Appeal No. 30194

In the
Supreme Court of the State of South Dakota

IN THE MATTER OF THE ESTATE OF NEIL WILLIAM SMEENK

DENISE L. SCHIPKE-SMEENK

Appellant

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

The Honorable Michael W. Day

Notice of Appeal filed December 12, 2022

BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK

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PRELIMINARY STATEMENT

Citations to the record will appear as "(CR ___)" with the page number from the Clerk's Appeal Index. Citations to Appellant Denise Schipke-Smeenk's appendix will be designated as "(APP___)" followed by the appropriate page number. Citations to the October 13, 2022, hearing transcript will be designated as "(HT___)".

Appellant Denise Schipke-Smeenk will be referred to as "Denise" and Appellee Ryan Smeenk shall be referred to as "Ryan." Decedent Neil William Smeenk shall be referred to as "Neil."

JURISDICTIONAL STATEMENT

Denise appeals from the circuit court's Order Regarding Petitioner Denise Schipke-Smeenk's Motion for Partial Summary Judgment dated November 14, 2022. (APP 009). This Order incorporated the circuit court's Memorandum of Decision on Motion for Partial Summary Judgment filed on October 19, 2022. (APP 001-008). Notice of Entry of this Order was filed on November 14, 2022. (CR 1084). Denise timely filed notice of appeal on December 12, 2022. (CR 1094).

The Order is one that may be appealed pursuant to SDCL § 15-26A-3 as well as *In re Est. of Geier*, 2012 S.D. 2, ¶ 15, 809 N.W.2d 355, 359, as the Order at issue finally resolved all of the issues remaining in Denise's Motion for Approval and Payment of Claim by finding that her request for damages could not proceed due to the doctrine of *res judicata*. Notice of Appeal was filed within the time limits of SDCL § 15-26A-6. Therefore, this Court has jurisdiction to consider the issues raised on appeal.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Is Denise's remedy of money damages barred by the doctrine of *res judicata* given this Court's holding in *Smeenk I*?

Following the appeal in *Matter of Est. of Smeenk*, 2022 S.D. 41, 978 N.W.2d 383 (hereinafter "*Smeenk I*"), Denise moved for partial summary judgment arguing (1) that the Agreement to Execute Mutual Wills (hereinafter the "Agreement") was binding and enforceable against Neil; and (2) that Neil breached the Agreement. (APP 011). Denise also requested the trial court enter an order requiring a trial on Denise's money damages associated with Neil's breach. (APP 047).

However, while the circuit court entered an Order granting Denise's motion, finding the Agreement was valid and that Neil did in fact breach the Agreement, the circuit court then ruled that regardless of this finding, the doctrine of *res judicata* "bars Denise L. Schipke-Smeenk from attempting to further litigate this or any claim or issue arising out of the Agreement, and therefore, Denise L. Schipke-Smeenk's claim for breach of contract is denied." (APP 001).

- *In re Est. of Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d 86, 90
- *Matter of Est. of Smeenk*, 2022 S.D. 41, 978 N.W.2d 383
- *Healy Ranch, Inc. v.* 2022 S.D. 43, 978 N.W.2d 786, reh'g denied (Sept. 19, 2022)
- *St. John v. Peterson*, 2013 S.D. 67, ¶ 22, 837 N.W.2d 394, 400

STATEMENT OF THE CASE AND FACTS

This is an appeal from the circuit court, Fourth Judicial Circuit, the Honorable Michael W. Day, Circuit Court Judge, presiding. This case has been before this Court previously in *Matter of Est. of Smeenk*, 2022 S.D. 41, 978 N.W.2d 383.

Denise and Neil were married and executed mutual and reciprocal wills in 2017 as well as an Agreement to Execute Mutual Wills. (APP 020, ¶ 1). The Agreement included a provision wherein neither party would be able to revoke or alter the estate plan absent the signed consent of the other party. (APP 020, ¶ 2). Subsequently, in April of 2019, unbeknownst to Denise, Neil executed a new will. (APP 021 at ¶ 4)). Neil passed away on June 14, 2019, and eventually, the circuit court appointed Denise to serve as Personal Representative of Neil's Estate. (APP 021, ¶ 5; CR 241).

After being appointed Personal Representative, in her capacity as personal representative, Denise filed a Motion for Approval and Payment of Claim with the circuit court pursuant to SDCL § 29A-3-713. (APP 069). In this Motion, Denise sought the circuit court's approval of her distributing to herself, as creditor of the Estate, all assets she was to receive pursuant to the terms of the Agreement. *Id.* Specifically, this Motion requested the circuit court "approve the disposition of the Estate of Neil William Smeenk as provided in the 2017 Agreement and 2017 Will." *Id.*

Neil's children Ryan Smeenk and Brandy Smeenk opposed the Motion and asserted that although Denise had not served herself notice as a known creditor, the time to file her claim had run and therefore the Motion should not be awarded. (CR 460). However, while Ryan and Brandy objected to the enforcement of the Agreement to Execute Mutual Wills because it would be inequitable, they did not dispute the validity of the contract to make Wills. *Id.*

The circuit court determined that as Personal Representative, Denise was held to a higher standard, and therefore, was barred from making a claim under SDCL §§ 29A-3-803 and 804, even though she filed her Motion for approval of payment of her claim prior

to any deadline to file a claim. (CR 804). The circuit court further determined that even if Denise had timely made her claim, specific performance of the agreement was inequitable given the deterioration of the marriage. *Id.*

On appeal, this Court reversed the circuit court, finding Denise's notice of claim was timely under SDCL § 29A-3-803 and substantially complied with the presentation requirements of SDCL § 29A-3-804. *Smeenk I*, 2022 S.D. 41 at ¶ 31; 978 N.W.2d at 393. Additionally, while this Court affirmed the circuit court's holding that Denise was not entitled to specific performance of the Agreement, it specifically noted there had been no finding as to liability, stating, "questions of enforceability and breach of the Agreement" have not yet been resolved because "the circuit court specifically reserved ruling on the issues of enforceability and breach of the Agreement." *Id.* ¶ 32. This Court then remanded the case back to the circuit court for further proceedings. (APP 95).

Based on this ruling, following the appeal, Denise moved for partial summary judgment seeking a finding from the circuit court that (1) the Agreement was valid and enforceable against Neil; and (2) Neil breached the Agreement. Denise further asked that upon a finding of enforceability and breach, the circuit court enter an order requiring a trial on Denise's money damages associated with Neil's breach. (APP 047). Tellingly, Ryan never filed a cross-motion for summary judgment on the grounds of res judicata; he simply raised it in response to Denise's Motion.

The circuit court did grant Denise's Motion finding the Agreement was enforceable and that Neil breached the Agreement. However, the circuit court went further (without having a motion regarding the applicability of res judicata before it to do

so) and held that Denise's claim could not proceed as her requested remedy of money damages it was barred by the doctrine of *res judicata.* (APP 001; APP 009).

STANDARD OF REVIEW

Res judicata is a question of law examined by this Court under the de novo standard of review. *In re Pooled Advoc. Tr*., 2012 S.D. 24, ¶ 20, 813 N.W.2d 130, 138 (citing *Farmer v. S.D. Dep't of Revenue and Regulation*, 2010 S.D. 35, ¶ 6 n. 4, 781 N.W.2d 655, 659 n. 4); *see also In re L.S.*, 2006 SD 76, ¶ 21, 721 N.W.2d 83, 89.

ARGUMENT AND AUTHORITIES

I. THE CIRCUIT COURT ERRED IN DETERMINING DENISE'S REMEDY OF MONEY DAMAGES WAS BARRED BY THE DOCTRINE OF *RES JUDICATA*.

Essentially, the circuit court's theory is that by finding that specific performance was not an appropriate remedy for Denise's claim in *Smeenk I,* this Court entered a final judgment forever barring Denise's claim. This is despite the fact: (1) this Court specifically vacated the circuit court's finding that Denise's claim was barred as being untimely and not containing sufficient information; and (2) this Court specifically noted that Neil's liability for Denise's breach of contract claim had never been established.

However, when reviewing the circuit court's ruling as well as the factual and procedural background of this case, it is clear the circuit court is attempting to force a square peg into a round hole by utilizing *Healy Ranch, Inc. v. Healy* and res judicata as justification for barring Denise's claim. *See Healy*, 2022 S.D. 43, 978 N.W.2d 786, reh'g denied (Sept. 19, 2022) (hereinafter, "*Healy II*"). Simply put, and as is analyzed below, the circuit court erred in utilizing res judicata to bar Denise's claim because, "Where successive appeals are taken in the same case *there is no question of res judicata*, because

the same suit, and not a new and different one, is involved." *In re Est. of Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d 86, 90 (emphasis added) (quoting *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 105–06 (Fla.2001)).

A. The circuit court's only support for its holding regarding res judicata--*Healy II*—is not applicable to this case.

Res judicata's applicability to this case cannot be discussed without first addressing *Healy II*, as that case is really the only authority the circuit court cites in support of its findings barring Denise's claim. *Healy II,* 2022 S.D. 43. A review of the factual and procedural background of *Healy II* highlights a critical distinction between it and the case at bar: in *Healy II* there was a "prior adjudication" and a "final judgment on the merits," which simply are not present in this case. This case is simply a continuation of the same case with multiple appeals, rending res judicata inapplicable. *See Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d at 90.

After recognizing this crucial discrepancy, it becomes unnecessary, and frankly difficult, to squarely address each of the elements of res judicata because one of the fundamental requirements of res judicata is not met—a "prior adjudication" or final judgment.

In *Healy II*, the plaintiff filed suit against two family businesses alleging a variety of tort and contract claims associated with an allegedly improper deed transferring a ranch property from one entity into another. *Healy II*, 2022 SD 43 at ¶ 7 (describing the facts in *Healy v. Osborne*, 2019 S.D. 56, ¶ 1, 934 N.W.2d 557, 559) ("*Healy I*"). The circuit court granted summary judgment in the defendants' favor finding all of the plaintiff's claims to be untimely under the relevant statute of limitations. *Id*. ¶ 8. The plaintiff appealed, and this Court agreed the plaintiff's claims were barred by the statute

of limitations and affirmed the summary judgment in favor of the defendants. *Id.* ¶ 9 (citing *Healy I*, 2019 S.D. 56).

After this Court issued its opinion in *Healy I*, the plaintiff then filed a completely separate lawsuit with the circuit court alleging a different cause of action—seeking a determination of marketable title under the South Dakota Marketable Title Act. *Healy II*, 2022 SD 43 at ¶ 11. After the defendants moved for summary judgment in the new action, the circuit court found the plaintiff's notice under the SDMTA was also untimely, and the plaintiff appealed again to this Court. *Id.* ¶ 14.

On appeal, the defendants argued the plaintiff's claims were barred by the doctrine of res judicata. This Court agreed, finding claim preclusion applied because the plaintiff was attempting to litigate "the same cause of action" that he had litigated in the earlier, separate lawsuit. *Id.* ¶ 49. In particular, this Court noted that because the circuit court had determined that the plaintiff's claims were untimely in *Healy I*, it constituted a decision on the merits of the plaintiff's claims. *Id.* ¶ 51. Thus, this Court concluded that the former finding on statute of limitations grounds was entitled to preclusive effect "because it settled the rights and obligations of the respective parties." *Id.* ¶ 53 (citing *Am. Nat. Bank & Tr. Co. v. City of Chicago*, 826 F.2d 1547, 1553 (7th Cir. 1987)).

As noted above, the distinctions in *Healy II* are critical and should not be overlooked by this Court because they emphasize why res judicata is simply not applicable in the case at bar. First, in this case there was no separate suit or claim filed. In *Healy II*, the plaintiffs filed multiple, brand new lawsuits asserting different claims after this Court upheld the circuit court's statute of limitations ruling in *Healy I*. Here, the case currently before this Court is simply a continuation within the same case

following reversal of the circuit court's decision to bar Denise's claim. Because there was no "prior adjudication," every citation the circuit court made to *Healy II* in its Memorandum Decision lacks support because that case is wholly inapplicable to the case at hand. Again, res judicata does not apply in cases such as this where there are successive appeals taken *in the same case. See Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d at 90.

Because of this, there was no prior adjudication or final judgment on the merits to give rise to a preclusive effect. In fact, unlike the circuit court in *Healy I*, the circuit court here was reversed as to its finding barring Denise's claim in *Smeenk I. See Smeenk I*, 2022 SD 41, ¶ 41 ("The circuit court erred in determining that Denise failed to substantially comply with SDCL 29A-3-804 in presenting the creditor claim within the time requirements of SDCL 29A-3-803, and we vacate the circuit court's findings of fact and conclusions of law from February 2, 2021, to the extent that they are inconsistent with this opinion"). The only part of the circuit court's holding upheld by this Court in *Smeenk I* was this Court agreeing the remedy of specific performance is not an available remedy for Denise's breach of contract claim.

Even the plain language of many of the circuit court's own citations to *Healy II* demonstrates why it is distinguishable from this case. For example, the circuit court states:

> It has long been held that "if the claims rose out of a single act or dispute, *and* one claim *has been brought to a final judgment*, then all other claims arising out of that same act or dispute are barred." "This is true regardless of whether there were different theories asserted or different forms of relief requested *in a subsequent action*."

(APP 005) (emphasis added) (quoting *Healy II*, 2022 S.D. 43, ¶ 45, 978 N.W.2d at 799 (quoting *Farmer*, 2010 S.D. 35, ¶ 9, 781 N.W.2d at 659)). Again, at no point in this case has any claim ever been "brought to a final judgment" because the circuit court never made any findings as to enforceability or breach of the agreement. This Court only agreed that specific performance was not an available *remedy*—not that Denise's *claim* itself was invalid. Again, there has never been a "subsequent action" wherein Denise filed a new lawsuit; it has always been within this suit and her claim has always remained the same—that Neil breached the Agreement.

When removing *Healy II* from the calculus as being both inapplicable and unpersuasive, the circuit court's findings in the case at bar are unsupported. Res judicata is not appropriate here and the circuit court's reliance upon *Healy II* to attempt to make that leap is misplaced. Therefore, the circuit court erred in utilizing *Healy II* and finding Denise's claim was barred by the doctrine of res judicata.

B. Res judicata is not applicable in this case.

As can likely be seen from the analysis above, res judicata is not appropriate given the factual and procedural status of this action. The inapplicability of the doctrine is made even clearer when looking to the four elements that must be satisfied to utilize res judicata—none of which are satisfied here.

In order to establish that a claim is barred by res judicata, the following elements must be proven:

> (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 Healy II, 2022 S.D. 43, ¶ 42, 978 N.W.2d at 799 (citing *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661; *Lippold v. Meade Cnty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 28, 906 N.W.2d 917, 925, as modified on denial of reh'g (Mar. 13, 2018)).

"The doctrine of res judicata serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined *in a prior action*." *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc*., 336 N.W.2d 153, 157 (S.D. 1983) (emphasis added) (citing *Matter of Estate of Nelson*, 330 N.W.2d 151 (S.D.1983); *Schmidt v. Zellmer*, 298 N.W.2d 178 (S.D.1980); *Gottschalk v. South Dakota State Real Estate Comm'n*, 264 N.W.2d 905 (S.D.1978)).

Again, there was no "prior action" as is required for res judicata—this is simply a continuation of the same case, rending res judicata inapplicable. *See Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d at 90. That none of the required elements of res judicata are satisfied here simply emphasizes this fact, as illustrated below.

(1) There was no "prior adjudication" to which to compare to determine whether Denise's claim is identical.

In order to determine whether a claim is identical, courts determine "whether the claims asserted in both suits arose out of a single dispute and whether one claim has been brought to a final judgment on the merits." *Farmer*, 2010 S.D. 35, ¶ 10, 781 N.W.2d at 660 (citations omitted). Essentially, the circuit court interprets this Court's ruling in *Smeenk I* to mean that because one of Denise's potential remedies—specific

performance—is barred, her entire claim is barred by res judicata. This conflates two distinct legal principles—a claim versus a remedy. Denise's breach of contract claim was never brought to a final judgment in any "prior adjudication". Thus, it is inappropriate to find that this claim is now barred by res judicata. This element is not satisfied.

(2) There was no final judgment on the merits in this case.

a. This Court's opinion in *Smeenk I* was not a "final judgment" on the merits.

A critical component of *res judicata* is that there must have been a prior final judgment on the merits. In addition to the fact that there was no "prior adjudication" or "previous case" as argued *supra*, there also was no final judgment on the merits in this case, thus barring the use of res judicata.

A final judgment for purposes of res judicata, "is one which is based on legal rights rather than matters of procedure and jurisdiction." *Nelson v. Hawkeye Sec. Ins. Co.*, 369 N.W.2d 379 (S.D. 1985). A final judgment entitled to preclusive effect "settle[s] the rights and obligations of the respective parties." *Healy II*, 2022 SD 43, ¶ 53, 978 N.W.2d at 801-802.

The circuit court believes that this Court's holding in *Smeenk I*, finding specific performance to be inapplicable, was a final judgment on the merits precluding Denise from seeking any other form of relief requested in her Motion for Approval and Payment of Claim. The substantive legal right at issue is Denise's right to bring a claim as a result of Neil's breach of contract—not the issue of the type of remedy or amount of money to which she may be entitled. Furthermore, res judicata is not meant to "defeat the ends of justice"—instead, it was meant to prevent re-litigation of something that was actually determined *on the merits* and *in a prior action*. *See Farmer*, 2010 S.D. 35, ¶ 7, 781

N.W.2d at 659. Simply because one potential remedy is not available to Denise does not mean that all remedies are thereby precluded.

This is perhaps more clearly illustrated with an example. Say that a plaintiff files a lawsuit against a defendant alleging various tort claims and seeking two different remedies—regular compensatory damages as well as punitive damages. After proceeding with certain discovery, the defendant files a partial motion for summary judgment, acknowledging that while *liability is yet to be determined*, the plaintiff has not met his high burden to show entitlement to punitive damages. If the court agrees and dismisses the remedy of punitive damages, it does not mean that the plaintiff's entire claim is extinguished and that the plaintiff cannot still seek the other available remedy of compensatory damages. Instead, it simply means that the case proceeds with all parties knowing that at least one remedy has been determined to be unavailable as a matter of law, because unresolved matters are allowed to move forward when they are still contained within the *same action*.

This is what has happened here. In *Smeenk I*, this Court noted the issue of available remedies was likely not ripe because liability had not yet been established, but determined that the circuit court was correct in finding *that if liability is to be established*, Denise cannot seek specific performance as a remedy. *Smeenk I*, 2022 S.D. 41, ¶ 32, 978 N.W.2d at 393-394. This did not mean that Denise's claim was determined on the merits and that she cannot proceed to seek alternative remedies—as evidenced by the fact this Court specifically remanded the case for further proceedings consistent with the Supreme Court's opinion. (CR 987).

Had this Court actually found that Denise's claim was decided on the merits (as the circuit court has now interpreted it to be), there would have been no need for this Court to remand in the judgment; it simply could have affirmed the circuit court and entered judgment in Ryan's favor on Denise's claim. Instead, there is no preclusive effect because the rights and obligations of the parties have not been established in a prior action as is required for a finding of res judicata. *See Healy*, 2022 SD 43 at ¶ 53, 978 N.W.2d 801-802 (citing *Am. Nat. Bank & Tr. Co.*, 826 F.2d at 1553); *Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d at 90.

b. Neither case cited by the circuit court as support for its finding of a final judgment is applicable.

The circuit court cites predominantly to *Healy II* and one case cited within it for support that there existed a final judgment on the merits in this case. (APP 006-007) (citing *Healy II*, 2022 S.D. 43, 978 N.W.2d 786, and *United States v. Oregon Lumber Co.*, 260 U.S. 290, 294, 43 S. Ct. 100, 101, 67 L. Ed. 261 (1922)). As *Healy II* has already been distinguished, this leaves only one other case upon which the circuit court relied to find a final judgment existed, *In re Estate of Geier*, 2012 S.D. 2, 809 N.W. 2d 355. However, *Geier* does not stand for the proposition the circuit court advances.

In *Geier*, the petitioner appealed the circuit court's determination that supervised administration of the estate in question and removal of the personal representative was not necessary. *Id.* ¶ 4. The estate moved to dismiss the appeal arguing the order from which appeal was attempted was not final. *Id.* ¶ 6.

This Court was tasked with analyzing what constitutes a final order in a probate proceeding—not what constitutes a final order for purposes of res judicata. *Id.* In order to do so, this Court interpreted both the Uniform Probate Code and South Dakota statute

to determine what "the scope of the proceeding" meant for purposes of final orders in probate cases. *Id.* ¶ 11. Ultimately, this Court determined that for purposes of probate cases, a "proceeding" would be "final" for appeal purposes if the circuit court's order "resolved all of the issues" related to a particular petition or subject matter.

Here, in *Smeenk I*, Denise did have a final judgment *for purposes of appeal* because the circuit court determined her claim could not advance because it was barred by the notice and presentation statutes. Thus, for purposes of *Geier*, Denise had no choice but to appeal the circuit court's barring of her claim. However, this Court then specifically vacated that ruling, finding that Denise's claim was both timely and contained sufficient information to proceed. *Smeenk I*, 2022 S.D. 41, ¶ 31, 978 N.W.2d at 393. This Court also noted specifically that there was no finding as to liability—instead, the circuit court barred the claim and then gave essentially an advisory opinion on Denise's ability to seek a particular remedy—specific performance. *Id.* ¶ 32.

Thus, this Court's analysis in *Geier* deals specifically with determining how and when to allow a party to appeal from various "proceedings" in probate court—not whether a judgment is final and on the merits for purposes of res judicata. Therefore, the circuit court's reliance on *Geier* to support its finding that a final judgment existed in this case is misplaced.

Ultimately, there is no final judgment on the merits in a prior action from this Court that precludes Denise from bringing her claim. If anything, by vacating the findings of the circuit court, this Court's ruling in *Smeenk I* revived Denise's claim, allowing her to move forward in front of the circuit court to pursue her recovery for

Neil's breach. Therefore, because this element is not satisfied, res judicata is inapplicable and cannot be used to bar Denise's claim.

(3) The parties are the same because this is still the same lawsuit, with no "prior adjudication" with which to compare.

As with the first element, this element is impossible to analyze because there is no "prior adjudication"; this is not a separate lawsuit and there was no final judgment on the merits. It is simply a continuation of the same case following this Court's ruling in *Smeenk I*. *See Siebrasse*, 2006 S.D. 83, ¶ 16, 722 N.W.2d at 90. Thus, while the parties are the "same," this element is still not satisfied due to the lack of any "prior adjudication" and the fact that res judicata is simply inapplicable here.

(4) There was no "full and fair" opportunity to litigate the issue in the prior adjudication.

The circuit court stated that Denise is now attempting to "retool her previously litigated breach of contract claim as an action for money damages." (APP 005). There are multiple issues with this analysis. First, as this Court noted in *Smeenk I*, Denise never actually litigated her breach of contract claim because the circuit court incorrectly found it was barred by the notice and presentation statutes set forth in SDCL §§ 29A-3-803-804. Thus, because there was no finding of enforceability or liability, there was no "previously litigated" breach of contract claim.

Second, there is no such "action for money damages." Money damages are a legal remedy that are often sought via a breach of contract claim. Again, the circuit court's finding of res judicata is improper because it essentially holds that Denise's claim is barred simply because one particular remedy is unavailable to her.

Denise never had a full or fair opportunity to litigate her breach of contract claim or entitlement to money damages. Thus, like the three preceding elements, this element is not satisfied, rendering res judicata inappropriate to bar Denise's claim.

C. Res judicata only applies to unreversed claims.

Res judicata is also inapplicable as it can only be applied to unreversed claims. South Dakota precedent is clear: "In South Dakota, it is well settled that the decision upon which one may base a claim of res judicata must be final and unreversed." *Bank of Hoven v. Rausch*, 449 N.W.2d 263, 265 (S.D. 1989) (citing *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 262 (S.D.1988); *Black Hills Jewelry*, 336 N.W.2d at 157 ("Of course, the earlier court must have had jurisdiction and its decision must be final and unreversed")); *see also Skoglund v. Staab*, 269 N.W.2d 401, 403 (S.D. 1978) (an adjudication on the merits is a "bar to any future action between the same parties or their privies upon the same cause of action *so long as it remains unreversed*") (emphasis added)).

This Court has stated the following with regard to the meaning of a reversed judgment:

> "To 'reverse' a judgment means to 'overthrow, *vacate*, set aside, make void, annul, repeal, or revoke it.'" Wheeler v. John Deere Co., 935 F.2d 1090, 1096 (10th Cir.1991) (quoting Black's Law Dictionary 1319 (6th ed.1990)). "A judgment reversed by a higher court is 'without any validity, force or effect, and ought never to have existed.'" Id. (quoting Butler v. Eaton, 141 U.S. 240, 244, 11 S.Ct. 985, 987, 35 L.Ed. 713 (1891)). See also Arkadelphia Milling Co. v. St. Louis Sw. Ry. Co., 249 U.S. 134, 145, 39 S.Ct. 237, 242, 63 L.Ed. 517 (1919) (stating that "the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby"); Riha v. Int'l Tel. & Tel. Corp., 533 F.2d 1053, 1054 (8th Cir.1976) (noting "[a] judgment vacated on appeal is of no further force and effect").

St. John v. Peterson, 2013 S.D. 67, ¶ 22, 837 N.W.2d 394, 400 (emphasis added). Here, in *Smeenk I*, this Court held:

> The circuit court erred in determining that Denise failed to substantially comply with SDCL 29A-3-804 in presenting the creditor claim within the time requirements of SDCL 29A-3-803, and *we vacate the circuit court's findings of fact and conclusions of law from February 2, 2021, to the extent that they are inconsistent with this opinion*. However, the court properly considered whether Denise could seek court approval of her request for specific performance of the Agreement. We affirm the circuit court's determination that Denise is not entitled to the remedy of specific performance on her claim for the alleged breach of the Agreement.

See Smeenk I, 2022 SD 41, ¶ 41, 978 N.W.2d at 396 (emphasis added). As set forth in *St. John*, the reversal and vacation of a court's finding are synonymous. *St. John*, 2013 S.D. 67, ¶ 22, 837 N.W.2d at 400. This Court specifically vacated—and as such, reversed—the circuit court as to its finding that Denise could not bring her claim under SDCL § 29A-3-804 and SDCL § 29A-3-803. The circuit court's ruling in barring Denise's claim via res judicata subverts this Court's findings in *Smeenk I*. Because of this, Denise's rights are "left wholly unaffected by any previous determination that was reversed" and as such, should be "restored" to what she had lost—the right to bring her claim. *Id.* ¶¶ 21-22.

Therefore, the circuit court's finding that Denise's claim is barred by res judicata is contradicted by clearly stated South Dakota law as res judicata does not apply to reversed claims. As such, this Court should reverse and remand with instructions to the circuit court to hold a trial to determine Denise's damages as a result of Neil's breach.

CONCLUSION

Res judicata is inapplicable in this case. There was no "prior adjudication" to give rise to a preclusive effect and none of the required elements are satisfied.

Furthermore, there was no final judgment on the merits as to any claim. While this Court may have found Denise might be precluded from seeking the *remedy* of specific performance, the "rights and obligations of the parties" have clearly not been decided as no finding as to liability has been made. Finally, res judicata only applies to claims that have not been reversed—unlike the claim in the case at bar.

The trial court found in favor of Denise and granted her Motion for Partial Summary Judgment. Because the circuit court erred in utilizing res judicata to bar Denise's remedy, Denise respectfully requests this Court reverse the circuit court's November, 14 2022, Order and remand the case back to the circuit court, ordering the circuit court to hold a trial on Denise's money damages.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument in this case.

Dated: March 2, 2023.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Katelyn A. Cook*

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellant, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 4,920 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellant. The original Brief for Appellant and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Katelyn A. Cook*
Katelyn A. Cook

CERTIFICATE OF SERVICE

I hereby certify on March 2, 2023, the **BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was filed through South Dakota Odyssey File and Serve and the original plus one copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 E. Capitol Avenue
Pierre, SD 57501-5070

and the **BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was served by electronic mail and mailed by U.S. Mail to the following:

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By: */s/ Katelyn A. Cook*
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APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
	)	File No: 09PRO19-000013
In the Matter of the Estate of NEIL WILLIAM SMEENK,	)	MEMORANDUM OF DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT
Deceased.	)	

On October 13, 2022, a Motions Hearing was held before the Honorable Michael W. Day on a Motion for Partial Summary Judgment. On September 15, 2022, Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, according to SDCL § 15-6-56 filed a Motion for Partial Summary Judgment. On September 29, 2022 Ryan Smeenk, by and through his attorneys John W. Burke, and Kimberly S. Pehrson filed a response. Subsequently both parties filed additional responsive briefs. Accordingly, this Court having heard arguments of Counsel, and having considered the briefs from both parties, with good cause showing, issues its Memorandum of Decision.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background of this case is very familiar to this Court. Denise Schipke-Smeenk's Motion for Partial Summary Judgment is the most recent installment in lengthy proceedings between Denise and Ryan Smeenk regarding the proper distribution of Neil Smeenk's Estate. This Court witnessed the dispute as it ran its course, beginning with a bench trial before this Court and ending with an appeal to the South Dakota Supreme Court. Ultimately, the Supreme Court held that Denise's alleged creditor claim was sufficiently presented under SDCL Chapter 29A-3. *In re Estate of Smeenk*, 2022 S.D. 41, ¶ 41. However, and dispositive of Denise's Motion, the Supreme Court upheld the rejection of Denise's claim on the merits. *Id.* ¶¶ 1, 12, 41. In the Supreme Court's words, this Court "properly determined [that] Denise failed to allege or present

evidence of an essential element for specific performance, the lack of an adequate remedy at law[.]" *Id.* ¶ 40. While the Supreme Court ultimately determined that Denise is not entitled to specific performance of the Agreement because she has an adequate remedy at law, it did find that her Motion for Approval of Claim was both timely and appropriately presented. Therefore, before dealing with any damages resulting from the breach, Denise files her Motion for Partial Summary Judgment for the limited purpose of receiving a finding from this Court that Neil breached the Agreement.

STANDARD OF REVIEW

A grant of summary judgment is proper if the pleadings, depositions, answers and 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); *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶¶ 8–9, 817 N.W.2d 395, 398–99. Summary judgment is not the proper method to dispose of factual questions. *Id.* This Court determines whether summary judgment is proper by reviewing whether the moving party has "clearly demonstrate[ed] an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the non-moving party'." *SD State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, ¶ 9, 616 N.W.2d 397, 400–01 (quoting *Weiss v. Van Norman*, 1997 S.D. 40, ¶ 11, n.2, 562 N.W.2d 113, 116 (internal citations omitted)) (emphasis added).

"All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444. "Yet, the party challenging summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Id.* Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762. "Summary judgment [] should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy." *Berbos v. Krage*, 2008 S.D. 68, 15, 754 N.W.2d 432, 436 (quoting *Richard v. Lenz*, 539 N.W.2d 80,83 (S.D. 1995). "If undisputed facts fail to establish each required element

in a cause of action, summary judgment is proper." *McKie v. Huntley*, 2000 S.D. 160, ¶ 17 (citing *Groseth Int'l Inc. v. Tenneco Inc.*, 410 N.W.2d 159, 169 (S.D. 1987)).

OPINION

A breach of contract results if there is "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Department of Transportation,* 793 N.W.2d 36, 43 (S.D. 2010) (citing *Guthmiller v. Deloitte & Touche, L.L.P.,* 699 N. W. 2d 493, 498 (S.D. 2005)). "The existence of a valid contract is an issue of law to be determined by the court." *Weitzel v. Sioux Valley Heart Partners,* 2006 S.D. 45, ¶ 22, 714 N.W.2d 884, 892 (citing *Werner v. Norwest Bank South Dakota, N.A.,* 499 N.W.2d 138, 141 (S.D.1993) (citing *Mid—America Mktg. Corp. v. Dakota Indus.,* 289 N.W.2d 797 (S.D.1980))). A South Dakota statute specifically recognizes the right of parties to enter into contracts not to revoke their wills. *See* SDCL § 29A- 2-514; *see also Matter of Estate of Green,* 516 N. W.2d 326, 329 (S.D. 1994) (superseded by statute on other grounds). In this case, the 2017 Agreement is a valid and binding contract. Thus, as a matter of law, the first element of Denise's breach of contract claim is established as a valid and enforceable contract clearly existed.

