IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27804

TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN,
Plaintiffs /Appellants,

vs.

SOUTH DAKOTA DEPARTMENT OF REVENUE & REGULATION, SOUTH DAKOTA DEPARTMENT OF MOTOR VEHICLES, PEGGY LAURENZ, individually and in her official capacity as an employee and Director of the South Dakota Department of Motor Vehicles, and RONALD RYSAVY, individually and in his official capacity as an employee and agent of the South Dakota Department of Motor Vehicles,
Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Jon Sogn

BRIEF OF APPELLANTS

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Notice of Appeal filed March 26, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes cited: **Page**

Other authorities cited: **Page**

PRELIMINARY STATEMENT

Throughout this brief, Plaintiffs and Appellants, Total Auctions and Real Estate, LLC, Andrew Harr, and Jason Bormann will be referred to as "Total Auctions." Defendant Ronald Rysavy will be referred to as "Rysavy." Defendant Peggy Laurenz will be referred to as either "Director Laurenz" or "Laurenz." Defendant South Dakota Department of Motor Vehicles will be referred to as "DMV." All other parties will be referred to by name.

The settled record in the underlying civil action, Lincoln County Civil File No. 15-292, will be referred to as "S.R." The transcript from the hearing on the defendants' motion to dismiss held on December 1, 2015, will be cited as "M.T."

JURISDICTIONAL STATEMENT

This is an appeal from an Order Granting Defendants' Motion to Dismiss entered by the Honorable Jon Sogn, Circuit Court Judge, Second Judicial Circuit, Lincoln County, on March 10, 2016, dismissing Total Auctions' complaint with prejudice. (S.R. 43-51). Total Auctions filed a Notice of Appeal on March 22, 2016. (S.R. 61).

STATEMENT OF LEGAL ISSUE

Whether Total Auctions' complaint, viewed in the light most favorable to them, and with any doubt resolved in their favor, states any valid claim for relief sufficient to survive a motion to dismiss under SDCL §15-16-12(b)(5)?

The trial court ruled that Total Auctions' complaint failed to state a claim upon which relief could be granted.

Most relevant cases:
Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77, 699 N.W.2d 493

Nygaard v. Sioux Valley Hospitals and Health System, 2007 S.D. 34, 731 N.W.2d 184.
Meyer v. Santema, 1997 S.D. 21, 551 N.W.2d 251.
Wojewski v. Rapid City Regional Hosp., Inc., 2007 S.D. 33, 730 N.W.2d 626.

Most relevant statutes:
SDCL §15-16-12(b)(5)

STATEMENT OF THE CASE

Total Auctions filed the underlying action, Civ. 15-292, in Lincoln County, of the Second Judicial Circuit. Total Auctions' complaint alleged that it sustained damages as a result of the negligence of Dealer Agent a/k/a Dealer Inspector Rysavy in the performance of his official duties while acting as an employee of the DMV. Total Auctions' complaint also alleged a count of negligent supervision against the Director of the DMV, Peggy Laurenz, the person responsible for supervising, training, and assisting Rysavy in carrying out his official duties and responsibilities. Total Auctions alleged that it was damaged and harmed as the proximate result of the negligent acts and omissions of Rysavy, Director Laurenz, and the DMV.

Rather than filing an answer to Total Auctions' complaint, Defendants filed a motion to dismiss pursuant to SDCL §15-16-12(b)(5). (S.R. 32). Defendants claimed that Total Auctions' complaint failed to state a valid claim upon which relief could be granted. (S.R. 32). The trial court agreed with defendants and the Honorable Jon Sogn granted the defendants' motion and entered an order dismissing Total Auctions' complaint with prejudice. (S.R. 43).

STATEMENT OF THE FACTS

Total Auctions is a South Dakota limited liability company formed by Jason Bormann and Andrew Harr in March of 2014. (S.R. 3, ¶¶ 1, 2). Total Auctions was a

licensed vehicle dealer under South Dakota law. (S.R. 5, ¶ 14). Total Auctions' stated business purpose and plan was to host automobile auctions open to the general public. (S.R. 6, ¶ 15). Total Auctions located and leased a suitable business site for its auto auctions adjacent to the Tea exit on Interstate 29, in Lincoln County. (S.R. 6, ¶ 21).

The South Dakota Department of Revenue is a division of the State of South Dakota. (S.R. 4, ¶ 3). The DMV is a division within the South Dakota Department of Revenue. (S.R. 4, ¶ 4). The DMV is responsible for overseeing dealer licensing in South Dakota. (S.R. 4, ¶ 6). Peggy Laurenz is the Director of the DMV and Ronald Rysavy is employed by the DMV, as a Dealer Agent. (S.R. 4-5, ¶¶ 7, 9). Dealer agents are responsible for answering dealer business questions, providing training and instruction on dealer licensing compliance and procedures, enforcing established laws and regulations, investigating complaints and violations, and conducting inspections. (S.R. 5, ¶ 10).

On July 11th, 2014, representatives from Total Auctions met with Rysavy at his Sioux Falls office to discuss Total Auctions' business plan. (S.R. 7, ¶ 26). Total Auctions provided Rysavy with the specific details of all methods the business would pursue in order to obtain the vehicle inventory necessary to operate public auto auctions. (S.R. 7, ¶ 28). Total Auctions repeatedly stated that it would be obtaining vehicle consignments from dealers throughout the state of South Dakota, including dealers located outside of Lincoln County. (S.R. 7, ¶ 29).

While carrying out and performing his official duties as a dealer agent, Rysavy provided guidance and instruction to Total Auctions related to its dealer licensing application and other vehicle dealer requirements. (S.R. 7, ¶ 30). Rysavy identified

and provided Total Auctions with the specific forms that it needed to complete as part of its dealer application. (S.R. 7, ¶ 30). Rysavy also provided Total Auctions with the specific forms, information, and DMV requirements necessary to complete vehicle consignments for its public auctions. (S.R. 7, ¶ 30). Total Auctions fully disclosed all facts related to its public auto auction business model with Rysavy. (S.R. 8, ¶ 32). Rysavy never addressed, discussed, mentioned, expressed any concern, or raised any issues, with the fact that South Dakota law prohibited licensed vehicle dealers from obtaining consignment vehicles from dealers outside of the county where its principal place of business is located. (S.R. 8, ¶ 32).

Total Auctions relied on the authority and professional experience of Rysavy along with the information that he provided during the performance of his official duties as a dealer agent. (S.R. 8, ¶ 33). The internal procedures and protocols of the DMV required dealer agents to consult the Director of the DMV and other department personnel before issuing an opinion on a licensed dealer application. (S.R. 14, ¶ 71). Rysavy failed to follow protocol and procedures established by the DMV and issued a favorable opinion related to Total Auctions' business compliance without the approval of Director Laurenz. (S.R. 14, ¶ 71).

On August 8, 2014, the day before the first public auto auction, Rysavy notified Total Auctions' personnel that there was an issue with the consignments from dealers outside of Lincoln County and further directed Total Auctions to contact Director Laurenz in Pierre. (S.R. 11, ¶ 46). Director Laurenz informed Total Auctions that it was not allowed to sell consigned vehicles from dealers outside of Lincoln County at the auction. (S.R. 11, ¶ 51). Director Laurenz ultimately allowed Total

Auctions to proceed with the initial auction as originally planned, but cautioned Total Auctions that it was required to conduct all future auctions having only those vehicle consignments obtained from dealers located in Lincoln County. (S.R. 12, ¶¶ 53, 54).

The inability to obtain consignment vehicles from outside of Lincoln County crippled Total Auctions' business and caused substantial damages. (S.R. 12, ¶ 58). Total Auctions sued the South Dakota Department of Revenue, the DMV, Director Laurenz, and Rysavy. (S.R. 3). The complaint included two counts: negligence and negligent supervision. (S.R. 14, 17). Defendants moved the trial court to dismiss Total Auctions' complaint, claiming that it failed to state a claim upon which relief can be granted. (S.R. 32). The trial court granted the motion to dismiss ruling that, "…any misinformation from or misrepresentations by Rysavy to Plaintiffs related to the interpretation and implementation of South Dakota dealer laws, as held in *Meyer*, misrepresentations of law are not actionable." (S.R. 43). Therefore, Total Auctions' complaint failed to state a claim upon which relief can be granted. (S.R. 43).

ARGUMENT

1. The trial court erred in granting the Defendants' Motion to Dismiss.

a. The trial court erroneously applied the law to the facts of this case.

b. The trial court erroneously relied on the case of *Meyer v. Santema*.

2. Total Auctions' Complaint, viewed in the light most favorable to them, and with any doubt resolved in their favor, contains allegations that state a valid claim for relief.

a. Total Auctions' Complaint states a valid claim for Negligence.

b. Total Auctions' Complaint states a valid claim for Professional

Negligence.

c. Total Auctions' Complaint states a valid claim for Negligent Supervision.

d. Total Auctions' Complaint alleges facts sufficient to state a valid claim under the theory of Respondeat Superior.

1. The trial court erred in granting the Defendants' Motion to Dismiss.

A motion to dismiss under SDCL §15-16-12(b)(5) tests the legal sufficiency of the pleading, not the facts which support it. *Nygaard v. Sioux Valley Hospitals and Health System*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190. Whether a motion to dismiss has been properly granted is a question of law that is reviewed de novo. *Id.* On appeal, the trial court's decision is entitled to no deference. The trial court erred in this case and its decision should be reversed.

a. The trial court erroneously applied the law to the facts of this case.

To survive a motion to dismiss, the rules of civil procedure contemplate a statement of circumstances, occurrences, and events in support of the claim presented. *Sisney v. State*, 2008 S.D. 71, 754 N.W.2d 639. On a motion to dismiss, the court accepts the material allegations as true and construes them in a light most favorable to the pleader, to determine whether the allegations allow relief. *Thompson v. Summers*, 1997 S.D. 103, 567 N.W.2d 387.

A motion to dismiss under Rule 12(b)(5) is "viewed with disfavor and is rarely granted." *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 493. "Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action." *Id*. The rules of procedure favor the

resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations. *Id*.

In order to survive a motion to dismiss, the plaintiff need not include evidentiary detail but must allege a factual predicate concrete enough to warrant further proceedings. *Nygaard* , 2007 S.D. 34, ¶ 39, 731 N.W.2d at 184. When deciding a motion to dismiss, the court must go beyond the allegations for relief, accept the pleader's description of what happened along with any conclusions reasonably drawn therefrom and examine the complaint to determine if the allegations provide for relief on any possible theory. *Wojewski v. Rapid City Regional Hosp., Inc.*, 2007 S.D. 33, ¶ 11, 730 N.W.2d 626.

Total Auctions complaint alleges counts of negligence and negligent supervision. (S.R. 14, 17). The complaint alleges that, while acting within the ordinary course or scope of his authority and employment relationship with the South Dakota Department of Revenue and Regulation and the DMV, Rysavy provided negligent direction, counsel, opinions, and advice to Total Auctions. (S.R. 15, ¶ 75).

The complaint also alleges that Rysavy owed Total Auctions several duties, including, but not limited to, following the protocols and procedures established by the DMV, before issuing an opinion related to Total Auctions' business. (S.R. 14, ¶ 72). Total Auctions further alleges that Rysavy breached one or more of the duties owed them (S.R. 14, ¶ 73) and that Total Auctions was financially harmed as a direct and proximate cause of Rysavy's actions, errors, and omissions while acting within the scope of his employment. (S.R. 15, ¶ 81).

The complaint, viewed in the light most favorably to Total Auctions, adequately states facts and allegations to support a valid claim for relief sufficient to survive a motion to dismiss. This Court has stated, "[d]espite our adoption of the new rule in *Best*, South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief." *Gruhlke v. Sioux Empire Federal Credit Union, Inc*., 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 409. This Court emphasized that the South Dakota Constitution clearly and unequivocally directs that the courts be open to the injured and oppressed. *Cleveland v. BDL Enterprises, Inc.*, 2003 S.D. 54, 663 N.W.2d 212.

The trial court erred in its application of the law to Total Auctions' complaint. The trial court erroneously focused its attention on only one possible claim for relief, negligent misrepresentation of law, but controlling law states that "when deciding a motion to dismiss, the court must go beyond the allegations for relief and examine the complaint to determine if the allegations provide for relief on any possible theory. *Wojewski*, 2007 S.D. 33, ¶ 11, 730 N.W.2d at 626. The allegations contained in Total Auctions' complaint are sufficient to state claims for relief under several legal theories, including negligence, professional negligence, negligent supervision, and respondeat superior. The trial court failed to consider other valid claims for relief stated in the complaint when it erroneously concluded that the allegations of the complaint only support a claim for negligent misrepresentations of law, which are not actionable. (S.R. 43).

b. The trial court erroneously relied on the case of *Meyer v. Santema*.

The trial court's letter decision spends a significant amount of time addressing this Court's ruling in *Meyer v. Santema,* 1997 S.D. 21, 559 N.W.2d 251, and its application to the current case. (S.R. 43). Defense counsel informed the trial court that it could essentially rely on *Meyer*, as dispositive of the motion to dismiss. (M.T. 2:16-24). In fact, defendants stated it had essentially relied on that single case in its brief to support the motion to dismiss. (M.T. 2:19-24). The trial court's reliance on *Meyer* is misplaced, as the *Meyer* case contains key distinctions and distinguishable facts that are not present in the underlying case.

Meyer was an appeal of a trial court's decision granting the defendant's motion for summary judgment. *Meyer*, 1997 S.D. 21, ¶ 1, 559 N.W.2d at 253. The legal standard for granting a summary judgment motion is different from the legal standard applicable to ruling on a motion to dismiss under SDCL §15-16-12(b)(5). Summary judgment is appropriate when the court determines that the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits of the parties, reveal that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. SDCL §15-6-56(c); see also, *Breen v. Dakota Gear & Joint Co., Inc*., 433 N.W.2d 221 (S.D. 1988).

The burden of proof required to survive a motion to dismiss is lower than that required to defeat a motion for summary judgment. *Cohen v. Northwestern Growth Corp.*, 385 F.Supp.2d 935 (D.S.D. 2005). During the motion to dismiss hearing, defense counsel acknowledged that the standard for granting a motion to dismiss is stringent and that the motions are not to be frequently made. (M.T. 2:13-16).

To survive a motion to dismiss, a plaintiff need only show that the allegations in the complaint are sufficient to allow for relief under any possible theory. *Wojewski*, 2007 S.D. 33, ¶ 11, 730 N.W.2d at 631. Total Auctions' complaint contains allegations sufficient to state claims for relief under several legal theories, including negligence, professional negligence, and negligent supervision.

In *Meyer*, negligent misrepresentation was specifically pled, not negligence. Total Auctions' complaint alleges negligence and negligent supervision. Negligent misrepresentation does not appear in their complaint. (S.R. 3). Defendants acknowledge that Total Auctions' complaint did not include a count for negligent misrepresentation. (M.T. 7:19-21).

Defense counsel argued that the facts and allegations of Total Auctions' complaint could be characterized as negligent misrepresentation or negligence but either way it did not make any legal difference. (M.T. 3:23-25, 4:1-2). Total Auction's complaint consists of 19 pages containing 105 numbered paragraphs and none of them includes the phrase "negligent misrepresentation." (S.R. 3). Defense counsel singled out five paragraphs from the underlying complaint and argued that it was crystal clear that the essence of the claims against Rysavy is that he gave improper advice on the application of South Dakota law, which is the exact issue that this Court decided in *Meyers v. Santema*. (M.T. 5:14-19). Defendants' claimed that there was simply no way that the *Meyer* case was distinguishable from the facts presented in this case. (M.T. 6:17-19).

During the hearing, the trial court questioned whether or not it should make any difference from a legal standpoint if Total Auctions' position was analyzed as a

negligent misrepresentation case or a basic negligence case. (M.T. 7:10-17). Defense counsel claimed that if the court simply looked at what the allegations of negligence are in the complaint, they lead back to the rule in *Meyer* that you cannot base a claim on misrepresentations of law. (M.T. 7:18-25, 8:7-11). The defense reiterated that the court need only look at the five paragraphs it selected from the complaint that were most favorable to its position to see what Total Auctions is really alleging is a misrepresentation of law, which *Meyer* says is not actionable. (M.T. 8:7-11).

Total Auctions' counsel acknowledged that some of the allegations in the complaint might be classified as misrepresentations of law, which are not actionable (M.T. 14:4-7), but disagreed there was no legal difference if the claim was analyzed under a negligence theory or a negligent misrepresentation theory. (M.T. 10:11-13). Total Auctions' counsel emphasized that the legal differences between a negligence claim and a negligent misrepresentation mattered a great deal in the court's analysis. (M.T. 10:11-13).

During the hearing, defense counsel acknowledged that negligence is the failure to use reasonable care. (M.T. 27:14-16). Accordingly, the question becomes the failure to use reasonable care to do what. (M.T. 27:16-17). Defendants took the position that the complaint did not allege that Rysavy failed to follow protocols or follow a handbook. (M.T. 27:17-19). Defendants' position is in direct conflict with the allegations of Total Auctions' complaint which state "that Rysavy owed Total Auctions a duty to follow the established Department of Motor Vehicles protocols before issuing an opinion." (S.R. 14, ¶ 72). The complaint also alleges that Rysavy's

failure to follow the established protocols constitutes a breach of his duties and Total Auctions was injured as a result of Rysavy's negligence (S.R. 14, ¶¶ 72, 73).

The elements of negligence differ from the elements of negligent misrepresentation. This Court did not analyze *Meyer* according to the law and elements of negligence. Total Auctions' complaint alleges that Rysavy's acts, errors, and omission constitute negligence (S.R. 14, ¶ 74). Therefore, the law and facts of *Meyer* are materially distinguishable from the law and facts of this case.

According to *Meyer*, misrepresentations of future events and misrepresentations of law are not actionable. 1997 S.D. 21, ¶ 13, 559 N.W.2d at 255. *Meyer* hinged on the statement that the lots would be rezoned at a later time, a future event. Distinguishable from the facts in *Meyer*, Rysavy made statements concerning current facts and events. Rysavy's negligent direction, guidance, and information related to current rules and regulations that applied to Total Auctions' business. Additionally, Rysavy failed to follow the current procedures and protocols established by the DMV, which dealer agents were required to follow before issuing an opinion on Total Auctions' business. (S.R. 14, ¶ 72). Therefore, Rysavy's negligent conduct in his dealings with Total Auctions related to existing facts and current events rather than future events.

Finally, *Meyer* was analyzed according to negligent misrepresentation law in 1997. In *Meyer*, two of the defendants owned the lots sold to the plaintiff and gained financially from the sale of the lots. Therefore, they had a pecuniary interest in the transaction. This Court held that sellers misrepresentation of fact might be actionable had Meyer relied on that statement to his detriment. However, by Meyers own

admission, the sellers were not to blame for his closing of the lots. *Meyer*, 1997 S.D. 21, ¶ 10, 559 N.W.2d at 254. Since this Court decided *Meyer*, the law on negligent misrepresentation has changed and removed the pecuniary interest requirement as a specific element. *Fischer v. Kahler*, 2002 S.D. 30, 641 N.W.2d 122.

