IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30252

DOUG BARR and DAWN BARR

Plaintiffs and Appellants,

vs.

JEFFREY A. COLE, WILLIAM D. SIMS, and GREGORY T. BREWERS

Defendants and Appellees.

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

HONORABLE JOHN BROWN, Retired
Presiding Judge

APPELLANTS' BRIEF

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Notice of Appeal filed February 13, 2023

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PRELIMINARY STATEMENT

Because the Trial Court granted Defendants' motion for summary judgment, and denied Plaintiffs' motion for partial summary judgment, the facts must be assumed in favor of the Plaintiffs as a non-moving party on the motion that was granted. For purposes of this appeal, it must be assumed that the Defendants-Attorneys knew that there was potential coverage under the PEPL Fund, knew they had failed to give the 180-day notice, and acted to keep their clients from knowing they had missed the statute of limitations. (Plaintiffs' Statement of Undisputed Material Facts No. 24-33.) (App. 11-12, SR 233-234.)

Additionally, there's no dispute that Plaintiffs' expert, Attorney Ken Barker, whose report was submitted as Exhibit DD in response to Defendants' motion for summary judgment, testified that the notice had value to the Defendants' clients, the Barrs:

> It is my opinion that the failure to give the PEPL Fund notice caused the Barrs, in substantial likelihood, the loss of the opportunity to recover an additional $500,000 of damages.

(Ex. DD, p.6, App. 28, SR 964.)

Appellants, Doug and Dawn Barr, will be referred to by their first names or collectively as the "Barrs." Appellees, Jeffery Cole, William Sims, and Gregory Brewers, will be referred to by their last names or collectively as the "Defendants-Attorneys." The Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment will be referred to as "PLs' SUMF" followed by the paragraph number. The Appendix for this brief will be referred to as "App."

followed by the appropriate page number. The settled record will be referred to as "SR" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

This is an appeal from the Trial Court's judgment dismissing claims against all Defendants with prejudice. (App. 4-5, SR 1295-1296.)

Notice of Entry of Order and Judgment was filed on February 7, 2023. (App. 1-3, SR 1290-1292.) Doug Barr and Dawn Barr filed a Notice of Appeal on February 13, 2023. (SR 1297.) This Court has jurisdiction over this action pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

1. Did the Barrs have a viable legal claim against the PEPL Fund, so that it was reversable error for the Trial Court to grant summary judgment to the Defendants on the Plaintiffs' Complaint?

The trial court held that summary judgment was appropriate.

Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,
2020 S.D. 5, 939 N.W.2d 32
Wilson v. Great Northern Ry. Co.,
83 S.D. 207, 157 N.W.2d 19
Muldin v. Hills Material Co.,
*2005 S.*D. 64, 698 N.W.2d 67
South Dakota Public Entity Pool for Liability v. Winger,
1997 S.D. 77, 566 N.W.2d 125

STATEMENT OF THE CASE

Doug Barr and Dawn Barr filed a Complaint dated September 17, 2021, against Jeffrey A. Cole, William D. Sims, and Gregory T. Brewers. The Complaint alleges breach of fiduciary duty, negligence, fraud and breach of contract, and punitive damages. (SR 2-7.)

The allegations in the Complaint arise from a December 21, 2016, motor vehicle accident, in which Doug Barr was the victim, and in which matter he was represented by the Defendants. The defendant in the underlying matter was a law clerk with the First Judicial Circuit, who was driving to his father's vehicle to his father's home to stay that night after court. The gravamen of the Complaint is that the Defendants did not give the 180-day notice required by SDCL 3-21-2, and hid the failure from the Plaintiffs. The Defendants in this action ultimately settled the Plaintiffs' claim for the $500,000 of available liability insurance coverage on the underlying tortfeasor's vehicle, and with no demand made or payment from the PEPL Fund, which had an additional potential of $500,000 of coverage.

The three Defendants have answered and alleged that they were not negligent, and that there was no coverage available under the PEPL Fund. (SR 15-30.)

After depositions were taken and some discovery was conducted, the parties filed cross-motions for summary judgment. (SR 81-82; 83-85; 219.) The motions for summary judgment were heard before the Honorable John Brown on January 26, 2023, and at that hearing, Judge Brown granted the Defendants' motion for summary judgment on all claims, and denied the Plaintiffs' motion seeking summary judgment as to all or part of the Complaint. (App. 6-7, SR 1293-1294.) Judge Brown subsequently signed a judgment dismissing claims against all Defendants with prejudice. (App. 4-5, SR 1295-1296.) On February 7, 2023, the Defendants filed a Notice of Entry of Order and Judgment. (App. 1-3, SR 1290-1292.)

STATEMENT OF THE FACTS

Because Summary Judgment was granted against the Barrs/Appellants, because facts must be viewed in a light most favorable to the non-moving party, the Barrs, the following facts are verbatim from those submitted at the summary judgment hearing (App. 8-15):[1]

1. Doug Barr was injured in an automobile accident in Lincoln County, South Dakota on December 21, 2016. (C/S Ans.[2] ¶ 4.) (SR 21.)

2. Doug and Dawn Barr were represented in the personal injury matter arising from the December 2016 accident by the Defendants, Jeffery Cole, William Sims, and Greg Brewers. (C/S Ans. ¶ 6; B Ans.[3] ¶ 5.) (SR 21; SR 15.)

3. The December 21, 2016, accident was caused by the negligent operation of an automobile by Stuart Hughes. (C/S Ans. ¶ 8.) (SR 21.)

4. At the time of the accident, Stuart Hughes was a state employee. (C/S Ans. ¶ 8.) (SR 21.)

5. State employees are provided insurance coverage under the Public Entity Pool for Liability known as the "PEPL Fund." (Depo. Ex. 46—PEPL Fund.) (SR 456-492.)

6. When a claim of negligence is asserted against an individual covered by the PEPL Fund, the party asserting the claim must give written notice within 180 days, pursuant to SDCL 3-21-2. (C/S Ans. ¶ 10.) (SR 22.)

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[1] The Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment was incorporated by reference into the response to Defendants' Motion for Summary Judgment. (SR 831.)
[2] "C/S Ans." is a reference to Jeff Cole & William Sims' Answer to Complaint.
[3] "B Ans." is a reference to Gregory Brewers' Answer to Complaint.

7. In December of 2016, the Defendants knew that Stuart Hughes was a state employee, serving as a law clerk for the First Judicial Circuit. (C/S Ans. ¶ 15.) (SR 23.)

8. Soon after the accident, the Defendants knew that Stuart Hughes was leaving court in Parker, South Dakota, where he was serving as a law clerk, at the time of the accident. (Brewers Depo. pp. 15-16, 21; Cole Depo. p. 11; Sims Depo. pp. 22-26.) (SR 596-597, 602; SR 640; SR 516-520.)

9. The 180-day statutory notice ran on June 19, 2017, and the Defendants were undisputedly aware that it had run by September 5, 2017. (C/S Ans. ¶ 11; Depo. Ex. 2—Sims Email to Cole/Brewers.) (SR 22; SR 360-261.)

10. The Defendants did not give State the written notice pursuant to SDCL 3-21-2. (C/S Ans. ¶ 12; Ambach Depo. p.8; Sims Depo. p. 39.) (SR 22; SR 673; SR 533.)

11. It's easy to give the statutory notice, it's just sending a letter. (Brewers Depo. pp. 21-23; Cole Depo. p. 18; Sims Depo. p. 37.) (SR 602-604; SR 647; SR 531.)

12. The only written record of Defendants-Attorneys considering complying with SDCL 3-21-2 is after the statute of limitations ran. (Depo. Ex. 3—Sims Email to Brewers/Cole; Cole Depo. pp. 12-13.) (SR 263; SR 641-642.)

13. Defendants-Attorneys know that it's important to document the file with important events. (Sims Depo. p. 71.) (SR 565.)

14. PEPL Fund coverage limits are $1,000,000 for covered individuals, less coverage available on any private vehicles involved. (Ambach Depo. p. 6; Depo. Ex. 46—PEPL Fund, p. BARR 1426, ¶ 17.) (SR 671; SR 488.)

15. When a personal owned auto "POV" is driven by a State employee, the PEPL Fund is secondary to the POV coverage, and the State office of Risk Management doesn't investigate until they receive the 180-day written notice required by SDCL 3-21-2. (Ambach Depo. pp. 16-17.) (SR 681-682.)

16. The PEPL Fund agreement provides coverage for an "occurrence" which is defined as follows:

> 8. Occurrence – an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the employee's duties for the State.

(Depo. Ex. 46—PEPL Fund, p. BARR 1416.) (SR 478.)

17. When the PEPL Fund evaluates the State employee's use of a personal auto vehicle when the employee is leaving a remote duty station, the PEPL Fund is looking at the "reasonableness of what they are doing with their vehicle." (Ambach Depo. p. 20.) (SR 685.)

18. If the State is paying an employee to drive somewhere to sleep, and the employee is driving somewhere to sleep, the PEPL Fund doesn't care where they sleep at. (Ambach Depo. p. 42.) (SR 707.)

19. Only $500,000 of insurance coverage was available without the PEPL Fund. (C/S Ans. ¶ 18.) (SR 23.)

20. The Defendants made demands in the case for amounts in excess of $1,000,000. (C/S Ans. ¶ 17.) (SR 23.)

21. The Defendants knew that the liability insurance carrier's available coverage, excluding the PEPL Fund, was inadequate for the damages sustained by Doug and Dawn Barr. (Depo. Ex. 15—NPJ Email to Grinnell; Depo. Ex. 22-

Cole ltr to Luce; Depo. Ex. 26-Cole Email to Barrs; Sims Depo. p. 52.) (SR 267; SR 315; SR 320-321; SR 546.)

22. On September 5, 2017, the Defendants were told by Stuart Hughes that his medical bills were paid by "work comp." (Depo. Ex. 2—Sims Email to Cole/Brewers.) (SR 261.)

23. Also on September 5, 2017, Stuart Hughes suggested to the Defendants-Attorneys that they should be putting the State on notice of a claim. (Depo. Ex. 2—Sims Email to Cole/Brewers; Depo. Ex. 1—Contact Sheet narrative.) (SR 261; SR 259.)

24. The State of South Dakota paid medical bills for Stuart's 2016 accident injuries under their workers' compensation fund because they determined the claim was compensable. (Job Depo. pp. 5-6; Depo. Ex. 44—Work Comp Pmts.) (SR 715-716; SR 357.)

25. The State's workers' compensation fund provides coverage for State employees if the injury arises out of and in the course of employment and was a major contributing factor. (Job Depo. p. 6.) (SR 716.)

26. Stuart Hughes, the law clerk leaving court in Parker, was compensable because he was reimbursed mileage and its paid work time. (Job Depo. pp. 10-11, 14-15.) (SR 720-721, 724-725.)

27. John Hughes advised the State on January 30, 2017, that the accident happened two and a half miles west of Tea on Highway 17 and 272nd Street, the exact location where the accident happened. (Job Depo. p. 26; Depo. Ex. 45—Work Comp Emails, p. STATE0046.) (SR 736; SR 445.)

28. The Defendants know that workers' compensation only pays medical bills when an employee's injuries arise out of and in the scope of their employment. (Cole Depo. p. 13; Sims Depo. p. 31.) (SR 642; SR 525.)

29. On Thursday, September 7, 2017, the Defendants-Attorneys recognized a potential "respondeat superior claim because Stuart was an employee" and that the "180 day notice timeframe is long past, so I don't know how viable such a claim would be." (Depo. Ex. 3—Sims Email to Brewers/Cole.) (SR 263.)

30. By September 7, 2017, the Defendants knew that the PEPL Fund's coverage would have been available for their clients' injuries. (Depo. Ex. 1—Contact Sheet narrative; Depo. Ex. 2—Sims Email to Cole/Brewers; Depo. Ex. 3—Sims Email to Brewers/Cole; Cole Depo. p. 17; Sims Depo. pp. 36-38.) (SR 259; SR 261; SR 263; SR 646; SR 530-532.)

31. Defendants did not disclose to their clients the possibility that the PEPL Fund's coverage was available. (Brewers Depo. p. 24.) (SR 605.)

32. In the Defendants email exchange when they discussed that the 180-day notice had lapsed, while they had their client on the email exchange earlier, they removed the clients from the discussion of the statute of limitations having lapsed. (Depo. Ex. 2—Sims Email to Cole/Brewers; Depo Ex. 3—Sims Email to Brewers/Cole; Brewers Depo. pp. 28-29, 33-36; Cole Depo. p. 20; Sims Depo. pp. 46-49.) (SR 261; SR: 263; SR 609-610, 614-617; SR 649; SR 540-543.)

33. The Defendants have admitted that they did not disclose the initial malpractice claim to their clients. (Sims Depo. pp. 32-33, 46-49.) (SR 526-527, 540-543.)

34. In March of 2021, Dawn and Doug Barr signed the Settlement Agreement negotiated by the Defendants-Attorneys, who were still representing Dawn and Doug. (C/S Ans. ¶ 14; B Ans. ¶ 11.) (SR 22; SR 16.)

35. Defendants-Attorneys' website indicated this was one of the largest cases they had handled. (Depo. Ex. 39—NPJ's Website; Cole Depo. p. 9.) (SR 331-332; SR 638.)

36. On the night before the accident, Stuart Hughes and his pregnant wife stayed with his parents, Mr. and Mrs. John Hughes, in Sioux Falls, South Dakota. (J.Hughes Depo. p. 6.) (SR 812.)

37. On the morning of December 21, 2016, because he was concerned about the condition of Stuart's car and the weather, Stuart's father, John Hughes, allowed Stuart to drive John Hughes's pickup to court in Parker, South Dakota. (Depo. Ex. 45—Work Comp Emails, p. STATE0046; J.Hughes Depo. pp. 6-7.) (SR 446; SR 812-813.)

38. It is 30 miles from John Hughes's home at 4405 South River Oaks Circle, Sioux Falls, South Dakota to the Turner County Courthouse. (Google Maps; J.Hughes Depo. pp. 8-9.) (SR 825-826; SR 814-815.)

39. After court on December 21, 2016, Stuart Hughes was driving on a direct route back to his father's home, where he had stayed with his wife the night before. (J.Hughes Depo. p. 8.) (SR 814.)

40. Stuart Hughes and his wife lived in Vermillion, South Dakota at the time. (J.Hughes Depo. p. 10.) (SR 816.)

41. State employee, Stuart Hughes, lived because he was driving his father's pickup instead of Stuart's Volkswagen car. (J.Hughes Depo. p. 8.) (SR 814.)

42. The State of South Dakota has law clerks drive their personal vehicles to court in different counties in the First Circuit. (Allison Depo. p. 10.) (SR 752.)

43. The law clerk is expected to go to whatever county a judge requests them to for whatever proceeding is happening in that county. (Allison Depo. p. 12.) (SR 754.)

44. Driving to various counties within the Circuit is an expectation the UJS places upon law clerks, and advises them of this at their initial interview. (Allison Depo. p. 31.) (SR 773.)

45. The State of South Dakota pays mileage to law clerks and circuit court judges when they drive to remote courthouses. (Allison Depo. pp. 11, 13; Depo. Ex. 40—UJS Travel Regulations, p. STATE0028.) (SR 753, 755; SR 342.)

46. If the Circuit Judge or a law clerk had a hearing in Parker, but afterwards drove to Sioux Falls instead of their duty station in Yankton or their home in Vermillion, the UJS would still pay mileage—as if they had "driven straight up and driven straight back." (Allison Depo. p. 16.) (SR 758.)

47. The State of South Dakota paid Stuart Hughes to drive home from the Turner County Courthouse, after work on December 21, 2016. (Allison Depo. pp. 19-20; Depo. Ex. 38—Travel Pmt Detail for S.Hughes.) (SR 761-762; SR 329.)

48. When asked, Stuart Hughes advised the court administrator that he was on his way to Sioux Falls from Parker. (Allison Depo. p. 23.) (SR 765.)

49. The UJS does not have a requirement that an employee take a certain path from the courthouse to their duty station or their home. (Allison Depo. p. 24.) (SR 766.)

50. With respect to the accident, the UJS reported that Stuart was "still on work time as he had been required to travel for work and was returning home." (Allison Depo. pp. 25-26; Depo. Ex. 43—Allison's Email.) (SR 767-768; SR 355.)

51. UJS would reimburse Stuart Hughes's mileage after court, regardless of whether he drove to Sioux Falls or Vermillion. (Allison Depo. p. 27.) (SR 769.)

52. It's not disputed that Doug Barr's damages exceeded $1,000,000, because of the serious head injury. (Depo. Ex. 19—Dr. Tranel Report; Depo. Ex. 20—Dr. Swenson Report; Depo. Ex. 21—Dr. Patra Report; Depo. Ex. 29—Cole's Demand Ltr to Oberg; Cole Depo. p. 21; Sims Depo. pp. 49-59.) (SR 390-400; SR 274-284; SR 291-313; SR 323-327; SR 650; SR 543-553.)

53. Doug Barr's medical bills alone exceeded $265,000. (Depo. Ex. 23—Cole's Demand Ltr to Luce.) (SR 317-318.)

54. In 2021, three and a half years after the accident, on March 4th, Steve Oberg emailed Jeff Cole and Bill Sims and inquired whether they had given the 180-day notice to the PEPL Fund, as there may have been available coverage. (Depo. Ex. 17—Oberg's Email to Cole/Sims.) (SR 269.)

55. Six days later, March 10, 2021, Jeff Cole called Steve Oberg and accepted the $500,000 settlement. (Depo. Ex. 18—Cole's Email to Brewers/Sims.) (SR 271.)

56. The Defendants-Attorneys didn't tell their clients about the PEPL Fund issues raised by Steve Oberg. (Sims Depo. pp. 57-58.) (SR 551-552.)

57. The PEPL Fund never evaluated coverage because they weren't given notice, and they don't do it until they receive notice. (Ambach Depo. pp. 8, 10, 13-14.) (SR 673, 675, 678-679.)

Plaintiff's Additional Material Facts were provided in response to the Defendants' Statement of Undisputed Material Facts (App. 16-20):

1. Kim Allision, the Circuit Court Administrator in charge of the First Circuit, agreed that one of the routes from the Parker County Courthouse would be to drive to the interstate first, and then drop down to Vermillion. (Allison Depo. p. 30.) (SR 772.)

2. Kim Allison described that the UJS policy is to pay mileage to law clerks for the distance between where they left from to the courthouse where they are traveling to—which would include a roundtrip to Sioux Falls. (Allison Depo. pp. 45-46.) (SR 787-788.)

3. The Defendants-Attorneys were still investigating a possible claim against the PEPL Fund on September 6, 2017, three months after the 180-day deadline, as the Defendants-Attorneys sent discovery requests that asked Stuart the following: "Interrogatory No. 32. State the name and address of your employer, your job title, and describe your job duties, **and state whether you were performing any duties for your employer at the time of the collision.**" (emphasis added) (Interrogatories to Stuart Hughes (First) 9/6/17.) (SR 915-934.)

4. In 2019, the Defendants-Attorneys' deposition outline for Stuart involved several questions relating to workers' compensation that they did not ask:

> Make work comp claim. We'd request any work comp documents regarding the crash and Mr. Hughes' injuries.
>
> . . .
>
> How much were you paid for your work comp claim.

(2019 Depo. Outline for Stuart, pp. 18, 20.) (SR 953, 955.)

Additionally, Plaintiffs' resistance to the Defendants' motion for summary judgment included the report of Ken Barker,[4] which report included the following opinion:

> **2. Did the failure to give notice to the PEPL Fund cause Barrs a loss?**
>
> It is my opinion that the failure to give the PEPL Fund notice caused the Barrs, in substantial likelihood, the loss of the opportunity to recover an additional $500,000 of damages.

Barker Report, p. 6. (SR 964.)

STANDARD OF REVIEW

In *Wilson v. Great Northern Ry. Co.*, 83 S.D. 207, ¶ 212, 157 N.W.2d 19, 21, the summary judgment standards have included the following:

1. The evidence must be viewed most favorable to the nonmoving party;
2. The burden of proof is upon the moving party to show that there is no genuine issue of material fact, and that he is entitled to judgment as a matter of law;

[4] Ken Barker's Report was attached as Exhibit DD to Affidavit of Joe Erickson filed in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment.

3. Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or trial by jury where any genuine issue of material fact exists.

4. A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them.

5. Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant.

6. Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Through more recent decisions, this Court has provided additional guidance:

7. If a trial court engages in fact finding on a motion for summary judgment, reversal is required. *Johnson v. Rapid City Softball Ass'n*, 514 N.W.2d 693 (S.D. 1994).

8. Summary judgment should not be granted unless the moving party demonstrates a right to judgment "with such clarity as to leave no room for controversy." *Id.*

ARGUMENT

The Barrs had a viable legal claim against the PEPL Fund, so that it was reversable error for the Trial Court to grant summary judgment to the Defendants on the Plaintiffs' Complaint.

Introduction

This decision will turn on what a "viable" claim means when the client walks into the attorney's office. Since almost no claims result in civil jury trials in South Dakota, from a statistical perspective, it is not a question of what the academic result would have been if the claim had run the process and been the subject of a completed appeal. In the context of this case, just as the definition reads in Black's Law Dictionary, this is a case about whether or not a claim has the opportunity of succeeding, which success in the legal world is about whether or not the claim could have resulted in a recovery for the client.

Case, within a case, within a case

Pursuant to *Robinson-Podoll*, the first case the Barrs must prove is that they have a viable claim for legal malpractice. The second case the Barrs must prove is that the Defendants missed the statute of limitations. The third case the Barrs must prove is that the Defendants failed to disclose the initial claim of malpractice.

Additionally noteworthy is that in *Robinson-Podoll*, this Court found the circumstances under which a separate claim for legal malpractice could proceed because of a continuing tort. 939 N.W.2d 32, 47, 2020 S.D. 5, ¶ 46. In *Robinson-Podoll*, this Court did not address the breach of fiduciary duty issues, as they were not plead. *Id.* at ¶ 28.

The Policy Underlying Malpractice Continuing Tort

In *Robinson-Podoll*, you laid out the policy behind the continuing tort doctrine of legal malpractice:

> When an act, error, or omission could reasonably be expected to be the basis of a legal malpractice claim against a lawyer, the lawyer's professional responsibility to keep a client 'reasonably' informed is directly implicated. Imposing a legal duty to disclose such an act, error, or omission serves the purpose of ensuring that a client is able to make an informed decision about how best to proceed under such circumstances. As the Court stated in *Leonard*, 'the client is entitled to be informed of any acts or events *over which it has control.*'

Robinson-Podoll, at ¶ 40 (citations omitted).

This Court favorably cited authority that makes the standard crystal clear:

> The client can't make an informed decision regarding these issues without being informed about the potential claim. Indeed, in this situation, where the interest of the attorney and client may differ substantially, 'a high degree of disclosure' is necessary.

Robinson-Podoll, at ¶ 40; 61 Baylor L. Rev. at 184.

1. Case No. 3: Failure to Disclose

There is no dispute that the 180 days for the notice to the State's PEPL Fund ran on June 19, 2017, and that the Defendants knew it by September 5, 2017 (PLs' SUMF Nos. 9, 22, 23) (App. 9, 11; SR 231, 233). The Defendants have admitted that they did not disclose the initial malpractice claim to their clients (PLs' SUMF No. 33) (App. 12; SR 234), and continued to not disclose on the week they settled the claim in 2021 (PLs' SUMF Nos. 34, 54-56) (App. 12, 15; SR 234, 237).

In *Robinson-Podoll*, this Court held:

> [T]hat a lawyer has a professional duty of care in South Dakota to notify a client of an act, error, or omission that is reasonably expected to be the basis of a malpractice claim. In most instances, a duty to disclose will only arise when the client has already sustained actual injury, or the likelihood of injury is readily apparent.

Robinson-Podoll, at ¶ 41.

As to the failure to disclose the initial potential claim of malpractice to the clients, partial summary judgment should have been granted to the Barrs, as there are no issues in dispute for a trier of fact.

2. Case No. 2: Missed Personal Injury Statute of Limitations

There is no dispute that the accident happened on December 21, 2016 (PLs' SUMF No. 1) (App. 8; SR 230). There is no dispute that 180 days from December 21, 2016, is June 19, 2017 (PLs' SUMF No. 9) (App. 9; SR 231). There is no dispute that written notice to the State is required to assert a claim under the PEPL Fund (PLs' SUMF No. 6 and/or SDCL 3-21-2) (App. 9; SR 231). There is no dispute that the Defendants did not give notice to the State as required by statute. (PLs' SUMF No. 10.) (App. 9; SR 231.)

Partial summary judgment should have been granted to the Barrs as to the missed statute of limitations, as there are no questions for a trier of fact on this issue.

3. Case No. 1: The Viable Claim for Damages in Personal Injury

There were three relevant factors for the Trial Court to consider with respect to Defendants' motion for summary judgment against the Barrs, or for the Barrs' motion for partial summary judgment on all or parts of Case No. 1.

a. Negligence by Stuart Hughes.

It is undisputed that Stuart Hughes was negligent in the operation of his motor vehicle with respect to this accident (PLs' SUMF No. 3) (App. 8; SR 230).

b. Causation and damages.

Doug Barr suffered a serious head injury, as well as other injuries from the accident. (PLs' SUMF No. 52.) (App. 14; SR 236.) The value of his injuries exceeded $1,000,000. (PLs' SUMF Nos. 20-21, 52.) (App. 10-11, 14; SR 232-233, 236.) Doug Barr had medical bills related to the accident that exceeded $265,000. (PLs' SUMF No. 53.) (App. 15; SR 237.)

The maximum recovery from all available insurance, if notice had been given to the PEPL Fund, was $1,000,000 (PLs' SUMF Nos. 14, 30) (App. 9, 12; SR 231, 234). It's not realistically disputed that Doug Barr's damages exceeded $1,000,000 (PLs' SUMF Nos. 20, 52) (App. 10, 14; SR 232, 236). Therefore, partial summary judgment should have been granted for the Barrs as to the issues of causation and damages.

c. Viable Claim.

"Viable" means "capable of succeeding." Black's Law Dictionary (11th ed. 2019); *People in Interest of D.S.*, 2022 S.D. 11, ¶ 26, 970 N.W.2d 547, 555. Viable is about "capable" of succeeding and is not a requirement of a guarantee of success. The test makes sense in application. At the time an attorney is deciding whether or not to file a lawsuit or give a notice to protect the statute of limitations, the attorney doesn't know what the ultimate outcome of the claim or lawsuit will be. There are always unknown facts and potential future defenses. The only issue at the time of filing is whether or not the claim was "capable of succeeding."

The Court has the expert opinion of Attorney Ken Barker that not only was the claim capable of succeeding, it was worth $500,000 to the Defendants-Attorneys' clients. (App. 23-37; SR 959-973.) In reality, as every attorney involved in litigation knows, litigation is a process. A viable claim that has a maximum value of $500,000, has a likely value of somewhere between zero and $500,000 as the parties developed their case and negotiate. In this instance, with no information in the record to justify the decision to allow the statute of limitations to run, the Defendants-Attorneys gave up a viable claim.

The Defendants-Attorneys knew Stuart Hughes was a State employee, serving as a law clerk, who was in a car accident immediately after leaving court in Parker, South Dakota. (PLs' SUMF Nos. 4-5, 7-8.) (App. 8-9; SR 230-231.) The State of South Dakota pays law clerks and circuit court judges when they drive to remote courthouses, because it's a job requirement that they are advised of from their initial interview. (PLs' SUMF Nos. 42-45.) (App. 13-14; SR 235-236.) The UJS treats the law clerk as still on work time when they are traveling to and from the remote courthouses. (PLs' SUMF Nos. 26, 47, 50.) (App. 11, 14; SR 233, 236.)