Whether a contract has been breached is a question of fact. *Weitzel,* 2006 S.D. 45, ¶ 31, (citing *Rindal v. Sohler,* 2003 SD 24, ¶ 13, 658 N.W.2d 769, 772 (citing *Moe v. John Deere Co.,* 516 N. W. 2d 332, 335 (S.D. 1994); *C & W Enterprises v. City of sioux Falls,* 2001 SD 132, ¶ 19, 635 N. W. 2d 752, 758; *Harms v. North land Ford Dealers,* 1999 SD 143, ¶ 21, 602 N. W. 2d 58, 63; *Swiden Appliance v. Nat'1. Bank ofS.D.,* 357 N. W. 2d 271, 277 (S.D. 1984))). Here, the Agreement provided the following:

> The parties agree not to revoke or to amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express written consent of the other party.

SUMF ¶ 3. There is no dispute that Neil executed a will in 2019. SUMF ¶ 4. There is no dispute that Denise did not consent to the execution of the 2019 Will and did not have knowledge of it. *Id.* Therefore, by executing the 2019 Will, Neil breached this provision of the Agreement. Therefore, because there is no genuine dispute of material fact as to Neil's breach of the Agreement, Denise is entitled to summary judgment as a matter of law. This becoming the ruling of the Court we now turn to whether res judicata bars Denise from seeking any remedy for Neil's breach of contract.

Res Judicata is the legal principle that prevents a party from re-litigating a claim or issue that a judicial decision has settled. *See Res Judicata Black's Law Dictionary* (11th ed. 2019). The

doctrine's roots are ancient, and its purpose well- established: "[A] person should not be twice vexed for the same cause[.]" *Healy Ranch, Inc. v. Healy [Healy II]*, 2022 S.D. 43, ¶ 58. Appropriate application of the doctrine is critical because it prevents costly and repetitive lawsuits, conserves judicial resources, and encourages reliance on judicial decisions by providing finality. *See Brown v. Felson*, 442 U.S. 127, 131 (1979) (Res judicata serves to "free [] the courts to resolve other disputes."). The legal principle of res judicata has two distinct branches: claim preclusion and issue preclusion. *Healy II*, 2022 S.D. 43, ¶ 40. Claim preclusion bars not only "a claim ... actually litigated" but also claims "*which could have been properly raised.*" *Id.* (emphasis in original). On the other hand, issue preclusion forecloses "re-litigation of a matter that has been litigated and decided." *Id.* The following factors are often used to guide a decision on the applicability of the doctrine:

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

Id.

ISSUES

1. ***Is the breach of contract claim Denise wishes to litigate in this Motion identical to the previously adjudicated claim?***

The first element—i.e., that the claims be identical—is established. As applied to claim preclusion, the Supreme Court has explained that "claim identity" is determined by whether a litigant is "attempt[ing] to relitigate a prior determined cause of action." *Healy II*, 2022 S.D. 43, ¶ 44 (emphasis in original). This requires examining 'whether the wrong sought to be redressed is the same in both actions." *Healy II*, 2022 S.D. 43, ¶ 44; *Clay v. Weber*, 2007 S.D. 45, ¶ 13, 733 N.W. 2d 278, 284. It is irrefutable that the wrong to be redressed by Denise's Motion—i.e., Neil's alleged breach of contract—is identical to the claim that this Court previously considered. For over two years, Denise has aggressively litigated her breach of contract claim, not only before this Court but also before the South Dakota Supreme Court. *In re Estate of Smeenk*, 2022 S.D. 41, ¶ 7. In its opinion, the Supreme Court described both Denise's cause of action and this Court's ultimate holding over the same as follows:

> The court received evidence and arguments from the parties on the merits of Denise's claim for specific performance as a remedy for Neil's alleged breach of the

> Agreement. The court then made a merits-based determination that Denise was not entitled to specific performance because Denise failed to show an adequate remedy at law.

Id. at ¶ 12.

Denise now attempts to retool her previously litigated breach of contract claim as an action for monetary damages. She contends that the Supreme Court's decision only precludes the equitable remedy of specific performance, leaving her free to come back to this Court and pursue an action at law for monetary damages. For purposes of claim preclusion, however, it makes no difference that Denise elected not to pursue the possibility of monetary damages at the previous trial. The fact that a party fails to assert an alternative claim for relief "is not an impediment to claim preclusion" when "it would have been appropriate for [the party] to [assert the theories together] rather than later through piecemeal litigation." *Healy II*, 2022 S.D. 43, ¶ 50, n.11 (citing SDCL 15-6-8(a) and SDCL 15-6-8(e)). It has long been held that "[i]f the claims arose out of a single act or dispute, and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Farmer v. S.D. Dep't of Revenue & Regul.*, 781 N.W. 2d 655, 660 (S.D. 2010). "This is true regardless of whether there were different legal theories asserted or different forms of relief requested in a subsequent action." *Id.* This concept has also been reaffirmed by the South Dakota Supreme Court in *Healy II* and the Eighth Circuit Court of Appeals (applying South Dakota law) in *Healy III*. *Healy II*, 2022 S.D. 43, ¶ 46; *Healy v. Fox [Healy III]*, 46 F.4th 739 (8th Cir. 2022).

As the Eighth Circuit recently observed, for claim preclusion, the 'two actions do not require absolutely identical proof…South Dakota law requires only that the actions seek to redress the same wrong, not that they involve the same legal theories." *Healy III*, 46 F.4th at ¶ 9. Therefore, it is well-established that South Dakota's res judicata doctrine bars "all grounds for recovery…that were previously available[.]" *Healy II*, 2022 S.D. 43, ¶ 44, n.9. Nothing prevented Denise from requesting monetary damages when she came before this Court. In fact, throughout the entirety of her *Brief in Support of Motion for Approval and Payment of Claim*, filed on July 9, 2020, Denise argues that the only remedy she is seeking for the breach of contract is specific performance. At no time in that brief or during the trial before this Court does Denise seek or argue for monetary damages. She also failed to allege this remedy in the alternative at the original trial and other fillings. The rules of civil procedure unambiguously allowed her to seek equity and money

damages in the alternative. *See* SDCL 15-6-8(a) ("Relief in the alternative or of several different types may be demanded."). Rather than attempting to prove both forms of relief in the original action, Denise made the strategic decision to pursue only the equitable theory. *See In re Estate of Smeenk*, 2022 S.D. 41, ¶ 41.

Denise does not explain her failure to assert monetary damage in the alternative while she had the chance. When parties fail to raise a theory as part of a legal strategy timely, they cannot be saved from the preclusive effects of res judicata. *Id.* (barring claim on res judicata ground when the only reason for the delay was strategic). The first element—i.e., the identity of the claim—is met.

2. Was there a judgment on the merits in the previous action?

The second element requires a final judgment on the merits. *Healy II*, 2022 S.D. 43, ¶ 51. To satisfy this element, the prior judgment must be "one based on legal rights rather than matters of procedure and jurisdiction." *Id.* According to the United States Supreme Court, a judgment is considered on the merits when it is "based on...a failure to prove substantive allegations of fact." *Id.* ¶ 53 (quoting *United States v. Or. Lumber Co.*, 260 U.S. 290, 300-01, 43 S. Ct. 100, 103, 67 L. Ed. 261 (1922)).

There is no question that this matter was litigated to a final judgment. Because this Court's February 5, 2021, Order resolved all issues related to Denise's creditor claim, it was a final judgment as contemplated by SDCL 15-26A-3. *See In re Estate of Geier*, 2012 S.D. 2, 809 N.W. 2d 355. Not only did both parties file appellate briefs certifying as much; the Supreme Court accepted the finality of the judgment by entertaining Denise's appeal without an SDCL 15- 6-54(b) certification.

There is equally no question that the judgment was on the merits. Denise attempted to prove her case at a bench trial, making this Court's ultimate holding certainly "one based on legal rights rather than matters of procedure and jurisdiction." *Healy II*, 2022 S.D. 43, ¶ 51. The dispute ended with the Supreme Court agreeing with this Court. More specifically, the Supreme Court noted that Denise had "failed to allege or present evidence of an essential element of specific performance, the lack of an adequate remedy at law." *Id.* ¶ 40. A judgment is considered on the merits even when it is "based on ... a failure to prove substantive allegations of fact." Id. ¶ 53 (quoting *United States v. Or. Lumber Co.*, 260 U.S. 290, 300-01, 43 S. Ct. 100, 103, 67 L. Ed. 261 (1922)). The second element—i.e., the existence of a final judgment on the merits—is met.

3. Are the parties the same in the two actions?

Denise has pursued her claim as the personal representative of the Estate and as an alleged creditor in both the previous action and the current one. Ryan, as an interested party, has resisted her in both. Therefore, it is undisputed that the parties are the same.

4. Did Denise have a full and fair opportunity to litigate the issues in the prior adjudication?

The final element of res judicata—namely, that the party against whom res judicata is sought had a full and fair opportunity to litigate the issue—is also satisfied. As the Supreme Court has recently instructed, "[f]or a claim to be barred by res judicata, the claim need not have been actually litigated at an earlier time. Rather, the parties only need to have been provided a fair opportunity to place their claims in the prior litigation." *Healy II*, 2022 S.D. 43, ¶ 56.

This Court finds that Denise had every opportunity to litigate her breach of contract claim—including a chance to put on proof of monetary damages—at the first trial. This Court is intimately familiar with Denise's efforts, given that it presided over those proceedings. Denise attended a bench trial, called witnesses, offered exhibits, made legal arguments, and proposed findings of fact and conclusions of law. She even testified to support her belief that she was entitled to specific performance of the Agreement. At that time, she exclusively sought an equitable remedy. She lost; She appealed; She was unsuccessful again. *See In re Estate of Smeenk*, 2022 S.D. 41, ¶ 41 (affirming this Court's ruling on Denise's failure to prove an element of her case).

The Supreme Court has made it clear that parties have been given a full and fair opportunity to litigate potential—but unasserted—theories if they do not pursue those theories despite having "every opportunity to do so." *Healy II*, 2022 S.D. 43, ¶ 57 (Holding that "Bret did not bring a quiet title action .... However, he had every opportunity to do so .... Therefore, element four [the full and fair opportunity element] is met.").

Denise had every opportunity to prove her case by: (i) asserting an entitlement to an equitable remedy; (ii) pursuing a right to monetary damages; or (iii) seeking both alternatively. She elected to pursue only an equitable remedy. She cannot now object to the results of her own legal strategy; res judicata forbids it. *State v. Miller*, 248 N.W.2d 874, 878 (S.D. 1976) ("A defendant cannot follow one course of strategy at the time of trial and, if that turns out to be unsatisfactory, complain that he should be discharged or given a new trial."); *Sharpe v. Dept. of Transp.*, 505 S.E.2d 473, 475 (1998) ("A party cannot complain of error that [his] own legal

strategy, trial procedure, or conduct aided in causing."). This Court finds that the fourth and final element of res judicata has been met. This Court **GRANTS** Denise's Motion for Partial Summary Judgment; however, this Court finds that res judicata bars Denise from seeking monetary damages on this breach of contract action.

CONCLUSION

After considering all the briefs and arguments of counsel, Denise's Motion for Partial Summary Judgment is **GRANTED**, to the extent that this Court finds, as a matter of law, that there was a breach of contract of the 2017 Agreement; however, Denise failed to seek monetary damages at the original trial thus being barred by res judicata from now coming before this Court again and seeking monetary damages.

Dated this 18th day of October, 2022.

BY THE COURT:

Michael. W. Day
Presiding Circuit Court Judge

ATTEST:

ALANA JENSEN
Clerk of Courts

By: _____

UNIFIED JUDICIAL SYSTEM
STATE OF SOUTH DAKOTA

FILED
OCT 19 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By _____

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	09PRO19-000013
NEIL WILLIAM SMEENK,	)	**ORDER REGARDING PETITIONER DENISE L. SCHIPKE-SMEENK'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
Deceased.	)	

The above-captioned matter came before the Court on Thursday, October 13, 2022 on *Petitioner Denise L. Schipke-Smeenk's Motion for Partial Summary Judgment ("Motion for Partial Summary Judgment")* and Ryan Smeenk's *Petition to Direct Personal Representative to Distribute Cash Assets.* Talbot J. Wieczorek and Katelyn A. Cook appeared on behalf of Denise L. Schipke-Smeenk; John W. Burke and Kimberly S. Pehrson appeared on behalf of Ryan Smeenk. The Court having reviewed all the pleadings, files, and records herein, and having heard and considered the arguments of counsel, it is hereby:

ORDERED that the *Motion for Partial Summary Judgment* is granted as the record does not reflect any genuine issue of material fact related to the validity of the *Agreement to Execute Mutual Wills* (the "*Agreement*") or its breach. However, in accordance with this Court's *Memorandum of Decision on Motion for Partial Summary Judgment* (filed 10/19/22), which is incorporated herein by reference, the doctrine of res judicata bars Denise L. Schipke-Smeenk from attempting to further litigate this or any claim or issue arising out of the *Agreement*, and therefore, Denise L. Schipke-Smeenk's claim for breach of contract is denied.

IT IS FURTHER ORDERED that the *Petition to Direct Personal Representative to Distribute Cash Assets* shall be held in abeyance pending further instruction or Order of the

Filed on:11-14-22 Butte County, South Dakota 09PRO19-000013

Court.

11/14/2022 1:32:02 PM

Attest:
Adams, Denise
Clerk/Deputy

BY THE COURT:

Honorable Michael W. Day
Fourth Circuit Court Judge

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

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK,	)	**PETITIONER DENISE L. SCHIPKE-SMEENK'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
	)	
Deceased.	)	
	)	
	)	
	)	
	)	

Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk, by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, pursuant to SDCL § 15-6-56, respectfully submits this Motion for Partial Summary Judgment.

Denise moves this Court specifically for partial summary judgment on the narrow issues (1) that a valid contract existed (the Agreement); and (2) that Neil breached the Agreement by executing the 2019 Will. Because there is no genuine dispute of material fact with regard to either of these elements, and because Denise is entitled to judgment as a matter of law, Denise respectfully requests this Court enter partial summary judgment in her favor.

A Memorandum in Support and Statement of Undisputed Material Facts are filed contemporaneously herewith and incorporated herein by this reference.

Filed: 9/15/2022 3:23 PM CST Butte County, South Dakota 09PRO19-000013

Dated this 15th day of September, 2022.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Katelyn A. Cook
Talbot J. Wieczorek
Katelyn A. Cook
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katie@gpna.com

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, a true and correct copy of **PETITIONER DENISE L. SCHIPKE-SMEENK'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was sent, by first-class mail, postage prepaid on the following:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Ave. Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

And served by electronic services via Odyssey File & Serve and electronic mail to:

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Attorneys for Ryan William Smeenk

/s/ Talbot J. Wieczorek
Talbot J. Wieczorek

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	09PRO19-000013
NEIL WILLIAM SMEENK,	)	**PETITIONER DENISE L. SCHIPKE-SMEENK'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
Deceased.	)	

Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk, by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, pursuant to SDCL § 15-6-56, respectfully submits this Memorandum in Support of her Motion for Partial Summary Judgment.

INTRODUCTION

This Memorandum and Motion focus on the very narrow issue of liability for Denise's claim against the Estate; that is, whether Neil Smeenk ("Neil") breached the Agreement to Execute Mutual Wills by executing his April 2019 Last Will and Testament. While the Supreme Court found in its July 20, 2022 opinion that Denise's claim was both timely and properly presented, before distributing any assets of the Estate, Denise respectfully requests this Court make a finding on the issue of Neil's breach of contract as there would be a conflict of interest for Denise to determine the claim as Personal Representative.[1] There is no genuine dispute of material fact as to Neil's breach, and as such, Denise is entitled to partial summary judgment on this issue as a matter of law.

[1] Denise requests a finding from this Court pursuant to SDCL § 29A-3-713.

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FACTUAL AND PROCEDURAL BACKGROUND

The factual background of this case is familiar to this Court. Denise and Neil were married and executed mutual and reciprocal wills in 2017 (the "2017 Wills"), as well as an Agreement to Execute Mutual Wills (the "Agreement"). *See* Statement of Undisputed Material Facts ("SUMF") at ¶ 1. This Agreement included a provision wherein neither party would be able to revoke or alter the estate plan absent the signed consent of the other party. SUMF ¶ 2. In April 2019, Neil executed a new will without Denise's knowledge or consent (the "2019 Will"). SUMF ¶ 4. Neil died on June 14, 2019. SUMF ¶ 5.

After being appointed as Personal Representative of the Estate, and after this Court admitted the 2019 Will to probate, on April 8, 2020, Denise filed a "Motion for Approval of Claim," setting forth the nature of her claim against the Estate, founded upon her and Neil's 2017 Agreement. While the Supreme Court ultimately determined that Denise is not entitled to specific performance of the Agreement because she has an adequate remedy at law, it did find that her Motion for Approval of Claim was both timely and appropriately presented. Therefore, prior to dealing with any damages that resulted from the breach, Denise files this Motion for the limited purpose of receiving a finding from this Court that Neil breached the Agreement.

STANDARD

The standard for summary judgment is set forth in SDCL § 15-6-56(c), which dictates summary judgment should be granted when "there is no genuine issue of material fact and [ ] the moving party is entitled to judgment as a matter of law." *Breen v. Dakota Gear & Joint Co., Inc.*, 433 N.W.2d 221, 223 (S.D. 1988). A party opposing summary judgment may not rest upon the mere allegations of his pleadings. *Id.*; SDCL § 15-6-56(e). Rather, the opposing party's

response "must set forth specific facts showing that there is a genuine issue for trial." SDCL § 15-6-56(e).

"When considering a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party." *Hoaas v. Griffiths*, 714 N.W.2d 61, 65 (S.D. 2006). Thus, it is incumbent upon the nonmoving party to establish significant probative evidence to sustain its burden in the face of the moving party's showing. "It is not sufficient for the nonmoving party to present evidence that would permit a finding in its favor based on mere speculation, conjecture, or fantasy." *Weitzel v. Sioux Valley Heath Partners*, 714 N. W. 2d 884, 897 (S.D. 2006).

ARGUMENT

A breach of contract results if there is "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Department of Transportation*, 793 N.W.2d 36, 43 (S.D. 2010) (citing *Guthmiller v. Deloitte & Touche, L.L.P.*, 699 N.W.2d 493, 498 (S.D. 2005)).

A. The 2017 Agreement is a valid and enforceable contract.

"The existence of a valid contract is an issue of law to be determined by the court." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22, 714 N.W.2d 884, 892 (citing *Werner v. Norwest Bank South Dakota, N.A.*, 499 N.W.2d 138, 141 (S.D.1993) (citing *Mid–America Mktg. Corp. v. Dakota Indus.*, 289 N.W.2d 797 (S.D.1980))). South Dakota statute specifically recognizes the right of parties to enter into contracts not to revoke their wills. *See* SDCL § 29A-2-514; *see also Matter of Estate of Green*, 516 N.W.2d 326, 329 (S.D. 1994) (superseded by statute on other grounds).

In this case, the 2017 Agreement is a valid and binding contract. At no point has Ryan Smeenk argued that the Agreement was invalid—he only argued that the 2017 will should not be admitted because the 2019 will was later in time. *See* November 25, 2019, Findings of Fact and Conclusions of Law at ¶ 64. Thus, as a matter of law, the first element of Denise's breach of contract claim is established as a valid and enforceable contract clearly existed.

B. In executing the 2019 Will, Neil breached the Agreement.

Whether a contract has been breached is a question of fact. *Weitzel*, 2006 S.D. 45, ¶ 31, (citing *Rindal v. Sohle*r, 2003 SD 24, ¶ 13, 658 N.W.2d 769, 772 (citing *Moe v. John Deere Co.*, 516 N.W.2d 332, 335 (S.D.1994); *C & W Enterprises v. City of Sioux Falls*, 2001 SD 132, ¶ 19, 635 N.W.2d 752, 758; *Harms v. Northland Ford Dealers*, 1999 SD 143, ¶ 21, 602 N.W.2d 58, 63; *Swiden Appliance v. Nat'l. Bank of S.D.*, 357 N.W.2d 271, 277 (S.D.1984))). Here, the Agreement provided the following:

> The parties agree not to revoke or to amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express written consent of the other party.

SUMF ¶ 3. There is no dispute that Neil executed a will in 2019. SUMF ¶ 4. There is no dispute that Denise did not consent to the execution of the 2019 Will and did not have knowledge of it. *Id.* Therefore, by executing the 2019 Will, Neil breached this provision of the Agreement.

Therefore, because there is no genuine dispute of material fact as to Neil's breach of the Agreement, Denise is entitled to summary judgment as a matter of law.

CONCLUSION

Denise moves this Court specifically for partial summary judgment on the narrow issues (1) that a valid contract existed (the Agreement); and (2) that Neil breached the Agreement by

executing the 2019 Will. Because there is no genuine dispute of material fact with regard to either of these elements, and because Denise is entitled to judgment as a matter of law, Denise respectfully requests this Court enter partial summary judgment in her favor.

Dated this 15th day of September, 2022.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Katelyn A. Cook
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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, a true and correct copy of **PETITIONER DENISE L. SCHIPKE-SMEENK'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was sent, by first-class mail, postage prepaid on the following:

Brandy Ruth Mooney	Dominique Sterrett	Damian Heinert
28854 225th Ave.	1088 2nd Ave.	18291 Winkler Road
Martin, SD 57551	Deer Trail, CO 80105	Newell, SD 57760

And served by electronic services via Odyssey File & Serve and electronic mail to:

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Attorneys for Ryan William Smeenk

/s/ Talbot J. Wieczorek
Talbot J. Wieczorek

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

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK,	)	**PETITIONER DENISE L. SCHIPKE-SMEENK'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
	)	
Deceased.	)	
	)	
	)	
	)	
	)	

Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk, by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, pursuant to SDCL § 15-6-56(c), submit this statement of fact to which there is no genuine dispute:

1. Denise and Neil were married and executed mutual and reciprocal wills in 2017 ("2017 Wills") as well as an Agreement to Execute Mutual Wills (the "Agreement"). *See* November 25, 2019, Findings of Fact and Conclusions of Law ("Nov. FOF" or "Nov. COL") ¶ 33-36, ¶ 38; *see also* Ex. 3, 4 October 31, 2019 hearing, Agreement to Execute Mutual Wills and 2017 Will.
2. This Agreement included a provision wherein neither party would be able to revoke or alter the estate plan absent the signed consent of the other party. *See* Ex. 3, October 31, 2019 hearing at § VII.
3. The Agreement contained the following provision:

> The parties agree not to revoke or to amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express written consent of the other party.

See Ex. 3, October 31, 2019 hearing, § VII.

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4. In April 2019, Neil executed a new will without Denise's knowledge or consent (the "2019 Will"). *See* Nov. FOF, ¶ 53, ¶ 58; Ex. 25, October 31, 2019 hearing; *see also* December 3, 2020 Hearing Transcript, 9:4-15.

5. Neil died on June 14, 2019. Nov. FOF ¶ 3; October 31, 2019 Hearing Transcript, 66:17-20.

Dated this 15th day of September, 2022.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Katelyn A. Cook
Talbot J. Wieczorek
Katelyn A. Cook
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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2022, a true and correct copy of **PETITIONER DENISE L. SCHIPKE-SMEENK'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was sent, by first-class mail, postage prepaid on the following:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Ave Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

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4200 Beach Drive, Suite 1
Rapid City, SD 57702
Attorneys for Ryan William Smeenk

/s/ Talbot J. Wieczorek
Talbot J. Wieczorek

STATE OF SOUTH DAKOTA)SS COUNTY OF BUTTE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of **NEIL WILLIAM SMEENK,** Deceased.	)	09PRO19-000013 **BRIEF IN RESISTANCE TO PETITIONER DENISE L. SCHIPKE–SMEENK'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW Ryan Smeenk, by and through his attorneys of record, John W. Burke and Kimberly S. Pehrson, and hereby submits the following in resistance to *Petitioner Denise L. Schipke-Smeenk's Motion for Partial Summary Judgment ("Motion").*

INTRODUCTION

Denise Schipke-Smeenk's ("Denise's") *Motion* is the most recent installment in lengthy proceedings between Denise and Ryan Smeenk ("Ryan") regarding the proper distribution of Neil Smeenk's ("Neil's") Estate. This Court witnessed the dispute as it ran its course, beginning with a bench trial before this Court and ending with an appeal to the South Dakota Supreme Court. Ultimately, the Supreme Court held that Denise's alleged creditor claim was sufficiently presented under SDCL Chapter 29A-3. *In re Estate of Smeenk, 2022 S.D. 41, ¶ 41.* However, and dispositive of Denise's *Motion*, the Supreme Court upheld the rejection of Denise's claim on the merits. *Id.* ¶¶ *1, 12, 41.* In the Supreme Court's words, this Court "properly determined [that] Denise failed to allege or present evidence of an essential element for specific performance, the lack of an adequate remedy at law[.]" *Id.* ¶ *40.*

Notwithstanding the Supreme Court's ruling, and in a final effort to recover on her foreclosed claim, Denise is now attempting to reverse-course and seek money damages. In

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furtherance of this new theory, Denise submits that she is entitled to partial summary judgment on two elements of a breach of contract claim.

Denise's approach is unavailing. First, Denise cannot request summary judgment on an adjudicated—and therefore unviable—claim; the doctrine of res judicata prevent such a maneuver. Second, Denise has waived the ability to pursue a claim for money damages by failing, at the prior trial, to offer any evidence or propose any findings of fact to this Court supporting a theory of money damages. Third, in the end, Denise's effort will be futile for a separate reason. She is bound by her prior and numerous admissions that it was "impossible" to determine a monetary award. For these reasons, this Court should reject Denise's *Motion.*

ANALYSIS

Denise cannot seek—and certainly is not entitled to—summary judgment because she is barred from re-litigating Neil's alleged breach of the *Agreement to Execute Mutual Wills* ("the Agreement").[1]

I. RES JUDICATA PRECLUDES DENISE FROM RE-LITIGATING ANY MATTER RELATED TO NEIL'S ALLEGED BREACH OF CONTRACT.

As this Court knows, res judicata is the legal principle that prevents a party from re-litigating a claim or issue that has been settled by a judicial decision. *See Res Judicata Black's Law Dictionary (11th ed. 2019).* The doctrine's roots are ancient, and its purpose well-established: "[A] person should not be twice vexed for the same cause[.]" *Healy Ranch, Inc. v. Healy [Healy II], 2022 S.D. 43, ¶ 58.* Appropriate application of the doctrine is critical because

[1] SDCL 15-6-56(a) provides that a party may seek summary judgment on "a claim, counterclaim, or cross-claim . . . ." Here, Denise does not have a claim on which summary judgment can be sought.

it prevents costly and repetitive lawsuits, conserves judicial resources, and encourages reliance on judicial decisions by providing finality. *See Brown v. Felson, 442 U.S. 127, 131 (1979) ("Res judicata serves to "free[] the courts to resolve other disputes.").*

The legal principle of res judicata has two distinct branches: claim preclusion and issue preclusion. *Healy II, 2022 S.D. 43, ¶ 40.* Claim preclusion bars not only "a claim . . . actually litigated" but also claims "*which could have been properly raised.*" *Id. (emphasis in original).* Issue preclusion, on the other hand, forecloses "re-litigation of a matter that has been litigated and decided." *Id.* The following factors are often used to guide a decision on the applicability of the doctrine:

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

Id.

Here, all four factors are met. Therefore, Denise cannot bring any further claims or issues related to her allegation that Neil breached the *Agreement.*

[2] Just last month, in *Healy II*, the South Dakota Supreme Court discussed its liberal use of the phrase "issue" to analyze the identity of the causes of actions barred for purposes of claim preclusion. Despite its use of the word "issue," the Supreme Court clarified that "exacting 'issue identity'" is generally not required to establish claim preclusion. *Healy II, 2022 S.D. 43, ¶ 44.* Instead, "[i]f a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Id. ¶ 44, n.9.*

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A. The alleged breach of contract claim that Denise wishes to litigate in this action is identical to the previously adjudicated claim.

The first element—i.e., that the claims be identical—is established. As applied to claim preclusion, the Supreme Court has explained that "claim identity" is determined by whether a litigant is "attempt[ing] to relitigate a prior determined *cause of action.*" *Healy II, 2022 S.D. 43, ¶ 44* (emphasis in original). This requires examining "whether the wrong sought to be redressed is the same in both actions." *Healy II, 2022 S.D. 43, ¶ 44 (emphasis added); Clay v. Weber, 2007 S.D. 45, ¶ 13, 733 N.W.2d 278, 284.*

It is irrefutable that the wrong to be redressed by Denise's *Motion*—i.e., Neil's alleged breach of contract—is identical to the claim that this Court previously considered. For over two years, Denise has aggressively litigated her breach of contract claim, not only before this Court but also before the South Dakota Supreme Court. *In re Estate of Smeenk, 2022 S.D. 41, ¶ 7.* In its opinion, the Supreme Court described both Denise's cause of action and this Court's ultimate holding over the same as follows:

> The court received evidence and arguments from the parties on the merits of Denise's claim for specific performance as a remedy for Neil's alleged breach of the Agreement. The court then made a merits-based determination that Denise was not entitled to specific performance because Denise failed to show an inadequate remedy at law.

Id. ¶ 12.

With little left to argue, Denise now attempts to retool her previously litigated breach of contract claim as an action for monetary damages. She contends that the Supreme Court's decision only precludes the equitable remedy of specific performance, leaving her free to come back to this Court and pursue an action at law for money damages. For purposes of claim

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preclusion, however, it makes no difference that Denise elected not to pursue the possibility of monetary damages at the previous trial. The fact that a party fails to assert an alternative claim for relief "is not an impediment to claim preclusion" when "it would have been appropriate for [the party] to [assert the theories together] rather than later through piecemeal litigation." *Healy II, 2022 S.D. 43, ¶ 50, n.11 (citing SDCL 15-6-8(a) and SDCL 15-6-8(e)).*

It has long been held that "[i]f the claims arose out of a single act or dispute and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Farmer v. S.D. Dep't of Revenue & Regul., 781 N.W.2d 655, 660 (S.D. 2010).* "This is true regardless of whether there were different legal theories asserted or different forms of relief requested in a subsequent action." *Id.* Within the past two months, this concept has been reaffirmed not only by the South Dakota Supreme Court in *Healy II*, but also by the Eighth Circuit Court of Appeals (applying South Dakota law) in *Healy III. Healy II, 2022 S.D. 43, ¶ 46; Healy v. Fox [Healy III], 46 F.4th 739 (8th Cir. 2022).* As the Eighth Circuit recently and correctly observed, for claim preclusion, the "two actions do not require absolutely identical proof . . . . South Dakota law requires only that the actions seek to redress the same wrong, not that they involve the same legal theories." *Healy III, 46 F.4th at *9 (emphasis added).* Therefore, it is well-established that South Dakota's res judicata doctrine bars "all grounds for recovery . . . that were previously available[.]" *Healy II, 2022 S.D. 43, ¶ 44, n.9.*

Nothing prevented Denise from requesting monetary damages when she previously came before this Court. In fact, the rules of civil procedure unambiguously allowed her to seek equity and money damages in the alternative. *See SDCL 15-6-8(a) ("Relief in the alternative or of*

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several different types may be demanded.").[3] Rather than attempting to prove both forms of relief, for reasons that are unclear, Denise made the strategic decision to pursue only the equitable theory. *See SDCL 15-6-8(a) ("Relief in the alternative or of several different types may be demanded."). In re Estate of Smeenk, 2022 S.D. 41, ¶ 41 (affirming this Court's denial of Denise's equitable remedy).* In fact, on appeal, she went to great lengths to convince the Supreme Court that "money damages would be an insufficient remedy." *Brief of Appellant Denise L. Schipke-Smeenk at 28.* Denise offers no explanation for her failure to assert monetary damage in the alternative while she had the chance. This is because "other than [her] own strategy[,]" none existed. *Piper v. Young, 2019 S.D. 65, ¶ 33, 936 N.W.2d 793, 806.* When parties fail to timely raise a theory as part of a legal strategy, they cannot be saved from the preclusive effects of res judicata. *Id. (barring claim on res judicata ground when only reason for delay was strategic).* The first element—i.e., the identity of the claim—is met.