This Court in *Meyer* also stated that Meyer is presumed to know the law including the nature and extent of the city's authority. *Meyer*, 1997 S.D. 21, ¶ 12, 559 N.W.2d at 255. Meyer sought the city's input to confirm whether the lots he had purchased were properly zoned. At the city council meeting, the mayor stated, "that if the lots were not industrial we will make them industrial." *Id*. at ¶ 3, 559 N.W.2d at 253. The council then voted to zone the lots industrial and told Meyer to proceed with his buildings plans. *Id*. at ¶ 5, 559 N.W.2d at 253.

Meyer began to prepare the site for its intended use. At a subsequent city council meeting, a citizen protested the council's authority to rezone the lots by challenging the method it used to rezone them. *Id*. Because the City's misrepresentations concerned interpretation and implementation of a zoning ordinance, which is a matter of law, misrepresentations of law are not actionable. *Id.* at ¶ 13, 559 N.W.2d at 255. This Court went on to say that, Meyer had alternative means of obtaining an interpretation of the zoning ordinance, either by consulting an attorney or by applying to the full commission for a formal interpretation pursuant to established procedures. *Id*. at ¶ 12, 559 N.W.2d at 255. Therefore, Meyer was charged with knowledge that an ordinance may only be changed through compliance with proper statutory procedures. *Id*.

In our case, Total Auctions followed the dealer licensing process identified by the official websites for the South Dakota Department of Revenue and the DMV. The DMV website instructs people with dealer license questions to contact a dealer agent. The DMV website identifies only three dealer agents throughout the state with the knowledge and authority to answer dealer business questions, provide training and instruction on compliance and procedures, enforce laws and regulations, investigate complaints and violations, and conduct inspections.

Additionally, the DMV provides all required forms and paperwork necessary to become a licensed vehicle dealer including the application. The DMV website also lists the documentation that must be submitted with the application before a dealer license can be issued. Total Auctions followed the procedures set forth by the DMV, as identified on its website, concerning compliance with dealer licensing laws and regulations.

Unlike *Meyer*, where the plaintiff was presumed to know the nature and extent of the City's authority, Total Auctions did not contact someone, whom they thought or claimed to be the person, with the authority to provide them information on dealer licensing requirements. Total Auctions contacted Ronald Rysavy, the publically named dealer agent, who the DMV holds out as the person with the authority to answer dealer business questions and provide instruction on compliance and procedures. SDCL §32-6B-38 gives the DMV the authority to appoint dealer inspectors a/k/a dealer agents to enforce the provisions related to the regulation of vehicle dealers.

Finally, Total Auctions was not seeking information related to a reclassification of its business and there are no statutes available that limit a dealer agent's authority to issue a business compliance opinion on behalf of the DMV. There

were no options for Total Auctions to seek a formal interpretation pursuant to established procedures. Total Auctions followed the only available procedure identified by the DMV in order to obtain answers and instruction on dealer licensing compliance and procedures.

When ruling on the motion to dismiss, the trial court was required to accept the material allegations as true and construe them in a light most favorable to Total Auctions, to determine whether the allegations allow relief on any possible legal theory. *Wojewski*, 2007 S.D. 33, ¶ 11, 730 N.W.2d at 626. Accepting all material allegations of Total Auctions' complaint as true and construing them in a light most favorable to them, which the court is required to do, Total Auctions' complaint contains allegations sufficient to survive a motion to dismiss.

The trial court construed all allegations in a light most favorable to the defendants' when it analyzed the case solely under a negligent misrepresentation of law theory and failed to consider other legal theories contained in Total Auctions' complaint. Although defendants' argued that Total Auctions negligence claim is actually mislabeled as a negligent misrepresentation claim, defendants cannot dictate the theory upon which Total Auctions makes its case. *Johnson v. Hayman Residential, et al*., 2015 S.D. 63, ¶ 25, 867 N.W.2d 698, 706 at FN 3. The dispute in the current case implicates various factual issues concerning negligence and professional negligence. As a result, Total Auctions is entitled to proceed with its claims.

2. Total Auctions' Complaint, viewed in the light most favorable to them, and with any doubt resolved in their favor, contains allegations that state a valid claim for relief.

For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Nygaard*, 2007 S.D. 34, ¶ 9, 731 N.W.2d at 190. "The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom." *Id.* at ¶ 5. This Court "reviews the circuit court's ruling de novo, with no deference to its determination." *Nygaard*, 2007 SD 34, ¶ 9, 731 N.W.2d at 190. When the facts are viewed most favorably to Total Auctions, as they must be viewed, the allegations within the complaint are adequate to survive a motion to dismiss.

a. Total Auctions' Complaint states a valid claim for Negligence.

It is well established in South Dakota that the state, its agencies, and their employees are liable for negligence in the performance of their duties. *Ritter v. Johnson*, 465 N.W.2d 196, 198 (S.D. 1991); *Hansen v. SD Dep't of Transp.,* 1998 S.D. 109, 584 N.W.2d 881; *Nat. Bank of SD v. Leir,* 325 N.W.2d 845 (S.D. 1982); *Sioux Falls Constr. Co. v. City of Sioux Falls*, 297 N.W.2d 454, 458 (S.D. 1980).

In 1986, the South Dakota legislature passed legislation establishing the procedure for bringing legal claims against public entities, their employees, and waiving sovereign immunity by participating in a risk-sharing pool or the purchase of liability insurance. SDCL §21-32A-2 has been amended to include state employees, officers, or agents.

To fund and pay for valid claims against the state, its agencies, or employees, SDCL §3-22-1 was enacted to establish a public entity pool for liability ("PEPL").

PEPL shall provide defense and liability coverage for any state entity or employee as provided for within the coverage document issued by the PEPL.

The South Dakota PEPL covers the liability of any employee, officer or agent of the public entity, including the state, for negligence in the performance of their duties while acting within the scope of his employment or agency whether the claims brought against him are in his individual or official capacity. *Hansen*, 1998 S.D. 109, ¶ 19, 584 N.W.2d 881; see also, *South Dakota Public Entity Pool For Liability v. Winger*, 1997 S.D. 77, ¶ 19, 566 N.W.2d 125. The rule of law that a public employee is liable for the negligent performance of his acts was first recognized by this Court in 1896. *State v. Ruth*, 9 S.D. 84, ¶ 90, 68 N.W. 189 (S.D.1896) (occurring seven years after the adoption of the South Dakota Constitution.)

Negligence is one of the most basic legal theories. Under common law, negligence occurs when one fails to exercise that care which an ordinarily prudent or reasonable person would exercise under the same or similar circumstances, commensurate with existing and surrounding hazards. *Lovell v. Oahe Elec. Co-op.*, 382 N.W.2d 396 (S.D. 1986). To prevail in a suit based on negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury. *Johnson v. Hayman Residential, et al*., 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702 (citing *Hendrix v. Schulte*, 2007 S.D. 73, ¶ 7, 736 N.W.2d 845, 847).

Negligence is the failure to exercise the ordinary care which a reasonable person would exercise under similar conditions. *Ritter*, 658 N.W.2d at 199. What constitutes due care and other questions relating to negligence are generally questions of fact for the jury. *Id*.

Negligence law requires people to use reasonable care and provides that those who fail to use reasonable care are liable for the harm that results. The legal duty in a negligence action is the duty to exercise reasonable care under the circumstances. *Bland v. Davison County,* 507 N.W.2d 80, 82 (S.D. 1993). The law does not set out a myriad of narrow duties to prescribe exactly what conduct qualifies as "reasonable care" in every instance. That question is one entrusted to the jury. See South Dakota Civil Pattern Jury Instruction 20-20-10 stating:

> Negligence is the failure to use reasonable care. It is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence. The law does not say how a reasonable person would act under facts similar to those shown by evidence. That is for you to decide.

Whether a duty exists depends upon the existence of a relationship between the parties and a duty can be based on foreseeability of the harm. *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 14, 756 N.W.2d 19, 26. Total Auctions' complaint alleges that dealer agents are responsible for answering dealer business questions, providing training, and instruction on compliance and procedures, enforcing laws and regulations, investigating complaints and violations, and conducting inspections. (S.R. 5, ¶ 10). Total Auctions consulted Rysavy in his official capacity as a dealer agent for the DMV. (S.R. 7, ¶ 24) (S.R. 15, ¶¶ 76-81). In his official capacity as a state employee, Rysavy provided guidance, information, and assistance to Total Auctions concerning specific requirements, protocols, and procedures adopted by the DMV to enforce the current laws established regulating licensed vehicle dealers. (S.R. 7-8, 15).

Rysavy owed Total Auctions a duty to exercise reasonable care under the circumstances. To satisfy his duty of exercising reasonable care under the circumstances, Rysavy was required, at a minimum, to verify that the guidance, direction, and instruction he provided to Total Auctions was researched, accurate, verified, and in accordance with those standards and protocols established by the DMV.

Foreseeability created a duty on Rysavy to exercise reasonable care under the circumstances. *First Am. Bank & Trust, N.A.*, 2008 S.D. 83, ¶ 14, 756 N.W.2d at 26. Rysavy instructed Total Auctions on its business activities, the DMV's application process and requirements, proper execution of the required consignment paperwork, and current dealer licensing laws or established DMV regulations. (S.R. 7-8, 15). Rysavy met with Total Auctions' personnel or visited their facility several times to discuss updates on the progress of its business and provide guidance on completing the necessary DMV paperwork and forms required for public auction vehicle consignments. (S.R. 9, ¶ 36). Given Rysavy's stated authority, promulgated duties, and position with the DMV, it was reasonable for Total Auctions to rely upon his representations. Rysavy knew, or should have known, that Total Auctions would rely on him to competently perform his job duties as a state employee.

Rysavy is held out by the State of South Dakota as one of only three dealer agents to contact for dealer licensing information. Given his position, authority, and stated duties and responsibilities, Total Auctions relied on his guidance and instruction. (S.R. 8, ¶ 33). Total Auctions reasonably believed that Rysavy would

adhere to the internal protocols or procedures established by the DMV related to dealer agent opinions.

If Rysavy were unsure or unfamiliar with the information and assistance he provided Total Auctions while carrying out his duties as dealer agent, he was required to seek confirmation or verification from Director Laurenz, in accordance with the internal protocols established by the DMV. (S.R. 14, ¶ 72). Rysavy failed to follow the DMV's established protocols, failed to consult with Director Laurenz, failed to competently perform his official duties, and breached his duties owed Total Auctions. (S.R. 14, ¶¶ 72-73). As a result, Total Auctions suffered economic loss and other damages. (S.R. 16-17, ¶¶ 83-89). Viewed in a light most favorable to them, the allegations of Total Auctions' complaint sufficiently states that it was foreseeable and reasonable that it would be harmed by the negligence and failures of Rysavy to follow established DMV protocols.

The complaint alleges that, at all relevant times, Rysavy was acting within the ordinary course or scope of his authority and employment relationship with the South Dakota Department of Revenue and Regulation and the DMV. (S.R. 15, ¶ 76). Rysavy's acts were the type and kind of which he was hired to perform or carry out as a dealer agent. (S.R. 15, ¶ 79). Rysavy had a number of opportunities to correct his deficient guidance and instruction. (S.R. 16, ¶ 82). Rysavy was required to verify the information he provided to Total Auctions with Director Laurenz but he failed to do so. (S.R. 14, ¶ 72).

Treating as true all facts properly pled in the complaint and resolving all doubts in favor of Total Auctions along with accepting their description of what

happened and any conclusions reasonably drawn therefrom, the complaint states a valid claim allowing relief for negligence.

b. Total Auctions' Complaint states a valid claim for Professional Negligence.

This Court has recognized a cause of action for economic damages based on professional negligence beyond the strictures of privity of contract. *Mid-Western Elec. v. DeWild Grant Reckert & Assocs. Co.*, 500 N.W.2d 250, 252 (S.D. 1993). To deny a plaintiff his day in court would, in effect, be condoning a professional's right to do his or her job negligently with impunity as far as innocent parties who suffer economic loss. *Id.* This Court has stated that liability in tort may arise from breaching a duty to use proper care despite the absence a contract. *Limpert v. Bail*, 447 N.W.2d 48, 51 (S.D. 1989). This Court instructed the trial courts to use the legal concept of foreseeability to determine the existence of a duty and the harm caused by a professional's negligence. *Mid-Western Elec.*, 500 N.W.2d at 252.

The trial court held that Total Auctions did not cite any authority to support its theory that a state employee, in this case a dealer agent, is a "professional" subject to a professional negligence cause of action. (S.R. 36). However, Total Auctions is not required to prove that dealer agents are professionals at this stage in the proceedings. Total Auctions is simply required to state allegations sufficient to support a claim of professional negligence. Whether dealer agents are professionals implicates various factual issues best left to the discretion of the jury and Total Auctions is entitled to proceed with the claim.

c. Total Auctions' Complaint states a valid claim for Negligent Supervision.

South Dakota law recognizes a cause of action for negligent supervision and this Court has consistently described such claim as: "a negligent supervision claim alleges that the employer inadequately or defectively managed, directed, or oversaw its employees." *Iverson v. NPC Int'l, Inc.*, 2011 S.D. 40, ¶ 23, 801 N.W.2d 275, 282 (citing *McGuire v. Curry*, 2009 S.D. 40, ¶ 21, 766 N.W.2d 501, 509). A negligent supervision claim avers that the employer failed to exercise reasonable care in supervising (managing, directing, or overseeing) its employees so as to prevent harm to other employees or third parties. *Id*.

Similar to other causes of action regarding negligence, a prerequisite to a claim for negligent supervision is establishing the existence of a duty. *Iverson*, 2011 S.D. 40, ¶ 23, 801 N.W.2d at 282-83. Specifically, "the duty involved in a negligent supervision claim is one of ordinary care." *Id.* Further, this general duty of ordinary care concerns the employer's duty to conduct itself reasonably. *Id.* The existence of the duty of ordinary care in causes of action for negligent supervision depends on the foreseeability of the injury to the claiming party. *Id.* If a duty exists, the remaining questions of breach and causation are factual questions that must be determined by the trier of fact. *Id.* at ¶ 7, 801 N.W.2d at 278.

In *McGuire*, the defendant employer provided an underage employee with unrestricted and unsupervised access to its alcohol. *McGuire v. Curry*, 2009 S.D. 40, 766 N.W.2d 501. The court held that the defendant employer had a duty to supervise its underage employee because it was foreseeable that the employee could take advantage of the lax circumstances and indulge to excess when provided unrestricted

and unsupervised access to alcohol. *Id.* The *McGuire* holding was summarized in *Iverson*, as "this Court imposed a duty on the employers because it was foreseeable that specific harms could result." 2011 S.D. 40, ¶ 26, 801 N.W.2d at 284-85.

The allegations contained in Total Auctions' complaint are more straightforward than those presented in *McGuire* or *Iverson.* Total Auctions' alleges that as an employee and dealer agent of the DMV, Rysavy was responsible for answering dealer business questions, providing training and instruction on compliance and procedures, enforcing laws and regulations, investigating complaints and violations, and conducting inspections. (S.R. 5, ¶¶ 9-10). Total Auctions also alleges that Laurenz is the Director of the DMV and as such, she is responsible for managing, supervising, and overseeing the actions Department of Motor Vehicles employees, including Rysavy. (S.R. 4, ¶ 7) (S.R. 17, ¶ 91).

Under its negligent supervision count, Total Auctions superficially alleges that Director Laurenz owed them a duty to supervise, inspect, train, educate, and assist Rysavy with his evaluation and subsequent opinion issued to Total Auctions while acting as a dealer agent for the DMV. (S.R. 18, ¶ 94). Total Auctions complaint further alleges that Director Laurenz breached this duty by failing to adequately supervise and monitor the acts of Rysavy to ensure that the internal protocols and procedures established by the DMV were being followed, and that Total Auctions was harmed as a direct and proximate result of this breach. (S.R. 18, ¶ 96) (S.R. 19, ¶ 103).

When the trial court evaluated Total Auctions' complaint to rule on the defendants' motion to dismiss, it was required to accept the material allegations as

true and construe them in a light most favorable to the pleader and determine whether the allegations allow for relief on "any possible theory." *Fenske Media Corp. v. Banta Corp.*, 2004 S.D. 23, ¶ 7, 676 N.W.2d at 393. This Court has stated that "[A] claim of negligent supervision avers that the employer failed to exercise reasonable care in supervising (managing, directing, or overseeing) its employees so as to prevent harm to other employees or third persons." *McGuire,* 2011 S.D. 40, ¶ 26, 801 N.W.2d at 282.

Total Auctions' complaint alleges that Director Laurenz owed Total Auctions a general duty of ordinary care to perform her official duties as Director of the DMV with reasonable care, that she breached that duty by failing to act reasonably in supervising Rysavy, and that Total Auctions was harmed as a result of her breach in the duties owed them. (S.R. 3). Total Auctions' complaint satisfies the legal requirements of containing allegations sufficient to state a valid claim for negligent supervision.

To support its motion to dismiss, defendants argued that an employer cannot be held liable for negligent supervision without an underlying tort. (M.T. 8:1-10, 9:1-10). This Court's recent opinions do not hold that an underlying tort of the employee is a required element for a negligent supervision claim. See, *Iverson,* 2011 S.D. 40, 801 N.W.2d 275; *McGuire,* 2009 S.D. 40, 766 N.W.2d 501, *Kirlin v. Halverson,* 2008 S.D. 107, 758 N.W.2d 436.

Defense counsel suggested that this Court found such a requirement in *Kirlin*, however, that is not the case. Instead, this Court's discussion of the underlying torts in *Kirlin* dealt exclusively with claims for civil conspiracy. In that context, this Court

stated, "to establish a *prima facie* case of civil conspiracy, the plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action to be taken; (4) the *commission of one or more unlawful over acts*; and (5) damages as the proximate result of the conspiracy….This is not an independent cause of action, but is 'sustainable only after an underlying tort has been established.'" *Kirlin*, 2008 S.D. 107, ¶ 57, 758 N.W.2d at 455. There is no such underlying tort discussion in the section of the opinion analyzing the negligent supervision claim.

Total Auctions complaint does not allege a civil conspiracy but specifically alleges a claim for negligent supervision against Director Laurenz. As such, the presence of an underlying employee tort is not fatal to a valid claim for negligent supervision. However, even if an underlying tort is a required element of negligent supervision, Total Auctions' complaint alleges that the underlying tort committed by Rysavy is negligence, including his failures to follow established DMV protocols. As such, any underlying tort requirement is satisfied by the allegations of Total Auctions' complaint.

Defendants' also argued that Total Auctions' claim for negligent supervision is redundant and unnecessary because Totals Auctions alleges that Rysavy acted within the ordinary course and scope of his employment. However, Total Auctions' cause of action for negligent supervision is with respect to Director Laurenz, and not Rysavy. As such, vicarious liability of the South Dakota Department of Revenue and Regulation or the DMV could stem from either Director Laurenz's or Rysavy's negligent actions. Based on this Court's prior holdings, Total Auctions' claim against

Director Laurenz is independent from any causes of action against Rysavy. Therefore, Total Auctions' allegations of respondeat superior relating to its claim for negligent supervision are also independent from any of its claims against Rysavy.

Treating as true all facts properly pled in the complaint and resolving all doubts in favor of Total Auctions, along with accepting their description of what happened and any conclusions reasonably drawn therefrom, the underlying complaint states a valid claim allowing relief for negligent supervision.

d. Total Auctions' Complaint alleges facts sufficient to state a valid claim under the theory of Respondeat Superior.