To preserve a claim of coverage for the State employee when they are a tort-feasor in an accident, the party making the claim has to give written notice to the State within 180 days, and it's an easy thing to do. (PLs' SUMF Nos. 10-11.) (App. 9; SR 231.) The Defendants-Attorneys in this case did not give the written notice, and there is no indication in their files that they considered sending the notice prior to the statute of limitations running on June 19, 2017. (PLs' SUMF Nos. 9-13.) (App. 9; SR 231.) The PEPL Fund coverage would have provided an additional $500,000 of available coverage for a State employee driving a

personally owned vehicle who had $500,000 of coverage on their vehicle. (PLs' SUMF Nos. 14-15, 19.) (App. 9-10; SR 231-232.)

The PEPL Fund provides coverage for an occurrence that's defined as an accident that "arises within the scope of the employee's duties for the State." (PLs' SUMF No. 16.) (App. 10; SR 232.) The PEPL Fund never evaluated coverage because they weren't given notice, and they don't do it until they receive notice. (PLs' SUMF No. 57.) (App. 15; SR 237.) Driving to and from remote courthouses is within the scope of UJS employment duties. (PLs' SUMF 42-51.) (App. 13-14; SR 235-236.)

The State of South Dakota did determine that the medical bills for Stuart Hughes from the 2016 accident were compensable from their workers' compensation fund, which only pays if the injury arises out of and in the course of employment. (PLs' SUMF Nos. 24-25, 28.) (App. 11; SR 233.) At the time that the State was evaluating the workers' compensation coverage, they had been advised by Stuart Hughes that he was driving from Parker to Sioux Falls. (PLs' SUMF No. 48.) (App. 14; SR 236.) Additionally, Stuart Hughes's father, John Hughes had advised the State where the accident happened, northeast of Parker, at the time the State was evaluating the workers' compensation. (PLs' SUMF No. 27.) (App. 11; SR 233.)

In fact, Stuart Hughes and his pregnant wife were staying with his parents in Sioux Falls, and Stuart had driven from his parents' house in Sioux Falls to the Turner County Courthouse in Parker, and was returning home by a direct route the day of the accident. (PLs' SUMF Nos. 36-39.) (App. 13; SR 235.)

The State employee, Stuart Hughes, lived through the accident because he took his father's pickup from Sioux Falls that day, instead of Stuart Hughes's own Volkswagen. (PLs' SUMF No. 41.) (App. 13; SR 235.)

If the employer requires the employee to travel to and from a job site in their personal vehicle, and even more so if there was reimbursement, the driving arises out of and in the course of employment. *Muldin v. Hills Material Co.*, 698 N.W.2d 67, 73-74, 2005 S.D. 64, ¶¶ 14 & 18.

d. Related Supreme Court decisions are fact based.

Further proof that the Barrs' claim was viable at the time the Defendants-Attorneys chose to let the statute of limitations run, is the factual nature of the decisions courts have had to make in cases arising under this issue.

In *Tammen v. Tronvold*, 965 N.W.2d 161, 2021 S.D. 56, this Court recently addressed a similar issue, but faced a different factual scenario. In *Tammen*, the employer did not reimburse the employee for the travel expense and did not require the employee to drive their vehicle to work. *Id.* at ¶ 34. Conversely, in this matter, Stuart Hughes was required from the outset to use his vehicle to drive to work, was treated as "on work time" when driving to and from work, and was reimbursed the travel expense by his employer for doing that driving for his employer.

Similarly, this Court in *South Dakota Public Entity Pool for Liability v. Winger*, 566 N.W.2d 125, 1997 S.D. 77, was faced with a fact-based decision about whether coverage existed. In *Winger*, the circuit judge issued a declaratory judgment after a court trial. This Court, in *Winger*, said that an act is within the scope of employment if the act "is within the scope of a servant's employment where it is reasonably necessary or appropriate to accomplish the purpose of his

employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master." *Id.* at ¶ 9. To not be acting within the scope of the employment, they have to substantially deviate from the course of employment. *Id.* at ¶ 10. If the conduct was reasonably foreseeable in work performance, then there is no deviation. *Id.* at ¶ 10. Finally, "substantial deviations occur when employees abandon the work purpose in furtherance of a personal motive or 'frolic'." *Id.* at ¶ 10.

e. Conclusion with respect to viable claim.

The Barrs claim, at the time the Defendants-Attorneys blew the statute of limitations, was viable—it had value. Whether the Defendants-Attorneys were good enough lawyers to win a declaratory judgment action with respect to coverage, if one would have ever been necessary, or to settle or resolve the potential $500,000 of available coverage is not the issue before the Court. The issue before the Court is whether the claim was viable, such that it had value to the Defendants-Attorneys' clients, so the Defendants-Attorneys had to meet the standard of care in protecting their clients' claim.

With respect to the conduct of Stuart Hughes, the record shows that he was actually driving less miles, than the UJS was paying him for driving, and that he was not frolicking or engaging in some unnecessary risk. He was driving to and from a place to sleep. The accident happened shortly after he left the courthouse in Parker, on a direct route to where he was staying with his wife and son at his father's home.

4. The Complaint that was dismissed included Counts for Fiduciary Duty, Negligence, Fraud, and Breach of Contract

The Trial Court dismissed all of the counts based upon its ruling that, ultimately, if litigated in the underlying case, there would not have been insurance coverage with the PEPL Fund. If the Court reverses the Trial Court, the Barrs respectfully request that the entire Complaint be reinstated, as there was no separate ruling with respect to each of the counts—they were all dismissed for this one reason.

CONCLUSION

Because this was a summary judgment that was granted against the Barrs in favor of their attorneys, this record has to be reviewed with the assumption that the attorneys knew there was potential coverage under the PEPL Fund, they knew they'd failed to give the 180-day notice, and they actively worked to keep their clients from knowing about the missed statute of limitations. Furthermore, it has to be assumed that the case had value.

Measured against those fact, this viable claim that the Barrs had against the PEPL Fund is an issue for the jury in South Dakota to value, and the summary judgment should be reversed.

Additionally, with respect to Plaintiffs' motion for partial summary judgment, there is no serious dispute about the other elements of the legal malpractice cause of action.

DATED this 21st day of April, 2023.

Respectfully submitted,

SCHOENBECK & ERICKSON, PC

By: _/s/ Lee Schoenbeck_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 5,645 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 21st day of April, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on April 21, 2023, I served a true and correct copy of the foregoing *Appellants' Brief* via electronic means on the following:

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LEE SCHOENBECK
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APPENDIX
TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
MINNEHAHA COUNTY	)	SECOND JUDICIAL CIRCUIT

DOUG BARR and DAWN BARR,

Plaintiffs,

vs.

JEFFREY A. COLE; WILLIAM D. SIMS; and GREGORY T. BREWERS,

Defendants.

49Civ21-002535
Hon. John L. Brown

Notice of Entry of Order and Judgment

To: **Plaintiffs** Doug and Dawn Barr, and to their attorneys, **Lee Schoenbeck** and Schoenbeck Law PC, and **Defendant Gregory Brewers**, and his attorneys, **Jason Sutton** and the Boyce Law Firm:

Please take notice that the *Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment* and *Judgment Dismissing Claims Against All Defendants with Prejudice* were signed by the Honorable John L. Brown on February 6, 2023 and filed with the Minnehaha County Clerk of Courts on February 6, 2023. True and correct copies of the *Order* and *Judgment* are attached.

Filed: 2/7/2023 9:59 AM CST Minnehaha County, South Dakota 49CIV21-002535

Respectfully submitted the 7th day of February 2023.

BANGS, MCCULLEN, BUTLER, FOYE
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Certificate of Service

I certify that, on February 7, 2023, I served copies of this document upon each of the listed people by the following means:

☐ First Class Mail ☒ Odyssey
☐ Hand Delivery ☐ Overnight Mail
☐ Electronic Mail ☐ ECF System

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

DOUG BARR AND DAWN BARR, Plaintiffs. v. JEFFREY A. COLE, WILLIAM D. SIMS, AND GREGORY T. BREWERS, Defendants.	49CIV.21-002535 **JUDGMENT DISMISSING CLAIMS AGAINST ALL DEFENDANTS WITH PREJUDICE**

Plaintiffs, Dawn and Doug Barr, filed a Motion for Summary Judgment on December 23, 2022. Defendants, Jeffrey A. Cole and William D. Sims, filed a Motion for Summary Judgment on December 23, 2022. Defendant, Gregory T. Brewers, joined Defendants Sims' and Cole's Motion for Summary Judgment. All these motions came before the Court, Honorable John Brown presiding, for hearing on Thursday, January 26, 2023. Plaintiffs appeared through their attorney, Lee A. Schoenbeck. Defendants Cole and Sims appeared through their attorney, Jeffrey G. Hurd. Defendant Brewers appeared through his attorney, Jason R. Sutton. The Court entered an Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment on Feb. 3, 2023 Based upon that order, it is hereby

ORDERED, ADJUDGED AND DECREED that a judgment be entered in this action that Plaintiffs recover nothing from Defendants, Jeffrey A. Cole, William D. Sims, and Gregory T. Brewers, and that Plaintiffs claims in the Complaint are all dismissed with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that the Defendants, Jeffrey A. Cole and William D. Sims, shall have and recover its costs in the amount of $_____, the

amount thereof to be taxed and inserted by the Clerk of this Court in accordance with SDCL 15-6-54(d). It is further

ORDERED, ADJUDGED AND DECREED that the Defendant, Gregory T. Brewers, shall have and recover its costs in the amount of $_____, the amount thereof to be taxed and inserted by the Clerk of this Court in accordance with SDCL 15-6-54(d)

Honorable John L. Brown
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

FILED
FEB 06 2023
Minnehaha County, S.D.
Clerk Circuit Court

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

DOUG BARR AND DAWN BARR, Plaintiffs, v. JEFFREY A. COLE, WILLIAM D. SIMS, AND GREGORY T. BREWERS, Defendants.	49CIV.21-002535 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, Dawn and Doug Barr, filed a Motion for Summary Judgment on December 23, 2022. Defendants, Jeffrey A. Cole William D. Sims, filed a Motion for Summary Judgment on December 23, 2022. Defendant, Gregory T. Brewers, joined Defendants Sims' and Cole's Motion for Summary Judgment. All these motions came before the Court, Honorable John Brown presiding, for hearing on Thursday, January 26, 2023. Plaintiffs appeared through their attorney, Lee A. Schoenbeck. Defendants Cole and Sims appeared through their attorney, Jeffrey G. Hurd. Defendant Brewers appeared through his attorney, Jason R. Sutton. Based upon the Court's review of the submissions of the parties, the oral and written arguments of counsel, and the review of the record as a whole, it is hereby

ORDERED that Defendants Jeffrey A. Cole's, William D. Sims', and Gregory T. Brewers' Motion for Summary Judgment is granted for the reasons stated at the hearing. It is further

ORDERED that Plaintiffs' Motion for Summary Judgment is denied.

Honorable John L. Brown
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

FILED
FEB 06 2023
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA :ss COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
DOUG BARR AND DAWN BARR, Plaintiffs, v. JEFFREY A. COLE, WILLIAM D. SIMS, AND GREGORY T. BREWERS, Defendants.	)	49CIV.21-2535 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs respectfully submit these statements of undisputed material facts in support of their Motion for Summary Judgment. Exhibits referenced herein are attached to the *Affidavit of Lee Schoenbeck* filed in support of Plaintiffs' Motion.

1. Doug Barr was injured in an automobile accident in Lincoln County, South Dakota on December 21, 2016. (C/S Ans.[1] ¶ 4.)

2. Doug and Dawn Barr were represented in the personal injury matter arising from the December 2016 accident by the Defendants, Jeffery Cole, William Sims, and Greg Brewers. (C/S Ans. ¶ 6; B Ans.[2] ¶ 5.)

3. The December 21, 2016, accident was caused by the negligent operation of an automobile by Stuart Hughes. (C/S Ans. ¶ 8.)

4. At the time of the accident, Stuart Hughes was a state employee. (C/S Ans. ¶ 8.)

5. State employees are provided insurance coverage under the Public Entity Pool for Liability known as the "PEPL Fund." (Depo. Ex. 46—PEPL Fund.)

[1] "C/S Ans." is a reference to Jeff Cole & William Sims' Answer to Complaint.
[2] "B Ans." is a reference to Gregory Brewers' Answer to Complaint.

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6. When a claim of negligence is asserted against an individual covered by the PEPL Fund, the party asserting the claim must give written notice within 180 days, pursuant to SDCL 3-21-2. (C/S Ans. ¶ 10.)

7. In December of 2016, the Defendants knew that Stuart Hughes was a state employee, serving as a law clerk for the First Judicial Circuit. (C/S Ans. ¶ 15.)

8. Soon after the accident, the Defendants knew that Stuart Hughes was leaving court in Parker, South Dakota, where he was serving as a law clerk, at the time of the accident. (Brewers Depo. pp. 15-16, 21; Cole Depo. p. 11; Sims Depo. pp. 22-26.)

9. The 180-day statutory notice ran on June 19, 2017, and the Defendants were undisputedly aware that it had run by September 5, 2017. (C/S Ans. ¶ 11; Depo. Ex. 2—Sims Email to Cole/Brewers.)

10. The Defendants did not give State the written notice pursuant to SDCL 3-21-2. (C/S Ans. ¶ 12; Ambach Depo. p.8; Sims Depo. p. 39.)

11. It's easy to give the statutory notice, it's just sending a letter. (Brewers Depo. pp. 21-23; Cole Depo. p. 18; Sims Depo. p. 37.)

12. The only written record of Defendants-Attorneys considering complying with SDCL 3-21-2 is after the statute of limitations ran. (Depo. Ex. 3—Sims Email to Brewers/Cole; Cole Depo. pp. 12-13.)

13. Defendants-Attorneys know that it's important to document the file with important events. (Sims Depo. p. 71.)

14. PEPL Fund coverage limits are $1,000,000 for covered individuals, less coverage available on any private vehicles involved. (Ambach Depo. p. 6; Depo. Ex. 46—PEPL Fund, p. BARR 1426, ¶ 17.)

15. When a personal owned auto "POV" is driven by a State employee, the PEPL Fund is secondary to the POV coverage, and the State office of Risk Management doesn't investigate until they receive the 180-day written notice required by SDCL 3-21-2. (Ambach Depo. pp. 16-17.)

16. The PEPL Fund agreement provides coverage for an "occurrence" which is defined as follows:

> 8. Occurrence – an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the employee's duties for the State.

(Depo. Ex. 46—PEPL Fund, p. BARR 1416.)

17. When the PEPL Fund evaluates the State employee's use of a personal auto vehicle when the employee is leaving a remote duty station, the PEPL Fund is looking at the "reasonableness of what they are doing with their vehicle." (Ambach Depo. p. 20.)

18. If the State is paying an employee to drive somewhere to sleep, and the employee is driving somewhere to sleep, the PEPL Fund doesn't care where they sleep at. (Ambach Depo. p. 42.)

19. Only $500,000 of insurance coverage was available without the PEPL Fund. (C/S Ans. ¶ 18.)

20. The Defendants made demands in the case for amounts in excess of $1,000,000. (C/S Ans. ¶ 17.)

21. The Defendants knew that the liability insurance carrier's available coverage, excluding the PEPL Fund, was inadequate for the damages sustained by Doug

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and Dawn Barr. (Depo. Ex. 15—NPJ Email to Grinnell; Depo. Ex. 22-Cole ltr to Luce; Depo. Ex. 26-Cole Email to Barrs; Sims Depo. p. 52.)

22. On September 5, 2017, the Defendants were told by Stuart Hughes that his medical bills were paid by "work comp." (Depo. Ex. 2—Sims Email to Cole/Brewers.)

23. Also on September 5, 2017, Stuart Hughes suggested to the Defendants-Attorneys that they should be putting the State on notice of a claim. (Depo. Ex. 2—Sims Email to Cole/Brewers; Depo. Ex. 1—Contact Sheet narrative.)

24. The State of South Dakota paid medical bills for Stuart's 2016 accident injuries under their workers' compensation fund because they determined the claim was compensable. (Job Depo. pp. 5-6; Depo. Ex. 44—Work Comp Pmts.)

25. The State's workers' compensation fund provides coverage for State employees if the injury arises out of and in the course of employment and was a major contributing factor. (Job Depo. p. 6.)

26. Stuart Hughes, the law clerk leaving court in Parker, was compensable because he was reimbursed mileage and its paid work time. (Job Depo. pp. 10-11, 14-15.)

27. John Hughes advised the State on January 30, 2017, that the accident happened two and a half miles west of Tea on Highway 17 and 272nd Street, the exact location where the accident happened. (Job Depo. p. 26; Depo. Ex. 45—Work Comp Emails, p. STATE0046.)

28. The Defendants know that workers' compensation only pays medical bills when an employee's injuries arise out of and in the scope of their employment. (Cole Depo. p. 13; Sims Depo. p. 31.)

29. On Thursday, September 7, 2017, the Defendants-Attorneys recognized a potential "respondeat superior claim because Stuart was an employee" and that the "180 day notice timeframe is long past, so I don't know how viable such a claim would be." (Depo. Ex. 3—Sims Email to Brewers/Cole.)

30. By September 7, 2017, the Defendants knew that the PEPL Fund's coverage would have been available for their clients' injuries. (Depo. Ex. 1—Contact Sheet narrative; Depo. Ex. 2—Sims Email to Cole/Brewers; Depo. Ex. 3—Sims Email to Brewers/Cole; Cole Depo. p. 17; Sims Depo. pp. 36-38.)

31. Defendants did not disclose to their clients the possibility that the PEPL Fund's coverage was available. (Brewers Depo. p. 24.)

32. In the Defendants email exchange when they discussed that the 180-day notice had lapsed, while they had their client on the email exchange earlier, they removed the clients from the discussion of the statute of limitations having lapsed. (Depo. Ex. 2—Sims Email to Cole/Brewers; Depo Ex. 3—Sims Email to Brewers/Cole; Brewers Depo. pp. 28-29, 33-36; Cole Depo. p. 20; Sims Depo. pp. 46-49.)

33. The Defendants have admitted that they did not disclose the initial malpractice claim to their clients. (Sims Depo. pp. 32-33, 46-49.)

34. In March of 2021, Dawn and Doug Barr signed the Settlement Agreement negotiated by the Defendants-Attorneys, who were still representing Dawn and Doug. (C/S Ans. ¶ 14; B Ans. ¶ 11.)

35. Defendants-Attorneys' website indicated this was one of the largest cases they had handled. (Depo. Ex. 39—NPJ's Website; Cole Depo. p. 9.)

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36. On the night before the accident, Stuart Hughes and his pregnant wife stayed with his parents, Mr. and Mrs. John Hughes, in Sioux Falls, South Dakota. (J.Hughes Depo. p. 6.)

37. On the morning of December 21, 2016, because he was concerned about the condition of Stuart's car and the weather, Stuart's father, John Hughes, allowed Stuart to drive John Hughes's pickup to court in Parker, South Dakota. (Depo. Ex. 45—Work Comp Emails, p. STATE0046; J.Hughes Depo. pp. 6-7.)

38. It is 30 miles from John Hughes's home at 4405 South River Oaks Circle, Sioux Falls, South Dakota to the Turner County Courthouse. (Google Maps; J.Hughes Depo. pp. 8-9.)

39. After court on December 21, 2016, Stuart Hughes was driving on a direct route back to his father's home, where he had stayed with his wife the night before. (J.Hughes Depo. p. 8.)

40. Stuart Hughes and his wife lived in Vermillion, South Dakota at the time. (J.Hughes Depo. p. 10.)

41. State employee, Stuart Hughes, lived because he was driving his father's pickup instead of Stuart's Volkswagen car. (J.Hughes Depo. p. 8.)

42. The State of South Dakota has law clerks drive their personal vehicles to court in different counties in the First Circuit. (Allison Depo. p. 10.)

43. The law clerk is expected to go to whatever county a judge requests them to for whatever proceeding is happening in that county. (Allison Depo. p. 12.)

44. Driving to various counties within the Circuit is an expectation the UJS places upon law clerks, and advises them of this at their initial interview. (Allison Depo. p. 31.)

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45. The State of South Dakota pays mileage to law clerks and circuit court judges when they drive to remote courthouses. (Allison Depo. pp. 11, 13; Depo. Ex. 40—UJS Travel Regulations, p. STATE0028.)

46. If the Circuit Judge or a law clerk had a hearing in Parker, but afterwards drove to Sioux Falls instead of their duty station in Yankton or their home in Vermillion, the UJS would still pay mileage—as if they had "driven straight up and driven straight back." (Allison Depo. p. 16.)

47. The State of South Dakota paid Stuart Hughes to drive home from the Turner County Courthouse, after work on December 21, 2016. (Allison Depo. pp. 19-20; Depo. Ex. 38—Travel Pmt Detail for S.Hughes.)

48. When asked, Stuart Hughes advised the court administrator that he was on his way to Sioux Falls from Parker. (Allison Depo. p. 23.)

49. The UJS does not have a requirement that an employee take a certain path from the courthouse to their duty station or their home. (Allison Depo. p. 24.)

50. With respect to the accident, the UJS reported that Stuart was "still on work time as he had been required to travel for work and was returning home." (Allison Depo. pp. 25-26; Depo. Ex. 43—Allison's Email.)

51. UJS would reimburse Stuart Hughes's mileage after court, regardless of whether he drove to Sioux Falls or Vermillion. (Allison Depo. p. 27.)

52. It's not disputed that Doug Barr's damages exceeded $1,000,000, because of the serious head injury. (Depo. Ex. 19—Dr. Tranel Report; Depo. Ex. 20—Dr. Swenson Report; Depo. Ex. 21—Dr. Patra Report; Depo. Ex. 29—Cole's Demand Ltr to Oberg; Cole Depo. p. 21; Sims Depo. pp. 49-59.)

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53. Doug Barr's medical bills alone exceeded $265,000. (Depo. Ex. 23—Cole's Demand Ltr to Luce.)

54. In 2021, three and a half years after the accident, on March 4th, Steve Oberg emailed Jeff Cole and Bill Sims and inquired whether they had given the 180-day notice to the PEPL Fund, as there may have been available coverage. (Depo. Ex. 17—Oberg's Email to Cole/Sims.)

55. Six days later, March 10, 2021, Jeff Cole called Steve Oberg and accepted the $500,000 settlement. (Depo. Ex. 18—Cole's Email to Brewers/Sims.)

56. The Defendants-Attorneys didn't tell their clients about the PEPL Fund issues raised by Steve Oberg. (Sims Depo. pp. 57-58.)

57. The PEPL Fund never evaluated coverage because they weren't given notice, and they don't do it until they receive notice. (Ambach Depo. pp. 8, 10, 13-14.)

Dated this 23rd day of December, 2022.

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STATE OF SOUTH DAKOTA ss: COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
DOUG BARR AND DAWN BARR, Plaintiffs, v. JEFFREY A. COLE, WILLIAM D. SIMS, AND GREGORY T. BREWERS, Defendants.	)	49CIV.21-2535 RESPONSE TO COLE AND SIMS'S STATEMENT OF UNDISPUTED MATERIAL FACTS, AND PLAINTIFFS' ADDITIONAL MATERIAL FACTS

COMES NOW the Plaintiffs, Doug and Dawn Barr, and respectfully submit this Response to Cole and Sims's Statement of Undisputed Material Facts and submit Plaintiffs' Additional Material Facts. The exhibits referenced herein are attached to the *Affidavit of Joe Erickson* filed herewith. Additionally, the Plaintiffs ask the Court to take judicial notice of their *Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment*, which the Plaintiffs incorporate to their Response herein by reference.

RESPONSE TO COLE/SIMS'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff, Doug Barr, was injured in an auto accident on December 21, 2016 (the "Accident") (Ex. 42, Accident Report.)

RESPONSE: Undisputed.

2. The Accident was caused by Stuart Hughes. Hughes failed to yield, and pulled out in front of Doug on a highway (Ex. 42, Accident Report.)

RESPONSE: Undisputed.

3. The accident occurred approximately two miles west of Tea, South Dakota, at the intersection of SD Hwy 17 and 272 Street in Lincoln County (Ex. 42, Accident Report.).

RESPONSE: Undisputed.

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4. Tea is in Lincoln County, which is in the Second Judicial Circuit (Ex. C, Circuit Court Map.).

RESPONSE: Undisputed.

5. At the time of the accident, Hughes was a law clerk for the First Judicial Circuit (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11.).

RESPONSE: Undisputed.

6. Hughes lived in Vermillion, and his duty station was Yankton (Ex. B, Plaintiff's Responses to Defendants' First Requests for Admissions, Requests 4 & 5.).

RESPONSE: Undisputed.

7. First Circuit Law clerks are stationed in either Yankton or Mitchell (Ex. D, Kim Allison Deposition at 8:16-8:20.).

RESPONSE: Undisputed.

8. The morning of the Accident, Hughes drove from Vermillion to the Turner County Courthouse in Parker to attend a hearing (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 34.).

RESPONSE: Disputed. Stuart Hughes was driving from Sioux Falls to the Turner County Courthouse on the morning of the accident. (J.Hughes Depo. pp. 5-6.)

9. Sometime after 5:00 p.m., Hughes left Parker, and "began the trip to Sioux Falls to visit family for a holiday dinner." (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11; Ex. 101, Stuart Hughes Deposition, 14:24-15:2.).

RESPONSE: Disputed. After court, Stuart Hughes was driving on a direct route back to his father's home, where he had stayed with his wife the night before. (Plaintiffs' SUMF No. 39—J.Hughes Depo. p. 8.)

10. Hughes's parents were having a family holiday gathering because Hughes's brother was in town (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11; Ex. 101, Stuart Hughes Deposition at 15:3-10; Ex. I, John Hughes Deposition at 6:12-6:20.).

RESPONSE: Undisputed.

11. Hughes was expected to drive to and from an out of town hearing from either his duty station in Yankton, or his home in Vermillion, whichever is shorter (Ex. D, Kim

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Allison Deposition at 10:1-11:9, 13:11-13:22; Ex. 40, UJS Travel Policies at STATE 0028.).

RESPONSE: **Disputed. The UJS reimbursed Stuart Hughes for his mileage regardless of whether he drove to Sioux Falls or Vermillion. (Plaintiffs' SUMF No. 51—Allison Depo. p. 27.)**

12. No one acting on behalf of the First Judicial Circuit asked Hughes to drive to Sioux Falls (Ex. B, Plaintiffs' Responses to Defendants' First Request for Admissions at 4, RFA No. 15.).

RESPONSE: **Disputed. The UJS expects law clerks to sleep somewhere, and does not require them to sleep in a certain location—and reimburses the law clerk whether they travel to Sioux Falls or Vermillion. (Plaintiffs' SUMF No. 51—Allison Depo. p. 27.)**

Further, a law clerk is expected to drive to and from remote counties in the First Circuit when a judge asks—regardless of where they intend to sleep that night. (Plaintiffs' SUMF No. 43—Allison Depo. p. 12.)

13. There was nothing about Hughes's employment with the UJS that would have compelled him to drive to Sioux Falls (Ex. D, Kim Allison Deposition at 44:14-44:17.).

RESPONSE: **Disputed. The UJS did not require Stuart to drive a certain path home. (Plaintiffs' SUMF No. 49—Allison Depo. p. 24)**

The UJS paid Stuart Hughes reimbursement for his mileage on the date of the accident. (Plaintiffs' SUMF No. 47—Allision Depo. pp. 19-20; Depo. Ex. 38.)

The UJS would have reimbursed Stuart regardless if he drove to Sioux Falls or Vermillion, and he was required to drive to the Turner County Courthouse for his job duties. (Plaintiffs' SUMF No. 51—Allison Depo. p. 27.)

14. Hughes's trip to Sioux Falls was on his own time, and had nothing to do with his duties and responsibilities for the UJS (Ex. D, Kim Allison Deposition at 53:4-53:9.).

RESPONSE: **Disputed. First, Stuart Hughes was not in Sioux Falls at the time of the accident. The UJS did not require Stuart Hughes to travel to a certain location in order to be reimbursed for his mileage, and it could have been either Sioux Falls or Vermillion. (Plainitiffs' SUMF No. 51—Allision Depo. p. 27.)**

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The reason Stuart was traveling from the Turner County Courthouse was because of his employment with the UJS that requires extensive travel to remote counties. (Plaintiffs' SUMF Nos. 42-44—Allision Depo. pp. 10, 12, 31.)