B. There was a final judgment on the merits.

The second element requires a final judgment on the merits. *Healy II, 2022 S.D. 43, ¶ 51.* To satisfy this element, the prior judgment must be "one based on legal rights rather than matters of procedure and jurisdiction." *Id.* A judgment is considered on the merits, according to the Supreme Court, when it is "based on . . . a failure to prove substantive allegations of fact."

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[3] As *Bouvier Law Dictionary Election of Remedies* explained, "[t]o elect a remedy is to waive the remedies that are not elected." It further noted that "[a] plaintiff who elects one remedy and waives others, even if the plaintiff is unaware of the nature of the election but merely seeks one and not the others, waives the other remedies as against that defendant for that cause of action, and the waiver is final barring later causes of action under the other theories of remedy as a matter of res judicata." *Id.*

Id. ¶ 53 (quoting United States v. Or. Lumber Co., 260 U.S. 290, 300–01, 43 S. Ct. 100, 103, 67 L. Ed. 261 (1922)).

There is no question that this matter was litigated to a final judgment. Because this Court's February 5, 2021 *Order* resolved all issues related to Denise's creditor claim, it was a final judgment as contemplated by SDCL 15-26A-3. *See In re Estate of Geier, 2012 S.D. 2, 809 N.W.2d 355.* Not only did both parties file appellate briefs certifying as much; the Supreme Court accepted the finality of the judgment by entertaining Denise's appeal without a SDCL 15-6-54(b) certification.

There is equally no question that the judgment was on the merits. Denise attempted to prove her case at a bench trial, making this Court's ultimate holding certainly "one based on legal rights rather than matters of procedure and jurisdiction." *Healy II, 2022 S.D. 43, ¶ 51.* The dispute ended with the Supreme Court agreeing with this Court. More specifically, the Supreme Court noted that Denise had "failed to allege or present evidence of an essential element of specific performance, the lack of an adequate remedy at law." *Id. ¶ 40.* A judgment is considered on the merits even when it is "based on . . . a failure to prove substantive allegations of fact." *Id. ¶ 53 (quoting United States v. Or. Lumber Co., 260 U.S. 290, 300–01, 43 S. Ct. 100, 103, 67 L. Ed. 261 (1922)).*[4] The second element—i.e., the existence of a final judgment on the merits—is met.

[4] If, however, there was ever any room for debate, the Supreme Court resolved it. In its decision, the Supreme Court stated that this Court "made a merits-based determination that Denise was not entitled to specific performance because Denise failed to show an inadequate remedy at law." *In re Estate of Smeenk, 2022 S.D. 41, ¶ 12 (emphasis added).*

C. The parties—Denise and Ryan—are the same in both actions.

At all stages, Denise has pursued her claim as both the personal representative of the Estate and as an alleged creditor. Ryan, as an interested party, has resisted her. Therefore, it is undisputed that the parties are the same.

D. Denise had a full and fair opportunity to litigate the issues in the prior adjudication.

The final element of res judicata—namely, that the party against whom res judicata is sought had a full and fair opportunity to litigate the issue—is also satisfied. As the Supreme Court has recently instructed, "[f]or a claim to be barred by res judicata, the claim need not have been actually litigated at an earlier time. Rather, the parties only need to have been provided a fair opportunity to place their claims in the prior litigation." *Healy II, 2022 S.D. 43, ¶ 56.*

It is beyond debate that Denise had every opportunity to litigate her breach of contract claim—including an opportunity to put on proof of monetary damages—at the first trial. This Court is intimately familiar with Denise's efforts, given that it presided over those proceedings. Denise attended a bench trial, called witnesses, offered exhibits, made legal arguments, and proposed findings of fact and conclusions of law. She even testified in support of her belief that she was entitled to specific performance of the *Contract for Deed.* At that time, she exclusively sought an equitable remedy. She lost. She appealed. She was unsuccessful again. *See In re Estate of Smeenk, 2022 S.D. 41, ¶ 41 (affirming this Court's ruling on Denise's failure to prove an element of her case).*

The Supreme Court has made it clear that parties have been given a full and fair opportunity to litigate potential—but unasserted—theories if they do not pursue those theories

despite having "every opportunity to do so." *Healy II, 2022 S.D. 43, ¶ 57 ("Bret did not bring a quiet title action . . . . However, he had every opportunity to do so . . . . Therefore, element four [the full and fair opportunity element] is met.").* Denise had every opportunity to prove her case by: (i) asserting an entitlement to an equitable remedy; (ii) pursuing a right to monetary damages; or (iii) seeking both alternatively. She elected to pursue only an equitable remedy. She cannot now object to the results of her own legal strategy; in fact, res judicata forbids it.[5] *State v. Miller, 248 N.W.2d 874, 878 (S.D. 1976) ("A defendant cannot follow one course of strategy at the time of trial and, if that turns out to be unsatisfactory, complain that he should be discharged or given a new trial."); Sharpe v. Dept. of Transp., 505 S.E.2d 473, 475 (1998) ("A party cannot complain of error that [his] own legal strategy, trial procedure, or conduct aided in causing.").* This Court should dismiss Denise's *Motion* as barred.

II. DENISE HAS WAIVED ANY ALLEGED CLAIM TO MONETARY DAMAGES.

"A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned." *Stemper v. Stemper, 415 N.W.2d 159, 160 (S.D. 1987)*; *State v. Rodriguez, 2020 S.D. 68, ¶ 34, 952 N.W.2d 244, 254 ("Nor did [Rodriguez] submit proposed findings of fact and conclusions of law to preserve whatever issue he was attempting to raise.").* This rule exists to give trial courts an "opportunity to consider [the issue] and take whatever measures it felt were necessary, if any, to correct the situation." *See Gilkyson v. Wheelchair Express, 1998 S.D. 45, ¶ 14 (holding objections are waived unless timely brought).* In light of

[5] Additionally, because Denise no longer has a redressible injury, she lacks standing to bring her *Motion. See, e.g., Black Bear v. Mid-Central Educ. Coop., 2020 S.D. 14, ¶¶ 11–12, 941 N.W.2d 207, 212–213.*

this, "[i]n the absence of a proposed finding . . . [the petitioner] cannot be heard to complain that the trial court did not [enter a specific finding]." *Martin v. Martin, 358 N.W.2d 793, 798 (S.D. 1984).*

Denise invited this Court to consider the merits of her alleged claim for specific performance; she did not pursue a monetary remedy or propose a single finding on the same. *See Petitioner Denise L. Schipke-Smeenk's Proposed Findings of Fact and Conclusions of Law on Motion to Allow Claim ("Denise's Proposed Findings and Conclusions").* Due to this strategic decision, at all stages of this dispute, the parties—and the Supreme Court—understood that her only alleged remedy was equitable. Indeed, the Supreme Court specifically observed that "Denise was not seeking a monetary remedy for the alleged breach of contract claim[.]" *Id. ¶ 28.* Even Denise herself cannot reasonably dispute this; her proposed conclusions of law stated her desire plainly:

> Denise Schipke-Smeenk, as a creditor, is entitled to specific performance of the Agreement to Execute Mutual Wills resulting in the specific performance of the terms of the 2017 Will to the extent that the 2017 Will devises to her property of the Descendant. The property devised to Denise Schipke-Smeenk in the 2017 Will will be awarded [sic] her in satisfaction of her creditor claim. Any remaining property in the Estate will pass pursuant to the terms of the 2019 Will.

Denise's Proposed Findings and Conclusions at 17 (emphasis added).

In addition to Denise's own court filings, Denise's decision to overlook or abandon her monetary damages theory is clear in other areas of the record. For instance, Denise failed to offer any evidence in support of money damages at the first trial. *See id.* Nor did she make any effort to secure expert testimony or provide this Court with an offer of proof that might establish some basis for such damages.

Whether she did so intentionally or otherwise, Denise has lost her right to argue she is entitled to monetary damages. Failure to secure the testimony or documentation required to establish an element of claim is fatal. *See Krsnak v. Brant Lake Sanitary Dist., 2018 S.D. 85, ¶ 29, 921 N.W.2d 698, 705 (noting that "the Krsnaks have not presented evidence of causation.")*. In this instance, electing not to create an adequate record was a product of Denise's "own failed trial strategy." *State v. Burtzlaff, 493 N.W.2d 1, 11 (S.D. 1992); Excel Underground v. Brant Lake Sanitary Dist., 2020 S.D. 19, ¶ 30, 941 N.W.2d 791, 801 (affirming trial court's holding that a party was not entitled to relief from the unintended consequences of their "tactical[] . . . decision")*. This Court should deny Denise's *Motion* on the basis of waiver.

III. DENISE'S MOTION IS MOOT DUE TO HER ADMISSIONS THAT SHE HAS NO REMEDY AT LAW.

"A judicial admission is binding on the party who makes it." *In re Estate of Tallman, 1997, S.D. 97, ¶ 13, 562 N.W.2d 893, 896.* "'Judicial admissions may occur at any point during the litigation process.'" *Id.* This is because "[t]he focus is on the statement, not on a certain stage of the litigation." *Id.* The South Dakota Supreme Court "has held that parties are bound by their judicial admissions made in appellate briefs . . . ." *Id. See also Tuttle v. Tuttle, 399 N.W.2d, 876, 877, n. 2 (S.D. 1986) ("Although the trial court did not make a finding as to the last four debts, the husband in his brief admitted that these debts existed. . . . This admission is binding on the husband.")*. In similar fashion, the Supreme Court routinely binds parties to the concessions of their counsel. *See, e.g., Pickerel Lake Outlet Ass'n v. Day Cty., 2020 S.D. 72, ¶ 12, 953 N.W.2d 82, 88 ("At oral argument, both parties agreed that the Bracker balancing test does not apply to this case."); Rush v. U.S. Bancorp Equip. Fin., Inc., 2007 S.D. 119, ¶ 11, 742*

N.W.2d 266, 269 ("Plaintiffs concede as much in their appellate argument[.]").

Before the Supreme Court, Denise repeatedly represented—in no uncertain terms—that monetary damages were not available. Consider the following excerpts from her appellate brief:

- "[I]t is **impossible** to make a determination of what the value of the Estate might be upon the second person's death, as well as what the surviving spouse's consumption of the Estate might be during the time that they are still alive." *Brief of Appellant Denise L. Schipke-Smeenk at 29 (emphasis added).*

- "[I]t is **not possible** to know what property would be left in Denise's Estate or what the impact of her being bound to leave her property pursuant to the Agreement would have." *Id. (emphasis added).*

- "[M]oney damages would be an insufficient remedy." *Id. at 28.*

- "[I]f this was the second of the two parties to reciprocal wills to pass away, money damages may be appropriate, **such is not the case here**." *Id. at 29 (emphasis added).*

- "The **only** practical way of enforcing the Agreement between Denise and Neil in this situation is by specific performance." *Id. (emphasis added).*

- "[N]ot only is specific performance the appropriate remedy for a breach of an agreement to execute wills, it is also the appropriate remedy when the subject of the agreement is a unique piece of property—i.e., the ranch." *Id.*

Clearly, even Denise agrees that it is not possible for her to calculate monetary damages. Therefore, by her own admission, any litigation past this point would be litigation for litigation's sake. This Court should deny the *Motion*.

CONCLUSION

It is understandable that Denise is disappointed with the Supreme Court's decision to affirm this Court's ruling, namely, the determination that she did not prove a necessary element of her case. However, it is inappropriate for Denise to continue filing motions in this matter, especially when she does so both as the personal representative and as a creditor.

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Allowing Denise an opportunity to re-litigate this case not only disregards the Supreme Court's recent condemnation of piecemeal litigation; it also creates unnecessary judicial waste by burdening the judiciary and the Estate with endless litigation. The Supreme Court's reversal on the question of whether Denise's creditor claim was properly presented in accordance with SDCL Chapter 29A-3 was not an invitation for Denise to continue the battle over Neil's remaining assets. It is disheartening that Denise persists in forcing the heirs of the Estate—and, more importantly, this Court—to continue to expend resources litigating the same issue over and over again. This Court should deny the *Motion.*

Dated this 29th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2022, I filed the foregoing *Brief in Resistance to Petitioner Denise L. Schipke-Smeenk's Motion for Partial Summary Judgment* relative to the above-entitled matter via Odyssey File and Serve, and that such system effected service of the same on the following individuals:

Talbot J. Wieczorek / Tyler C. Wetering / Katelyn A. Cook
Gunderson Palmer Ashmore & Nelson, LLP
PO Box 8045
Rapid City, SD 57709

And served via first class U.S. mail on:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Avenue Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

/s/ John W. Burke
John W. Burke

Filed: 9/29/2022 9:15 PM CST Butte County, South Dakota 09PRO19-000013

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

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK,	)	**PETITIONER DENISE L. SCHIPKE-SMEENK'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
	)	
Deceased.	)	
	)	
	)	
	)	
	)	

Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk, by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, pursuant to SDCL § 15-6-56, respectfully submits this Reply in Support of her Motion for Partial Summary Judgment.

INTRODUCTION

Denise moved for partial summary judgment on a very narrow issue—a determination as to liability for the breach of contract claim she has successfully asserted. Neither this Court nor the Supreme Court disputes that liability has yet to be determined. Instead, this Court and the Supreme Court made a determination as to the legal availability of one potential remedy should Denise actually be able to establish Neil's liability for breach of contract—not a decision on the actual merits of Denise's claim as Ryan attempts to argue. Because Ryan has not established a genuine dispute as to any material fact and Ryan's arguments fail as a matter of law, Denise is entitled to partial summary judgment.

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ARGUMENT

A. Ryan's arguments as to res judicata are unavailing.

In order to establish that a claim is barred by res judicata, the following elements must be proven:

> (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 Healy Ranch, Inc. v. Healy, 2022 S.D. 43, 978 N.W.2d 786, reh'g denied (Sept. 19, 2022) (citing *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 17, 720 N.W.2d 655, 661; *see also Lippold v. Meade Cnty. Bd. of Comm'rs*, 2018 S.D. 7, ¶ 28, 906 N.W.2d 917, 925, as modified on denial of reh'g (Mar. 13, 2018)). As stated below, Ryan's defense of res judicata must be disregarded.

1. Denise's claim is not barred by res judicata because there was never a determination on the merits of the claim.

Ryan heavily relies upon *Healy Ranch, Inc. v. Healy*, for the proposition that Denise's claim is barred by the doctrine of res judicata. 2022 S.D. 43. However, a simple review of the facts of that case compared to the facts of the case at issue here demonstrates that *Healy* is not on point.

In *Healy*, the plaintiff filed suit against two family businesses alleging a variety of tort and contract claims associated with an allegedly improper deed transferring a ranch property from one entity into another. *Healy*, 2022 SD 43 at ¶ 7. The circuit court granted summary judgment in the defendants' favor finding all of the plaintiff's claims to be untimely. *Id.* at ¶ 8. The plaintiff appealed, and the Supreme Court affirmed, finding the plaintiff's claims were

barred by the statute of limitations. *Id.* at ¶ 9. After the Supreme Court issued its opinion, the plaintiff filed a completely separate lawsuit alleging a different cause of action—seeking a determination of marketable title under the South Dakota Marketable Title Act. *Id.* at ¶ 11. After the defendants moved for summary judgment in the new action, the circuit court found the plaintiff's notice under the SDMTA was also untimely, and the plaintiff appealed. *Id.* at ¶ 14.

On appeal, the defendants argued the plaintiff's claims were barred by the doctrine of res judicata. The Supreme Court agreed, finding claim preclusion applied because the plaintiff was attempting to litigate "the same cause of action" that he had litigated in the earlier, separate lawsuit. *Id.* at ¶ 49. In particular, the Supreme Court noted that because the circuit court had determined that the plaintiff's claims were untimely, it constituted a decision on the merits of the plaintiff's claims. *Id.* at ¶ 51. Thus, the Court concluded that the former finding on statute of limitations grounds was entitled to preclusive effect "because it settled the rights and obligations of the respective parties." *Id.* at ¶ 53 (citing *Am. Nat. Bank & Tr. Co. v. City of Chicago*, 826 F.2d 1547, 1553 (7th Cir. 1987)).

The facts of this case are entirely different than those in *Healy*. First, unlike *Healy*, there has been no determination on the merits necessary to give rise to a preclusive effect. In *Healy*, both the circuit court and the Supreme Court found that the plaintiff's claims were untimely, barred by statute of limitations, thus rendering a decision on the merits and determining that there was no liability for the claims raised by plaintiff. Here, the exact opposite has occurred.

While this Court initially found Denise's claims to be untimely, the Supreme Court disagreed. *See In the Matter of the Estate of Neil William Smeenk*, 2022 SD 31, ¶ 41, 978 N.W.2d 383 (noting that Denise's claim was timely per SDCL § 29A-3-803 and SDCL § 29A-3-804). In fact, the Supreme Court specifically noted that there has been no finding as to liability

yet, stating that "questions of enforceability and breach of the Agreement" have not yet been resolved because "the circuit court specifically reserved ruling on the issues of enforceability and breach of the Agreement." *Id.* at ¶ 32. Because there has yet to be a finding of liability in this case, the "rights and obligations of the respective parties" have not yet been determined—unlike *Healy*. *See Healy*, 2022 SD 43 at ¶ 53 (citing *Am. Nat. Bank & Tr. Co.*, 826 F.2d at 1553); *see also Skoglund v. Staab*, 269 N.W.2d 401, 403 (S.D. 1978) (res judicata should not be utilized to prevent a litigant a fair opportunity to place his or her claim in litigation on its merits).

Instead, Ryan puts the proverbial cart before the horse, arguing that simply because one available remedy is not available, Denise is somehow barred from pursuing other available remedies *when liability has not even been determined.* Res judicata is not about *remedy* preclusion—it is meant to prevent re-litigation of something actually determined *on the merits.* Ryan has not been "twice-vexed" as he argues—this is the same lawsuit (unlike *Healy*) and he has yet to ever actually obtain any ruling on the merits in his favor. Ryan cannot try to avoid such a finding simply because one potential remedy is no longer available to Denise.

This is perhaps more clearly illustrated with an example. Say that a plaintiff files a lawsuit against a defendant alleging various tort claims and seeking two different remedies—regular compensatory damages as well as punitive damages.[1] After proceeding with certain discovery, the defendant files a partial motion for summary judgment, acknowledging that while *liability is yet to be determined*, the plaintiff has not met his high burden to show entitlement to punitive damages. If the court agrees and dismisses the remedy of punitive damages, it does not mean that the plaintiff's entire claim is extinguished and that the plaintiff cannot still seek the

[1] Ryan argues that Denise's claim must fail because she did not plead two damage/remedy theories in her claim. This argument is unavailing and will be discussed later in the brief.

other available remedy of compensatory damages. Instead, it simply means that the case proceeds with all parties knowing that at least one remedy has been determined to be unavailable as a matter of law.[2]

This is exactly what has happened here. The Supreme Court noted that this issue of available remedies was not ripe because liability has not been established, but determined that this Court was correct in finding *that if liability is to be established*, Denise cannot seek specific performance as a remedy. It does not mean that Denise's claim was ever determined on the merits and that she cannot proceed to seek alternative remedies—as evidenced by the fact the Court specifically remanded the case for further proceedings consistent with the Supreme Court's opinion. *See* Judgment, August 15, 2022. Had the Supreme Court actually found that Denise's claim was decided on the merits (as Ryan argues), there would have been no need for the Supreme Court to remand; it simply could have affirmed this Court and entered judgment in Ryan's favor on Denise's claim. Instead, there is no preclusive effect because the rights and obligations of the parties have not been established as is required for a finding of res judicata. *See Healy*, 2022 SD 43 at ¶ 53 (citing *Am. Nat. Bank & Tr. Co.*, 826 F.2d at 1553).

Therefore, because there has been no finding on the merits, Ryan cannot satisfy all of the required elements for res judicata.

2. Res judicata only applies to unreversed claims.

South Dakota precedent is clear: "In South Dakota, it is well settled that the decision upon which one may base a claim of res judicata must be final and unreversed." *Bank of Hoven*

[2] The procedure in this case only differed because of the Supreme Court's precedent in *In re Estate of Geier*, 2012 S.D. 2, ¶ 10, 809 N.W.2d 355, 358 which found that an order determining individual petitions for relief in probate action can constitute a final order when it disposes of all issues relative to a particular petition and leave nothing for decision. Here, this Court's ruling as to the untimeliness of Denise's claim left nothing to decide; once that finding was remanded by the Supreme Court, liability is clearly still at issue.

v. Rausch, 449 N.W.2d 263, 265 (S.D. 1989) (citing *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 262 (S.D.1988); *Black Hills Jewelry Mfg. v. Felco Jewel Ind.*, 336 N.W.2d 153, 157 (S.D.1983)); *see also Skoglund*, 269 N.W.2d at 403 (an adjudication on the merits is a "bar to any future action between the same parties or their privies upon the same cause of action *so long as it remains unreversed*") (emphasis added)).

Here, it is undisputed that the Supreme Court reversed this Court's holding with regard to the timeliness of Denise's claim. *See Smeenk*, 2022 SD 41 at ¶ 41. Thus, Ryan's arguments that Denise's claim is barred by res judicata is contradicted by clearly-stated South Dakota law, and as such, this Court should disregard the same.

B. Ryan's waiver argument is inapplicable.

Ryan next argues that Denise is barred from pursuing the alternative form of damages because she allegedly waived it by not requesting money damages in her claim. However, this argument ignores the plainly stated rules of Civil Procedure.

First, a Court shall conform the pleadings to the evidence, as "all pleadings shall be so construed as to do substantial justice." SDCL § 15-6-8(f). Second, Denise would not be barred from bringing a claim for damages here as Ryan suggests because "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." SDCL § 15-6-54(c).

For example, *in Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, the parties were embroiled in litigation over a purchase agreement and accompanying contracts for the sale of a funeral home. 2006 S.D. 6, 709 N.W.2d 350. The circuit court found that the plaintiff was not entitled to the remedy of specific performance because she had not plead or proved her entitlement to specific performance—instead, she had requested monetary damages. *Id.* at ¶ 33.

On appeal, the Supreme Court disagreed, citing both SDCL §§ 15-6-54(c) and SDCL 15-6-8(f), finding that this alleged failure to plead or prove a remedy did not bar the plaintiff from pursuing other available remedies. *Id.* at ¶ 34.

In this case, the Supreme Court specifically noted there was evidence of money damages in the record, which is partly why it denied specific performance, noting that the inventory provides a monetary value for Neil's one-half interest remaining in the contract for deed. *See Smeenk*, 2022 SD 41 at ¶ 39. Denise's entitlement to monetary damages is even clearer now given the new evidence put into the record by Ryan in his Petition to Direct Personal Representative to Distribute Cash assets, wherein he acknowledges that "during the pendency of the appeal, the purchaser under the Contract for Deed prepaid the remaining payments, i.e. fully paid off the Contract for Deed." *See* Petition at ¶ 6. Clearly, even just based on the evidence in front of the Court at this time, Denise is entitled to money damages, leading to this Court's duty to conform the pleadings accordingly to "do substantial justice." *See* SDCL § 15-6-8(f).

Second, the Supreme Court has noted that election of remedies rule, such as the one advanced by Ryan here, is disfavored, "often results in substantial injustice" and "is harsh and largely obsolete." *Ripple v. Wold*, 1996 S.D. 68, ¶ 11, 549 N.W.2d 673, 676 (citing *Tuchalski v. Moczynski*, 152 Wis.2d 517, 449 N.W.2d 292, 293 (1989)). As noted in *Ripple*, "a trial court may permit the amendment of pleadings before, during, and even after trial without the adverse party's consent." *Id.* (citations omitted). Such amendment is favored because "the purpose of the election of remedies doctrine is not to block recourse to any particular remedy *but to prevent duplicate recovery for a single wrong*." *Id.* (Emphasis added) (citing *Riverview Co-op., Inc. v. First Nat. Bank and Trust Co. of Michigan*, 417 Mich. 307, 337 N.W.2d 225, 226–27 (1983); *Vesta State Bank v. Indep. State Bank*, 518 N.W.2d 850, 855 (Minn.1994))).

This Court allowing Denise to seek money damages does not result in a double recovery; and as such, Ryan's election of remedy and waiving arguments are unavailing given this Court's duty to conform the pleadings to do substantial justice and grant the relief to which Denise is entitled upon an appropriate showing of Neil's liability for breach. Furthermore, Ryan makes it seem as though Denise's claim specifically requested one form of remedy and no others. In reality, Denise's claim is quite broad, asking the Court to approve "disposition of the decedent's estate as provided in the 2017 Agreement. . ." Thus, it is disingenuous to imply that Denise narrowly limited her request for relief in the pleadings.

Importantly, even if this Court were to find Denise's claim to be too narrow, Denise filed a subsequent claim in February of 2021 seeking monetary damages in the alternative. While Ryan will argue that this claim was untimely, as set forth in *Ripple*, it is well within this Court's discretion to treat this filing as an amendment to the pleadings, relating back claim to Denise's initial claim.

As he has throughout the entirety of this lawsuit, Ryan attempts to avoid "substantial justice" by availing himself of procedural loopholes and "gotchas." He has failed to establish any genuine dispute of material fact associated with Neil's breach of the Agreement outside of his argument that Denise's claim does not exist. Because of this, he has thrown every theory he can think of at the wall in an attempt to avoid "substantial justice"—that Denise receives what she has a legal right to under the 2017 Agreement.

C. Admissions against interest apply only to *facts* in the case, not legal admissions.

Ryan's next attempt to avoid a finding in Denise's favor is to argue that Denise is bound by alleged "judicial admissions." "A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of a fact claimed to be true, *and is used as a substitute for legal*

evidence at the trial." *Tunender v. Minnaert*, 1997 S.D. 62, ¶ 21, 563 N.W.2d 849, 853 (emphasis added) (citing *Harmon v. Christy Lumber, Inc.*, 402 N.W.2d 690, 692–93 (S.D.1987)). Argument by counsel does not constitute a judicial admission, as "[a]n admission 'is limited to matters of fact which would otherwise require evidentiary proof,' and cannot be based upon personal opinion or legal theory." *Id.* (quoting *Baxter v. Gannaway*, 113 N.M. 45, 822 P.2d 1128, 1133 (1991)).

Admissions of the type asserted by Ryan only apply to questions of fact: "[A] party to a lawsuit cannot claim the benefit of a version of relevant facts more favorable to his own contentions than he has given in his own testimony." *Law Capital, Inc. v. Kettering*, 2013 S.D. 66, ¶ 13, 836 N.W.2d 642, 646 (citing *J. Clancy, Inc. v. Khan Comfort, LLC,* 2021 S.D. 9, ¶ 22, 955 N.W.2d 382, 390); *see Tunender*, 1997 S.D. 62, ¶ 27 (an attorney's argument that plaintiff was entitled to at most $10,000 was not a judicial admission and noting that proceedings "should not be relegated to a game of "gotcha" and "admissions should be limited in accordance with our prior case law").

Ryan argues that because Denise's counsel argued that money damages were not legally appropriate in her appellate briefing, it constitutes a judicial admission and therefore she cannot seek money damages. However, the alleged "admissions" by Denise/Denise's counsel were not factual admissions but were instead in the nature of pure legal argument. The fact that these arguments did not "substitute as evidence" (as is required for a judicial admission) is made even more apparent in looking at both this Court and the Supreme Court's findings.

First, as this Court specifically found, Denise did not provide any *evidence* of her entitlement to specific performance. *See* February 2, 2021, Findings of Fact and Conclusions of Law, COL, ¶ 4. Clearly, this Court did not substitute any arguments made by Denise or counsel

as evidence since this Court found no evidence was presented to support the request for specific performance. Next, the Supreme Court also clearly did not substitute any of these arguments as evidence because as the Supreme Court noted, the actual evidence in the record—i.e. the inventory showing the contract for deed and Denise's testimony regarding the income stream stemming from the contract for deed—belied any argument by Denise that she did not have a claim for monetary damages.

The arguments by counsel upon which Ryan attempts to rely do not constitute judicial admissions because neither this Court nor the Supreme Court used these arguments "as a substitute for legal evidence at the trial." *See Tunender*, 1997 S.D. 62 at ¶ 21. Therefore, this Court should disregard the same.

CONCLUSION

Here, res judicata is inapplicable because there was no final judgment on the merits as to any claim. While this Court and the Supreme Court may have found that Denise might be precluded from seeking the *remedy* of specific performance, the "rights and obligations of the parties" have clearly not been decided as no finding as to liability has been made. Additionally, res judicata only applies to claims that have not been reversed—unlike those in the case at bar.

Second, Denise did not waive her right to seek monetary damages as is made clear by SDCL §§ 15-6-54(c) and 15-6-8(f). Furthermore, the election of remedy rule advanced by Ryan is clearly disfavored, especially given that there is no risk of duplicative discovery in this instance.

Finally, Ryan's argument as to judicial admissions is unavailing as neither this Court nor the Supreme Court used any arguments of counsel as a substitute for legal evidence.

Ryan's only defense to Denise's Statement of Undisputed Material Fact was that Denise's claim does not exist. Because the record and decision of the Supreme Court in *In re Matter of Estate of Smeenk* specifically bely this argument, and because Denise has shown that she is entitled to partial summary judgment on the issue of enforceability and breach of the Agreement as a matter of law, this Court should grant partial summary judgment in Denise's favor, leaving only the issues of damages to be determined.

Dated this 6th day of October, 2022.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Katelyn A. Cook
Talbot J. Wieczorek
Katelyn A. Cook
Attorneys for Denise L. Schipke-Smeenk
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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2022, a true and correct copy of **PETITIONER DENISE L. SCHIPKE-SMEENK'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was sent, by first-class mail, postage prepaid on the following:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Ave. Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

And served by electronic services via Odyssey File & Serve and electronic mail to:

John W. Burke
Kimberly Pehrson
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4200 Beach Drive, Suite 1
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Attorneys for Ryan William Smeenk

/s/ Katelyn A. Cook
Katelyn A. Cook

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of	)	09PRO19-000013
NEIL WILLIAM SMEENK,	)	**PETITION TO DIRECT PERSONAL REPRESENTATIVE TO DISTRIBUTE CASH ASSETS**
Deceased.	)	

COMES NOW Ryan Smeenk, by and through his attorneys of record, John W. Burke and Kimberly S. Pehrson, and hereby petitions the Court for an *Order* directing the Personal Representative, Denise L. Schipke-Smeenk, to distribute certain cash assets of the Estate of Neil W. Smeenk ("Estate") presently held in the Trust Account of Ms. Schipke-Smeenk's attorneys, Gunderson Palmer Nelson & Ashmore, LLP. This *Petition* is based upon the following considerations:

(1) As this Court knows, the *Last Will & Testament* at the center of this estate proceeding is the *Last Will & Testament of Neil William Smeenk*, executed on April 19, 2019 and admitted into formal probate by this Court pursuant to its November 23, 2019 *Findings of Fact and Conclusions of Law* ("*2019 Will*").

(2) The Court is familiar with the facts underlying this matter as a result of the extensive litigation and appellate proceedings that have taken place between Ms. Schipke-Smeenk (Neil's estranged spouse) and Ryan Smeenk (Neil Smeenk's son) related to the proper distribution of the Estate's primary asset. The primary asset, as this Court knows, is one half of the proceeds from the sale of Neil W. Smeenk's family ranch sold pursuant to a *Contract for*

Deed.[1] *In the Matter of the Estate of Neil W. Smeenk, 2022 S.D. 41, ¶ 38 ("Estate of Smeenk").*

(3) At a December 3, 2020 evidentiary hearing, Ms. Schipke-Smeenk presented evidence and sought redress for her allegation that Neil breached his contractual obligations to her by executing the *2019 Will*, which completely disinherited her.