Employment by the state is not an absolute shield to suit or an entitlement to breach the legal duties required of state employees in carrying out their responsibilities and the defendants are required to perform their official job duties with reasonable care. South Dakota has permitted respondeat superior claims against the state for the negligence of its employees since 1896. *Ruth*, 68 N.W. 189 (S.D. 1896). Further, by establishing the PEPL, the state has "consented to suit in the same manner that any other party may be sued." *Hansen* at ¶ 45, 584 N.W.2d at 892 (Sabers, R., concurring in part and dissenting in part) (citing SDCL 21-32-16).

A state government, or its agencies or instrumentalities, is subject to liability under the doctrine of respondeat superior for the torts of its agents, officers, and employees while acting in the course and scope of their employment and authority. *Id*. at ¶ 46, 584 N.W.2d at 892 (Sabers, R., concurring in part and dissenting in part). Whether a principal will be held liable for the conduct of an agent is determined by the nexus between the agent's employment and the activity that caused the injury. *Id.*

at ¶ 51, 584 N.W.2d at 894. Liability will be imposed when the nexus is sufficient to make the resulting harm foreseeable. *Id*. Foreseeability, as used in respondeat superior, is different from foreseeability as used for proximate causation analysis in tort law. *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 14, 758 N.W.2d 436, 444. In respondeat superior, foreseeability includes a range of conduct which is fairly regarded as typical of or broadly incidental to the enterprise undertaken by the employer. *Id*.

Defendants represented that there can be no claim for negligent supervision or respondeat superior without an underlying tort. (M.T. 8:21-25, 9:1-7) Defendants' argument confuses the analysis of a negligent supervision claim with the analysis of a duty to control claim under the Restatement of Torts § 317, which this Court has held are two separate causes of action. *Iverson,* 2011 S.D. 40, ¶ 23, 801 N.W.2d at 282.

Defendants assert that negligent supervision claims are typically brought where the employee's conduct falls outside of the scope of employment, to support the position that without a valid negligent supervision claim, Total Auctions cannot rely on respondeat superior. However, based on this Court's prior holdings, the underlying tort analysis applies in the context of duty to control claims. *Iverson,* 2011 S.D. 40, ¶ 8, 801 N.W.2d at 278-279 (quoting *Black's Law Dictionary* (8th ed. 2004)). Total Auctions has alleged a claim for negligent supervision, not negligence based on a duty to control. (S.R. 17).

Total Auctions' has not alleged that either Rysavy or Director Laurenz acted outside the scope of their employment. Total Auctions alleges that Rysavy was negligent in the performance of his official duties and that Director Laurenz

negligently supervised Rysavy. (S.R. 14, 17). Total Auctions alleges that both were acting within the scope of their employment. (S.R. 15, 18). Total Auctions is not required to allege that either Rysavy or Director Laurenz were acting outside the scope of employment before respondeat superior can be invoked against the state for negligence or negligent supervision.

In sum, this Court has held that negligent supervision is an independent cause of action where the duty to exercise reasonable care in supervising is distinct from the duty to control employees acting outside their scope of employment. Additionally, this Court has stated "the ancient doctrine of respondeat superior is well established as 'holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.'" *Kirlin,* 2008 S.D. 107, ¶ 12, 758 N.W.2d at 444.

As such, Total Auctions has alleged two valid claims under the legal theory of respondeat superior: (1) that the South Dakota Department of Revenue & Regulation and the DMV are vicariously liable for the negligence of Rysavy; and (2) that the South Dakota Department of Revenue & Regulation and the DMV are vicariously liable for Laurenz's negligent supervision of Rysavy.

Accepting all material allegations of Total Auctions' complaint as true and construing them in a light most favorable to them, which the court is required to do, Total Auctions' complaint contains allegations sufficient to state a valid claim for relief under the theory of respondeat superior and survive the defendants' motion to dismiss.

CONCLUSION

The rules of civil procedure favor resolution of cases upon the merits by trial or summary judgment rather than on motions to dismiss. Rule 12(b)(5) motions are viewed with disfavor and seldom prevail. Accepting Total Auctions' description of the facts, along with any conclusions reasonably drawn therefrom, their complaint contains allegations sufficient to state several claims for relief. The trial court erred when it granted the defendants' motion to dismiss, dismissing Total Auctions complaint with prejudice. The trial court's decision should be reversed and the case should be remanded for trial on its merits.

REQUEST FOR ORAL ARGUMENT

Oral argument is respectfully requested.

Dated this 21st day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2016, pursuant to SDCL §15-26C-4, I mailed the original Brief, Appendix, and attachments with two (2) copies to the Supreme Court and emailed a Word version of the same to the Supreme Court. I also electronically served James Moore and Joel Engel the above Brief, Appendix, and attachments by transmitting electronic copies to them at the following email addresses:

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APPENDIX
TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF LINCOLN	SECOND JUDICIAL CIRCUIT

TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN, Plaintiffs, - vs - SOUTH DAKOTA DEPARTMENT OF REVENUE AND REGULATION, SOUTH DAKOTA DEPARTMENT OF MOTOR VEHICLES, PEGGY LAURENZ, individually and in her official capacity as an employee and Director of the South Dakota Department of Motor Vehicles, and RONALD RYSAVY, individually and in his official capacity as an employee and agent of the South Dakota Department of Motor Vehicles, Defendants.	41 CIV. 15-0292 COMPLAINT

Plaintiffs for their complaint against the Defendants, state as follows:

1. Plaintiff, Total Auctions and Real Estate, LLC (hereinafter "Plaintiff" or "Total Auctions") is a South Dakota Limited Liability Company with its principal place of business located at 6140 S Lyncrest Ave, Sioux Falls, South Dakota.

2. At all times relevant to this action, Andrew Harr (hereinafter "Harr") and Jason Bormann (hereinafter "Bormann") were and remain members of Total Auctions.

3. To the best of Plaintiffs' knowledge, Defendant South Dakota Department of Revenue & Regulation is a division of the State of South Dakota with its principal office located at 445 East Capitol Avenue, Pierre, South Dakota.

4. The South Dakota Department of Revenue & Regulation's purpose is to serve South Dakotans and support government services by collecting all taxes required by law, supporting motor vehicle requirements, and regulating the gaming industry and state's lottery to raise revenue for government programs.

5. To the best of Plaintiffs' knowledge, Defendant South Dakota Department of Motor Vehicles (hereinafter "Department of Motor Vehicles") is a division of the State of South Dakota and the South Dakota Department of Revenue & Regulation with its principal office located at 445 East Capitol Avenue, Pierre, South Dakota.

6. Defendant Department of Motor Vehicles is responsible for overseeing dealer licensing in South Dakota by providing information on licensing and renewal requirements, principal place of business requirements, bonding and insurance requirements, fees, dealer plates and permits, title and registration, recordkeeping requirements, and any resulting violations or penalties thereof.

7. To the best of Plaintiffs' knowledge, Defendant Peggy Laurenz (hereinafter "Laurenz") is the Director of the Department of Motor

Vehicles and her principal office is located at 445 East Capitol Avenue, Pierre, South Dakota.

8. The Director of the Department of Motor Vehicles is responsible for managing and supervising the employees, agents, or inspectors of the Department of Motor Vehicles.

9. To the best of Plaintiffs' knowledge, Defendant Ronald Rysavy (hereinafter "Rysavy") is employed by the Department of Motor Vehicles as a Dealer Agent and his principal office is located at 300 S. Sycamore Avenue, Suite 102, Sioux Falls, South Dakota.

10. As employees of the Department of Motor Vehicles, Dealer Agents are responsible for answering dealer business questions, providing training and instruction on compliance and procedures, enforcing laws and regulations, investigating complaints and violations, and conducting inspections.

11. To the best of Plaintiffs' knowledge, Defendant Rysavy has been performing his duties as an employee or Dealer Agent for the Department of Motor Vehicles for over twenty years.

12. Harr and Bormann formed Total Auctions in 2014.

13. A Certificate of Organization for Total Auctions was issued by the South Dakota Secretary of State's Office on March 7th, 2014.

14. As part of its business, Total Auctions was a licensed vehicle dealer under the laws of the State of South Dakota.

15. Total Auctions developed a business plan and created a business model based on providing auto auctions that were open to the public.

16. Total Auctions' primary intended business activity and income producer was conducting public auto auctions.

17. Total Auctions searched for and located the ideal facility capable of satisfying the needs required to conduct public auto auctions.

18. Total Auctions executed a commercial lease for the facility and real estate located at 27266 Kenworth Place, Harrisburg, South Dakota (hereinafter "Leased Premises").

19. The Commercial Lease granted Total Auctions an irrevocable purchase option to purchase the Leased Premises for a one-year period.

20. Upon expiration of the irrevocable purchase option, Total Auctions was granted a right of first refusal for any subsequent offer on the Leased Premises.

21. The Leased Premises is located in Lincoln County, South Dakota and situated adjacent to the Interstate 29 and Tea exit.

22. All of Total Auctions' public auto auctions would take place at the Leased Premises.

23. To ensure that Total Auctions business would comply with South Dakota law, Bormann and Harr contacted the South Dakota

Department of Motor Vehicles for advice, guidance, and assistance about prohibited business activities.

24. Total Auctions set up a meeting with Defendant Rysavy, a Dealer Agent and employee of the Department of Motor Vehicles.

25. Defendant Rysavy's office is located at 300 South Sycamore Ave, Suite 102 in Sioux Falls, South Dakota.

26. Around July 11th, 2014, at approximately 8:30 a.m., representatives from Total Auctions met with Defendant Rysavy at his Sioux Falls office to address any potential issues related to applicable law or regulations and discuss the proper procedures that Total Auctions was required to follow in order to comply with the relevant law and regulations of South Dakota (hereinafter "Initial Meeting").

27. During the Initial Meeting, Total Auctions discussed its entire business plan with Defendant Rysavy.

28. Total Auctions provided Defendant Rysavy with the specific details of each and every method it would pursue in order to obtain the vehicle inventory necessary for public auto auctions.

29. During the Initial Meeting, Total Auctions repeatedly stated that Total Auctions would be obtaining vehicle consignments from dealers throughout the state of South Dakota, including dealers located outside of Lincoln County.

30. During the Initial Meeting, Defendant Rysavy provided guidance to Total Auctions and devoted a significant amount of time

identifying the specific forms and information required by the Department of Motor Vehicles to complete vehicle consignments for the contemplated public auctions.

31. During the Initial Meeting, Defendant Rysavy also provided guidance to Total Auctions by explaining the forms required by the Department of Motor Vehicles and instructing Total Auctions how to properly complete the legally required forms.

32. With full knowledge and complete disclosure by Total Auctions during the Initial Meeting, related to its intended public auto auction business, structure, model, and concept, Defendant Rysavy never addressed and failed to discuss, mention, express any concern, raise any issues, or in any way indicate to Total Auctions that obtaining consignments from dealers outside of Lincoln County was not permissible and prohibited under South Dakota law.

33. Based on the advice, guidance, and information that Defendant Rysavy provided during the Initial Meeting, Total Auctions, Harr, and Bormann relied on Defendant Rysavy's experience and authority to their detriment.

34. After the Initial Meeting, Total Auctions took the necessary actions and began performing the tasks required to make its business operational.

35. Total Auctions scheduled its first public auto auction to take place at the Leased Premises for Saturday, August 9, 2014 (hereinafter "Initial Auction").

36. Prior to the Initial Auction, Defendant Rysavy and Total Auctions had numerous additional conversations, meetings, discussions, and face-to-face visits at the Leased Premises to ensure that Total Auctions was following the proper guidelines, conforming to the standards set by the Department of Motor Vehicles, and in compliance with applicable South Dakota law.

37. At no time, during any of these follow-up visits, meetings, or discussions with Total Auctions did Defendant Rysavy ever raise any issues, express any concerns, or mention a single potential problem with Total Auctions intended business complying with South Dakota law.

38. Defendant Rysavy took further affirmative actions throughout the entire compliance process to support Total Auctions business and provide assistance in getting it operational, confirming Defendant Rysavy's opinion that Total Auctions' business complied with the law and conformed to the regulations.

39. Two days before the Initial Auction, which was on or about August 7, 2014, at approximately 10:00 am, Defendant Rysavy spoke via telephone with Dan Uthe, the owner of Lake Herman Auto in Madison, South Dakota.

40. Lake Herman Auto was one of the out of county dealerships that was going to consign vehicles to Total Auctions as part of the vehicle inventory available for sale at the Initial Auction.

41. To ensure Total Auctions was following the proper procedures and complied with the law, Defendant Rysavy instructed Mr. Uthe of the necessary paperwork required from Lake Herman Auto to complete any consignments with Total Auctions, prior to the Initial Auction.

42. During his conversation with Mr. Uthe, Defendant Rysavy never mentioned or raised any potential concerns and issues with the Lake Herman Auto consignments to Total Auctions.

43. All of Defendant Rysavy's actions and interactions with Total Auctions throughout the entire process, indicated that, based on his expertise as a Dealer Agent for the Department of Motor Vehicles, it was his professional opinion that Total Auctions' business complied with South Dakota law.

44. Defendant Rysavy never provided any indication to the contrary and failed to raise a single issue that would put Total Auctions on notice or indicate that it was unreasonable for it to rely on the opinion Defendant Rysavy issued regarding how South Dakota law applied to its business.

45. On Friday, August 8th, 2014, less than twenty-four (24) hours before the scheduled Initial Auction, Defendant Rysavy stopped

by the Leased Premises and for the first time indicated that there was an issue with the consignments from dealers outside of Lincoln County.

46. Defendant Rysavy informed Total Auctions of the situation and directed Total Auctions to contact Defendant Laurenz, the Director of the Department of Motor Vehicles in Pierre, South Dakota.

47. Because Defendant Rysavy had never mentioned any concerns or raised any issues about the auctions to Total Auctions prior to this and the Initial Auction was scheduled for the next day, Total Auctions was shocked and forced into an emergency state of panic.

48. Demanding answers, Total Auctions and its legal counsel immediately attempted to contact Defendant Laurenz via telephone but were unable to reach her directly.

49. Total Auctions only option was to leave messages requesting information and a return call on Defendant Laurenz's voice mail.

50. Several hours later on August 8, 2014, Defendant Laurenz and the Deputy Director of the South Dakota Department of Motor Vehicles telephoned Total Auctions' member, Bormann, on his cell phone.

51. Defendant Laurenz and the Deputy Director informed Bormann that Total Auctions was not allowed to sell consigned vehicles from dealers outside of Lincoln County at the Initial Auction, scheduled for the following day.

52. Bormann emphasized the devastating and crippling impact that Defendant Laurenz's decision would have on Total Auctions' business.

53. Defendant Laurenz ultimately allowed Total Auctions to proceed with the claimed non-compliant Initial Auction as originally planned.

54. Defendant Laurenz cautioned that Total Auctions was required to conduct all future auctions having only those vehicle consignments obtained from dealers located in Lincoln County available for sale to the public.

55. Inventory for the Initial Auction included consigned vehicles from eight (8) dealers outside of Lincoln County that had consigned thirty-four (34) vehicles out of the total 114 vehicles available for sale or approximately 30% of Total Auctions' consigned inventory.

56. Following the Initial Auction, Total Auctions completed a number of additional public auto auctions at the Leased Premises.

57. The additional public auto auctions were scheduled for the following dates in 2014: September 6, October 25, November 15, November 29, and December 13.

58. Consignments from dealers outside of Lincoln County were an indispensable aspect of Total Auctions' business and without these consignments its business was crippled.

59. The number of vehicles per sale that Total Auctions was able to obtain for sale at future auctions was drastically reduced and the inventory dropped off substantially with each subsequent auction.

60. The acts, errors, and omissions of Defendant Rysavy deprived Total Auctions of its ability to generate revenue.

61. The acts, errors, and omissions of Defendant Rysavy caused Total Auctions to incur substantial financial and economic damages.

62. The acts, errors, and omissions of Defendant Rysavy caused significant hardship, turmoil, stress, anxiety, mental anguish, disappointment, and loss of life enjoyment to Total Auctions' members, Bormann and Harr.

63. The acts, errors, and omissions of Defendant Rysavy forced Total Auctions out of business and caused the business to incur additional damages in the form of expenses and other foregone business opportunities.

64. As a result of Defendant Rysavy's acts, errors and omissions, Total Auctions was unable to exercise the irrevocable purchase option on the Leased Premises.

65. As a result of Defendant Rysavy's acts, errors and omissions, Total Auctions was unable to exercise its right of first refusal and purchase the Leased Premises so the building was sold to a third party, and Total Auctions was forced to vacate.

66. As a result of Defendant Rysavy's acts, errors and omissions, Total Auctions was stripped of the critical income generator for its business and forced to abandon the public auto auction business.

67. The acts, errors and omissions of Defendant Rysavy caused significant financial harm and losses to Total Auctions, Bormann and Harr.

68. Total Auctions reasonably relied on Defendant Rysavy's actions, advice, guidance, and counseling to its detriment.

69. On January 12, 2015, pursuant to SDCL § 3-21-2 et. seq., Total Auctions provided notice of its claim to the Secretary of the South Dakota Department of Revenue and Regulation, Director of the South Dakota Department of Motor Vehicles, Attorney General, Commissioner of Administration, and Dealer Agent Rysavy.

COUNT I – NEGLIGENCE

70. Paragraphs 1 through 69 are re-alleged as if set forth here again.

71. Defendant Rysavy owed Total Auctions, Bormann, and Harr a duty to exercise reasonable care under the circumstances.

72. Defendant Rysavy owed Total Auctions a duty to follow the established Department of Motor Vehicles protocols before issuing an opinion on the application of South Dakota law to Total Auctions' business.

73. Defendant Rysavy breached one of more of the duties owed to Total Auctions, Bormann, and Harr.

74. Defendant Rysavy's acts, errors, and omissions constitute negligence under the laws of the State of South Dakota.

75. As an experienced Dealer Agent and employee of the South Dakota Department of Motor Vehicles, Defendant Rysavy provided Total Auctions with erroneous direction, counsel, opinions, advice, and guidance on the application of South Dakota law to Total Auctions' business.

76. At all times relevant to this action, Defendant Rysavy was serving and acting for the benefit of Defendants South Dakota Department of Revenue and Regulation and the South Dakota Department of Motor Vehicles.

77. At all times relevant to this action, Defendant Rysavy was acting within the ordinary course or scope of his authority and employment relationship with Defendants the South Dakota Department of Revenue and Regulation, and the South Dakota Department of Motor Vehicles.

78. Defendant Rysavy's acts were motivated by a purpose to serve Defendants South Dakota Department of Revenue and Regulation and South Dakota Department of Motor Vehicles.

79. Defendant Rysavy's acts were the type and kind of which Defendant Rysavy was hired to perform.

80. All interactions that took place between Defendant Rysavy and Total Auctions occurred within normal business hours and during the ordinary work week established by the State of South Dakota.

81. Defendant Rysavy's acts, errors, and omissions occurred within the scope and performance of Defendant Rysavy's duties while

acting as an employee and agent of the South Dakota Department of Motor Vehicles.

