the alleged events upon which this lawsuit is predicated occurred prior to the execution of the release.

The date of execution of the Agreement (more than one year after the alleged events forming the basis of Julie's current lawsuit) is particularly important in this case, as supported by the Supreme Court case of *Henry v. Henry*, 534 N.W.2d 844 (S.D. 1995). In both today's case and in *Henry*, the respective plaintiff attempting to bring certain claims against the former spouse had "waived that opportunity by signing a release in the parties' settlement agreement." *Cf. id.* at 847.

In *Henry*, a husband and wife divorced after a lengthy and tumultuous marriage. *Id.* at 845. After the divorce proceeding was initiated, yet prior to its resolution through a divorce settlement agreement, an altercation occurred that resulted in an assault conviction against the husband. *Id.* The subsequent divorce settlement agreement entered into by the parties "contained a release for all legal claims between the parties 'arising out of or by virtue of the marital relation of the parties." *Id.* The former wife later brought a civil suit against the former husband for both pre-divorce and post-divorce conduct. *Id.* at 847. Although the trial court granted the former husband's Motion for Summary Judgment, on appeal, the South Dakota Supreme Court affirmed in part and reversed in part, concluding that the former wife could not sue for pre-divorce conduct

pursuant to the mutual release contained in the divorce settlement agreement but that she could sue for post-divorce conduct, which was not encompassed by the agreement. *Id.* at 846-47.

Comparable to the timeline in *Henry*, and although Richarrd maintains his innocence, in this case the alleged conduct forming the basis for the conviction occurred prior to the parties' execution of the Agreement. With that timing in mind, the Agreement provided that Julie shall have no claim against any of Richard's property and that Richard shall not be liable for "medical bills incurred for treatment to Julie[.]" R. 664 (App. 1), 668 (App. 5). That Agreement also divided the bank accounts and assets of the parties, as well as established a non-modifiable award of alimony "intended as a final judgment of mutual rights and obligation and is an absolute judgment." *See* R. 672 (App. 9), 681-82 (App. 18-19). And importantly, as stated above, the Agreement did not specifically reserve Julie's right to pursue a claim against Richard's property for the alleged incident that had occurred. *See* R. 664-82 (App. 1-19); *Cf. Richardson*, 2017 S.D. 92, ¶ 1, 906 N.W.2d at 370 (noting that the former wife specifically reserved "the right to bring other nonproperty causes of action against [the former husband]").

The Supreme Court case of *Aggregate Construction, Inc. v. Aaron Swan & Associates, Inc.*, 2015 S.D. 79, 871 N.W.2d 508, likewise supports that the Agreement bars the lawsuit predicated on alleged events occurring prior to the execution of the release. In that case, the plaintiff brought a breach of contract and negligence action against the defendants based on defendants' alleged failure to adequately test material for a construction project for the South Dakota Department of Transportation (SDDOT). *Id.*

and those two parties settled the lawsuit and executed a "Full and Final Release of All Claims." *Id.* ¶¶ 6-7. The release executed between the plaintiff and SDDOT provided in part that the plaintiff released:

[A]ny and all claims, demands, liabilities, obligations, damages, costs, expenses, loss of profits, loss of use, loss of services and consortium, actions and causes of action, including each and every right of payment for damages said undersigned may now or hereafter have, arising from any act, occurrence or omission up to the present time and particularly on account of all loss and damage of any kind heretofore sustained, presently existing, or that may hereafter be sustained or that may arise in consequence of incidents that occurred during construction season 2008–2009 on: (1) the Butte County Project, which is the subject matter of Butte County lawsuit 10–298; and (2) the Ziebach County Project, which is the subject matter of Ziebach County lawsuit 10–15.

Id. ¶ 10. Based upon that release that the plaintiff executed in connection with its prior lawsuit against SDDOT, the defendants moved for summary judgment arguing that the release also barred any claims against the defendants in the subsequent action. Id. ¶ 7. The circuit court agreed, granted summary judgment, and dismissed all claims against the defendants, finding that the release "barr[ed] any cause of action related to harms or injuries from the 2008-2009 Project. Id. ¶ 11.

On appeal, the plaintiff argued that the release it had executed was limited to claims "aris[ing] in consequence of incidents that occurred during construction season 2008-2009 on (1) the Butte County Project, which is the subject matter of Butte County lawsuit 10-298; and the Ziebach County lawsuit 10-15" and that its claims against the defendants had not been released because, according to the plaintiff, the defendant's negligence and breach of contract was not an "incident [] that occurred during construction season 2008-2009". *Id.* ¶ 11. The Supreme Court not only affirmed the circuit court's grant of summary judgment, but went further and held that the language of

the release was much broader than the circuit court recognized. *Id.* ¶ 12. The Supreme

Court concluded:

The release applies more broadly than to only those claims arising out of the 2008–2009 construction season. The release bars all "causes of action ... arising from any act, occurrence or omission up to the present time [.]" According to its language, the release bars any claim that Aggregate has against SDDOT from any "act, occurrence or omission" by SDDOT "and all others directly or indirectly liable" that had occurred up to the date the release was executed. The phrase "incidents that occurred during construction season 2008–2009" is part of the broader phrase: "and particularly on account of all loss and damage of any kind heretofore sustained, presently existing, or that may hereafter be sustained or that may arise in consequence of incidents on: (1) the Butte County Project ... and (2) the Ziebach County Project[.]" Therefore, "arise in consequence of incidents that occurred during construction season 2008–2009" modifies the immediately preceding phrase "and particularly on account of all loss and damage" rather than "any and all claims, demands, liabilities, obligations, damages, costs, expenses, loss of profits, loss of use, loss of services and consortium, actions and causes of action, including each and every right of payment for damages said undersigned may now or hereafter have, arising from any act, occurrence or omission up to the present time[.]" To read the release otherwise would render the *512 phrase "arising from any act, occurrence or omission up to the present time" meaningless. (Emphasis added.) See Nelson v. Schellpfeffer, 2003 S.D. 7, ¶ 14, 656 N.W.2d 740, 744 ("An interpretation which gives a reasonable and effective meaning to all the terms is preferred to an interpretation [that] leaves a part unreasonable or of no effect.").

Contrary to Aggregate's interpretation, this last phrase in the first paragraph of the release is not a limitation on the release's applicability. Rather, the words "and particularly" indicate that the words that follow are those of emphasis. Therefore, the release applies to the Butte and Ziebach County Projects in addition to any other claims against SDDOT and "all others directly or indirectly liable" up to that time. Because of the broad language of the release, Swan's actions need only to have occurred by the time the release was executed rather than during the construction season of 2008–2009. The parties do not dispute that Swan's soundness testing occurred in December 2007 or January 2008, which is clearly prior to the settlement reached with SDDOT and thus covered by the release.

Id. ¶¶ 12-13.

Just as the Supreme Court held in *Aggregate* that the phrase "and particularly" and "arise in" did not limit the breadth of the release in that Agreement, so to the terms of the release in this case are not limited. The terms of the release are unambiguous and sufficiently broad to release <u>all</u> claims seeking Richard's property that arose from the alleged events occurring prior to the signing of the Agreement. Julie's entire Complaint is based solely on the allegations made against Richard relating to the events of November 2, 2017. The Agreement signed by Julie and Richard on December 3, 2018 bars Julie from seeking Richard's property through this lawsuit based solely upon the earlier alleged events. *See id.* ¶ 13.

D. Parol evidence is not appropriate as the Agreement is unambiguous.

In this case, Richard moved for summary judgment on the basis that the Agreement's release was unambiguous. Although offering a contrary interpretation, Julie herself agreed that the Agreement is clear and unambiguous. And as the Agreement is unambiguous, it is to be interpreted by the four corners of the document. Despite both parties' positions that the Agreement is unambiguous, Julie now calls for reversal of the circuit court decision because alternatively, the Agreement is ambiguous.

At the outset, Julie contends that summary judgment in favor of Richard must be overturned because Richard failed to submit supporting affidavits by himself and others as to the interpretation of the Agreement. *See* Appellant's Brief at 19-20, 23. Julie has also submitted extrinsic evidence in support of her position as to the "unambiguous" Agreement. Julie's attempts to impose a nonexistent burden upon Richard to submit parol evidence, and Julie's own submission of parol evidence, in support of the

interpretation of an <u>unambiguous</u> agreement is inappropriate and contrary to contract interpretation principles.

Not only does Julie ask for an alternative ruling that the Agreement is ambiguous, but it also seems that Julie is requesting this Court decide, in the first instance, that the ambiguous Agreement does not bar this lawsuit, thus preventing Richard from submitting any parol evidence as to the (claimed) ambiguous terms. Julie cites to her counsel's testimony in the criminal case, which is her same counsel for this case, and contends that "the only evidence of intent of the parties unequivocally confirms that the document did not serve to be a release of Julie's civil tort claims." *See* Appellant's Brief at 9, 22. Julie emphasizes, as that sole evidence of intent, that: "[s]pecifically referring to the [Agreement], Seidel's criminal defense attorney stated to the jury that the divorce was concluded 'by stipulation,' rather than trial, and that pursuant to that stipulation Julie 'retain[ed]' the right under the [Agreement] 'to sue him civilly for all of this [criminal charges including domestic assault, kidnapping and rape]."")

Exhibiting the absurdity in Julie's invitation for this Court to find not only that the contract is ambiguous, but also to construe it in favor of her ability to bring this lawsuit based solely upon the opinion of the very counsel bringing this appeal,⁷ is the lack of exploration of the actual circumstances surrounding the Agreement. What was discussed in the settlement negotiations between the parties' divorce counsel? Who drafted the

^{. .}

⁷ In Julie's Appellant's Brief, counsel utilizes brackets and a footnote seeming to expand upon and clarify its prior testimony, which, in turn, highlights the prejudice to Richard if opposing counsel's testimony is used as the sole evidence of the parties' intent. *Cf.* Appellant's Brief at 6 & n.3.

Agreement?⁸ Was a provision regarding a reservation of this cause of action discussed during the drafting of the Agreement? Were there concerns by Julie as to how a reservation of a \$10,000,000 lawsuit within the Agreement would look to a jury in the criminal case that was yet to be tried?

In addition, if the parties were to argue to this Court regarding evidentiary matters surrounding any ambiguity, Richard would be requesting an inference that opposing counsel's knowledge of the parties' divorce proceeding is favorable to Richard. It was requested to the circuit court that opposing counsel be removed as counsel for purposes of discovery because of his involvement in the divorce proceeding, and particularly the Agreement. R. 296-99. In the alternative, Richard requested that if opposing counsel is permitted to remain as Plaintiff's counsel, then Julie should not be able to call opposing counsel in rebuttal regarding this matter and that opposing counsel remains as Julie's counsel at Julie's peril – including not being allowed to shift roles and become a witness on behalf of Julie to try to rebut Richard's evidence. R. 523. Opposing counsel objected to the removal, but the Motion was moot and therefore remains unaddressed. R. 491.

If one were to consider alternative positions, Richard's affirmative defense of res judicata, rather than the question of ambiguity, is dispositive and further supports that Julie's lawsuit is barred. *See* R. 9-12. Res judicata is a judicially created doctrine

⁸ "This Court has said that 'ambiguities arising in a contract should be interpreted and construed against the scrivener." *See Coffey*, 2016 SD 96, ¶ 9, 888 N.W.2d at 809 (quoting *Advanced Recycling Sys.*, *LLC*, 2010 S.D. 70, ¶ 19, 787 N.W.2d at 785)).