(4) After the hearing, this Court issued an *Order Denying Motion for Approval and Payment of Claim (02/05/21)* and entered its *Findings of Fact and Conclusions of Law (02/02/21).* In doing so, the Court held that Ms. Schipke-Smeenk was not entitled to the *Contract for Deed* proceeds on three primary grounds: (i) Ms. Schipke-Smeenk failed to timely and properly present her creditor's claim, rendering it barred; (ii) as to her requested relief of specific performance, Ms. Schipke-Smeenk failed to establish—or "even raise the issue" of—the lack of an adequate remedy at law; and (iii) Ms. Schipke-Smeenk was not entitled to specific performance under SDCL 21-9-3(2) because the remedy was not "just or reasonable." *Estate of Smeenk, 2022 S.D. 41, ¶ 11; Findings of Fact and Conclusions of Law (02/02/21) at 12-13.*

(5) Ms. Schipke-Smeenk subsequently appealed this Court's decision to the South Dakota Supreme Court.

(6) During the pendency of the appeal, the purchaser under the *Contract for Deed* prepaid the remaining payments, i.e., fully paid off the *Contract for Deed.*

(7) The Estate's one-half of the proceeds under the *Contract for Deed* are presently being held in Gunderson Palmer Nelson & Ashmore, LLP's Trust Account.

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[1] The remaining half of the proceeds *Contract for Deed* were assigned by Neil to Ms. Schipke-Smeenk in 2017. *Estate of Smeenk, 2022 S.D. 41, ¶ 3.*

(8) On July 20, 2022, the Supreme Court issued its decision, affirming in part and reversing in part this Court's decision. Specifically, the Supreme Court reversed this Court's decision as to whether Ms. Schipke-Smeenk's creditor claim was timely presented, but, importantly, affirmed this Court's determination that Ms. Schipke-Smeenk is not entitled to specific performance. *Estate of Smeenk, 2022 S.D. 41, ¶ 41.*

(9) Because the Supreme Court upheld this Court's decision denying specific performance, Ms. Schipke-Smeenk's claim related to the *Contract for Deed* proceeds is denied; therefore, the Personal Representative should distribute the cash proceeds from the *Contract for Deed* in accordance with the *2019 Will.*

WHEREFORE, Ryan Smeenk respectfully requests that the Court enter an *Order* directing the Personal Representative to distribute the proceeds from the pay-off of the *Contract for Deed* in accordance with the *2019 Will.*

Dated this 14th day of August, 2022.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellee, Ryan Smeenk

By: /s/ John W. Burke .

John W. Burke
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2022, I filed the foregoing *Petition to Direct Personal Representative to Distribute Cash Assets* relative to the above-entitled matter via Odyssey File and Serve, and that such system separately effected service of the same on the following individuals:

Talbot J. Wieczorek / Tyler C. Wetering / Katelyn A. Cook
Gunderson Palmer Ashmore & Nelson, LLP
P.O. Box 8045
Rapid City, SD 57709

And served via first class U.S. mail on:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Avenue Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

/s/ John W. Burke
John W. Burke

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

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK,	)	**PETITIONER DENISE L. SCHIPKE-SMEENK'S REPONSE TO PETITION TO DIRECT PERSONAL REPRESENTATIVE TO DISTRIBUTE CASH ASSETS**
Deceased.	)	

Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk, by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, respectfully submits this Response to Ryan's Petition to Direct Personal Representative to Distribute Cash Assets.

After Ryan filed this Petition arguing that all issues have been determined by the Supreme Court, Denise submitted a separate Motion for Partial Summary Judgment on the issues of enforceability of the 2017 Agreement to Execute Wills and breach of the same. Ryan responded to that Motion. Because the arguments set forth in Denise's Reply in Support of her Motion also address the arguments against Ryan's Petition to Distribute Assets, in the interests of efficiency and judicial economy, Denise respectfully incorporates all arguments made in her Reply in Support of Motion for Partial Summary Judgment herein by this reference.

Filed: 10/6/2022 5:24 PM CST Butte County, South Dakota 09PRO19-000013

Dated this 6th day of October, 2022.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Katelyn A. Cook
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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2022, a true and correct copy of **PETITIONER DENISE L. SCHIPKE-SMEENK'S RESPONSE TO PETITION TO DIRECT PERSONAL REPRESENTATIVE TO DISTRIBUTE CASH ASSETS** was sent, by first-class mail, postage prepaid on the following:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Ave Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

And served by electronic services via Odyssey File & Serve and electronic mail to:

John W. Burke
Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
Attorneys for Ryan William Smeenk

/s/ Katelyn A. Cook
Katelyn A. Cook

STATE OF SOUTH DAKOTA)SS COUNTY OF BUTTE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of **NEIL WILLIAM SMEENK,** Deceased.	)	09PRO19-000013 **REPLY BRIEF IN SUPPORT OF PETITION TO DIRECT PERSONAL REPRESENTATIVE TO DISTRIBUTE CASH ASSETS**

COMES NOW Ryan Smeenk, by and through his attorneys of record, John W. Burke and Kimberly S. Pehrson, and hereby submits the following in support of the *Petition to Direct Personal Representative to Distribute Cash Assets ("Petition").*[1]

INTRODUCTION

Denise makes a few misstatements in her responsive brief, two of which must be corrected. First, Denise states that Ryan "has yet to ever actually obtain any ruling on the merits in his favor." *Petitioner Denise L. Schipke-Smeenk's Reply in Support of Motion for Partial Summary Judgment ("Denise's Brief") at 4.* This claim is puzzling given that this Court held in favor of Ryan on all issues after a day-long bench trial on Denise's *Motion for Approval and Payment of Claim.* The Supreme Court said it best when it observed that, "[a]fter receiving evidence and arguments from the parties on the merits of Denise's claim for specific performance, the circuit court denied the claim[.]" *In re Estate of Smeenk [Smeenk], 2022 S.D. 41, ¶ 33 (emphasis added).*

[1] Denise's response to Ryan's *Petition* was untimely. *See Petitioner Denise L. Schipke-Smeenk's Response to Petition to Direct Personal Representative to Distribute Cash Assets (10/06/22).* In any case, Denise limited her response to "incorporat[ing] all arguments made in her Reply in Support of Motion for Partial Summary Judgment." *Id.* For that reason, Ryan is replying to those arguments.

Filed: 10/11/2022 8:19 PM CST Butte County, South Dakota 09PRO19-000013

Second, without citation to record, Denise asserts that "[n]either this Court nor the Supreme Court disputes that liability has yet to be determined." *Denise's Brief at 1.* This statement has no factual foundation. As this Court is aware, it has already entered numerous findings of fact determining that the *Agreement to Execute Mutual Wills* ("*Agreement*") is not enforceable.[2] The legal impact of these findings is that Neil is not liable for breach of contract. Therefore, it is simply incorrect to suggest that this Court does not "dispute" that "liability has yet to be determined." *See Denise's Brief at 1.*

ARGUMENT AND AUTHORITIES

I. THERE IS A FINAL JUDGMENT ON THE MERITS.

The only portion of the res judicata test that Denise appears to challenge is the second factor, namely, the existence of a final judgment on the merits. *See Denise's Brief at 2–6; Healy Ranch, Inc. v. Healy [Healy II], 2022 S.D. 43, ¶ 40.* Therefore, Ryan limits his response to that element.

Despite Denise's creative arguments to the contrary, there is no question that this Court reached a final decision on the merits. After the bench trial, this Court drew two separate conclusions that disposed of Denise's claim. *See, e.g., In re Estate of Geier, 2012 S.D. 2, ¶ 15, 809 N.W.2d 355, 360 (holding that an order in a probate proceeding that "resolve[s] all the issues" in a petition is a final order from which appeal can be taken).* First, this Court held that

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[2] *See, e.g., Findings of Fact and Conclusions of Law (2/2/21) ("FOF/COL") at (b)(5) ("Denise focused on the underlying validity of the 2017 Agreement at the hearing, but the question before this Court is not necessarily validity, but rather, enforceability."); Id. at (b)(9) ("[T]his result would not be 'just and reasonable' as to Neil."); Id. at 'Conclusion' ("[T]he Motion for Approval and Payment of Claim is hereby DENIED.").*

Denise did not timely and properly present her creditor claim under SDCL Chapter 29A-3. *FOF/COL at (a)(32), (34).* Second, it held that: (i) Denise failed to prove—or "even raise"—the inadequacy of her legal remedy; and (ii) even if she had, enforcing the *Agreement* against Neil "would not be 'just and equitable[.]'" *Id. at (b)(4), (b)(9).* Either of these holdings, standing alone, resolved this case. Thus, in order for Denise to pursue her claim in any manner, she needed the Supreme Court to reverse both holdings. However, the Supreme Court assigned error on only one issue—the interpretation of SDCL Chapter 29A-3.

Following a lengthy analysis of SDCL Chapter 29A-3, the Supreme Court ultimately concluded that "[u]nder the unique circumstances presented on this record[,]" Ryan and this Court misinterpreted the nonclaim statutes. *Smeenk, 2022 S.D. 41, ¶ 31.* As a consequence, the Supreme Court vacated the findings of fact and conclusions of law pertaining to SDCL Chapter 29A-3. *Id. ¶ 41.* The Supreme Court's decision to vacate these findings and conclusions did not affect the overall outcome, however, because it affirmed on the merits. Because it had already explained that "Denise was not seeking a monetary remedy," the Supreme Court correctly described specific performance as "the issue . . . at the center of the controversy between the parties." *Id. ¶¶ 28, 33.* With regard to the availability of that remedy, the Supreme Court agreed with this Court that "the inadequacy of the legal remedy is [] the controlling consideration[.]" *Id. ¶ 37.* It then affirmed this Court's holding that Denise failed to plead or prove the inadequacy of a remedy at law. *Id. ¶ 40. ("[T]he circuit court properly determined Denise failed to allege or present evidence of an essential element for specific performance, the lack of an adequate*

remedy at law[.]").[3] Denise elected not to petition the Supreme Court for rehearing under SDCL 15-30-4. Therefore, upon the expiration of the twenty-day rehearing period, this Court's holding became a final, unappealable judgment on the merits. *Id.*

In spite of the affirmance, Denise persists that the Supreme Court remanded this action for a trial on money damages. *See Denise's Brief at 6.* In making this argument, however, Denise ignores that the Supreme Court explicitly concluded that she "was not seeking a monetary remedy for the alleged breach of contract claim." *Id. ¶ 28.* In other words, despite the Supreme Court's plain statement, Denise argues that the Supreme Court somehow intended to order this Court to conduct a second trial, this time on money damages. *Id.* This is an unsupportable position.

The Supreme Court's decision did not remand this action with instructions to this Court to engage in further merit-based decisions. Because the opinion contains no such instruction, Denise grasps at the following language found in the Supreme Court's *Judgment* for support: "[This cause] is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court." *See Attachment A—Smeenk Judgment (8/15/2022).* Denise's reliance upon this standard language is misplaced. As this Court knows from its previous

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[3] In light of this affirmance, the Supreme Court deemed it "unnecessary to consider [this Court's] alternative finding under SDCL 21-9-3 that specific performance was not a just or equitable remedy under the circumstances[.]" *Id.* The Supreme Court ended its discussion there because, as previously stated, an affirmance on any issue ended this case. *Healy II, 2022 S.D. 43, ¶ 51, __ N.W.2d at __ (holding that a judgment is considered on the merits, according to the Supreme Court, when it is "based on . . . a failure to prove substantive allegations of fact."); Wolf v. Anderson, 422 N.W.2d 400, 400–01 (N.D. 1988) (following an affirmance regarding the petitioners' failure to prove the inadequacy of their legal remedy, all other remedies were likewise foreclosed).*

decisions, virtually all Supreme Court judgments—even the affirmances—include this same remand language. *See Attachment B—State v. Babcock (12/16/20) (affirmed) ("[I]t is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court."); Attachment C—State v. Delehoy (5/22/19) (affirmed) (same); Attachment D—State v. Uhre (1/23/19) (affirmed) (same).* This language is included because almost every case requires a remand for enforcement at the trial court level. This case is no exception.

In the present case, the best evidence of the Supreme Court's intent is the opinion itself—as it should be. Again, the Supreme Court explicitly pointed out that Denise did not seek money damages. *Smeenk, 2022 S.D. 41, ¶ 28.* Whether Denise is satisfied with the outcome or not, further arguments related to validity of the *Agreement* or its breach were left unappealed and are now both waived and moot. *See Drier v. Great Am. Ins. Co., 409 N.W.2d 357, 361 (S.D. 1987) ("We have often stated, in reference to an appellant, that an issue that an issue or argument not briefed and supported by authority is considered abandoned.") (collecting cases).* All that is left for this Court to do is honor the Supreme Court's clear mandate and grant Ryan's *Petition.*[4]

II. DENISE HAS WAIVED ANY ALLEGED CLAIM TO MONETARY DAMAGES.

In Ryan's *Brief in Resistance to Petitioner Denise L. Schipke-Smeenk's Motion for Partial Summary Judgment*, he explained that Denise must overcome a second obstacle—namely, waiver—to proceed forward. This Court is already well aware that Denise did not: (i)

[4] *See, e.g., 21 Moore's Federal Practice – Civil § 341.12 ("All issues within the scope of the appealed judgment are deemed incorporated within the [appellate] court's mandate and are precluded from further adjudication by the district court unless remanded by the [appellate] court."); see also Engel Indus., Inc. v. Lockformer Co., 166 F.3d 1379, 1382–1384 (Fed. Cir. 1999).*

propose any findings of fact or conclusions of law regarding monetary damages; or (ii) put on any evidence of monetary damages. *Stemper v. Stemper, 415 N.W.2d 159, 160 (S.D. 1987) ("A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned.").* Her decision not to create an adequate record regarding money damages stripped this Court of the "opportunity to consider [the issue] and take whatever measures it felt were necessary, if any, to correct the situation." *See Gilkyson v. Wheelchair Express, 1998 S.D. 45, ¶ 14 (holding objections are waived unless timely brought).* Therefore, she has waived any right to pursue her alleged legal remedy.

Denise provides no explanation regarding her failure to propose findings of fact and conclusions of law on money damages—or even mention their possibility—in the prior adjudication. Nor does she point this Court to any authority indicating that these failures do not result in a waiver. Instead, Denise contends that SDCL 15-6-54(c) and SDCL 15-6-8(f) require this Court to re-write her *Petition* to include a prayer for money damages. In reality, Denise is attempting to shift the inquiry away from her lack of proposed findings, conclusions, and evidence and toward the narrower issue of whether her *pleadings* resulted in a waiver. *See Denise's Brief at 6–8.* Ryan's waiver argument was not limited to Denise's *Petition*; however, regardless, the statutes upon which Denise relies do not support her request.

The language of the first statute, SDCL 15-6-54(c), provides, in pertinent part, that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." *SDCL 15-6-54(c); Denise's Brief at 6–7.* However, as the Supreme Court has explained, SDCL 15-6-54(c) only applies if the petitioner has put on evidence in support of the claim in the first place. In the

Supreme Court's words: "[T]he relief to be granted under SDCL 15-6-54(c) is not unlimited, and such relief must be based upon the facts alleged in the pleadings and justified by the proof at trial." *See, e.g., Baldwin v. First Nat'l Bank, 362 N.W.2d 85, 90 (S.D. 1985) (emphasis added).* Here, Denise did not present this Court with evidence of her alleged money damages to which it could conform the pleadings.[5]

Denise turns next to SDCL 15-6-8(f), which provides: "All pleadings shall be so construed as to do substantial justice." *SDCL 15-6-8(f); Denise's Brief at 6–7.* This argument also fails. Ryan would submit that there is nothing "just" about allowing Denise to start a new case at this late hour—after discovery, a trial, proposed findings and conclusions, and an unsuccessful appeal. In fact, re-construing Denise's pleadings to include monetary damages would be at odds with this Court' prior findings that enforcing the contract against Neil is neither just nor equitable. *See FOF/COL (b)(9)–(12).*

Aside from vague arguments about her desire for "justice," Denise offers no explanation for her failure to plead or prove money damages. Her reasoning makes little difference now. Similar to this Court's previous holding regarding her failure to prove a necessary element of specific performance, Denise did not properly prosecute a claim for money damages. She failed to request money damages in her *Petition*; she failed to present evidence of—or even mention—

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[5] Denise also attributes significance to the Supreme Court's decision in *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec* to support her position that this Court should rewrite her pleadings under SDCL 15-6-54(c). *2006 S.D. 6, 709 N.W.2d 350.* Rather than help Denise, however, *Ziegler Furniture* actually undermines her position. In that case, the Supreme Court allowed the plaintiff to seek specific performance even though it was not specifically pled; however, that was because the record reflected that specific performance was "[w]hat the [plaintiff] sought all along . . . ." *Id. ¶ 34.* Here, Denise did not even suggest money damages, much less seek them "all along." *Id.*

money damages at the trial; she failed to propose any findings of fact or conclusions of law related to money damages; and she explicitly represented to the Supreme Court that proving money damages was "impossible." Any one of these failures is fatal. Collectively they are dispositive. *See Smeenk, 2022 S.D. 41, ¶ 40 (affirming circuit court when advocate "failed to allege or present evidence of an essential element[.]"); Stemper, 415 N.W.2d at 160 ("A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned."); Krsnak v. Brant Lake Sanitary Dist., 2018 S.D. 85, ¶ 29, 921 N.W.2d 698, 705 (noting that "the Krsnaks have not presented evidence of causation.").* Denise has waived any entitlement to money damages. Therefore, this Court should grant Ryan's *Petition.*[6]

CONCLUSION

Denise's resistance to Ryan's *Petition* lacks merit for at least the following reasons:

(i) Res judicata bars further litigation of Denise's alleged claim on the merits;

(ii) Denise waived her right to assert money damages by failing to plead, present evidence, propose findings of fact and conclusions of law, or appeal the question of money damages;

(iii) Denise's numerous statements that it is impossible to prove money damages are

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[6] In his *Brief in Resistance to Petitioner Denise L. Schipke-Smeenk's Motion for Partial Summary Judgment*, Ryan also argued that Denise's request for monetary damages is moot not only due to her judicial admissions, but also as a consequence of her concessions. While Denise addresses judicial admissions, she does not explain how her statements—i.e., the impossibility of calculating money damages—are not binding concessions. *See, e.g., Pickerel Lake Outlet Ass'n v. Day Cty., 2020 S.D. 72, ¶ 12, 953 N.W.2d 82, 88 ("At oral argument, both parties agreed that the Bracker balancing test does not apply to this case."); Rush v. U.S. Bancorp Equip. Fin., Inc., 2007 S.D. 119, ¶ 11, 742 N.W.2d 266, 269 ("Plaintiffs concede as much in their appellate argument[.]").*

binding judicial admissions; and

(iv) Denise has conceded that she cannot prove money damages.

Therefore, Ryan respectfully requests that the Court grant his *Petition* and enter an *Order* directing the Personal Representative to distribute the proceeds from the pay-off of the *Contract for Deed* in accordance with the *2019 Will*.

Dated this 11th day of October, 2022.

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellee, Ryan Smeenk

By: /s/ John W. Burke .

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2022, I filed the foregoing *Reply Brief in Support of Petition to Direct Personal Representative to Distribute Cash Assets* relative to the above-entitled matter via Odyssey File and Serve, and that such system separately effected service of the same on the following individuals:

Talbot J. Wieczorek / Tyler C. Wetering / Katelyn A. Cook
Gunderson Palmer Ashmore & Nelson, LLP
P.O. Box 8045
Rapid City, SD 57709

And served via first class U.S. mail on:

Brandy Ruth Mooney 28854 225th Ave. Martin, SD 57551	Dominique Sterrett 1088 2nd Avenue Deer Trail, CO 80105	Damian Heinert 18291 Winkler Road Newell, SD 57760

/s/ John W. Burke
John W. Burke

Appeal No. 29580

July 20, 2022

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

Present: Steven R. Jensen, Chief Justice, Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

In the Matter of the Estate of NEIL WILLIAM SMEENK, Deceased.

J U D G M E N T

This Cause coming on to be heard on October 5, 2021, at a term of this Court at the University of South Dakota Knudson School of Law in the City of Vermillion, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the order of the Fourth Judicial Circuit Court, within and for Butte County, appealed from herein, be and the same is hereby affirmed in part and reversed in part,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Shirley A. Jameson-Fergel
Clerk of the Supreme Court

By: Chief Deputy Clerk
(SEAL)

FILED
AUG 15 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JUL 20 2022
Clerk

ATTACHMENT A

Appeal No. 28880

December 16, 2020

IN THE SUPREME COURT)
) SS
STATE OF SOUTH DAKOTA)

Present: Chief Justice David Gilbertson, Justices Janine M. Kern, Steven R. Jensen, Mark E. Salter and Patricia J. DeVaney.

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

KEVIN BABCOCK,
Defendant and Appellant.

J U D G M E N T

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 16 2020

Clerk

This Cause coming on to be heard upon the merits of the cause, oral argument having been dispensed with by the Court, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Fourth Judicial Circuit Court, within and for Butte County, appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

FILED

JAN 08 2021

SOUTHDAKOTAUNIFIEDJUDICIALSYSTEM
4THCIRCUITCLERKOFCOURT

ATTACHMENT B

Appeal No. 28682

May 22, 2019

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

Present: Chief Justice David Gilbertson, Justices Janine M. Kern, Steven R. Jensen, Mark E. Salter AND Retied Justice Glen A. Severson.

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

J U D G M E N T

DEVON ANTHONY DELEHOY,
Defendant and Appellant.

This Cause coming on to be heard upon the merits of the cause, oral argument having been dispensed with by the Court, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Fourth Judicial Circuit Court, within and for Butte County, appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

FILED
JUN 14 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
MAY 22 2019
Clerk

Appeal No. 28279

January 23, 2019

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

Present: Chief Justice David Gilbertson, Justices Janine M. Kern, Steven R. Jensen and Mark E. Salter.

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,

vs.

J U D G M E N T

WAYLON NATHAN UHRE,
Defendant and Appellant.

This Cause coming on to be heard on October 3, 2018, at a term of this Court at the Supreme Court Courtroom in the City of Sioux Falls, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment of the Fourth Judicial Circuit Court, within and for Meade County, appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

FILED
FEB 21 2019
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN 23 2019
Clerk

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF BUTTE | FOURTH JUDICIAL CIRCUIT

In the Matter of the Estate of	)	09PRO19-000013
	)	
NEIL WILLIAM SMEENK	)	**MOTION FOR APPROVAL AND**
	)	**PAYMENT OF CLAIM**
Deceased.	)	
	)	
	)	

COMES NOW, Denise L. Schipke-Smeenk, as Personal Representative the Estate of Neil William Smeenk, by and through her attorney, Tyler C. Wetering of Gunderson, Palmer, Nelson & Ashmore, LLP, and moves this Court for the Payment of a Claim pursuant to SDCL § 29A-3-713 as follows:

1. Denise L. Schipke-Smeenk was appointed Personal Representative of the Estate of Neil William Smeenk by Order of Formal Probate and Appointment of Personal Representative dated December 9, 2019.
2. The Order of Formal Probate and Appointment of Personal Representative dated December 9, 2019, admitted decedent's Last Will and Testament dated April 9, 2019, to probate.
3. An Agreement to Execute Mutual Wills dated August 25, 2017, (the "2017 Agreement" has previously been filed with this court.
4. The 2017 Agreement provided:

> Each party agrees to provide for the for the disposition of any and all property which each party may die possessed by the execution of a Last Will separate but contemporaneously with the execution of this Agreement. The separate Will of each party will devise and bequeath all property, excepting only certain specific bequests with are identified in Article IV of each Last Will and Testament to the other party as surviving spouse.

5. Contemporaneous with the execution of the 2017 Agreement, the decedent executed a Last Will and Testament dated August 25, 2017, (the "2017 Will") which has previously been filed with this court.
6. The 2017 Will provides for the disposition of the decedent's estate in the same manner as the 2017 Agreement.
7. This Court's Findings of Fact and Conclusions of Law dated November 23, 2019, found that the 2017 Agreement was executed by Neil William Smeenk. (See Finding #38).
8. Further this Court found that attorney Wes Buckmaster oversaw the execution of the 2017 Agreement and 2017 Will and testified that he had no question about Neil's capacity to execute and understand the documents at the time of their execution and further that Neil was not under any duress or undue influence at the time of the execution of the 2017 Agreement and 2017 Will. (See Findings # 41 and 42).
9. Counsel for the Personal Representative has asked whether counsel for Ryan Smeenk has any evidence that Neil Smeenk lacked capacity at the time of executing the 2017 Will and associated documents. No evidence has been provided.
10. The 2017 Agreement created a binding contractual obligation for the disposition of the decedent's estate. Neil Smeenk was contractually obligated to follow the 2017 Agreement. The estate is also so obligated.

11. Denise L. Schipke-Smeenk, as Personal Representative, intends to fulfil the contractual obligations of the estate by disposing of the Estate as provided for in the 2017 Agreement and 2017 Will.

12. The Personal Representative is seeking court approval of the disposition of the decedent's estate as provided in the 2017 Agreement and 2017 Will pursuant to SDCL § 29A-3-713.

WHEREFORE, Petitioner respectfully requests this Court approve the disposition of the Estate of Neil William Smeenk as provided in the 2017 Agreement and 2017 Will.

Dated this 8th day of April, 2020.

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

/s/ Tyler C. Wetering
Tyler C. Wetering
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CERTIFICATE OF SERVICE

Tyler C. Wetering, attorney, states that on the 8th day of April, 2020, I sent, by first-class mail, postage prepaid, a true and correct copy of the **Motion for Approval and Payment of Claim** to the following person:

Brandy Ruth Mooney
28854 225th Ave.
Martin, SD 57551

And served by electronic services via Odyssey File & Serve and electronic mail to:

N. Drew Skjoldal
Cassidy Stalley
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph Street, Suite 800
Rapid City, SD 57701-3301
Attorneys for Ryan William Smeenk

/s/ Tyler C. Wetering
Tyler C. Wetering

Filed: 4/8/2020 5:14 PM CST Butte County, South Dakota 09PRO19-000013

#29580-aff in part & rev in pt-SRJ
2022 S.D. 41

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

In the Matter of the Estate of
NEIL WILLIAM SMEENK, Deceased.

* * * *

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

* * * *

THE HONORABLE MICHAEL W. DAY
Judge

* * * *

KATELYN A. COOK
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Denise Schipke-Smeenk.

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Rapid City, South Dakota

Attorneys for appellee
Ryan William Smeenk.

* * * *

ARGUED
OCTOBER 5, 2021
OPINION FILED **07/20/22**

#29580

JENSEN, Chief Justice

[¶1.] Denise L. Schipke-Smeenk and Neil Smeenk, as husband and wife, executed mutual wills (2017 Wills) and an agreement that neither party would revoke their respective wills without the other's consent (Agreement). Neil later executed a new will (2019 Will) without Denise's consent. After Neil's death, the circuit court ordered the 2019 Will to be probated and appointed Denise as personal representative of Neil's estate (Estate). Denise filed a motion for approval and payment of claim (Motion) in her capacity as personal representative and sought specific performance of the Agreement. The circuit court determined the Motion was not properly presented as a creditor claim and was untimely under the nonclaim statute. However, the court considered the merits of the Motion and determined that Denise was not entitled to specific performance. Denise appeals, arguing that the Motion was a timely and properly presented creditor's claim and that she is entitled to specific performance as the remedy for Neil's alleged breach of the Agreement. We conclude that the circuit court erred in determining that Denise's claim was not timely and properly presented but correctly ruled that Denise was not entitled to specific performance. We therefore affirm in part and reverse in part.

Facts and Procedural History

[¶2.] Neil and Denise were married in 2000. They each had two children from a prior marriage. After they were married, Neil and Denise began residing at the ranch that Neil owned prior to the marriage. Neil sold the ranch in 2011 pursuant to a contract for deed.

[¶3.] On August 25, 2017, Neil and Denise executed the 2017 Wills and the Agreement. The Agreement provided that the parties "agree not to revoke or amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express consent of the other party." Additionally, the Agreement provided that Neil would assign an undivided one-half interest in the contract for deed for the sale of the ranch to Denise, which included the right to receive one-half of the contract payments. On the same day, Neil executed an assignment and a quitclaim deed granting Denise a one-half interest in the contract for deed and the ranch.

[¶4.] The 2017 Wills provided that the assets of the first spouse to die would be distributed to the surviving spouse. Upon the death of the surviving spouse, the assets would be distributed 50% to Denise's children and 50% to Neil's children. The 2017 Wills nominated one another as personal representative of their respective estates.

[¶5.] Neil and Denise's relationship began to deteriorate following the making of the 2017 Wills. Neil battled depression and had a severe drinking problem that caused tension in the marriage. Neil and Denise had separated by March 2019. In April 2019, Neil commenced a divorce action. Denise hired a divorce attorney but did not file an answer to the complaint because she believed they were working toward an amicable resolution of the divorce. The divorce was never finalized.

[¶6.] On April 19, 2019, Neil executed the 2019 Will. The 2019 Will revoked his prior wills and codicils, expressly disinherited Denise, and named his son, Ryan

Smeenk, as personal representative. Neil took his own life on June 14, 2019. Denise testified that she became aware of the 2019 Will on the day that Neil died.

[¶7.] On July 15, 2019, Denise filed a petition for formal probate, seeking to probate Neil's 2017 will and requesting appointment as personal representative. Shortly thereafter, Ryan filed a petition for formal probate, seeking to probate the 2019 Will and requesting appointment as personal representative. The circuit court held an evidentiary hearing on the competing petitions. On November 25, 2019, the circuit court entered findings of fact and conclusions of law determining that the 2019 Will was valid and that it revoked Neil's 2017 will. In upholding the 2019 Will, the circuit court concluded that the Agreement did not make Neil's 2017 will irrevocable and did not impact the validity of the 2019 Will. Rather, the court reasoned that Neil, as the testator, may revoke a will until his death, but the Estate may be subject to a claim for breach of contract if Neil's execution of the 2019 Will breached the Agreement. The court declined to resolve the question whether the Agreement is enforceable, stating "that determination is left for another day." The circuit court admitted the 2019 Will to probate.

[¶8.] The circuit court also addressed the separate requests by Denise and Ryan to serve as personal representative of the Estate and found that Denise and Ryan had a hostile relationship that would make it difficult for them to work together. Despite admitting the 2019 Will to probate, the circuit court determined Denise was qualified to serve as personal representative. The circuit court entered an order for formal probate of the 2019 Will and appointed Denise as personal

representative on December 9, 2019. Neither party appealed the circuit court's order.

[¶9.] On December 12, 2019, Denise sent the required statutory notice to the Department of Social Services (DSS) pursuant to SDCL 29A-3-705(c). The notice informed DSS of Denise's appointment and provided that if DSS "claim[ed] to be a creditor" it must present a claim within four months from the date of Denise's appointment as personal representative. Denise did not provide any other written notice to any known or reasonably ascertainable creditors pursuant to SDCL 29A-3-801(b).[1] On December 16, 2019, Denise first published a general notice to creditors in a legal newspaper pursuant to SDCL 29A-3-801(a). The notice established a four-month deadline after the first publication for creditors to present a claim against the Estate.

[¶10.] On April 8, 2020, Denise filed the Motion seeking specific performance of the Agreement and requesting permission from the circuit court to distribute the Estate in accordance with Neil's 2017 will. Denise filed the Motion in her capacity as personal representative pursuant to SDCL 29A-3-713. In support of the Motion, Denise argued that the Agreement was an enforceable contract and that there were no existing grounds that would allow the Estate to reject the Agreement. Denise also asserted that specific performance was the appropriate remedy to prevent a testator from avoiding his or her contractual obligations.

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1. Aside from Denise's claim for breach of the Agreement, the record does not show that any other known creditors existed at the time of Neil's death. DSS did not submit a claim and there was no showing that DSS was a creditor of the Estate.

[¶11.] Ryan objected to the Motion arguing that Denise had failed to timely present a creditor's claim to the Estate, that payment of the claim was not in the best interest of the Estate and its heirs, and that specific performance of the Agreement violated Neil's testamentary intent. Ryan asserted that Denise's breach of contract claim should not be approved in the probate proceedings without a separate action on the merits of the claim. Ryan argued that an independent personal representative should handle the breach of contract claim in the separate action. The court held a hearing on the Motion on December 3, 2020.