82. Defendant Rysavy had adequate time and opportunities to correct the negligent direction, counsel, opinions and advice that he provided to Total Auctions on the application of South Dakota law but Defendant Rysavy failed to do so.

83. As a direct and proximate result of Defendant Rysavy's negligence, Total Auctions sustained significant financial harm and members Bormann and Harr suffered severe mental anguish, frustration, stress, anxiety, disappointment, and loss of enjoyment of life.

84. As a direct and proximate result of Defendant Rysavy's negligence, Total Auctions incurred significant startup business expenses in pursuit of its business, the reasonable value of which is estimated to be $130,000.

85. As a direct and proximate result of Defendant Rysavy's negligence, Total Auctions incurred damages related to building improvements, repairs, and upgrades to the Leased Premises in order to provide the accommodations necessary to meet or satisfy the needs required to operate Total Auctions' business, the reasonable value of which is estimated to be $20,000.

86. As a direct and proximate result of Defendant Rysavy's negligence, Total Auctions sustained foregone business opportunity

damages including but not limited to, the purchase of the Leased Premises, with a reasonable value estimated to be $450,000.

87. As a direct and proximate result of Defendant Rysavy's negligence, Total Auctions sustained lost profit damages, the reasonable value of which is estimated to be $150,000.

88. As a direct and proximate result of Defendant Rysavy's negligence, Total Auctions sustained future lost profits and damages related to lost business relationships, the reasonable value of which is estimated to be $800,000.

89. As a direct and proximate result of Defendant Rysavy's negligence, Bormann and Harr suffered severe mental anguish, frustration, stress, anxiety, disappointment, and loss of life enjoyment, the reasonable value of which is to be determined by the jury.

COUNT II-NEGLIGENT SUPERVISION

90. Paragraphs 1 through 89 are re-alleged as if set forth here again.

91. As the Director of the South Dakota Department of Motor Vehicles, Defendant Laurenz, is responsible for managing, supervising and overseeing the actions of the employees and agents of the South Dakota Department of Motor Vehicles.

92. Defendant Laurenz knew or reasonably should have known about the interactions between Defendant Rysavy and Total Auctions

related to the application of South Dakota law to its public auto auction business.

93. Defendant Laurenz, as Director of the South Dakota Department of Motor Vehicles, had a duty to supervise Defendant Rysavy's actions, guidance, advice, and opinions while performing his duties as an employee and agent of the South Dakota Department of Motor Vehicles.

94. Defendant Laurenz owed Total Auctions a duty to supervise, inspect, train, educate, and assist Defendant Rysavy before he issued Total Auctions an opinion, to ensure that the laws of the state of South Dakota were correctly applied to the public auto auction business being conducted by Total Auctions.

95. Defendant Laurenz knew or reasonably should have known that Defendant Rysavy was providing direction, counsel, opinion, and advice to Total Auctions on the application of South Dakota law to its business.

96. Defendant Laurenz failed to adequately supervise and monitor the acts of Defendant Rysavy to ensure that the established protocols of the South Dakota Department of Motor Vehicles were being followed.

97. At all times relevant to this action, Defendant Laurenz was serving and acting for the benefit of Defendants South Dakota

Department of Revenue and Regulation and the South Dakota Department of Motor Vehicles.

98. At all times relevant to this action, Defendant Laurenz was acting within the ordinary course or scope of her authority and employment relationship with Defendants, the South Dakota Department of Revenue and Regulation, and the South Dakota Department of Motor Vehicles.

99. Defendant Laurenz's acts, errors and omissions were related to the routine duties and responsibilities for which she was hired to perform.

100. Defendant Laurenz's acts, errors, and omissions occurred within the scope and performance of Defendant Laurenz's duties while acting as an employee, director and agent of the South Dakota Department of Motor Vehicles.

101. Defendant Laurenz breached one or more of the duties owed Plaintiffs.

102. Defendant Laurenz's acts, errors, omissions, failures, and breach of duty, constitutes negligence under the laws of South Dakota.

103. As a direct and proximate result of Defendant Laurenz's negligence, Total Auctions has sustained significant financial harms and damages including but not limited to, lost profits, lost future profits, business expenses, and lost business relationships, the reasonable value of which is estimated at $1,100,000.

104. As a direct and proximate result of Defendant Laurenz's negligence, Total Auctions sustained foregone business opportunity damages including but not limited to, the purchase of the Leased Premises, with a reasonable value estimated to be $450,000.

105. As a direct and proximate result of Defendant Laurenz's negligence, Bormann and Harr suffered severe mental anguish, frustration, stress, anxiety, disappointment, and loss of enjoyment of life, the reasonable value of which is to be determined by the jury.

THEREFORE, Plaintiffs asks the Court to enter a judgement against the Defendants, jointly and severally, for the reasonable value of such damages as are proven by the evidence at trial, together with pre-judgment and post-judgment interest and Plaintiffs' costs and disbursement in this action, and for such other relief as the Court may deem appropriate.

Dated this 30th day of July, 2015.

CHRISTOPHERSON, ANDERSON, PAULSON & FIDELER, LLP.

Casey W. Fideler
Christopher L. Fideler
Attorneys for Plaintiff
509 S. Dakota Avenue
Sioux Falls, SD 57104
(605) 336-1030
casey@capflaw.com
chris@capflaw.com

DEMAND FOR JURY TRIAL

Plaintiffs, hereby demand trial by jury on all the issues in this action.

Dated this 30th day of July, 2015.

CHRISTOPHERSON, ANDERSON, PAULSON & FIDELER, LLP.

Casey W. Fideler
Attorneys for Plaintiffs

STATE OF SOUTH DAKOTA :SS COUNTY OF LINCOLN	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

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TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN, Plaintiffs, v. SOUTH DAKOTA DEPARTMENT OF REVENUE & REGULATION, SOUTH DAKOTA DEPARTMENT OF MOTOR VEHICLES, PEGGY LAURENZ, individually and in her official capacity as an employee and Director of the South Dakota Department of Motor Vehicles, and RONALD RYSAVY, individually and in his official capacity as an employee and agent of the South Dakota Department of Motor Vehicles, Defendants.	: : : : : : : : : : : : : :	41CIV15-000292 **DEFENDANTS' MOTION TO DISMISS**

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The South Dakota Department of Revenue and Regulation, the South Dakota Division of Motor Vehicles, Peggy Laurenz, and Donald Rysavy (the "Defendants") move that the Court dismiss both counts of Plaintiff Total Auctions' Complaint for failure to state a claim upon which relief may be granted. This motion is supported by the pleadings of record, and a separately filed brief.

Dated this 3rd day of September 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

James E. Moore
Joel E. Engel III
300 South Phillips Avenue, Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
James.Moore@woodsfuller.com
Joel.Engel@woodsfuller.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 2015, I electronically filed the foregoing Defendants' Motion to Dismiss using the Odyssey File & Serve System which will automatically send e-mail notification to the following:

Casey W. Fideler
Christopher L. Fideler
Christopherson, Anderson, Paulson & Fideler, LLP
casey@capflaw.com
chris@capflaw.com

/s/ James E. Moore
One of the attorneys for Defendants

Filed: 9/3/2015 1:42:43 PM CST Lincoln County, South Dakota 41CIV15-000292

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
Lincoln County
104 N. Main Street
Canton, SD 57013

March 3, 2016

[Sent by email and not by U.S. Mail]

Casey Fideler & Christopher Fideler
509 S. Dakota Ave.
Sioux Falls, SD 57104

James Moore & Joel Engel
PO Box 5027
Sioux Falls, SD 57117

Re: Total Auctions and Real Estate, LLC, Andrew Harr & James Bormann (Plaintiffs) v. SD Dept. of Rev., SD Dept. of Motor Vehicles, Peggy Laurenz & Ronald Rysavy (Defendants)
Lincoln County Civ. No. 15-292

Dear Counsel:

This letter sets forth my decision on defendants' motion to dismiss. I grant the motion for the reasons set forth herein.

Procedural Background

Plaintiff's filed this action on August 12, 2015. Defendants did not file an answer to the complaint, but instead on September 3, 2015 filed their motion to dismiss, asserting that Plaintiffs' complaint failed to state a claim upon which relief can be granted.

The parties briefed the issues and a hearing was held on December 1, 2015, at which oral argument was received and the matter was taken under advisement.

Motion to Dismiss

Defendants' motion is made pursuant to SDCL 15-6-12(b)(5), which states:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the

responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:...

(5) Failure to state a claim upon which relief can be granted;

A motion making any of these defenses shall be made before pleading if a further pleading is permitted...

All reasonable inferences of fact must be drawn in favor of the non-moving party when ruling on a motion to dismiss. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, 699 N.W.2d 493. A motion to dismiss is viewed with disfavor and is rarely granted. *Id.* A motion to dismiss for failure to state a claim tests the law of a plaintiff's claim, not the facts which support it. *Wojewski v. Rapid City Regional Hosp., Inc.*, 2007 S.D. 33, 730 N.W.2d 626. While a court must accept allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations. *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, 731 N.W.2d 184.

Facts Taken From Complaint

Plaintiffs' 19 page complaint contains 105 numbered paragraphs of alleged facts.

Plaintiff Total Auctions and Real Estate, LLC ("Total Auctions") is a South Dakota LLC formed in March 2014. Complaint ¶¶ 1, 12-13. Plaintiffs Harr and Bormann are the members of Total Auctions. ¶¶ 2, 12. Total Auctions was a licensed vehicle dealer under South Dakota law, and the business plan of Total Auctions was to host automobile auctions open to the general public. ¶¶ 14-16. A business site was located and leased adjacent to the Tea, SD exit on Interstate 29, in Lincoln County. ¶¶ 18-22.

Defendant SD Department of Revenue ("DOR") is a division of the State of South Dakota, and the Department of Motor Vehicles ("DMV") is a division within the DOR. ¶¶ 3-5. DMV is responsible for overseeing dealer licensing in South Dakota. ¶ 7. Defendant Laurenz is the Director of DMV and Rysavy is an employee of DMV, employed as a Dealer Agent. ¶¶ 7-9.

"To ensure that Total Auctions business would comply with South Dakota law, Bormann and Harr contacted the South Dakota Department of Motor Vehicles for advice, guidance, and assistance about prohibited business activities." ¶ 23.

Plaintiffs met with Rysavy on July 11, 2014 to discuss Total Auctions' business plan. During that meeting, plaintiffs "repeatedly" stated they would be obtaining vehicle consignments from dealers throughout South Dakota, including dealers outside of Lincoln County. ¶¶ 26-29. During the meeting Rysavy provided guidance to plaintiffs,

including identifying and explaining forms required by DMV regarding vehicle consignments for the planned public auctions. ¶¶ 30-31.

"With full knowledge and complete disclosure by Total Auctions during the Initial Meeting, related to its intended public auto auction business, structure, model, and concept, Defendant Rysavy never addressed and failed to discuss, mention, express any concern, raise any issues, or in any way indicate to Total Auctions that obtaining consignments from dealers outside of Lincoln County was not permissible and prohibited under South Dakota law." ¶ 32. Plaintiff's relied on the advice, guidance and information provided by Rysavy. ¶¶ 33, 68.

Total Auctions scheduled its first public auction for August 9, 2014. ¶ 35. Between July 11 and August 7, 2014, plaintiffs continued to meet and communicate. ¶ 36. "At no time, during any of these follow-up visits, meetings, or discussions with Total Auctions did Defendant Rysavy ever raise any issues, express any concerns, or mention a single potential problem with Total Auctions intended business complying with South Dakota law." ¶ 37.

One of the dealers outside of Lincoln County who was going to provide vehicles for the auctions was located in Madison, S.D. Rysavy visited with that Madison dealer and helped that dealer with the paperwork, never indicating there would be a problem with that dealer providing vehicles for the auctions. ¶¶ 39-42.

"All of Defendant Rysavy's actions and interactions with Total Auctions throughout the entire process, indicated that, based on his expertise as a Dealer Agent for the Department of Motor Vehicles, it was his professional opinion that Total Auctions' business complied with South Dakota law." ¶ 43.

On August 8, 2014, the day before the first auction, Rysavy notified plaintiffs there was an issue with the consignments from dealers outside of Lincoln County, and later that same day Laurenz informed plaintiffs that while it could proceed with the August 9 auction as planned, for all future auctions Total Auctions was prohibited from selling vehicles consigned from dealers outside of Lincoln County. ¶¶ 45-55.

The inability to get consignment vehicles from dealers outside of Lincoln County "crippled" Total Auctions' business and caused substantial damages. ¶¶ 56-67, 83-89, 103-105.

Plaintiffs allege two counts. Count I is for negligence, alleging Rysavy's acts, errors and omissions constitute negligence, and said negligence occurred in the scope of his employment with DMV. Count II is for negligent supervision, in that Laurenz breached her duty to supervise Rysavy's actions in the scope of his employment.

Legal Issues

Count I - Negligence

Defendants' motion to dismiss is based the ruling in *Meyer v. Santema*, 1997 S.D. 21, 559 N.W.2d 251, that misrepresentations of law are not actionable. *Id.* at ¶ 13. In that case, Meyer approached sellers Santema and Willmott about buying some lots in White, S.D, for the purpose of operating a trucking terminal on the land. Sellers told Meyer the land was zoned for that type of use. When Meyer attempted to obtain a building permit, there was an issue about whether the lots were zoned for business use, so Meyer attended a city council meeting. Willmott was a member of the council, and during the meeting the city mayor stated "If they are not industrial, we will make them industrial." The council then voted to zone the land as industrial.

Later a citizen complained, challenging the vote as being defective due to lack of proper notice. The council rescinded the earlier vote, and after a public hearing, eventually denied rezoning the land for industrial use.

Meyer sued sellers and the city alleging negligent misrepresentation. The court granted summary judgment for defendants and the South Dakota Supreme Court affirmed that summary judgment was proper for two reasons. First, when the city represented it would rezone the land to industrial use, this was a representation as to a future event, and "representations as to future events are not actionable and false representations must be of past or existing facts." *Id.* at ¶ 11.

More pertinent to our pending motion to dismiss, the court in *Meyer* also held:

> Additionally, Meyer is presumed to know the law, including the nature and extent of City's authority. *State v. Dorhout*, 513 N.W.2d 390, 395 (S.D. 1994) (citing *Hanson v. Brookings Hosp.*, 469 N.W.2d 826, 828 (S.D. 1991) ("The law includes municipal ordinances.")); see also *Northernaire Productions, Inc. v. County of Crow Wing*, 244 N.W.2d 279, 282 (Minn. 1976) ("The plaintiffs here had alternative means of obtaining an interpretation of the zoning ordinance, either by consulting an attorney or by applying to the full [Commission] for a formal interpretation pursuant to established procedures."). Therefore, Meyer was charged with the knowledge that an ordinance may only be changed through compliance with proper statutory procedures.
>
> Furthermore, City's misrepresentations concerned interpretation and implementation of a zoning ordinance, which is a matter of law -- misrepresentations of law are not actionable. *Gatz*, 356 N.W.2d at 718 (citing *Northernaire*, 244 N.W.2d at 281, where the Minnesota Supreme Court held that county officials may not be held liable in damages when they negligently misrepresent the legal requirements of their zoning ordinance to members of the

public who rely on that misrepresentation); see also *Smith v. Sears, Roebuck & Co.*, 672 So.2d 794, 797 (Ala. Civ. App.), reh'g & cert. denied (1995) (stating that misrepresentations of law do not support an action for fraud).

Count I of plaintiffs' complaint alleges general negligence, not negligent misrepresentation. The alleged negligent conduct, however, is that Rysavy "never addressed and failed to discuss, mention, express any concern, raise any issues, or in any way indicate to Total Auctions that obtaining consignments from dealers outside of Lincoln County was not permissible and prohibited under South Dakota law." Further, "All of Defendant Rysavy's actions and interactions with Total Auctions throughout the entire process, indicated that, based on his expertise as a Dealer Agent for the Department of Motor Vehicles, it was his professional opinion that Total Auctions' business complied with South Dakota law." Complaint ¶ 43.

Giving plaintiffs the benefit of all reasonable inferences of fact, the bottom line is that plaintiffs assert Rysavy's acts or inactions led plaintiffs to believe that Total Auctions' business plan of selling vehicles on consignment from dealers outside of Lincoln County complied with South Dakota law. As in *Meyer*, plaintiffs are presumed to know the law, and could have ascertained on their own or consulted their own legal counsel as to the legality of their business plan. Further, any misinformation from or misrepresentations by Rysavy to plaintiffs related to the interpretation and implementation of South Dakota dealer laws, and as held in *Meyer*, misrepresentations of law are not actionable. Therefore, plaintiffs' complaint fails to state a claim against defendants upon which relief can be granted.

The law and logic of the Meyer decision is supported by cases from other jurisdictions. *See, Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn. Ct. App. 2002); *Carolina Chloride, Inc. v. Richland County*, 714 S.E.2d 869 (S.C. 2013).

Plaintiffs address in their brief the issues of sovereign immunity and coverage by the PEPL fund of negligence by employees of the state. These are not the issues raised, however, by defendants in their motion to dismiss, and these arguments are not applicable.

At oral argument counsel for plaintiffs also raised the argument that Rysavy's conduct constituted professional negligence vs. ordinary negligence. South Dakota does recognize professional negligence actions. For examples see *Kostel v. Schwartz*, 2008 S.D. 85, 756 N.W.2d 363 (physician), *Masloskie v. Century*, 2012 S.D. 58, 818 N.W.2d 798 (realtor), *O'Bryan v. Ashland*, 2006 S.D. 56, 717 N.W.2d 632 (accountant), *Richards v. Lenz*, 539 N.W.2d 80 (S.D. 1995) (psychologist), *Bosse v. Quam*, 537 N.W.2d 8 (S.D. 1995) (accountant), *Lien v. McGladrey & Pullen*, 509 N.W.2d 421 (S.D. 1993) (accountants), *Sander v. Gieb, Elston, Frost, PA*, 506 N.W.2d 107 (S.D. 1993) (clinical laboratory), *Mid-Western Elec. v. DeWild Grant Reckert & Assc.*, 500 N.W.2d 250 (S.D. 1993) (engineers/architects), *Appeal of Schramm*, 414 N.W.2d 31 (S.D. 1987) (dentist),

Wells v. Billars, 391 N.W.2d 668 (S.D. 1986) (optometrist). Plaintiffs, however, have pointed to no authority to support the theory that a state employee, in this case a dealer agent, is a "professional" subject to a professional negligence cause of action. Further, even if so, in this case it would not overcome the holding of *Meyer* as set forth above.

Count II – Negligent Supervision

South Dakota recognizes a claim for negligent supervision. A claim of negligent supervision avers that the employer failed to exercise reasonable care in supervising (managing, directing, or overseeing) its employees so as to prevent harm to other employees or third persons. *Iverson v. NPC International, Inc.*, 2011 S.D. 40, 801 N.W.2d 275. Negligent supervision is different than respondeat superior. *Rehm v. Lenz*, 1996 S.D. 51, 547 N.W.2d 560. Plaintiffs' complaint asserts negligent supervision, while plaintiffs' brief primarily addresses respondeat superior.