⁹ "The non-production or suppression by a party of evidence which is within his power to produce and which is material to an issue in the case justifies the inference that it would be unfavorable to him if produced." *Cody v. Leapley*, 476 N.W.2d 257, 264 (S.D. 1991).

that prevents a party from relitigating a claim or issue that had been actually litigated by the parties in an earlier suit. *Long v. State*, 2017 S.D. 79, ¶ 50 n.13, 904 N.W.2d 502, 519 n.13 (quoting *Lawrence Cty. v. Miller*, 2010 S.D. 60, ¶ 24, 786 N.W.2d 360, 369). "Res judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Estate of Johnson ex rel Johnson v. Weber*, 2017 S.D. 36, ¶ 41, 898 N.W.2d 718, 733 (quotation omitted). Issue preclusion, also called direct or collateral estoppel, refers to a prior judgment's ability to foreclose relitigation of a matter that has been litigated and decided. *Id.* Claim preclusion refers to a judgment which forecloses litigation of a matter which has never before been litigated, based on a determination that it should have been brought in an earlier suit. *Id.*

As Richard indicated to the circuit court in the below proceedings, Justice Severson, in a concurring opinion in *Richardson*, which was joined by Chief Justice Gilbertson, stated that "counsel must be aware that these matters are subject to the principles of preclusion through res judicata and estoppel." *Richardson*, 2017 S.D. 92, ¶¶ 35-36, 906 N.W.2d at 381-82 (Severson J. concurring in result); *see* R. 529. He recognized that "res judicata may bar a subsequently filed interspousal tort action because an action for divorce and [a] tort claim both evolve from a common factual nucleus and raise interrelated economic issues that should be resolved in a single proceeding." *Id*.

A marital tort claim was found to be barred under res judicata under similar circumstances to those in the case at hand in *Brinkman v. Brinkman*, 966 S.W.2d 780 (Tx. Ct. App. 1998). In that case the parties were divorced after a physical assault by the husband injured the wife. The Court of Appeals of Texas, San Antonio applied the principle of res judicata in finding that "res judicata, or claims preclusion, prevents the

relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit." *Id.* at 782. The court ultimately concluded that subsequent litigation of the marital tort was precluded by res judicata. *Id.* at 781-83.

Henry is also in line with Richard's affirmative defense that today's case is barred by res judicata. The Supreme Court in Henry recognized that "[m]any jurisdictions have allowed former spouses' claims in tort for assault and battery which occurred during the marriage." 534 N.W.2d at 847. But in Henry, the Plaintiff "waived that opportunity by signing a release in the parties' settlement agreement." Id. at 846. As stated in that case, "[t]he goal of a release agreement signed between the parties is 'achieved by extinguishing any claims, rights and responsibilities that existed prior to the signing of the agreement." Id. at 847 (emphasis in original); cf. Richardson, 2017 S.D. 92, ¶¶ 35-36, 906 N.W.2d at 381-82 (Severson, J., concurring in result) (discussing that claims relating to pre-divorce conduct may be subject to res judicata and estoppel).

Although res judicata is a separate affirmative defense pleaded by Richard, the basis for Richard's affirmative defenses primarily revolve around the fact that Julie is now raising claims encompassed in the earlier divorce proceeding. Julie's counsel's own testimony supports as much, indicating that Julie changed what she was asking for, left more on the table, and "took a discount" because of the criminal matter. *See* R. 449-50, 52. Here, the parties entered into the Agreement more than one year after Julie's alleged events upon which this lawsuit is predicated, Julie released all claims against Richard's property now held or hereinafter acquired, and Julie did not reserve a right bring these causes of action. The Agreement is consistent with the intention of the *Henry* release

agreement to extinguish claims for pre-divorce conduct. Cf. Henry, 534 N.W.2d at 847.

E. The prior criminal case involving Richard does not require that Julie be allowed to proceed with her civil lawsuit.

Julie next seems to argue that the circuit court was bound by the principle of judicial estoppel because of Richard's prior criminal case. As a preliminary matter, any attempt to argue judicial estoppel must be rejected as it was not argued or presented in the established summary judgment procedure. *See* R. 481-90. An invitation to allow a nonmoving party to submit additional legal theories and evidence with no reason for the delayed submission subverts the summary judgment procedure set forth in SDCL 15-6-56 and should be rejected.

Even if this Court were to address Julie's new judicial estoppel argument, it must fail on its merits. For judicial estoppel to apply, the following elements are generally considered:

[T]he later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped." *Canyon Lake Park, LLC,* 2005 S.D. 82, ¶ 34, 700 N.W.2d at 737 (quoting *Watertown Concrete Prods., Inc. v. Foster,* 2001 S.D. 79, ¶ 12, 630 N.W.2d 108, 112–13). *See also Wilcox v. Vermeulen,* 2010 S.D. 29, 781 N.W.2d 464 (discussing equitable estoppel principles).

Hayes v. Rosenbaum Signs & Outdoor Advert., Inc., 2014 S.D. 64, ¶ 15, 853 N.W.2d 878, 883. "[J]udicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." New Hampshire v. Maine, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814 (2001) (quoting Pegram v. Herdrich, 530 U.S. 211, 227 n.8, 120 S.Ct. 2143, 2153 n.8

(2000)). "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. *Id.* at 750–51, 121 S.Ct. at 1815 (internal quotations and citations omitted).

Here, at a minimum, there was no judicial acceptance of a legal theory presented at Richard's criminal matter. 10 "[J]udicial acceptance means only that the first court has adopted the position urged by the party ... as part of a final disposition." Lowery v. Stovall, 92 F.3d 219, 224–25 (4th Cir. 1996) (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 n.5 (6th Cir.1982)). There is no evidence that a court or jury adopted any position that Julie was making false allegations for financial benefit. See also Wells v. Coker, 707 F.3d 756, 760 (7th Cir. 2013) (in context of 42 U.S.C. § 1983 case, indicating that "We need not reach this test [of judicial estoppel], however, since Wells [the criminal defendant] did not "prevail" in his criminal case. After pleading guilty to reckless conduct, Wells was sentenced to two years of probation and two days in jail."). In addition to failing to establish all elements of judicial estoppel, "[i]t may be appropriate to resist application of judicial estoppel 'when a party's prior position was

¹⁰ Along the same lines of judicial estoppel, Julie relies on *Tunender v. Minnaert*, 1997 SD 62, 563 N.W.2d 849, in support of her position that a statement by "[legal] counsel is tantamount to an admission", but *Tunender*, in fact, rejects that position. See Appellant's Brief at 22. In that case, Tunender attempted to argue that Minnaert's counsel made judicial admissions in closing arguments that entitled him to recover damages. *Tunender*, 1997 S.D. 62, ¶¶ 19-27, 563 N.W.2d at 851-53. The Supreme Court found that these closing arguments were not judicial admissions and declined to grant a new trial for damages based on an attorney's statements in closing arguments. *Id*.

In addition, a judicial admission "is limited to matters of fact which would otherwise require evidentiary proof' and cannot be based upon personal opinion or legal theory." *Id.*, ¶ 21.

based on inadvertence or mistake." *New Hampshire*, 532 U.S. at 753, 121 S. Ct. at 1816 (quoting *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 29 (4th Cir. 1995)). For the foregoing reasons, Julie's judicial estoppel argument must be rejected.

Julie also argues that this Court has already conclusively determined that Julie is not barred from bringing this civil lawsuit. *See* Appellant's Brief at 22. Julie cites to *State v. Seidel*, 2020 SD 73, 953 N.W.2d 301, in which this Court stated that Julie's divorce counsel (also Julie's counsel in this case) ultimately testified that Julie had not waived her right to bring a subsequent civil suit. *See id.* ¶ 29. However, it seems that the Supreme Court did not analyze the actual language of the Agreement with an intent to make a specific ruling on the interpretation of the Agreement. *Id.* In the one sentence that Julie is relying upon as dispositive for purposes of this case, the Court only referenced opposing counsel's testimony at the criminal trial. *See id.*. Regardless, dicta is not binding legal precedent. *See Wiersma v. Maple Leaf Farms*, 1996 S.D. 16, ¶ 5 n.1, 543 N.W.2d 787, 790 n.1.

F. Illegal contract pursuant to SDCL 53-9-3.

Finally, Julie now argues that the Agreement is an illegal contract. SDCL 53-9-3 provides that "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud or willful injury to the person or property of another or from violation of law whether willful or negligent, are against the policy of the law." Julie contends that South Dakota law prohibits the use of the [Agreement] as a release of the intentional torts. *See* Appellant's Brief at 25-27. But as with judicial estoppel, Julie did not raise this argument in her Response to Summary Judgment. *See* R. 481-90. Therefore, it is waived.

Regardless, Julie's proposed interpretation and application of SDCL 53-9-3 must be rejected as it would lead to an absurd result in prohibiting settlement agreements. It is appropriate - and indeed important - to include releases in settlement agreements, including when settling civil tort cases. Yet, pursuant to Julie's reasoning, those settlement agreements would be illegal.

The absurd result is not supported by Julie's cited case of *Fix v. First State Bank of Roscoe*, 559 F.3d 803 (8th Cir. 2009). In that case, the plaintiff (a homeowner involved in a bankruptcy proceeding) entered into a settlement agreement with a lender in which the plaintiff released the lender from liability for all "presently existing, known or unknown" claims that she may have against the lender. *Id.* at 807. One day after the settlement agreement was accepted by the court, a letter was written to plaintiff that informed the plaintiff of the lender's actions supporting a claim for intentional infliction of emotional distress, an intentional tort. *Id.* at 810. Based upon that timeline, the "alleged emotional distress did not occur until" after the plaintiff had signed the release. *See id.* at 806-07, 09-10.

When the Eighth Circuit in *Fix* stated that "South Dakota law prohibits a release which attempts to 'exempt anyone from responsibility for his own fraud or willful injury to the person . . . of another[,]" it was considering whether an individual could release another from liability for torts <u>unknown</u> at the time of the release's signing and arising <u>after</u> the signing of the release. *Id.* at 810. Unlike *Fix*, and for obvious reasons, Julie cannot claim that she did not know of the tort she is alleging until after she had executed the release. Further, in contrast to *Fix*, Julie's Complaint is predicated upon alleged events arising over one year <u>prior to</u> the release. Ultimately, there is no indication that

the Eighth Circuit was suggesting that alleged torts cannot be subsequently settled through an agreement containing a release.

CONCLUSION

Ultimately, Julie identified two cases as most relevant to this Court's decision: one case involving a divorce settlement agreement containing no release language (Gassman v. Gassman, 296 N.W.2d 518 (S.D. 1980)); and this Court's decision as to Richard's criminal case (State v. Seidel, 2020 SD 73, 953 N.W.2d 301). See Appellant's Brief at 1. Yet, the divorce settlement agreement between Julie and Richard contained a release, and an analysis of that broad, unambiguous language shows that Julie is barred from making this claim against Richard's property in which she seeks at least \$10,000,000 and medical expenses, among other things. Julie should not be allowed to circumvent her contractual obligations. Julie's Complaint is based entirely on alleged events of November 2, 2017, and Julie released those claims in the December 2018 Agreement. Richard respectfully requests that this Court uphold the circuit court's conclusion that the Agreement unambiguously bars Julie's lawsuit.