[¶12.] The circuit court determined that the Motion failed to comply with the requirements of SDCL 29A-3-804 for presentment of a creditor's claim. By applying the principles of judicial estoppel, the court also determined that Denise's creditor claim was time-barred, at the latest, on April 16, 2020. Notwithstanding its procedural determination that Denise had not timely and properly presented a creditor claim, the court received evidence and arguments from the parties on the merits of Denise's claim for specific performance as a remedy for Neil's alleged breach of the Agreement. The court then made a merits-based determination that Denise was not entitled to specific performance because Denise failed to show an inadequate remedy at law. Additionally, the circuit court concluded that specific performance of the Agreement was not a just or reasonable remedy under SDCL 21-9-3(2). The court incorporated its previous findings of fact and conclusions of law from its December 2019 order entering the 2019 Will to probate, but the court again made no determination concerning the enforceability of the Agreement or whether Neil had breached it.

[¶13.] Subsequently, Denise filed a statement of claim with the clerk of court, in her individual capacity as a creditor of the Estate, seeking specific performance of the Agreement. Denise also filed a motion for reconsideration of the circuit court's ruling on the Motion. However, Denise, individually and in her capacity as personal representative, had appealed the circuit court's denial of the Motion. Therefore, the circuit court could not address the statement of claim or the motion for reconsideration.

[¶14.] On appeal, Denise argues (1) that the circuit court erred in determining that the Motion was not a timely and properly presented creditor claim, and (2) that the circuit court erred in determining that she was not entitled to specific performance for Neil's alleged breach of the Agreement.

Analysis and Decision

1. Whether the circuit court erred in determining that Denise failed to timely and properly present a creditor claim.

[¶15.] "A circuit court's findings of fact will be upheld 'unless they are clearly erroneous.'" *In re Estate of Fox*, 2019 S.D. 16, ¶ 12, 925 N.W.2d 467, 471, (reh'g denied Apr. 24, 2019) (citation omitted). "We review the circuit court's conclusions of law and rulings on statutory interpretation de novo." *In re Estate of Ginsbach*, 2008 S.D. 91, ¶ 10, 757 N.W.2d 65, 68.

[¶16.] Denise argues that the circuit court erred in determining that she was required to give notice to known creditors within four months after her appointment as personal representative and that she was judicially estopped from presenting a creditor claim after April 16, 2020. Denise asserts the shortened time-bar for

known creditors under the nonclaim statute in SDCL 29A-3-803(a)(2)[2] has not begun as to her claim because she has not, as personal representative, given written notice of a shortened time-bar to herself as required by SDCL 29A-3-801(b).[3] She argues that the three-year time-bar under SDCL 29A-3-803(a)(3) applies to her creditor claim until she is provided written notice from the personal representative. Additionally, Denise contends that the Motion was a timely and properly presented creditor claim under the nonclaim and presentment statutes because she substantially complied with SDCL 29A-3-804(a) by filing the Motion with the clerk of court less than four months after she was appointed as personal representative.

[¶17.] Ryan responds that Denise had adequate notice of the shortened time-bar in SDCL 29A-3-803(a), despite a lack of written notice from the personal

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2. SDCL 29A-3-803(a) provides, in relevant part, that:

> All claims against a decedent's estate which arose before the death of the decedent, . . . whether . . . absolute or contingent, . . . founded on contract . . . are barred . . . unless presented as follows:
>
> (1) As to creditors barred by publication, within the time set in the published notice to creditors;
> (2) As to creditors barred by written notice, within the time set in the written notice;
> (3) As to all creditors, within three years after the decedent's death.

3. SDCL 29A-3-801(b) provides:

> Except as provided in subsection (c), a personal representative shall give written notice by mail or other delivery to a creditor of the decedent, who is either known to or reasonably ascertainable by the personal representative, informing the creditor to present the claim within four months after the date of the personal representative's appointment, or within sixty days after the mailing or other delivery of the written notice, whichever is later, or be forever barred.

representative, because she provided written notice to DSS and published notice to unknown creditors under SDCL 29A-3-801(a). He asserts that providing notice to other potential creditors provided Denise with actual notice that triggered the shortened time-bar. Ryan also asserts that judicial estoppel prevents Denise from claiming that she did not have sufficient notice under SDCL 29A-3-801 because Denise knew of her creditor claim, imposed a time-bar on other creditors, and would gain an unfair advantage by not providing herself written notice to avoid triggering a shortened time-bar.

[¶18.] The nonclaim statute in SDCL 29A-3-803(a) broadly bars "[a]ll claims against a decedent's estate which arose before the death of the decedent, . . . whether due or to become due, absolute or contingent, . . . unless *presented"* within the time periods set forth in the statute. (Emphasis added.) A creditor claim that has not been timely presented is barred. *See In re Bachand's Estate*, 307 N.W.2d 140, 142 (S.D. 1981). Denise's breach of contract claim is subject to the nonclaim and presentment requirements as a contingent creditor claim that arose prior to Neil's death. *See* SDCL 29A-3-803(a); *see also Huston v. Martin,* 2018 S.D. 73, ¶ 23, 919 N.W.2d 356, 364 (holding that contingent claims encompass promises that could have been fulfilled during the decedent's life but are broken at the time of decedent's death). As our Court has explained, "South Dakota's nonclaim statute applies to *all* claims 'which arose before the death of the decedent[,]'" including

contingent claims. *Huston*, 2018 S.D. 73, ¶ 19, 919 N.W.2d at 363 (quoting SDCL 29A-3-803(a)).[4]

[¶19.] A review of the record reveals that Denise timely filed her claim with the clerk of court. There is no dispute that Denise filed the Motion with the clerk of court within four months after she was appointed as personal representative, the earliest point in time under the provisions in SDCL 29A-3-803(a) in which a claim must be presented. Therefore, so long as her Motion constitutes a properly *presented* claim under SDCL 29A-3-804, it becomes unnecessary to address Denise's arguments regarding which particular time-bar in SDCL 29A-3-803(a) applies to her claim or whether she is judicially estopped from presenting her claim. As such, we first examine whether the Motion filed with the circuit court on April 8, 2020 by Denise satisfied the presentation requirements in SDCL 29A-3-804.

[¶20.] "When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is

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4. In *Huston v. Martin*, we reversed our decision *In re Estate of Green*, 516 N.W.2d 326, 329 (S.D. 1994), which analyzed South Dakota's nonclaim statute before the adoption of the Uniform Probate Code. 2018 S.D. 73, ¶ 26, 919 N.W.2d at 364–65. In *Huston*, we explained that "a contingent claim is dependent on a potential future event and an accrued claim is one that has already come into existence as an enforceable claim." *Id.* ¶ 26, 919 N.W.2d at 365. We concluded that the *Green* Court had failed to consider the statutory "contingent claim" language that encompasses a claim that only comes into being upon the occurrence of a future event. *Id.* In this case, the contingent event was an alleged breach of the Agreement that could have been cured before Neil's death and did not become actionable until Neil's death. Contrary to the conclusion in *Green*, such contingent claims are subject to the limitation periods set forth in SDCL 29A-3-803(a).

to declare the meaning of the statute as clearly expressed." *Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 S.D. 67, ¶ 12, 868 N.W.2d 381, 387 (citation omitted). We have recognized that "[n]onclaim statutes are applied strictly." *Ginsbach*, 2008 S.D. 91, ¶ 13, 757 N.W.2d at 68. "Courts cannot broaden the opportunity for creditors to make claims against an estate beyond that allowed by statute." *Id.*

[¶21.] SDCL 29A-3-804(a)(1) and SDCL 29A-3-804(a)(2) provide three methods for presenting a creditor's claim that is subject to SDCL 29A-3-803:

> (1) *The claimant* may deliver or mail *to the personal representative a written statement* of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may *file a written statement* of the claim, in the form prescribed by rule, *with the clerk of the court* and mail or deliver a copy thereof to the personal representative. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the clerk of court . . . ;
>
> (2) *The claimant* may *commence a proceeding* against the personal representative . . . . The claim is deemed presented on the date the proceeding is commenced.

(Emphasis added.)

[¶22.] Denise argues that her Motion substantially complied with the requirements of SDCL 29A-3-804. Although the substantial compliance doctrine has not been previously applied to the requirements of SDCL 29A-3-804, we have held in other contexts that the question whether the substantial compliance doctrine applies is one for this Court to decide as a matter of law. *See Myears v. Charles Mix Cnty.*, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474 (finding that substantial compliance is sufficient to satisfy a notice statute as a matter of law). We have applied this doctrine to other court rules and statutes in South Dakota.

See, e.g., R.B.O. v. Congregation of Priests of Sacred Heart, Inc., 2011 S.D. 87, ¶¶ 12–13, 806 N.W.2d 907, 911–12 (holding that "actual notice coupled with substantial compliance is sufficient to satisfy personal service of process requirements" in SDCL 15-6-4(d)(1)); *In re Alcohol Beverage License Suspension of Cork 'n Bottle, Inc.*, 2002 S.D. 139, ¶ 13, 654 N.W.2d 432, 435–36 (concluding that substantial compliance is sufficient to satisfy a safe harbor statute for mistaken alcohol sales "if the licensee satisfies the five requirements of the statute"); *Myears*, 1997 S.D. 89, ¶ 13, 566 N.W.2d at 474 (holding that substantial compliance is sufficient to satisfy the notice requirements for tort claims against public entities in SDCL 3-21-2 and SDCL 3-21-3); *Sauder v. Parkview Care Ctr.*, 2007 S.D. 103, ¶¶ 20–21, 740 N.W.2d 878, 884 (concluding that the Legislature's use of the word "may" in the workers' compensation notice statute permitted employer to substantially comply with the statute for the purpose of giving a notice of denial of claim to employee).

[¶23.] This Court defines substantial compliance as:

> "Substantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

R.B.O., 2011 S.D. 87, ¶ 12, 806 N.W.2d at 911–12 (citation omitted); *see also Myears*, 1997 S.D. 89, ¶ 13, 566 N.W.2d at 474.

[¶24.] The South Dakota Uniform Probate Code and our jurisprudence supports the view that substantial compliance is sufficient to satisfy SDCL 29A-3-804. In particular, the language of SDCL 29A-3-804(a) provides several methods for presenting a creditor claim and the language for each statutory method is permissive in nature. Further, the express language of the presentation statute accounts for substantial compliance. It provides that a failure to describe the nature of the claim correctly or the due date of a claim does not render the presentation invalid. SDCL 29A-3-804(a)(1).

[¶25.] Other jurisdictions that have adopted the Uniform Probate Code have likewise applied a substantial compliance standard for presentation of a creditor's claim. *See Peterson v. Marston*, 362 N.W.2d 309, 313 (Minn. 1985) ("Generally, the form in which a claim is presented is not important as long as it contains sufficient information to enable the personal representative to determine its extent and character."); *Vincent v. Estate of Simard*, 801 A.2d 996, 999 (Me. 2002) (permitting substantial compliance with the requirements of the presentation statute). In these jurisdictions, the courts have liberally construed the presentation statute to permit substantial compliance when "the information provided by the notice will enable the personal representative to investigate the claim without the expenditure of substantial sums and make an intelligent judgment whether to allow or disallow the claim." *In re Estate of Wolf*, 96 P.3d 1110, 1114 (Kan. Ct. App. 2004); *see also Estate of Simard*, 801 A.2d at 999 (same).

[¶26.] Similarly, the purpose of South Dakota's nonclaim and presentation statutes is to ensure that a personal representative has early notice of all creditor

claims in order to make a determination whether a claim should be allowed and paid under SDCL 29A-3-806 and SDCL 29A-3-807. Therefore, we conclude that a claim substantially complies with the requirements of SDCL 29A-3-804 if notice of the claim is provided to the personal representative prior to the time-bar date and the notice provides sufficient information to allow the personal representative to investigate the claim without the expenditure of substantial resources and to make a determination whether to allow or disallow the claim. This aligns with our previous cases applying the substantial compliance doctrine to other statutes, wherein we have "held that substantial compliance is not established unless the statute has been actually followed sufficiently to carry out the substance essential to every reasonable objective of the statute." *See Alcohol Beverage License Suspension of Cork 'n Bottle, Inc.*, 2002 S.D. 139, ¶ 12, 654 N.W.2d at 435.

[¶27.] After a review of the circumstances presented in this case, we conclude that Denise's Motion substantially complied with SDCL 29A-3-804. The Motion was filed with the clerk of court and served upon the interested parties. When the Motion was filed, all of the interested parties were fully aware of the claim and of Denise's arguments based on the initial dispute over the competing petitions to probate Neil's different wills. Similar to Denise's petition filed as part of the initial dispute, the Motion summarized the basis for the breach of contract claim and requested that the alleged breach should be remedied by specific performance. The Motion, filed by Denise in her capacity as personal representative, further requested for the court to approve her proposed treatment of the claim. The application of the substantial compliance doctrine to determine whether the

presentation statute was satisfied is particularly appropriate under the unique circumstances of this case.

[¶28.] Ryan, however, argues that Denise failed to substantially comply with the requirements of the presentation statute because the Motion failed to specify the amount of the claim. This argument misapprehends the nature of Denise's claim. Denise was not seeking a monetary remedy for the alleged breach of contract claim, but rather, she sought to enforce the terms of the Agreement by specific performance. As such, the Motion, by fully detailing the remedy sought for the alleged breach, substantially complied with the requirement to set forth the amount of the claim under SDCL 29A-3-804.

[¶29.] Ryan also argues that Denise failed to substantially comply with the presentation statute because she presented the Motion in her capacity as personal representative rather than as a creditor of the Estate. While SDCL 29A-3-804 contemplates that the creditor will present a written statement of claim with the clerk of court or personal representative, or commence an action against the personal representative, the statute does not require the creditor to verify or sign the claim under oath. The purpose of the presentation statute is not to prove up the claim but to provide notice of the claim and sufficient information for the personal representative to determine its basis. Upon presentation, the personal representative has 60 days to decide whether to allow the claim under SDCL 29A-3-806. Given that Denise is both the creditor and the personal representative in this case, a presentation of a written statement of claim signed by Denise as a creditor would not have provided more information pertinent to the evaluation of the claim.

[¶30.] Further, SDCL 29A-3-807 provides that the personal representative "shall" pay any allowed claims or "may pay any valid claim that has not been barred with or without formal presentation." In other words, it is not the presentation of the claim by the creditor that authorizes the personal representative to allow and pay a claim. Rather, a personal representative is authorized to allow and pay a non-barred claim that the personal representative knows exists. *See* SDCL 29A-3-807. Here, Denise was fully aware of her breach of contract claim as both the alleged creditor and the personal representative. However, although Denise had the statutory authority as the personal representative to allow and pay valid and non-barred claims under SDCL 29A-3-806 and SDCL 29A-3-807, any effort on her part to satisfy her own creditor claim without court approval would have been contrary to her duties as personal representative to administer the Estate consistent with the 2019 Will and likely would have voided the transaction under SDCL 29A-3-713.[5] Therefore, the filing of the Motion under SDCL 29A-3-713 by Denise reflects an appropriate recognition of the conflict created by her role as the personal representative and as a creditor of the Estate seeking specific performance

5. SDCL 29A-3-713 voids "any transaction which is affected by a substantial conflict of interest on the part of a personal representative . . . unless: (2) [t]he transaction is approved by the court after notice to interested persons." The language of SDCL 29A-3-713(2) permitted Denise to file her Motion upon notice to interested persons. Ryan has not identified any authority that prohibited Denise, as personal representative, from requesting the circuit court to review and approve the merits of a creditor claim in which she had a substantial conflict of interest.

of the Agreement that stood in direct opposition to the 2019 Will admitted to probate.[6]

[¶31.] Under the unique circumstances presented on this record, we conclude that Denise's Motion strictly complied with the time requirement in the nonclaim statute in SDCL 29A-3-803 and substantially complied with the presentation requirements in SDCL 29A-3-804. The circuit court erred in determining that the Motion was not timely and properly presented.[7]

2. Whether the circuit court erred in denying the Motion seeking specific performance of the Agreement.

[¶32.] Denise's Motion sought a determination on the claim for specific performance, but the circuit court specifically reserved ruling on the issues of enforceability and breach of the Agreement. Nevertheless, in order for Denise to be entitled to the remedy of specific performance on her breach of contract claim, she must show "proof of an enforceable promise, [and] its breach[.]" *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 45, 942 N.W.2d 249, 262. Arguably, then,

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6. Ryan asserts that Denise's dual capacity as the personal representative and a creditor of the Estate created a serious conflict of interest. After the circuit court appointed Denise as personal representative, Ryan filed a petition in circuit court for removal of Denise as personal representative pursuant to SDCL 29A-3-611. Ryan's petition alleged mismanagement of the Estate by Denise and that "her personal interests diverge from the best interests of the Estate[.]" The circuit court denied the petition and Ryan did not appeal the circuit court's order denying his petition; thus, the question whether Denise should be permitted to continue as personal representative is not before us.

7. Having determined that the Motion was timely and properly presented, it is unnecessary to address Ryan's argument that judicial estoppel prevents Denise from asserting her creditor claim. It is also unnecessary to address whether the subsequently presented statement of claim filed by Denise in her capacity as creditor would be timely.

the question of the appropriate remedy may not be ripe until the questions of enforceability and breach of the Agreement have been resolved, but neither party has raised ripeness as an issue on appeal. Further, both parties squarely presented evidence and argument to the circuit court on the issue whether specific performance is an appropriate remedy for the alleged breach of the Agreement. The parties have also fully briefed the issue to this Court and have asked that we address the merits of the specific performance issue on appeal. Therefore, we will address the issue that is at the center of the controversy between the parties.

[¶33.] After receiving evidence and arguments from the parties on the merits of Denise's claim for specific performance, the circuit court denied the claim determining that she had failed to allege or present any proof that she had an inadequate remedy at law. Additionally, the court found that specific performance could not be enforced against Neil under SDCL 21-9-3(2) because such a remedy would not be just and equitable under the circumstances.

[¶34.] "Specific performance is an equitable remedy and this [C]ourt's standard of review addresses whether there has been an abuse of discretion by the circuit court after reviewing the facts and circumstances of each case."[8] *Johnson v. Sellers*, 2011 S.D. 24, ¶ 21, 798 N.W.2d 690, 696 (quoting *Lamar Adver. of S.D., Inc. v. Heavy Constr., Inc.*, 2008 S.D. 10, ¶ 10, 745 N.W.2d 371, 375). Specific

8. The circuit court's ruling that Denise was not entitled to specific performance under SDCL 21-9-3 is reviewed for an abuse of discretion, but we review the question whether Denise properly alleged an essential element for specific performance and presented any proof that she had an inadequate remedy at law de novo. *See Total Auctions & Real Estate, LLC v. S.D. Dep't of Revenue & Regulation*, 2016 S.D. 95, ¶ 8, 888 N.W.2d 577, 580 ("We review the dismissal of a complaint for failure to state a claim de novo.").

performance is an extraordinary remedy. *Crawford v. Carter*, 74 S.D. 316, 52 N.W.2d 302, 321 (1952). An extraordinary remedy "should never be granted, except where the evidence is clear and convincing." *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994) (applying the clear and convincing standard to the extraordinary remedy of rescission (quoting *Vermilyea v. BDL Enters., Inc.*, 462 N.W.2d 885, 888 (S.D. 1990)).

[¶35.] "A person may enter into a contract to devise property or make a will which is enforceable in equity[.]" *In re Gosmire's Estate*, 331 N.W.2d 562, 568 (S.D. 1983). Specific performance, or the equivalent of specific performance, may be an appropriate remedy for a breach of a contract to make a will or devise property. "It has long been recognized that it is within the jurisdiction of equity to require the equivalent of specific performance of such an agreement after the death of the promisor by requiring transfer of his property in accordance with the terms of the agreement." *Lass v. Erickson*, 74 S.D. 503, 506, 54 N.W.2d 741, 742 (1952). However, it is well settled that "[s]pecific performance is an equitable remedy, and '[a]n essential element to equitable relief is the lack of an adequate remedy at law.'" *McCollam v. Cahill*, 2009 S.D. 34, ¶ 15, 766 N.W.2d 171, 176 (quoting *Rindal v. Sohler*, 2003 S.D. 24, ¶ 12, 658 N.W.2d 769, 772).

[¶36.] Denise argues that it was unnecessary to show that she had an inadequate remedy at law because the Agreement involved a conveyance of real estate, and "[t]he presumed remedy for the breach of an agreement to transfer real property is specific performance." *Id.* (citation omitted); *see also Steensland v. Noel*, 28 S.D. 522, 134 N.W. 207, 210 (1912) (recognizing that in "contracts for the sale of

land, . . . an allegation that the remedy at law is inadequate is unnecessary, since that is apparent from the nature of the subject-matter"). Denise argues that the Agreement is essentially a contract for the transfer of real property because the disposition of Neil's 2017 will as mandated by the Agreement would transfer legal title of the ranch to Denise, "while the vendee [would hold] equitable title and . . . the right to use and possession of the property." *Anderson v. Aesoph*, 2005 S.D. 56, ¶ 21, 697 N.W.2d 25, 31, *holding modified by L & L P'ship v. Rock Creek Farms*, 2014 S.D. 9, ¶ 21, 843 N.W.2d 697 (citation omitted). Ryan asserts that the presumption under SDCL 21-9-9 does not apply because Denise is seeking performance of a contract for mutual wills, not a contract for the transfer of real property.

[¶37.] "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved." SDCL 21-9-9. However, this Court has explained "this presumption is not a conclusive one[.]" *Nelson v. Lybeck*, 21 S.D. 223, 111 N.W. 546, 547 (1907). We have denied specific performance of a contract to transfer real property after finding that the contract was "not an ordinary agreement to transfer real property" and the circumstances did not justify specific performance. *Id.* Importantly, this Court has recognized "the inadequacy of the legal remedy is still the controlling consideration[.]" *Id.*; *see also Gosmire's Estate*, 331 N.W.2d at 568 (affirming the circuit court's allowance of specific performance of a contract to devise property after decedent's death because "it [was] impossible to quantify the dollar value" of

the individuals' hard work and dedication). "Equity has jurisdiction . . . only if the legal remedy is not full, adequate and complete." *Holzworth v. Roth*, 78 S.D. 287, 291, 101 N.W.2d 393, 395 (1960).

[¶38.] At the time of Neil's death, the Estate primarily consisted of Neil's undivided one-half interest in the remaining contract for deed payments and his legal interest in the contract for deed. His one-half interest in the contract for deed was a vendor's interest entitling him to payment until the balance of the contract was paid or the right of forfeiture in the event of default. "A contract for deed is, in its essence, a financing arrangement for the purchase of real property." *Anderson*, 2005 S.D. 56, ¶ 21, 697 N.W.2d at 31; *see also Renner v. Crisman*, 80 S.D. 532, 537, 127 N.W.2d 717, 719 (1964) (stating that "the final interest of the seller [under a contract for deed] is nothing other than the right to payment of whatever sums are still owed him on the sale of the property"). "In a contract for deed, the installment vendor maintains 'legal title to the property while the vendee holds equitable title and has the right to use and possession of the property.'" *Anderson*, 2005 S.D. 56, ¶ 21, 697 N.W.2d at 31 (citation omitted).

[¶39.] There was no claim or evidence before the circuit court that the contract for deed was in default, or that Neil's one-half interest in the contract for deed, at the time of his death, would result in him receiving anything more than a stream of payments until the contract balance was paid. Further, Denise made no effort to show that she was unable to calculate the value of the remaining payments under the contract for deed, based upon her life expectancy, or that she would otherwise be unable to present a claim for damages under the circumstances as they

existed. The record also contains the inventory providing a monetary value for Neil's one-half interest remaining in the contract for deed. Under these circumstances, the circuit court could appropriately conclude that Denise failed to allege or prove that she did not have an adequate remedy at law.

[¶40.] Based upon our conclusion that the circuit court properly determined Denise failed to allege or present evidence of an essential element for specific performance, the lack of an adequate remedy at law, it is unnecessary to consider the court's alternative finding under SDCL 21-9-3 that specific performance was not a just or equitable remedy under the circumstances presented on this record.

Conclusion

[¶41.] The circuit court erred in determining that Denise failed to substantially comply with SDCL 29A-3-804 in presenting the creditor claim within the time requirements of SDCL 29A-3-803, and we vacate the circuit court's findings of fact and conclusions of law from February 2, 2021, to the extent that they are inconsistent with this opinion. However, the court properly considered whether Denise could seek court approval of her request for specific performance of the Agreement. We affirm the circuit court's determination that Denise is not entitled to the remedy of specific performance on her claim for the alleged breach of the Agreement.

[¶42.] KERN, SALTER, DEVANEY, and MYREN, Justices, concur.

Appeal No. 29580

July 20, 2022

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

Present: Steven R. Jensen, Chief Justice, Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

In the Matter of the Estate of NEIL WILLIAM SMEENK, Deceased.

J U D G M E N T

This Cause coming on to be heard on October 5, 2021, at a term of this Court at the University of South Dakota Knudson School of Law in the City of Vermillion, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the order of the Fourth Judicial Circuit Court, within and for Butte County, appealed from herein, be and the same is hereby affirmed in part and reversed in part,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Shirley A. Jameson-Fergel
Clerk of the Supreme Court

By: Chief Deputy Clerk
(SEAL)

FILED
AUG 15 2022
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JUL 20 2022
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30194

IN THE MATTER OF THE ESTATE OF NEIL WILLIAM SMEENK

DENISE SCHIPKE–SMEENK,

Individually, and as Personal Representative,
Appellant,

vs.

RYAN SMEENK,

Interested Party, Appellee.

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

THE HONORABLE MICHAEL W. DAY

APPELLEE'S BRIEF

Notice of Appeal Filed: December 12, 2022

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PRELIMINARY STATEMENT

Throughout Appellee's Brief, Interested Party/Appellee, Ryan Smeenk, is referred to as "Ryan." Appellant, Denise Schipke–Smeenk, is referred to as "Denise." The decedent, Neil Smeenk, is referred to as "Neil." The settled record is denoted "SR," followed by the appropriate pagination. Findings of fact and conclusions of law are denoted with "FOF" or "COL" followed by the appropriate number.

JURISDICTIONAL STATEMENT

Denise appeals the circuit court's order regarding Petitioner Denise L. Schipke-Smeenk's motion for partial summary judgment, entered on November 14, 2022. SR 1094 (notice of appeal). Because the circuit court's order determined all issues with respect to Denise's previously-litigated creditor claim, it is a final order as contemplated by SDCL 15-26A-3. SR 1098–99; *see In re Estate of Geier*, 2012 S.D. 2, 809 N.W.2d 355; *see also* SDCL 29A-3-107. Denise timely filed her notice of appeal pursuant to SDCL 15-26A-6 on December 12, 2022. SR 1094.

STATEMENT OF THE ISSUES

I. WHETHER DENISE'S CREDITOR CLAIM IS BARRED BY RES JUDICATA?

The circuit court held that Denise's claim was barred by the doctrine of res judicata.

In re Estate of Smeenk, 2022 S.D. 41, 978 N.W.2d 383

Healy Ranch Inc. v. Healy, 2022 S.D. 41, 978 N.W.2d 786

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

SDCL 29A-1-102

SDCL 29A-3-107

Restatement (Second) of Judgments § 25

18 Charles A. Wright, et al., Federal Practice and Procedure § 4410

STATEMENT OF THE CASE AND FACTS

This is the second appeal in a lengthy dispute between Denise (Neil's estranged spouse) and Ryan (Neil's son) over the proper distribution of Neil's estate. *See In re Estate of Smeenk [Smeenk I]*, 2022 S.D. 41, 978 N.W.2d 383. The genesis of the dispute is an agreement that Neil and Denise executed, as husband and wife, in which they purportedly agreed that neither would revoke their respective Wills without the other's consent. *Id.* ¶ 1. Shortly before Neil took his own life, and while their divorce was imminent, Neil executed a new Last Will and Testament ("2019 Will") disinheriting Denise. SR 9–14 (2019 Will) ("I wish for Denise Schipke–Smeenk to receive the least amount of my estate as is allowable by South Dakota law."). This new 2019 Will, in Denise's view, amounted to a breach of their agreement. *Smeenk I*, 2022 S.D. 41, ¶ 1, 978 N.W.2d at 386.

After Neil's passing, the 2019 Will disinheriting Denise was admitted into formal probate over Denise's objection. SR 241. Believing herself entitled to virtually all of Neil's assets due to the agreement, Denise proceeded to adjudicate her breach of contract creditor claim in the probate proceeding.[1] *Smeenk I*, 2022 S.D. 41, ¶ 1, 978 N.W.2d at 386. As her sole remedy for this alleged breach, Denise sought specific performance of the agreement. *Id.* ¶ 10. Following a bench trial, the circuit court barred Denise's

[1] The primary asset of the Estate is one half of the proceeds from a contract for deed, whereby Neil sold his family ranch. *Smeenk I*, 2022 S.D. 41, ¶ 38, 978 N.W.2d at 395. In 2017, Neil assigned one-half of these proceeds to Denise outright. SR 125. Therefore, regardless of the outcome of this dispute, Denise will receive one-half of Neil's assets. *Id.* This appeal is before the Court because Denise seeks the other half of the proceeds, which is contrary to Neil's desire. SR 9–14 (2019 Will disinheriting Denise).

creditor claim as untimely under the nonclaim statutes in SDCL Chapter 29A-3. *Id.* ¶¶ 11–12. The circuit court also denied Denise's claim on the merits on two independent bases. First, Denise failed to prove—or even raise—a necessary element of her only chosen remedy of specific performance. *Id* ¶ 12; SR 814–15. Second, it held that the agreement was unenforceable against Neil because specific performance would not be just and reasonable to him. *Id.*; SR 815 (2/2/21 COL #5) ("[S]pecific performance is nevertheless inappropriate . . . . The question before this Court is not necessarily validity, but rather, *enforceability*.") (emphasis added).

On appeal, this Court concluded that Denise's creditor claim was timely presented under SDCL Chapter 29A-3. *Id.* ¶ 41. However, and dispositive of the issue, this Court upheld the circuit court's order denying Denise's claim for failing to prove, or even raise, a necessary element of specific performance (the inadequacy of her legal remedy). *Id.* This Court correctly described the circuit court's denial as "merits-based." *Id.* ¶ 12. Given its affirmance on the merits, this Court deemed it unnecessary to consider the circuit court's separate determination that it would be inequitable to enforce the agreement against Neil. *Id.* ¶ 40; SDCL 21-9-3(2); SR 815 (2/2/21 COL #5).

With her only requested remedy barred, this Court's affirmance in *Smeenk I* fully resolved Denise's creditor claim. *See* 2022 S.D. 41, ¶ 28, 978 N.W.2d at 392. Nevertheless, in this next installment, Denise argues that she is permitted to re-litigate her previously denied claim, now for money damages. *See* Brief of Appellant Denise L. Schipke–Smeenk ("Appellant Brief") at 4. Denise takes this position even though she did not advance a money damages theory in *Smeenk I* by: (i) pleading money damages as an

alternative remedy; (ii) offering evidence related to money damages at the trial; (iii) proposing findings of fact or conclusions of law related to money damages; or (iv) otherwise mentioning money damages prior to the circuit court's denial of her claim. Denise did not take these actions because, as this Court aptly observed in *Smeenk I*, "Denise was not seeking a monetary remedy[.]" *Smeenk I*, 2022 S.D. 41, ¶ 28, 978 N.W.2d at 392. Consistent with this theme, at the appellate level, Denise took matters a step further and repeatedly represented that proving her legal remedy would not be possible. *See, e.g.*, Brief of Appellant Denise L. Schipke–Smeenk ("*Smeenk I* Appellant Brief") at 28–29 ("[I]t is *impossible* to make a determination of what the value of the Estate might be upon the second person's death[.]") (emphasis added).[2]

In light of this Court's decision, Ryan petitioned the circuit court to direct Denise, as Personal Representative, to distribute the assets of the estate in accordance with the 2019 Will. SR 959. In response, to test the veracity of her new theory for money damages, Denise filed a motion for partial summary judgment in the open probate proceeding requesting summary judgment on two elements of her barred claim: validity of the agreement and its breach. SR 999. Ryan resisted her request for partial summary judgment.[3] SR 1006–13. Ultimately, the circuit court agreed that no material facts were

[2] This Court has a history of binding parties to the concessions of their counsel. *See, e.g.*, *Pickerel Lake Outlet Ass'n v. Day Cty.*, 2020 S.D. 72, ¶ 12, 953 N.W.2d 82, 88 ("At oral argument, both parties agreed that the *Bracker* balancing test does not apply to this case."); *Rush v. U.S. Bancorp Equip. Fin., Inc.*, 2007 S.D. 119, ¶ 11, 742 N.W.2d 266, 269 ("Plaintiffs concede as much in their appellate argument[.]").