Regardless of the theory, an underlying tort by the employee or agent is a requirement to pursue a negligent supervision or respondeat superior claim. As addressed above, there is no cause of action for negligence against Rysavy. Since there is no underlying tort by Rysavy, there can be no award to plaintiffs against the remaining defendants under a claim of negligent supervision or respondeat superior. I was unable to find any South Dakota cases directly on point, but the requirement of an underlying tort makes sense, and cases from other jurisdictions, such as *Schoff v. Combined Ins. Co. of Am.*, 604 N.W. 2d 43 (Iowa 1999) and *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907 (Neb. 1993), support defendants' argument.

Further, examinations of South Dakota cases that have addressed negligent supervision in an employment setting involve an underlying tort by the employee. See *Iverson v. NPC International, Inc.*, 2011 S.D. 40, 801 N.W.2d 275 (assault); *McGuire v. Curry*, 2009 S.D. 40, 766 N.W.2d 501 (drunk driver); *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436 (assault).

Conclusion

For the reasons set forth above, defendants' motion to dismiss is granted. A copy of this letter is being filed with the Clerk of Courts. I request that defendants' counsel prepare a proposed order, which order shall incorporate by reference the findings and conclusions of this written decision. If the parties wish to have additional findings of fact and conclusions of law entered, they shall submit proposed findings and conclusions per SDCL 15-6-52.

Sincerely,

Jon Sogn - Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF LINCOLN	)	SECOND JUDICIAL CIRCUIT

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TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN,	:	41CIV15-000292
Plaintiffs,	:	
v.	:	
SOUTH DAKOTA DEPARTMENT OF REVENUE & REGULATION, SOUTH DAKOTA DEPARTMENT OF MOTOR VEHICLES, PEGGY LAURENZ, individually and in her official capacity as an employee and Director of the South Dakota Department of Motor Vehicles, and RONALD RYSAVY, individually and in his official capacity as an employee and agent of the South Dakota Department of Motor Vehicles,	:	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**
Defendants.	:	

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On September 3, 2015, Defendants filed a motion to dismiss under SDCL § 15-6-12(b)(5). The parties submitted written briefs on the motion, and the Court held a hearing on December 1, 2015, at which the parties were represented by counsel of record. After considering the oral and written arguments of counsel, on March 3, 2016, the Court issued a memorandum decision. For the reasons stated in that decision, a copy of which is attached and incorporated by reference, it is hereby

ORDERED AND ADJUDGED that Defendants' motion to dismiss is granted and Plaintiffs' complaint is dismissed with prejudice.

CW15-292

Dated this 10th day of March, 2016.

BY THE COURT:

JON SOGN
CIRCUIT COURT JUDGE

ATTEST:

KRISTIE TORGERSON, CLERK

By Karen J Nelson
Deputy

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
Lincoln County
104 N. Main Street
Canton, SD 57013

March 3, 2016

[Sent by email and not by U.S. Mail]

Casey Fideler & Christopher Fideler
509 S. Dakota Ave.
Sioux Falls, SD 57104

James Moore & Joel Engel
PO Box 5027
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> Additionally, Meyer is presumed to know the law, including the nature and extent of City's authority. *State v. Dorhout*, 513 N.W.2d 390, 395 (S.D. 1994) (citing *Hanson v. Brookings Hosp.*, 469 N.W.2d 826, 828 (S.D. 1991) ("The law includes municipal ordinances.")); see also *Northernaire Productions, Inc. v. County of Crow Wing*, 244 N.W.2d 279, 282 (Minn. 1976) ("The plaintiffs here had alternative means of obtaining an interpretation of the zoning ordinance, either by consulting an attorney or by applying to the full [Commission] for a formal interpretation pursuant to established procedures."). Therefore, Meyer was charged with the knowledge that an ordinance may only be changed through compliance with proper statutory procedures.
>
> Furthermore, City's misrepresentations concerned interpretation and implementation of a zoning ordinance, which is a matter of law -- misrepresentations of law are not actionable. *Gatz*, 356 N.W.2d at 718 (citing *Northernaire*, 244 N.W.2d at 281, where the Minnesota Supreme Court held that county officials may not be held liable in damages when they negligently misrepresent the legal requirements of their zoning ordinance to members of the

public who rely on that misrepresentation); see also *Smith v. Sears, Roebuck & Co.*, 672 So.2d 794, 797 (Ala. Civ. App.), reh'g & cert. denied (1995) (stating that misrepresentations of law do not support an action for fraud).

Count I of plaintiffs' complaint alleges general negligence, not negligent misrepresentation. The alleged negligent conduct, however, is that Rysavy "never addressed and failed to discuss, mention, express any concern, raise any issues, or in any way indicate to Total Auctions that obtaining consignments from dealers outside of Lincoln County was not permissible and prohibited under South Dakota law." Further, "All of Defendant Rysavy's actions and interactions with Total Auctions throughout the entire process, indicated that, based on his expertise as a Dealer Agent for the Department of Motor Vehicles, it was his professional opinion that Total Auctions' business complied with South Dakota law." Complaint ¶ 43.

Giving plaintiffs the benefit of all reasonable inferences of fact, the bottom line is that plaintiffs assert Rysavy's acts or inactions led plaintiffs to believe that Total Auctions' business plan of selling vehicles on consignment from dealers outside of Lincoln County complied with South Dakota law. As in *Meyer*, plaintiffs are presumed to know the law, and could have ascertained on their own or consulted their own legal counsel as to the legality of their business plan. Further, any misinformation from or misrepresentations by Rysavy to plaintiffs related to the interpretation and implementation of South Dakota dealer laws, and as held in *Meyer*, misrepresentations of law are not actionable. Therefore, plaintiffs' complaint fails to state a claim against defendants upon which relief can be granted.

The law and logic of the Meyer decision is supported by cases from other jurisdictions. *See, Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn. Ct. App. 2002); *Carolina Chloride, Inc. v. Richland County*, 714 S.E.2d 869 (S.C. 2013).

Plaintiffs address in their brief the issues of sovereign immunity and coverage by the PEPL fund of negligence by employees of the state. These are not the issues raised, however, by defendants in their motion to dismiss, and these arguments are not applicable.

At oral argument counsel for plaintiffs also raised the argument that Rysavy's conduct constituted professional negligence vs. ordinary negligence. South Dakota does recognize professional negligence actions. For examples see *Kostel v. Schwartz*, 2008 S.D. 85, 756 N.W.2d 363 (physician), *Masloskie v. Century*, 2012 S.D. 58, 818 N.W.2d 798 (realtor), *O'Bryan v. Ashland*, 2006 S.D. 56, 717 N.W.2d 632 (accountant), *Richards v. Lenz*, 539 N.W.2d 80 (S.D. 1995) (psychologist), *Bosse v. Quam*, 537 N.W.2d 8 (S.D. 1995) (accountant), *Lien v. McGladrey & Pullen*, 509 N.W.2d 421 (S.D. 1993) (accountants), *Sander v. Gieb, Elston, Frost, PA*, 506 N.W.2d 107 (S.D. 1993) (clinical laboratory), *Mid-Western Elec. v. DeWild Grant Reckert & Assc.*, 500 N.W.2d 250 (S.D. 1993) (engineers/architects), *Appeal of Schramm*, 414 N.W.2d 31 (S.D. 1987) (dentist),

Wells v. Billars, 391 N.W.2d 668 (S.D. 1986) (optometrist). Plaintiffs, however, have pointed to no authority to support the theory that a state employee, in this case a dealer agent, is a "professional" subject to a professional negligence cause of action. Further, even if so, in this case it would not overcome the holding of *Meyer* as set forth above.

Count II – Negligent Supervision

South Dakota recognizes a claim for negligent supervision. A claim of negligent supervision avers that the employer failed to exercise reasonable care in supervising (managing, directing, or overseeing) its employees so as to prevent harm to other employees or third persons. *Iverson v. NPC International, Inc.*, 2011 S.D. 40, 801 N.W.2d 275. Negligent supervision is different than respondeat superior. *Rehm v. Lenz*, 1996 S.D. 51, 547 N.W.2d 560. Plaintiffs' complaint asserts negligent supervision, while plaintiffs' brief primarily addresses respondeat superior.

Regardless of the theory, an underlying tort by the employee or agent is a requirement to pursue a negligent supervision or respondeat superior claim. As addressed above, there is no cause of action for negligence against Rysavy. Since there is no underlying tort by Rysavy, there can be no award to plaintiffs against the remaining defendants under a claim of negligent supervision or respondeat superior. I was unable to find any South Dakota cases directly on point, but the requirement of an underlying tort makes sense, and cases from other jurisdictions, such as *Schoff v. Combined Ins. Co. of Am.*, 604 N.W. 2d 43 (Iowa 1999) and *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907 (Neb. 1993), support defendants' argument.

Further, examinations of South Dakota cases that have addressed negligent supervision in an employment setting involve an underlying tort by the employee. See *Iverson v. NPC International, Inc.*, 2011 S.D. 40, 801 N.W.2d 275 (assault); *McGuire v. Curry*, 2009 S.D. 40, 766 N.W.2d 501 (drunk driver); *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436 (assault).

Conclusion

For the reasons set forth above, defendants' motion to dismiss is granted. A copy of this letter is being filed with the Clerk of Courts. I request that defendants' counsel prepare a proposed order, which order shall incorporate by reference the findings and conclusions of this written decision. If the parties wish to have additional findings of fact and conclusions of law entered, they shall submit proposed findings and conclusions per SDCL 15-6-52.

Sincerely,

Jon Sogn - Circuit Court Judge

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

: SS

COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

* *

TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN,	*	CIV. 15-292
Plaintiffs,	*	DEFENDANTS' MOTION TO DISMISS HEARING
vs.	*	
SOUTH DAKOTA DEPARTMENT OF REVENUE AND REGULATION, et. al.,	*	
Defendants.	*	

* *

BEFORE: The Hon. John C. Sogn, Circuit Court Judge in and for the Second Judicial Circuit, Canton, South Dakota.

APPEARANCES: Mr. Casey W. Fideler
Mr. Christopher L. Fideler
Attorneys at Law
509 South Dakota Avenue
Sioux Falls, South Dakota 57104

Attorneys for the Plaintiffs;

Mr. James E. Moore
Attorney at Law
300 South Phillips - Suite 300
Sioux Falls, South Dakota 57117

Attorney for the Defendants.

PROCEEDINGS: The above-entitled matter commenced at 11:00 a.m. on the 1st day of December, 2015, in the Lincoln County Courthouse, Canton, South Dakota.

That is a 1997 South Dakota Supreme Court case. But, unfortunately, I misplaced the plaintiffs' brief in this particular matter. They have provided a copy to me now and I have very briefly reviewed that, but have not had time to review the cases cited in there or to digest the argument that they have, and I will take some time after the hearing today to do that in fairness to all of the parties. But I do want to proceed with oral argument and I do have some questions that we can address this morning.

So, Mr. Moore, I would turn it over to you, please.

MR. MOORE: Thank you, Your Honor.

I am well aware of the standard for granting a motion to dismiss. I'm well aware that it's a stringent standard and that motions to dismiss are not to be frequently made, but I think this is an appropriate case for a motion to dismiss and it is so because it's one of those rare cases in which lawyers get to write the kind of brief they always dream about writing, one where you can rely essentially on one case, you can argue that that cases is dispositive of the motion, and you can be done with your brief. And that's essentially what we did here and it's essentially the basis on which I think the Court can grant the motion.

First of all, the motion is clearly based on nothing

more than the facts that are pleaded in the Complaint. If you look at the facts in a nutshell, they are that the principals of Total Auctions formed a new business in 2014. They had a business plan whereby they wanted to obtain vehicle consignments from South Dakota dealers, including out-of-county dealers, who would be able to bring a vehicle to their location in Lincoln County where it could be sold on consignment without the dealer actually transferring the title for that to happen. They met with Ron Rysavy, who was an employee of the South Dakota Department of Revenue, in July of 2014. They told him about their business plans and he did not tell them that what they were planning to do could not be done under South Dakota law.

On August 8th of 2014, shortly before their first consignment sale was to occur on August 9, there was conversation with Peggy Laurenz, who is the Director of the South Dakota Department of Motor Vehicles, and she advised them that their plans for out-of-county consignments were not lawful under South Dakota law and could not happen. Despite that, there was one auction that occurred on August 9.

So, in a nutshell, those are the facts, and the facts give rise to a claim that could be characterized as negligent misrepresentation. It could also just be

characterized as a negligence claim. I don't think that makes any difference.

If you look at the allegations in the Complaint, you can start with Paragraph 75, which talks about Rysavy giving erroneous advice about the application of South Dakota law, and that summary in Paragraph 75 is echoed in four other paragraphs in the Complaint.

If you look at Paragraph 32, it accuses him of giving incorrect advice about what is permissible and prohibited by South Dakota law.

In Paragraph 43 the allegation is that he gave his professional opinion that their business plan complied with South Dakota law.

If you look at Paragraph 44, the allegation is that he failed to notify them that it was not reasonable to rely on his opinion.

And if you look at Paragraph 82 --

THE COURT: That was 44?

MR. MOORE: 44.

-- that he failed to notify them that it was not reasonable to rely on his opinion.

THE COURT: And I'm looking at that -- and I'm sorry to interrupt your argument -- but just looking at that, are you saying that the allegation is that Rysavy said that they should not rely upon his opinion?

MR. MOORE: Well, the way the paragraph reads, it says: Defendant Rysavy never provided any indication to the contrary and failed to raise a single issue that would put Total Auctions on notice or indicate that it was unreasonable for it to rely on the opinion Defendant Rysavy issued regarding how South Dakota law applied to its business.

Maybe the best way to understand that paragraph is by focusing on the last part related to his opinion regarding how South Dakota law applied to its business.

And then lastly, Paragraph 82 again alleges that he gave a negligent opinion on the application of South Dakota law.

So, I think it's crystal clear from those five paragraphs in the Complaint that the essence of the claim against Rysavy is that he gave improper advice about the application of South Dakota law to their business. And I think that that is exactly the issue that the South Dakota Supreme Court decided in the Meyer vs. Santema case. The claim against the City of White essentially was that -- umm -- that property -- that the City had represented to the purchasers of the property that it could be rezoned for industrial use, and the South Dakota Supreme Court said, sorry, that is not an actionable claim because of two things: One, it relates to future events; but two, it

is a representation about the law and misrepresentations of law are not actionable. And the Court went on to indicate that the purchaser in that case was presumed to know the law. All of those things can be said about Total Auctions in this case.

First of all, Total Auctions is presumed to know what South Dakota law requires with respect to out-of-county consignments of dealers and whether a title has to actually be transferred for a sale to occur.

Secondly, as we just went through, the Complaint alleges repeatedly that what Rysavy did that was actionable and that was negligent is based on the legal advice that he gave to Total Auctions about what they could and could not do under South Dakota law, and I think that falls clearly within the rule in Meyer that misrepresentations of law are not actionable.

I simply don't see, Your Honor, any way in which the Meyer case is distinguishable from the facts that are presented in this case. I think the Court can grant the motion simply based on the Meyer case.

We did cite a couple of other out-of-state cases that illustrate that this is not some sort of isolated decision. It's not a unique proposition. It is well settled authority that you can't bring this kind of claim against a state official or any other person if what the

claim is based on is a representation as to what the law is.

So, in a nutshell, Your Honor, I think it's a very straightforward motion and I think it can be decided on a very straightforward basis in what the law has clearly established in the state of South Dakota, that the motion has merit and should be granted.

And that's all I have, unless you have any questions.

THE COURT: I appreciate that. One of the questions that I had is, I know in your briefs you indicated that you thought this is a negligent misrepresentation and the plaintiffs' position is that it's a negligent case, and you kind of touched on that, that -- are we in agreement that -- well, I am going to ask: What is the difference between the two and should it make a difference from a legal standpoint as to what we're approaching here?

MR. MOORE: One, I don't think it does make any difference. And for purposes of the motion, I think I can concede that they do not expressly plead negligent misrepresentation, but that does not distinguish this case from the Meyer vs. Santema decision. Certainly, the facts of that case are analogous to what occurred here, and if you simply look at what the allegations of negligence are, in the Complaint, it's clear that the allegations are

based on a representation as to what the law is or how it would apply to their business, and that leads you back to the rule in Santema that you can't base a claim on a misrepresentation of the law. So, I don't think that the Meyer case turned on whether or not it was a negligent misrepresentation claim. I don't think that this case needs to turn on that. I think you can simply look at the allegations in the Complaint that I have pointed out and say that based on those allegations, what they're alleging is a misrepresentation of law, which Meyer says is not actionable.

THE COURT: All right. And I'll ask the plaintiffs some of these same questions, to give us your position. But before I hear your side, one of the other issues that I had was one of the counts in the Complaint is for negligent supervision, and I've seen some argument as to whether that is respondeat superior or a separate negligent-supervision-type claim.

Do you think that makes a difference again in our legal analysis for this particular motion?

MR. MOORE: Well, if it's based on respondeat superior, there is no basis to hold the state liable if there is no underlying liability on the part of Ron Rysavy. And with respect to Peggy Laurenz, my understanding from the Complaint is that there was clearly a negligent

misrepresentation -- or a negligent supervision -- excuse me -- claim pleaded against her. And again, the elements of that claim under South Dakota law require that there be proof of an underlying tort. So again, if the employee that she's responsible for supervising, Ron Rysavy, is not negligent as a matter of law, there is simply no basis for her to be liable for negligent supervision.

THE COURT: Yeah. And that's really kind of what I'm trying to ask is, I think your position is whether it's respondeat superior or negligent supervision, your position is regardless, both require an underlying tort on behalf of Ron Rysavy before that action can be maintained?

MR. MOORE: That's correct.

THE COURT: And then I saw in the plaintiffs' brief, they indicated something about that the Meyer's case is distinguishable because the defendant had a pecuniary interest in the property. And I'm going to ask plaintiffs to expand on that, but also -- and we can wait until they talk about it, or I'll ask you right now, what is your position on that?

MR. MOORE: That it doesn't matter for purposes of applying the Meyer case. If they had actually pleaded explicitly a claim of negligent misrepresentation, that is an element of such a claim, and it is one argument that I could have made, that they can't establish negligent

misrepresentation because, in fact, Rysavy did not have a pecuniary interest in the outcome of the transaction, but it's not at issue from the Meyer case. The principle that misrepresentations of law are not actionable applies regardless of whether the person accused of making the misrepresentation has any pecuniary interest in the outcome.

THE COURT: Okay. Thank you.

From the plaintiff.

MR. CHRISTOPHER FIDELER: Thank you, Your Honor.

Yes, it matters a great deal whether or not we analyze this under a negligence point of view or a negligent misrepresentation. This could never be a negligent misrepresentation claim because the Supreme Court has said that one of those four elements is a pecuniary interest. Agent Rysavy, as an employee of the state of South Dakota, he cannot have a pecuniary interest in the underlying transaction. That is one distinction between our case and the Meyer case. Another one is the fact that the property was -- the guy says, you know what, it is zoned B, but if it's not, the City Council has the power to rezone it and we'll do that.

Well, they did just that. They rezoned it -- had an amendment to rezone it, and it turns out that that was the future event, the future occurrence. It wasn't the

Anybody who has questions about it, you go to the website. They tell you: Here's your guys to contact. Call Dealer Agent Rysavy and he'll get you set up.