REQUEST FOR ORAL ARGUMENT

Richard hereby requests oral argument.

Respectfully submitted this 20th day of September, 2021.

ATTORNEYS FOR APPELLEE

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 29 pages long and the word count is 8,867, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 20th day of September, 2021.

/s/ Stacy R. Hegge

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CERTIFICATE OF SERVICE

I certify that on September 20, 2021, a true and correct copy of the BRIEF OF

APPELLEE RICHARD SEIDEL was served via email upon the following individuals:

Michael K. Sabers Michael C. Loos Clayborne, Loos & Sabers, LLP PO Box 9129 Rapid City, SD 57709 msabers@clslawyers.net mloos@clslawyers.net

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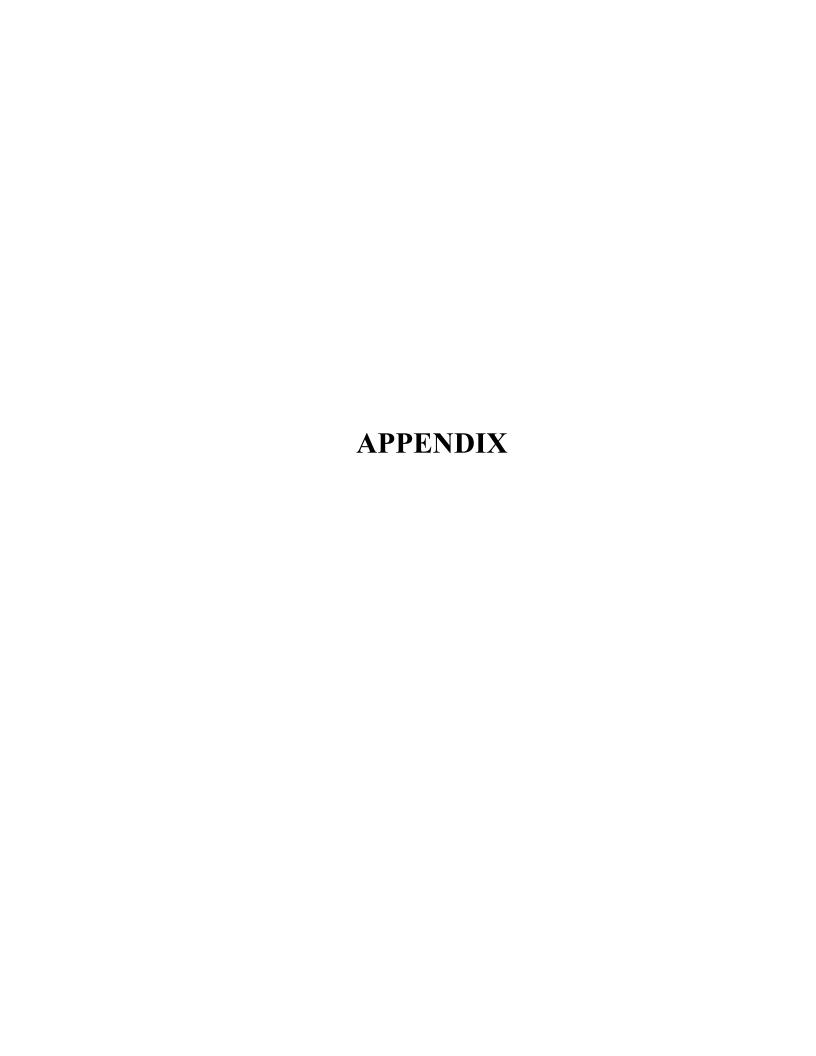


Table of Contents

1.	Property Distribution and Divorce Agreement, Seidel v. Seidel, Div. No. 17-32 (Dec. 3, 2018)
2.	Order on Defendant's Motion for Summary Judgment and Motion for Substitution of Counsel; Plaintiff's Motion for Partial Summary Judgment
3.	May 20, 2021 Letter Opinion Denying Motion for Reconsideration (filed May 24, 2021)
4.	Judgment and Decree of Divorce, <i>Seidel v. Seidel</i> , Div. No. 17-32 (Dec. 4, 2018)

1

STATE OF SOUTH DAKOTA)) 88.)	IN CIRCUIT COURT	
COUNTY OF BUTTE		FOURTH IUDICIAL CIRCUIT	
Julie seidel, Plaintiff,) Div. No. 17-32	
V\$.		PROPERTY DISTRIBUTION AND DIVORCE AGREEMENT	
RICHARD SHIDHL, Defendant.)	

COMES NOW, Richard Seidel ("Richard") and Julie Seidel ("Julie") the above-named parties, and do hereby stipulate and agree as follows, intending the following Property Distribution and Divorce Agreement ("Agreement") to be an Agreement for a divorce and the division of all property owned by the above-named parties,

WITNESSETH:

The parties hereto, being husband and wife, and being unable to continue such relationship, hereby agree to an immediate separation and that Julie, shall be granted a Judgment of Divorce on the grounds of Richards's adultery, and further agree to a full, complete and final property settlement of all the property of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of the Defendant either now hold or afterwards acquired; and that the Richard shall have no claim against any property of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of all the property rights of the parties. It is hereby specifically agreed and understood as follows:

- CHILDREN: The parties have no minor children.
- 2. PERSONAL PROPERTY:

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- A. The parties acknowledge that they have fully informed the other of the existence, nature and extent of the personal property owned either jointly or severally by them, and that they have agreed on a fair and equitable division of property.
- B. Richard shall be entitled to possession and title to the items listed in Richard's column on the attached PROPERTY EXHIBIT A.
- C. Julie shall be entitled to possession and title to the items listed in Julie's column on the attached PROPERTY EXHIBIT A.
- D. Richard shall pay Julie a property equalization payment of one million twenty five themsand dollars (\$1,025,000.00). Of this amount, \$25,000.00 shall be paid concurrent with signing of this Agreement. The remaining \$1,000,000.00 shall be paid on or before January 31, 2019. If Richard fails to pay such amount within the time period specified it shall accrue interest at the category b statutory interest rate of ten percent simple. Such interest shall in no way prevent Julie from seeking any other type or kind of remedy associated with collection of such amount. The parties agree that the timely payment of such equalization payment is a material factor in the entering into of this Agreement. The parties agree that this property division payment shall not be considered alimony, but rather shall constitute a Section 1041 tax free transfer under 26 U.S.C. §1041.
- E. The parties own certain personal items and furniture that is located in a home (the "Hitzel" house or property) which is owned by RJ Seidel, Corporation. Unless set forth otherwise herein, Richard shall be entitled to ownership and possession of all furniture and personal property located in the "Hitzel" property.



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- F. Unless set forth otherwise herein, Julie shall be entitled to ownership and possession of all furniture and personal property located in the "Arizona House", which real property will also be transferred to Julie as further set forth below in this Agreement
- G. If located, Richard shall provide Julie with the scrap-booking materials that have been requested
- H. The parties continue to have a 529 College account for their adult child, Madelyn. The amount of \$9,821 remains in such account. Richard shall continue to have control over this account but shall have an obligation to account for all such funds. The account shall be used for reimburse for college or other post-secondary education that qualify under the plan. The bills or invoices shall be presented to either Richard or Julie. Payment by Richard shall occur within 20 days after presentation of the bill. In the event that Madelyn does not utilize all of the funds for college or other post-secundary education purposes, the remaining amount less the tax liability shall be distributed to Madelyn no later than four years after this Agreement is reached.
- I. The parties shall cooperate, through their attorneys, in making the designated personal and real property available to the other party. Each party shall make arrangements to obtain their property on or before May 1, 2019.
- J. The parties have divided all other personal property. By the inclusion of this Agreement in the Judgment and Decree of Divorce, each party shall be awarded the property each party respectively is in possession of as of the date and signing of this Agreement. The exception to this is the personal property located at the Hitzel property, which Julie shall remove, and have the parties children remove, no later than December 21, 2018.

REAL ESTATE:

The parties personally own four tracts of real property which include the following:

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Sex,

1) Bison Land - 160 acres;

Township 18 North Range 15 E BHM, Perkins County, SD

Section 16: NW1/4 Less Highway Lot H1

Richard shall receive full title and ownership of the Bison Land. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement.

Richard shall be responsible for all mortgage, taxes, insurance, utilities, and maintenance of this property.

2) Miller Land;

Township 18 North Range 12 East BHM, Perkins County, SD

Section 19: Government lots 1, 2, 3, and 4;

E1/2W1/2; and NE1/4.

Richard shall receive full title and ownership of the Miller Land. Julie shall quit claim ber interest in the land to Richard concurrent with the execution of this Agreement.

Richard shall be responsible for all taxes, insurance, utilities, and maintenance of this property.

New Leipzig Bulk Plant property;

West Seventy-five (75) Feet of Lot Four (4), Block Three (3), Railway Second Addition, City of New Leipzig, Grant County, North Dakota.

It consists of real and personal property located upon the above described real property.

Richard shall receive full title and ownership of the New Leipzig Bulk Plant. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement. Richard shall be responsible for all taxes, insurance, utilities, and maintenance of this property.

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4) Bison Lot;

Township 18 North Rango 13 Bast BHM, Perkins County, SD

Section 13: Block X of Tract D of Outlot 27X of the Northeast Quarter, the same being a tract of land 140' x 310'.

Richard shall receive full title and ownership of the Bison Lot. Julie shall quit claim her interest in the land to Richard concurrent with the execution of this Agreement. Richard shall be responsible for all mortgage, taxes, insurance, utilities, and maintenance of this property.

4. MARITAL BILLS AND OBLIGATIONS:

Richard shall be responsible for the following personal debt for so long as any balance remains owing and agrees to both hold harmless, and indemnify, Julie from the following personal debts and liabilities, to include but not be limited to any atterney's fees and costs incurred in any action regarding any of the liabilities identified below:

- The full amount owing to Parm Credit Services secured by the Miller Land and Bison Land;
- The full amount owed on Capital One Credit Card ending in 3570. Upon payment in full, this account shall be closed. Richard shall receive all reward points on this card;
- The full amount owed to Bison Grain Corp. for crop services or any other services which exist as of the date of the signing of this Agreement;
- 4. All debt held solely in Richard's name including but not limited to all credit cards, lines of credit, or other revolving loan payments.

Julie shall be responsible for the following debt for so long as any balance remains owing and agrees to both hold harmless, and indemnify, Richard from the following personal debts and liabilities, to include but not be limited to any attorney's fees and costs incurred in any action regarding any of the liabilities identified below

- All debt held solely in Julie's name unless set forth otherwise heroin, including butnot limited to credit cards;
- 2. All medical bills incurred for treatment to Julic;

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3. Full amount owed to Ally Financial for auto loan co-signed with daughter, Beth. Any debts or obligations incurred prior to or subsequent to the parties' separation and not set forth herein shall be the solely responsibility of the party who incurred the same, which party hereby covenants to hold the other harmless therefrom.