15. The PEPL Fund provides liability coverage for state employees "as provided for within the coverage document issued by PEPL." SDCL § 3-22-1.

RESPONSE: Undisputed.

16. The "coverage document issued by PEPL" is the Participation Agreement Between the Public Entity Pool for Liability and the State of South Dakota (Ex. 46, PEPL Fund Participation Agreement and Memorandum at Barr 1405.).

RESPONSE: Undisputed.

17. The Participation Agreement at issue is the 2016 Agreement (Ex. H, Craig Ambach Deposition at 21:23-22:6.).

RESPONSE: Undisputed.

18. The Memorandum of Coverage that is attached to the Participation Agreement sets out the scope and limit of coverage (Ex. 46, PEPL Fund Participation Agreement and Memorandum at Barr 1406.).

RESPONSE: Undisputed.

19. The PEPL Fund covers damages that a covered employee "becomes legally obligated to pay because of an occurrence." (Ex. 46, PEPL Fund Participation Agreement and Memorandum, at Barr 1411 (italics in original)).

RESPONSE: Undisputed.

20. An "occurrence" is "an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the employee's duties for the State." (Ex. 46, PEPL Fund Participation Agreement and Memorandum at Barr 1416; Ex. H, Craig Ambach Deposition at 24:23-25:11; 26:2-26:7.).

RESPONSE: Undisputed.

PLAINTIFFS' ADDITIONAL MATERIAL FACTS

1. Kim Allision, the Circuit Court Administrator in charge of the First Circuit, agreed that one of the routes from the Parker County Courthouse would be to drive to

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the interstate first, and then drop down to Vermillion. (Allison Depo. p. 30.)

2. Kim Allison described that the UJS policy is to pay mileage to law clerks for the distance between where they left from to the courthouse where they are traveling to—which would include a roundtrip to Sioux Falls. (Allison Depo. pp. 45-46.)

3. The Defendants-Attorneys were still investigating a possible claim against the PEPL Fund on September 6, 2017, three months after the 180-day deadline, as the Defendants-Attorneys sent discovery requests that asked Stuart the following: "Interrogatory No. 32. State the name and address of your employer, your job title, and describe your job duties, **and state whether you were performing any duties for your employer at the time of the collision.**" (emphasis added) (Interrogatories to Stuart Hughes (First) (9/6/17).)

4. In 2019, the Defendants-Attorneys' deposition outline for Stuart involved several questions relating to workers' compensation that they did not ask:

> Make work comp claim. We'd request any work comp documents regarding the crash and Mr. Hughes' injuries.
>
> . . .
>
> How much were you paid for your work comp claim.

(2019 Depo. Outline for Stuart, pp. 18, 20.)

Dated this 11th day of January, 2023.

SCHOENBECK & ERICKSON, PC

By: _/s/_Joe Erickson_____
Lee Schoenbeck
Joe Erickson
Attorneys for Plaintiffs
1200 Mickelson Dr., STE. 310
Watertown, SD 57201

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STATE OF SOUTH DAKOTA :ss COUNTY OF MINNEHAHA	)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
DOUG BARR AND DAWN BARR, Plaintiffs, v. JEFFREY A. COLE, WILLIAM D. SIMS, AND GREGORY T. BREWERS, Defendants.	)	49CIV.21-2535 AFFIDAVIT OF JOE ERICKSON

STATE OF SOUTH DAKOTA)
ss:
COUNTY OF CODINGTON)

Joe Erickson, being first duly sworn on oath, deposes and states as follows:

1. That attached hereto are the following exhibits in support of Plaintiffs' Additional Statement of Material Facts:

Ex. #	Description
AA	Kim Allison Deposition (8/18/22)
BB	Interrogatories and Request for Production of Documents to Defendant Stuart J. Hughes (First Set) (9/6/17)
CC	2019 Deposition Outline for Stuart Hughes

2. Additionally, attached hereto as **Exhibit DD** is a report by Plaintiffs' expert, Ken Barker, being filed in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment.

3. Finally, I am reattaching certain exhibits from Plaintiffs' Motion for Summary Judgment, which are referenced in Plaintiffs' Response to Defendants' Motion for Summary Judgment:

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Ex. #	Description
3	**Depo. Ex. 1** – Contact Sheet narrative
4	**Depo. Ex. 2** – William Sims' Email to Jeff Cole & Greg Brewers (9/5/17)
5	**Depo. Ex. 3** – William Sims' Email to Greg Brewers and Jeff Cole (9/7/17)
16	**Depo. Ex. 38** – Travel Payment Detail for Stuart Hughes
19	**Depo. Ex. 43** – Kim Allison's Email to Bureau of Human Resources (2/6/17)
23	William Sims Deposition (4/11/22)
24	Gregory Brewers Deposition (4/11/22)
25	Jeffery Cole Deposition (4/11/22)
29	John Hughes Deposition (11/30/22)

JOE ERICKSON

Subscribed and sworn to before me this 11th day of January, 2023.

JENNIFER X. FREDERICK
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

Notary Public – South Dakota
My Commission Expires: 11/15/26

EXHIBIT DD

BARKER LAW FIRM, LLC

211 Zinnia Drive PO Box 100
Belle Fourche, SD 57717-0100

The wisdom to win.

Phone 605-723-8000
Fax 605-723-8010

kbarker@barkerlawfirm.com

January 3, 2023

VIA EMAIL & U.S. MAIL

Mr. Lee Schoenbeck
Mr. Joe Erickson
Schoenbeck & Erickson, PC
1200 Mickelson Dr., Ste. 310
Watertown, SD 57302

Re: Doug and Dawn Barr v. Jeff Cole, William Sims, and Gregory Brewers
49CIV21-002535
Our File No. 5093

Dear Mr. Schoenbeck and Mr. Erickson:

Thank you for asking me to offer my opinions regarding the professional liability issues presented in *Barr v. Cole, Sims, and Brewers*.[1] This is my Report.

INTRODUCTION

I was first contacted by your office in September 2022. I was asked to review relevant documents and testimony to consider whether attorneys Cole, Sims, and Brewers[2] met the applicable standard of care in their representation of Doug and Dawn Barr[3] in their personal injury lawsuit arising from the two-vehicle crash in which Doug was seriously injured.[4] It is alleged Cole, Sims, and Brewers did not meet professional standards of care.[5]

My opinions address that question.[6]

The liability for the cause of the crash is not credibly in dispute.[7] It is acknowledged the driver of the at-fault vehicle was a State employee traveling to his parents' home from his work

[1] 49CIV21-002535 Minnehaha Co., Second Judicial District, South Dakota, Honorable John Brown.
[2] Collectively, "Defendants" or by their individual names.
[3] "Plaintiffs" or by their names.
[4] "Underlying lawsuit."
[5] "Current lawsuit" or "present lawsuit."
[6] *See, Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 41, 939 N.W.2d 32, "[I]t is most often necessary to have an expert witness explain how the lawyer's actions fell below the standard of care," citing *Shi Gang Zhang v. Rasmus*, 2109 S.D. 46, ¶ 28, 932 N.W.2d 153, 162.
[7] Dep. Ex 42.

station, being paid for his time and travel at the time of the collision.[8] The State of South Dakota paid the driver's medical bills through its worker's compensation system.[9] It is disputed whether he was within the scope of his employment at the time of the collision.[10] For reasons explained in this Report, the answer to that question is secondary to the initial question of whether the failure of the Barrs' lawyers to give notice to the Public Entity Pool for Liability, that is the "PEPL Fund," met the applicable standard of care.

The Barrs, on the advice of their counsel, settled their combined claims for the $500,000 limits offered under two insurance policies that provided coverage for the at-fault driver.[11] Their attorneys had previously made demands for settlement that exceeded $1million.[12] Doug's medical bills totaled $265,000.[13] There appears to be little debate that some of the injuries he suffered were permanent. The extent of his traumatic brain injury appears lightly contested and there seemed to be a consensus that it was his most serious injury.[14]

The questions that I am asked to address are:[15]

1) Did the Barrs' lawyers fail to meet the applicable standard of care of civil trial lawyers when they failed to give written notice to the PEPL Fund of the Barrs' claim of coverage for the State employee who caused the collision?

   It is alleged the failure to provide what is commonly referred to as 'the 180-day notice' under SDCL § 3-21-2, prevented Barrs' from the recovery of an additional $500,000 of coverage.

2) If the failure to give notice of a claim to the PEPL Fund is below the standard of care of a civil trial lawyer, did that failure cause the Barrs any damage or loss?

   Defendants allege that their failure to give notice did not cause the Barrs any damage or loss because they concluded that the at-fault driver was not within the scope of his employment at the time of the accident.

3) Upon recognition there was at least a question if the 180-day notice should have been issued to the PEPL Fund, did the Barrs' lawyers further fail to meet the applicable

[8] Cole & Sims Answer, ¶ 8; Job Dep. 11:14-17; Dep. Ex. 45, STATE 0047.
[9] Dep. Exs. 2, 44.
[10] Cole & Sims Answer ¶15; Brewers Dep. 29:7-10.
[11] Dep. Ex. 10.
[12] Dep. Ex. 29, Brewers000070.
[13] Dep. Ex. 23, NPJ000697.
[14] Dep. Exs. 19, NPJ002797-NPJ002799; 20, Brewers000089; 21, Brewers000124.
[15] From Barrs' Complaint, September 17, 2021.

professional standard of care and their fiduciary duty by failing to fully inform and advise their clients?

It is alleged in the present action that the failure to fully advise the Barrs' of the 180-day notice issue prevented them from seeking and considering the advice of independent counsel regarding both questions, the propriety of accepting the settlement and whether a 180-day notice should have been issued.

4) Did the Barrs' lawyers meet legal professional standards when they accepted a fee for their services knowing there was at least a question that their failure to provide written notice to the PEPL Fund deprived their clients from an additional $500,000 of coverage?

It is alleged that upon knowing they failed to give written notice to the PEPL Fund of their clients' claim, the Barrs' lawyers could not ethically accept a fee for their services.

RELEVANT CREDENTIALS AND BACKGROUND

I am a civil trial lawyer focusing on complex litigation, usually on behalf of plaintiffs. I have been licensed to practice in South Dakota since 1985 and in Wyoming since 1996. I regularly represent clients in state and federal courts in both states, as well as occasionally in Montana and North Dakota (pro hac vice). I am admitted to practice before the United States District Courts for South Dakota, Wyoming, and Montana (pro hac vice). I have also been admitted to practice before the United States Court of Appeals for the Eighth, Ninth, and Tenth Circuits, as well as the United States Supreme Court.

I have been continuously certified as a Civil Trial Specialist by the National Board of Trial Advocacy since 1996. My Martindale—Hubbell rating is "AV" "Preeminent." "Best Lawyers in America, a professional rating service, listed me as "Lawyer of the Year" for "Personal Injury Litigation-Plaintiffs" for the Rapid City area in 2013, 2016 and 2019. I have been peer reviewed and rated as a member of "Super Lawyers" for the last 15 years. I have presented professional topics at the invitation of various groups in South Dakota and other states.

Over the years, our work has included wrongful death and personal injury cases involving industrial and mining accidents, wildfire and structure fires, product liability, medical negligence, truck and vehicle wrecks, wrongful discharge, tortious interference, insurance bad faith, estate and contract disputes, and construction litigation. We have represented plaintiffs in class actions, but it is not a significant part of our practice. In several of our cases, however, we have represented multiple plaintiffs (5-45 families) in the same action. Having practiced in the

same small town (Belle Fourche) for over 37 years, we have handled our share of the occasional small claims, adoptions, guardianships and conservatorships, and informal probates. We refer all of our criminal, family law, estate planning, formal probates, business transactions, worker's compensation, and other work outside our practice expertise to other attorneys specializing in these areas of the law.

DOCUMENTS REVIEWED

I have reviewed and considered the following documents in preparation of my opinions:

1. **Pleadings:**
   a. Summons and Complaint from the current lawsuit
   b. Separate Answer of Defendant Gregory T. Brewers
   c. Answer of Jeffrey A. Cole and William D. Sims
   d. Defendant Jeffrey A. Cole's Answers and Responses to Plaintiffs' Interrogatories and Requests for Production to Jeffrey A. Cole (First Set)
   e. Defendant William D. Sims's Answers and Responses to Plaintiffs' Interrogatories and Requests for Production to William D. Sims (First Set)
   f. Cole and Sims's Responses to Plaintiffs' Second Set of Discovery Requests
   g. Defendant Gregory T. Brewers' Responses and Objections to Plaintiffs' Interrogatories and Request for Production to Gregory T. Brewers (First Set)
   h. Defendant Gregory T. Brewers' Answers to Plaintiffs' Interrogatories and Request for Production to Gregory T. Brewers (Second Set)
   i. Notice of Appearance – Jason Sutton
   j. Notices of Appearances of Jeffrey G. Hurd and Emily M. Smoragiewicz
   k. Notice to Take Oral Deposition of William D. Sims
   l. Notice to Take Oral Deposition of Gregory T. Brewers
   m. Notice to Take Oral Deposition of Jeffrey A. Cole
   n. Amended Notice to Take Oral Deposition of William D. Sims
   o. Amended Notice to Take Oral Deposition of Jeffrey A. Cole
   p. Amended Notice to Take Oral Deposition of Gregory T. Brewers
   q. Amended Notice to Take Deposition of Doug Barr
   r. Amended Notice to Take Deposition of Dawn Barr
   s. Notice to Take Oral Deposition of Craig Ambach
   t. Notice to Take Oral Deposition of Lynn Job
   u. Notice to Take Oral Deposition of Kim Allison
   v. Deposition Subpoena to John Hughes
   w. Admission of Service, Deposition Subpoena to John Hughes
   x. Plaintiffs' Discovery Answers to Defendant Cole and Sims (First)
   y. Plaintiffs' Responses to Defendants Cole and Sims' Request for Admissions (First)

z. Plaintiffs' Discovery Answers to Defendants Cole and Sims (Second)
aa. Answers to Defendants Cole and Sims's [Third] Discovery Requests to Plaintiffs
bb. Plaintiffs' Joint Answers to Defendant Brewers' Interrogatories, Request for Production, and Request for Admissions (First Set)
cc. Subpoena Duces Tecum, State of South Dakota
dd. Admission of Service of Subpoena Duces Tecum, State of South Dakota
ee. Order for Appointment of Judge
ff. Filed email string from Judge Sogn
gg. Order, Judge John Brown
hh. Notice of Hearing
ii. Amended Notice of Hearing
jj. Joint Motion for Scheduling Order
kk. Scheduling Order
ll. Notice of Entry of Order

2. **Depositions:**
   a. Craig Ambach, August 24, 2022
   b. Gregory T. Brewers, April 11, 2022
   c. Jeffrey A. Cole, April 11, 2022
   d. John Hughes, November 30, 2022
   e. Kim Allison, August 18, 2022
   f. Lynn Job, August 24, 2022
   g. William D. Sims, April 11, 2022
   h. Stuart J. Hughes, January 31, 2021

3. **Additional Documents considered:**
   a. Complaint and Demand For Jury Trial in the underlying lawsuit, "Douglas J. Barr and Dawn Barr, Plaintiffs, vs. Stuart J. Hughes," 41CIV17-000383 Lincoln County, Second Judicial Circuit, South Dakota. [16]
   b. AMCO Declarations for Hughes (Brewers001222)

OPINIONS

The following summarizes my professional opinions:

1. **Did the facts and applicable standard of care require Barrs' lawyers to send a written notice of a claim to the PEPL Fund under the authority of SDCL § 3-21-2?**

[16] Obtained through eCourts.

It is my opinion that the applicable standard of care required the Barrs' lawyers to provide written notice of a claim to the PEPL Fund upon their knowledge in December of 2016 that the at-fault driver was a State of South Dakota employee at the time of the collision. Relatedly, it is also my opinion the evidence strongly supports the claim that the at-fault driver was within the scope of his employment at the time of the collision, and therefore, the accident would have been covered by the PEPL Fund as secondary coverage.

2. **Did the failure to give notice to the PEPL Fund cause Barrs a loss?**

   It is my opinion that the failure to give the PEPL Fund notice caused the Barrs, in substantial likelihood, the loss of the opportunity to recover an additional $500,000 of damages.

3. **Upon recognizing they failed to provide the 180-day notice to the PEPL Fund, was the failure of Barrs' lawyers to fully advise the Barrs of the effect on their recovery below the applicable standard of care and contrary to their fiduciary duty?**

   It is my opinion that the applicable standard of care and their fiduciary duty required the Barrs' lawyers to advise the Barrs promptly of their error in failing to send notice to the PEPL Fund, allowing the Barrs to seek independent legal advice. Even if it was their lawyers' sincere belief a claim for coverage under the PEPL Fund was 'not viable,' they nevertheless had a duty to fully inform their clients that notice was not timely, thereby preventing the question of PEPL Fund coverage to be determined by PEPL Fund administrators or, if necessary, the court or a jury.

4. **Under the circumstances of this case, was the Barrs' lawyers' acceptance of a fee for their services contrary to the Rules of Professional Conduct?**

   It is my opinion that the acceptance of a fee in light of their failure to provide notice to the PEPL Fund and failure to fully advise their clients of their error, was contrary to the Rules of Professional Conduct, including Rule 1.4.

DISCUSSION

Relevant Facts and Background

The underlying lawsuit giving rise to this malpractice action involves a vehicle collision on December 21, 2016, at a rural intersection in Lincoln County, South Dakota.[17] According to the South Dakota Traffic Accident Report, the cause of the collision was the failure of the other

[17] Dep. Ex. 118.

driver to yield, causing the broadside impact that injured Doug Barr.[18] The 'other driver,' Stuart Hughes, was at the time a law clerk for the First Judicial Circuit of the State of South Dakota.[19] It was discovered he was being compensated for his time and mileage for his use of a private vehicle in the performance of his duties as an employee of the State of South Dakota at the time of the crash.[20]

Barrs and the Strange, Farrell, Johnson and Brewers, PC law firm entered a "Retainer Agreement (Personal Injury) on January 1, 2017, within 10 days of the accident, in which the firm agreed to represent Barrs for all claims arising from the accident.[21] Among other conditions, the Agreement provides "[T]he law firm has an ethical responsibility to gather and accurately disclose all case facts and financial details that are relevant to the case issues."[22] The Barrs' attorneys also agreed to keep the Barrs "[i]nformed as to developments in [their] case...."[23] Correspondence suggests Defendants Cole and Sims of the Zimmer, Duncan and Cole firm became actively involved on the Barrs' behalf as co-counsel at least by February, 2017.[24]

The letter of February 23, 2017, from Cole to Grinnell Mutual Insurance on behalf of the Barrs puts Grinnell on notice of a potential UIM claim and asks about available medical payments coverage.[25] The letter also expresses a lack of knowledge of the coverage offered under the Hughes polic(ies).[26] Nothing in the correspondence mentions a potential claim for coverage under the PEPL Fund. Notwithstanding, internal emails between Cole and Sims and external correspondence discuss concern about enough insurance to cover the Barrs' damages as Mr. Barr was still recovering from his injuries four months after the accident.[27]

According to their pleadings and testimony, Barrs' lawyers were first aware Stuart Hughes was an employee of the State at the time of the collision, a short time after undertaking representation of the Barrs.[28] In ¶ 15 of their Answer, they state that although "[C]ole and Sims learned that Hughes had been a state employee in December 2016, ... they determined he was not acting within the scope of his employment in causing the Accident."[29] They concluded

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[18] *Id.*
[19] See e.g., Dep. Ex. 2.
[20] Cole & Sims Answer, ¶ 15; Job Dep. 10:15-11:16; 14:24-15:5; Ambach Dep. 6:15-21, 9:18-24, 13:18-14:8.
[21] Dep. Ex. 7.
[22] *Id.*
[23] *Id.*
[24] Dep. Exs. 9, 13, but it is noted the "Attorneys' Fee Sharing Agreement" (unsigned/undated) is dated March 2017.
[25] Dep. Ex. 13.
[26] *Id.*
[27] Dep. Exs, 14, 15.
[28] Cole & Sims Answer, ¶¶ 8. 15; Cole Dep. 11:10-12; Sims Dep. 24:4-7; Brewers Dep. 15:20-16:10.
[29] Cole & Sims Answer, ¶ 15.

therefore, compliance with SDCL § 3-21-2 was not necessary.[30] They do not state in their pleading the critical question of "when" they reached their conclusion?

The answer to that question is addressed in documents which indicate Defendants did not reach their opinion that the 180-day notice did not apply until September 5 and 7, 2017—well after June 19, 2017, when the 180-day window had already closed.[31] Pleadings, exhibits and testimony do not mention a calendar entry, legal research, memo, or document Defendants authored that establishes that they considered or weighed the issue of a § 3-21-2 notice before June 19. Meanwhile, a January 2017 internal email from the Bureau of Human Resources confirms Hughes' status as a State employee at the time of the collision. It states he was "[s]till on work time as he had been required to travel to work and was returning home."[32]

The Bureau's confirmation of Hughes's status as a State employee at the time of the collision was also documented in the Zimmer, Duncan, and Cole "Contact Sheet," which according to Attorney Sims is a collection point for case information, including contact information of "[a]ll the insurance companies."[33] It summarizes a conversation Sims had with Stuart Hughes on September 5, 2017, slightly more than eight months after Doug Barr's wreck.[34] In the call, Hughes confirms his medical bills were paid by the State of South Dakota under worker's compensation.[35] Hughes suggested to Sims that he consider "[p]utting the state on notice; Duty station was Yankton, was returning from Parker in Judge Gering's court when the collision happened[.]"[36] There is no entry in the Contact Sheet prior to June 19 showing the lawyers considered or even discussed a 180-day notice.

In an email to Greg Brewers and Jeff Cole, also on September 5, Sims states, "I don't know if there is a 'discovery rule' for the 180-day notice for claims against the state. Probably worth looking into."[37] This statement reveals two things; first, recognition PEPL Fund notice on behalf of their clients was necessary and second, Defendants' realization they were by that time, beyond the 180-time limit to give that notice.

Two days later, on September 7, Cole sent an email to Brewers and Dawn Barr, copied to Sims, that "[W]e do not see a claim against the State as viable."[38] The basis of their conclusion was the fact that Hughes was employed by the State at the time of the accident was not enough to

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[30] *Id.*, at ¶¶ 12, 15.
[31] *Id.*, at ¶¶ 11;15; Dep. Exs. 2, 3.
[32] Dep. Ex. 43.
[33] Dep. Ex. 1; Sims Dep. 24:10-13.
[34] Dep. Ex. 1.
[35] *Id.*
[36] *Id.*
[37] Dep. Ex. 2.
[38] Dep. Ex. 3, NPJ015123.

"[l]ikely lead to any viable claim."[39] Sims acknowledged in an email later that day to Brewers and Cole (notably without a copy to Dawn Barr), that "[T]he 180-day notice timeframe is long past, so I don't know how viable such a claim would be."[40] There is no further documentation of any discussion the Defendants had with the Barrs concerning the effect of the lack of the 180-day notice.

In their development of the Barrs' case, their lawyers expressed the opinion to the Barrs their damages likely exceeded the coverages available from the Hughes' policies.[41] The basis of their opinion appears well-founded for in the reports of the retained medical experts on both sides, they agree Doug's brain injury was caused by the trauma of the collision and its affects were likely permanent.[42]

Cole, Sims, and Brewers also expressed the opinion the Barrs' damages exceeded available policy limits in communications with both Hughes' lawyers and with the Barrs.[43] Hughes' attorneys confirmed there was no available 'umbrella' coverage beyond the primary coverage, but expressed the opinion to Barrs' lawyers that PEPL Fund coverage was a consideration if notice had been given.[44] There is no documentation Barrs' lawyers discussed the PEPL Fund issue raised by Hughes' counsel with the Barrs.[45] Rather, their internal emails indicate they believed the Barrs' damages exceeded the available policy limits, but that the only available remedy they appear to have considered after the 180-day Fund period had lapsed was to seek an 'excess verdict' through a jury trial.[46] [47] It is unclear why they believed that strategy solved the issue of sufficient coverage, or timely notice to the Fund, but ultimately, it appears to have been abandoned for unstated reasons.[48]

Cole, Sims, and Brewers settled Barrs' claims against Stuart Hughes on March 31, 2021, for $500,000 in consideration of their signing a "Full and Final Global Release of All Claims."[49] This current lawsuit alleging legal negligence was filed on September 17, 2021, 6½ months later.

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[39] *Id.*
[40] Dep. Ex. 3.
[41] Dep. Exs. 15; 22; 23, NPJ000698.
[42] Dep. Exs. 19, NPJ002498; 20, Brewers000089; 21, e.g., Brewers000130.
[43] Dep. Exs. 22, 107, Brewers000079.
[44] Dep. Exs. 16, 17.
[45] Dep. Ex. 34.
[46] Dep. Exs 34, 36,107.
[47] It is unclear how Defendants believed an 'excess verdict' would be collected, if successful.
[48] Dep. Exs. 30, 34, 36, 107. Defendants apparently were under the belief Hughes and his lawyers could 'third party' the State for contribution under a respondeat superior theory, even though the PEPL Fund had not received a 180-day notice. Their lawsuit against Hughes was filed on September 6, 2017.
[49] Dep. Exs. 11, 18, 30, 36,103, 104.

Defendants' Professional Negligence

1. **Defendants have a duty to provide competent legal representation.**

It is every lawyer's duty to "[p]rovide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation."[50] The South Dakota Supreme Court has identified four elements that must be met for a successful claim against a lawyer for legal malpractice. They are:

> (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual damage.[51]

In sum, Cole, Sims, and Brewers undertook representation of the Barrs as their lawyers according to professional standards, including those expressed in the Retainer Agreement. In doing so, Defendants assumed the duty to apply their 'knowledge, skill, and thoroughness' to protect the Barrs' interests.[52]

2. **Under the facts, the failure to give a 180-day notice is a breach of the standard of care.**

It is fundamental in plaintiff's personal injury litigation that one of the first assessments a lawyer must make is 'what are the applicable statutes of limitation, repose or similar notice sensitive deadlines?' The answer should be documented in a calendaring system as part of the intake file. There is no evidence here the Defendants did so. If the issue of a 180-day notice had been considered, it is the standard of care that such an important deadline would be calendared or otherwise memorialized.

The reasons are both legal and practical. While the PEPL Fund is not traditional insurance, attorneys holding themselves out as specializing in plaintiffs' litigation in South Dakota must be aware of what is commonly referred to as the "180-day Notice Rule." It is potentially in play whenever a State employee may be involved in an accident and can provide primary or secondary coverage, depending on facts of the case. The notice required under SDCL § 3-21-2 requires "substantial compliance" within the 180-days of an injury.[53] "The PEPL fund defends and indemnifies state employees sued for negligence in the course of their

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[50] Rules of Professional Conduct, Rule 1.1; *see also*, *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 23, 855 N.W.2d 855.
[51] *Slota v. Imhoff & Assocs., P.C.*, 2020 S.D. 55, ¶ 17, n.9, 949 N.W.2d 864.
[52] Dep. Ex. 7
[53] SDCL § 3-21-2; *Anderson v. Keller*, 2007 S.D. 35, 739 N.W.2d 35; *Zoss v. Protsch*, 2021 W.L. 1312868 (D.S.D., April 8, 2021), citing *Hamilton*, at 862.

employment."[54] All plaintiff's lawyers and their staff should be aware of deadlines through a calendaring system to ensure the deadline is met.