[3] In her brief, Denise criticizes the fact that Ryan did not file a cross motion for summary judgment. *See* Appellant Brief at 4. However, Ryan was not required to cross move. He appropriately raised the issue of res judicata in his resistance to Denise's motion for

in dispute as to validity of the agreement or its breach. SR 1052–59, 1082–83.[4] Nevertheless, the circuit court barred Denise's claim as precluded under the doctrine of res judicata because "Denise failed to seek monetary damages at the original trial[.]" SR 1059. This appeal follows.

STANDARD OF REVIEW

Application of the doctrine of res judicata is a legal question. *Farmer v. S.D. Dep't of Rev. & Reg.*, 2010 S.D. 35, ¶ 6, n.4, 781 N.W.2d 655, n.4. Therefore, this issue is reviewed de novo. *Id.*

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR WHEN IT BARRED DENISE'S CREDITOR CLAIM BASED ON THE DOCTRINE OF RES JUDICATA.

Res judicata is the legal principle that prevents a party from re-litigating a claim or issue that has been settled by a judicial decision. *See Res Judicata* Black's Law Dictionary (11th ed. 2019). The doctrine's roots are ancient and its purpose well-established: "[A] person should not be twice vexed for the same cause[.]" *Healy Ranch, Inc. v. Healy [Healy II]*, 2022 S.D. 43, ¶ 58, 978 N.W.2d 786, 798. Appropriate application of the doctrine is critical because it prevents costly and repetitive lawsuits,

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partial summary judgment. SR 1006–1018. The circuit court then barred the claim, a dismissal that was well within its authority in "avoidance of unnecessary judicial waste." *Healy II*, 2022 S.D. 43, ¶ 49, n.10, 978 N.W.2d at 800, n.10.

[4] In her brief, Denise represents that Ryan did "not dispute the validity of the contract to make Wills." Appellant Brief at 3. Denise's citation for this proposition is "CR 460." A review of this document will confirm that it does not stand for this proposition. SR 460. Ryan disputed the validity of the agreement in *Smeenk I* and objected to Denise's motion for partial summary judgment on the issue of validity in *Smeenk II*. SR 1022.

conserves judicial resources, and encourages reliance on judicial decisions by providing finality. *See Brown v. Felson*, 442 U.S. 127, 131 (1979) ("Res judicata serves to "free[] the courts to resolve other disputes."). *Piper v. Young*, 2019 S.D. 65, ¶ 22, 936 N.W.2d 793, 804 ("[P]ublic policy is best served when litigation has [] finality.").

This Court has a long history of faithfully applying the doctrine of res judicata. It has barred duplicative divorce litigation. *Evens v. Evens*, 2022 S.D. LEXIS 26, 971 N.W.2d 907, 2022 WL 538508. It has given preclusive effect to administrative decisions. *Johnson v. UPS*, 2020 S.D. 39, ¶ 35, 946 N.W.2d 1, 10–11. It has prevented successive challenges to tax assessments even when the overvaluation was "enorm[ous]." *In re Hunt Tax Refund*, 2019 S.D. 26, ¶ 26, 927 N.W.2d 894, 900. It has prohibited duplicative litigation when a plaintiff alleged newly discovered evidence. *Estate of Johnson v. Weber*, 2017 S.D. 36, 898 N.W.2d 718. It has even blocked a repetitious habeas corpus petition from a death row inmate alleging constitutional rights violations. *Piper*, 2019 S.D. 65, ¶ 22, 936 N.W.2d at 804. Now, consistent with South Dakota law, Ryan asks this Court to once again apply the doctrine of res judicata to the administration of an estate and decline Denise's attempt to resurrect her previously litigated creditor claim. *See In re Estate of Ducheneaux*, 2018 S.D. 26, 909 N.W.2d 730; *cf. In re Estate of Geier*, 2012 S.D. 2, 809 N.W.2d 355.

As this Court is intimately aware, the legal principle of res judicata has two distinct branches: issue and claim preclusion. *Healy II*, 2022 S.D. 43, ¶ 58, 978 N.W.2d at 798. Issue preclusion forecloses "re-litigation of a matter that has been litigated and decided." *Id.* ¶ 40. Claim preclusion, on the other hand, bars not only "a claim . . .

actually litigated" but also claims "*which could have been properly raised.*" *Id.* (emphasis in original). As relevant here, the following factors are often used to guide the application of claim preclusion:

> (1) the issue in the prior adjudication must be identical to the present issue;[5]
> (2) there must have been a final judgment on the merits in the previous case;
> (3) the parties in the two actions must be the same or in privity; and
> (4) there must have been a full and fair opportunity to litigate the issues in the prior adjudication.

Id. Denise challenges all four elements. Therefore, Ryan addresses each in turn.

A. THE BREACH OF CONTRACT CLAIM IS IDENTICAL TO THE PREVIOUSLY ADJUDICATED CLAIM.

The first element—i.e., that the claims be identical—is established. As applied to claim preclusion, this Court has explained that "claim identity" is determined by whether a litigant is "attempt[ing] to relitigate a prior determined *cause of action.*" *Id.* ¶ 44, 978 N.W.2d at 799 (emphasis in original). This requires examining "whether *the wrong sought to be redressed* is the same in both actions." *Healy II*, 2022 S.D. 43, ¶ 44, 978 N.W.2d at 799 (emphasis added).

It is undeniable that the wrong sought to be redressed by Denise's motion for partial summary judgment—i.e., Neil's alleged breach of contract—is identical to the previously adjudicated claim. *Smeenk I*, 2022 S.D. 41, ¶ 9, 978 N.W.2d at 387. For almost three years, Denise aggressively litigated this exact breach of contract claim, not

[5] In *Healy II*, this Court discussed its use of the phrase "issue" to analyze the identity of the causes of actions barred for purposes of claim preclusion and explained that "exacting 'issue identity'" is generally not required to establish claim preclusion. *Healy II*, 2022 S.D. 43, ¶ 44, 978 N.W.2d at 799.

only before the circuit court but also before this Court. *Id.* ¶ 7. Her efforts began with her motion for court approval of her creditor claim, continued with a bench trial on the motion, and ended with this Court's affirmance of the circuit court's merit-based holding that she did not prove her claim. *Id.* ¶¶ 7, 11, 41. The first element of the res judicata test is therefore established.

In an effort to overcome this, Denise argues that the circuit court "conflate[d] two distinct principles—a claim versus a remedy." Appellant Brief at 11. However, as this Court recently explained, application of res judicata does not turn on whether a party seeks a different remedy in the new proceedings. Rather, the question is whether the "wrong sought to be redressed is the same in both actions." *Healy II*, 2022 S.D. 43, ¶ 44, 978 N.W.2d at 799. In the previous adjudication, Denise sought to resolve her perceived wrong—i.e., the breach of contract claim—exclusively with specific performance; she made no attempt to raise or prove money damages prior to the denial of her claim. *See Smeenk I*, 2022 S.D. 41, ¶ 28, 978 N.W.2d at 392 ("Denise was not seeking a monetary remedy[.]"). For purposes of res judicata, the impact of Denise obtaining an unfavorable ruling on specific performance is that her entire claim is now barred "regardless of whether . . . different forms of relief [are] requested in a subsequent action." *Farmer v. S.D. Dep't of Rev. & Regul.*, 781 N.W.2d 655, 660 (S.D. 2010); *Healy II*, 2022 S.D. 43, ¶ 44, n.9, 978 N.W.2d at 799, n.9 ("If a later suit advances the same claim as an earlier suit . . . the [] judgment prevents litigation of all grounds for . . . recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.") *Cf. Hudlund v. River Bluff Estates, LLC*, 2018 S.D.

20, ¶ 24, 908 N.W.2d 766, 774.

Both legal treatises and modern case law align with this Court's refusal to allow separate adjudications for different forms of relief. *See Farmer*, 781 N.W.2d at 660; *Healy II*, 2022 S.D. 43, ¶ 44, n.9, 978 N.W.2d at 799, n.9. Turning first to the treatises, the Restatement (Second) of Judgments pointedly states that "[a] judgment granting or denying specific performance of a contract should preclude an action for money damages for breach."[6] *See, e.g.*, Restatement (Second) of Judgments § 25, cmt. i(2). In harmony with this principle, Wright and Miller's Federal Practice and Procedure explains that "[a] contract action for specific performance cannot be followed by a second action for damages[.]" *See* 18 Fed. Prac. & Proc. Juris. § 4410 (3d. ed Apr. 2022). Consistent with these secondary sources, courts across the United States—including the Eighth Circuit Court of Appeals—shun successive litigation for money damages following an unsuccessful trial in equity.[7] One decision even went so far as observing that "[t]o allow

[6] Although inapplicable here, an exception occurs when the previous adjudicatory body lacked jurisdiction to hear the later-asserted claim. These situations are protected by the full and fair opportunity element of the test. *See, e.g., In re Estate of Ducheneaux*, 2018 S.D. 26, ¶ 21, 909 N.W.2d 730, 738 (noting that nontrust property could not be probated before the Department of the Interior). This exception is inapplicable.

[7] The following cases provide a sample of many decisions articulating this principle: *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 335 (1979) ("[A]n equitable determination can have collateral-estoppel effect in a subsequent legal action[.]"); *Estate of Young v. Williams*, 810 F.2d 363, 365 (2d Cir. 1986) (permanent injunction precluded money damages); *Falls Stamping & Welding Co. v. Inter'l Union, United Auto. Workers, etc., Region II*, 744 F.2d 521, 525 (6th Cir. 1984) (same); *Ennenga v. Starns*, 677 F.3d 766, 776–77 (7th Cir. 2012) (same); *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976) (same); *Clarke v. Redeker*, 406 F.2d 883, 884 (8th Cir. 1969) (same); *Mirin v. Nevada*, 547 F.2d 91, 94 (9th Cir. 1976) (same); *Barkley v. Carter County State Bank*, 791 S.W.2d 906, 911–12 (Mo. Ct. App. S.D. 1990) (same); *Jou v. Adalian*, 2016 U.S. Dist. LEXIS 117914 at *44–45 (D. Haw. Sept. 1, 2016) (specific performance and money damages

[a party] to litigate separately each theory of recovery would destroy the purpose of the doctrine of res judicata[.]" *Kradoska v. Kipp,* 397 A.2d 562, 569 (Me. 1979). This logic is sound.

It is understood that when, as here, "a party fails to fully develop all of the issues and evidence available in a case, [s]he is not justified in later trying the omitted issues or facts in a second action based upon the same claim." *Crowley v. Spearfish Independent School Dist., No 40–2,* 445 N.W.2d 308, 312 (S.D. 1989). Honoring this principle, and applying the holdings in *Farmer* and *Healy II*, Denise's attempt to split her legal and equitable remedies into two separate adjudications is legally impermissible. *Farmer*, 781 N.W.2d at 660; *Healy II*, 2022 S.D. 43, ¶ 44, n.9, 978 N.W.2d at 799, n.9; *see supra*, note 5. The first element of res judicata—that the claims be identical—is met.

B. THERE WAS A FINAL JUDGMENT ON THE MERITS.

The circuit court's order denied Denise's motion for approval and payment of claim on the merits. SR 836. This was a final decision on the merits for purposes of res judicata. *Smeenk*, 2022 S.D. 41, ¶¶ 12, 41, 978 N.W.2d at 388, 396. In probate proceedings, the finality of an order is measured not by the closing of an estate, but rather by whether an order "disposes of all issues relative to a particular petition and leaves nothing for decision."[8] *In re Estate of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d at 770

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without jury precluded legal relief before jury); *Wolf v. Anderson*, 422 N.W.2d 400, 400–01 (N.D. 1988) (following an affirmance regarding the petitioners' failure to prove the inadequacy of their legal remedy, all other remedies were likewise foreclosed).

[8] Citing *In re Estate of Siebrasse* [*Siebrasse IV*] as her exclusive authority, Denise contends that res judicata does not apply because, in her view, these are "successive appeals" taken in the same case. *See* Appellant Brief at 5–6, 10; *Siebrasse IV*, 2006 S.D.

(analyzing *Geier*); *In re Estate of Geier*, 2012 S.D. 2, 809 N.W.2d 355. Although a petition "defines a proceeding," "further pleadings relating to the same subject matter, whether labeled motions or petitions, are part of the same proceeding." *Geier*, 2012 S.D. 2, ¶ 13, 809 N.W.2d at 359.

Applying these principles here, Denise presented her creditor claim with a single document—her motion for approval and payment of claim. *See* SR 258–60 (4/8/20 motion); *Smeenk I*, 2022 S.D. 41, ¶ 10, 978 N.W.2d at 387. In this pleading and its supportive briefs, Denise requested that the circuit court enforce the agreement exclusively with specific performance. *Smeenk I*, 2022 S.D. 41, ¶ 10, 978 N.W.2d at 387 (describing Denise's motion as "seeking specific performance of the Agreement[.]"); *see also* SR 259, 449–52. Therefore, finality is defined by whether the order denying her motion fully resolved this request on the merits. *See Geier*, 2012 S.D. 2, ¶ 13, 809 N.W.2d at 359.[9]

83, 722 N.W.2d 86. This argument should be summarily rejected. *Siebrasse IV* was handed down six years prior to this Court's decision *In re Estate of Geier*, 2012 S.D. 2, 809 N.W.2d 355. As noted previously, in *In re Estate of Geier*, this Court set aside its previous definition of finality in probate proceedings and followed the lead of "persuasive authority from other jurisdictions" to redefine the meaning of a final order as applied to the administration of an estate. *In re Estate of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d at 770. Prior to *In re Estate of Geier*, an estate had to reach final administration before an order was "final." *In re Estate of Fox*, 2018 S.D. 35, ¶ 10, 911 N.W.2d 746, 749. Because the Siebrasse estate underwent four rounds of appeals that involved reversals on various issues, it never achieved "finality" under the old rule—i.e., closing of the estate. *See, e.g.*, *Siebrasse IV*, 2006 S.D. 83, ¶¶ 2–4, 722 N.W.2d at 87–88. Because it applies an inapplicable rule, the *Siebrasse* decisions are of little import.

[9] In her motion, Denise specifically requested that the court administer Neil's estate in accordance with the Neil's 2017 Will. *Smeenk I*, 2022 S.D. 41, ¶ 10, 978 N.W.2d at 387; *see also* SR 259, 449–52. This request was more of an attempt to circumvent the circuit court's previous order admitting Neil's 2019 Will into formal probate. *Id.* ¶ 8. Neither

Not only did the circuit court fully resolve Denise's motion on the merits; it did so for two different reasons. SR 836 (02/05/21 order denying claim). As an initial matter, the circuit court held that Denise failed to prove—or even raise—a necessary element of her creditor claim (the inadequacy of her legal remedy). SR 814–15. Additionally, it found that the agreement was unenforceable against Neil because specific performance would not be just and reasonable to him. SR 815 (2/2/21 COL #5) ("[S]pecific performance is nevertheless inappropriate . . . . The question before this Court is not necessarily validity, but rather, *enforceability*.") (emphasis added). Both determinations disposed of all issues in her motion and were not reversed. *Smeenk I*, 2022 S.D. 41, ¶ 41, 978 N.W.2d at 396. Thus, the circuit court's order was final for purposes of res judicata. *See* SR 817 (2/5/21 order) ("[T]he Motion for Approval and Payment of Claim is hereby DENIED.").

Notwithstanding the preceding, Denise argues that the circuit court did not determine whether the agreement was enforceable or breached; thus, she believes herself entitled to a second trial on these issues. *See* Appellant Brief at 4. This argument is untenable for three reasons. First, in essence, Denise's argument simply repeats this Court's observation in *Smeenk I* that denial of her claim prior to a determination of breach may have offended principles of ripeness. 2022 S.D. 41, ¶ 32, 978 N.W.2d at 393.

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party appealed the circuit court's order admitting the 2019 Will. *Id.* Therefore, it is no longer possible for Denise to challenge Neil's 2019 Will with another testamentary document. *In re Estate of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d at 770 (defining a final order). Along these lines, at oral argument in *Smeenk I*, members of the Court observed that the motion might be the equivalent of an "end around" to the circuit court's order denying Denise's petition to admit Neil's 2017 Will into probate. Ryan agrees.

This Court has already set this issue aside. *Id.* ("[N]either party has raised ripeness as an issue on appeal . . . . Therefore, we address the issue that is at the center of the controversy between the parties."). For that reason alone, Denise's argument is both untimely and unpersuasive. *See In re Estate of Smid*, 2008 S.D. 82, ¶ 22, n.5, 756 N.W.2d 1, 9, n.5 (discussing waiver of unpresented arguments).

Second, even if Denise had earned a merits-based reversal—she did not—such an outcome would not allow her to turn back time and re-litigate her claim under a new theory. *See Smeenk I*, 2022 S.D. 41, ¶ 28, 978 N.W.2d at 392 ("Denise was not seeking a monetary remedy[.]"). Instead, at best, a reversal in *Smeenk I* would have resulted in a remand directing the circuit court to enter holdings on the remaining elements. This is not the result that Denise seeks; rather, she desires an opportunity to re-litigate her claim under a new theory of money damages. Thus, her argument is less helpful.

Third and finally, Denise broadly suggests that the circuit court bypassed consideration of liability altogether. Appellant Brief at 14. Not only is this assertion factually unsupportable; it contradicts Denise's previous representations to this Court regarding the nature of the issues presented in *Smeenk I*. SR 900 (docketing statement) ("Did the Circuit Court err in finding <u>against enforcement</u> of the Agreement to Execute Mutual Wills . . . ?") (emphasis added). As her docketing statement correctly noted, regardless of validity or breach, the agreement has already been adjudicated as unenforceable against Neil. SR 815 (2/2/21 COL #5). This determination stands unreversed. *See Smeenk I*, 2022 S.D. 41, ¶ 41, 978 N.W.2d at 396 (vacating only the findings and conclusions pertaining to SDCL Chapter 29A-3). Therefore, consistent with

Geier and its descendants, the circuit court's denial of Denise's creditor claim "le[ft] nothing for decision." *In re Estate of Petrik*, 2021 S.D. 49, ¶ 16, 963 N.W.2d at 770.

In a last effort to challenge finality, Denise insists that this Court specifically remanded this matter for additional substantive proceedings. *See* Appellant Brief at 4, 13. A review of the decision in *Smeenk I* confirms that this Court did not include any remand instructions. *Smeenk I*, 2022 S.D. 41, 978 N.W.2d 383. For this reason, Denise relies instead on this Court's judgment as evidence that a merits-based remand was desired. SR 987 (Judgment (08/12/22) ("[T]his cause . . . is hereby remanded . . . for further proceedings according to law and the decision of this Court."). However, as this Court is aware, the remand language this Court included in the *Smeenk I* judgment is used in all judgments regardless of whether this Court affirms, reverses, or affirms in part and reverses in part. *See* Appendix at 27–29 (attaching judgments in all three scenarios). This language is inserted because regardless of the ultimate appellate outcome, this Court must transfer subject matter jurisdiction back to the circuit court. *See, e.g.*, *O'Neill v. O'Neill*, 2016 S.D. 15, ¶ 34, 876 N.W.2d 486, 500 ("An appeal from a[n] [] order strips the [circuit] court's jurisdiction over the subject matter of the [] order except as to certain trivial matters[.]"). It is not, as Denise suggests, evidence that this Court blessed an attempt by Denise to re-litigate her claim with new proceedings for money damages.[10]

[10] Denise goes so far as to assert that "[i]f anything, by vacating the findings of the circuit court, this Court's ruling in *Smeenk I* revived Denise's claim, allowing her to move forward in front of the circuit court to pursue her recovery for Neil's breach." *See* Appellant Brief at 14–15. To be clear, rather than wholly "vacate the findings of the circuit court," this Court vacated only those findings to the extent that they were inconsistent with its ruling on the non-claim statutes. *Smeenk I*, 2022 S.D. 41, ¶ 41, 978 N.W.2d at 396. Further, and just as important, Denise cites no statute or case in support

With finality established, the remaining question is whether the order denying Denise's claim amounted to a decision on the merits. This factor is easily resolved, given that the *Smeenk I* decision has already drawn this conclusion. 2022 S.D. 42, ¶ 12, 978 N.W2d at 388 ("The [circuit] court then made a *merits-based* determination that Denise was not entitled to specific performance because Denise failed to show an inadequate remedy at law.") (emphasis added). Classifying the *Smeenk I* affirmance as a decision on the merits is consistent with the holding in *Healy II*, in which this Court held that a decision is on the merits "even when it is 'based on . . . a failure to prove a substantive allegation[] of fact." 2022 S.D. 43, ¶ 53, 978 N.W.2d at 801 (quoting *United States v. Or. Lumber Co.*, 260 U.S. 290, 300–01, 43 S.Ct. 100, 103, 67 L.Ed. 261 (1922)). The second element of res judicata—a final, unreversed decision on the merits—is met.

C. THE PARTIES ARE THE SAME IN BOTH ACTIONS.

At all stages, Denise has pursued her claim as both the personal representative of the Estate and as an alleged creditor. Ryan, as an interested party, has resisted her. Notably, Denise admits that "the parties are the 'same.'" Appellant Brief at 15. Therefore, this element is undisputed.

D. DENISE HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE HER CLAIM IN A PRIOR ADJUDICATION.

The final element of res judicata—namely, that Denise had a full and fair opportunity to litigate the issue—is also satisfied. As this Court has recently instructed, "[f]or a claim to be barred by res judicata, the claim need not have been actually litigated

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of her proposition that this Court's vacating of certain findings somehow "revived" a damage theory that had never been presented.

at an earlier time. Rather, the parties only need to have been provided a fair opportunity to place their claims in the prior litigation." *Healy II*, 2022 S.D. 43, ¶ 56. 978 N.W.2d at 801.

It is beyond debate that Denise had every opportunity to litigate her breach of contract claim—including an opportunity to assert monetary damages—at the first trial. This Court is intimately familiar with Denise's efforts, given that it has already considered an appeal regarding those proceedings. Denise attended a bench trial, called witnesses, offered exhibits, made legal arguments, and proposed findings of fact and conclusions of law. SR 602–750 (bench trial transcript); SR 755–71 (proposed findings). She even testified in support of her belief that she was entitled to the entirety of Neil's estate by virtue of her breach of contract claim. SR 608–67. She exclusively sought an equitable remedy. She did not prevail. She appealed. She was unsuccessful again.[11] *Smeenk I*, 2022 S.D. 41, ¶ 41, 978 N.W.2d at 396 (affirming denial on the merits). Not only does res judicata prevent re-litigation of her previously barred claim; Denise's failure to present evidence or propose findings on money damages is—independently—dispositive of this case under this Court's well-established waiver and forfeiture standards. *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D. 1987) ("A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed

[11] Denise makes the factually unsupportable claim that she "never actually litigated her breach of contract claim because the circuit court incorrectly found it was barred by the notice and presentation statutes set forth in SDCL §§ 29A-3-803–804." Appellant Brief at 15. In actuality, Denise extensively litigated her claim—from serving and responding to written discovery to a bench trial at which she testified in support of it. SR 568 (answers to interrogatories and requests for production); SR 578; SR 678; SR 602–750 (bench trial transcript).

abandoned."); *Martin v. Martin*, 358 N.W.2d 793, 798 (S.D. 1984) ("In the absence of a proposed finding . . . [the petitioner] cannot be heard to complain that the trial court did not [enter a specific finding]."); *Huth v. Hoffman*, 464 N.W.2d 637, 638 (S.D. 1991).[12]

In the end, this Court has made it clear that parties have been given a full and fair opportunity to litigate potential—but unasserted—theories if they do not pursue those theories despite having "every opportunity to do so." *Healy II*, 2022 S.D. 43, ¶ 57, 978 N.W.2d at 802 ("Bret did not bring a quiet title action . . . . However, he had every opportunity to do so . . . . Therefore, element four [the full and fair opportunity element] is met."). Denise had every opportunity to prove her case by asserting an entitlement to an equitable remedy, pursuing monetary damages, or seeking both alternatively. She elected to pursue only an equitable remedy. Her failure to "fully develop all of the issues and evidence available in [her] case" does not justify her attempt to retry "the omitted issues or facts in a second action based upon the same claim." *See Crowley*, 445 N.W.2d at 312; *State v. Miller*, 248 N.W.2d 874, 878 (S.D. 1976) ("A defendant cannot follow one course of strategy at the time of trial and, if that turns out to be unsatisfactory,

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[12] Denise's proposed conclusions of law stated her desire in *Smeenk I* plainly:

> Denise Schipke-Smeenk, as a creditor, is entitled to specific performance of the Agreement to Execute Mutual Wills resulting in the specific performance of the terms of the 2017 Will to the extent that the 2017 Will devises to her property of the Descendant. The property devised to Denise Schipke-Smeenk in the 2017 Will will be awarded [sic] her in satisfaction of her creditor claim. Any remaining property in the Estate will pass pursuant to the terms of the 2019 Will.

SR 771 (Proposed FOF/COL # 43) (emphasis added).

complain that he should be discharged or given a new trial."); *Sharpe v. Dept. of Transp.*, 505 S.E.2d 473, 475 (1998) ("A party cannot complain of error that [his] own legal strategy, trial procedure, or conduct aided in causing."). Because Denise had a full and fair opportunity to litigate her claim, the final element is met. The circuit court did not err in dismissing Denise's claim as barred by res judicata.

CONCLUSION

Based upon the foregoing, Ryan respectfully requests that this Court affirm the circuit court's order barring Denise's claim.

REQUEST FOR ORAL ARGUMENT

Appellee Ryan Smeenk, by and through his counsel, respectfully requests the opportunity to present oral argument before this Court.

Dated this 20th day of March, 2023.

Respectfully submitted,

THOMAS BRAUN BERNARD & BURKE, LLP
Attorneys for Appellee, Ryan Smeenk

By: /s/ John W. Burke .
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellee's Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellee's Brief* was prepared using Times New Roman typeface in 12-point font and contains 5,419 words. I relied on the word count of our word processing system used to prepare *Appellee's Brief* and the original and all copies are in compliance with this rule.

/s/ John W. Burke .
John W. Burke

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2023, I mailed the foregoing *Appellee's Brief* to the Clerk for the South Dakota Supreme Court via first class U.S. Mail and filed a true and correct copy of the same via Odyssey File & Serve, and that such system effected service of the same on the following individuals:

Talbot J. Wieczorek / Katelyn A. Cook
Gunderson Palmer Nelson & Ashmore, LLP
PO Box 8045
Rapid City, SD 57709

And separately served a copy of the same via first class U.S. Mail on the following individuals:

Brandy Ruth Mooney
28854 225th Ave.
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Dominique Sterrett
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Damian Heinert
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Newell, SD 57760

Talbot J. Wieczorek / Katelyn A. Cook
Gunderson Palmer Nelson & Ashmore, LLP
PO Box 8045
Rapid City, SD 57709

/s/ John W. Burke .
John W. Burke

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA)SS COUNTY OF BUTTE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of **NEIL WILLIAM SMEENK,** Deceased.	)	09PRO19-000013 **ORDER REGARDING PETITIONER DENISE L. SCHIPKE-SMEENK'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The above-captioned matter came before the Court on Thursday, October 13, 2022 on *Petitioner Denise L. Schipke-Smeenk's Motion for Partial Summary Judgment ("Motion for Partial Summary Judgment")* and Ryan Smeenk's *Petition to Direct Personal Representative to Distribute Cash Assets.* Talbot J. Wieczorek and Katelyn A. Cook appeared on behalf of Denise L. Schipke-Smeenk; John W. Burke and Kimberly S. Pehrson appeared on behalf of Ryan Smeenk. The Court having reviewed all the pleadings, files, and records herein, and having heard and considered the arguments of counsel, it is hereby:

ORDERED that the *Motion for Partial Summary Judgment* is granted as the record does not reflect any genuine issue of material fact related to the validity of the *Agreement to Execute Mutual Wills* (the "*Agreement*") or its breach. However, in accordance with this Court's *Memorandum of Decision on Motion for Partial Summary Judgment* (filed 10/19/22), which is incorporated herein by reference, the doctrine of res judicata bars Denise L. Schipke-Smeenk from attempting to further litigate this or any claim or issue arising out of the *Agreement*, and therefore, Denise L. Schipke-Smeenk's claim for breach of contract is denied.

IT IS FURTHER ORDERED that the *Petition to Direct Personal Representative to Distribute Cash Assets* shall be held in abeyance pending further instruction or Order of the

Court.

11/14/2022 1:32:02 PM

Attest:
Adams, Denise
Clerk/Deputy

BY THE COURT:

Honorable Michael W. Day
Fourth Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF BUTTE	)	FOURTH JUDICIAL CIRCUIT
	)	File No: 09PRO19-000013
In the Matter of the Estate of NEIL WILLIAM SMEENK,	)	MEMORANDUM OF DECISION ON MOTION FOR PARTIAL SUMMARY JUDGMENT
Deceased.	)	

On October 13, 2022, a Motions Hearing was held before the Honorable Michael W. Day on a Motion for Partial Summary Judgment. On September 15, 2022, Denise L. Schipke-Smeenk ("Denise"), individually and as personal representative of the Estate of Neil William Smeenk by and through Talbot J. Wieczorek and Katelyn A. Cook of Gunderson, Palmer, Nelson & Ashmore, LLP, her attorneys, according to SDCL § 15-6-56 filed a Motion for Partial Summary Judgment. On September 29, 2022 Ryan Smeenk, by and through his attorneys John W. Burke, and Kimberly S. Pehrson filed a response. Subsequently both parties filed additional responsive briefs. Accordingly, this Court having heard arguments of Counsel, and having considered the briefs from both parties, with good cause showing, issues its Memorandum of Decision.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background of this case is very familiar to this Court. Denise Schipke-Smeenk's Motion for Partial Summary Judgment is the most recent installment in lengthy proceedings between Denise and Ryan Smeenk regarding the proper distribution of Neil Smeenk's Estate. This Court witnessed the dispute as it ran its course, beginning with a bench trial before this Court and ending with an appeal to the South Dakota Supreme Court. Ultimately, the Supreme Court held that Denise's alleged creditor claim was sufficiently presented under SDCL Chapter 29A-3. *In re Estate of Smeenk*, 2022 S.D. 41, ¶ 41. However, and dispositive of Denise's Motion, the Supreme Court upheld the rejection of Denise's claim on the merits. *Id.* ¶¶ 1, 12, 41. In the Supreme Court's words, this Court "properly determined [that] Denise failed to allege or present

evidence of an essential element for specific performance, the lack of an adequate remedy at law[.]" *Id.* ¶ 40. While the Supreme Court ultimately determined that Denise is not entitled to specific performance of the Agreement because she has an adequate remedy at law, it did find that her Motion for Approval of Claim was both timely and appropriately presented. Therefore, before dealing with any damages resulting from the breach, Denise files her Motion for Partial Summary Judgment for the limited purpose of receiving a finding from this Court that Neil breached the Agreement.

STANDARD OF REVIEW

A grant of summary judgment is proper if the pleadings, depositions, answers and 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); *Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶¶ 8–9, 817 N.W.2d 395, 398–99. Summary judgment is not the proper method to dispose of factual questions. *Id.* This Court determines whether summary judgment is proper by reviewing whether the moving party has "clearly demonstrate[ed] an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343. "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the non-moving party'." *SD State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, ¶ 9, 616 N.W.2d 397, 400–01 (quoting *Weiss v. Van Norman*, 1997 S.D. 40, ¶ 11, n.2, 562 N.W.2d 113, 116 (internal citations omitted)) (emphasis added).