As to the issue of health insurance, Richard shall continue to maintain and pay for the parties' children's health insurance for so long as Richard's plan permits the children to be covered under Richard's insurance. This obligation shall end no later than a child reaching age 26. Julie has heretofore been provided health insurance coverage as a spouse of a "covered employee" under Bison Grain Company's group health insurance plan. Pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and acts amendatory thereto, Julie is entitled to certain notice and rights of continued coverage as set forth in the Act. Divorce constitutes a "qualifying event" for the former spouse of a covered employee and notification of rights must be given as provided by federal law. Julie is responsible for notifying the employer's plan administrator that a "qualifying event" has occurred and the parties agree that the signing of this Stipulation qualified as such notice. Richard shall take all reasonable steps to ensure that timely notification is provided to the employer's plan administrator and that the requirements of federal law and regulation are met in compliance with Julie's rights under COBRA.

5, BISON GRAIN COMPANY (BGC):

The parties hold a majority interest in Bison Grain Company Richard owns 4,768 shares solely in Richard's name. Julie owns 400 shares solely in Julie's name. The parties jointly own 131 shares. Richard shall retain all shares held solely in Richard's name as well as his interest in all jointly owned shares. Julie shall transfer her 400 shares in BGC along with her interest in

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the jointly owned shares in BGC to BGC. In exchange, Julie shall receive the Bscalade and Yukon in addition to real property legally described below (the Arizona House);

Sec / Lot 82, Saville Parcel 29 MCR 774-39

And has a physical address of 3383 East Sports Drive, Gilbert, AZ. Julie shall also receive the home furnishings in the AZ house. The parties agree that a material consideration to this Agreement is that Julie shall have no income tax liability for this initial transfer. Richard agrees that any tax liability that arises for Julie from such intial transfer will either be borne by BGC or that he will personally hold harmless, indemnify, and pay Julie any tax liability that could arise as a result of the transfer of this Arizona property to Julie. Any subsequent tax consequences that may arise based upon Julie decision to sell such Arizona property shall be Julie's responsibility.

Concurrent with execution of this Agreement, Richard shall cause a deed to be transferred to Julie from BGC. Commencing January 1, 2019, Julie shall be responsible for all taxes, utilities, maintenance, and insurance on the Arizona House. Richard effirms, however, that BGC has paid the existing property taxes due and that the next property tax payment would not be due until 2019. Further, Richard shall provide Julie with contact information for the lawn, pool service, and other maintenance persons known to Richard. He will also provide Julie with all known passwords associated with the wireless system that controls some of the home utilities as well as any other reasonable and necessary information incidental to ownership of the same. Once the stock transfer occurs, Julie shall have no further liability for any BGC debt or obligations and Richard agrees that he will hold harmless and indemnify, including attorney's fees and costs, Julie from any such liabilities as well as any actions or claims which could or may arise out of the same. It is the intent and purpose of this provision and section that Julie shall divest herself of all ownership interest, if any, in the above named entity (EGC) and enterprises

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in favor of Richard, subject to any and all debt, obligation, or liability, whether personal or otherwise, related to such entitles and enterprises, which Richard shall assume as his separate responsibility. Further, in the event any corporate debt, obligation, or liability shall identify Julie as an obligor, debtor, or guarantor, Richard shall cause Julie's name to be removed from any such indebtedness, obligation, or liability upon the renewal of each debt and no later than December 1, 2020. Under no chromstances shall Julie be responsible for any business debt, obligation, or liability, including federal, state, or local taxes related to BGC. By this provision, Julie hereby resigns and withdraws any position she may have heretofore held as an officer, director, employee, or agent of BGC and makes no claim for damages or compensation related thereto.

RISEIDEL, CORPORATION:

Richard and Julie equally own all shares in RJ SEIDEL, CORPORATION. ("RJ"). Julie shall transfer her shares in RJ to Richard. After such transfer of shares occurs, Julie shall receive the 2016 Chevy Silverado and stock trailer from RJ. The parties agree that Julie shall have no income tax liability for these initial transfers from RJ and Richard agrees that if any tax liability arises for Julie from such transfer it will either be borne by RJ or that he will personally hold harmless, indemnify, and pay Julie any tax liability that could arise as a result of the transfer. Julie shall be responsible for all subsequent tax consequences. Richard and / or RJ shall retain all other assets owned by RJ unless set forth otherwise herein. Julie shall provide Richard with all corporate books including but not limited to the stock certificates, bylaws, and articles. Once the stock transfer occurs, Julie shall have no further liability for any RJ debt or obligations.

It is the intent and purpose of this proviskm and section that Julie shall divest herself of all ownership interest, if any, in RJ in favor of Richard, subject to any and all debt, obligation, or

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Hability, whether personal or otherwise, related to such entities and enterprises, which Richard shall assume as his separate responsibility. Further, in the event any corporate debt, obligation, or liability shall identify Julie as an obligor, debtor, or guarantor, Richard shall cause Julie's name to be removed from any such indebtedness, obligation, or liability upon the renewal of each debt and no later than December 1, 2020. Under no circumstances shall Julie be responsible for any business debt, obligation, or liability, including federal, state, or local taxes related to RJ. By this provision, Julie hereby resigns and withdraws any position she may have heretofore held as an officer, director, employee, or agent of RJ and makes no claim for damages or compensation related thereto.

7. LUMP SUM NON-MODIFIABLE ALIMONY:

As for spousal support, Richard shall pay to Julie lump-sum, non-modifiable alimony in the gross total amount of \$750,000.00 to be paid in installment payments. Based on South Dakota law, this is intended as a final adjustment of mutual rights and obligation and is an absolute judgment. Such lump sum non modifiable alimony shall be paid in one hundred twenty (120) consecutive monthly installment payments each in the amount of \$6,250,00 due on or before the 1st day of each month commencing on November 1, 2018. Such alimony obligation shall not bear interest so long as it is timely and fully paid on a monthly basis. All such payments shall be made in direct deposit form and by electronic funds transfer into an account specified by Julie. Such alimony shall be taxable to WIFE in accordance with 26 U.S.C. Sec. 71 and deductible to HUSBAND in accordance with 26 U.S.C. Sec. 215. It is expressly understood and agreed by the parties that the taxability and deductibility of the alimony payments shall be determined by the actual installment payments paid and received in the taxable year. The alimony described herein shall not cease or terminate upon the death or disability of Richard nor

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shall it cease or terminate upon the remarriage or cohabitation of Julie and shall be paid to either Julie as provided for herein or to her estate. The fact that the parties have agreed to lump sum, non-modifiable alimony in the gross amount identified above is a material consideration to entering into this Agreement.

The total gross amount of lump sum non-modifiable alimony in the amount of \$750,000.00 shall be secured by a letter of credit obtained by Richard from Bison Grain Company. The letter of credit shall be a non-revocable. This letter of credit shall guarantee Richard's obligation to Julie to pay the lump sum alimony identified above. An updated letter of credit may be supplemented annually, with the guaranteed amount being reduced commiserate with the installment payments made by Richard. Nothing about this latter of credit shall in any way prohibit; hinder, or limit Julie's right to seek enforcement or collection of the remaining amount due and owing from either Richard or Bison Grain should payment not be made pursuant to the terms of this Stipulation. If Julie is required to make any such claim, or to initiate any type of action, Richard agrees that he shall be responsible for the payment of the reasonable attorney's fees and costs incurred by Julie in having to either make a claim, or initiate any type of action, associated with collection of the remaining amount of the total gross sum of lump sum alimony as identified above.

8. INCOME TAX RETURN:

The parties shall file separately for 2018 and all subsequent tax years. Julie shall be responsible for taxes owed on her personal employment and income received from BGC.

Richard shall be responsible for all taxes owed on his employment income, farm income, and the RJ and BGC distributions and gains which were issued or made to either party in 2018. The purpose of this provision is to make certain, when read in coordination with all other provisions

43 de



of this Stipulation, that Julie shall receive the property equalization payment, personal and real property, and other assets without tax liability. The perties contemplated, in reaching the amount of the property equalization payment, as well as the division of various real and personal property, that Julie would receive such items without a tax liability associated with the same. As set forth herein, and other than Julie's personal income and income from BGC, the parties agree that any other tax liability that is ultimately imposed upon Julic from the initial transfers identified in this Agreement shall be paid by Richard and that Richard shall further indemnify and hold hamiless, including attorney's fees, Julie from any such tax claims.

9. PENSION AND RETIREMENT:

Richard has retirement plans through Dreyfusa, First Interstate, and Thrivent. Richard shall retain his retirement plans free and clear of any claim by Julie

Julie has retirement plans through Thrivent Financial, Julie shall retain her retirement plans free and clear of any claim by Richard.

Each party hereto waives, releases and relinquishes any and all rights that he or she may have or may hereafter acquire to the retirement and/or pension plans or funds in which either party may now or hereafter acquire, unless set forth above.

WAIVER OF ESTATES:

That except as otherwise set forth in this Agreement, Plaintiff and Defendant hereby mutually release and waive any and all right, title and interest accruing by operation of law or under any statute now or hereafter enforced, or otherwise, to participate in the separate estates and property of each other, whether such property be real or personal or wheresoever located, and whether acquired before or subsequent to their marriage, and whether acquired before or subsequent to the date hereof, including any right of election to take against any last will and

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testament of each other, and any right to the administration of the estate of each other, except only as provided by will or codicil executed after the date of this Agreement.

11. WAIVER OF DISCOVERY:

Both parties acknowledge that they have been fully advised that depositions, interrogatories, and requests for admissions may be served upon the other party, or taken, in order to more fully determine and make a record of their respective property rights and interests.

The parties have conducted discovery and hereby waive any right to pursue further discovery.

12. WATVER AND INCORPORATION:

Each of the parties hereto hereby waives findings of fact and conclusions of law in this action, and further waives any notice of hearing or notice of trial herein, and consents to the entry of a Judgment and Decree of Divorce without further notice, upon the Court's determination that there is a just cause for divorce existing in the moving party's favor.

It is further stipulated and agreed by and between the parties hereto that all provisions of this Agreement shall be incorporated by reference into any Decree of Divorce which may be issued herein; and that if the Court refuses to accept any part or paragraph of this Agreement or wishes to modify the same, this Agreement shall be deemed null and void by the parties hereto and no Decree of Divorce may be entered by default herein without Notice of Application of Default Judgment and completion of all of the requirements of law relative to the taking and entry of a default judgment; and to this end, the provisions of this Agreement are not decreed to be severable.

13. FULL DISCLOSURE:

The parties agree, represent, and warrant to the other that each party has made a full and complete disclosure of all financial matters, and that no assets or liabilities have been secreted or

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hidden from the other party. Each party has had full opportunity to review the terms and conditions contained herein.

14. MILITARY SERVICE:

Neither of the parties is serving on active duty in the samed forces of the United States and/or its allies end neither party claims any rights or privileges under the Service Members' Civil Relief Act as amended (50 U.S.C. App. s. 501 et reg.).

15. OTHER INSTRUMENTS:

Both of the parties hereto agree to execute any and all formal documents which may be necessary and needed in order to effectuate the purposes of this Agreement, including instruments of waiver, remunciation, release transfer or conveyance. Each party shall provide the other with any designated vehicle titles. The receiving party shall be responsible for transferring the title into his/her name within five days of receipt of the Title. The receiving party shall be responsible for the cost of transfer of the title and payment of licensing and transfer taxes/fees. Pive days after provided to the receiving party, the providing party may cancel insurance on the transferred vehicles.