Defendants knew early on in the Barrs' case that Hughes was a State employee. They should therefore have assumed, until otherwise proven, that he was acting within the scope of his employment at the time of the collision. Evidence may be developed during discovery that supports a claim for PEPL Fund or other employment-related coverages. Notice should therefore always be given when the at-fault party may have been 'within the scope' of their duties. This practice applies whether the employee works for the State or any other employer but is especially critical in the context of a § 3-21-3 notice because of the ease in which it can be issued and more importantly, the time limit within which it must be made.[55]

A PEPL Fund notice is straightforward. It simply requires "[w]ritten notice of the time, place, and cause of the injury... within one hundred eighty days after the injury."[56] The State Office of Risk Management does not necessarily investigate an event to assess coverage until they receive a SDCL § 3-21-2 notice or, in the even the employee was driving a privately owned vehicle ("POV"), a summons and complaint .[57] Fund coverage is offered when there is an "occurrence" which is broadly defined as:

> 8.Occurrence—an accident, act, error, omission, or event, during the Covered Period, which results in damages and arises within the scope of the employee's duties for the State.[58]

Under the most favorable facts to the Defendants, it was not until *after* the 180-day deadline of June 19, 2017 that they summarily concluded that Hughes was not acting within the "scope of his duties" at the time of the wreck. Even more troubling is that conclusion later proved to be incorrect. Discovery revealed he was being paid by the State to use his personal vehicle to conduct the State's business in lieu of using a State-owned auto.[59] That fact, coupled with the standard of care required that Barrs' lawyers at least make the claim on their behalf, especially when there was not enough insurance coverage offered under Hughes' policies to fully compensate the Barrs for their damages.

Defendants' comments about the "viability" of PEPL Fund coverage seem to confuse the burden of proving Hughes' negligence with the State's determination of coverage. They are two completely different concepts. The claim against Hughes is based on his negligence which

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[54] *Pub. Entity Pool for Liability v. Score*, 2003 S.D. 17, ¶ 2, 658 N.W.2d 64.
[55] SDCL § 3-21-2.
[56] *Id.*
[57] Ambach Dep. 13:18-14:8, 16:8-17:7.
[58] Dep. Ex. 46, Barr 1416.
[59] Dep. Ex. 40, STATE 0020.

seemed to be clearly established by the evidence and testimony. The claim for PEPL Fund coverage on the other hand, is a separate and distinct consideration that asks the questions of whether Hughes was within the scope of his employment at the time of his negligent acts and whether his negligence is an 'occurrence' as defined under the PEPL Fund definition. The State was not given the opportunity to consider these questions because it did not receive the prerequisite notice of a claim.

Defendants either acknowledged they did not understand how the PEPL Fund worked or if they did, they were deliberate in misinforming their clients of their failure to comply with the 180-day notice deadline. On September 7, 2017, ten weeks after the notice should have been issued, they stated in an email in which their clients were copied, that the notice to the State would not be "[w]orth the effort."[60] Attorney Brewers commented further, "I do not know of any theory of liability with (sic) [which] would likely lead to any viable claim simply because Hughes was working for the UJS the day of the accident."[61] This statement confuses the concept of Hughes' liability and PEPL Fund coverage of the claim. An inference of an attorney's negligence may be drawn from their failure to investigate a case adequately or from their failure to apply or understand pertinent and well-known statutes.[62]

It is my opinion, that it is more likely than not that if the issue of Fund coverage is considered in this case as either a legal and/or factual issue, the preponderance of evidence weighs heavily in favor of the Barrs for at least four reasons. First, albeit in the worker's compensation context, the State already found Hughes was within the scope if his duties at the time of the accident when it paid his medical bills.[63] It would not have done so otherwise, keeping in mind his vehicle coverage provided medical payment coverage.[64] He was also being paid for his time and mileage.[65] Third, his travel from his duty station for the day of the accident was consistent with what was expected of him for travel as a law clerk for the Second Circuit.[66] Hughes' deviation to return his father's vehicle was reasonable under the circumstances.[67] Finally, Stuart Hughes' father, John, advised the State on January 30, 2017 where the collision occurred, so not only was the State fully informed when it made the decision to provide worker's compensation coverage and mileage, but it is evidence that it did not consider the route chosen by Hughes to be a deviation that disqualified Stuart's status as a State employee.[68]

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[60] Dep. Ex. 3, NPJO15124.
[61] *Id.*
[62] *Nemec v. Deering*, 350 N.W.2d 53 (S.D. 1984).
[63] Dep. Exs. 38, 43; Allison Dep. 25:22-26:23.
[64] Brewers001222 (AMCO Declarations for Hughes)
[65] Dep. Ex. 38; Allison Dep. 15:10-25, 28:3-16, 49:22-25.
[66] Dep. Ex. 40, STATE 0028; Allison Dep. 16:18-17:3.
[67] Dep. Exs. 38, 40; Allison Dep. 19-20, Ambach Dep. 18:11-20:14.
[68] *Mudlin v. Hills Material Co.*, 698 N.W. 2d 67, 73-74, ¶¶ 14, 18 (SD 2005)

In summary, Cole, Sims, and Brewers' failure to calendar or otherwise memorialize the 180-day notice requirement is below the standard of care expected of an attorney representing clients in a collision case involving an at-fault employee who at the time was employed by the State, acting within the scope of his employment. Of course, it naturally follows that failure to then give that notice is likewise also below the standard of care.

3. Cole, Sims, and Brewers' failure to give a 180-day notice likely caused the Barrs additional loss.

a. The PEPL Fund provided an additional $500,000 of coverage.

If a 180-day notice had been made, Barrs would have had an additional $500,000 of coverage under the "Memorandum of Liability Coverage to the Employees of the State of South Dakota," where the Fund agreed to "[p]ay damages, not excluded hereunder, on behalf of the *employee* that the *employee* becomes legally obligated to pay because of an *occurrence* not excluded hereunder."[69] Coverage is allowed under the Fund for private vehicles used in the course of an employee's work for the State.[70] "[P]ersonal vehicle insurance shall provide primary coverage for the *occurrence* in the event the *employee* drives a vehicle not owned or leased by the *State* in the conduct of *State* business.[71] Applying this provision to the $500,000 of coverage offered under Hughes's policies results in $500,000 of available coverage under the Fund.[72]

While representing their clients, Cole, Sims, and Brewers believed Doug's damages exceeded the $500,000 of coverage offered under the two Hughes' policies.[73] There was good reason for their opinion. Three qualified specialists all agreed Doug's brain injury was caused by the collision and that its effects were permanent.[74] Because of their serious nature, brain injuries, especially those from which there will never be a recovery, warrant special consideration when it comes to damages. As is the case with the Barrs, often the injury affects the spouse and the marital relationship as much as it does the accident victim who suffered the physical injuries.[75]

If Cole, Sims, and Brewers had given proper notice to the Fund, it is my opinion the evidence supports damages that meet or exceed the additional Fund coverage of $500,000.

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[69] Dep. Ex. 46, BARR 1411B, "Damages Coverage" (emphasis original).
[70] Dep. Ex. 46, BARR 1426, ¶ 17 (emphasis original).
[71] *Id.* (emphasis original).
[72] *Id.*, BARR 1410.
[73] Dep. Exs. 15, 22, 23, 26, 27.
[74] Dep. Exs. 19, 20, 21, 29; Cole Dep. 21:1-13; Sims Dep. 59:11-24, 68:22-24.
[75] Dep. Ex. 20, Brewers000089.

b. Cole, Sims, and Brewers were required under the Rules of Professional Conduct to withdraw from representing Barrs upon their realization they missed giving notice to the PEPL Fund.

Lawyers have a professional duty of care to timely notify their clients of an act, error, or omission that would "reasonably expected to be the basis of a malpractice claim."[76] Cole, Sims, and Brewer's first apparent recognition of the 180-day Notice Rule is in their email on September 5, 2017, when Attorney Sims asks the question whether the "discovery rule" applies to the 180-day notice requirement.[77] The next day, September 6, the Complaint and Demand for Jury Trial was filed, 78 days beyond the 180-day notice limit.[78] The Complaint makes no claim that Hughes was within the scope of his duties as an employee of the State of South Dakota on the day of the collision, December 21, 2016, which would typically be an affirmative pleading in the Plaintiffs' Complaint.[79] On September 7, Defendants' internal email exchange confirms they came to the realization the time to give a 180-day notice had long-passed.[80] Despite recognition, or what should have been recognition of their error, there is no indication that they advised the Barrs of how the error affected the Barrs.[81]

Three and a half years later, on March 4, 2021, Attorney Steve Oberg, representing Hughes, emailed Jeff Cole and Bill Sims, stating, "[a]s I read the Participation Agreement and Memorandum of Coverage of the PEPL Fund, additional coverage in excess of the coverage Stuart Hughes has may be or may have been available to indemnify him in this case, provided that the required written notice was given to the State within the Statutory 180 day period."[82] Oberg's email explained the factual basis of his belief that Hughes was within the scope of his employment at the time of the crash. Oberg excuses the Defendants' oversight of the 180-day notice because, "[F]rom our conversation, I understand that you and your law firm may not have been retained before the 180-day statutory notice period ran."[83] Of course, it is now known Oberg's assumption was incorrect as Cole, Sims and Brewers had been retained at least five months before the deadline.

Barrs' lawyers had a duty to fully inform the Barrs of their failure to give notice to the Fund before they settled the underlying lawsuit.[84] They did not do so.[85] Instead, they continued to represent Barrs until their case settled for $500,000 on March 10, six days after they received

[76] *Robinson-Podoll*, at ¶ 41; *see also*, Rules of Professional Conduct, Rule 1.4.
[77] Dep. Ex. 2.
[78] Complaint in underlying action.
[79] *Id.*
[80] Dep. Ex. 3.
[81] Dep. Ex. 17.
[82] Dep. Exs. 17, 46.
[83] *Id.*
[84] *Robinson-Podoll*, ¶ 31, n.5.
[85] Dep. Ex. 116, BARR 1398.

the Oberg email.[86] They also collected their attorneys' fees from the settlement.[87] In doing so, they were in an ethical conflict with the Barrs because they knew they could be at risk of being sued for malpractice.[88] This is because at that point, Cole, Sims, and Brewers' decisions could be viewed as protecting their own interests rather than those of their clients.[89] As a result, they violated both their fiduciary and professional duties to the Barrs.[90]

As to their fiduciary duty, they were to keep their clients informed of information that may limit their ability to comply with fiduciary obligations on behalf of the Barrs.[91] The Defendants' professional duties arise from our professional standards.[92] The conflict is perfectly illustrated by the fact the Barrs were never informed by their lawyers that their claim was likely covered under the PEPL Fund and they would not have known but for a fortuitous encounter with Attorney Oberg after the Barrs' case was settled and the funds distributed.[93] Their negligence in failing to provide the 180-day notice was, therefore, compounded by their failure to advise their clients of their error.

CONCLUSION

I have expressed my opinions here to a reasonable degree of professional certainty. They are based on my review of the pleadings, exhibits and deposition testimony provided to me, as well as my education, training, and experience. I reserve the right to amend, supplement or comment further on my opinions if additional information becomes available, or in response to an opposing expert's report.

Thank you.

Very truly yours,

BARKER LAW FIRM, LLC

Kenneth E. Barker

KEB/rl

[86] Dep. Ex. 18.
[87] Dep. Ex. 10.
[88] *Robinson-Podoll*, ¶¶ 38, 41.
[89] *Id.*
[90] *Robinson-Podoll*, at ¶ 36, citing *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009).
[91] *Id.*
[92] *Id.*
[93] Dep. Ex. 116, BARR 1398.

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30252

DOUG BARR and DAWN BARR
Plaintiffs and Appellants,

vs.

JEFFREY A. COLE, WILLIAM D. SIMS,
and GREGORY T. BREWERS
Defendants and Appellees.

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

HONORABLE JOHN BROWN, Retired
Presiding Judge

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Notice of Appeal filed February 13, 2023

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JURISDICTIONAL STATEMENT

Defendant/Appellee, Gregory Brewers ("Brewers), agrees with Plaintiffs/Appellants, Doug Barr's and Dawn Barr's (collectively "the Barrs"), jurisdictional statement.

STATEMENT OF ISSUES

I. **Whether The Barrs Must Prove Coverage Would Actually Exist Under the PEPL Fund to Sustain their Claims Against the Attorney Defendants, or Whether Barrs Can Simply Prove the Claim was Viable When the Barrs First Met with the Attorney Defendants.**

The Barrs failed to present this argument to the Circuit Court, so this specific question was not directly addressed by the Circuit Court By granting summary judgment because there was no coverage under the PEPL Fund, the Circuit Court necessarily ruled the Barrs must prove coverage actually existed to sustain their claims against the Attorney Defendants.

SDCL 20-9-1.1.
Zhi Gang Zhang v. Rasmus, 2019 SD 46, 932 N.W.2d 153
Hamilton v. Sommers, 2014 SD 76, 855 N.W.2d 855
Haberer v. Rice, 511 N.W.2d 279 (S.D. 1994)

II. **Whether The Circuit Court Properly Granted Defendants Summary Judgment After Concluding Hughes Was Outside the Scope of His Employment As a Matter of Law at the Time of the Accident.**

The Circuit Court granted Attorney Defendants' motion for summary judgment because no coverage existed under the PEPL Fund as a matter of law.

SDCL 3-22-1
South Dakota Public Entity Pool for Liability v. Winger, 1997 SD 77, 566 N.W.2d 125
Terveen v. SD Dep't of Transp., 2015 SD 10, 8612 N.W.2d 775
Tammen v. Tronvold, 2021 SD 56, 965 N.W.2d 161

STATEMENT OF THE CASE

The Barrs filed a complaint against Defendants, Jeffrey Cole, William Sims, and Gregory Brewers (collectively "Attorney Defendants"), asserting four substantive causes of action: (1) breach of fiduciary duty; (2) negligence (or legal malpractice); (3) fraud; and (4) breach of contract. (SR 2-7).[1] The complaint arises out of the Attorney Defendants' representation of the Barrs in a personal injury lawsuit against Stuart Hughes ("the Underlying Action"). (SR 2-7).

The Underlying Action arose out of Doug Barr's car accident that occurred on December 21, 2016. *Id.* The other driver in the accident was Stuart Hughes ("Hughes"), who worked for the Unified Judicial System ("UJS") as law clerk for the First Judicial Circuit at the time of the accident. In this current case, the Barrs allege the Attorney Defendants failed to properly provide notice to the State of South Dakota within 180 days as required by SDCL 3-21-2, and that after making that mistake, the Attorney Defendants failed to disclose the error to the Barrs. *Id.* The Barrs allege that if notice would have been timely provided, then there would have been an additional $500,000.00 in liability insurance coverage for Hughes in the Underlying Action. *Id.* This additional coverage allegedly would have been provided by the Public Entity Pool for Liability ("PEPL Fund"). The Attorney Defendants denied liability, and the parties proceeded with some discovery. (SR 15-30).

[1] Citations to the settled record are cited "SR" with reference to the appropriate page. Citations to the January 23, 2023, Transcript of Motions Hearing is cited "TR" with reference to the appropriate page. Citations to Brewers' appendix are cited "B-Appx." with reference to the appropriate page.

All parties filed cross-motions for summary judgment on the issue of whether coverage existed under the PEPL Fund. (SR 81-85, 219). Retired Circuit Court John Brown was appointed to preside over these proceedings. (SR 57). Judge Brown heard the motions for summary judgment on January 26, 2023. Judge Brown granted Attorney Defendants' motion for summary judgment ruling that, based upon the undisputed facts, no coverage existed under the PEPL Fund. (Tr. 34-35; SR 1286-87). Judge Brown denied Barrs' motion for summary judgment. (SR 1286-87). Judge Brown entered a judgment dismissing Barrs' complaint with prejudice. (App. 4-5; SR 1295-1296). Attorney Defendants served notice of entry of the judgment on February 7, 2023. (App. 1-3, SR 1290-92). Barrs appealed to this Court through a notice of appeal filed February 13, 2023. (SR 1297-1302).

STATEMENT OF THE FACTS

The Barrs sued the Attorney Defendants alleging Attorney Defendants made mistakes in representing the Barrs in the Underlying Action. The Underlying Action was a personal injury case against Hughes based upon an accident that occurred on December 21, 2016.

A. The December 21, 2016 Accident

In December of 2016, Hughes worked as a law clerk for the First Judicial Circuit. (Response to Cole and Sim's Statement of Undisputed Material Facts, and Plaintiff's Additional Material Facts ("RSUMF") ¶ 4, B-Appx. 2). There were two law clerks in the First Judicial Circuit. (SR 750). One law clerk was assigned to the north half of the circuit, and one was assigned to the south half of the circuit. Hughes was assigned to the

south half of the circuit, and his primary duty station was Yankton, South Dakota. (SR 750; RSUMF ¶ 6, B-Appx. 2). Hughes lived in Vermillion, South Dakota. (*Id.*).

On December 20 and 21, 2016, Hughes traveled to court in Parker, South Dakota, for a trial with Judge Cheryl Gering. Hughes drove father's pick-up to the courthouse. (SR 173). Under UJS travel policy at the time, law clerks were reimbursed mileage for driving the shorter of the two distances: (1) from the clerk's duty station to the remote courthouse; or (2) from the clerk's residence to the remote courthouse. (SR 9, 752-53, 755). In this case, Hughes was entitled to mileage from Vermillion (where he lived) to Parker (where court was located). For both December 20 and 21, Hughes claimed mileage indicating he drove from Vermillion to Parker and back. (SR 329).

In the Underlying Action, Hughes swore under oath that he traveled from Vermillion to Parker before court on the morning of the accident, which was December 21. (SR 170).[2] After the completion of the court day in Parker, Hughes did not return to home to Vermillion. (SR 173-74). Instead, he drove to Sioux Falls for a holiday gathering at his parents' house. (SR 169, 173-74). Hughes was attending a holiday dinner at his parents' house the evening of December 21, 2016, because his brother was in town. (RSUMF ¶ 10, B-Appx. 2).

On the way to Sioux Falls, Hughes was in an accident in Lincoln County, South Dakota. (SR 765). The accident occurred two miles West of Tea, South Dakota, at the corner of SD Hwy 17 and 272nd Street in Lincoln County. (RSUMF at ¶ 3, B-Appx. 1).

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[2] Hughes's father, John Hughes, was deposed in this lawsuit. Although John Hughes testified that he thought Hughes might have spent the night before the accident at John Hughes's home in Sioux Falls, he was not sure. (SR 812, 815). In fact, when pressed about the issue on cross-examination, Mr. Hughes stated he was not positive, and "I honestly can't remember." (SR 815).

The other driver in the accident was Doug Barr, who was injured. (RSUMF at ¶ 1, B-Appx. 1). Hughes was driving his father's pickup at the time of the accident because Hughes' vehicle was in the shop in Sioux Falls. (SR 173, 1168).

B. Workers' Compensation Pays Hughes's Medical Bills

As a result of the accident, Hughes had some injuries and medical bills. (SR 357). Hughes reported the accident to the First Circuit Judicial Administrator, Kim Allison ("Allison"). (SR 763). Hughes originally told Allison that the accident happened when he was on his way back from Parker. (SR 764). Because he merely said that "he was on his way back from Parker," Allison "assumed it was directly." (SR 765). Based on Hughes's statements, Allison told the HR office in Pierre that Hughes was injured while returning home to Vermillion from Parker. (SR 764).

Hughes also completed a First Report of Injury for workers' compensation benefits. In that document, Hughes stated he was "[r]eturning home from work at the Parker courthouse" when the accident occurred. (SR 726, 1242). After missing a couple days of work, Hughes returned to work as a law clerk. (SR 1242).

On January 30, 2017, John Hughes called Kristi Longbrake ("Longbrake"), a SD HR Specialist, and told her that Hughes was driving John's pickup, and told her the accident occurred near Tea. (SR 445). Based on the call, Longbrake asked Allison via email:

> was [Stuart Hughes] on paid work time at the time of the accident? According to the FROI [First Report of Injury] time of accident was 5:30 PM. The FROI states he was returning home from work. Was he returning from Parker to his home work station or was he actually headed home from Parker? We will also need a copy of the police report.

(SR 446).

In response, Allison told Longbrake that Hughes "was still on work time as he had been required to travel for work *and was returning home*." *Id.* (emphasis added). Allison wrote:

> Stuart's duty station is in Yankton but he resides in Vermillion. He was going home to Vermillion from Parker which was where he was required to be that day for court by Judge Gering. Please let me know if you need any additional information. I'll forward you the police report as soon as I receive it.

Id. At the time, Allison believed that information was correct.

After responding to Longbrake's email, Allison received a copy of the accident report and saw that Hughes's accident actually occurred in Lincoln County. (SR 765). After Allison received the accident report and found that the accident was in Lincoln County, she questioned Hughes. *Id.* Hughes then admitted that he had actually been driving from Parker to Sioux Falls. *Id.* Allison reported that information to Human Resources in Pierre. *Id.* But, there is no evidence indicating that Workers' Compensation actually learned that the accident occurred anywhere other than on the way home following court.

On April 7, 2017, Hughes again told Lynn Job ("Job") that the accident happened when he "was headed back from Parker to Vermillion." (SR 450). Job is the workers' compensation manager for the State of South Dakota (SR 715). She handled Hughes's claim because there were possible subrogation issues. (SR 733).

On September 5, 2017, Hughes again told Job that he was returning to either Yankton or Vermillion following the hearing. (SR 458). Hughes wrote: "My duty station was Yankton, but I was sent to Parker that day for a hearing with a judge I was assisting

handle a case. The collision occurred just outside of Parker on my way back from the hearing." *Id.*

Based upon the information she had received, Job decided that Hughes's medical expenses were compensable because she was told that he was paid mileage, and that he was on work time at the time of the accident. (SR 720-21). When she made that decision, the only information Job was provided was the information provided from Allison and Hughes. (SR 735-36). But that information was wrong. Job did not know that Hughes was traveling in the opposite direction as his home when the accident occurred.

C. The Underlying Lawsuit

Brewers' best friends were the Barrs. (SR 588). When Doug's wife could not get ahold of Doug the evening of the accident, she called Brewers. *Id.* Brewers drove to accident scene looking for Doug. *Id.*. Brewers also went up to the hospital to visit Doug on the night of the accident. *Id.*

Barrs engaged Brewers to represent him regarding the accident. Brewers brought in attorneys Jeffrey Cole ("Cole") and William Sims ("Sims") as co-counsel with more experience in personal injury claims. (SR 591). Within a few months after the accident, and before 180-days expired, Brewers concluded that no coverage would exist under the PEPL Fund. (SR 602-03).

The Attorney Defendants represented the Barrs in suing Hughes for a personal injury claim. In conjunction with commencing that lawsuit, Sims had a phone call on September 5, 2017, with Hughes inquiring whether he was admitting service of the summons and complaint. (SR 261). Following the call, Sims sent an email to Brewers and Cole summarizing the call. *Id.* According to the summary email, Hughes told Sims

that he was a law clerk for the First Circuit, and that he was traveling home from Parker to Yankton when the accident occurred. *Id.* Hughes also volunteered that work comp paid his medical bills. *Id.* Hughes suggested putting the state on notice of the claim. *Id.*

Following the email, the Attorney Defendants discussed whether there was a potential claim against the PEPL Fund worth pursuing. (SR 648). They again concluded there was not a claim worth pursuing against the State. (SR 263-64). The Attorney Defendants discussed this conclusion with the Barrs a few weeks later in a meeting. (SR 648).

Ultimately, the Barrs settled the Underlying Action for the $500,000.00 auto liability insurance limits on the vehicle Hughes was driving. By February 12, 2021, Doug directed the Attorney Defendants to settle the case for Hughes's $500,000.00 policy limits. (SR 563). Nearly a month later, on March 4, 2012, attorney Steve Oberg emailed Cole and Sims about settlement and inquired whether they had given the 180-day notice to the PEPL Fund. (SR 269). On March 10, 2021, Cole called Steve Oberg and accepted the $500,000.00 settlement. (SR 271).

D. The Barrs Sue the Attorney Defendants for Failing to Procure Coverage Under the PEPL Fund

After settling with Hughes, the Barrs commenced this lawsuit against the Attorney Defendants. Essentially, the Barrs contend that the Attorney Defendants failed to provide notice to the State within the 180-days necessary to trigger coverage under the PEPL Fund, and that, after making that mistake, they allegedly withheld the mistake from the Barrs. (Appellants' Brief ("Plaintiffs' Brief") at p.3).

A threshold issue in the case was whether coverage existed under the PEPL Fund for Hughes's accident if notice was properly provided. The Legislature created the PEPL

Fund to provide liability insurance coverage for public employees. SDCL 3-22-1. The statute creating the PEPL Fund states: "PEPL shall provide defense and liability coverage for any state entity or employees as defined in the coverage document issued by PEPL." *Id.* The coverage document issued by PEPL is the Participation Agreement Between the Public Entity Pool for Liability and the State of South Dakota ("Participation Agreement"). (RSUMF at ¶ 16, B-Appx. 4). There is a Memorandum of Coverage attached to the Participation Agreement. (RSUMF at ¶ 18, B-Appx. 4). The Memorandum of Coverage states the scope and limit of coverage for the PEPL Fund. *Id.*

Under the Memorandum of Coverage, "PEPL will pay damages, not excluded hereunder, on behalf of an *employee* that the *employee* becomes legally obligated to pay because of an *occurrence*, not excluded hereunder." (B-Appx. 13 (emphasis in original)). The Memorandum of Coverage defines an "occurrence" in relevant part as "an accident, act, error, or omission or event, during the Coverage Period, which results in damages and arises within the scope of the *employee's* duties for the State. . . ." (B-Appx. 18 (emphasis in original); RSUMF ¶¶ 19-20).

Under the terms of the PEPL Fund, when a state employee like Hughes drives a personally owned vehicle, that personally owned vehicle provides primary liability insurance coverage. (SR 681-82). The PEPL Fund may provide secondary coverage if the primary coverage is exhausted and all other necessary conditions are satisfied. *Id.*

As part of discovery, the parties deposed administrator of the PEPL Fund, Craig Ambach ("Ambach"). Ambach testified about how the PEPL Fund works and the potential coverages relating to Hughes's accident. (SR 673-74, 685-90).

In this case, Hughes was the party who initially provided notice to Ambach about the accident. (SR 673). This notice was more than 180 days after the accident. *Id.* Irrespective of the 180-days' notice requirement, however, the PEPL Fund would only provide secondary coverage if Hughes was acting in the scope of his employment when the accident occurred. (SR 689-90). According to Ambach, if a claim had been presented against the PEPL Fund, and if the accident occurred during Hughes's deviation that was not work-related but solely personal, then Ambach would have filed a declaratory judgment action to determine no secondary coverage existed under the PEPL Fund. (SR 702).

After completing some discovery, the parties filed cross-motions for summary judgment on whether coverage existed under the PEPL Fund. The Circuit Court granted Defendants' motions for summary judgment because it ruled that Hughes abandoned his work purpose and was on a personal trip when the accident occurred. (Tr. 34-35). Barrs appeal to this Court.

ARGUMENT

I. Standard of Review

This Court reviews a decision granting summary judgment *de novo* with no deference to the Circuit Court. *Larimer v. Am. Family Mut. Ins. Co.*, 2019 SD 21, ¶ 6, 926 N.W.2d 472, 475. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56; *Mark, Inc. v. Maquire Ins. Agency, Inc.*, 518 N.W.2d 227, 229 (S.D. 1994). The court must review the

evidence most favorably to the non-moving party and resolve reasonable doubts about the facts in its favor. *Id.* The party opposing the motion for summary judgment must establish the specific facts, and said facts must show that a genuine, material issue for trial exists. *Anderson v. Prod. Credit Ass'n.*, 482 N.W.2d 642, 644 (S.D. 1992). Mere allegations are not sufficient to preclude summary judgment. *Mark, Inc.*, 518 N.W.2d at 229. When a plaintiff fails to make a sufficient showing regarding an essential element of her case for which she bears the burden of proof, a trial court is obligated to grant defendant's motion for summary judgment. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986).

"[S]ummary judgment is a preferred process to dispose of meritless claims." *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, ¶ 7, 704 N.W.2d 24, 27. It should never be viewed as "a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Accounts Mgmt., Inc. v. Litchfield*, 1998 SD 24, ¶ 4, 576 N.W.2d 233, 234 (quoting *Celotex*, 477 U.S. at 327).