There might be a misrepresentation of law somewhere in the gambit of the acts, errors, and omissions of Agent Rysavy, but the legal opinion he gave, that is the final outcome, Your Honor, the finality. That wasn't the only thing he did. They met about seven or eight times at different -- you know, out at the facility. He would show them what -- here's the forms. So, he provided negligent guidance on proper forms to fill out. He gave assistance in those forms. He said these are the forms required.

I would love to list every misrepresentation of fact, if that were the case, but without discovery, I can't say exactly what he based his decision on. But there was eight different -- I don't want to get held to that -- but I feel like there was between five and ten encounters where he told them the instructions. He gave them the forms. He said, this is what -- you know, fill this out. And it wasn't like in the White case where they said even if you're not good to go, we can change that. There was no future events here. He said at that time, this is the form. Fill it out. Good. You want to do consignments, here's the form. Here's how you fill it out. Good.

MR. CHRISTOPHER FIDELER: No, Your Honor. Two ways of saying the same thing I believe.

THE COURT: Because both require an underlying tort?

MR. CHRISTOPHER FIDELER: Both are not joint tortfeasor, but imputed liability because of the control element of the agent.

THE COURT: Okay. Thank you.

Anything else that you want to add right now?

(Pause)

MR. CHRISTOPHER FIDELER: No, Your Honor. Thank you.

THE COURT: Thank you.

Mr. Moore.

MR. MOORE: Just a couple of points, Your Honor.

First of all, in response to Mr. Fideler's argument that negligence is the failure to use reasonable care, I think we can all agree on that. The question is failure to use reasonable care to do what? The Complaint does not allege that Ron Rysavy failed to follow protocols or that he failed to follow a handbook. The Complaint clearly alleges that he was negligent in the advice that he gave to Total Auctions about whether or not its business plan conformed to South Dakota law. That is a representation as to the law. The allegation is not that he told them to use Form A and they in fact were required to use Form B or Form C. The allegation is that he did not tell them that

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27804

TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN,

Plaintiffs/Appellants,

vs.

SOUTH DAKOTA DEPARTMENT OF REVENUE & REGULATION, SOUTH DAKOTA DEPARTMENT OF MOTOR VEHICLES, PEGGY LAURENZ, individually and in her official capacity as an employee and Director of the South Dakota Department of Motion Vehicles, and RONALD RYSAVY, individually and in his official capacity as an employee and agent of the South Dakota Department of Motor Vehicles,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

THE HONORABLE JON SOGN

BRIEF OF APPELLEES

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Notice of Appeal filed March 26, 201

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The Order Granting the Appellees' Motion to Dismiss was filed on March 10, 2016. (SR 43.) Notice of Entry was filed the same day. (SR 51.) The Appellants' Notice of Appeal was filed on March 24, 2016. (SR 61.)

STATEMENT OF ISSUES

1. This Court held in *Meyer v. Santema*, 1997 S.D. 21, 559 N.W.2d 251, that representations of law are not actionable in a claim for negligent misrepresentation. Total Auctions alleges that Ron Rysavy, an agent of the Department of Revenue, gave bad advice about how South Dakota law would apply to its proposed new business. Is Total Auctions' claim barred under *Meyer*?

   The circuit court concluded that Total Auctions could not state a claim for negligence or negligent misrepresentation arising from representations of law under this Court's decision in *Meyer v. Santema*, 1997 S.D. 21, 559 N.W.2d 251.

   Meyer v. Santema, 1997 S.D. 21, 559 N.W.2d 251
   Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002)
   Carolina Chloride, Inc. v. Richland County, 714 S.E.2d 869 (S.C. 2011).

2. Total Auctions argues that *Meyer* applies only to claims for negligent misrepresentation, and that it seeks damages instead based on negligence. Assuming that the distinction is valid under *Meyer* for claims based on representations of law, this Court has held that claims seeking purely economic loss, like Total Auctions' claim, are barred by the economic-loss doctrine. Even if *Meyer* does not apply, is Total Auctions' claim barred by the economic loss doctrine?

   The circuit court did not address this issue, reasoning that it made no substantive difference under *Meyer* whether Total Auctions labeled its cause of action as negligence or negligent representation. This Court can affirm, however, for any legal reason that supports the judgment.

   Diamond Surface, Inc. v. State Cement Plan Comm'n, 1998 S.D. 97, 583 N.W.2d 155, 160
   Nebraska Innkeepers v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984)
   Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000).
   Monroe v. Sarasota County School Board, 746 So. 2d 530 (Fla. Dist. Ct. App. 1999)

3. Total Auctions' complaint does not plead or mention professional negligence, but Total Auctions argued in opposition to the motion for summary judgment that Rysavy should be liable based on professional negligence. This Court has held

that only certain occupations qualify as professions. Is a state revenue agent a "professional" who can be sued for malpractice?

The circuit court concluded that Rysavy was not a "professional" subject to such a cause of action.

Saiz v. Horn, 2003 S.D. 94, 668 N.W.2d 332.

4. The circuit court dismissed Total Auctions' claim for negligent supervision because it found no legally-valid claim against Rysavy. While the issue has not been directly addressed by this Court, the general rule is that a negligent supervision claim requires proof of an underlying tort against an employee. Can Rysavy's supervisor be liable for negligent supervision if Rysavy is not himself liable for negligence?

The circuit court held that proof of an underlying tort by the employee or agent is a necessary predicate for a negligent-supervision claim.

Schoff v. Combined Ins. Co. of Am., 604 N.W.2d 43 (Iowa 1999)
Schieffer v. Catholic Archdiocese, 508 N.W.2d 907 (Neb. 1993)
Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436
McGuire v. Curry, 2009 S.D. 40, 766 N.W.2d 501

STATEMENT OF THE CASE

On August 12, 2015, Total Auctions filed a complaint in circuit court in the second judicial circuit seeking damages for negligence and negligent supervision. Total Auctions alleged that Ron Rysavy, a dealer-agent with the South Dakota Division of Motor Vehicles, failed to inform Total Auctions that its intended plan to auction automobiles consigned from other vehicle dealers located outside Lincoln County was impermissible under South Dakota law. On September 3, 2015, Appellees South Dakota Department of Revenue and Regulation, South Dakota Department of Motor Vehicles, Peggy Laurenz, and Ronald Rysavy filed a motion to dismiss. A hearing on the motion was held on December 1, 2015, before the Honorable Jon Sogn. In a letter opinion dated March 3, 2016, the circuit court granted the motion to dismiss, reasoning that Total Auctions alleged that Rysavy's actions or inactions led Total Auctions to believe that its business plan complied with South Dakota law. The circuit court concluded that under

Meyer v. Santema, Total Auctions was presumed to know the law, and that Rysavy's representations of law were not actionable.

STATEMENT OF THE FACTS

Total Auctions is a South Dakota limited liability company that was formed by members Andrew Harr and Jason Borman in March 2014.[1] (Complaint ¶ 1-2, 12-13.) Total Auctions was a licensed vehicle dealer under South Dakota law. (*Id.* at ¶ 14.) Total Auctions' business plan was to hold public automobile auctions. (*Id.* at ¶¶ 15-16.) Total Auctions leased a facility in Harrisburg, Lincoln County, South Dakota, to hold its public auctions. (*Id.* at ¶¶ 19-21.) Total Auctions wanted to obtain vehicle consignments from dealers located throughout South Dakota, including dealers located outside Lincoln County. (*Id.* at ¶ 29.)

Total Auctions contacted the South Dakota Division of Motor Vehicles "[t]o ensure that Total Auctions business would comply with South Dakota law." (*Id.* at ¶ 24.) On July 11, 2014, Total Auctions met with Ronald Rysavy, a dealer-agent for the Division of Motor Vehicles. (*Id.* at ¶ 26.) Rysavy provided guidance by identifying the relevant forms and information required by the Division of Motor Vehicles to complete vehicle consignments for public auctions. (*Id.* at ¶ 30.) On August 7, 2014, two days before Total Auctions planned to hold its first auction, Rysavy spoke to Dan Uthe, the owner of Lake Herman Auto in Madison, South Dakota. (*Id.* at ¶ 39.) Lake Herman Auto was one of the dealers located outside Lincoln County that was going to consign vehicles to Total Auctions for public auction. (*Id.* at ¶ 40.) Rysavy instructed Uthe about the necessary paperwork required for Lake Herman Auto to complete any consignments to Total Auctions before the initial auction. (*Id.* at ¶ 41.)

[1] Like the circuit court and this Court, the Appellees accept as true the factual allegations contained in Total Auctions' Complaint for the purposes of the motion to dismiss.

On August 8, 2014, Rysavy informed Total Auctions that there was an issue with taking consignments from dealers outside of Lincoln County. (*Id.* at ¶ 45.) Rysavy told Total Auctions to contact Peggy Laurenz, the Director of the Division of Motor Vehicles. (*Id.* at ¶ 46.) On August 8, 2014, Laurenz and the Deputy Director called Bormann on his cell phone. (*Id.* at ¶ 50.) Laurenz informed Bormann that Total Auctions would not be permitted to sell consigned vehicles from dealers located outside of Lincoln County. (*Id.* at ¶ 51.) After Bormann protested, Laurenz ultimately permitted Total Auctions to proceed with the non-compliant auction as scheduled for August 9, but informed Bormann that Total Auctions would not be permitted to auction vehicles consigned from dealers located outside of Lincoln County at any future auctions. (*Id.* at ¶¶ 53-54.)

Total Auctions alleged that it relied on Rysavy's "actions, advice, guidance, and counseling to its detriment." (*Id.* at ¶ 68.) Count one of Total Auctions' Complaint pleaded negligence against Rysavy individually and vicariously against the Department of Revenue and the Division of Motor Vehicles. (*Id.* at ¶ 77.) Count two of Total Auctions' Complaint pleaded negligent supervision against Laurenz individually and vicariously against the Department of Revenue and the Division of Motor Vehicles. (*Id.* at ¶ 97.) Total Auctions sought damages in excess of one million dollars arising from alleged lost profits and "business opportunity damages." (*Id.* at ¶ 103.)

ARGUMENT

A motion to dismiss under SDCL § 15-6-12(b)(5) "tests the legal sufficiency of the pleading, not the facts which support it." *North American Truck & Trailer, Inc. v. M.C.I. Communication Serv's, Inc.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712. "For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Id.* However, a motion to

dismiss "does not admit conclusions of the pleader either of fact or law." *Nygaard v. Sioux Valley Hospitals & Health System*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190. "Therefore, while the court must accept allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Id.* The complaint should be dismissed if it fails to state any valid claim of relief. *Wojewski v. Rapid City Regional Hosp., Inc.*, 2007 S.D. 33, ¶ 11, 730 N.W.2d 626, 631.

The circuit court reasoned that the gravamen of Total Auctions' complaint was that Rysavy's conversation, or lack thereof, with Total Auctions led it to believe that its business plan of selling vehicles on consignment from dealers outside of Lincoln County complied with South Dakota law. Because representations of law are not actionable, and because Total Auctions was presumed to know the law, the circuit court correctly concluded that Total Auctions' complaint failed to state a claim upon which relief could be granted.

1. Representations of law are not actionable as negligence or negligent misrepresentation.

The crux of Total Auctions' lawsuit is that it relied on representations made by Rysavy to Total Auctions' detriment. "Defendant Rysavy provided Total Auctions with erroneous direction, counsel, opinions, advice, and guidance on the application of South Dakota law to Total Auctions' business." (Complaint, ¶ 75.) Although styled as a negligence claim, the facts Total Auctions has pleaded support a claim for negligent misrepresentation. While Total Auctions contends that there is a substantive difference between a negligence claim and a negligent misrepresentation claim, neither claim can be based on a misrepresentation of law. If that were not so, the holding in *Meyer v.*

Santema, 1997 S.D. 21, 559 N.W.2d 251, could be circumvented by a mere pleading decision.

A. Total Auctions' claim is based on representations of law.

Total Auctions wanted to sell vehicles on consignment from other dealers located outside of Lincoln County. Total Auctions alleges that ultimately it was not permitted to sell vehicles on consignment from out-of-county dealers under South Dakota law. Total Auctions alleges that it relied on Rysavy, who failed to "raise any issues, express any concerns, or mention a single potential problem with Total Auctions intended business complying with South Dakota law." (Complaint, ¶ 37.)

Total Auctions argues that the Appellees "singled out" five paragraphs from its complaint in support of the argument that the essence of the claim against Rysavy arose from his improper advice regarding South Dakota law. (Total Auctions Br., pg. 10.) But a reading of Total Auctions' complaint reveals that Rysavy's advice about the law, whether described as an affirmative approval or failing to raise a concern, is the only basis for Total Auctions' claim against him. The following paragraphs make clear that Total Auction pleaded misrepresentations of law:

> 23. *To ensure that Total Auctions business would comply with South Dakota law*, Bormann and Harr contacted the South Dakota Department of Motor Vehicles for advice, guidance, and assistance about prohibited business activities.
>
> 26. Around July 11, 2014, at approximately 8:30 a.m., representatives from Total Auctions met with Defendant Rysavy at his Sioux Falls office to address any potential issues related to *applicable law or regulations* and discuss the proper procedures that Total Auctions was required to follow *in order to comply with the relevant law and regulations of South Dakota* (hereinafter 'Initial Meeting').
>
> 32. With full knowledge and complete disclosure by Total Auctions during the Initial Meeting related to its intended public auto auction business, structure, model, and concept, Defendant Rysavy never addressed and failed to discuss, mention, express any concern, raise any

issues, or in any way indicate to Total Auctions that obtaining consignments from dealers outside Lincoln County *was not permissible and prohibited under South Dakota law*.

36. Prior to the Initial Auction, Defendant Rysavy and Total Auctions had numerous additional conversations, meetings, discussions, and face-to-face visits at the Leased Premises to ensure that Total Auctions was following the proper guidelines, conforming to the standards set by the Department of Motor Vehicles, *and in compliance with applicable South Dakota law*.

37. At no time, during any of these follow-up visits, meetings, or discussions with Total Auctions did Defendant Rysavy ever raise any issues, express any concerns, or mention a single potential problem with Total Auctions intended business *complying with South Dakota law*.

38. Defendant Rysavy took further affirmative actions throughout the entire compliance process to support Total Auctions business and provide assistance in getting it operational, confirming Defendant Rysavy's opinion that Total Auctions' business *complied with the law and conformed to the regulations*.

43. All of Defendant Rysavy's actions and interactions with Total Auctions throughout the entire process, indicated that, based on his expertise as a Dealer Agent for the Department of Motor Vehicles, it was his professional opinion that Total Auctions' business *complied with South Dakota law.*

44. Defendant Rysavy never provided any indication to the contrary and failed to raise a single issue that would put Total Auctions on notice or indicate that it was unreasonable for it to rely on the opinion Defendant Rysavy issued *regarding how South Dakota law applied to its business*.

72. Defendant Rysavy owed Total Auctions a duty to follow the established Department of Motor Vehicles protocols *before issuing an opinion on the application of South Dakota law to Total Auctions' business*.

75. As an experienced Dealer Agent and employee of the South Dakota Department of Motor Vehicles, Defendant Rysavy provided Total Auctions with erroneous direction, counsel, opinions, advice, and guidance *on the application of South Dakota law to Total Auctions' business*.

82. Defendant Rysavy had adequate time and opportunities to correct the negligent direction, counsel, opinions and advice that he provided to Total Auctions *on the application of South Dakota law* but Defendant Rysavy failed to do so.

> 92. Defendant Laurenz knew or reasonably should have known about the interactions between Defendant Rysavy and Total Auctions related to the *application of South Dakota law to its public auto auction business*.
>
> 95. Defendant Laurenz knew or reasonably should have known that Defendant Rysavy was providing direction, counsel, opinion, and advice to Total Auctions *on the application of South Dakota law to its business*.

(A-1 to A-19) (emphasis added). There is no need to "single out" a few paragraphs from the Complaint, because at least thirteen paragraphs directly discuss the application of South Dakota law to Total Auctions' business. That the basis of Total Auctions' Complaint is Rysavy's representations about the application of South Dakota law to its business cannot reasonably be disputed.

B. This Court's holding in *Meyer* bars Total Auctions' claim.

A legally-indistinguishable scenario was addressed by this Court in *Meyer v. Santema,* 1997 S.D. 21, 559 N.W.2d 251. There, Keith Meyer approached Darwin Willmott and Leonard Santema to buy two lots of real property in White, South Dakota. *Id.* at ¶ 2. Meyer intended to build and operate a trucking terminal on the lots. *Id.* Willmott and Santema represented to Meyer that the lots were zoned industrial and that a trucking operation could be located there. *Id.* Meyer gave the sellers $500.00 in earnest money and signed a purchase agreement for the lots. *Id.*

Meyer then attempted to obtain a building permit to construct the trucking terminals, but was informed that he would need to appear before the White City Council. *Id.* at ¶ 4. There was a dispute whether the lots that Meyer purchased were zoned industrial, or R-2 for residential use. *Id.* Willmott was a member of the city council, and assured the other members that the lots were zoned industrial. *Id.* The mayor stated that if the lots were not industrial, the council would make them industrial. *Id.* The council

then voted to zone the lots industrial and told Meyer to proceed with his building plans. *Id.*

After Meyer paid the balance of the purchase price, a citizen challenged the method by which the city rezoned the lots as contrary to statute. *Id.* at ¶ 5. The resolution was defective because the city council failed to give notice or hold a hearing. *Id.* The city rescinded the resolution and passed an identical resolution with proper notice. *Id.* However, a number of citizens spoke in opposition to the rezoning of the lots, and the city council voted to deny the rezoning of the lots to industrial. *Id.* Meyer then brought suit against Wilmott, Santema, and the city, alleging that the defendants' statements that the lots were zoned industrial constituted negligent misrepresentation. *Id.* at ¶ 7. The trial court granted the defendants' motions for summary judgment, and this Court affirmed. *Id.*

This Court first provided a framework for a negligent misrepresentation claim. The tort of negligent misrepresentation occurs when "in the course of business or any other transaction in which an individual has a pecuniary interest, he or she supplies false information for the guidance of others in their business transactions, without exercising reasonable care in obtaining or communicating the information." *Id.* at ¶ 9. A party seeking to recover for negligent misrepresentation must show "[k]knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous he will . . . be injured in person or property." *Id.* Additionally, the relationship of the parties "arising out of the contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information and the other giving information owes a duty to give it with care." *Id.*

This Court first noted that it was Meyer's reliance on the city's representations that led to his claimed pecuniary loss. *Id.* at ¶ 10. Importantly, the Court held, "Meyer is presumed to know the law, including the nature and extent of City's authority." *Id.* at ¶ 12. As such, Meyer was charged with the knowledge that an ordinance could only be changed through compliance with proper statutory procedures. *Id.* Additionally, this Court explained that "City's misrepresentations concerned interpretation and implementation of a zoning ordinance, which is a matter of law – misrepresentations of law are not actionable." *Id.* at ¶ 13.

Like the plaintiff in *Meyer*, Total Auctions alleged that it relied on Rysavy's "direction, counsel, advice, and guidance on the application of South Dakota law to Total Auctions' business." (Complaint, ¶ 75.) Whether Total Auctions characterizes Rysavy's conduct as negligent misrepresentation or negligence, the result is the same. Both claims presume a failure to exercise reasonable care, but the gravamen of the accusation against Rysavy is that he misled Total Auctions about what was acceptable under South Dakota law. *Meyer* is controlling and precludes Total Auctions from recovery based on a misrepresentation of law. *Meyer*, 1997 S.D. 21, ¶ 13, 559 N.W.2d at 255. The Circuit Court correctly held that Total Auctions' complaint fails to state a claim upon which relief may be granted.