16. ATTORNEY'S FEES:

Each party shall pay their own attorney's fees.

17. RESTORATION OF MAIDEN NAME

The parties agree that Plaintiff shall be restored to her maiden name of Julie Niemitalo and that the Judgment and Decree of Divorce so shall state the same.

18. <u>ENTIRE AGREEMENT:</u>

The parties hereto agree that this Property Distribution and Divorce Agreement constitutes the sole, exclusive and entire Agreement between the parties hereto; and that there are 13

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no other oral or collateral agreements existing between them. To this end, the parties hereby agree and declare that this Agreement shall supersede all prior written or contemporaneous oral agreements between them.

19. BINDING EFFECT:

This Agreement shall bind and inure to the benefit of the parties and their respective heirs, assigns, next of kin, devisees, legatees, executors, administrators and assigns,

20. INDEMNIFICATION:

The Plaintiff agrees to hold the Defendant harmless from any and all indebtedness hereby essumed by the Plaintiff. Should the Defendant become obligated and make payment upon any of said indebtedness, the Plaintiff agrees to pay to the Defendant that amount which the Defendant was obligated to expend toward the indebtedness assumed by the Plaintiff, said payment to be made upon demand. Similarly, the Defendant agrees to hold the Plaintiff harmless from any and all indebtedness hereby assumed by the Defendant. Should the Plaintiff become obligated and make payment upon any of said indebtedness, the Defendant agrees to pay to the Plaintiff that amount which the Plaintiff was obligated to expend toward the indebtedness assumed by the Defendant, said payment to be made upon demand. Nothing about this paragraph otherwise limits or modifies the obligations of Richard to Julie as otherwise set forth in this Agreement.

21. MODIFICATION AND PERFORMANCE OF THE AGREEMENT:

This Agreement shall not be modified or annulled by the parties hereto except by a written instrument, executed in the same manner as this instrument. The failure of either party to insist upon the strict performance of any provision of this Agreement shall not be deemed as a wriver of the right to insist upon the strict performance of any other provision of this Agreement

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at any other time. Any breach of any of the terms and conditions of this Agreement shall be deemed to be a breach of the entire Agreement. The obligations incurred under this Agreement may be enforced by specific performance.

Bach party acknowledges that no representations of any kind have been made to him or her as an inducement to enter into this Agreement other than the representations set forth herein, and that this Agreement contains all of the terms of the contract between the parties. Bach party acknowledges that this Agreement has been entered into of his or her own volition, with full knowledge of the facts and full information as to the legal rights and liabilities of each. Each party believes the Agreement to be reasonable under the chromostances.

22. REPRESENTATION:

Plaintiff is represented by Attorney Michael Sabers. Defendant is represented by Attorney Ronda Miller. Both parties have been advised that they should seek the advice of an accountant regarding all tax issues related to this matter and both parties have either sought the advice of an accountant regarding all issues related to this matter or have had the opportunity to do so. Based on such, the parties agree and understand that certain tax liabilities or risks may be inherent to this Agreement as provided for herein and that each party agrees to assume those risks associated with the same.

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Juin Sticel

State of South Dakota

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On this the <u>3'</u> day of <u>Decamber</u>, 2018, before me the undersigned Notary Public, personally appeared Julie Seidel, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same for the purposes therein contained.

In Witness Whereof, I hereunto set my hand and official seal.



HUKA OW HON NOTARY PUBLIC

My Commission Exp.

My Commission Expires
February 4, 2021

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State of San	H. Ook	Richard Seidel
State of 5m. County of Z	effe) ss.	
On this Public, persons person whose n	the _30 day of	known to me or satisfactorily proven to be the in instrument and acknowledged to me that he
•	ess Whereof, I hereunto set m	y hand and official seal. NOTARY PUBLIC
(SEAL)	Senl)	My.Commission Exp: //-7-22
	STATE OF THE PARTY	
		:
	•	
		STATE OF SOUTH DAKOTA Fourth Judicial Circuit Court I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:
		FEB 0 6 2019
'		Butte County Clerk of Courts By:
		~

Filed: 5/5/2021 3:11 PM CST Perkins County, South Dakota 52CIV19-000031 - Page 680 -

PROPERTY EXHIBIT A SEIDEL v. SEIDEL

***************************************	Italin	Richard	Julie
	All Bank Accounts held in Richard's name	x	
	All Bank Accounts held in Julie's name		x
	It, Bank Account	х	
	Сторв	x	
	vacant mobile home in Bison	х	
	02 Corvette	х	
	1990 Corvette		Х
	Transam (02' Pontiac)		X
	05 Harley Davidson	x	
	'13 Avalanche		X
	Horses		x
	93' Kawasaki	х	
	05' Boat Baba and Trailer	x	
	1984 8x12 Circle L Trailer		×
	GUNS ·		
	Rugor Red Hawk	X	
	Pollet gun Rifle	х	
	Walthers 22	х	
	Ruger 380	x	
	· 3 Mfles	x	
	22 pistol	x	

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Item	Richard	Julie	
 Grand Electric and WRCTC capital credits	x		~
Life insurance owned by Richard	x		

X

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Filed: 5/5/2021 3:11 PM CST Perkins County, South Dakota 52CIV19-000031 - Page 682 -

ORDER: ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUBSTITUTION OF COUNSEL; PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Page 1 of 2

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PERKINS)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

JULIE NIEMITALO,

52CIV19-000031

Plaintiff.

v.

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND MOTION FOR
SUBSTITUTION OF COUNSEL;
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGEMENT

RICHARD SEIDEL

Defendant.

On April 7, 2021, a hearing was held on Defendant's Motion for Summary Judgment and Motion for Substitution of Counsel and Plaintiff's Motion for Partial Summary Judgment. The Plaintiff, Julie Niemitalo, appeared by and through her attorneys, Travis Jones and Michael Sabers of Clayborne, Loos & Sabers, LLP. The Defendant, Richard Seidel, appeared by and through his attorneys, Timothy Barnaud of Barnaud Law Firm and Stacy Hegge of Gunderson Palmer Nelson & Ashmore, LLP. This Court, having heard arguments of Counsel, and having considered the briefs from both parties, with good cause showing, it is hereby:

ORDERED that Defendant's Motion for Summary Judgment is GRANTED. While this Court recognizes that the allegations in this action are egregious, the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that "Julie shall have <u>no claim</u> against any property of the Defendant either now held or afterwards acquired... and that this Agreement shall be in <u>full and final settlement</u> of all the property rights of the parties." (emphasis added); see Henry v. Henry, 534 N.W.2d 844, 847 (S.D. 1995) (holding that wife waived tort claims by signing a release in the parties' settlement agreement); see also Coleman v. Coleman, 566 So.2d 482, 485 (Ala. 1990) (holding

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT ORDER: ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUBSTITUTION OF COUNSEL; PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT Page 2 of 2

that allowing a spouse "to use the fact that she may have been infected with a venereal disease by her husband as leverage in her divorce settlement, and then [permitting] her to bring a subsequent tort action, would seriously undermine the settlement of divorce actions in the future. To do so would, in the trial court's words cause confusion and lead to fraud, potential ambush, and a play on words within the settlement." *Id.* (quotations omitted)).

This ruling finds support in policy. See, e.g., SDCL 25-4-1 (explaining that "the effect of [a divorce] judgment is to restore the parties to the state of unmarried persons); Henry v. Henry, 534 N.W.2d 844, 846 ("After the decree of divorce is entered, the parties no longer have any legal strings attached relating to the marital relationship.").

As this Court has resolved this case on summary judgment in favor of the Defendant, it need not address the Plaintiff's Motion for Partial Summary Judgment or the Defendant's Motion for Substitution of Counsel.

Dated this 29th day of April, 2021.

BY THE COURT:

Hon. Michelle K. Comer Circuit Court Judge

ATTEST:

Trish Peck Clerk of Courts

Deputy Clerk of Courts

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SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM

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by		

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the COURT'S CORRESPONDENCE REGARDING PLAINTIFF'S MOTION FOR RECONSIDERATION (52CIV19-31) in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

Mr. Michael Sabers Mr. Travis Jones Attorney at Law PO BOX 9129 Rapid City, SD 57709

Mr. Timothy J. Barnaud (Hand Delivered) Attorney at Law 211 Main St. Suite 103 Spearfish, SD 57783

Ms. Stacy Hegge Attorney at Law 111 W. Capitol Ave #230 Pierre, SD 57501

which addresses are the last addresses of the addresses known to the subscriber.

Dated this 20th day of May 2021.

Carol Latuseck Lawrence County Clerk of Courts

FILED

MAY 2 4 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

Ву_____



Fourth Judicial Circuit Court

Michelle K. Comer Circuit Court Judge P.O. Box 626 Deadwood, SD 57732 Phone: 605-578-2044 Fax: 605-578-3613 Sandra Semerad Court Reporter

May 20, 2021

Mr. Sabers Mr. Jones 2834 Jackson Blvd. Ste 201 Rapid City, SD 57702

Mr. Tim Barnaud 704 7th Avenue- Ste 201 PO Box 2124 Belle Fourche, SD 57717

Ms Stacy Hegge 111 W. Capitol Ave #230 Pierre, SD 57501

Dear Counsel:

A hearing was held on Plaintiff's Motion for Reconsideration on Wednesday May 19, 2021. Defense Counsel objected to the Motion for Reconsideration and moved that the record be stricken. Defendant reasoned that Plaintiff's arguments not be considered because it was new information different than the Plaintiff's original response to Defendant's Motion for Summary Judgment. The Court took the objection under advisement.

After, much consideration the Court will not reconsider the Defendant's Motion for Summary Judgment. Initially both Parties agreed that the divorce stipulation was unambiguous and was controlled by the four corners of the document.

The Court previously granted the Defendant's Motion for Summary Judgment finding the document unambiguous. The Court specifically notes that nowhere in the Stipulation is a reservation of any further claims. In fact, the Stipulation is replete with language that this was a release. Specifically but not limited to the provisions that Plaintff agrees to pay all of her medical bills for her treatment without reservation. Further, Plaintiff received a lump sum nonmodifiable alimony amount of \$750,000 "intended as a final adjustment of mutual rights and obligation and is an absolute judgment." Next, there is language under the heading "ENTIRE AGREEMENT" that this "constitutes the sole, exclusive and entire agreement between the parties....." Under the heading MODIFICATION AND PERFORMANCE of the Agreement the language provides "each party acknowledges that this Agreement has been entered into of his or her own volition, with full knowledge of the facts and full information as to the legal rights and liabilities of each. Each party believes the Agreement to be reasonable under the circumstances."

The Court stands by its previous Order Granting Summary Judgment to the Defendant. Due to this ruling it is unnecessary for the Court to make further ruling on the other motions.