II. To Recover On Their Legal Malpractice Claim, The Barrs Have to Prove That Hughes Would Have Had Insurance Coverage Under the PEPL Fund But For The Attorney Defendants' Failure to Provide Notice Within the 180-Day Deadline Imposed by SDCL 3-21-2

The Barrs asserted a legal malpractice claim against the Attorney Defendants claiming they committed malpractice in failing to provide notice to the State within 180-days of the accident as required by SDCL 3-21-2. Presumably, this claim would have been a claim for vicarious liability against the UJS arguing that Hughes was in the scope of his employment at the time of the accident. *See Tammen v. Tronvold*, 2021 SD 56, ¶ 1, 965 N.W.2d 161, 164. According to the Barrs, failure to provide the 180-day statutory notice prevented the Barrs from recovering from Hughes's accident under the PEPL

Fund. The Barrs' argument fails as a matter of law because, under the undisputed facts, no coverage existed under the PEPL Fund. As a result, any failure to provide notice never caused any harm as a matter of law.[3]

1. The Barrs Have to Prove There Was In Fact Coverage Under the PEPL Fund.

Without any legal support for their argument, Barrs argue that they can recover in this legal malpractice case by merely showing their claim against the PEPL Fund was "viable" when they walked into the attorneys' office. (Plaintiffs' Brief at p.15). According to the Barrs, if the claim is viable, then they can recover for legal malpractice regardless of whether they actually would have prevailed on their claim against the PEPL Fund. *Id.* The Barrs' argument conflicts with binding South Dakota law.

In a legal malpractice claim, the plaintiff must prove four essential elements: "'(1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual damage.'" *Hamilton v. Sommers*, 2014 SD 76, ¶ 21, 855 N.W.2d 855, 862 (quoting *Peterson v. Issenhuth*, 2014 SD 1, ¶ 17, 842 N.W.2d 351, 355). To survive summary judgment, the plaintiff must present evidence supporting each of these essential elements. *See Celotex Corp.*, 477 U.S. at 322.

Issues of causation in legal malpractice cases present unique challenges for the plaintiff. "[C]ausation in a legal malpractice case requires the plaintiff to show that but

[3] Separate, and in addition, the Attorney Defendants properly chose not to give notice to the State because they correctly concluded no coverage existed under the PEPL Fund as Hughes was outside the scope of his employment at the time of the accident.

for his attorney's negligence he would have been *successful* in the original litigation." *Haberer v. Rice*, 511 N.W.2d 279, 285 (S.D. 1994) (emphasis added). "Therefore, the plaintiff must essentially prove a 'case within a case' by showing 'that the underlying claim was valid [and] would have resulted in a favorable judgment had it not been for the attorney's error[.]'" *Zhi Gang Zhang v. Rasmus*, 2019 SD 46, ¶ 27, 932 N.W.2d 153, 162 (quoting *Haberer*, 511 N.W.2d at 285) (alterations in original). The plaintiff in legal malpractice cases involving litigation "is faced with the difficult task of proving two cases within a single proceeding." *Haberer*, 511 N.W.2d at 285.

To satisfy the "case-within-the-case" causation requirement, the plaintiff must prove three additional essential elements: "1) that the underlying claim was valid, 2) that it would have resulted in a favorable judgment had it not been for the attorney's error, and 3) the amount of the judgment and that the judgment was collectible." *Haberer*, 511 N.W.2d at 285, citing D. Meiselman, Attorney Malpractice: Law and Procedure, § 3:5, pp.39-40 (1980). Thus, when the plaintiff-client brings a malpractice case claiming the lawyer's error prevented the client from bringing a claim, then plaintiff must prove that underlying claim would have succeeded if brought. *Id.* Although causation is generally a question of fact for the jury, summary judgment should be granted when the undisputed facts prove the attorneys' alleged wrongful act did not harm the client. *Weiss v. Van Norman*, 1997 SD 40, ¶ 13, 562 N.W.2d 113, 116 ("Causation is generally a question of fact for the jury except when there can be no difference of opinion in the interpretation of the facts.").

Based upon this Court's precedent, the Barrs must prove they would have actually succeeded in their claim for insurance coverage under the PEPL Fund. It is not enough to

show the claim was "viable" when the Barrs first walked into the Attorney Defendants' office. If the Barrs would not have succeeded on their underlying claim against the PEPL Fund, then the Attorney-Defendants did not cause any harm. Instead, the Barrs' harm is caused by the merits (or lack thereof) on their underlying claim against the PEPL Fund.

2. *This Court Should Not Abandon Current South Dakota Law Requiring the Barrs to Prove They Actually Would Have Succeeded on the PEPL Fund Claim for the Barrs' Unsupported Argument That They Only Have to Show the Claim was "Viable"*

Ignoring South Dakota legal malpractice law, the Barrs argue that they do not have to prove they would have succeeded on the PEPL Fund claim; but instead, just that the claim was viable. (Plaintiffs' Brief at p.14). This argument fails.

As an initial matter, this Court should not even consider this argument because the Barrs' fail to cite any law supporting this argument. As a result, the Barrs waived the argument on appeal. *See, e.g., In re Florence Y. Wallbaum Revocable Living Tr. Agreement*, 2012 SD 18, ¶ 38, 813 N.W.2d 111, 120 (holding that party violates SDCL 15-26A-60(6) and waives an issue on appeal by failure to cite authority supporting their argument). The Barrs also waived this argument on appeal because they never made this argument to the Circuit Court. *Sioux Falls Shopping News, Inc. v. Dep't of Revenue & Regul.*, 2008 SD 34, ¶ 29, 749 N.W.2d 522, 528 ("Generally, this Court will not address issues raised for the first time on appeal and not presented to the trial court." (internal quotation omitted)). Even if preserved, however, the Barrs' argument fails because it conflicts with South Dakota law as described above.

Analytically, the Barrs are arguing they can pursue this malpractice claim because, even if the underlying PEPL Fund case lacked merit, the claim should have been asserted to try to negotiate a settlement. A plaintiff cannot sustain a legal malpractice

claim, however, based upon failure to assert a legally deficient claim. *See Lebair v. Carey*, 291 P.3d 1160, 1168 (Mont. 2012) (stating that plaintiff in malpractice claim cannot recover for failure to assert legally deficient claim because "the loss of a claim completely devoid of merit is truly no loss at all"); *see also Minn-Kota Ag Products, Inc. v. Carlson*, 684 N.W.2d 60, 62-63 (N.D. 2004) (affirming summary judgment for attorney in legal malpractice claim based upon allegations that lawyer failed to timely commence an action before the expiration of the statute of limitations because the claim was already barred by the statute of limitations before the attorney was engaged); *Independent Stave Co., v. Bell, Richardson & Sparkman, P.A.*, 678 So. 2d 770, 772 (Ala. 1996) (affirming summary judgment in legal malpractice claim because even though attorney failed to timely file notice of claim in bankruptcy court, the client would not have recovered anything even if the claim was filed because the client would have been an unsecured creditor); *Deramus v. Donovan, Leisure, Newton & Irvine*, 905 A.2d 164, 171-74 (DC 2006) (affirming summary judgment for attorney based upon allegation that attorney committed malpractice in failing to sue other defendants but the court of appeals concluded that any claim against those alleged other defendants was defective as a matter of law).

Nor can the Barrs rely on the argument that there is some "settlement value" for the underlying claim against the PEPL Fund even if legally deficient. The Oregon Supreme Court in *Rowlett v. Fagan*, 369 P.3d 1132 (Or. 2016), rejected this same argument. In *Rowlett*, the client sued the attorney for malpractice claiming, among other things, that the attorney was negligent in failing to initially assert an LLC member oppression claim in an arbitration. After a different lawyer within the law firm took over

responsibility for the case, the law firm asserted the oppression claim but only after litigating the initial arbitration for several years. The client settled the arbitration, but, by the time of the settlement, the real estate market had decreased substantially, which decreased the value of the settlement. The client then sued the law firm arguing that failure to initially assert the oppression claim prevented the client from settling earlier for a higher amount before the real estate market decreased.

The trial court dismissed the malpractice claim because it ruled there was no claim for LLC member oppression in Oregon. The Oregon Court of Appeals reversed the trial court and stated that regardless of whether the LLC membership claim could actually succeed, it was a colorable claim. *Id.* at 1139. According to the Court of Appeals, "an assertion of a colorable claim could have altered the outcome for Rowlett considerably by giving him increased leverage to secure a settlement on much more favorable terms than what he obtained." *Id.*

The Oregon Supreme Court reversed the Oregon Court of Appeals' decision. In doing so, the Oregon Supreme Court rejected the argument that a legal malpractice claim can be based upon a colorable but legally defective claim just because assertion of that claim could provide leverage for settlement. *Id.* at 1139-40. Instead, the plaintiff in a malpractice claim "must prove the existence of a valid cause of action or defense, which, had it not been for the attorney's alleged negligence, would have brought about a judgment favorable to the client in the original action." *Id.* at 1140 (internal quotation omitted).[4]

[4] In *Rowlett*, the Oregon Supreme Court ruled that the claim must be viable rather than merely colorable. *Id.* at 1140-41. Barrs do argue that this Court should apply the "viability" test, but that is not the test the actually apply. Instead, they effectively argue

Furthermore, sound policy reasons prevent allowing the Barrs to recover without actually showing they would have prevailed on the underlying PEPL Fund claim. Although not specifically described as such, the Barrs are effectively asserting a malpractice claim based upon "loss of chance" to assert a claim under the PEPL Fund. A leading legal malpractice treatise explained why other courts reject malpractice claims based upon "loss of chance:"

> When faced with the difficulty of proving that they should have prevailed, some clients have argued that the lawyer should be liable for their "loss of chance," that is, the value of the opportunity to prevail. The potential exposure to the legal profession would be immense since even a claim likely to lose 95 percent of the time could have some theoretical value. A few lawyers would say that there was a 100 percent certainty that a case will be lost. For such reasons, those courts, when presented with the contention, have rejected it as speculative, as inconsistent with the case-within-a-case methodology, and as contrary to public policy.

4 Ronald Mallen, *Legal Malpractice* § 33:31 (2023 ed.).[5] The South Dakota Legislature expressly prohibits plaintiffs from recovering for a "loss of chance." SDCL 20-9-1.1.[6]

"colorable" and then mislabel the claim as "viable," by claiming liability attaches if the claim has viability based upon what the lawyer knows when the client walks into the office. Asking this Court to ignore the actual merits of the underlying PEPL Fund claim, Barrs argue that "viable" means capable of succeeding. (Plaintiffs' Brief at p.18). Analytically, this is essentially the same as a "colorable claim." *See* Black's Law Dictionary (11th ed. 2019) (defining colorable claim as "[a] plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law").

[5] This Court has cited to Ronald Mallen's legal malpractice treatise in its legal malpractice cases. *See, e.g., Behrens v. Wedmore*, 2005 SD 79, ¶ 51, 698 N.W.2d 555, 576; *Yarcheski v. Reiner*, 2003 SD 108, ¶ 16 n.5, 669 N.W.2d 487, 493 n.5; *Haberer v. Rice*, 511 N.W.2d 279, 284 (S.D. 1994).

[6] SDCL 20-9-1.1 states: "The Legislature finds that in those actions founded upon an alleged want of ordinary care or skill the conduct of the responsible party must be shown to have been the proximate cause of the injury complained of. The Legislature also finds that the application of the so called loss of chance doctrine in such cases improperly alters or eliminates the requirement of proximate causation. Therefore, the rule in *Jorgenson v. Vener*, 2000 SD 87, 616 N.W. 2d 366 (2000) is hereby abrogated."

The Barrs argue that they only need to prove the underlying PEPL Fund claim was viable when the attorney Defendants decided not to send the 180-day notice. (Plaintiffs' Brief at p.18). According to the Barrs, a lawyer "doesn't know what the ultimate outcome of the claim or lawsuit will be" when deciding whether to provide notice or commence an action withing the statute of limitations. *Id.* The Barrs, thus, argue that they can recover in this malpractice claim if the prove the claim is "capable of succeeding" when the decision was made not to provide notice.

The Barrs' argument conflates the issues of breach and causation. What the attorney knew about the viability of the claim at the time could impact whether a reasonable attorney under the circumstances would have provided the 180-day notice. But, that is a question of breach of the applicable standard of care. *See Hamilton*, at ¶¶ 22-23, 855 N.W.2d at 862 (describing the duty imposed by lawyers and how plaintiffs generally prove breach of the standard of care). Separate from breach, the Barrs also must prove causation and damages. *Id.* at ¶ 21, 855 N.W.2d at 861. If there was no coverage under the PEPL Fund for the accident, then failure to provide the 180-day notice did not cause any harm as a matter of law regardless of whether a reasonable attorney would have provided the notice.

3. *The Barrs Cannot Rely On Their Proffered Expert Ken Barker to Opine Failure to Provide Timely Notice Caused the Barrs Harm Because the Issue of Coverage Under the PEPL Fund Presents a Question of Law for the Court.*

The Barrs argue that the Circuit Court wrongfully granted summary judgment because "expert" Ken Barker opined that the PEPL Fund claim was worth $500,000.00 to the Barrs. (Plaintiffs' Brief at p.19). But, even Barker admits that the PEPL Fund only provides coverage if Hughes was acting in the scope of his employment at the time of the

accident. (SR 970). In this case, when the facts are undisputed, whether there was coverage under the PEPL Fund presents a question of law *for the Court*. *See South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, ¶¶ 6-21, 566 N.W.2d 125, 127-32 (reversing circuit court and stating that there was no coverage under the PEPL Fund as a matter of law). Existence of coverage under the PEPL Fund presents issues regarding contract because the PEPL's Fund's Memorandum of Coverage determines whether coverage exists. Questions of contract interpretation present an issue of law for the Court. *McCroden v. Case*, 1999 SD 146, ¶ 10, 602 N.W.2d 736, 739 ("Cases involving the interpretation of written documents are particularly appropriate for disposition by summary judgment, such interpretation being a legal issue rather than a factual one.")

Experts, including Ken Barker, cannot opine on questions of law. *Zens v. Harrison*, 538 N.W.2d 794, 796 (S.D. 1995). The Barrs, thus, cannot rely on Ken Barker's inadmissible opinions to avoid summary judgment. *See Andrushchenko v. Silchuk*, 2008 SD 8, ¶¶ 10-20, 744 N.W.2d 850, 855-57 (affirming exclusion of inadmissible evidence by Circuit Court at the summary judgment stage). Further, regardless of Ken Barker's inadmissible opinions, the court decides the legal questions, including whether there was coverage under the PEPL Fund in this case. *Cf. Zacher v. Budd Co.*, 396 N.W.2d 122, 135 (S.D. 1986) (stating that questions of fact are for the jury and questions of law are for the Court).

In sum, South Dakota malpractice law requires Barrs to prove they would have prevailed on their claim against the PEPL Fund. Unless able to do so, any alleged negligence did not cause any harm as a matter of law. Thus, the key question in this case

is whether there was coverage under the PEPL Fund when the accident occurred.

III. Based Upon the Undisputed Facts, There Was No Coverage Under the PEPL Fund, and, As a Result, the Circuit Court Properly Granted Summary Judgment.

1. *Coverage Only Exists Under the PEPL Fund if Hughes Was Acting Within the Scope of His Employment When The Accident Occurred.*

The Legislature created the PEPL Fund to provide liability insurance coverage for public employees. SDCL 3-22-1. The statute creating the PEPL Fund states: "PEPL shall provide defense and liability coverage for any state entity or employees as defined in the coverage document issued by PEPL." *Id.* The coverage document issued by PEPL is the Participation Agreement Between the Public Entity Pool for Liability and the State of South Dakota ("Participation Agreement"). (RSUMF ¶ 16, B-Appx. 4). There is a Memorandum of Coverage attached to the Participation Agreement. (RSUMF at ¶ 18, B-Appx. 4). The Memorandum of Coverage states the scope and limit of coverage. *Id.*

Under the Memorandum of Coverage, "PEPL will pay damages, not excluded hereunder, on behalf of an *employee* that the *employee* becomes legally obligated to pay because of an *occurrence*, not excluded hereunder." (B-Appx. 13 (emphasis in original)). The Memorandum of Coverage defines an "occurrence" in relevant part as "an accident, act, error, or omission or event, during the Coverage Period, which results in damages and arises within the scope of the *employee's* duties for the State. . . ." (B-Appx. 18 (emphasis in original); RSUMF ¶¶ 19-20, B-Appx. 4).

Under the plain language of the Memorandum of Coverage, the PEPL Fund only provided coverage for Hughes's accident if he was acting within the scope of his employment at the time of the accident. Indeed, this Court has previously held coverage only exits under the PEPL Fund if the employee was acting in the scope of his or her

employment at the time of the accident. *See also Winger*, at ¶¶ 8-9, 566 N.W.2d at 127-28. Thus, the ultimate issue in this case is whether Hughes was acting the scope of his employment at the time of the accident.

2. *At the Time of the Accident, Hughes Was Outside the Scope of His Employment Because He Was Driving to Sioux Falls to Serve His Own Personal Interest of Going to His Parents' Home Rather than Serving the UJS's Interests.*

In South Dakota, the test for scope of employment is whether the employee is acting for the employer's purposes or acting for the employee's own purposes. The Court must determine "whether the purpose of the act was to serve the principal." *Tammen v. Tronvold*, 2021 SD 56, ¶ 19, 965 N.W.2d 161, 169. "An act is within the scope of a servant's employment where it is reasonably necessary or appropriate to accomplish the purpose of his employment, *and intended for that purpose*[.]" *Winger*, 1997 SD 77 at ¶ 9, 566 N.W.2d at 128 (citations omitted) (emphasis added). Therefore, "[e]mployees do not act within the scope of their jobs when they substantially deviate from the course of employment." *Winger*, at ¶ 10, 566 N.W.2d at 128. And, a substantial deviation occurs "when employees abandon the work purpose in furtherance of a personal motive or 'frolic.'" *Id.*

Here, the undisputed facts indicate that Hughes was serving his own personal interests rather than the UJS's interests when the accident occurred. It is undisputed that Hughes's assigned duty station was located in Yankton, SD. (RSUMF ¶ 5, B-Appx. 2). Hughes lived in Vermillion, SD. *Id.* On the day of the accident, Hughes attended Court at the Turner County Courthouse. (SR 173-74). After the end of the workday, rather driving south to return home or to his duty station, Hughes drove north to his parents'

home in Sioux Falls. He was driving to Sioux Falls for a holiday dinner his parents were hosting because Hughes's brother was in town. (RSUMF ¶ 10, B-Appx. 2).

While driving to Sioux Falls, the accident occurred. The accident occurred approximately two miles west of Tea, South Dakota, at the intersection of SD Hwy 17 and 272nd Street in Lincoln County. (RSUMF ¶ 3, B-Appx. 1). Lincoln County is outside of the First Judicial Circuit. (RSUMF ¶ 4, B-Appx. 2). No one on behalf of the UJS asked Hughes to drive to Sioux Falls after court in Turner County on the day of the accident. (RSUMF ¶ 12, B-Appx. 3).[7]

Driving to Sioux Falls after Court on December 21, 2016 did not serve any work purpose of the UJS. Hughes only served his own personal interests when going to Sioux Falls. Because Hughes acted in his own interests rather than serving the UJS, he was outside the scope of his employment at the time of the accident. In turn, no coverage existed as a matter of law under the PEPL Fund.

Ignoring the undisputed personal nature of Hughes's trip, Barrs claim that Hughes was acting in the scope of his employment at the time of the accident because Hughes slept at his parents' home in Sioux Falls the night before the accident. Barrs argue that law clerks need to travel to courthouses for work, and because Hughes slept the night before accident at his parents' home, he is automatically withing the scope of his

[7] Barrs purport to dispute Attorney Defendants' Statement of Undisputed Material Fact ¶ 12, which states: "No one acting on behalf of the First Judicial Circuit asked Hughes to drive to Sioux Falls." (RSUMF ¶ 12, B-Appx. 3). Barrs do not cite evidence actually disputing this fact. Instead, they claim the fact is "disputed" because law clerks can sleep wherever they choose, and law clerks are asked to drive to courthouses as the request of the Court. *Id.* This is a good illustration of where the Barrs use misdirection in an effort to "dispute" an undisputed fact. Barrs must actually present evidence, however, that shows a genuine issue of material fact exists. *See* SDCL 15-6-56(c)(2). The actual evidence in the record shows this fact is undisputed.

employment when returning to his parents' home. This argument is a non-sequitur. The accident occurred **after** Court in Turner County. The UJS's only requirement for Hughes was that he be in court in Turner County. Hughes reported, and the UJS paid, mileage assuming Hughes was driving to his home in Vermillion. There was no UJS purpose for Hughes to travel to Sioux Falls after court was done. He was doing one of two things: (1) either attending a holiday party as Hughes testified; or (2) returning a borrowed pickup as the Barrs argued. Either way, the only reason to drive to Sioux Falls was to serve Hughes's own personal interests. Nothing about the trip to Sioux Falls after the end of the court day actually benefited the UJS.

Indeed, both Allison and Ambach testified that Hughes's trip to Sioux Falls was a detour or deviation outside the scope of his employment with UJS. (SR 694-95, 776). Ambach testified that he would have commenced a declaratory judgment action to declare no coverage existed. (SR 702-03). Thus, based upon the undisputed facts, Hughes was outside the scope of his employment when the accident occurred.

Barrs note that Hughes was paid mileage for his trip to Parker even though he drove to Sioux Falls after court. (Plaintiffs' Brief at p.12). But, as Court Administrator Kim Alison testified, that makes sense because he would eventually have to return to his residence. (SR 788-89). Thus, even if Hughes took a "personal deviation" to Sioux Falls, he, at some point in time, traveled from his residence in Vermillion to the court in Parker and back. It is this travel from Vermillion to Parker for which mileage is paid. Not the separate "personal detour." This is confirmed by Hughes' actual mileage vouchers in which he claimed reimbursement on both December 20, 2016 and December 21, 2016 to travel from Vermillion to Parker. (SR 329).

Albeit in the workers' compensation context, this Court previously recognized that personal deviations while on a work-related trip are outside the scope of employment if the accident occurs during that personal deviation. *Terveen v. SD Dep't of Transp.*, 2015 SD 10, ¶¶ 9-19, 8612 N.W.2d 775, 779-81. In *Terveen*, the employee worked for the Department of Transportation. The employee's duties and responsibilities required the employee to travel for a business trip from his duty station in Belle Fourche to Yankton. *Id.* at ¶ 1. When returning from Belle Fourche, the employee usually checked in with the DOT office in Belle Fourche upon his return. *Id.* at ¶ 2. The DOT did not have a policy prohibiting employees from making stops along their travel route or from engaging in personal activities during the work-related trip. *Id.* at ¶ 2.

While returning from Yankton, the employee took a personal diversion off the highway and onto a side road – Prairie Hills Road. After only one-half mile on the Prairie Hills Road, the employee was involved in a one-car accident. *Id.* at ¶ 3. Due to the accident, the employee could not recall why he went down Prairie Hills Road. *Id.*

The employee applied for workers' compensation benefits. Under the applicable workers' compensation law, the employee "must prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of the employment." *Id.* at ¶ 8 (internal quotation omitted). This Court held that the employee could not meet this requirement, and thus, the employee could not receive workers' compensation benefits. Although the employee argued that a 10-minute detour in an 840 mile round trip should be considered activity for which a DOT employee may reasonably engage, this Court disagreed. *Id.* at ¶ 10. This Court stated that the employee was "not engaging in work-related activity at the time of the accident." Although his work required him to

travel from Belle Fourche to Yankton and back, it did not require him to travel to take a side trip down the Prairie Hills Road. *Id.* at ¶ 11. This Court also held that accident did not arise in the course of the employee's employment because this personal side trip is not an "activity naturally or incidentally related to the employee's employment with the DOT." *Id.* at ¶¶ 12, 15. Because the employee went on a personal side-trip, the employee was not back within the scope of his employment for workers' compensation purposes until the employee was "back on the beam" before being deemed to have resumed the business trip. *Id.* at ¶ 21. That means, the employee in *Terveen* was not acting within the scope of his employment for workers' compensation purposes until the employee actually returned to the route that he was driving back to Belle Fourche (*i.e.*, Highway 85). Because the accident occurred during the side trip, there was no workers' compensation benefits.

Like in *Terveen*, Hughes was on a personal side-trip to Sioux Falls when the accident occurred. There was no business purpose for him to be driving to Sioux Falls. And, just like the employee in *Terveen*, Hughes was outside the scope of his employment as a matter of law when the accident occurred.[8]

Similarly, in *South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, 566 N.W.2d 125, this Court held that there is no coverage under the PEPL Fund as a matter of law when an accident occurred during a substantial personal deviation. In

[8] *Terveen* addressed the scope of employment analysis for workers' compensation benefits. This case involves the scope of employment for third-party liability purposes. But, the scope of employment for workers' compensation benefits is construed more liberally than the scope of employment for third-party liability purposes. *Tammen v. Tronvold*, 2021 SD 56, ¶ 30, 965 N.W.2d 161-73. If an employee like *Terveen* would be outside the scope of employment for workers' compensation purposes, then that employee is certainly outside the scope of employment for third-party liability purposes.

Winger, a Pennington County Highway Department employee went for a motorcycle ride on his day off. During the ride, the employee claimed he was checking on a construction project on Nemo Road. *Id.* at ¶ 2. Part of the road washed out from flooding, and the barricades needed to be checked regularly. *Id.* The employee's supervisor instructed the employee to check the barricades on his day off and after-hours, and the supervisor authorized the employee to use his personal vehicle to do so. *Id.*

Both before and after checking the Nemo Road construction site, the employee made personal side-trips. The employee rode his motorcycle on Skyline Drive to watch the sunset. *Id.* at ¶ 3. He stayed there for at least an hour. *Id.* He then drove through Canyon Lake Park, and drove around Rapid City looking for a friend. *Id.* He then drove out to the construction site. *Id.* After checking the construction site, he rode his motorcycle to a bar. *Id.* He claimed he was looking for another Pennington County employee to delegate the task of checking the Nemo Road construction site. He did not find that employee. After having a one-half of a beer, the employee left the bar. The employee then talked with someone in the street before leaving the bar. While on the way home for the evening, he was involved in a motorcycle accident.

The employee sought underinsured motorist coverage under the PEPL Fund. The Circuit Court held a court trial and found, as a matter of fact, that coverage existed. This Court reversed ruling that no coverage existed as a matter of law. In reaching its conclusion, this Court stated that coverage only arises under the PEPL Fund if the employee was "'acting on behalf of or in the interest of the public entity' at the time of the accident." *Id.* at ¶ 8, 566 N.W.2d at 127 (quoting *Farmland Ins. Companies v. Heitmann*, 498 N.W.2d 620, 624 (S.D. 1993)). According to this Court, "[m]ost critical

to deciding coverage here is the question whether [the employee] was acting with the scope of employment at the time the accident occurred." *Id.* at ¶ 8. "Employees do not act within the scope of their jobs when they substantially deviate from the course of employment." *Id* at ¶ 10. "Substantial deviation occurs when employees abandon the work purpose in furtherance of a personal motive or 'frolic.'" *Id.* (quoting *Piper v. Neighborhood Youth Corps.*, 241 N.W.2d 868, 869 (S.D. 1976)). If there is a substantial deviation, then there is no coverage after the deviation occurs because the employee had abandoned their work purpose. *Id.* at ¶ 11. Whether a deviation is substantial presents a question of law for the court. *Id.* But, even in those circumstances when the deviation is only slight versus substantial, "coverage resumes *only* when employees return to the course of employment." *Id.* (emphasis added). Thus, whenever a deviation occurs, there is no coverage for an accident occurring during the deviation. *See id.*

In *Winger*, the court concluded the employee engaged in a substantial personal deviation. The court concluded that the personal deviation meant the employee was outside the scope of his employment. *Id.* at ¶ 14. As a result, no coverage existed under the PEPL Fund.

Just like in *Winger*, Hughes in this case was driving to Sioux Falls for personal reasons. This was a personal deviation, and the accident occurred during that deviation. As a result, just like in *Winger*, Hughes did not have coverage under the PEPL Fund as a matter of law.