"All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Tolle v. Lev*, 2011 S.D. 65, ¶ 11, 804 N.W.2d 440, 444. "Yet, the party challenging summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Id.* Summary judgment is an extreme remedy, [and] is not intended as a substitute for a trial." *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762. "Summary judgment [] should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy." *Berbos v. Krage*, 2008 S.D. 68, 15, 754 N.W.2d 432, 436 (quoting *Richard v. Lenz*, 539 N.W.2d 80,83 (S.D. 1995). "If undisputed facts fail to establish each required element

in a cause of action, summary judgment is proper." *McKie v. Huntley*, 2000 S.D. 160, ¶ 17 (citing *Groseth Int'l Inc. v. Tenneco Inc.*, 410 N.W.2d 159, 169 (S.D. 1987)).

OPINION

A breach of contract results if there is "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Construction, Inc. v. South Dakota Department of Transportation*, 793 N.W.2d 36, 43 (S.D. 2010) (citing *Guthmiller v. Deloitte & Touche, L.L.P.*, 699 N. W. 2d 493, 498 (S.D. 2005)). "The existence of a valid contract is an issue of law to be determined by the court." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 22, 714 N.W.2d 884, 892 (citing *Werner v. Norwest Bank South Dakota, N.A.*, 499 N.W.2d 138, 141 (S.D.1993) (citing *Mid—America Mktg. Corp. v. Dakota Indus.*, 289 N.W.2d 797 (S.D.1980))). A South Dakota statute specifically recognizes the right of parties to enter into contracts not to revoke their wills. *See* SDCL § 29A- 2-514; *see also Matter of Estate of Green*, 516 N. W.2d 326, 329 (S.D. 1994) (superseded by statute on other grounds). In this case, the 2017 Agreement is a valid and binding contract. Thus, as a matter of law, the first element of Denise's breach of contract claim is established as a valid and enforceable contract clearly existed.

Whether a contract has been breached is a question of fact. *Weitzel*, 2006 S.D. 45, ¶ 31, (citing *Rindal v. Sohler*, 2003 SD 24, ¶ 13, 658 N.W.2d 769, 772 (citing *Moe v. John Deere Co.*, 516 N. W. 2d 332, 335 (S.D. 1994); *C & W Enterprises v. City of sioux Falls*, 2001 SD 132, ¶ 19, 635 N. W. 2d 752, 758; *Harms v. North land Ford Dealers*, 1999 SD 143, ¶ 21, 602 N. W. 2d 58, 63; *Swiden Appliance v. Nat'1. Bank ofS.D.*, 357 N. W. 2d 271, 277 (S.D. 1984))). Here, the Agreement provided the following:

> The parties agree not to revoke or to amend the Last Wills which each party has executed contemporaneously with and in reliance upon this Agreement without the express written consent of the other party.

SUMF ¶ 3. There is no dispute that Neil executed a will in 2019. SUMF ¶ 4. There is no dispute that Denise did not consent to the execution of the 2019 Will and did not have knowledge of it. *Id.* Therefore, by executing the 2019 Will, Neil breached this provision of the Agreement. Therefore, because there is no genuine dispute of material fact as to Neil's breach of the Agreement, Denise is entitled to summary judgment as a matter of law. This becoming the ruling of the Court we now turn to whether res judicata bars Denise from seeking any remedy for Neil's breach of contract.

Res Judicata is the legal principle that prevents a party from re-litigating a claim or issue that a judicial decision has settled. *See Res Judicata Black's Law Dictionary* (11th ed. 2019). The

doctrine's roots are ancient, and its purpose well- established: "[A] person should not be twice vexed for the same cause[.]" *Healy Ranch, Inc. v. Healy [Healy II]*, 2022 S.D. 43, ¶ 58. Appropriate application of the doctrine is critical because it prevents costly and repetitive lawsuits, conserves judicial resources, and encourages reliance on judicial decisions by providing finality. *See Brown v. Felson*, 442 U.S. 127, 131 (1979) (Res judicata serves to "free [] the courts to resolve other disputes."). The legal principle of res judicata has two distinct branches: claim preclusion and issue preclusion. *Healy II*, 2022 S.D. 43, ¶ 40. Claim preclusion bars not only "a claim ... actually litigated" but also claims "*which could have been properly raised.*" *Id.* (emphasis in original). On the other hand, issue preclusion forecloses "re-litigation of a matter that has been litigated and decided." *Id.* The following factors are often used to guide a decision on the applicability of the doctrine:

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

Id.

ISSUES

1. ***Is the breach of contract claim Denise wishes to litigate in this Motion identical to the previously adjudicated claim?***

The first element—i.e., that the claims be identical—is established. As applied to claim preclusion, the Supreme Court has explained that "claim identity" is determined by whether a litigant is "attempt[ing] to relitigate a prior determined cause of action." *Healy II*, 2022 S.D. 43, ¶ 44 (emphasis in original). This requires examining 'whether the wrong sought to be redressed is the same in both actions." *Healy II*, 2022 S.D. 43, ¶ 44; *Clay v. Weber*, 2007 S.D. 45, ¶ 13, 733 N.W. 2d 278, 284. It is irrefutable that the wrong to be redressed by Denise's Motion—i.e., Neil's alleged breach of contract—is identical to the claim that this Court previously considered. For over two years, Denise has aggressively litigated her breach of contract claim, not only before this Court but also before the South Dakota Supreme Court. *In re Estate of Smeenk*, 2022 S.D. 41, ¶ 7. In its opinion, the Supreme Court described both Denise's cause of action and this Court's ultimate holding over the same as follows:

> The court received evidence and arguments from the parties on the merits of Denise's claim for specific performance as a remedy for Neil's alleged breach of the

> Agreement. The court then made a merits-based determination that Denise was not entitled to specific performance because Denise failed to show an adequate remedy at law.

Id. at ¶ 12.

Denise now attempts to retool her previously litigated breach of contract claim as an action for monetary damages. She contends that the Supreme Court's decision only precludes the equitable remedy of specific performance, leaving her free to come back to this Court and pursue an action at law for monetary damages. For purposes of claim preclusion, however, it makes no difference that Denise elected not to pursue the possibility of monetary damages at the previous trial. The fact that a party fails to assert an alternative claim for relief "is not an impediment to claim preclusion" when "it would have been appropriate for [the party] to [assert the theories together] rather than later through piecemeal litigation." *Healy II*, 2022 S.D. 43, ¶ 50, n.11 (citing SDCL 15-6-8(a) and SDCL 15-6-8(e)). It has long been held that "[i]f the claims arose out of a single act or dispute, and one claim has been brought to a final judgment, then all other claims arising out of that same act or dispute are barred." *Farmer v. S.D. Dep't of Revenue & Regul.*, 781 N.W. 2d 655, 660 (S.D. 2010). "This is true regardless of whether there were different legal theories asserted or different forms of relief requested in a subsequent action." *Id.* This concept has also been reaffirmed by the South Dakota Supreme Court in *Healy II* and the Eighth Circuit Court of Appeals (applying South Dakota law) in *Healy III*. *Healy II*, 2022 S.D. 43, ¶ 46; *Healy v. Fox [Healy III]*, 46 F.4th 739 (8th Cir. 2022).

As the Eighth Circuit recently observed, for claim preclusion, the 'two actions do not require absolutely identical proof...South Dakota law requires only that the actions seek to redress the same wrong, not that they involve the same legal theories." *Healy III*, 46 F.4th at ¶ 9. Therefore, it is well-established that South Dakota's res judicata doctrine bars "all grounds for recovery...that were previously available[.]" *Healy II*, 2022 S.D. 43, ¶ 44, n.9. Nothing prevented Denise from requesting monetary damages when she came before this Court. In fact, throughout the entirety of her *Brief in Support of Motion for Approval and Payment of Claim*, filed on July 9, 2020, Denise argues that the only remedy she is seeking for the breach of contract is specific performance. At no time in that brief or during the trial before this Court does Denise seek or argue for monetary damages. She also failed to allege this remedy in the alternative at the original trial and other fillings. The rules of civil procedure unambiguously allowed her to seek equity and money

damages in the alternative. *See* SDCL 15-6-8(a) ("Relief in the alternative or of several different types may be demanded."). Rather than attempting to prove both forms of relief in the original action, Denise made the strategic decision to pursue only the equitable theory. *See In re Estate of Smeenk*, 2022 S.D. 41, ¶ 41.

Denise does not explain her failure to assert monetary damage in the alternative while she had the chance. When parties fail to raise a theory as part of a legal strategy timely, they cannot be saved from the preclusive effects of res judicata. *Id.* (barring claim on res judicata ground when the only reason for the delay was strategic). The first element—i.e., the identity of the claim—is met.

2. ***Was there a judgment on the merits in the previous action?***

The second element requires a final judgment on the merits. *Healy II*, 2022 S.D. 43, ¶ 51. To satisfy this element, the prior judgment must be "one based on legal rights rather than matters of procedure and jurisdiction." *Id.* According to the United States Supreme Court, a judgment is considered on the merits when it is "based on…a failure to prove substantive allegations of fact." *Id.* ¶ 53 (quoting *United States v. Or. Lumber Co.*, 260 U.S. 290, 300-01, 43 S. Ct. 100, 103, 67 L. Ed. 261 (1922)).

There is no question that this matter was litigated to a final judgment. Because this Court's February 5, 2021, Order resolved all issues related to Denise's creditor claim, it was a final judgment as contemplated by SDCL 15-26A-3. *See In re Estate of Geier*, 2012 S.D. 2, 809 N.W. 2d 355. Not only did both parties file appellate briefs certifying as much; the Supreme Court accepted the finality of the judgment by entertaining Denise's appeal without an SDCL 15- 6-54(b) certification.

There is equally no question that the judgment was on the merits. Denise attempted to prove her case at a bench trial, making this Court's ultimate holding certainly "one based on legal rights rather than matters of procedure and jurisdiction." *Healy II*, 2022 S.D. 43, ¶ 51. The dispute ended with the Supreme Court agreeing with this Court. More specifically, the Supreme Court noted that Denise had "failed to allege or present evidence of an essential element of specific performance, the lack of an adequate remedy at law." *Id.* ¶ 40. A judgment is considered on the merits even when it is "based on ... a failure to prove substantive allegations of fact." Id. ¶ 53 (quoting *United States v. Or. Lumber Co.*, 260 U.S. 290, 300-01, 43 S. Ct. 100, 103, 67 L. Ed. 261 (1922)). The second element—i.e., the existence of a final judgment on the merits—is met.

3. Are the parties the same in the two actions?

Denise has pursued her claim as the personal representative of the Estate and as an alleged creditor in both the previous action and the current one. Ryan, as an interested party, has resisted her in both. Therefore, it is undisputed that the parties are the same.

4. Did Denise have a full and fair opportunity to litigate the issues in the prior adjudication?

The final element of res judicata—namely, that the party against whom res judicata is sought had a full and fair opportunity to litigate the issue—is also satisfied. As the Supreme Court has recently instructed, "[f]or a claim to be barred by res judicata, the claim need not have been actually litigated at an earlier time. Rather, the parties only need to have been provided a fair opportunity to place their claims in the prior litigation." *Healy II*, 2022 S.D. 43, ¶ 56.

This Court finds that Denise had every opportunity to litigate her breach of contract claim—including a chance to put on proof of monetary damages—at the first trial. This Court is intimately familiar with Denise's efforts, given that it presided over those proceedings. Denise attended a bench trial, called witnesses, offered exhibits, made legal arguments, and proposed findings of fact and conclusions of law. She even testified to support her belief that she was entitled to specific performance of the Agreement. At that time, she exclusively sought an equitable remedy. She lost; She appealed; She was unsuccessful again. *See In re Estate of Smeenk*, 2022 S.D. 41, ¶ 41 (affirming this Court's ruling on Denise's failure to prove an element of her case).

The Supreme Court has made it clear that parties have been given a full and fair opportunity to litigate potential—but unasserted—theories if they do not pursue those theories despite having "every opportunity to do so." *Healy II*, 2022 S.D. 43, ¶ 57 (Holding that "Bret did not bring a quiet title action .... However, he had every opportunity to do so .... Therefore, element four [the full and fair opportunity element] is met.").

Denise had every opportunity to prove her case by: (i) asserting an entitlement to an equitable remedy; (ii) pursuing a right to monetary damages; or (iii) seeking both alternatively. She elected to pursue only an equitable remedy. She cannot now object to the results of her own legal strategy; res judicata forbids it. *State v. Miller*, 248 N.W.2d 874, 878 (S.D. 1976) ("A defendant cannot follow one course of strategy at the time of trial and, if that turns out to be unsatisfactory, complain that he should be discharged or given a new trial."); *Sharpe v. Dept. of Transp.*, 505 S.E.2d 473, 475 (1998) ("A party cannot complain of error that [his] own legal

strategy, trial procedure, or conduct aided in causing."). This Court finds that the fourth and final element of res judicata has been met. This Court **GRANTS** Denise's Motion for Partial Summary Judgment; however, this Court finds that res judicata bars Denise from seeking monetary damages on this breach of contract action.

CONCLUSION

After considering all the briefs and arguments of counsel, Denise's Motion for Partial Summary Judgment is **GRANTED**, to the extent that this Court finds, as a matter of law, that there was a breach of contract of the 2017 Agreement; however, Denise failed to seek monetary damages at the original trial thus being barred by res judicata from now coming before this Court again and seeking monetary damages.

Dated this 18th day of October, 2022.

BY THE COURT:

Michael. W. Day
Presiding Circuit Court Judge

ATTEST:
ALANA JENSEN
Clerk of Courts

By:

STATE OF SOUTH DAKOTA)SS COUNTY OF BUTTE	)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
In the Matter of the Estate of **NEIL WILLIAM SMEENK,** Deceased.	)	09PRO19-000013 **ORDER DENYING MOTION FOR APPROVAL AND PAYMENT OF CLAIM**

The above-captioned matter came before the Court on December 3, 2020 for an evidentiary hearing on the *Motion for Approval and Payment of Claim* filed by Personal Representative Denise L. Schipke-Smeenk. Talbot J. Wieczorek appeared on behalf of Denise L. Schipke-Smeenk; John W. Burke and Kimberly S. Pehrson appeared on behalf of Ryan Smeenk. The Court having listened to and reviewed the testimony and evidence presented, having reviewed the parties' submissions, and having considered the arguments of counsel, it is hereby:

ORDERED that, in accordance with the Court's *Findings of Fact and Conclusions of Law* entered on February 2, 2021, the *Motion for Approval and Payment of Claim* is DENIED.

BY THE COURT:

Signed: 2/5/2021 9:53:52 AM

Honorable Mike Day
Fourth Circuit Court Judge

Attest:
Schmoker, Laura
Clerk/Deputy

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

In the Matter of the Estate of	09PRO19-000013
NEIL WILLIAM SMEENK,	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
Deceased.	

On December 3, 2020, a Motions Hearing was held before the Honorable Judge Michael W. Day on Personal Representative Denise Smeenk's Motion to Allow Claim and Ryan Smeenk's Objection to Approval of the Claim. Denise Smeenk appeared, represented by Talbot Wieczorek of Gunderson Palmer Nelson & Ashmore, LLP. Ryan Smeenk appeared, represented by John Burke and Kimberly Pehrson of Thomas Braun Bernard & Burke, LLP. The parties filed post hearing submissions. This Court having considered the testimony, evidence, briefs and post hearing submissions from both parties, with good cause showing, now adopts and enters these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Any Finding of Fact more appropriately labeled as a Conclusion of Law, or vice versa, is to be considered as such.

2. This Court's previous Findings of Fact dated November 25, 2019 are hereby incorporated in these Findings of Fact as if stated here in full.

3. This Court incorporates the entirely of the testimony and evidence admitted during the hearing held on December 3, 3030, as well as the prior submission of the parties. By agreement of the parties, this Court further relies, as appropriate, upon the testimony and evidence admitted at the earlier evidentiary held on October 31, 2019.

a. SDCL Chap. 29A-3 Nonclaim Statutes

4. The Estate of Neil Smeenk's primary asset is the proceeds from a contract for deed whereby Neil sold his family ranch. In conjunction with the parties' execution of the Agreement to Execute Mutual Wills in 2017, Neil signed an Assignment of Contract for Deed wherein he assigned directly to his wife, Denise Smeenk, the right to one-half of the proceeds he was receiving from the sale of his family's ranch. Therefore, regardless of the outcome of this dispute, Denise will receive approximately half of their marital property.

5. Denise Smeenk is a creditor of the Estate pursuant to her breach of contract claim based upon the 2017 Agreement to Execute Mutual Wills.

6. By order of this Court, Denise also serves as Personal Representative of the Estate. In her capacity as Personal Representative, Denise had knowledge of her own claim as a creditor, making her a known creditor of the Estate.

7. Following her appointment as Personal Representative on December 9, 2019, Denise began sending written notices to known creditors and publishing notice to unknown creditors.

8. On December 12, 2019, Denise sent the Department of Social Services (hereafter "DSS") a notice of her appointment as Personal Representative. This notice informed DSS to bring all claims against Neil's Estate within four months of her appointment or sixty days after the mailing or other delivery of the written notice, whichever was later. In this Notice, pursuant to her duties as Personal Representative, Denise advised DSS that if it failed to bring its claim within that period, the claim would be forever barred. Four months from December 12, 2019 was April 12, 2020. As of that date, the statute of repose in SDCL 29A-3-803 ran as to DSS's creditor's claims.

9. Also on December 12, 2019, Personal Representative Denise signed another notice informing unknown creditors "to file their claims within four months after the date of the first publication of this notice" or be forever barred. She published the notice in the Black Hills Pioneer[1] beginning on December 16, 2019. Four months from December 16, 2019 was April 16, 2020. Therefore, unknown creditors were required to present their claims to the Estate on or before that date or "be forever barred."

10. Denise's Notice to DSS, Notice to Unknown Creditors, and Affidavit of Publication are filed with this Court. This Court has accepted these notices and will rely upon them if creditors who have been properly notified attempt to bring untimely claims against Neil's Estate.

[1] The Black Hills Pioneer is the legal notice newspaper for Butte County.

11. Personal Representative Denise did not send written notice to herself, a known creditor of the Estate, pursuant to SDCL 29A-3-801(b). Rather, on April 8, 2020, Denise moved this Court to approve her breach of contract claim under SDCL 29A-3-713. SDCL 29A-3-713 sets forth the procedure a Personal Representative must follow when she has a substantial conflict of interest. In her Motion, Denise specifically states she "moves this Court for the Payment of a Claim..." She submitted this Motion in her capacity as Personal Representative.

12. Consideration of Denise's Motion for Approval of Claim requires this Court to determine whether Denise, in her capacity as a creditor to the Estate, timely and properly presented her creditor's claim.

13. Denise testified that she knew about her claim the day that Neil passed away—June 14, 2019.

14. Apart from her April 8, 2020 Motion for Approval of Claim, Denise did not submit any document to present her creditor's claim between December 9, 2019 and the April 9, 2020 deadline for known creditor claims or the April 16, 2020 deadline for unknown creditor claims.

b. Equity

15. Before he committed suicide in June 2019, Neil's marriage to Denise was severely strained. This was especially true in the later years of their relationship. Neil battled with substance abuse and depression, which caused Denise extreme frustration.

16. In the months leading up to his death, Neil discussed his depression with Denise and others. On occasion, Neil mentioned that he wanted to take his own life.

17. By March 2019, Neil's and Denise's marriage had deteriorated to such a degree that Neil moved out of the marital home. In a subsequent letter, dated March 22, 2019, Denise acknowledged that she knew Neil considered their marriage over.

18. From March 2019 until he took his life in June, Neil moved from house to house, relying on relatives and friends to provide him with a place to stay. He did not move back in with Denise. At one point, he stayed with his daughter, Brandy Mooney. At other times, he stayed with his son, Ryan Smeenk.

19. While Neil was staying with Brandy, he expressed his desire to divorce Denise and stated that he intended to change his Will "so that it would be better for Ryan and [her]." After Neil told Brandy that he desired to get divorced, Brandy considered having Neil meet with an attorney that Brandy had used in the past. However, given that Brandy's lawyer practiced a considerable distance from Belle Fourche, Brandy recommended that Neil find a closer attorney. Neil then sought assistance from his brother, Stephen Smeenk. Stephen directed him to the Lynn Jackson Law Firm. Neil also asked Ryan, who then helped him as well.

20. In early April 2019, Neil met with Lynn Jackson attorney Drew Skjoldal regarding estate planning and then met with Lynn Jackson attorney Jeffery D. Collins regarding getting a divorce. After Neil retained Mr. Collins to represent him for the purpose of the divorce, Mr. Collins wrote to Denise on April 8, 2019 to advise that he was representing Neil regarding their "recent separation and mutual decision to end [their] marriage." He also requested information to assist with equitable division of the martial assets. According to Mr. Collins, he referred to the divorce as a "mutual decision" in his letter because that was his understanding after conferring with Neil. Denise testified that Neil told her about his decision to hire a divorce attorney prior to receiving Mr. Collins' letter. Around that time, on April 12, 2019, Denise wrote to Neil. Her letter recounted her perception of Neil's emotional struggle with their separation and expressed that Neil's decision to seek legal counsel meant that he had no interest in reconciliation.[2]

21. On April 19, 2019, Neil went to his lawyer to execute certain legal documents. Ryan accompanied him. In the morning, Neil signed the 2019 Will, which explicitly disinherited Denise. In the afternoon, Neil met with Mr. Collins and, Mr. Collins issued a divorce Complaint against Denise. Denise admitted service of the Summons and Complaint on April 25, 2019, thereby commencing the divorce action.

22. Neil's pending divorce is strong evidence of his intent to disinherit her. However, nothing could communicate his testamentary intent more than the language of his 2019 Will, in which he declares he "wish[ed] for Denise Schipke-Smeenk to receive the least amount of my estate as is allowable by South Dakota law." Neil was adamant about preventing Denise from inheriting his assets. In fact, while discussing his estate plan with his attorney, Neil slammed his hand down on the table and declared, "I want my kids to have what's mine."

[2] Her April 12, 2019 letter specifically stated: "[O]nce you decided to go to a lawyer that pretty much says to me that you have no desire to work on this relationship."

23. As summer 2019 approached, the situation between Neil and Denise did not improve. By that time, most of their family—including Ryan Smeenk (Neil's son), Brandy Mooney (Neil's daughter), Kurtis Mooney (Neil's grandson), and Stephen Smeenk (Neil's brother)—knew that divorce was imminent. Sadly, before their divorce was finalized, Neil's situation overwhelmed him, and he committed suicide.

24. Following Neil's death, the relationship between Denise and Ryan went from generally disagreeable to openly hostile.

CONCLUSIONS OF LAW

a. SDCL Chap. 29A-3 Nonclaim Statutes

1. Generally, the manner of notice a Personal Representative is required to give to a decedent's creditors is dictated by whether they are (i) unknown creditors; or (ii) creditors that are "known or reasonably ascertainable" to the Personal Representative. SDCL 29A-3-801(a).

2. With regard to unknown creditors, the Personal Representative may publish notice in a legal newspaper in the proper county for three consecutive weeks. Notice using this method runs from "the date of the first publication of notice[,]" meaning that creditors must present their claims within four months of that date. SDCL 29A-3-801(a).

3. If the creditors are "known or reasonably ascertainable," however, "a personal representative shall give written notice by mail or other delivery...informing the creditor to present the claim within four months after the date of the personal representative's appointment or within sixty days after the mailing or other delivery of the written notice, whichever is later, or be forever barred." SDCL 29A-3-801(b).

4. "A creditor is known if the personal representative is aware that the creditor has demanded payment from the decedent or the estate or if the personal representative is otherwise aware of the decedent's obligation." SDCL 29A-3-801(d).

5. Because Denise is both Personal Representative of Neil's Estate and a holder of a creditor claim, Creditor Denise is a creditor known to herself.

6. Notice given under SDCL 29A-3-801(b) triggers the nonclaim clock for known creditors. In her capacity as Personal Representative, Denise never mailed or

delivered written notice to herself as a creditor[3] as she was required to under SDCL 29A-3-801(b).

7. At the absolute latest, Denise, in her capacity as a creditor, had actual notice of her breach of contract claim, including the requirements associated with presenting her claim, on December 12, 2019 when she sent her notice to DSS and signed the general notice to unknown creditors.

8. Both notices warn the creditors that failure to timely assert their claims means they will be "forever barred." Denise acknowledged this when she signed the general notice to unknown creditors under oath.

9. "The question whether to apply principles of judicial estoppel is a mixed question of law and fact, which [the South Dakota Supreme Court] review[s] de novo." *Wyman v. Bruckner*, 2018 17, ¶ 12, 908 N.W.2d 170, 175.

10. "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." *Wyman*, 2018 S.D. 17, ¶ 11, 908 N.W.2d at 175.

11. "Courts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]" *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001) (quotations omitted). However, generally, four elements should be present for judicial estoppel to apply: (1) The latter position must be clearly inconsistent with the earlier one; (2) The earlier position was judicially accepted, creating the risk of inconsistent legal determinations; (3) The party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped; and (4) The inconsistency must be about a matter of fact, not law. *Wyman*, 2018 S.D. 17, ¶¶ 11-12, 908 N.W.2d at 175.

12. Denise, in her capacity as a creditor, received actual notice of her claim against the Estate on December 12, 2019. Therefore, it would be inequitable to allow Denise in her capacity as Personal Representative to indefinitely extend the timeframe for presenting her claim by claiming lack of notice. This is especially true because Denise owes fiduciary duties to the Estate to maintain a clean record of all claims and remain faithful to the statutes in SDCL chap. 29A–3. *See* SDCL 29A-3-703 (providing that a personal representative assumes a duty to act in the best interests of the estate).

13. The first two elements of judicial estoppel—which require a judicially-accepted inconsistency—are met. There is no dispute that Creditor Denise knew that

[3] Although mailing to oneself or hand delivery to oneself seem absurd the statutory language is clear.

her contract claim existed. Denise testified that she first realized she had a claim well over a year ago—"[t]he day that [Neil] died." Nor is there any dispute that Denise knew the deadline for presenting known creditors' claims—she presented DSS with notice and signed a notice to unknown creditors on December 12, 2019, which was then subsequently published in the Black Hills Pioneer. This Court has acknowledged and adopted the existence of Creditor Denise's contract claim, her knowledge of the Estate's assets and liabilities, and her actual notice of the timeline for bringing creditor claims. Concluding that Creditor Denise did not have notice under SDCL 29A-3-801(b) while also imposing her notice on other creditors "create[s] the risk of inconsistent legal determinations." *Wyman*, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175.

14. The third element, unfair advantage, is also met. Personal Representative Denise cannot suspend triggering her own non-claim period by delaying sending written notice to herself without resulting inequity. Denise, in her capacity as Personal Representative, had absolute control over who received notice and when. *See* SDCL 29A-3-801(b). Absent judicial estoppel, this power could potentially allow her to extend her claim period well beyond the legislatively-prescribed four months. SDCL 29A-3-801(b) *(notice)*; SDCL 29A-3-803 *(limitations period)*.

15. Over a year has passed since Denise sent her notice to DSS and published notice to unknown creditors. Allowing her to side step a deadline, whether it be April 9, 2020 or April 16, 2020, that has already lapsed by at least nine months would render an inequitable result. If this Court were to rule to the contrary, such a decision would disregard the clear import of SDCL 29A-3-801.

16. Notwithstanding the fact that this Court is confined to the requirements outlined in SDCL 29A-3-801, Creditor Denise's claim against the Estate cannot be extended without frustrating the speedy and efficient settlement of estates that the nonclaim period exists to encourage. *See, e.g., 34 C.J.S. Executors & Administrators* § 540 (2020 update) (providing the various purposes for nonclaim limitation periods). Beyond that, and perhaps most importantly, if this Court were to allow Denise's creditor's claim to stand, it would allow her to derive an unfair advantage over other untimely creditors, resulting in inequity. *See In re Estate of Pina*, 443 N.W.2d 627, 631 (S.D. 1989) (preventing a personal representative from benefiting herself "at the expense of other creditors."). For these reasons, the third element—unfair advantage—is met. *See Wyman*, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175.

17. The fourth and final element—that the inconsistency be rooted in fact—is also satisfied. *See Wyman*, 2018 S.D. 17, ¶ 12, 908 N.W.2d at 175. At its heart, the crux of the issue before this Court is decided based on when Creditor Denise

had notice of her claim for purposes of starting the nonclaim clock. *See Spencer v. Estate of Spencer, 2008 S.D. 129, ¶ 16, 759 N.W.2d 539, 544.* While determining whether a triggering event is sufficient for accrual is a question of law, the question of "*when* accrual occurs is a question of fact[.]" *See, e.g., East Side Lutheran Church of Sioux Falls v. Next, Inc.*, 2014 S.D. 59, ¶ 11, 852 N.W.2d 434, 439 (emphasis in original). Knowledge and notice are questions of fact. *See, e.g., Schott v. S.D. Wheat Growers Ass'n*, 2017 S.D. 91, ¶ 14, N.W.2d 359, 362 (explaining that knowledge in assumption of the risk defenses is typically a question of fact.); *West Cent. Elec. Coop. v. James River Broadcasting Co.*, 393 N.W.2d 83, 87 (S.D. 1986) (holding, in the constructive notice context, that "[w]hether or not notice is given or received is a question of fact.) Because the final element of the *Wyman* test is met, judicial estoppel is appropriate.

18. This Court does not stand alone in its holding. Courts in other jurisdictions have prevented personal representatives/creditors from using notice statutes to their benefit.

19. This Court is particularly persuaded by the holding in *Mead v. Barton*, 885 N.W.2d 316, 318 (Mich. Ct. App. 2016) when analyzing notice requirements for individuals who are both personal representatives and creditors to estates. In *Mead*, the personal representative published a notice to creditors in a newspaper but failed to timely present her own creditor claim. When the personal representative took steps to distribute the settlement to herself, the other heirs objected on the basis that the time for her creditor claim had expired. The probate court agreed with the personal representative, holding that her claim was timely presented. On appeal, however, the Michigan Court of Appeals disagreed. *Id.* at 322. While the court was unwilling to require the personal representative to send notice to herself to start the clock, it recognized that a joint creditor/personal representative must be held to some deadline. As a result, the court held that the personal representative was bound to the four-month notice period she published to the other creditors months prior. *Id.* at 322–23. The court adopted this position, in part, because it feared another construction of the statute would permit the personal representative extra time to bring a creditor's claim. *Id.* at 322.

20. Courts in Missouri, Pennsylvania, and Kansas have engaged in similar statutory interpretation. *See Adams v. Braggs*, 739 S.W.2d 744, 745–47 (Mo. Ct. App. 1987) (holding that a personal representative that has a claim against the estate must file the claim "within six months after the first published notice of letters testamentary or of administration[.]"); *In re Cohen's Estate*, 364 A.2d 888, 891 (Pa. 1976) ("While the letter of the act does not cover the situation in the instant case, the spirit of the law required that [the personal

representative] give notice of her claim and her failure to do so bars her claim."); *In re Estate of Hoover*, 180 P. 275, 277 (Kan. 1919).

21. Because this Court has found that Denise's creditor's claim is known to herself as Personal Representative, she was required to bring her claim within four months of her appointment as Personal Representative—April 9, 2020. However, even if the deadline for unknown creditors applies to her claim, it would only have extended it for a short period of time—to April 16, 2020.

22. While it is true that Denise submitted her April 8, 2020 Motion for Approval and Payment of Claim before the deadline for known creditors, that document does not satisfy the stringent requirements in SDCL 29A-3-804. SDCL 29A-3-804 requires Denise to present her claim by either (1) delivering or mailing to the personal representative a written statement of claim indicating its basis, the name and address of the claimant, and the amount claimed; or (2) filing a written statement of the claim, in the form prescribed by rule, with the clerk of the court and mailing or delivering a copy thereof to the personal representative. SDCL 29A-3-804.