LETTER: ORIGINAL LETTER FROM JUDGE COMER WITH CERTIFICATE OF SERVICE Page 3 of 3

Judge Michelle Comer

4th Circuit Judge

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MAY 2 4 2021

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM 4TH CIRCUIT CLERK OF COURT

Ву_____

Filed on: 07/26/2019 Perkins

County, South Dakota 52CRI17-000034

STATE OF SOUTH DAKOTA))SS:	IN CIRCUIT COURT
COUNTY OF BUTTE)	FOURTH JUDICIAL CIRCUIT
JULIE SEIDEL,)	09DIV17-000032
Plaintiff,)	
y .)	JUDGMENT & DECREE OF DIVORCE
RICHARD SEIDEL,	j	
Defendant.)	,

This matter came before the Honorable Circuit Court Judge Michael Day on the 4th day of December, 2018, via a Property Distribution and Divorce Agreement ("PDDA") as well as Affidavits of Jurisdiction of the parties. Plaintiff and Defendant both appeared by way of the referenced Affidavits of Jurisdiction and have waived Findings of Fact and Conclusions of Law through the Affidavits and terms of the PDDA. The Plaintiff was represented by attorney of record Michael K. Sabers and the Defendant was represented by his attorney of record Ronda Miller.

It appears to the Court that the Summons and Complaint were properly served, as shown by the service documents on file herein, and more than sixty days have elapsed since such service and that the Court has jurisdiction of this matter and the parties. The parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence and which appears to be a fair and equitable adjustment of the property rights of the parties. The Court finds that the parties have stipulated to grounds for divorce based on Defendant's adultery. Therefore, based upon the PDDA, and the record in this matter, it is hereby:

ORDERED, ADJUDGED AND DECREED that the marriage heretofore existing between the parties be, and the same hereby is, dissolved and set aside, and that the parties be, and each of them is, restored to the status, conditions and rights of single persons and that each party is hereby granted an absolute divorce from the other on the grounds of Defendant's adultery; and it is further

Filed on: 12/04/2018 BUTTE County, South Dakota 09DIV17-000032

Filed: 5/5/2021 3:11 PM CST Perkins County, South Dakota 52CIV19-000031 - Page 662 -

ORDERED, ADJUDGED AND DECREED that the PDDA signed by the Plaintiff on the 3rd day of December, 2018 and by the Defendant on the 30th day of November, 2018, which is filed in the Court File, be and hereby is incorporated into this Judgment and Decree of Divorce as is set forth in its entirety herein and shall be enforceable as an Order and Judgment of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff, based upon her request, is hereby returned to her maiden / former name known as Julie Niematalo. Plaintiff's date of birth is December 6th, 1964; and it is further

ORDERED, ADJUDGED AND DECREED that each party shall, at the request of the other, execute and deliver any such instruments as may be required in order to carry out the intentions and provisions of this Judgment and Decree of Divorce and the PDDA incorporated herein. In the event either party shall fail to execute deeds, titles, or other appropriate instruments of conveyance as required by this Judgment and Decree of Divorce, this Judgment shall act in lieu of such conveyance; and it is further

ORDERED, ADJUDGED AND DECREED that as may be necessary, this Court will enter any such further Orders as may be needed to carry out the terms and conditions of the PDDA which is incorporated herein.

Dated this 4th day of December, 2018.

BY THE COURT:

Signed: 12/4/2018 9:11:02 AM

Honorable Judge Michael Bay

Circuit Court Judge

Attest: Schmoker, Laura Clerk/Deputy

(SEAL)

STATE OF SOUTH DAKOTA
Fourth Judicial Circuit Court
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears on file in my office on this date;

FEB 0 1 2019

Laura Schmoker Butte County Clerk of Courts

By: <u>Alana Johnson</u>

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Filed on: 12/04/2018 BUTTE County, South Dakota 09DIV17-000032

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IN THE SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

 No. 29653
 10. 29033

JULIE NIEMITALO,

Appellant/Plaintiff,

v.

RICHARD SEIDEL,

Appellee/Defendant.

Appeal from the Circuit Court Fourth Judicial Circuit Perkins County, South Dakota

The Honorable Michelle Comer Circuit Court Judge

REPLY BRIEF OF APPELLANT JULIE NIEMITALO

Attorneys for Appellant Julie Niemitalo

Michael K. Sabers Michael C. Loos Clayborne, Loos, & Sabers, LLP PO Box 9129 Rapid City, SD 57709 605-721-1517 Attorneys for Appellee Richard Seidel

Stacy R. Hegge Gunderson, Palmer, Nelson, & Ashmore, LLP 111 W Capitol Ave, Ste 230 Pierre, SD 57501 605-494-0105

Tim Barnaud Barnaud Law Firm PO Box 2124 Belle Fourche, SD 57717 605-717-0186

TABLE OF CONTENTS

TAE	BLE OF AUTHORITIESii
RES	PONSE TO SEIDEL'S1
STA	TEMENT OF ISSUES AND FACT1
AR(GUMENT2
1.	Reversal is Warranted Under A Plain Reading of the PDDA2
2.	Reversal is Warranted as Seidel Has Not Met His Burden
	to Show a Valid Release of Civil Claims Which is Clear, Definite
	and Complete4
3.	Other Provisions of PDDA Do Not Cure Circuit Court's
	Error10
4.	Timing of the PDDA with Respect To the Attack
	is Irrelevant11
5.	PDDA Ambiguity on the Issue of Release of Civil Claims
	Provides Alternative Grounds to Reverse the Circuit Court
6.	Application of Judicial Estoppel is Warranted15
CO	NCLUSION16
CEF	RTIFICATE OF COMPLIANCE17
CEF	RTIFICATE OF SERVICE18

TABLE OF AUTHORITIES

Cases

Boever v. South Dakota Bd. Of Accountancy, 526 N.W.2d 747, 750 (S.D. 1995)	9
Bowen v. Arnold, 502 S.W.3d 102, 113 (Tenn. 2016)	2
Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 700 N.W.2d 729, 737 (SD 2005)	16
Chord v. Pacer Corp., 326 N.W.2d 224, 226 (SD 1982)	3
Coffee v. Coffey, 888 N.W.2d 805, 809 (SD 2016)	4
Cole v. Wellmark of S.D., Inc., 2009 S.D. 108, ¶ 14, 776 N.W.2d 240, 246	4
Dakota, Minnesota & Eastern Railroad Corp. v. Acuity, 720 N.W.2d 655, 661 (S.D.	
2006)	15
Detmers v. Costner, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151	3
Fenske Media Corp. v. Banta Corp., 676 N.W.2d 390 (SD 2004)	6
Flynn v. Lockhart, 526 N.W.23d 743 (SD 1995)	
Fox v. Burden, 1999 SD 154, 603 N.W.2d 916	15
Gores v Miller, 875 N.W.2d 34 (S.D. 2016)	6
Gottschalk v. Hegg, 228 N.W.2d 640, 643-44 (S.D.1975)	9
Henry v. Henry, 534 N.W.2d 844 (S.D. 1995)	12
In re Dissolution of Midnight Star Enters., L.P., 2006 S.D. 98, ¶ 12, 724 N.W.2d 334,	
337	
Kneeland v. Matz, 388 N.W.2d 890, 891 (S.D. 1986)	15
Mckie Ford Lincoln, Inc. v. Hanna, 907 N.W.2d 795, 798 (SD 2018)	3
Middleton v. Klinger, 410 N.W.2d 184, 185-86 (SD 1987)	3
Northwestern Public Service Co. v. Chicago & N.W.Ry.Co., 210 N.W.2d 158 484 (sic))
(S.D. 1973)	7
Paweltzke v. Paweltzke, 2021 S.D. 52 ¶ 40	. 16
Pickering v. Pickering, 434 N.W.2d 758 (SD 1989)	. 10
Richardson v Richardson, 906 N.W.2d 369 (SD 2017)	. 10
Sanford v. Sanford, 694 N.W.2d 283, 290-291 (S.D. 2005)	. 11
Singpiel v. Morris, 582 N.W.2d 715, 719 (S.D. 1998)	. 13
State v Seidel, 953 N.W.2d 301, 310 n5 (SD 2020)	, 16
State v. Seidel, 953 N.W.2d 301, 312 (S.D. 2020)	8
State. v. Seidel, 2020 SD 73, 953 NW.2d 301	2
Statutes	
17A C.J.S. Contracts § 297, 127 (1963)	3
SDCI 8 53.9.3	16

RESPONSE TO SEIDEL'S STATEMENT OF ISSUES AND FACT

Although the legal issue itself is correctly identified in Seidel's brief, the narration improperly frames the issue and highlights the Circuit Court's error and the flaw in Seidel's argument on appeal.

The circuit court correctly granted Richard's Motion for Summary Judgment because the divorce settlement agreement bars Julie from bringing the current lawsuit *that seeks Richard's property* and is predicated upon facts occurring over one year prior to Julie's signing of the divorce settlement agreement.

Appellee's Brief p. 2 (*emphasis added*). The emphasized phrase incorrectly characterizes Julie's civil lawsuit arising out of Richard's attack as "seek[ing] Richard's property." This is neither factually, legally or procedurally correct. The civil action at issue does not "seek Richard's property," but is a claim against him personally. The use of the phrase is revealing and not a coincidence. The language in the Property Division and Divorce Agreement (PDDA) relied upon by the Circuit Court in granting Seidel's motion for summary judgment provides in part:

[I]t is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of the Defendant either now held or afterwards acquired[.]

APP 005. The unmistakable purpose of the document is a marital property settlement. In that context the referenced language makes sense – neither party shall have claim in the divorce proceedings to the property which was subject to the agreement. Although contrived, Seidel has to frame the issue in this matter – the civil action is a claim "seeking property" - otherwise, the Circuit Court's order cannot be upheld.

Seidel was found guilty beyond a reasonable doubt of kidnapping, rape and assault. APP 028. This Court unanimously upheld the conviction and sentence. *State. v.*

Seidel, 2020 SD 73, 953 NW.2d 301. Despite this, Seidel "maintains his innocence" and refers to his attack which is the subject of Julie's civil claims as "alleged." This is offensive generally and not permitted in this civil action as the prior criminal proceedings have conclusively established his guilt of the underlying acts. See, e.g., *Bowen v. Arnold*, 502 S.W.3d 102, 113 (Tenn. 2016) (criminal conviction is preclusive in favor of a victim in a civil action).

ARGUMENT

1. Reversal is Warranted Under A Plain Reading of the PDDA

The parties agree resolution of this appeal is controlled by this Court's precedent on contract interpretation. There is also no dispute that the Circuit Court's decisions granting summary judgment in favor of Seidel are reviewed de novo. *Detmers v. Costner*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151, and that the Circuit Court's interpretation of the PDDA is afforded no deference on appeal. *Mckie Ford Lincoln, Inc. v. Hanna*, 907 N.W.2d 795, 798 (SD 2018) (citation omitted). In determining the proper interpretation of a contract the court must seek to ascertain and give effect to the intention of the parties. *Chord v. Pacer Corp.*, 326 N.W.2d 224, 226 (SD 1982). In determining the meaning of a contract, "effect will be given to the plain meaning of its words." *In re Dissolution of Midnight Star Enters., L.P.*, 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337. Finally, there can be no dispute as to the admonitions against improper means of interpreting contracts, to wit:

• Words in a contract should not be read in isolation or given undue weight or emphasis. "We must give effect to the language of the entire contract and particular words and phrases are not interpreted in isolation." *Id.* (additional citation

omitted).

In construing a contract, disproportionate or undue weight or emphasis should not be placed on particular words, parts, or provisions thereof, to the neglect or detriment of others such emphasis does not serve the object of interpretation, and no single part, sentence, or clause, when considered alone, will control.