3. *Hughes's Alleged Receipt of Work Comp Benefits Is Immaterial to This Court's Legal Conclusion About Whether Hughes Had Coverage Under the PEPL Fund.*

The Barrs suggest that coverage existed under the PEPL Fund because Hughes had received workers' compensation benefits for the accident. (Plaintiffs' Brief at p.20). This argument fails. The scope of employment for workers' compensation purposes is broader and more liberally construed than the scope of employment for third-party liability. *See Tammen v. Tronvold*, 2021 SD 56, ¶ 30, 965 N.W.2d 161-73.

Separately, the undisputed facts show that the payment of workers' compensation benefits based upon an undisputedly wrong factual assumption, namely that Hughes was driving from court in Parker to his home in Vermillion when the accident occurred. In the First Report of Injury, Hughes stated he was "[r]eturning home from work at the Parker courthouse" when the accident occurred. (SR 726, 1242). Hughes originally told Allison that the accident happened when he was on his way back from Parker. (SR 764). Because he merely said that "he was on his way back from Parker," Allison "assumed it was directly." (SR 765) Based on Hughes's statements, Allison told the HR office in Pierre that Hughes was injured while returning home to Vermillion from Parker. (SR 764).

On January 30, 2017, John Hughes called Longbrake, a SD HR Specialist, and told her that Stuart was driving John's pickup, and told her the accident occurred near Tea.[9] (SR 445). Longbrake then asked Allison:

[9] The Barrs have argued that John Hughes's comment about Tea put workers' compensation on notice that the accident was on a side-trip from Hughes's work. But John's comment was meaningless to them. Until her deposition in this case, Job (who made the workers' compensation decision) had no idea where the intersection of the Accident was located in comparison to Parker or Vermillion. (SR 737). She was unfamiliar with the area.

> was [Stuart Hughes] on paid work time at the time of the accident? According to the FROI [First Report of Injury] time of accident was 5:30 PM. The FROI states he was returning home from work. Was he returning from Parker to his home work station or was he actually headed home from Parker? We will also need a copy of the police report.

(SR 446) So, Longbrake made it clear that it was important to the workers' compensation office to know where Hughes was going and why when the accident occurred.

In response, Allison told Longbrake that Hughes "was still on work time as he had been required to travel for work *and was returning home*." *Id.* (emphasis added). Allison wrote:

> Stuart's duty station is in Yankton but he resides in Vermillion. He was going home to Vermillion from Parker which was where he was required to be that day for court by Judge Gering. Please let me know if you need any additional information. I'll forward you the police report as soon as I receive it.

Id. Of course, that is undisputedly not true. So, after Allison received the accident report and found that the accident was in Lincoln County, she questioned Hughes's story. At that point, he admitted that he had actually been driving from Parker to Sioux Falls. (SR 763-65).

The workers' compensation file, however, revealed that SD workers' compensation was ever told that Hughes had changed his story. (SR 440-464). Indeed, just the opposite.

Hughes continued to tell workers' compensation that he was returning to Vermillion or Yankton. On April 7, 2017, Hughes again told Job that the accident happened when he "was headed back from Parker to Vermillion." (SR 450). Job is the workers' compensation manager for the State of South Dakota (SR 715).

On September 6, 2017, Hughes again told Job that he was returning to either Yankton or Vermillion following the hearing. (SR 458) ("My duty station was Yankton, but I was sent to Parker that day for a hearing with a judge I was assisting handle a case. The collision occurred just outside of Parker on my way back from the hearing.")).

Job decided that Hughes's medical expenses were compensable because she was told that he was paid mileage, and that he was on work time at the time of the accident. (SR 720-21). When she made that decision, the only information Job was provided was the information provided from Allison and Hughes. (SR 735-36). But that information was wrong.

Thus, based upon the undisputed facts, the State believed that Hughes was driving home to Vermillion at the time of the accident when it made the decision on workers' compensation benefits. The State was mistaken, and Hughes was instead driving a personal side-trip in the opposite direction to Sioux Falls when the accident occurred. There is no coverage under the PEPL Fund for this side-trip.

IV. The Lack of Coverage Under the PEPL Fund Also Prevents Barrs from Proving Causation, Which is An Essential Element of the Barrs' Other Causes of Action.

In addition to malpractice, the Barrs' complaint also asserts claims for breach of fiduciary duty, fraud, and breach of contract. (SR 2-7). For each of these claims, the Barrs must prove the Attorney Defendants' alleged wrongful conduct caused Barrs to incur damages. *See Grand State Property, Inc. v. Woods, Fuller, Schultz, & Smith P.C.*, 1996 SD 139, ¶ 16, 556 N.W.2d 84, 88 (stating essential elements of breach of fiduciary duty claim); *Stabler v. First State Bank of Roscoe*, 2015 SD 44, ¶ 19, 865 N.W.2d 466,

477 (stating elements of fraud claim); *Bowes Constr., Inc. v. SD Dep't of Transp.*, 2010 SD 99, ¶ 21, 793 N.W.2d 36, 43 (stating essential elements for breach of contract).

Here, the alleged harm is the Barrs' inability to access additional insurance under the PEPL Fund. (Complaint ¶¶ 26, 32, 34-37, SR 4-5). As described above, this "alleged harm" occurred because under the facts of the case, no PEPL Fund coverage existed. The Attorney Defendants did not cause any of this harm. In turn, all the claims were properly dismissed.[10]

CONCLUSION

Based on the foregoing, Brewers respectfully requests this Court affirm the award of summary judgment.

Dated this 20th day of June, 2023.

/s/ Jason R. Sutton
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[10] The only argument asserted by the Barrs for reversal of the summary judgment on the breach of fiduciary duty, fraud, and breach of contract claim is that a viable claim existed under the PEPL Fund. (Plaintiffs' Brief at p.23). The arguments at the Circuit Court also were limited to the effect of PEPL Fund coverage on Plaintiffs' claims. To the extent the Barrs later argue some other basis for reversing summary judgment on these claims, this Court should not consider that argument. *Mach v. Connors*, 2022 SD 48, ¶ 37, 979 N.W.2d 161, 173 ("[A] party may not raise an issue for the first time on appeal, especially in a reply brief when the other party does not have an opportunity to answer." (internal quotation omitted)).

CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 9,457 words as counted by Microsoft Word.

/s/ Jason R. Sutton
Jason R. Sutton

CERTIFICATE OF SERVICE

I, Jason R. Sutton, hereby certify that I am a member of the law firm of Boyce Law Firm, L.L.P., and that on the 20th day of June, 2023, Appellee Brewers' Brief and this Certificate of Service were electronically filed and served via Odyssey File & Serve upon the following individuals:

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APPENDIX-TABLE OF CONTENTS

STATE OF SOUTH DAKOTA COUNTY OF MINNEHAHA	) ss:)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
DOUG BARR AND DAWN BARR, Plaintiffs, v. JEFFREY A. COLE, WILLIAM D. SIMS, AND GREGORY T. BREWERS, Defendants.	)	49CIV.21-2535 RESPONSE TO COLE AND SIMS'S STATEMENT OF UNDISPUTED MATERIAL FACTS, AND PLAINTIFFS' ADDITIONAL MATERIAL FACTS

COMES NOW the Plaintiffs, Doug and Dawn Barr, and respectfully submit this Response to Cole and Sims's Statement of Undisputed Material Facts and submit Plaintiffs' Additional Material Facts. The exhibits referenced herein are attached to the *Affidavit of Joe Erickson* filed herewith. Additionally, the Plaintiffs ask the Court to take judicial notice of their *Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment*, which the Plaintiffs incorporate to their Response herein by reference.

RESPONSE TO COLE/SIMS'S STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff, Doug Barr, was injured in an auto accident on December 21, 2016 (the "Accident") (Ex. 42, Accident Report.)

RESPONSE: Undisputed.

2. The Accident was caused by Stuart Hughes. Hughes failed to yield, and pulled out in front of Doug on a highway (Ex. 42, Accident Report.)

RESPONSE: Undisputed.

3. The accident occurred approximately two miles west of Tea, South Dakota, at the intersection of SD Hwy 17 and 272 Street in Lincoln County (Ex. 42, Accident Report.).

RESPONSE: Undisputed.

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4. Tea is in Lincoln County, which is in the Second Judicial Circuit (Ex. C, Circuit Court Map.).

RESPONSE: Undisputed.

5. At the time of the accident, Hughes was a law clerk for the First Judicial Circuit (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11.).

RESPONSE: Undisputed.

6. Hughes lived in Vermillion, and his duty station was Yankton (Ex. B, Plaintiff's Responses to Defendants' First Requests for Admissions, Requests 4 & 5.).

RESPONSE: Undisputed.

7. First Circuit Law clerks are stationed in either Yankton or Mitchell (Ex. D, Kim Allison Deposition at 8:16-8:20.).

RESPONSE: Undisputed.

8. The morning of the Accident, Hughes drove from Vermillion to the Turner County Courthouse in Parker to attend a hearing (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 34.).

RESPONSE: Disputed. Stuart Hughes was driving from Sioux Falls to the Turner County Courthouse on the morning of the accident. (J.Hughes Depo. pp. 5-6.)

9. Sometime after 5:00 p.m., Hughes left Parker, and "began the trip to Sioux Falls to visit family for a holiday dinner." (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11; Ex. 101, Stuart Hughes Deposition, 14:24-15:2.).

RESPONSE: Disputed. After court, Stuart Hughes was driving on a direct route back to his father's home, where he had stayed with his wife the night before. (Plaintiffs' SUMF No. 39—J.Hughes Depo. p. 8.)

10. Hughes's parents were having a family holiday gathering because Hughes's brother was in town (Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11; Ex. 101, Stuart Hughes Deposition at 15:3-10; Ex. I, John Hughes Deposition at 6:12-6:20.).

RESPONSE: Undisputed.

11. Hughes was expected to drive to and from an out of town hearing from either his duty station in Yankton, or his home in Vermillion, whichever is shorter (Ex. D, Kim

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Allison Deposition at 10:1-11:9, 13:11-13:22; Ex. 40, UJS Travel Policies at STATE 0028.).

RESPONSE: **Disputed. The UJS reimbursed Stuart Hughes for his mileage regardless of whether he drove to Sioux Falls or Vermillion. (Plaintiffs' SUMF No. 51—Allison Depo. p. 27.)**

12. No one acting on behalf of the First Judicial Circuit asked Hughes to drive to Sioux Falls (Ex. B, Plaintiffs' Responses to Defendants' First Request for Admissions at 4, RFA No. 15.).

RESPONSE: **Disputed. The UJS expects law clerks to sleep somewhere, and does not require them to sleep in a certain location—and reimburses the law clerk whether they travel to Sioux Falls or Vermillion. (Plaintiffs' SUMF No. 51—Allison Depo. p. 27.)**

Further, a law clerk is expected to drive to and from remote counties in the First Circuit when a judge asks—regardless of where they intend to sleep that night. (Plaintiffs' SUMF No. 43—Allison Depo. p. 12.)

13. There was nothing about Hughes's employment with the UJS that would have compelled him to drive to Sioux Falls (Ex. D, Kim Allison Deposition at 44:14-44:17.).

RESPONSE: **Disputed. The UJS did not require Stuart to drive a certain path home. (Plaintiffs' SUMF No. 49—Allison Depo. p. 24)**

The UJS paid Stuart Hughes reimbursement for his mileage on the date of the accident. (Plaintiffs' SUMF No. 47—Allision Depo. pp. 19-20; Depo. Ex. 38.)

The UJS would have reimbursed Stuart regardless if he drove to Sioux Falls or Vermillion, and he was required to drive to the Turner County Courthouse for his job duties. (Plaintiffs' SUMF No. 51—Allison Depo. p. 27.)

14. Hughes's trip to Sioux Falls was on his own time, and had nothing to do with his duties and responsibilities for the UJS (Ex. D, Kim Allison Deposition at 53:4-53:9.).

RESPONSE: **Disputed. First, Stuart Hughes was not in Sioux Falls at the time of the accident. The UJS did not require Stuart Hughes to travel to a certain location in order to be reimbursed for his mileage, and it could have been either Sioux Falls or Vermillion. (Plainitiffs' SUMF No. 51—Allision Depo. p. 27.)**

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The reason Stuart was traveling from the Turner County Courthouse was because of his employment with the UJS that requires extensive travel to remote counties. (Plaintiffs' SUMF Nos. 42-44—Allision Depo. pp. 10, 12, 31.)

15. The PEPL Fund provides liability coverage for state employees "as provided for within the coverage document issued by PEPL." SDCL § 3-22-1.

RESPONSE: Undisputed.

16. The "coverage document issued by PEPL" is the Participation Agreement Between the Public Entity Pool for Liability and the State of South Dakota (Ex. 46, PEPL Fund Participation Agreement and Memorandum at Barr 1405.).

RESPONSE: Undisputed.

17. The Participation Agreement at issue is the 2016 Agreement (Ex. H, Craig Ambach Deposition at 21:23-22:6.).

RESPONSE: Undisputed.

18. The Memorandum of Coverage that is attached to the Participation Agreement sets out the scope and limit of coverage (Ex. 46, PEPL Fund Participation Agreement and Memorandum at Barr 1406.).

RESPONSE: Undisputed.

19. The PEPL Fund covers damages that a covered employee "becomes legally obligated to pay because of an occurrence." (Ex. 46, PEPL Fund Participation Agreement and Memorandum, at Barr 1411 (italics in original)).

RESPONSE: Undisputed.

20. An "occurrence" is "an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the employee's duties for the State." (Ex. 46, PEPL Fund Participation Agreement and Memorandum at Barr 1416; Ex. H, Craig Ambach Deposition at 24:23-25:11; 26:2-26:7.).

RESPONSE: Undisputed.

PLAINTIFFS' ADDITIONAL MATERIAL FACTS

1. Kim Allision, the Circuit Court Administrator in charge of the First Circuit, agreed that one of the routes from the Parker County Courthouse would be to drive to

the interstate first, and then drop down to Vermillion. (Allison Depo. p. 30.)

2. Kim Allison described that the UJS policy is to pay mileage to law clerks for the distance between where they left from to the courthouse where they are traveling to—which would include a roundtrip to Sioux Falls. (Allison Depo. pp. 45-46.)

3. The Defendants-Attorneys were still investigating a possible claim against the PEPL Fund on September 6, 2017, three months after the 180-day deadline, as the Defendants-Attorneys sent discovery requests that asked Stuart the following: "Interrogatory No. 32. State the name and address of your employer, your job title, and describe your job duties, **and state whether you were performing any duties for your employer at the time of the collision.**" (emphasis added) (Interrogatories to Stuart Hughes (First) (9/6/17).)

4. In 2019, the Defendants-Attorneys' deposition outline for Stuart involved several questions relating to workers' compensation that they did not ask:

> Make work comp claim. We'd request any work comp documents regarding the crash and Mr. Hughes' injuries.
>
> . . .
>
> How much were you paid for your work comp claim.

(2019 Depo. Outline for Stuart, pp. 18, 20.)

Dated this 11th day of January, 2023.

SCHOENBECK & ERICKSON, PC

By: _/s/_Joe Erickson_____
Lee Schoenbeck
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EXHIBIT 46 Ambach 8/31/22 JK

MEMORANDUM

TO: AJ Franken, Deputy General Counsel
Governor's Office

FROM: Craig Ambach, Director
PEPL Fund

RE: **Participation Agreement between The Public Entity Pool for Liability and the State of South Dakota**

DATE: June 27, 2018

Enclosed are the following documents for the Governor's signature:

1. Participation Agreement between the Public Entity Pool for Liability and the State of South Dakota; and
2. Memorandum of Liability Coverage to the Employees of the State of South Dakota.

The Agreement and Memorandum of Coverage are essentially the same as last year's with the exception of the new dates and the change to the aircraft exclusion.

I am requesting that you present these to the Governor for his signature. Once the Governor has signed both the Agreement and Memorandum of Coverage, please return the original to this office.

If you have any questions or would like additional information, please contact me. Thanks for your help on this matter.

BARR 1404

PARTICIPATION AGREEMENT
BETWEEN
THE PUBLIC ENTITY POOL FOR LIABILITY
AND
THE STATE OF SOUTH DAKOTA

This Agreement is made and entered into effective the first day of July 2016 by and between the Public Entity Pool for Liability (hereinafter referred to as "PEPL") and the State of South Dakota (hereinafter referred to as "State") and is made with reference to the following:

WITNESSETH:

WHEREAS, SDCL ch. 3-22 establishes PEPL to provide a fund as the sole source for payment of valid tort claims against employees of the State; and

WHEREAS, PEPL has developed a program for funding such tort claims; and

WHEREAS, the State is authorized to obtain liability coverage for its employees from PEPL; and

WHEREAS, the State has duly authorized the execution, delivery and performance of this Agreement,

NOW THEREFORE, in consideration of the mutual covenants contained herein, under which immunity of such employees is waived pursuant to SDCL ch. 3-22, PEPL and the State hereby agree as follows:

ARTICLE I
INTRODUCTION

This Agreement sets forth the terms and conditions applicable to the tort liability coverage program offered by PEPL to employees of the State and the conditions under which immunity of such employees is waived in accordance with the provisions of SDCL ch. 3-22 and Article III, Section 27 of the South Dakota Constitution.

ARTICLE II
TERM

This Agreement commences July 1, 2016, and shall automatically continue for successive annual periods until termination or dissolution as set forth in Article X. Notwithstanding this section, if the Legislature fails to appropriate funds or to grant expenditure authority for this purpose, this Agreement shall terminate at the end of the then current coverage period.

ARTICLE III
COVERAGE

The scope and limits of coverage shall be as set forth in the Memorandum of Coverage attached hereto and incorporated herein as Appendix A.

ARTICLE IV
CONTRIBUTIONS

Contributions by the State to PEPL shall be calculated annually and shall consider:

1. The State's employees' exposure to liability loss;
2. The State's employees' historical loss experience;
3. The cost of providing claim administration, legal defense, loss prevention and related services to the State and its employees;
4. PEPL's general administration and overhead related to the program provided to the State;
5. The cost of any commercial insurance protecting the State's employees and purchased by PEPL;
6. The need for reserve funds and contingency contributions to ensure the solvency of PEPL;
7. Amounts needed to restore shortfalls of previous coverage periods;
8. Investment income earned by PEPL;
9. The limit and scope of coverage provided to the State's employees by PEPL.

The rating formula may be changed by PEPL, effective with the first day of any coverage period. The contribution amount and the rating formula selected by PEPL for

any coverage period shall be disclosed to the State no later than November 1 preceding the effective date of the next coverage period. Contributions shall be remitted to PEPL on or about July 1 each year.

ARTICLE V
RETURN OF SURPLUS

PEPL shall, from time to time, evaluate the financial results of each coverage period. If PEPL determines there is a surplus for any coverage period, it may distribute the surplus to the State or transfer it to the Contingency Reserve. The amount, timing and method of distribution or transfer of surplus, if any, shall be at the sole discretion of PEPL. No surplus shall be distributed to the State without an independent actuarial determination that the contingency reserve is adequate and outstanding liabilities are adequately provided for.

ARTICLE VI
CONTINGENCY RESERVE

PEPL shall establish a contingency reserve. The contingency reserve shall be used for contingencies, including temporary funding of contribution shortfalls. The contingency reserve shall be credited with interest earnings. An actuary shall periodically review the contingency reserve for adequacy. The contingency reserve may not be counted for triggering a surplus distribution.

ARTICLE VII
FUND

Prior to the inception of each coverage period hereafter, PEPL shall, by resolution, establish the amount of the fund for the coverage period. The amount so established shall be used to compute payouts for all structured settlements from occurrences during the coverage period.

ARTICLE VIII
PEPL'S OBLIGATIONS

PEPL shall carry out the provisions of SDCL ch. 3-22 and this Agreement and shall provide:

1. Coverage in accordance with the Memorandum of Coverage, Appendix A;
2. Tort liability claim administration services for claims covered by the Memorandum of Coverage, Appendix A;
3. Legal defense for litigated claims covered by the Memorandum of Coverage, Appendix A;
4. Tort liability loss prevention services;
5. Monthly statements of claims reported and losses incurred, paid and reserved by accident year;
6. Detailed financial statements and budgets for each coverage period;
7. Independent audits of claim administration services;
8. Independent actuarial studies of loss and contingency reserves.

ARTICLE IX
STATE'S OBLIGATIONS

The State shall:

1. Remit to PEPL, in the manner and time requested, all contributions;
2. Comply with SDCL ch. 3-22;
3. Provide PEPL with prompt written notice of claims or events likely to give rise to claims covered by the Memorandum of Coverage;
4. Cooperate with PEPL and, upon its request, assist in the settlement and defense of claims and enforcement of any rights of contribution or indemnity that the State, its employees or PEPL may have against any person;
5. Not, except at its own expense, voluntarily make any payments, assume any obligations or incur any costs with regard to the settlement of any covered loss;

6. Subrogate PEPL to the extent of any and all rights that the State or its employees may have to the recovery or reimbursement of any payments made by PEPL on behalf of the State's employees. The State shall do nothing to prejudice such rights and shall cooperate with PEPL in the recovery or reimbursement of any sums.

ARTICLE X
TERMINATION OR DISSOLUTION

The State may withdraw from PEPL at the end of any coverage period by giving PEPL at least 180 days written notice of its desire to withdraw.

PEPL may decline renewal of the State's participation by giving the State at least 180 days written notice of its desire not to renew. Coverage may be terminated under this provision only at the end of a coverage period unless another date is mutually agreed upon.

Upon withdrawal, termination or dissolution for any reason, the State and PEPL shall reach an agreement on the disposition of all funds, reserves, surplus and claims.

THE PUBLIC ENTITY POOL FOR LIABILITY

By: _____
Craig Ambach, Director

THE STATE OF SOUTH DAKOTA

By: _____
Dennis Daugaard, Governor

Appendix A

THE PUBLIC ENTITY POOL FOR LIABILITY
Memorandum of Liability Coverage
to the Employees of the State of South Dakota

Declarations

Coverage Amount:	$1,000,000 per *occurrence*, subject to limitations set forth in SDCL ch. 3-22 and this Memorandum.
Coverage Period:	From July 1, 2016 through June 30, 2017.

THE PUBLIC ENTITY POOL FOR LIABILITY

Memorandum of Liability Coverage to the Employees of the State of South Dakota

In consideration of the Contribution stated in the Declarations and incorporating the provisions of SDCL ch. 3-22, except as altered by the Participation Agreement, *PEPL* and the *State* agree as follows:

I. COVERAGE DESCRIPTION

A. SOVEREIGN IMMUNITY

Except to the extent that coverage is specifically provided under this Memorandum, the *State* reserves on behalf of itself and the *employees* all rights of sovereign or governmental immunity.

B. DAMAGES COVERAGE

PEPL will pay damages, not excluded hereunder, on behalf of the *employee* that the *employee* becomes legally obligated to pay because of an *occurrence*, not excluded hereunder.

C. DEFENSE COVERAGE

PEPL has the right and duty to defend any claim or suit for damages not excluded hereunder, but:

1. *PEPL* may, at its discretion, investigate any *occurrence* and settle any claim or suit that may result, and
2. *PEPL*'s right and duty to defend ends after the Coverage Limit is exhausted by payments made or obligations assumed by *PEPL* for occurrences not excluded hereunder.

Defense costs are payable in addition to the Coverage Limit.

D. APPROPRIATION AND EXPENDITURE AUTHORITY LIMITATION

All liability recognized or created under this agreement is void, unless the *State* Legislature appropriates funds and grants expenditure authority as required to discharge such liability.

E. EXCLUSIONS

This Memorandum does not extend coverage or apply to any liability:

1. Assumed under contract, except this exclusion shall not apply to rental car contracts entered into by *employees* or to contracts specifically added by endorsement hereto;

2. Arising out of the ownership, operation, use, maintenance or entrustment of any *aircraft* owned or operated by, rented or loaned by or to any employee, except this exclusion shall not apply to the extent *PEPL* purchases insurance for such purposes;

3. Due to declared or undeclared war, riot, a concerted act of civil disobedience and similar *occurrences* or acts or conditions incident thereto. However this exclusion does not apply to liability arising from actions taken to protect persons or property;

4. Under workers' compensation, disability benefits, unemployment compensation or similar laws;

5. For *bodily injury* to an *employee* arising out of and in the course of employment by the *State*;

6. For injury to the spouse, child, parent, brother or sister of the *employee* in 5, above, as a consequence of the *bodily injury* to that *employee*;

7. Arising out of the actual, alleged, or threatened discharge, release or escape of *pollutants*;

8. Resulting from or contributed to in any manner by the hazardous properties of *nuclear material*;

9. For injuries resulting from or contributed to in any manner by the presence of asbestos;

10. Arising from or contributed to in any manner by acts, errors or omissions in the engineering or design of any public roadway or public transportation project;

11. For any costs relating to reinstatement or promotion of an employee, or any other equitable relief, arising from employee grievances, administrative claims, or legal actions, including but not limited to, claims asserted by an employee under any federal law or as a result of an employee's rights as guaranteed by the United States Constitution;

12. For back pay, front pay, benefits, emotional injuries, penalties, attorney fee awards, punitive damages, or any other form of damages, arising from employee grievances, administrative claims, or legal actions, including but not limited to, claims asserted by an employee under any federal law or as a result of an employee's rights as guaranteed by the United States Constitution;

13. For fines, penalties, punitive damages or exemplary damages;

14. For failure to perform, or breach of, a contractual obligation;

15. Arising out of the providing or the failure to provide *medical professional services* by *employees*, except this exclusion shall not apply to *employees* of the University of South Dakota Sanford School of Medicine to the extent they are performing medical research during the course of their employment and as approved by the University of South Dakota Sanford School of Medicine. This exclusion also does not apply to employees of the School of Health Sciences to the extent they are performing approved medical research during the course of their employment;

16. For damages that are a result of a discretionary act or task. This exclusion does not apply if the damages are the result of a *ministerial act or task*;

17. To the extent the *occurrence* is covered by any valid and collectible liability insurance, except this exclusion shall not apply to liability insurance of the *employee* that protects the *employee* while driving a *State* owned or leased vehicle;

18. For damages measured by contract, as set forth in SDCL ch. 21-2;

19. For damage to property owned by the *State*;

20. Arising out of the ownership, operation, engineering or design of any airport, landing strip or similar facility. However, this exclusion shall not apply to state-owned hangars in the cities of Brookings, Vermillion, and Pierre, South Dakota;

21. For refund of taxes, fees and assessments;

22. For claims where notice was not given by the claimant within 180 days after the injury or as required by SDCL, ch. 3-21;

23. Arising out of the *employee* obtaining remuneration or financial gain to which the *employee* was not legally entitled;

24. Arising from collecting or attempting to collect taxes;

25. Arising from providing or attempting to provide emergency disaster relief services pursuant to SDCL ch. 33-15;

26. Arising from activities or facilities of the South Dakota Building Authority or its *employees*;

27. Arising from activities or facilities of the South Dakota Health and Educational Facilities Authority or its *employees*;

28. Arising from activities or facilities of the South Dakota Housing Development Authority or its *employees* except this exclusion shall not apply to the South Dakota Housing Development Authority, its commissioners, officers and employees, with respect to liability arising from the construction of residential and other structures under the Governor's House and Daycare Building Project at Mike Durfee State Prison in Springfield, South Dakota;

29. Arising from activities or facilities of the South Dakota Science and Technology Authority or its *employees*;

30. Arising out of the employee's willful and wanton misconduct.

31. Arising in any manner from activities of South Dakota State University 4-H volunteers. No South Dakota 4-H volunteer is considered an *employee* under this Memorandum.

II. COVERAGE AMOUNT

The Coverage Amount shown in the Declarations is the most *PEPL* will pay for damages for each occurrence, regardless of the number of:

A. *Employees* involved;

B. Claims made or suits brought for damages; or

C. Persons or organizations who sustain damages.

The Coverage Amount shown in the Declarations shall be reduced by any insurance that applies to an *occurrence* not excluded hereunder, and the coverage afforded by

this Memorandum shall be excess of and not contribute with any such insurance. Notwithstanding the preceding sentence, this Memorandum shall be primary with respect to liability insurance of the *employee* that protects the *employee* while driving a *State* owned or leased vehicle.