C. Total Auctions' attempts to distinguish *Meyer* are meritless.

Although Total Auctions appears to have conceded that misrepresentations of law are not actionable (HT 22:10-13), it nonetheless attempts to distinguish *Meyer* from this case, arguing that the trial court's reliance on *Meyer* was misplaced. (Total Auctions Br., pg. 9.) Contrary to Total Auctions' arguments, the Court's primary holding from *Meyer*, that misrepresentations of law are not actionable, cannot be avoided.

First, Total Auctions asserts that *Meyer* is distinguishable because it was an appeal from a grant of summary judgment, not a motion to dismiss. (*Id.* pg. 9.) While Total Auctions is correct that the nonmovant's burden of proof in resisting summary judgment is higher than when resisting a motion to dismiss, there is no such difference when the issue is purely legal. Total Auctions has no burden to point to competent evidence – its allegations in its Complaint are accepted as true. The issue is purely one of law: is a misrepresentation of law actionable? Pursuant to *Meyer*, the circuit court properly concluded it is not.

Second, Total Auctions argues that Rysavy made statements concerning current facts and events, as opposed to statements as to future facts and events. (Total Auctions Br., pg. 12.) This argument is problematic for two reasons. First, the primary representation at issue in *Meyer*, i.e., the zoning status of a particular parcel of land, concerned a present issue of law. 1997 S.D. 21, ¶ 13, 559 N.W.2d at 255. Second, the representations Total Auctions alleges Rysavy made in this case concerned whether future acts would comply with South Dakota law. Total Auctions' complaint is replete with references to Total Auctions' future intentions. For example, Total Auctions alleged that it "provided Defendant Rysavy with the specific details of each and every method it *would* pursue in order to obtain the vehicle inventory necessary for public auto auctions." (Complaint, ¶ 28) (emphasis added). Similarly, Total Auctions alleged that "[d]uring the Initial Meeting, Total Auctions repeatedly stated that Total Auctions *would be* obtaining vehicle consignments from dealers throughout the state of South Dakota, including dealers located outside of Lincoln County." (Complaint, ¶ 29) (emphasis added).

Total Auctions' argument is factually incorrect.

Finally, Total Auctions argues that its case should have survived the motion to dismiss because it pleaded negligence, not negligent misrepresentation, and the Appellees "cannot dictate the theory upon which Total Auctions makes its case." (Total Auctions Br., pg. 15.) Based on this argument, misrepresentations of law are not actionable in a claim for negligent misrepresentation, but would be actionable in a negligence claim. This cannot be.

Total Auctions argues that it alleged a failure to follow protocols, consult with others, and to competently perform the duties of a dealer agent, (Total Auctions Br., at 20.) Thus, its claim is for negligence not negligent misrepresentation. As indicated, this is too fine a distinction. A claim for negligent misrepresentation includes proof that the defendant acted "without exercising care." *Meyer*, 1997 S.D. 21, ¶ 9, 559 N.W.2d at 254. The issue here is not the failure to use ordinary care, but the advice about compliance with South Dakota law.

Total Auctions cites no case in which a plaintiff has been allowed to circumvent the rule that misrepresentations of law are not actionable merely by labeling the claim one for negligence. By analogy, this Court has held that a plaintiff cannot defeat the defense of absolute privilege to a defamation claim by contending that the same facts also state claims for negligence and intentional and negligent infliction of emotional distress. *Harris v. Riggenbach*, 2001 S.D. 110, ¶ 14, 633 N.W.2d 193, 196. "'The salutary purpose of the privilege should not be frustrated by putting a new label on the complaint.'" *Id*. (quoting *Janklow v. Keller*, 241 N.W.2d 364, 370 (S.D. 1976)). What matters is what claim is supported by the facts, not what label is attached.

The tort of negligent misrepresentation exists to address liability in particular circumstances involving only pecuniary loss. "When the harm that is caused is only

pecuniary loss, the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it." Restatement (Second) of Torts § 552, cmt. a. Allowing Total Auctions to avoid the rule that misrepresentations of law are not actionable by recharacterizing its claim would ignore the principles that led to the development of the tort of negligent misrepresentation. As explained in the discussion below addressing the economic-loss doctrine, Total Auctions could not have stated a simple negligence claim. Its claim is necessarily based on negligent misrepresentation.

D. The rationale employed in *Meyer* is supported by other jurisdictions.

Other courts have employed similar reasoning to this Court's analysis in *Meyer* in holding that representations of law are not actionable. These decisions are specifically in the context of claims made against government officials, and elucidate strong policy considerations that weigh against imposing liability against government officials for representations of law.

Minnesota in particular has helpful caselaw on point. Although misrepresentations of fact may be actionable against government officials, "[m]isrepresentations of law, in contrast, are not actionable." *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 627 (Minn. Ct. App. 2002). In *Mohler*, the Christiansons sued the city of St. Louis Park after city officials erroneously approved a building permit for the Christiansons' detached garage. *Id.* at 628. The city initially granted the permit, but subsequently revoked the permit after neighbors complained, and the city council concluded that city staff had improperly interpreted the ordinance under which the permit initially had been granted. *Id.* at 629.

On appeal, the Christiansons contended that the city's representations constituted a misrepresentation of fact, not law, but the court disagreed. *Id.* at 637. The court explained, "The record establishes that the city on several occasions interpreted the ordinance for the Christiansons. There is no indication that the city made any representations of fact." *Id.* The court reasoned that, like Total Auctions, the Christiansons had access to the relevant ordinance at issue and were "charged with knowledge of the law." The court concluded that the Christiansons "have not established a claim against the city for damages based on negligence." *Id. see also RSI Recycling, Inc. v. City of Bloomington,* 2012 WL 3023410, *5 (Minn. Ct. App. July 23, 2012 (barring negligent misrepresentation claim where plaintiff alleged that city represented that plaintiff could operate its business without a permit or license because misrepresentations were of law and not actionable).

The South Carolina Supreme Court employed a similar analysis in *Carolina Chloride, Inc. v. Richland County,* 714 S.E.2d 869 (S.C. 2011). There, Carolina Chloride purchased 7.67 acres of land intending to use the property to store and distribute calcium chloride. *Id.* at 871. This use required M-2 zoning for a heavy industrial district. *Id.* Prior to the purchase, Carolina Chloride's realtor contacted the county to inquire about the zoning of the property. *Id.* The realtor stated that the person informed him that the property was zoned M-2. *Id.* Shortly after the purchase of the property, Carolina Chloride's president, Robert Morgan, requested a building permit from the county. *Id.* At that point, a question arose as to the property's zoning, so Morgan visited the county's zoning administrator, Terry Brown. *Id.* In a letter to Morgan, Brown stated that in his opinion, the property should properly be zoned M-2. *Id.*

Over the next several years, Carolina Chloride added improvements to the property with county approval. *Id.*at 872. County employees indicated on the various permits that the property was in fact zoned M-2. *Id.* Morgan began negotiating the potential sale of the property to the Watsons. *Id.* At that point, the county development service manager wrote a letter to Morgan and the Watsons advising that the property actually was zoned RU (Rural District), not M-2, and that the existing facilities were therefore non-conforming uses that could legally continue, but could not be expanded. *Id*. After the Watsons decided not to purchase the property due to the zoning issues, Carolina Chloride sued the county for several causes of action, including negligence and negligent misrepresentation. *Id.*

On appeal, the South Carolina Supreme Court addressed both the negligence and the negligent misrepresentation claims. The court reasoned that a plaintiff must show that its reliance on a misrepresentation was reasonable. *Id.* at 874. The court held, "There is no liability for casual statements, *representations as to matters of law*, or matters which plaintiff *could ascertain on his own* in the exercise of diligence." *Id.* (quoting *AMA Mgmt Corp. v. Strasburger*, 420 S.E. 2d 868, 874 (S.C. Ct. App. 1992)) (emphasis original). The court then cited this Court's decision in *Meyer* for the proposition that "[a]ll individuals are presumed to know the law, including the nature and extent of a government official's authority." *Id.* at 875 (citing *Meyer*, 559 N.W.2d at 255).

The court explained that Brown was not authorized to amend the property's zoning classification, and, because no official zoning map ever indicated the property was zoned anything other than RU, Carolina Chloride "could not rely upon Brown's

representation as to this matter of law." *Id.* The court then quoted helpful policy considerations form a similar Minnesota Supreme Court decision:

> To subject county officials to the prospect of liability for innocent misrepresentation would discourage their participation in local government or inhibit them from discharging responsibilities inherent in their offices. Their reluctance to express opinions would frustrate dialogue which is indispensable to the ongoing operation of government.

Id. (quoting *Northernaire Productions, Inc. v. Crow Wing County*, 244 N.W.2d 279, 282 (Minn. 1976)). The court agreed with this reasoning. "To hold otherwise would impose an impossible burden on the County (and taxpayers) to act, in effect, as an insurer of all information given by County employees under all circumstances." *Id.* "Due to the sheer volume of inquiries processed by the County, it would be unreasonable to impose a requirement of 100% fail-proof accuracy under the threat of tort liability on matters of law." *Id.* The court concluded that Chloride Chemical "had no legal right to rely solely upon the representations of County personnel and should have consulted the official record to determine the legal zoning classification of its property." *Id.*

Here, Total Auctions alleged that its entire business model was apparently premised upon its communications with Rysavy. Total Auctions is attempting to treat Rysavy, and, by extension, the Department of Revenue and the Division of Motor Vehicles, as absolute insurers of its business plan. But dealer-agents like Rysavy are not licensed attorneys and should not be relied upon for legal opinions. Total Auctions alleged that over a million dollars was at issue for its proposed business plan. Given such stakes, it would have been reasonable for Total Auctions to seek advice of counsel on whether it was legal under South Dakota law for Total auctions to be consigned vehicles for auction from dealers located outside Lincoln County.

Because Rysavy's advice on the matter was a representation of law, Total Auctions was not entitled to rely on the representation, and it is not actionable as a matter of law. As such, count one of Total Auctions' complaint failed to state a claim upon which relief may be granted.

2. Purely economic damages are not recoverable on the basis of negligence.

Total Auctions argues that there is a difference between analyzing its claim under a negligent supervision theory as opposed to a negligence theory. (Total Auctions Br., pg. 11). Whether the claim is labelled as a negligence claim or a negligent supervision claim, it is not viable because it is based on underlying representations of law, which are not actionable under *Meyer*. Even if this Court takes Total Auctions' negligence argument at face value, Total Auctions' complaint would still fail to state a claim, because purely economic damages are not recoverable based on negligence.

"[P]urely economic interests are not entitled to protection against mere negligence." *Diamond Surface, Inc. v. State Cement Plan Comm'n*, 1998 S.D. 97, ¶ 22, 583 N.W.2d 155, 160 (applying rule in context of economic loss doctrine). "'[W]hen there is no accident and no physical harm so that the only loss is pecuniary,' a negligence action will not lie." *Id.* (quoting *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933, 938 (Ind. Ct. App. 1996)). "[A]lmost all courts faced with this issue 'have evinced a uniformly hostile attitude toward claims . . . for economic loss based on negligence theories." *Id.* (quoting *Agristor Leasing v. Spindler*, 656 F.Supp. 653, 656-57 (D.S.D. 1987)).

Negligence claims are intended to compensate those whose property or person has been damaged by another's failure to exercise ordinary care. "Negligence theory protects interests related to safety or freedom from physical harm." *Bamberger*, 665 N.E.2d at

938. Tort law has evolved over the past century to create new claims involving negligence principals permitting recovery of pure economic damages, i.e., negligent misrepresentation, professional malpractice, negligent interference with contract, but these claims are exceptions to the general rule that purely economic damages may not be recovered for mere negligence. Additionally, while they share some similarities with a traditional negligence claim, they also require separate and unique showings not required in a normal negligence action.

Total Auctions cannot state a claim for negligence because the damages it seeks to recover are purely economic. Therefore, Total Auctions' complaint fails to state a claim for negligence.

3. A dealer-agent is not a professional for purposes of a professional - negligence claim.

Professional negligence was not pleaded in Total Auctions' complaint. This Court has held that negligent misrepresentation and professional negligence claims "are different and distinct from one another." *Johnson v. Hayman & Assoc.*, 2015 S.D. 63, ¶ 25, 867 N.W.2d 698, 706. Total Auctions raised professional negligence for the first time at the hearing on the motion to dismiss. (HT 23.) Despite not pleading professional negligence in its complaint, Total Auctions nonetheless maintains in this appeal that its complaint states a valid claim for professional negligence. (Total Auctions Br., pg. 21.) Total Auctions cites no authority to support its theory that a state employee such as Rysavy is subject to a malpractice claim. Instead, Total Auctions appears to argue that whether Rysavy is a professional subject to such a claim is a fact issue for a jury to resolve. (*Id.*)

Professional negligence or malpractice claims typically are asserted against professionals such as physicians, accountants, and attorneys. This Court has never held

that a state employee can be liable for professional negligence, and Total Auctions points to no authority in support of its argument. Indeed, the official commentary to the Restatement (Second) of Torts demonstrates that an employee such as Rysavy is not a professional as contemplated by a professional negligence claim.

As quoted by this Court, the RESTATEMENT (SECOND) OF TORTS provides:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Saiz v. Horn, 2003 S.D. 94, ¶ 13, n.5, 668 N.W.2d 332, 336 (quoting the RESTATEMENT (SECOND) OF TORTS § 299A). The official commentary to section 299A discusses the scope of the section. "It applies to any to any person who undertakes to render services to another in the practice of a profession, such as that of physician or surgeon, dentist, pharmacist, oculist, attorney, accountant or engineer." RESTATEMENT (SECOND) OF Torts § 299A, cmt. b. "It applies also to any person who undertakes to render services to others in the practice of a skilled trade, such as that of airplane pilot, precision machinist, electrician, carpenter, blacksmith, or plumber." *Id.*

As a threshold matter, then, it is clear that professional negligence claims are only available against one who renders services in the practice of a profession or trade. Rysavy's conduct does not fall within the scope of section 299A because he did not offer services in the practice of a profession or trade as contemplated by the Restatement.

Total Auctions' argument that whether Rysavy is a professional is a fact issue for the jury is without merit. Whether an individual is a professional and therefore liable for professional negligence is akin to determining whether a duty is owed, which is a matter

of law for the court to decide. *Johnson v. Hayman & Assoc's, Inc.*, 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702.

4. There can be no claim for negligent supervision absent an underlying tort.

Total Auctions pleaded the tort of negligent supervision in count two of its complaint against Laurenz in her role as Director of the Division of Motor Vehicles. (Complaint, ¶¶ 90-105.) Total Auctions alleges that Laurenz "failed to adequately supervise and monitor the acts of Defendant Rysavy to ensure that the established protocols of the South Dakota Department of Motor Vehicles were being followed. (*Id.* at ¶ 96.) However, because an employer cannot be held liable for negligent supervision absent an underlying tort, count two of Total Auctions' complaint fails to state a claim upon which relief may be granted.

Negligent supervision claims typically are brought by a plaintiff where an employee's conduct falls outside the scope of employment, i.e., where the employee is liable for an intentional tort or another tort that was unrelated to the defendant's employment. In those cases, if the plaintiff wishes to impose liability on the employer, it must establish an independent theory of recovery, because the plaintiff can no longer rely on "respondeat superior" to impose vicarious liability.[2] *See Bernie v. Catholic Diocese of Sioux Falls*, 2012 S.D. 63, ¶ 8, 821 N.W.2d 232, 237 ("Under the doctrine of respondeat superior, an employer or principal may be held liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.") Here, Total Auctions alleges that Rysavy acted within the ordinary course and scope of his

[2] Total Auctions also argues in its brief that its complaint alleges facts sufficient to state a claim under respondeat superior. (Total Auctions Br., pgs. 26-28.) Total Auctions appears to treat the doctrine of respondeat superior as an independent cause of action, when it is merely a method to impose vicarious liability. Absent an underlying tort, no claim for vicarious liability under respondeat superior may be made.

employment. (Complaint, ¶ 77.) As such, the negligent supervision claim is redundant and unnecessary.

Regardless, it is well-settled that there can be no claim for negligent supervision without an underlying tort. The Iowa Supreme Court held that "an employer cannot be liable for negligent supervision or training where the conduct that proper supervision and training would have avoided is not actionable against the employee." *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999). "[T]he torts of negligent hiring, supervision, or training 'must include as an element an underlying tort or wrongful act committed by the employee.'" *Id.* (quoting *Haverly v. Kaytec, Inc.*, 738 A.2d 86, 91 (Vt. 1999)).

Similarly, the Nebraska Supreme Court held that "an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer." *Schieffer v. Catholic Archdiocese*, 508 N.W.2d 907, 913 (Neb. 1993) (quoting *Strock v. Pressnell*, 527 N.E.2d 1235, 1244 (Ohio 1988)). The court in *Schieffer* explained, "If there is no tort liability to the plaintiff against Lange [the employee] individually, it follows that the Archdiocese [the employer cannot be held liable for his conduct." *Id.*

Total Auctions argues that there is no such requirement under South Dakota law, but fails even to address the ample authority outside South Dakota imposing such a requirement. The underlying tort requirement makes sense and comports with this Court's precedent. Under South Dakota law, a negligent supervision claim alleges that "the employer inadequately or defectively managed, directed, or oversaw its employees." *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 45, 758 N.W.2d 436, 452. A negligent supervision

claim assumes an underlying tort for which the employee is liable. *See Kirlin*, 2008 S.D. 107, ¶ 8 (employee convicted of simple assault); *McGuire v. Curry*, 2009 S.D. 40, ¶ 1, 766 N.W.2d 501, 504 (employee collided with plaintiff's motorcycle when employee was drunk, speeding, and driving on wrong side of the road). Because Rysavy is not liable for negligence or negligent misrepresentation as established above, Laurenz cannot be liable for negligent supervision as a matter of law. As such, the circuit court properly dismissed count two of Total Auctions' complaint for failure to state a claim.

CONCLUSION

A motion to dismiss tests the law of a claim. This Court established in *Meyer* that representations of law are not actionable. Total Auctions alleges that Rysavy gave bad advice about how to comply with South Dakota law and regulations governing a proposed new business, i.e., that he misrepresented the law. Whether Total Auctions' claim is ultimately analyzed as a negligence claim or a negligent misrepresentation claim, Total Auctions fails to state a claim as a matter of law under *Meyer*. Appellees respectfully request that the judgment be affirmed.

Dated this 8th day of August, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 6,730 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 8th day of August, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2016, I electronically served via e-mail, a true and correct copy of the foregoing Brief of Appellees to Casey W. Fideler and Christopher L. Fideler at Christopherson, Anderson, Paulson & Fideler, LLP. , 509 South Dakota Avenue, Sioux Falls, SD 57104, Attorneys for Appellants.

_____

One of the Attorneys for Defendants

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27804

TOTAL AUCTIONS AND REAL ESTATE, LLC, a South Dakota Limited Liability Company, ANDREW HARR, and JASON BORMANN,
Plaintiffs /Appellants,

vs.