Middleton v. Klinger, 410 N.W.2d 184, 185-86 (SD 1987) (citing 17A C.J.S. Contracts § 297, 127 (1963)).

- Forced interpretation or creating a "new" contract or provisions is not allowed. "We will not create a forced construction or a new contract for the parties when the language is clear and we are able to ascertain the plain and ordinary meaning of the language used." *Cole v. Wellmark of S.D., Inc.*, 2009 S.D. 108, ¶ 14, 776 N.W.2d 240, 246.
- Words/phrases in a contract shall not be ignored. "[W]e do not interpret language in a manner that renders a portion of the contract meaningless. Instead, we interpret the contract to give a reasonable and effective meaning to all its terms." *Coffee v. Coffey*, 888 N.W.2d 805, 809 (SD 2016) (citations and internal quotations omitted). In this context, the Circuit Court's decision cannot stand as being violative of each of these rules of construction. The Circuit Court's Order provides that "the settlement agreement and subsequent divorce decree that dissolved the marriage between the parties is unambiguous in its statement that 'Julie shall have <u>no claim</u> against any property of the Defendant either now held or afterwards acquired... and that this Agreement shall be in <u>full and final settlement</u> of all the property rights of the parties." (emphasis in Court's Order) APP 001. There is no mystery as to the words and phrases the Circuit Court emphasized (or over-emphasized). The Court also improperly broke apart the

agreement's language to get to its interpretation. Yet a fair reading of the plain text of the entire agreement makes clear that "no claim" and "full and final settlement" were read in isolation and given improper import. The Circuit Court's reliance on these terms to determine that there was a settlement agreement and release of unpled and unfiled civil claims renders the pervasive qualifiers "property" and "property rights" meaningless.

Plainly the Circuit Court created an agreement not supported by the plain language of the PDDA. The Circuit Court took the following language used by the parties in the recitals to the PDDA:

[The parties] further agree to a full, complete and final property settlement of all the property of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of the Defendant either now held or afterwards acquired; and that the Richard shall have no claim against any property of Julie either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of all the property rights of the parties.

And converted it to:

[The parties] further agree to a full, complete and final property settlement of all the property and other claims of the parties hereto; and it is further understood and agreed that, other than the Agreement contained herein, that Julie shall have no claim against any property of the Defendant either now held or afterwards acquired; and that this Agreement shall be in full and final settlement of all the property rights of the parties.

The Circuit Court erred as a matter of law by adding language, over-emphasizing language, reading phrases in isolation, ignoring other words and phrases, and generally re-writing the agreement to find a release of civil claims not mentioned or contemplated.

2. Reversal is Warranted as Seidel Has Not Met His Burden to Show a Valid Release of Civil Claims Which is Clear, Definite and Complete

Julie takes no issue with the law cited by Seidel regarding releases. Appellee's Brief pp. 9-11. The problem for Seidel is that nowhere in the PDDA is there even a

reference to it being a "release" or "release of claims" other than as to specific property divided in the divorce. Seidel can scarcely bring himself to use the title of the document, "Property Division and Divorce Agreement" because it belies a contention that it is, or even includes, a release of civil claims. For example, *Gores v Miller*, 875 N.W.2d 34 (S.D. 2016) involved a motor vehicle accident which was settled pursuant to a release of claims with the following language:

[T]he undersigned hereby releases, and forever discharges Lori Smith and her heirs, executors, administrators, agents, insurers, and assigns and all other persons, firms or corporations liable or who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an incident which occurred on or about the 28th Day of July, 2010, at or near Springfield, South Dakota....

Id. at 37 (emphasis in original). This "broad and unambiguous" language, including the release of "all additional claims" of "any kind or nature whatsoever" was deemed by this Court to have released a subsequent action against medical providers who provided treatment to the injured party. *Id.* This release language bears no semblance whatsoever to the PDDA.

Fenske Media Corp. v. Banta Corp., 676 N.W.2d 390 (SD 2004), cited by Seidel, is also instructive. In stark contrast to the present matter, the dispute involved a "Mutual Release of All Claims." *Id.* at 392. One of the parties sought to assert claims after it was required to return \$50,000 in bankruptcy proceedings involving the other contracting party. *Id.* This Court, reading the release "as a whole" disallowed the subsequent action based upon the terms of the release.

When read as a whole, the release provides but one reasonable and consistent interpretation of the parties' intentions. The first declaration in the release states, "WHEREAS, a dispute has risen between the parties arising out of the parties' prior business dealings." This language encompasses the matters the parties intended to discharge through the release. It includes "the parties' prior business dealings." This intention is manifested in the provision of the release that states "all claims liabilities, obligations, causes of action, and controversies arising out of the dispute ... are hereby settled." When this language is considered with the broad language of the fourth provision declaring that Banta be released from all claims "which in any way relate to any goods or services provided by Fenske to Banta," the only consistent and reasonable interpretation that can be drawn is that Banta and Fenske intended Banta to be released from all claims arising from their dispute.

Id. p. 393 (emphasis in original).

The Court is invited to read the PDDA's recital relied upon by the the Circuit Court. "The matters the parties intended to discharge" could not be more clear, including the five separate references to marital "property" and "property rights." This critical distinction reveals the error in the Circuit's Court's expanding the "matters the parties intended to discharge" to include Julie's civil claims which are nowhere mentioned or referenced.

The PDDA is as narrow as the *Fenske* Mutual Release of All Claims was broad. Compare the Fenske language releasing "all claims, liabilities, obligations, causes of action, and controversies arising out of the dispute," with the PDDA's extremely narrow "full and final settlement of all the property rights of the parties."

Seidel concedes that it is his burden to "prove the existence of a valid release." Appellee's Brief p. 10. Seidel further confirms that to meet his burden requires a release "reduced to a writing that is clear, definite and complete." *Id.* (citing *Northwestern Public Service Co. v. Chicago & N.W.Ry.Co.*, 210 N.W.2d 158 484 (sic) (S.D. 1973)). It is respectfully submitted that the PDDA is neither clear, nor definite, nor complete with respect to a supposed release of Julie's civil claims against Seidel arising out of his

attack. The PDDA does not even mention such claims and for that matter never even uses the word "release" in the operative provision. This Court knows a release when properly presented. The PDDA is a decidedly different document than any of the cases cited by Seidel. He cannot meet his burden in this case and the Circuit Court should be reversed.

Seidel's reference and citation to *Flynn v. Lockhart*, 526 N.W.23d 743 (SD 1995) bears mention. Seidel cites the case for the proposition that "a party to an unambiguous release cannot offer his or her attorney's alleged remarks about the release's effect so as to vary the terms of the release." Appellee's Brief p. 10. First, unlike the present case, *Flynn* involved a broad release of all claims arising out of an accident. *Id.* at 744-745. Second, it is not Julie's counsel who has offered evidence about the "release's effect"—it was *Seidel's* attorney who told the jury seated for Seidel's criminal trial that the PDDA he entered into evidence left Julie's civil claims entirely intact:

Attorney Rensch: Pg. 1058; lines 23-25: "And they did it with stipulation, and there was not a trial. And what does she retain? She still has the right to sue him for all of this."

Attorney Rensch Pg. 1059; lines 4-7: "She still has the right to sue him civilly for all of this. So you want to talk about bias and motivation and money coming into play. Money makes people do strange things.

APP 058-059. To the extent Mr. Rensch was relying upon testimony from Julie's counsel, it was evidence *Mr.Rensch* elicited, rather than some affirmative statement from Julie's counsel who had been subpoenaed to testify at trial. *State v. Seidel*, 953 N.W.2d 301, 312 (S.D. 2020). In affirming Seidel's conviction and sentence, the Court noted that "[t]he overarching theory of the defense was the J.S. engaged in all of these acts in order to use them as a basis for obtaining a more favorable divorce settlement or a monetary

award against Richard in a civil lawsuit." *Id.* at 310 n5. This "theory of the defense" certainly did not arise from Julie's counsel.

Unable to reconcile his position with the fact that the PDDA does not create a valid release which is clear, definite and complete, Seidel resorts to a hypothetical question of "how a lawsuit seeking \$10,000,0000 from Richard is not a claim against Richard's funds, assets, or any other property either owned by Richard at the time of the divorce or later acquired." Appellee's Brief p. 11. The answer is clear. As a matter of logic, the claim is against Seidel, not his "funds, assets or property." Julie's civil claims based upon Seidel's kidnapping, rape and assault are not against machinery, real property, a Harley Davidson motorcycle or any other property Seidel was awarded pursuant to the PDDA. The claims are against Seidel personally. It bears repeating given Seidel's argument and the Circuit Court's decision that "No claim against the property of Richard" is not the same thing as "No claim against Richard." Words matter – the PDDA cannot be interpreted by ignoring the words "property" and "property rights." Seidel's argument can only be accepted based a reading of the agreement which excludes its very essence; a division by settlement of marital property.

More fundamentally, how, whether or in what manner Julie could enforce a civil judgment against Seidel in light of the PDDA is not before the Court nor before the Circuit Court. Stated another way, the matter is not ripe. Ripeness involves the timing of judicial review and the principle that "[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote." *Boever v. South Dakota Bd. Of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)(quoting *Gottschalk v. Hegg*, 228 N.W.2d 640, 643–44

(S.D.1975)). Assuming the suit is permitted to proceed on remand, whether Julie will obtain a verdict and judgment against Seidel is unknown at this point.¹ So too is the amount of said verdict and judgment, and the manner Seidel would or could satisfy the same if enforced. The Court should decline Seidel's invitation to decide this appeal based upon future or hypothetical events. It need not do so as the plain language and rules of interpretation are well-sufficient to support reversal and remand.²

Seidel's reliance on *Richardson v Richardson*, 906 N.W.2d 369 (SD 2017) is misplaced as discussed in Julie's Appellant's Brief. Of course, *Richardson* is a seminal case which allowed spouses to seek civil redress for wrongful conduct of another spouse prior to divorce. *Id.* at 381 (overruling *Pickering v. Pickering*, 434 N.W.2d 758 (SD 1989). In the divorce proceeding the parties entered into a "settlement agreement contain[ing] a mutual release; however it provided an exception permitting either party to pursue nonproperty causes of action against the other." *Id* 371. The Court did not address the release language other than to recognize the cause of action. Nor has this Court ever subsequently required that expressly reserving "nonproperty" causes of action is the exclusive means of a spouse to pursue civil claims following divorce. Under basic contract principles, the same effect is had where the parties expressly limit their agreement, as here, to "property" and "property rights" of the other.

¹ Julie moved the Circuit Court for summary judgment on the issue of liability given the conclusive proof that the acts complained of, kidnapping, rape and assault, have been conclusively established by the unanimous conviction and affirmance on appeal. This motion was not ruled upon.

² Beyond ripeness, the PDDA would not be an impediment to enforcing a civil judgment as the PDDA was and is limited to the divorce proceedings. Civil claims and verdicts are not controlled by this document, including language Julie would have no claim against Seidel's property.