An *occurrence* taking place over more than one Coverage Period shall be deemed to have taken place during the Coverage Period in which the *occurrence* first took place, and only that Coverage Period's Coverage Amount applies.

III. DEFINITIONS

1. *Aircraft* – any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders, and drones.

2. *Bodily injury* - injury, sickness or disease sustained by a person, including death resulting therefrom.

3. *Defense costs* - fees and expenses generated by and related to the adjustment, investigation, defense or litigation of a claim, including attorney's fees, court costs, and interest on judgments before they are paid. *Defense costs* shall not include the salaries and overhead of employees of the *State*, except as may be provided for under contract with the Attorney General.

4. *Employee* - all current and former employees and elected and appointed officials of the *State* whether classified, unclassified, licensed or certified, permanent or temporary, whether compensated or not. The term includes employees of all branches of government including the judicial and legislative branches and employees of constitutional, statutory and executive order boards, commissions, and offices. The term does not include independent contractors.

5. *Medical professional services* - the furnishing of:

   a. Medical, surgical, psychiatric, dental, nursing or other health care services, including the furnishing of food or beverages in connection therewith; or

   b. Drugs or medical, dental or surgical supplies or appliances.

6. *Ministerial act or task* - an act or task that involves obedience to instructions, but demands no special discretion, judgment or skill.

7. *Nuclear material* - Source material, special nuclear material or byproduct material, all as defined in the Atomic Energy Act of 1954 or any law amendatory thereto.

8. *Occurrence* - an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the *employee's* duties for the *State*.

9. *PEPL* - the Public Entity Pool for Liability established by SDCL ch. 3-22.

10. *Pollutants* - any solid, liquid, gaseous or thermal irritant or contaminant.

11. *State* - the State of South Dakota.

IV. SPECIAL COVERAGE EXTENSION

This Memorandum shall cover students at *State* educational institutions and consultants to the *State* when operating *State* owned or leased vehicles on official *State* business. This Memorandum shall be primary with respect to liability insurance available to such consultants. However, with respect to liability, the student's own insurance shall be primary and any coverage provided by this special coverage extension shall be secondary and available only after all other available coverages are exhausted.

This extension shall only apply to students if the following conditions have been met:

1. That at the time the student makes application to use a vehicle the student presents a valid drivers license and current proof of compliance with the financial responsibility laws of the State of South Dakota.

2. That the educational institution photocopy the information required in paragraph 1 and attach the photocopies to the application and keep the same for a minimum of three years.

3. That if any of the information required in paragraph 1 is false or if the educational institution fails to perform the requirements in paragraph 2, then no coverage shall be provide

THE PUBLIC ENTITY POOL FOR LIABILITY
MEMORANDUM OF LIABILITY COVERAGE
TO THE EMPLOYEES OF SOUTH DAKOTA

Endorsement No. 1

Privately-Owned Vehicles Operated by Employees of the State of South while on Official Duty During Periods of State Disaster Declarations by the Governor

Effective Date of Endorsement: July 1, 2015

Issue Date of Endorsement: July 1, 2015

Section IV, Special Coverage Extension, is amended as follows:

With respect to employees of the State of South Dakota who must use their privately-owned vehicles to travel on official business to conduct disaster relief-related work during periods of time when there has been a State Disaster Declaration by the Governor, coverage is provided by this Memorandum and shall be a combined single limit of liability of $1,000,000 to include coverage for bodily injury and property damage. This shall include damage to the employee's vehicle (collision and comprehensive coverage) when in use under the conditions set forth in this endorsement.

This extension shall only apply to employees of the State of South Dakota if all of the following conditions have been met:

1. The employee must drive to a workstation that is located in a city, town or rural location that is not their normal place of work.
2. The director of Fleet and Travel or the director's designated agent has certified that a state-owned fleet vehicle is not available during the period of time of required use.
3. The employee is on official business conducting work associated with a State Disaster Declaration by the Governor.

THE PUBLIC ENTITY POOL FOR LIABILITY

By: _____
Grant Goodbach, Director

THE STATE OF SOUTH DAKOTA

By: _____
Dennis Daugaard, Governor

PARTICIPATION AGREEMENT
BETWEEN
THE PUBLIC ENTITY POOL FOR LIABILITY
AND
THE STATE OF SOUTH DAKOTA

This Agreement is made and entered into effective the first day of July 2020 by and between the Public Entity Pool for Liability (hereinafter referred to as "PEPL") and the State of South Dakota (hereinafter referred to as "State") and is made with reference to the following:

WITNESSETH:

WHEREAS, SDCL ch. 3-22 establishes PEPL to provide a fund as the sole source for payment of valid tort claims against employees of the State; and

WHEREAS, PEPL has developed a program for funding such tort claims; and

WHEREAS, the State is authorized to obtain liability coverage for its employees from PEPL; and

WHEREAS, the State has duly authorized the execution, delivery and performance of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants contained herein, under which immunity of such employees is waived pursuant to SDCL ch. 3-22, PEPL and the State hereby agree as follows:

ARTICLE I
INTRODUCTION

This Agreement sets forth the terms and conditions applicable to the tort liability coverage program offered by PEPL to employees of the State and the conditions under which immunity of such employees is waived in accordance with the provisions of SDCL ch. 3-22 and Article III, Section 27 of the South Dakota Constitution.

ARTICLE II
TERM

This Agreement commences July 1, 2020, and shall automatically continue for successive annual periods until termination or dissolution as set forth in Article X. Notwithstanding this section, if the Legislature fails to appropriate funds or to grant expenditure authority for this purpose, this Agreement shall terminate at the end of the then current coverage period.

ARTICLE III
COVERAGE

The scope and limits of coverage shall be as set forth in the Memorandum of Liability Coverage attached hereto and incorporated herein as Appendix A.

ARTICLE IV
CONTRIBUTIONS

Contributions by the State to PEPL shall be calculated annually and shall consider:

1. The State's employees' exposure to liability loss;
2. The State's employees' historical loss experience;
3. The cost of providing claim administration, legal defense, loss prevention and related services to the State and its employees;
4. PEPL's general administration and overhead related to the program provided to the State;
5. The cost of any commercial insurance protecting the State's employees and purchased by PEPL;
6. The need for reserve funds and contingency contributions to ensure the solvency of PEPL;
7. Amounts needed to restore shortfalls of previous coverage periods;
8. Investment income earned by PEPL;
9. The limit and scope of coverage provided to the State's employees by PEPL.

The rating formula may be changed by PEPL, effective with the first day of any coverage period. The contribution amount and the rating formula selected by PEPL for

any coverage period shall be disclosed to the State no later than November 1 preceding the effective date of the next coverage period. Contributions shall be remitted to PEPL on or about July 1 each year.

ARTICLE V
RETURN OF SURPLUS

PEPL shall, from time to time, evaluate the financial results of each coverage period. If PEPL determines there is a surplus for any coverage period, it may distribute the surplus to the State or transfer it to the Contingency Reserve. The amount, timing and method of distribution or transfer of surplus, if any, shall be at the sole discretion of PEPL. No surplus shall be distributed to the State without an independent actuarial determination that the contingency reserve is adequate and outstanding liabilities are adequately provided for.

ARTICLE VI
CONTINGENCY RESERVE

PEPL shall establish a contingency reserve. The contingency reserve shall be used for contingencies, including temporary funding of contribution shortfalls. The contingency reserve shall be credited with interest earnings. An actuary shall periodically review the contingency reserve for adequacy. The contingency reserve may not be counted for triggering a surplus distribution.

ARTICLE VII
FUND

Prior to the inception of each coverage period hereafter, PEPL shall, by resolution, establish the amount of the fund for the coverage period. The amount so established shall be used to compute payouts for all structured settlements from occurrences during the coverage period.

ARTICLE VIII
PEPL'S OBLIGATIONS

PEPL shall carry out the provisions of SDCL ch. 3-22 and this Agreement and shall provide:

1. Coverage in accordance with the Memorandum of Coverage, Appendix A;

2. Tort liability claim administration services for claims covered by the Memorandum of Coverage, Appendix A;

3. Legal defense for litigated claims covered by the Memorandum of Coverage, Appendix A;

4. Tort liability loss prevention services;

5. Monthly statements of claims reported and losses incurred, paid and reserved by accident year;

6. Detailed financial statements and budgets for each coverage period;

7. Independent audits of claim administration services;

8. Independent actuarial studies of loss and contingency reserves.

ARTICLE IX
STATE'S OBLIGATIONS

The State shall:

1. Remit to PEPL, in the manner and time requested, all contributions;

2. Comply with SDCL ch. 3-22;

3. Provide PEPL with prompt written notice of claims or events likely to give rise to claims covered by the Memorandum of Coverage;

4. Cooperate with PEPL and, upon its request, assist in the settlement and defense of claims and enforcement of any rights of contribution or indemnity that the State, its employees or PEPL may have against any person;

5. Not, except at its own expense, voluntarily make any payments, assume any obligations or incur any costs with regard to the settlement of any covered loss;

6. Subrogate PEPL to the extent of any and all rights that the State or its employees may have to the recovery or reimbursement of any payments made by PEPL on behalf of the State's employees. The State shall do nothing to prejudice such rights and shall cooperate with PEPL in the recovery or reimbursement of any sums.

ARTICLE X
TERMINATION OR DISSOLUTION

The State may withdraw from PEPL at the end of any coverage period by giving PEPL at least 180 days written notice of its desire to withdraw.

PEPL may decline renewal of the State's participation by giving the State at least 180 days written notice of its desire not to renew. Coverage may be terminated under this provision only at the end of a coverage period unless another date is mutually agreed upon.

Upon withdrawal, termination or dissolution for any reason, the State and PEPL shall reach an agreement on the disposition of all funds, reserves, surplus and claims.

THE PUBLIC ENTITY POOL FOR LIABILITY

By: _____
Craig Kaufmann, Director

THE STATE OF SOUTH DAKOTA

By: _____
Kristi Noem, Honorable Governor

Appendix A

THE PUBLIC ENTITY POOL FOR LIABILITY
Memorandum of Liability Coverage
to the Employees of the State of South Dakota

Declarations

Coverage Amount:	$1,000,000 per *occurrence*, subject to limitations set forth in SDCL ch. 3-22 and this Memorandum.
Coverage Period:	From July 1, 2020 through June 30, 2021.

THE PUBLIC ENTITY POOL FOR LIABILITY

Memorandum of Liability Coverage to the Employees of the State of South Dakota

In consideration of the Contribution stated in the Declarations and incorporating the provisions of SDCL ch. 3-22, except as altered by the Participation Agreement, *PEPL* and the *State* agree as follows:

I. COVERAGE DESCRIPTION

A. SOVEREIGN IMMUNITY

Except to the extent that coverage is specifically provided under this Memorandum, the *State* reserves on behalf of itself and the *employees* all rights of sovereign or governmental immunity.

B. DAMAGES COVERAGE

PEPL will pay damages, not excluded hereunder, on behalf of the *employee* that the *employee* becomes legally obligated to pay because of an *occurrence*, not excluded hereunder.

C. DEFENSE COVERAGE

PEPL has the right and duty to defend any claim or suit for damages not excluded hereunder, but:

1. *PEPL* may, at its discretion, investigate any *occurrence* and settle any claim or suit that may result, and
2. *PEPL*'s right and duty to defend ends after the Coverage Limit is exhausted by payments made or obligations assumed by *PEPL* for occurrences not excluded hereunder, and
3. PEPL has the right and duty, if the law allows for recovery of *Defense costs*, to apply to the Court for *Defense costs* PEPL incurred defending the claim or suit. Nothing in this section prevents PEPL or the State from waiving an award of *Defense costs* as a condition of settlement.

Defense costs are payable in addition to the Coverage Limit.

D. **APPROPRIATION AND EXPENDITURE AUTHORITY LIMITATION**

All liability recognized or created under this agreement is void, unless the *State* Legislature appropriates funds and grants expenditure authority as required to discharge such liability.

E. **EXCLUSIONS**

This Memorandum does not extend coverage or apply to any liability:

1. Assumed under contract, except this exclusion shall not apply to rental car contracts entered into by *employees* or to contracts specifically added by endorsement hereto;

2. Arising out of the ownership, operation, use, maintenance or entrustment of any *aircraft* owned or operated by, rented or loaned by or to any employee, except this exclusion shall not apply to the extent *PEPL* purchases insurance for such purposes;

3. Due to declared or undeclared war, riot, a concerted act of civil disobedience and similar *occurrences* or acts or conditions incident thereto. However this exclusion does not apply to liability arising from actions taken to protect persons or property;

4. Under workers' compensation, disability benefits, unemployment compensation or similar laws;

5. For *bodily injury* to an *employee* arising out of and in the course of employment by the *State*;

6. For injury to the spouse, child, parent, brother or sister of the *employee* in 5, above, as a consequence of the *bodily injury* to that *employee*;

7. Arising out of the actual, alleged, or threatened discharge, release or escape of *pollutants*;

8. Resulting from or contributed to in any manner by the hazardous properties of *nuclear material*;

9. For injuries resulting from or contributed to in any manner by the presence of asbestos;

10. Arising from or contributed to in any manner by acts, errors or omissions in the engineering or design of any public roadway or public transportation project;

11. For back pay and benefits and any costs relating to reinstatement of an *employee*, except this exclusion does not apply to any damages which may be awarded to an *employee* under any federal law or as a result of violations of an *employee's* rights as guaranteed by the United States Constitution, through either individual or official capacity claims against another *employee* or the *State*;

12. For *employee* grievances, actions and awards, except this exclusion does not apply to any damages which may be awarded to an *employee* under any federal law or as a result of violations of an *employee's* rights as guaranteed by the United States Constitution, through either individual or official capacity claims against another *employee* or the *State*;

13. For fines, penalties, punitive damages or exemplary damages;

14. For failure to perform, or breach of, a contractual obligation;

15. Arising out of the providing or the failure to provide *medical professional services* by *employees of the University of South Dakota School of Medicine*, except this exclusion shall not apply to *employees* of the University of South Dakota School of Medicine to the extent they are performing medical research during the course of their employment and as approved by the University of South Dakota School of Medicine. This exclusion also does not apply to employees of the School of Health Sciences to the extent they are performing approved medical research during the course of their employment;

16. For damages that are a result of a discretionary act or task. This exclusion does not apply if the damages are the result of a *ministerial act or task*;

17. To the extent the *occurrence* is covered by any valid and collectible liability insurance, except this exclusion shall not apply to liability insurance of the *employee* that protects the *employee* while driving a *State*-owned, *State*-leased, or *employee*-owned or leased vehicle in the conduct of *State* business, but the personal vehicle insurance shall provide primary coverage for the *occurrence* in the event the *employee* drives a vehicle not owned or leased by the *State* in the conduct of *State* business;

18. For damages measured by contract, as set forth in SDCL ch. 21-2;

19. For damage to property owned by the *State*;

20. Arising out of the ownership, operation, engineering or design of any airport, landing strip or similar facility. However, this exclusion shall not apply to state-owned hangars in the cities of Brookings, Vermillion, and Pierre, South Dakota;

21. For refund of taxes, fees and assessments;

22. For claims where notice was not given by the claimant within 180 days after the injury or as required by SDCL, ch. 3-21;

23. Arising out of the *employee* obtaining remuneration or financial gain to which the *employee* was not legally entitled;

24. Arising from collecting or attempting to collect taxes;

25. Arising from providing or attempting to provide emergency disaster relief services pursuant to SDCL ch. 34-48A;

26. Arising from, or contributed to in any manner by or through, acts, errors or omissions, activities or facilities of the (a) South Dakota Building Authority, its Board of Directors, or its employees; (b) South Dakota Health and Educational Facilities Authority, its Board of Directors, or its employees; (c) South Dakota Science and Technology Authority, its Board of Directors, or its employees; (d) South Dakota Educational Enhancement Facilities Corporation, its Board of Directors, or its employees; (e) South Dakota Ellsworth Development Authority, its Board of Directors, or its employees; and (f) South Dakota Housing Development Authority, its Board of Directors, or its employees;

27. Arising out of the employee's willful and wanton misconduct;

28. Arising in any manner from activities of South Dakota State University 4-H volunteers. No South Dakota 4-H volunteer is considered an *employee* under this Memorandum; or

29. To the extent the *occurrence* is covered by any valid and collectible cyber liability or media and information security protection insurance purchased by the *State*.

30. For *bodily injury* or property damage caused by, resulting from, or arising out of the actual or alleged transmission of a virus, bacterium, microorganism, or any communicable disease that induces or is capable of inducing physical distress, illness or disease, even if the claims against any *employee* or the *State* itself allege negligence or other wrongdoing in the supervising, hiring, employing, training or monitoring of others who may be infected with and spread a communicable disease, testing for a

communicable disease, failure to prevent the spread of a disease, or failure to report a disease to authorities.

II. COVERAGE AMOUNT

The Coverage Amount shown in the Declarations is the most *PEPL* will pay for damages for each occurrence, regardless of the number of:

A. *Employees* involved;

B. Claims made or suits brought for damages; or

C. Persons or organizations who sustain damages.

The Coverage Amount shown in the Declarations shall be reduced by any insurance that applies to an *occurrence* not excluded hereunder, and the coverage afforded by this Memorandum shall be excess of and not contribute with any such insurance. Notwithstanding the preceding sentence, this Memorandum shall be primary with respect to liability insurance of the *employee* that protects the *employee* while driving a *State* owned or leased vehicle in the conduct of state business.

An *occurrence* taking place over more than one Coverage Period shall be deemed to have taken place during the Coverage Period in which the *occurrence* first took place, and only that Coverage Period's Coverage Amount applies.

III. DEFINITIONS

1. *Aircraft* – any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders, and drones.

2. *Bodily injury* - injury, sickness or disease sustained by a person, including death resulting therefrom.

3. *Defense costs* - fees and expenses generated by and related to the adjustment, investigation, defense or litigation of a claim, including attorney's fees, court costs, and interest on judgments before they are paid. *Defense costs* shall not include the salaries and overhead of employees of the *State*, except as may be provided for under contract with the Attorney General.

4. *Employee* - all current and former employees and elected and appointed officials of the *State* whether classified, unclassified, licensed or certified, permanent or temporary, whether compensated or not, conducting State business. The term includes employees of all branches of government including the judicial and legislative branches and employees of constitutional, statutory and executive order boards, commissions, and offices. The term does not include independent contractors.

5. *Medical professional services* - the furnishing of:

   a. Medical, surgical, psychiatric, dental, nursing or other health care services, including the furnishing of food or beverages in connection therewith; or

   b. Drugs or medical, dental or surgical supplies or appliances.

6. *Ministerial act or task* - an act or task that involves obedience to instructions, but demands no special discretion, judgment or skill.

7. *Nuclear material* - Source material, special nuclear material or byproduct material, all as defined in the Atomic Energy Act of 1954 or any law amendatory thereto.

8. *Occurrence* - an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the *employee's* duties for the *State*. An injury arising out of continuous or repeated exposure to substantially the same general conditions is considered as arising out of one occurrence and will constitute only one occurrence for coverage purposes.

9. *PEPL* - the Public Entity Pool for Liability established by SDCL ch. 3-22.

10. *Pollutants* - any solid, liquid, gaseous or thermal irritant or contaminant.

11. *State* - the State of South Dakota.

THE PUBLIC ENTITY POOL FOR LIABILITY
MEMORANDUM OF LIABILITY COVERAGE
TO THE EMPLOYEES OF SOUTH DAKOTA

Endorsement No. 1

Privately-Owned Vehicles Operated by Employees of the State of South Dakota while on Official Duty During Periods of State Disaster Declarations by the Governor

Effective Date of Endorsement: July 1, 2020

Issue Date of Endorsement: July 1, 2020

Section IV, Special Coverage Extension, is amended as follows:

With respect to employees of the State of South Dakota who must use their privately-owned vehicles to travel on official business to conduct disaster relief-related work during periods of time when there has been a State Disaster Declaration by the Governor, coverage is provided by this Memorandum and shall be a combined single limit of liability of $1,000,000 to include coverage for bodily injury and property damage. This shall include damage to the employee's vehicle (collision and comprehensive coverage) when in use under the conditions set forth in this endorsement.

This extension shall only apply to employees of the State of South Dakota if all of the following conditions have been met:

1. The employee must drive to a workstation that is located in a city, town or rural location that is not their normal place of work.
2. The director of Fleet and Travel or the director's designated agent has certified that a state-owned fleet vehicle is not available during the period of time of required use.
3. The employee is on official business conducting work associated with a State Disaster Declaration by the Governor.

THE PUBLIC ENTITY POOL FOR LIABILITY

By: _____
Craig Ambach, Director

THE STATE OF SOUTH DAKOTA

By: _____
Kristi Noem, Honorable Governor

Supreme Court
for the
State of South Dakota

Appeal No. 30252

DOUG BARR and **DAWN BARR**,

Plaintiffs and Appellants,

vs.

JEFFREY A COLE, **WILLIAM D. SIMS**, and **GREGORY T. BREWERS**,

Defendants and Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County
Hon. John Brown (Ret.), Circuit Court Judge

Notice of Appeal filed February 13, 2023

Appellees' Brief of Jeffrey Cole and William Sims

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Preliminary Statement

Appellees Cole and Sims will refer to the Defendant Appellees, individually, by their surnames, and collectively as "Defendant Lawyers." Appellees will refer to Appellants, individually, as "Doug Barr" or "Dawn Barr," and collectively as "Plaintiffs."

Cole and Sims will refer to the Settled Record on Appeal as "SR", followed by the page number(s) assigned by the Minnehaha County Clerk of Courts. Cole and Sims will refer to the hearing transcript as "HT:," followed by the page number(s). They will refer to Exhibits as "Ex.," followed by the applicable Exhibit number. They will refer to materials in the Appellants' Brief by "Appellants' Br." followed by the page number(s).

Jurisdictional Statement

Cole and Sims agree with Appellants that the Court has jurisdiction to consider this appeal. This is an appeal from a final judgment dated February 6, 2023. (SR 1288-1289.) Notice of Entry of Judgment was served February 7, 2023. (SR 1290-1296.) Plaintiffs filed their Notice of Appeal on February 13, 2023. (SR 1297-1302.) The Court has jurisdiction of this appeal pursuant to SDCL § 15-26A-3(1).

Statement of Issues

To sue a lawyer for failing to assert a claim, a plaintiff must show the unasserted claim would have been successful. The PEPL Fund covers state employees for accidents arising within the scope of employment. If the state employee is outside the scope of their duties at the time of the accident, then is the defendant attorney entitled to summary judgment on failing to bring a claim against the PEPL Fund?

The circuit court ruled that if there was no PEPL Fund coverage, then there is no legal malpractice for failing to assert a claim against the PEPL Fund.

Haberer v. Rice, 511 N.W.2d 279 (S.D. 1994).

S.D. Publ. Entity Pool for Liab. v. Winger, 1997 S.D. 77, 566 N.W.2d 125.

> **If an employee departs from their duties for personal reasons, and not to serve the employer, then they are outside the scope of employment. Hughes was a law clerk, stationed in Yankton and living in Vermillion. At the time of the accident, Hughes had finished clerking a hearing in Parker, and was driving to a personal holiday party in Sioux Falls. Was Hughes within the scope of employment at the time of the accident?**

The circuit court ruled that Hughes was outside the scope of employment, and therefore there was no PEPL Fund coverage.

Terveen v. S.D. Dept. of Transp., 2015 S.D. 10, 861 N.W.2d 775.

S.D. Publ. Entity Pool for Liab. v. Winger, 1997 S.D. 77, 566 N.W.2d 125.

Statement of the Case

This is a legal malpractice case. In the underlying litigation, the Defendant Lawyers represented Plaintiffs in a personal injury action arising from a car accident. After settling the case, Plaintiffs sued the Defendant Lawyers for failing to

increase the available insurance coverage by timely asserting a claim against the Public Entity Pool for Liability[1] (the "PEPL Fund"). The Defendant Lawyers responded that the PEPL Fund did not provide coverage because the defendant driver was not within the scope of his state employment, and therefore, there was no claim to assert.

The parties brought cross-motions for summary judgment, which were heard by the Second Judicial Circuit Court, Minnehaha County, the Honorable John Brown (Ret.) presiding, on January 26, 2023. The circuit court concluded that the defendant driver was outside the scope of employment; therefore, the PEPL fund did not provide coverage for the accident. The court granted the Defendant Lawyers summary judgment.

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[1] The PEPL Fund is a self-funded pool of state government that provides indemnity protection for individual state employees.

The circuit court entered an ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and a JUDGMENT DISMISSING CLAIMS AGAINST ALL DEFENDANTS WITH PREJUDICE on February 6, 2023 (SR 1286-1289). This is an appeal from that summary judgment.

Statement of the Facts

1. THE UNDERLYING ACCIDENT

In January of 2017, attorney Greg Brewers called Jeff Cole to ask whether Cole and his partner, Bill Sims, would help Brewers represent his best friend in a car accident case. (SR 0177, Ex. A, Cole's Responses to Plaintiffs' First Discovery Requests at 7, Rog 14.) Brewers' friend, Doug Barr, had been injured in an auto accident on December 21, 2016 (the "Accident"). (SR 0127-0140, Ex. 42, Accident Report.) The Accident was caused by Stuart Hughes. Hughes failed to yield and pulled out in front of Doug on a highway. *Id.*

At the time of the Accident, Hughes was a law clerk for the First Judicial Circuit. (SR 0169, Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11.) He lived in Vermillion, and his duty station was Yankton. (SR 0180, Ex. B, Plaintiff's Responses to Defendants' First Requests for Admission, Requests 4 & 5.) That morning, Hughes drove from Vermillion to the Turner County Courthouse in Parker to attend a hearing. (SR 0170, Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 34.) After the hearing, Hughes left Parker, and "began the trip to Sioux Falls to visit family for a holiday dinner." (SR 0169, Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11.)

2. THE INITIAL REVIEW OF HUGHES'S TRIP TO SIOUX FALLS.

Early in the representation, Brewers told Cole and Sims that Hughes was a law clerk for the First Circuit. Cole and

Sims reviewed the accident report and found that the Accident was not in the First Circuit. The Accident was in Tea. (SR 0127-0140, Ex. 42, Accident Report.) Tea is in the Second Circuit. (SR 0184, Ex. C, Circuit Court Map.) First Circuit law clerks are stationed in either Yankton or Mitchell. (SR 0186, Ex. D, Kim Allison Deposition at 8:16-20.) The accident report also said that Hughes lived in Vermillion. A law clerk who lived in Vermillion would presumably be stationed in Yankton. The Accident occurred around 5:30 p.m., after the workday was over. And, from Parker, Tea is in the opposite direction of Yankton. Tea is also not on the route from Parker to Vermillion. Therefore, Defendant Attorneys concluded that the Accident did not occur in the scope of Hughes's work for the State. (SR 0194-0196, Ex. E, Jeff Cole Deposition at 11:20-13:5; and SR 0199-0200, Ex. F, William Sims Deposition at 21:23-22:17.)

3. LATER DISCOVERY ON HUGHES'S TRIP TO SIOUX FALLS.

On September 5, 2017, Hughes told Sims that, at the time of the accident, he was driving from a hearing in Parker back to his duty station in Yankton, and that workers compensation had paid his medical bills. (SR 0522, Ex. 23, William Sims Deposition, 28:5-12.) While that was inconsistent with the accident report, the Defendant Attorneys immediately served discovery requests on those subjects. (*See* SR 0168-0171, Ex. 100, Defendant's Answers to Plaintiffs' Interrogatories and Responses to Request for Production of Documents (First Set).)

Under oath, Hughes confirmed that, after the hearing in Parker, he "began the trip to Sioux Falls to visit family for a holiday dinner." (SR 0169, Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11.) Hughes's parents were hosting a holiday dinner because Hughes's "older brother and his wife were in town." (SR 0174, Ex. 101, Stuart Hughes Deposition at 15:3-10;

See also SR 0217, Ex. I, John Hughes Deposition at 6:12-20.) The Accident occurred while Hughes was on his way to that family holiday dinner.