23. This Court notes that an "or" separates the choices in SDCL 29A-3-804(a)(1). Therefore, a claimant is required to make a selection between the two options presented. The South Dakota Supreme Court has stated that "the word 'or' . . . ordinarily joins a disjunctive list to communicate a choice between exclusive possibilities." *Buffalo Chip*, 2020 S.D. 63, ¶ 48, __ N.W.2d at __ , __(Kern, J., concurring). This concept is consistent with South Dakota Supreme Court precedent. On many occasions, the Supreme Court has declined to loosen statutory requirements or insert additional elements into statutes when the options are joined by "or." *See, e.g., In re Estate of Flaws (Flaws I)*, 2016 S.D. 61, ¶¶ 27, 28, 885 N.W.2d 580, 588 (interpreting SDCL 29A-2-114(c) that lists four methods by which a child could establish the identity of her father separated by "or" as an exclusive list); *State v. Armstrong*, 2020 S.D. 6, ¶ 17, 939 N.W.2d 9, 14 (interpreting the word "directly" in SDCL 22-22-45 as it applies to a disjunctive list and not recognizing options outside of the legislatively-provided list); *State v. Bosworth*, 2017 S.D. 43, ¶ 23, 899 N.W.2d 691, 697–98 (interpreting SDCL 22-11-28.1 as a list of "alternatives" and noting that it uses "or to cover two types of instruments" without recognizing a third option).

24. Even if such a Motion could be considered an adequate statement of claim, Denise did not present it as a claimant under SDCL 29A-3-804. Rather, she moved "for approval of payment of claim" under SDCL 29A-3-713 as the Personal Representative. Denise's failure to act in the proper capacity is significant. While some jurisdictions permit a creditor to substantially comply with the statutory requirements for presentation, they have also scrutinized

the capacity under which a joint personal representative/creditor acts. *See, e.g., In re Estate of Sheridan,* 117 P.3d 39, 40, 43 (Colo. App. 2004) ("[Personal Representative] Jarret filed two claims as a creditor of the estate." The items Jarret submitted do not "contain sufficient information to satisfy the most basic requirements of § 15–12–804.").

25. Personal Representative Denise's actual knowledge of her own claim does not excuse this requirement. If it did, creditors known to the Personal Representative would never be required to present their claims.

26. Denise's Motion for Approval of Payment of Claim, which she submitted as the Personal Representative under SDCL 29A-3-713, suggests that Denise, as a creditor, had already presented a claim for the Court to approve. However, a presentation of a creditors claim is a condition precedent to such a Motion. *See, e.g., Pasley v. American Underwriters, Inc.,* 433 N.E.2d 838, 840 (Ind. Ct. App. 1982) (holding that the nonclaim presentation requirements were a condition precedent that, if not satisfied, "preclude[d] recovery when the condition is not met.").

27. In addition to the aforementioned, Denise's Motion also failed to include information expressly required by SDCL 29A-3-804, including the amount of her claim. The presentation statute is clear on this point, and mandatory. "If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the nature of the security shall be described. Failure to describe correctly the nature of the security or uncertainty, or the due date of a claim not yet due does not invalidate the presentation[.]" SDCL 29A-3-804 (emphasis added). In her Motion, Denise did not fail "to describe correctly" the value of her claim. Rather, she failed to describe it at all. Consequently, the safeguard in SDCL 29A-3-804 is inapplicable.

28. Recognizing that Denise, as a creditor, failed to comply with the plain language of SDCL 29A-3-804(a)(1), Denise asks this Court to turn to excerpts from varying other documents to determine the nature of her claim.[4] None of these documents state the uncertainty of Denise's claim or even attempt to discuss its value.

29. Importantly, even if these documents, when read together, did discuss the uncertainty of Denise's claim as a creditor, SDCL 29A-3-804(a)(1) expressly

[4] In addition to her Motion, Denise relies on the following documents: (1) Denise's July 12, 2019 Petition for Formal Probate; (2) Denise's October 16, 2019 Brief in Support of Denise's Petition; (3) A Transcript from the October 31, 2019 Evidentiary Hearing; and (4) A November 25, 2019 Letter from Talbot Wieczorek to Drew Skjoldal.

requires that the creditor deliver the document to the Personal Representative. Denise submitted these documents prior to her appointment as Personal Representative. Documents submitted before a personal representative was appointed cannot constitute presentation to the Personal Representative. Consequently, Creditor Denise did not satisfy the requirements of the first presentation option in SDCL 29A-3-804(a)(1).

30. Denise's second presentation option as a claimant was to file a written statement of the claim "in the form prescribed by rule, with the clerk of the court and mail or deliver a copy thereof to the Personal Representative." SDCL 29A-3-804(a)(1) (referring to Form 3-804 adopted by the South Dakota Supreme Court). Much of the information required by the form is absent from Denise's Motion. Consequently, Denise's Motion also fails to satisfy the requirements of the second presentation option in 29A-3-804(a)(1).

31. The South Dakota Supreme Court has strictly construed the statutes in SDCL Chapter 29A–3 routinely. In 2018, for instance, the Supreme Court strictly interpreted SDCL 29A-3-803, the statute immediately preceding SDCL 29A-3-804 involving the same general subject matter. *See Huston*, 2018 S.D. 73, ¶ 28, 919 N.W.2d at 365 (strictly construing SDCL 29A-3-803 and forever barring all untimely claims).

32. This Court finds that Creditor Denise did not timely and properly present a creditor's claim on or before April 9, 2020 or April 16, 2020. As noted previously, the nonclaim limitations period within SDCL Chap. 29A–3 is strictly enforced. *Huston*, 2018 S.D. 73, ¶ 28, 919 N.W.2d at 365 (forever barring all untimely claims under SDCL 29A-3-803).

33. "South Dakota's nonclaim statute applies to *all* claims 'which arose before the death of the decedent.'" *Huston*, 2018 S.D. 73, ¶ 19, 919 N.W.2d at 363 (quoting SDCL 29A-3-803(a)) (emphasis in original). This includes contingent claims arising "out of an agreement made during [the decedent's] lifetime" even though a decedent "could have modified his will to 'make things right' at any time while he was still alive." *Id.* 2018 S.D. 73, ¶ 23, 919 N.W.2d at 364.

34. Creditor Denise's breach of contract claim falls within the meaning of "all claims" under SDCL 29A-3-803. Almost nine months have passed since Personal Representative Denise's deadline for creditor claims. The same is true for the date of publication to unknown creditors. Because Creditor Denise's four-month period has long passed, her claim is barred.

b. Equity

1. Denise requests specific performance, a remedy that lies in equity. *Crawford*

v. Carter, 52 N.W.2d 302, 322 (S.D. 1952).

2. Specific performance is an extraordinary remedy. *Crawford*, 52 N.W.2d at 322. Extraordinary remedies "should never be granted, except where the evidence is clear and convincing." *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994).

3. To be entitled to specific performance, Denise is required to establish, by clear and convincing evidence, that she has no adequate legal remedy. *See Rindal v. Sohler*, 2003 S.D. 24, ¶ 12, 658 N.W.2d 769, 772 ("Specific performance is an equitable remedy, and an essential element of equitable relief is the lack of an adequate remedy at law."); *Williams v. Brinkman*, 2016 S.D. 50, ¶ 22, n. 11, 883 N.W.2d 74, 84, n. 11.

4. Denise has failed to establish that she has an inadequate remedy at law. As the movant, Denise carried the burden of proving that element. *See Brinkman*, 2016 S.D. 50, ¶ 22, n. 11, 883 N.W.2d at 84, n. 11 (inadequate legal remedy is an essential element). Her failure to meet this burden, or even raise the issue, is fatal. Inadequacy of a movant's legal remedy "is the very foundation for the jurisdiction to decree specific performance." *Leisch v. Baer*, 24 S.D. 184, 123 N.W.719 (1909). Thus, her equitable remedy fails from the onset.

5. Even if this Court assumed that Denise has proven that any legal remedy would be inadequate, specific performance is nevertheless inappropriate. Denise focused on the underlying validity of the 2017 Agreement at the hearing, but the question before this Court is not necessarily validity, but rather, enforceability. To specifically enforce the 2017 Agreement, such an action must be "just and reasonable" as to Neil.

6. SDCL 21-9-3 states that specific performance cannot be enforced against a party to a contract in any of the following cases:

> (1) If he has not received an adequate consideration for the contract;
> **(2) If it is not to him, just and reasonable;**
> (3) If his assent was obtained by misrepresentation, concealment, circumvention, or unfair practice of any party, to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;
> (4) If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within

> the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.

(Emphasis added).

7. Neil did everything he could to disinherit Denise and then divorce her. His intent is reflected by (i) his 2019 Will in which he declared that Denise receive the smallest possible amount legally permitted; (ii) the lengths he took to divorce Denise; and (iii) the numerous statements Neil made to others about his intent. By spring 2019, Neil's and Denise's marriage had almost certainly unraveled beyond repair.

8. Importantly, Denise admitted that if Neil had approached her, she might have consented to Neil changing his estate plan in light of their imminent divorce.[5] In fact, on cross-examination, she testified that she "wouldn't have had any objection to" Neil changing his Will in connection with the divorce. If Neil had survived, Neil and Denise would have equitably divided the marital estate pursuant to their divorce—or, as Denise testified, they would have "split the estate." This Court attributes significance to Denise's admission concerning the appropriateness of releasing the parties from their obligations under the 2017 Wills. Denise presumably made these admissions because her relationship with Neil had deteriorated, therefore frustrating the purpose of the Agreement to Execute Mutual Wills. It is not unlikely that the change in circumstance between them was so fundamental that it may have even destroyed the consideration upon which the original agreement rested—a defect that permits recession. *See Talley v. Talley*, 1997 S.D. 88, ¶ 42, 566 N.W.2d 846, 853–54 (allowing rescission "for breaches which are substantial and relate to a material part of the contract.")

9. In weighing the equities to assess what is "just and reasonable," this Court must also contemplate the fact that regardless of her creditor claim, Denise acknowledges that she will receive one-half of what Neil and Denise collectively held because she will be receiving half of the proceeds from the sale of Neil's family ranch pursuant to the Assignment of Contract for Deed. As a consequence of this assignment, Denise admits that, for all practical purposes, Neil's Estate consists of his right to the other half of the proceeds. Allowing Denise to inherit the other half of Neil's assets by awarding specific performance of the 2017 Agreement to Execute Mutual Wills would result in her inheriting nearly everything. Considering the turbulent circumstances surrounding their separation, this result would not be "just and equitable" as to Neil.

[5] Q: "You would have been open to him changing his will?" A: "Yes."

10. Notably, specific performance is not merely unjust and unreasonable as to Neil. It may also be unjust as to Denise. There is no dispute that if the 2017 Agreement is enforced, Denise would be legally obligated to provide for Neil's children in her own Will—meaning she could never change that document. Forcing Denise to provide for Ryan and Brandy as beneficiaries long into the future even though Denise and Ryan openly resent each other makes little sense indeed. This is particularly true considering that Denise's life might drastically change in ways this Court cannot realistically hypothesize. For instance, if Denise chooses to remarry, she may be required to disinherit her future husband or risk him taking his elective share, an action that would result in a breach of her contractual obligations.

11. In fashioning a just result in equity, this Court is afforded considerable discretion. *Donat v. Johnson*, 2015 S.D. 16, ¶ 32, 862 N.W.2d 122, 133 ("[A] trial court has broad discretion in fashioning an equitable remedy."). In exercising that discretion, this Court is mindful of the drastic change in Neil's and Denise's relationship between 2017 and 2019. Less than two years after they executed the 2017 documents, Neil had moved out, filed for divorced, and executed a new Will completely disinheriting Denise.

12. Finally, as the party requesting equitable relief, Denise has not only accepted a higher evidentiary burden; she has also opened the door to a broader discussion of equity. "Equity will not decree specific performance of a contract when it would work [an] injustice, and where...it is obvious that the contracting parties never expected or intended the results that have followed their action." *Watters v. Ryan*, 31 S.D. 536, 544, 141 N.W. 359, 363 (1913). When Neil and Denise went to their attorney in 2017 to finalize the Agreement to Execute Mutual Wills, neither of them intended for their relationship to struggle so significantly. It is therefore inequitable to specifically perform the 2017 Agreement to Execute Mutual Wills.

CONCLUSION

After considering of the foregoing, with good cause showing, the Motion for Approval and Payment of Claim is hereby **DENIED**.

Dated this 2nd day of February, 2021.

BY THE COURT:

Hon. Michael W. Day
Presiding Circuit Court Judge

ATTEST:

LAURA SCHMOKER

Laura Schmoker
Clerk of Court

BY:
Deputy Clerk of Court

FILED
FEB 02 2021
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

15

Appeal No. 28153

December 11, 2019

IN THE SUPREME COURT)
: SS
STATE OF SOUTH DAKOTA)

Present: Chief Justice David Gilbertson, Justices Janine M. Kern, Steven R. Jensen and Mark E. Salter

BRILEY W. PIPER,
Petitioner and Appellant,

vs.

DARRIN YOUNG, Warden of the South Dakota State Penitentiary,
Respondent and Appellee.

SLC 1498

J U D G M E N T

This Cause coming on to be heard on October 1, 2018, at a term of this Court at the Supreme Court Courtroom in the City of Sioux Falls, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Order of the Fourth Judicial Circuit Court, within and for Lawrence County, appealed from herein, be and the same is hereby affirmed,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

FILED
JAN 06 2020
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
DEC 11 2019
Clerk

Appeal No. 28588
Notice of Review No. 28597

October 9, 2019

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

Present: Acting Chief Justice Janine M. Kern and Justices Steven R. Jensen, Mark E. Salter, Circuit Court Judge Robert Gusinsky serving in the place of Chief Justice David Gilbertson who had deemed himself disqualified and Retired Justice Glen A. Severson.

LORETTA B. MEALY, Individually and as Personal Representative of the ESTATE OF TERRENCE L. MEALY, and INVESTMENT ENTERPRISES, INC.,
Plaintiffs and Appellants,

vs.

BRUCE PRINS and CORRINE PRINS, and PRAIRIE SKY GUEST & GAME RANCH, LLC,
Defendants and Appellees.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT 09 2019

Clerk

FILED
CINDY MAROHL
NOV 13 2019
Roberts County Clerk of Courts
Sisseton, SD

J U D G M E N T

This Cause coming on to be heard on January 8, 2019, at a term of this Court at the Supreme Court Courtroom in the City of Pierre, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment and Order of the Fifth Judicial Circuit Court, within and for Roberts County, appealed from herein, be and the same are hereby affirmed in part and reversed in part,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that no costs be taxed.

BY THE COURT:

Janine M. Kern, Acting Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

Appeal No. 29435

January 4, 2023

IN THE SUPREME COURT)
)SS
STATE OF SOUTH DAKOTA)

Present: Steven R. Jensen, Chief Justice, Justices Janine M. Kern, Mark E. Salter, Patricia J. DeVaney and Scott P. Myren.

TODD FUOSS,
Plaintiff and Appellee,

vs.

DAHLKE FAMILY LIMITED PARTNERSHIP AND RODNEY L. MANN,
Defendants and Appellants.

J U D G M E N T

STATE OF SOUTH DAKOTA
CIRCUIT COURT, JONES CO.
FILED
JAN 27 2023
Judy Feddersen Clerk
By_____Deputy

This Cause coming on to be heard on April 27, 2021, at a term of this Court at the Supreme Court Courtroom in the City of Pierre, State of South Dakota, upon the merits of the cause and upon oral argument of counsel, and the Court having advised thereon and filed its decision in writing, now, therefore,

IT IS CONSIDERED, ORDERED AND ADJUDGED that the Judgment and Order of the Sixth Judicial Circuit Court, within and for Jones County, appealed from herein, be and the same is hereby reversed,

AND IT IS FURTHER ORDERED AND ADJUDGED that this cause be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

AND IT IS FURTHER ORDERED AND ADJUDGED that Appellants have and recover of the Appellee costs and/or attorney fees on this appeal, taxed and allowed at Thirty and No/100 Dollars.

BY THE COURT:

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN 04 2023
Shirley A. Jameson-Fergel Clerk

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

Appeal No. 30194

In the
Supreme Court of the State of South Dakota

IN THE MATTER OF THE ESTATE OF NEIL WILLIAM SMEENK
DENISE L. SCHIPKE-SMEENK

Appellant

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

The Honorable Michael W. Day

Notice of Appeal filed December 12, 2022

REPLY BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK

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ARGUMENT

I. The circuit court erred in barring Denise's claim for money damages under the doctrine of res judicata.

The circuit court's ruling improperly barred Denise's claim for money damages under the doctrine of res judicata and should be overturned by this Court. The purpose of res judicata is to prevent a party from being "twice vexed" for the same cause stemming from a prior litigation or adjudication. *See Bank of Hoven v. Rausch*, 449 N.W.2d 263, 266 (S.D. 1989). Res judicata does not apply here—as is evidenced by the fact that none of Ryan's authority cited in support of his position is factually or procedurally on point. This is a case involving successive appeals *in the same case*, thus, there is no "prior adjudication" to give rise to a claim of res judicata. For these reasons, the circuit court's ruling should be overturned.

a. The authority cited by Ryan does not support his position.

Every piece of authority cited by Ryan in response to Denise's appellate brief is critically distinguishable from the case in front of this Court because every piece of authority specifically includes a separate, prior lawsuit. This is counter to what occurred in this case. Thus, none of the authority is on point—providing further support that res judicata is not applicable here because there was no "prior adjudication" of Denise's claim.[1]

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[1] *Evens v. Evens*, 971 N.W.2d 907 (S.D. 2022), reh'g denied (Mar. 16, 2022) (prior divorce case heard on appeal and fully disposed of); *Healy Ranch, Inc. v. Healy*, 2022 S.D. 43, 978 N.W.2d 786, reh'g denied (Sept. 19, 2022), (prior lawsuit filed against family); *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, 946 N.W.2d 1, (prior unappealed administrative decision); *Est. of Johnson by & through Johnson v. Weber*, 2017 S.D. 36, ¶ 39, 898 N.W.2d 718, 732 (asking Supreme Court of South Dakota to overturn judgment from prior lawsuit in federal court); *Matter of 2012 , 2013 & 2014 Tax Refund & Abatement Appeal of Hunt Companies, Inc.*, 2019 S.D. 26, ¶ 16, 927 N.W.2d 894, 898 (unappealed order from

After again heavily citing to *Healy II* (already discussed as being inapplicable in Denise's Appellant's Brief), Ryan then turns his argument to the Restatement (Second) of Judgments to argue that "both legal treatises and modern case law align with this Court's refusal to allow separate adjudications for different forms of relief." Appellee Br. pg. 10 (citing Restatement (Second) Judgments, § 25). However, a closer look at this particular authority makes clear that it is not as favorable as Ryan makes it seem.

Ryan cites to the underlying subpart of a certain comment to the Restatement to support his contention that res judicate applies here. However, in looking at the overarching comment for further context, it explains the historical approach to cases in law and equity whereby previously, when legal and equitable claims were separately administered, a plaintiff would have to choose between the two "sides" when bringing an action. Restatement (Second) of Judgments § 25 (1982)(i). This created logistical and legal difficulties due to the operation of merger and bar. *Id.* However, the treatise goes on to note:

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valuation court in prior tax appeal issue); *Piper v. Young*, 2019 S.D. 65, ¶ 25, 936 N.W.2d 793, 805 (two prior habeas attacks made by inmate); *Est. of Ducheneaux*, 2018 S.D. 26, ¶ 46, 909 N.W.2d 730, 745 (court actually found res judicata did not apply to bar claims); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 324, 99 S. Ct. 645, 648, 58 L. Ed. 2d 552 (1979) (dealt with a subsequent legal action brought by a new party) *Est. of Young v. Williams*, 810 F.2d 363, 364 (2d Cir. 1987) (filed a second, separate action in state court); *Falls Stamping & Welding Co. v. Int'l Union, United Auto. Workers, Aerospace & Agr. Implement Workers of Am., Region II*, 744 F.2d 521, 523 (6th Cir. 1984) (brought suit in federal court and then a subsequent lawsuit in state court years later); *Ennenga v. Starns*, 677 F.3d 766, 776 (7th Cir. 2012) (separate federal and state court lawsuits); *Lambert v. Conrad*, 536 F.2d 1183, 1184 (7th Cir. 1976) (separate, prior action for injunctive relief); *Clarke v. Redeker*, 406 F.2d 883, 884 (8th Cir. 1969) (separate, prior lawsuit); *Mirin v. State of Nev. ex rel. Pub. Serv. Comm'n*, 547 F.2d 91, 93 (9th Cir. 1976) (prior state and federal lawsuits); *Barkley v. Carter Cnty. State Bank*, 791 S.W.2d 906, 910 (Mo. Ct. App. 1990) (prior action filed three years earlier); *Jou v. Adalian*, 2016 WL 4582042, at *1 (D. Haw. Sept. 1, 2016) (prior lawsuit filed 7 years prior); *Wolf v. Anderson*, 422 N.W.2d 400, 401 (N.D. 1988) (prior, separate lawsuit involved).

> These [restrictive effects] are overcome when law and equity are "merged" or unified into the "one form of action" so that a pleader may and is expected to demand in a single action any and all remedies suited to the case. *The point is emphasized by the customary provision in modern rules or codes of procedure that, except where judgment is by default, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."* *See* Rule 54(c) of the Federal Rules of Civil Procedure.

Id. at §25, comment (i) (emphasis added). Thus, as this comment illustrates, a party no longer has to elect a certain remedy to pursue in the modern, unified system, and Rule 54(c) emphasizes this by ensuring that appropriate relief is rendered *even if the relief was not demanded in the pleadings. Id.*[2]

In fact, this is in line with the arguments made by Denise to the circuit court regarding the impact of Rule 54(c) on her claim as to why she did not "waive" her claim for money damages or otherwise elect any particular remedy. [3] Denise's initial claim requested the following, quite broad, prayer for relief: asking the circuit court to approve "disposition of the decedent's estate as provided in the 2017 Agreement." (APP 069). However, out of an abundance of caution, Denise then filed a subsequent claim which also further clarified a request for money damages, seeking the "present value" of the claim. (CR 840). After this, in *Smeenk I*, this Court found that Denise's claim was not barred by any of the statutory timelines alleged by Ryan. *Matter of Est. of Smeenk*, 2022 S.D. 41, 978 N.W.2d 383 at ¶ 31. Thus, in reviewing the record as it stands before the circuit court and this Court today, Denise has her first, broad motion for relief on file, as

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[2] South Dakota's Rule 54(c) language mirrors that cited by §25 of the Restatement. *See* SDCL § 15-6-54(c).[2]

[3] Denise also argued that Rule 8(f) supports this theory, stating "all pleadings shall be so construed as to do substantial justice."

well as an additional claim further clarifying the nature of the relief requested. Denise's requested remedies were not so narrow as Ryan might lead this Court to believe.

This premise is well illustrated in *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, where the parties were embroiled in litigation over a purchase agreement and accompanying contracts for the sale of a funeral home. 2006 S.D. 6, 709 N.W.2d 350. The circuit court found the plaintiff was not entitled to the remedy of specific performance because she had not plead or proved her entitlement to specific performance—instead, she had requested monetary damages. *Id.* at ¶ 33. On appeal, this Court disagreed, citing both SDCL §§ 15-6-54(c) and SDCL 15-6-8(f), finding this alleged failure to plead or prove a remedy did not bar the plaintiff from pursuing other available remedies. *Id.* at ¶ 34.

In fact, in addition to the fact Ryan's arguments run counter to Rule 54(c), they also are contrary to this Court's distaste for the election of remedies rule, which is essentially the argument Ryan advances here. This Court has noted that election of remedies rule is disfavored, and "often results in substantial injustice" and "is harsh and largely obsolete." *Ripple v. Wold*, 1996 S.D. 68, ¶ 11, 549 N.W.2d 673, 676 (citing *Tuchalski v. Moczynski*, 152 Wis.2d 517, 449 N.W.2d 292, 293 (1989)). Notably, "the purpose of the election of remedies doctrine is not to block recourse to any particular remedy *but to prevent duplicate recovery for a single wrong.*" *Id.* (Emphasis added) (citing *Riverview Co-op., Inc. v. First Nat. Bank and Trust Co. of Michigan*, 417 Mich. 307, 337 N.W.2d 225, 226–27 (1983)); *Vesta State Bank v. Indep. State Bank*, 518 N.W.2d 850, 855 (Minn.1994).

Thus, as a further analysis of this portion of the Restatement shows, there is no "separate adjudication for different forms of relief" here as Ryan argues because Denise's request was broader than that. And importantly, *even if* she had not requested any relief other than specific performance, as both the Restatement (Second) of Judgments and Rule 54(c) note, Denise would still not be barred from pursuing her money damage claim in this modern unified court system. Because of this, Denise should be allowed to pursue her claim for money damages as res judicata clearly does not apply.

b. Res judicata is not the legal doctrine that is applicable to this case.

In Denise's Appellant's Brief, she cited to *In re Est. of Siebrasse* to further explain why res judicata is inapplicable here. 2006 S.D. 83, 722 N.W.2d 86. In Ryan's response, he discusses that *Siebrasse* is factually inapplicable because it preceded this Court's decision *Estate of Geier* regarding the finality of judgments and otherwise deflects from the case. (Appellee's Br. pg. 11-12, FN 8). However, Ryan overlooks (or perhaps purposefully avoids) the actual root of the *Siebrasse* opinion and the reason Denise cited to it—the law of the case doctrine. *See* 2006 SD 83, ¶ 16.

As discussed by *Siebrasse*, while res judicata and the law of the case are related doctrines, the law of the case doctrine is distinct and has a different application. As stated in *Siebrasse*, "[I]t is a general rule, long recognized in this state, that a question of law decided by the supreme court on a former appeal becomes the law of the case, in all its subsequent stages, and will not ordinarily be considered or reversed on a second appeal when the facts and the questions of law presented are substantially the same." *Id.* at ¶ 16 (quoting *Jordan v. O'Brien*, 70 S.D. 393, 396, 18 N.W.2d 30, 31 (1945)). In practice, "the law of the case doctrine is the weaker corollary of the doctrines of res

judicata, collateral estoppel and stare decisis and is intended to prove some degree of certainty where those doctrines could not yet apply." *Id.* (cleaned up)(quoting *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251, 260 (S.D.1976) (overruled on other grounds)); (citing *Western States Land & Cattle Co. v. Lexington Ins. Co.*, 459 N.W.2d 429, 435 (S.D.1990)). As this Court has clarified:

> Although the principles of the law of the case doctrine and res judicata are similar, their application differs. The law of the case rule involves the effect of a previous ruling within one action on a similar issue of law raised subsequently *within the same action.* The rules of res judicata apply to *previous rulings* in an action on a similar determination *in a subsequent action.*

Id. (Emphasis added) (quoting *State v. Lowther*, 434 N.W.2d 747, 752 n. 7 (S.D.1989)). As further noted by this Court, "Where successive appeals are taken in the same case there is no question of res judicata, because the same suit, and not a new and different one, is involved." *Id.* (quoting *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 105–06 (Fla.2001)).

Importantly, the law of the case doctrine is not meant to "not rigidly bind a court to its former decisions, but is only addressed to its good sense." *Siebrasse*, 2006 S.D. 83 at ¶ 17 (quoting *Estate of Jetter*, 1999 SD 33, ¶ 21, 590 N.W.2d 254, 259). Thus, "[a] court may reopen a previously resolved question if the evidence on remand is substantially different or if a manifest injustice would otherwise result." *Id.* (quoting *Estate of Jetter*, at ¶ 27) (citations omitted).

In reviewing the discourse above regarding the two theories, it is clear that res judicata is simply the incorrect legal theory to apply here. While Denise does not agree nor submit that her claim for money damages would otherwise be barred by the law of the case doctrine, Ryan never argued this theory as a bar to Denise' claim to the circuit

court. *See Hall v. State ex rel. S. Dakota Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26 ("We have repeatedly stated that we will not address for the first time on appeal issues not raised below"). Thus, the circuit court never had the opportunity to determine whether the questions of law are "substantially the same" under the law of the case doctrine. [4] Because of this, it would be improper for this Court to approve of the circuit court utilizing the incorrect legal theory to bar Denise's claim without taking on the appropriate analysis and allowing argument from both sides.

Furthermore, contrary to Ryan's analysis of *Geier*, *Geier* did not overturn or otherwise invalidate the law of the case doctrine or the *Siebrasse* decision. *In re Est. of Geier*, 2012 S.D. 2, 809 N.W.2d 355, 359 2012 S.D. 2. Furthermore, *Geier* had nothing to do with res judicata. *Id.* Instead, *Geier* simply analyzed the finality of judgments in probate proceedings for purposes of appeal. *Id.* at ¶¶ 12-14. Further, even if *Geier* was somehow authoritative on final judgments for the purposes of res judicata, res judicata still would not be appropriate here given the fact the other elements are not met, as extensively argued in Denise's Appellant's brief.

Res judicata does not apply to this case. Because this is the theory by which the circuit court barred Denise's claim for money damages, the circuit court's November 14, 2022, Order should be overruled, with an instruction given to hold a trial on the value of Denise's money damages.

[4] As the party attempting to bar Denise's claim for money damages, it would be Ryan's burden to present this theory to the circuit court—it is not Denise's role to present the circuit court with further legal theories to defend against her own claims.

c. Liability was never decided by the circuit court.

Ryan argues the circuit court has already found that the Agreement to Execute Mutual Wills (hereinafter the "Agreement") was not enforceable against Neil and that this Court did not vacate those findings. (App. Br. pg. 14 (citing SR 815, 25/2/21 COL # 5)). However, in reviewing the finding to which he cites, it deals specifically with enforcement of the remedy of specific enforcement against Neil, not a determination of liability *Id.* ("To specifically enforce the 2017 Agreement, such an action must be 'just and reasonable' as to Neil.") Enforceability was not decided by the circuit court.

First, this Court correctly noted that the circuit court specifically reserved ruling on the issues of enforceability and breach of the Agreement, finding instead that specific performance was not a remedy available to Denise. *Smeenk I,* 2022 S.D. 41 at ¶ 32. Apparently, the circuit court also agreed with this Court that enforceability had not been addressed given the fact that it specifically found (1) that "a valid and *enforceable* contract clearly existed"; and (2) that Neil breached the Agreement by executing the 2019 Will. (APP 003) (emphasis added). The circuit court then noted that it would then "turn to whether res judicata bars Denise from seeking *any remedy* for Neil's breach of contract." *Id.*

Again, as argued extensively herein and in Denise's Appellant's Brief, no determination of liability was made, and as such, there was no "prior adjudication" such that res judicata would apply to this case. While this Court found that the remedy of specific performance was not available to Denise, res judicata does not preclude Denise's ability to seek money damages associated with her claim.

CONCLUSION

Res judicata is inapplicable in this case to bar Denise's claim for money damages. This is demonstrated by the fact there was no "prior adjudication" and none of the authority cited by Ryan is on point. If anything, Ryan's authority actually cuts against his narrow interpretation, as it cites to Rule 54(c) which favors the award of the appropriate remedy, regardless of whether it was actually plead. That res judicata is inapplicable is even more evident when comparing it to the law of the case doctrine—which was never advanced by Ryan to the circuit court in his attempt to defend against Denise's claim for money damages.

Therefore, because the circuit court erred in utilizing res judicata to bar Denise's remedy, Denise respectfully requests this Court reverse the circuit court's November 14, 2022, Order and remand the case back to the circuit court, ordering the circuit court to hold a trial on Denise's money damages.

Dated: April 19, 2023.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Katelyn A. Cook*

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Brief for Appellant, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates contains 2,836 words. I have relied upon the word count of our word processing system as used to prepare this Brief for Appellant. The original Brief for Appellant and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Katelyn A. Cook*
Katelyn A. Cook

CERTIFICATE OF SERVICE

I hereby certify on April 19, 2023, this **REPLY BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was filed through South Dakota Odyssey File and Serve and the original plus one copy was mailed to the South Dakota Supreme Court at:

Shirley A. Jameson-Fergel, Clerk
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Pierre, SD 57501-5070

and the **REPLY BRIEF OF APPELLANT DENISE L. SCHIPKE-SMEENK** was served by electronic mail and mailed by U.S. Mail to the following:

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By: */s/ Katelyn A. Cook*
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