3. Other Provisions of PDDA Do Not Cure Circuit Court's Error

Seidel's attempt to conflate other provisions of the PDDA as supportive of a release of civil claims fails. None of the cited portions of this standard divorce stipulation come close to supporting Seidel's burden to show a valid release of civil claims which is "clear, definite and complete." This includes standard provisions that each divorcing party shall not thereafter participate in the estates of the other; or that each would be responsible for "personal debts and liabilities" divided pursuant to the agreement, including medical expenses. Appellee's Brief p. 13-14. These are standard terms in a divorce. Further, Julie's civil claim seeks general and punitive damages which certainly are absent from any PDDA provision.

The reference to alimony in the PDDA warrants special mention as Seidel appears to believe this provision is most supportive of his position. Section 7 of the PDDA was titled "LUMP SUM NON-MODIFIABLE ALIMONY." App 013. This provision provided in part: "As for spousal support, Richard shall pay to Julie lump-sum, nonmodifiable alimony in the gross total amount of \$750,000.00 to be paid in installment payments. Based on South Dakota law, this is intended as a final adjustment of mutual rights and obligations and is an absolute judgment[.]" R. 672-73 (App. 9-10). Given that alimony or spousal support is a particular right of a spouse depending on factors outlined by this Court, it is absurd to claim that a reference to "final adjustment of mutual rights and absolute judgment" regarding alimony has anything whatsoever to do with an unspoken release of the separate right of Julie to seek civil redress for Seidel's torts.

This Court has described the various types of alimony. See, e.g., *Sanford v. Sanford*, 694 N.W.2d 283, 290-291 (S.D. 2005)(describing permanent alimony, lump sum alimony, restitutional or reimbursement alimony, and rehabilitative alimony). The parties' agreement and language regarding alimony, set forth separately as its own provision in the PDDA, is limited on its face to the issue and Julie's rights to alimony. It has nothing to do with civil claims and certainly cannot be relied upon to support Seidel's argument or the Circuit Court's holding.

4. Timing of the PDDA with Respect To the Attack is Irrelevant

Seidel appears to read Henry v. Henry, 534 N.W.2d 844 (S.D. 1995), as prohibiting all civil claims of a spouse taking place prior to any divorcing parties' stipulation. Appellee's Brief p. 15-16. Lois Henry's spouse Harold was abusive in the latter years of the parties' marriage and continued in his pattern after the divorce. Relying not on the general timing of any particular act, but rather the language of the parties' agreement, this Court simply disallowed claims prohibited by the document's plain language. This Court noted, "despite the potential for entertaining such a claim, ... Lois waived that opportunity by signing a release in the parties' settlement agreement." Id. at 847. The Court continued stating, "[t]he provision at issue in the decree provided that each party releases the other 'from any and all rights, claims, demands or obligations arising out of or by virtue the marital relation.' A clear reading of this agreement between the parties shows that they were settling all pre-divorce claims." *Id.* (emphasis added). Nowhere in the present PDDA does there appear language that "releases ... any and all rights, claims, demands or obligations arising out of or by virtue of the marital relation." In fact, the word "release" does not appear in the relied-upon recital at all.

Henry's "release" of "any and all rights, claims, demands or obligations arising out of or by virtue of the marital relation" stands in stark contrast to the present PDDA which states in a mere recital that the agreement "shall be in full and final settlement of all the property rights of the parties." Summarizing, the timeline between tortious conduct and the specific divorce agreement was deemed relevant in *Henry*. The same timeline is meaningless in this case given the language of the PDDA and entire absence of clear, definite and complete release of pre-divorce conduct.

5. <u>PDDA Ambiguity on the Issue of Release of Civil Claims Provides</u> Alternative Grounds to Reverse the Circuit Court

The Court has long recognized a party's ability to present alternative theories and arguments. Certainly this is not the first case in which litigants separately contend that an agreement unambiguously supports their respective, and contrary, positions. See, e.g., *Singpiel v. Morris*, 582 N.W.2d 715, 719 (S.D. 1998) (also addressing one party's contention, "[i]n the alternative," that the agreement at issue was ambiguous). Whether an agreement is ambiguous is a question of law. *Id*.

Seidel first contends that Julie's argument on ambiguity is only supported by her counsel's testimony in the criminal trial. This is incorrect. First, it was Seidel that introduced parole evidence at the summary judgment proceedings. See Exhibit B to the Affidavit of Tim Barnaud. Second, the evidence of the parties' intent that Julie maintained all rights to pursue the present civil action came from *Seidel's* attorney. Specifically referring to the PDDA he introduced into evidence, Seidel's criminal defense attorney stated to the jury that the divorce was concluded "by stipulation," rather than trial, and that pursuant to that stipulation Julie "retain[ed]" the right under the PDDA "to sue him civilly for all of this [criminal charges including domestic assault, kidnapping

and rape]." Beyond Seidel's attorney's introduction of the PDDA into evidence and his statements, this Court noted that "[t]he overarching theory of the defense was the J.S. engaged in all of these acts in order to use them as a basis for obtaining a more favorable divorce settlement or a monetary award against Richard in a civil lawsuit." *State v Seidel*, 953 N.W.2d 301, 310 n5 (SD 2020). Finally, if Julie's attorney's subpoenaed testimony is relevant or required on the issue at all (which it is not) it was *Seidel* who elicited the testimony and made the record as part of his "overarching theory." *Id.* at 312-313.

Seidel posits that Julie's position is "absurd" contending there is no record regarding the circumstances surrounding the execution of the PDDA. Seidel is again incorrect. Seidel elicited the following exchange as part of his overarching theory that the PDDA did not serve to bar Julie's civil claims.

Q [Mr. Rensch]: I asked if she reserved her right to file a civil claim against Mr. Seidel for what she's alleging in this case. Yes or no. A: [Mr. Sabers]No.

Q: She did not reserve the ability to sue him for that?

A: No. He didn't give up. He wanted to buy that [a release of civil claims], and he couldn't get it.

Q: Based upon the legal papers [PDDA and Divorce Decree], though, you reserved that, did you not, for her?

A: My recollection was that she wouldn't waive it [civil claims for Defendant's November 2, 2017 acts].

Q: If she did not waive the right to sue Richard for what happened here, she still had that right; isn't that correct?

A: She did not waive it. That's correct

Summarizing, the record on Seidel's several hypothetical questions, including "the actual circumstances surrounding the Agreement" (Appellee's Brief p. 20-21) is that Seidel wanted to include a waiver of civil claims as part of the divorce and that Julie refused.

This is fully in line with the overarching theory of Seidel's criminal defense, Julie's current position and is consistent with a fair reading of the PDDA. If deemed ambiguous, the intent of the parties is clear – Julie's right to bring this civil action was preserved.

Seidel's alternative argument that res judicata bars Julie's current tort claims is factually and legally incorrect. Factually, the civil matter was not litigated in the divorce as these claims were clearly outside of the PDDA's express limitation as to "property" and "property rights." ³ Legally, res judicata is inapplicable. This Court has identified four elements must be satisfied in order to apply res judicata: (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. See, e.g., Dakota, Minnesota & Eastern Railroad Corp. v. Acuity, 720 N.W.2d 655, 661 (S.D. 2006). Seidel cannot establish the first element as the PDDA and Judgement and Decree pertained only to marital property and dissolution of the marriage, and as such the issues resolved in the divorce action differ greatly from the present matter seeking to hold Seidel accountable for civil tort claims. Further, Julie is entitled to a jury trial on her civil claims against Seidel. South Dakota Constitution Article VI, § 6, provides in part: "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy...." See also, Kneeland v. Matz, 388 N.W.2d 890, 891 (S.D. 1986)(State Constitution mandates that a party be given a jury trial as a matter of right if the action is one at law). Divorce actions,

³ The trial court overseeing the divorce entered a Judgment and Decree of Divorce on December 4, 2018. APP 024. Therein, Judge Day found that "[t]he parties entered into a written Property Distribution and Divorce Agreement ("PDDA") concerning property rights, which is on file herein and is accepted in evidence and which appears to be a fair and equitable adjustment of the property rights and the parties."

on the other hand, are decided by the courts sitting in equity. See generally, *Fox v*. *Burden*, 1999 SD 154, 603 N.W.2d 916. Because Julie could not pursue her civil claims to a jury in the divorce proceeding, res judicata would not be applicable as she did not have a "full and fair opportunity to litigate" her civil claims in the divorce proceeding.

6. Application of Judicial Estoppel is Warranted

Seidel does not deny that his position in the criminal proceeding on the issue of release of civil claims is the exact opposite of the position he has taken herein. Instead, he contends that judicial estoppel should not be applied because "there is no evidence that a court or jury adopted any position [as claimed by Seidel in his criminal defense] that Julie was making false allegations for financial benefits." In a published opinion, this Court has already noted that "[t]he overarching theory of the defense was the J.S. engaged in all of these acts in order to use them as a basis for obtaining a more favorable divorce settlement or a monetary award against Richard in a civil lawsuit." State v Seidel, 953 N.W.2d 301, 310 n5 (SD 2020). Seidel's argument ignores this Court's admonition that application of judicial estoppel is not be reduced to an equation, and that various elements, including judicial acceptance of the prior position, are to be "generally consider[ed]." Canyon Lake Park, L.L.C. v. Loftus Dental, P.C., 700 N.W.2d 729, 737 (SD 2005). As an equitable doctrine principally adopted to maintain judicial integrity, *Id*. at 738, the Court can decide whether a party should be permitted to take one position as it's "overarching [albeit unsuccessful] theory" and turn around in a separate proceeding

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⁴ Seidel also requests that judicial estoppel not be addressed as it was raised on reconsideration to the Circuit Court. This contention should not deter the Court. The matter was briefed below in the reconsideration proceedings. Further, as a "procedural doctrine" the Court has "discretion to disregard the general rule of administration, particularly when, as here, the question raised for the first time is one of substantive law which is not affected by any factual dispute, for under such circumstances the parties may present the issue as thoroughly in the appellate court as it could have been presented below." *Paweltzke v. Paweltzke*, 2021 S.D. 52 ¶ 40 (citation and internal quotation omitted).

to take the exact opposite position on a dispositive issue. Julie submits that this type of "perversion" of the judicial machinery is well suited for application of the doctrine.⁵

CONCLUSION

For the reasons stated, Julie requests that the Circuit Court's grant of summary judgment be reversed, and that this matter be remanded for further proceedings on the merits.

Respectfully submitted this 28th day of October, 2021.

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 $^{^5}$ Due to page and space limitation Julie would refer the Court to her position on SDCL \S 53-9-3 as set forth in Appellant's Brief.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Michael K. Sabers, counsel for the Appellant, does hereby submit the following:

The foregoing brief is 16 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 5,000 words, and 25,635 characters (no spaces) in the body of the Brief.

Dated this 28th day of Octobe	r, 2021.
	MICHAEL C. LOOS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of October, 2021, he electronically filed the foregoing documents with the Clerk of the Supreme Court via email at <u>SCClerkBriefs@ujs.state.sd.us</u>, and further certifies that the foregoing document was also emailed and mailed via U.S. Mail, postage prepaid thereon, to:

TIM BARNAUD Barnaud Law Firm P.O. Box 2124 Belle Fourche, SD 57717

STACY R. HEGGE Gunderson, Palmer, Nelson & Ashmore, LLP 111 West Capitol Avenue, Ste 230 Pierre, SD 57501

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

MICHAEL C. LOOS	