SOUTH DAKOTA DEPARTMENT OF REVENUE & REGULATION, SOUTH DAKOTA DEPARTMENT OF MOTOR VEHICLES, PEGGY LAURENZ, individually and in her official capacity as an employee and Director of the South Dakota Department of Motor Vehicles, and RONALD RYSAVY, individually and in his official capacity as an employee and agent of the South Dakota Department of Motor Vehicles,
Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable Jon Sogn

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Notice of Appeal filed March 26, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Other Authorities:

PRELIMINARY STATEMENT

Throughout this reply brief, Plaintiffs and Appellants, Total Auctions and Real Estate, LLC, Andrew Harr, and Jason Bormann will be referred to as "Total Auctions." Defendant Ronald Rysavy will be referred to as "Rysavy." Defendant Peggy Laurenz will be referred to as "Laurenz." Defendant South Dakota Department of Motor Vehicles will be referred to as "DMV." Defendants' brief will be referred to as "Appellee Brief" with corresponding page number and paragraph. All other parties will be referred to by name.

The settled record in the underlying civil action, Lincoln County Civil File No. 15-292, will be cited as "S.R." The transcript from the hearing on the Defendants' motion to dismiss held on December 1, 2015, will be cited as "M.T."

ARGUMENT

Total Auctions has made no claim for recovery against Defendants under a theory of negligent misrepresentation. In addition to providing misstatements of law and fact, Rysavy breached the duties owed Total Auctions by failing to exercise reasonable care under the circumstances, which resulted in foreseeable damages. All of Total Auctions' claims for recovery rest on the principle that Rysavy was negligent by breaching the duties that the State of South Dakota ("State") holds him out as responsible for performing. Rysavy failed to be knowledgeable about his employment responsibilities, failed to stay current as to requirements for public auction vehicle consignments, failed to exercise due diligence regarding the DMV rules and regulations he is tasked with knowing, failed to follow established internal DMV protocols and procedures, and generally failed to perform the employment duties imposed upon him as a State employee. The allegations in the underlying Complaint support valid claims for relief

under several legal theories including negligence, negligent supervision, and respondeat superior. Therefore, Total Auctions has met its legal burden and is entitled to proceed with its claims.

1. The allegations of Total Auctions' Complaint support further inquiry.

On appeal, the only issue before the Court is whether the underlying Complaint contains sufficient allegations that provide relief under any possible theory such that the law allows Total Auctions to proceed with its claims. *Thompson v. Summers*, 1997 S.D. 103, ¶ 5, 567 N.W.2d 387, 390 (holding that a motion to dismiss under Rule 12(b)(5) tests the law of a plaintiff's claim, not the facts which support it). "It is settled law that the trial court is under a duty to determine if the plaintiff's allegations provide for relief on *any* possible theory, regardless of whether the plaintiff considered the theory. *Id.* at ¶ 12. (emphasis added) (citing *Schlosser v. Norwest Bank S.D., N.A.*, 506 N.W.2d 416, 418 (S.D. 1993); *Eide v. E.I. Du Pont De Nemours & Co.*, 1996 S.D. 11, ¶ 7, 542 N.W.2d 769, 771; *Seeley v. Brotherhood of Painters*, 308 F.2d 707, 714 (8th Cir. 1979) ("The 'theory of the pleadings' doctrine, under which a plaintiff must succeed on those theories that are pleaded or not at all, has been effectively abolished under the federal rules.").

Total Auctions alleges that "Rysavy owed Total Auctions a duty to follow the established Department of Motor Vehicles protocols before issuing an opinion." (S.R. 14, ¶ 72). Total Auctions unambiguously alleged that Rysavy failed to follow the procedures and protocols established by the DMV related to dealer agent conduct. This is not an allegation of negligent misrepresentation. This breach of duty is independent of any claimed misrepresentations made by Rysavy. Total Auctions is asserting a basic negligence claim as a direct result of Rysavy's inactions, omissions, and failures.

The unapproved, unverified, and inaccurate statements made by Rysavy during the performance of his official employment duties confirm that Rysavy failed to follow established DMV procedures and protocols. Total Auctions' negligence claim does not require any underlying negligent misrepresentations. The unverified and inaccurate statements and guidance provided by Rysavy serve to corroborate and substantiate that he failed to exercise due care under the circumstances by not following the proper procedures and protocols established by the DMV. South Dakota law entitles Total Auctions to proceed under its negligence theory of relief.

The "gravamen of Total Auctions' complaint" is not an issue on this appeal. Appellee Brief, pg. 5, ¶ 2. The sole issue before this Court is whether Total Auctions' Complaint states "*any valid claim of relief.*" Appellee Brief, pg. 5, ¶ 1 (emphasis added) (citing *Wojewski v. Rapid City Regional Hosp., Inc.*, 2007 S.D. 33, ¶ 11,730 N.W.2d 626, 633).

2. The economic loss doctrine is not properly raised and inapplicable.

Understanding that it cannot prevail on the sufficiency of the complaint issue, Defendants argue for the first time on appeal that "[p]urely economic interests are not entitled to protection against mere negligence." Appellee Brief, pg. 17, ¶¶ 2-3 (quoting *Diamond Surface, Inc. v. State Cement Plan Comm'n*, 1998 S.D. 97, ¶ 22, 583 N.W.2d 155, 160 (applying rule in context of economic loss doctrine)). This particular assertion was not raised in the pleadings, the settled record, or in the Defendants' arguments to the trial court. The trial court did not address this specific issue at the hearing or in its written decision. Therefore, the Defendants have improperly placed the issue before the Court for the first time on appeal.

In *Hall v. State* this Court said:

> We have repeatedly stated that we will not address for the first time on appeal issues not raised below. *See, e.g., Action Mech., Inc. v. Deadwood Historic Preservation Comm'n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742,755 ("An issue not raised at the trial court level cannot be raised for the first time on appeal."); *Sedlacek v. S.D. Teener Baseball Program*, 437 N.W.2d 866, 868 (S.D. 1989) (stating that where a party "failed to develop the record" on an issue "we deem that issue abandoned"); *Fortier v. City of Spearfish*, 433 N.W.2d 228, 231 (S.D. 1988) ("Since this issue was not framed in the pleading and was not addressed by the affidavits in support of or resistance to the motion for summary judgment, we do not believe the issue was properly before the trial court. Therefore, we will treat the issue as not being properly before us . . .."). *To raise a legal argument on appeal in an answering brief without first addressing it below puts the adverse party at an extreme disadvantage*. Had the issue been raised below, the parties would have had an opportunity to consider whether additional evidence was needed to decide the issue and certainly would have had an opportunity to brief the issue for the trial court's consideration. Likewise, the trial court would have been made aware of the issue and given an opportunity to rule on it. *Moreover, since the argument was first raised by the State in its answering brief to this Court, the opposing parties' ability to respond was limited to its reply brief.* For these reasons, we decline to review this particular argument proffered by the State. Consequently, we will only review the issues that were *presented to and determined* by the trial court.

2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 27 (emphasis added). This Court should follow the reasoning it detailed in *Hall* and decline to review this particular argument raised by the Defendants for the first time on appeal.

Regardless, the economic loss doctrine is inapplicable to the current dispute. A prerequisite for application of the economic loss doctrine is application of the Uniform Commercial Code ("UCC"). *Diamond,* 1998 S.D. 97, ¶ 24, 583 N.W.2d at 160 (stating "[f]irst, we addressed whether the transaction was a sales transaction which would bring it within the scope of the Uniform Commercial Code"); *Agristor Leasing v. Spindler*, 656 F.Supp. 653, 655 (D.S.D. 1987) (opining "[r]ecovery of economic losses is limited to the remedies of the Uniform Commercial Code"). The scope and applicability of the UCC is

set forth in SDCL § 57A-1-102, which provides "[t]his chapter applies to a transaction to the extent that it is governed by another chapter of Title 57A."

The significance of the doctrine is that it "precludes parties under certain circumstances from eschewing the more limited contract remedies and seeking tort remedies." *Kreisers Inc. v. First Dakota Title Ltd. P'ship*, 2014 S.D. 56, ¶ 29, 852 N.W.2d 413, 421. "The prohibition against tort actions to recover solely economic damages for those in contractual privity is designed to prevent parties to a *contract* from circumventing the allocation of losses set forth in the contract by bringing an action for economic loss in tort." *Id.* (emphasis added). The economic loss doctrine, therefore, sets forth that regardless of whether a tort duty may exist *between contracting parties*, the actual duty one party owes to another for purely economic loss should be *based exclusively on the contract* to which they agreed and assigned their various risks. *Id.* (emphasis added). This Court has not yet extended the doctrine beyond commercial transactions or applied it to transactions for services. *Id.*

In the underlying dispute, there is no contract, agreement, or transaction for the sale of goods between the parties. The UCC does not apply to the current dispute and therefore, the economic loss doctrine is also inapplicable. As articulated in Appellant's brief, Total Auctions' negligence claim and the duties Rysavy owed are based on foreseeability and his general duty to exercise ordinary care under the circumstances. The duties between the parties that are at issue in the cases cited by Defendants are placed upon them or controlled by operation of contract or application of the UCC. In our case, there is no underlying contract, agreement, or lease as required for application

of the UCC. Because the UCC does not apply, the economic loss doctrine is also inapplicable.

3. Dealer Agents are held out as professionals having specialized skills and knowledge.

In this case, Rysavy holds a very niche and specialized position with the State. He is one of three employees in the entire state who is responsible for answering dealer business questions, providing training and instruction on dealer licensing compliance and procedures, enforcing established laws and regulations, investigating complaints and violations, and conducting on-site inspections. As previously articulated, the State holds Rysavy out as an expert in this particular field. Individuals, businesses, and attorneys are directed to consult Rysavy for official direction and guidance concerning proper procedure, compliance, and actions. The State's website instructs and directs those with vehicle dealer licensing questions to contact Rysavy. The State holds Rysavy out as being the appropriate and knowledgeable professional on the subject matter involved in this litigation.

As provided in *Fisher Sand & Gravel Co. v. State by & Through South Dakota DOT*:

> Although Fisher was not a party to the contract, we recognize a cause of action for professional negligence when a foreseeable third party is injured. *See Mid-Western Elec., Inc. v. DeWild Grant Reckert & Assoc. Co.*, 500 N.W.2d 250 (S.D. 1993) . . . Despite DGR's claim that it owed no duty to Mid-Western in the absence of a contract, we held "in South Dakota a cause of action exists for economic damage for professional negligence beyond the strictures of privity of contract."
>
> To deny a plaintiff his day in court would, in effect, be condoning a professional's right to do his or her job negligently with impunity as far as innocent parties who suffer economic loss. We agree the time has come to extend to plaintiffs recovery for economic damage due to professional

negligence. *Mid-Western Elec., Inc.*, 500 N.W.2d at 254; *Fisher*, 1997 S.D. 8, ¶ 28, 558 N.W.2d at 871.

Therefore, this Court has specifically allowed a party to bring a cause of action in negligence against a professional for economic damages if the party was foreseeably harmed by the professional's negligence.

In *Fisher Sand & Gravel Co*. this Court also observed that "[i]f the relationship of the parties is such as to support a cause of action in tort, that cause of action is not to be denied because the parties happened also to have made a contract." *Id*. at ¶ 19, 558 N.W.2d at 869. Furthermore, "it is generally recognized that one who undertakes to provide professional services has a duty to the person for whom the services are performed to use such skill and care ordinarily exercised by others in the same profession." *Limpert v. Bail*, 447 N.W.2d 48, 51 (S.D. 1989) (citation omitted).

Total Auctions is imploring this Court to apply a similar analysis here. If Defendants' argument is accepted, Rysavy is condoned to engage in professional negligence without impunity. To compound that injustice, the State encourages individuals and entities to seek out Rysavy for the very direction and guidance sought by Total Auctions.

Rysavy is held out publicly by the State as one of only three professionals with the appropriate specialized skill, knowledge, and judgment. The State directs individuals and entities, like Total Auctions, to contact Rysavy to obtain guidance, direction, and insight. A person who undertakes to provide services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing. *RESTATEMENT (SECOND) OF TORTS* § 299A. A person who has "superior attention, perception, memory, knowledge, intelligence, and

judgment" is held to a higher standard than an ordinary person. *RESTATEMENT (SECOND) OF TORTS* § 289, cmt. m. Given Rysavy's title, employment duties, responsibilities, and superior knowledge related to vehicle dealer licensing requirements, it is foreseeable that Rysavy's negligent performance of his official duties would thereby cause economic loss and harm to Total Auctions.

Rysavy failed to follow proper procedures and protocol; had he consulted with his DMV supervisors as mandated by the applicable rules and procedure, the economic losses and other harms sustained by Total Auctions would have been avoided. "The reasonable skill and judgment expected of professionals must be rendered to those who foreseeably rely upon the services." *Fisher Sand & Gravel Co.* 1997 S.D. 8, ¶ 29, 558 N.W.2d at 871 (citing *Waldor Pump & Equip. Co. v. Orr-Schele-Mayeron & Assoc., Inc.*, 386 N.W.2d 375, 377 (Minn.Ct.App. 1986)). It was foreseeable that Total Auctions would rely upon the information, assistance, and guidance provided by Rysavy. As a State employee providing professional services, Rysavy, at a minimum, had a legal duty to exercise reasonable care.

The claims asserted in the underlying Complaint are based on the failure to perform, or negligent performance of, Rysavy's designated duties. Total Auctions' Complaint simply claims that Rysavy acted negligently in performing his defined State employment duties.

4. The cases cited in Appellee's brief are irrelevant and inapplicable.

The Minnesota and South Carolina cases cited by the Defendants are irrelevant and inapplicable to the current issue on appeal. The Court need not consider the law from

other jurisdictions as this Court has repeatedly addressed the law applicable to a state employee's liability for negligence. Appellant's Brief, pg. 17, ¶¶1-2.

The cases cited from other jurisdictions are materially distinguishable from the facts of the underlying dispute. *Carolina Chloride Inc. v. Richland County*, 394 S.C. 154 (S.C. 2011), involved a local county zoning administrator and a local resident who wanted to buy certain real estate. The zoning administrator informed the resident that in his opinion "the property should be zoned M-2." *Id*. at 160. The resident improved the property and, when he tried to sell it, he was informed by the county that the property was actually zoned RU not M-2. *Id.* The resident requested to have the lot rezoned as M-2 but the request was denied so he sued the county alleging a claim for negligent misrepresentation. *Id*. The South Carolina Supreme Court ruled that the local zoning administrator was not authorized to amend the property's zoning classification; therefore, the resident's negligent misrepresentation claim failed. *Id*.

The *Carolina Chloride Inc.* Courts' decision hinged on facts related to the future event of rezoning or changing the property's current classification. In this case, Total Auctions relied upon representations concerning current events and information related to dealer licensing requirements. Rysavy had a legal duty to follow the safeguards implemented by the DMV to verify the information he provided. Rysavy controlled whether or not he followed the procedures and protocols established by the DMV.

The *Carolina Chloride Inc.* Court noted that its holding was partly based on considerations of public policy. The court observed: "to subject *county officials* to the prospect of liability for innocent misrepresentations would discourage their participation in local government…" 394 S.C. at 164. (emphasis added).

The South Carolina and Minnesota cases cited in the Appellee's Brief relate to *local public officials* and not state employees or agents such as Rysavy. This distinction is critical in the analysis of the Defendants' public policy argument to support the principle that Rysavy and Laurenz should not be held accountable for the negligent performance of their official State employee duties.

The public policy concerns addressed in the cases cited by Defendants are inapplicable here because neither Rysavy nor Laurenz are elected county officials who will be discouraged from participating in local government by holding them liable for their negligence. Rysavy is employed by the State as a Dealer Inspector to enforce current motor vehicle laws and implement established government policies or procedures. Laurenz is employed by the State as Director of the DMV. As Director, Laurenz is responsible for managing and supervising DMV employees, agents, and appointed dealer inspectors, along with ensuring those employees are following the rules and protocols established by the DMV.

The actions, errors, and omissions of Rysavy and Laurenz occurred in the performance of their job duties, which is the precise situation envisioned to be covered by establishment of the South Dakota Public Entity Pool for Liability ("PEPL"). With PEPL protection, both Rysavy and Laurenz are free to perform every duty, task, or responsibility required of them as State employees without fear of public reprimand. Rysavy and Laurenz are protected by South Dakota law related to PEPL, which limits and controls the remedies available to those harmed by a state employee's negligence.

5. The allegations within Total Auctions' Complaint support a claim for negligent supervision.

Total Auctions' Complaint alleges that the underlying tort committed by Rysavy is negligence, including, but not limited to, his failure to follow established DMV procedures and protocols. As such, any underlying tort requirement for a negligent supervision claim is satisfied by the allegations of Total Auctions' Complaint.

However, South Dakota law does not require an underlying employee tort to hold the State responsible under a theory of respondeat superior. A governmental body is subject to liability under the doctrine of respondeat superior for the tortious acts *or omissions* of its officers, agents, or employees, committed within the scope of their employment. *Hansen v. SD Dep't of Transp.*, 1998 S.D. 109, ¶ 45, 584 N.W.2d 881, 892 (Sabers, R., concurring in part and dissenting in part) (emphasis added).

Whether a principal will be held liable for the conduct of an agent is determined by the nexus between the agent's employment and the activity causing the loss. Liability will be imposed upon the principal when the nexus is sufficient to make the resulting harm foreseeable. When the agent's employment puts him in a position where his harmful conduct would not be so unusual or startling that it would be unfair to impute the loss caused by the agent to the employer, then the principal is liable for the injury. *Hansen,* 1998 S.D. 109, ¶ 45, 584 N.W.2d at 892 (Sabers, R., concurring in part and dissenting in part).

This result fulfills the public policy considerations behind respondeat superior. The doctrine holds the master liable for the torts committed by his servant in the course of his employment. This principle imposes a duty on the State to be careful in the selection, instruction, and supervision of its employees and agents. Total Auctions'

Complaint states a valid claim of relief against Laurenz for failure to comply with one or more of her statutorily imposed duties. See SDCL §32-6B-60; see also SDCL §32-6B-11.

CONCLUSION

When reviewing a motion to dismiss, this Court must assume that the allegations contained in Total Auctions' Complaint are true. Total Auctions' Complaint alleges that the acts and omissions of Rysavy and Laurenz were in violation of established DMV policies and procedures. The underlying complaint contains allegations sufficient to state several claims for relief and Total Auctions has met its burden of showing allegations that provide for relief on any possible theory. Therefore, the law entitles Total Auctions to proceed with its claims and the trial court erred in granting the Defendants' motion to dismiss. Total Auctions respectfully requests that this Court reverse the trial court's decision and remand the case for trial on its merits.

Dated this 23rd day of August, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Reply Brief of Appellants Total Auctions and Real Estate, LLC, Andrew Harr and Jason Bormann has been produced in Microsoft Word using a 12 point proportionally spaced typeface for the text of the Brief and a 12 point proportionally spaced typeface for footnotes; that the Brief contains 3,435 words and 12 pages, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated this 23rd day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2016, pursuant to SDCL §15-26C-4, I electronically served James Moore and Joel Engel the above Reply Brief of Appellants by transmitting electronic copies to them at the following email addresses:

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Dated this 23rd day of August, 2016.

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