Under oath, Hughes denied making a workers compensation claim. (SR 1242, Ex. K, Excerpts from Stuart Hughes Deposition, 36:7-9.) Instead, he responded that Nationwide and Dakotacare insurance had paid his medical bills. (SR 0170a[2], Ex. 100, Hughes' Answers to Barr's 1st Interrogs & RFP at 13.)

After this legal malpractice suit was commenced, records from the State of South Dakota revealed that Hughes originally told Kim Allison, the First Circuit Court Administrator, that the Accident happened when he was on his way back from

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[2] Defendant Lawyers realized that the page referenced in their Statement of Undisputed Material Facts (SR 1228) was inadvertently omitted from the exhibit compiled (Ex. 100) and attached to the Declaration of Jeffrey G. Hurd. The Parties have filed a Stipulation to supplement the Settled Record and have marked the omitted page as "SR 170a".

Parker. (SR 0872, Ex. AA, Kim Allison Deposition, 22:4-10.) Because he merely said that "he was on his way back from Parker," Allison "assumed it was directly." (SR 0873, Ex. AA, Kim Allison Deposition, 23:12-20.) Based on Hughes's statements, Allison told the HR office in Pierre that he was injured while returning home to Vermillion from Parker. (SR 0872, Ex. AA, Kim Allison Deposition, 22:7-14.)

After Allison received the accident report showing the Accident occurred in Lincoln County, she questioned Hughes's story. At that point, he admitted that he had actually been driving from Parker to Sioux Falls. (SR 0871-0873, Ex. AA, Kim Allison Deposition, 21:24-23:20.) Allison confirmed that no one acting on behalf of the First Judicial Circuit asked Hughes to drive to Sioux Falls. (SR 0182, Ex. B, Plaintiffs' Responses to Defendants' First Request for Admissions at p. 4, RFA No. 15.) Allison confirmed that there was nothing about Hughes's employment with the UJS that would have compelled him to

drive to Sioux Falls. (SR 0190, Ex. D, Kim Allison Deposition at 44:14-17.) Hughes's trip to Sioux Falls was on his own time and had nothing to do with his duties and responsibilities for the UJS. (SR 0191, Ex. D, Kim Allison Deposition at 53:4-9.)

Argument

Plaintiffs' theory is that the PEPL Fund provided coverage for the accident. They claim that Defendant Attorneys did not figure out coverage existed before the 180-day notice period expired, so they negligently failed to give notice.

But Plaintiffs build their appeal upon the wrong legal standard for legal malpractice. Plaintiffs assert that "[t]his decision will turn on what a 'viable' claim means when the client walks into the attorney's office." (Appellants' Br., p. 15.) Plaintiffs cite no authority for that proposition;[3] and it is not

[3] Because they fail to cite authority, they have waived that argument. *Steele v. Bonner*, 2010 S.D. 37, ¶ 35, 782 N.W.2d 379, 386 ("As has been stated many times by this Court, Bonner's failure to cite authority is fatal.").

the law. The law requires Plaintiffs to demonstrate that their claim against the PEPL Fund would have been successful.

The circuit court concluded that the PEPL Fund did not provide coverage for the Accident because Hughes deviated from his employment in taking a personal holiday trip to Sioux Falls. (HT: 35:6-10.) And the undisputed facts show that decision is correct. There was no claim against the PEPL Fund because Hughes was outside the scope of his employment.

1. STANDARD OF REVIEW

The Court reviews the circuit court's entry of summary judgment *de novo*. *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174. This Court decides "only whether genuine issues of material fact exist and whether the law was correctly applied." *Hahne v. Burr*, 2005 S.D. 108, ¶ 6, 705 N.W.2d 867, 870–71. "If any legal basis exists to support the trial court's ruling, [this Court] will affirm." *Id.*

Summary judgment is not "an extreme remedy." SDCL § 15-6-56 is a statute like any other. It applies or it does not; and it applies in this case. "Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Veblen Dist. v. Multi-Cmty. Co-op. Dairy*, 2012 S.D. 26, ¶ 7, 813 N.W.2d 161, 164 (*quoting One Star v. Sisters of St. Francis, Denver, Colo.*, 2008 S.D. 55, ¶ 9, 752 N.W.2d 668, 674).

2. PLAINTIFFS MUST SHOW THAT THE PEPL FUND PROVIDED COVERAGE FOR THE ACCIDENT.

The elements in a legal malpractice case are:

> 1. the existence of an attorney-client relationship giving rise to a duty;
>
> 2. that the attorney, either by an act or a failure to act, violated or breached that duty;
>
> 3. that the attorney's breach of duty proximately caused injury to the client; and

> 4. that the client sustained actual injury, loss or damage.

Haberer v. Rice, 511 N.W.2d 279, 284 (S.D. 1994). The third element, proximate cause, requires "but for" causation; and that requires a plaintiff to prove that the underlying case would have been successful. "In other words, the plaintiff must show that 'but for' the negligence of the lawyer, the client's cause of action or defense against a claim in the underlying action would have been successful." *Id.* (*quoting* D. Meiselman, ATTORNEY MALPRACTICE: LAW AND PROCEDURE, § 3:1, p. 40 (1980)).

A. To establish causation, Plaintiffs must prove the case-within-the-case.

Because a legal malpractice case requires the plaintiff to show "that but for his attorney's negligence he would have been successful in the original litigation [,] . . . '[t]he client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.'" *Haberer*, 511

N.W.2d at 285 (*quoting Basic Food Industries, Inc. v. Grant*, 310 N.W.2d. 26, 29 (Mich. App. 1981)). That imposes three additional elements on a legal malpractice plaintiff. In addition to proving the usual elements of negligence, the plaintiff in a legal malpractice case must prove:

"1) that the underlying claim was valid,

2) that it would have resulted in a favorable judgment had it not been for the attorney's error, and

3) the amount of the judgment and that the judgment was collectible."

Haberer, 511 N.W.2d at 285 (*citing* D. Meiselman, *Attorney Malpractice: Law and Procedure*, § 3:5, pp.39-40 (1980)).

To meet that burden, the plaintiff must typically try the underlying case to a successful conclusion. *Haberer*, 511 N.W.2d at 285 ("The manner in which the plaintiff can establish what should have transpired in the underlying action

is to recreate, i.e. litigate, an action which was never tried.") The point is to show what would have actually happened had the case been litigated as the plaintiff alleges it should have been litigated.

> This procedure of recreating the underlying action is known as a suit within a suit, a trial within a trial, an action within an action, a case within a case, to name but a few of the designations. The objective is to establish what the result would have been had the case been filed.

Id. "This procedure amounts to trying two separate and distinct lawsuits." *Id.* And that "is the accepted and traditional means of resolving the issues involved in the underlying proceedings in a legal malpractice action." *Id.*

B. There is no "loss of chance" doctrine for legal malpractice.

Plaintiffs ignore the proper legal standard. Instead, but without expressly saying so, they seem to propose that the Court adopt a "loss of chance" doctrine for legal malpractice

claims.[4] Plaintiffs build their argument by extracting a word from *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office,* 2020 S.D. 5, ¶ 47, 939 N.W.2d 32, 48, and then defining it with Black's Law Dictionary, rather than defining it by applying the decisions of this Court. In discussing the continuing tort doctrine, the *Robinson-Podoll* Court said,

> Similarly, Robinson-Podoll will be required to show that she had a viable claim for damages in the personal injury action, a viable claim for legal malpractice against Howey-Fox involving the missed personal injury statute of limitations, and a viable claim for legal malpractice against Howey-Fox in failing to disclose the initial claim of malpractice to Robinson-Podoll during the ongoing representation.

Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office, 2020 S.D. 5, ¶ 47, 939 N.W.2d 32, 48. Then, Plaintiffs define "viable" by Black's Law Dictionary, while ignoring this Court's

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[4] It should also be noted that Plaintiffs did not assert a "loss of chance" argument in the circuit court. "Arguments not raised at the trial level are deemed waived on appeal." *State v. Hi Ta Lar*, 2018 S.D. 18, 908 N.W.2d 181, 187, n. 5, *citing Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 12 n.5, 764 N.W.2d 474, 480 n. 5.

holdings in *Haberer*, 511 N.W.2d at 284, and *Taylor Oil Co. v. Weisensee*, 334 N.W.2d 27, 29 (S.D. 1983).

First, *Haberer* and *Taylor Oil* make clear that Plaintiffs are using the wrong legal standard. *Haberer*, 511 N.W.2d at 284 ("the plaintiff must show that 'but for' the negligence of the lawyer, the client's cause of action or defense against a claim in the underlying action would have been successful."); *Taylor Oil Co.*, 334 N.W.2d at 29 ("A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectible in some amount, for therein lies the measure of his damages.").

Second, Courts that have been presented with a "loss of chance" argument "have rejected it as speculative, as inconsistent with the case-within-a-case methodology, and as contrary to public policy." Ronald E. Mallen, 4 LEGAL MALPRACTICE § 33:31 (2023 ed.). Such a standard would be

utterly unworkable in practice. As Mallen noted, clients would urge that even the worst case has *some* value. *Id.* Therefore, the "potential exposure to the legal profession would be immense since even a claim likely to lose 95 percent of the time could have some theoretical value." *Id.* One can see the consequences of adopting such a standard. It would abrogate the long-standing "case within a case" standard because plaintiffs could concede that the case would never win at trial—it would merely need to possess some nuisance or extortionary value. It would force lawyers to press every absurd claim or proposition to avoid a malpractice claim. And there is no logical reason it would be limited to claims. Lawyers facing such a standard would be forced to raise every conceivable objection, motion, and issue on appeal.

The Court should not accept Plaintiffs' invitation to change the *Haberer* standard to a "loss of chance" or "any conceivable value" standard.

3. PLAINTIFFS' CLAIM FAILS BECAUSE THE PEPL FUND DID NOT PROVIDE COVERAGE FOR THIS ACCIDENT.

A. The PEPL Fund covers only accidents that occur within the course and scope of Hughes's employment for the State.

PEPL Fund coverage is set out in an agreement between PEPL and State of South Dakota. That agreement limits coverage to acts within the course and scope of an employee's duties for the State.

i) The Memorandum of Coverage defines the scope of PEPL Fund coverage.

The PEPL Fund provides liability coverage for state employees "as provided for within the coverage document issued by PEPL." SDCL § 3-22-1. The "coverage document issued by PEPL" is the Participation Agreement Between the Public Entity Pool for Liability and the State of South Dakota (SR 0142, Ex. 46, PEPL Fund Participation Agreement and Memorandum ("This Agreement sets forth the terms and conditions applicable to the tort liability coverage program offered by PEPL to employees of the State[.]".))

The Participation Agreement at issue is the 2016 Agreement. (SR 0209, Ex. H, Craig Ambach Deposition at 21:23-22:6.) The Memorandum of Coverage that is attached to the Participation Agreement sets out the scope and limit of coverage. (SR 0143, Ex. 46, PEPL Fund Participation Agreement and Memorandum ("The scope and limits of coverage shall be as set forth in the Memorandum of Coverage attached hereto and incorporated herein as Appendix A.").)

ii) The Memorandum of Coverage limits PEPL Fund coverage to those acts arising within the course and scope of the employee's work for the State.

The PEPL Fund covers damages that a covered employee "becomes legally obligated to pay because of an *occurrence*." (SR 0148, Ex. 46, PEPL Fund Participation Agreement and Memorandum (emphasis in original).) An "occurrence" is "an accident, act, error, omission or event, during the Coverage Period, which results in damages and arises within the scope of the employee's duties for the State." (SR 0153, Ex. 46, PEPL

Fund Participation Agreement and Memorandum; SR 0211-0213, Ex. H, Craig Ambach Deposition at 24:23-25:11; 26:2-7.) *See also, S.D. Publ. Entity Pool for Liab. V. Winger*, 1997 S.D. 77, ¶ 2, 566 N.W.2d 125, 126 (The PEPL Fund provides coverage for employees "in the scope of employment and while acting on behalf of or in the interest of their employers.").

B. Hughes was not within the course and scope of employment at the time of the Accident because an employee is within the scope of employment only when intending to carry out the employer's purposes, and Hughes was driving on a personal trip to a family, holiday dinner.

The undisputed fact that Hughes was serving his personal purposes at the time of the accident is dispositive of scope of employment in this case. In South Dakota, the test for course and scope of employment is whether the employee is acting for the employer's purposes or acting for the employee's own purposes. The Court must determine "'whether the purpose of the act was to serve the principal." *Tammen v. Tronvold*, 2021

S.D. 56, ¶ 19, 965 N.W.2d 161, 169. "An act is within the scope of a servant's employment where it is reasonably necessary or appropriate to accomplish the purpose of his employment and *intended for that purpose*[.]" *Winger*, 1997 S.D. 77 at ¶ 9, 566 N.W.2d at 128 (citations omitted) (emphasis added). Hughes's trip to Sioux Falls was not reasonably necessary or appropriate to accomplish the purpose of his UJS employment. And, it is completely undisputed that there was nothing about the trip to Sioux Falls that was *intended* for purposes of his UJS employment.

Employees are outside the scope of their jobs "when they substantially deviate from the course of employment." *Winger*, 1997 S.D. 77 at ¶ 10, 566 N.W.2d at 128. And, a substantial deviation occurs "when employees abandon the work purpose in furtherance of a personal motive or 'frolic.'" *Id.* There was no work purpose for Hughes's drive to Sioux Falls. No one from the UJS asked him to drive to Sioux Falls. There was nothing

about Hughes's employment that would have compelled him to drive to Sioux Falls. Hughes's purpose was wholly personal.

In a very similar case, this Court discussed these rules in *Terveen v. S. Dakota Dep't of Transp.*, 2015 S.D. 10, 861 N.W.2d 775. "Terveen was on a business trip from Belle Fourche to Yankton, South Dakota. On the return trip, Terveen was injured in a car accident outside Belle Fourche while driving on a dead-end road just off the highway." *Id.* at ¶ 1, 861 N.W.2d at 777. At the time of the accident, Terveen was about one-half mile away from the highway on Prairie Hills Road. *Id.* at ¶ 3, 861 N.W.2d at 777. Terveen argued that the accident arose out of his employment because he was injured on his way back from a work-related trip to Yankton. *Id.* at ¶ 10, 861 N.W.2d at 779. This Court rejected that argument.

The *Terveen* Court agreed that he was on a business trip, but the issue was why he was on that particular road at that particular time.

> Terveen was not engaging in work-related travel at the time of the accident. Even while acknowledging that Terveen's employment caused him to travel from Yankton to Belle Fourche, Terveen's employment did not compel him to travel down Prairie Hills Road. Terveen responds by arguing that he would not have been in a position to go down Prairie Hills Road if he were not coming back from Yankton on work-related travel. While Terveen's employment exposes him to the risk of a car accident, his employment did not expose him to the risk of injury on *Prairie Hills Road*.

Id. at ¶ 11, 861 N.W.2d at 779 (emphasis in original). The exact same conclusion applies to this case. Hughes's employment may have exposed him to the risk of an accident between Vermillion and Parker, but it did not expose him to the risk of an accident in Lincoln County near Tea.

And we know that the PEPL Fund would have denied coverage, because the PEPL Fund's executive director was asked about it. If Defendant Attorneys had tried to make a claim for PEPL coverage, the PEPL Fund would have declined

coverage; and it would have filed a declaratory judgment action.

> If it was determined that he deviated from his home station, it wasn't approved, there was no work-related reason for the deviation, and it was solely personal, I would visit with general counsel and contend there is no secondary coverage, and probably file for a dec action with those facts.

(SR 0214, Ex. H, Craig Ambach Deposition at 37:13-19.) The facts Mr. Ambach said would cause him to bring a declaratory judgment action are the undisputed facts of the accident.

C. Plaintiffs attempt to create a factual dispute using proof contrary to admitted fact.

The truth of the material facts is undisputed. But because Hughes originally told Kim Allison and South Dakota Workers Compensation that he was returning home to Vermillion at the time of the accident, South Dakota's internal files both repeat and act upon what everyone now knows was false information. Plaintiffs use those false records to try to create factual

disputes. But evidence suggesting admittedly false information does not create a "genuine" dispute of fact.

The issue of genuineness tests the weight of the non-movant's evidence. Not all factual disputes are genuine. A dispute is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 17, 714 N.W.2d 884, 891 (citations omitted). Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (U.S. 1986). Rather, Plaintiffs must "establish significant probative evidence to prevent summary judgment." *Great West Cas. Co. v. Travelers Indem. Co.*, 925 F. Supp. 1455, 1462 (D.S.D. 1996) aff'd 111 F.3d 135 (8th Cir. 1997). There must be "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-7 (U.S. 1986) (citations omitted)

(emphasis in original). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-7 (U.S. 1986).

Because Hughes told Kim Allison that he was returning home to Vermillion at that time of the accident, she repeated that falsehood to the HR office in Pierre. (SR 0872, Ex. AA, Kim Allison Deposition, 22:7-14.) Hughes' First Report of Injury to workers compensation said that he was "[r]eturning home from work at the Parker courthouse" when the accident occurred. (SR 0726, Ex. 27, Lynn Job Deposition, 16:2-11; *See also* SR 0436, Ex. 19, Email Correspondence.) When South Dakota Workers Compensation specifically asked, Allison responded, "Stuart's duty station is in Yankton but he resides in Vermillion. He was going home to Vermillion from Parker which was where he was required to be that day for court by

Judge Gering." (SR 0436, Ex. 19, Email Correspondence.) In making the compensability determination, the only information Workers Compensation was provided were the statements from Allison and Hughes. (SR 0735-0736, Ex. 27, Lynn Job Deposition, 25:24-26:4.) But all of that is false, and all parties know it to be false.

Hughes subsequently admitted to Allison that he was actually going to Sioux Falls when he caused the accident. (SR 0871-0873, Ex. AA, Kim Allison Deposition, 21:24-23:20.) He then testified in his deposition and in his interrogatory answers that he was going "to Sioux Falls to visit family for a holiday dinner." (SR 0169, Ex. 100, Hughes's Answers to Barrs' First Interrogatories and Requests for Production, Interrogatory No. 11; SR 0173, Ex. 101, Stuart Hughes Deposition, 14:24-15:2.)

The material *facts* are not in dispute. Hughes left work in Parker to attend a family holiday dinner in Sioux Falls. The First Circuit did not ask him to go to Sioux Falls, it had no

reason for him to go to Sioux Falls, and he had no business purpose for going to Sioux Falls. All of that is undisputed. One cannot create a material dispute of fact using admittedly false information.

Conclusion

Law clerks who drive to attend family functions or private parties outside of their circuit are not serving the UJS. They are outside the scope of their duties, and the PEPL Fund does not provide coverage for their auto accidents. Plaintiffs cannot meet the elements of a legal malpractice claim because a claim against the PEPL Fund would fail.

The Court should affirm the circuit court's grant of summary judgment in favor of the Defendant Attorneys.

Request for Oral Argument

Appellees respectfully request that the Court grant them oral argument on the issues presented in the appeal.

Respectfully submitted the 20th day of June 2023.

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Certificate of Compliance

This brief is submitted under SDCL § 15-26A-66(b). I certify that the brief complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which this brief was prepared, the brief contains 5521 words and 27801 characters, including the table of contents, table of cases, jurisdictional statement, statement of legal issues, and any certificates of counsel, but excluding any addendum materials.

Certificate of Service

The undersigned hereby certifies that he electronically filed a copy of this legal document with the South Dakota Supreme Court and that the original of the same were filed by serving them upon:

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Dated this 20th day of June 2023.

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

No. 30252

DOUG BARR and DAWN BARR

Plaintiffs and Appellants,

vs.

JEFFREY A. COLE, WILLIAM D. SIMS, and GREGORY T. BREWERS

Defendants and Appellees.

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

HONORABLE JOHN BROWN, Retired
Presiding Judge

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Notice of Appeal filed February 13, 2023

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The Appellees ask this Court to apply their version of the facts to affirm the Trial Court's grant of summary judgment. Instead, this Court should reverse the Trial Court because—when applying the correct summary judgment standard—the facts show no *substantial deviation* occurred as a matter of law and material questions of fact remain. The material facts include whether Stuart Hughes traveling three miles north of Parker and towards I-29 was foreseeable when he drove away from the courthouse in Parker, and whether Stuart Hughes had the implied consent of the State (UJS) to do so.

In addition to facts that should be left to a jury, the Barrs believe the recent decision in *Robinson-Podoll* provides the correct legal standard for a legal malpractice case—the plaintiff is required to show "a viable claim for damages" in the underlying case.

1. No substantial deviation occurred.

The only way this Court can find a substantial deviation is if this Court makes inferences from the facts that are in a light most favorable to the Appellees' version of events. When applying the correct summary judgment standard—that all inferences of fact are viewed in the light most favorable to the Barrs—the facts show that no substantial deviation occurred.

The Appellees need this Court to accept their facts that rely on cherry-picked lines from Ms. Allison's deposition. The Barrs accept that Ms. Allison may have provided testimony that helps some of Appellees' arguments, but the

Appellees ignore the testimony that discredits that a substantial deviation occurred:

1. The Unified Judicial System (UJS) allows law clerks to drive their own vehicles a shorter distance to attend hearings, they do not have to travel to and from their assigned duty station. (SR 752.)
2. As a law clerk, there is an expectation by the UJS that the law clerk will drive to different hearings. (SR 751.)
3. The UJS expects that a law clerk will travel a lot during trials in the Circuit. (SR 754.)
4. Law clerks must drive to any county where a Judge requests them to go within the First Circuit, which could be any county in the First Circuit. (SR 753-754.)
5. The UJS has no policy about where a law clerk stays after a hearing; they are free to stay where they please. (SR 758.)
6. If a law clerk left a hearing in Parker, and then drove to Sioux Falls instead of the Yankton duty station, the UJS would pay the mileage as if the law clerk drove to Yankton. (SR 758.)
7. The UJS allows law clerks to take any route to their duty station or home—the UJS does not require a certain path from a courthouse to their duty station. (SR 766.)
8. The UJS allows law clerks to travel via Interstate instead of Highway 19 to return from a hearing in Parker. (SR 766.)
9. It made no difference to the UJS whether Stuart Hughes was driving to his home or Sioux Falls—the UJS would reimburse him for his mileage either way. (SR 769.)

10. Ms. Allison agreed that one of the routes Stuart Hughes could travel back from Parker is to go to Interstate 29 and head south. (SR 772.)
11. During the interview process to be a law clerk, the UJS informs prospective law clerks that traveling to hearings is an expectation of a law clerk. (SR 773.)
12. The UJS would anticipate that Stuart Hughes would be traveling in Lincoln County because it would fit a path of taking "the interstate home from Parker to Vermillion." (SR 775.)
13. The UJS reimburses law clerks because traveling is in the course of their duties. (SR 785.)
14. The UJS looks at mileage from where the person stayed the night or is going to stay the night—it does not always have to be to the law clerk's home. (SR 787.)
15. Ms. Allison believes that Stuart Hughes actually lived in Sioux Falls at some point during his clerkship, but is unsure of when that living arrangement began. (SR 788.)
16. There is no UJS policy that prohibits reimbursement for travel if a law clerk drives from Parker County to Lincoln County. (SR 790.)

Ms. Allison's testimony—viewed in a light most favorable to the Barrs' case—reveals that Stuart Hughes was allowed to drive to Sioux Falls under UJS policies, that the UJS bases its payment on where a clerk stays (not always his homeplace or duty station), a route traveling on I-29 is a route allowed by the law clerk or judge to travel from Parker to Vermillion, and traveling is an expectation and duty of a law clerk.

When applying their analysis of their version of the facts, the Appellees also failed to provide this Court a full picture of the law on the scope of employment issue. Specifically, although *Winger* is cited in both briefs, neither Appellee brief includes the following legal standards that this Court applies to the scope of employment question:

> Most critical to deciding coverage here is the question whether Winger was acting within the scope of employment at the time the accident occurred. An act "is within the scope of a servant's employment where it is reasonably necessary or appropriate to accomplish the purpose of his employment, **and intended for that purpose, although in excess of the powers actually conferred on the servant by the master.**" *Alberts*, 80 S.D. at 307, 123 N.W.2d at 98. **Considerations of time, place, and circumstance assist our evaluation.** *Krier v. Dick's Linoleum Shop*, 78 S.D. 116, 119, 98 N.W.2d 486, 487 (1959). Employees perform within the scope of employment **even when they act with only implied authority.** *Howell v. Cardinal Industries, Inc.*, 497 N.W.2d 709, 711–12 (S.D.1993). **Such authority exists if an act is implicitly directed by an employer, or is of the same general nature of what is empowered, or is incident to conduct authorized.** *Deuchar*, 410 N.W.2d at 180. If employers decline to specify the manner in which their employees must perform, **employees may use "usual or suitable means" to accomplish their tasks.** *Wollman v. Gross*, 484 F.Supp. 598, 602 (D.S.D.1980)(citing *Alberts*, 80 S.D. at 308, 123 N.W.2d at 99), *aff'd* 637 F.2d 544 (8thCir.1980).

South Dakota Public Entity Pool for Liability v. Winger, 1997 S.D. 77, ¶9, 566 N.W.2d 125, 128 (emphasis added).

At the summary judgment stage, after a review of Ms. Allison's deposition in a light most favorable to the Barrs' case, it is apparent that Stuart Hughes' travel after leaving the courthouse in Parker was implicitly allowed by the UJS. The UJS allows law clerks to be reimbursed for driving to locations other than

their duty station or residence—which Sioux Falls would have been. Further, when looking at the time, location, and circumstances of where the accident occurred—it fits within the implied authority the UJS provided Stuart Hughes. The accident occurred soon after the workday ended at 5:30 p.m.; the location of the accident was a few miles north of Parker; Stuart Hughes was heading east toward the interstate; and Stuart Hughes was driving back to his dad's home to stay. (In addition to the facts above, see John Hughes' deposition at SR 814, and the Accident Report at SR 127-133.) Additionally, the facts support that Stuart Hughes was driving to Sioux Falls to go to his parents' house and had stayed at his parents' house the night before (SR 815-816)—the UJS allows reimbursement for travel when a law clerk stays at a location other than their home or duty station.

Also missing from Appellees' *Winger* analysis is any discussion regarding Stuart Hughes as an "outside employee." In fact, at the summary judgment stage, the inferences from the facts in the record support that Stuart Hughes is an "outside employee." Specifically, Ms. Allison described in detail during her deposition the law clerk's traveling responsibilities—referring to it as a duty and part of the interviewing process with a prospective law clerk. (See facts above.)

When the Appellees ignore this legal concept, they don't have to address that *Winger* specifically holds that "[t]he 'course of the employment' of an outside employee is necessarily broader than that of an ordinary employee." *Winger*, at ¶ 14. At the summary judgment stage, the record and law supported a dispute of material fact as to whether Stuart Hughes was an "outside employee." Because the Trial Court applied the Appellees' version of facts to that analysis, the Trial Court's ruling should be dismissed.

Next, the Appellees claim Stuart Hughes traveling a short distance north of the courthouse and east towards the interstate was a substantial deviation based only on their version of the facts—by claiming that the travel constituted "no work purpose," and that "no one asked Stuart Hughes to travel to Sioux Falls," and that it was "wholly personal." (See Appellees Cole and Sims' Brief p. 17.) However, these conclusory "factual" remarks ignore that the UJS allows law clerks to stay the night at places other than their homes, that the UJS would reimburse Stuart Hughes for traveling to stay in Sioux Falls, and that the location of the accident fit a route that the UJS would allow Stuart Hughes to take to get to Vermillion.

Lastly, the Appellees' main component of their argument is claiming that Stuart Hughes intended to go to a family party in Sioux Falls, so that cannot be work related and must be a *substantial deviation*. However, even taking Appellees' version of the facts as true about Stuart Hughes' intention, no substantial deviation had occurred at the time and location of the accident. Stuart Hughes was not only on a route approved by the UJS to head to his home, but he was also on a route to his father's house—and the UJS pays mileage to either one. The Appellees' argument requires this Court to only look at Stuart Hughes' supposed intention while driving, instead of where he was actually at and the authority the UJS granted him to stay the night somewhere other than his homeplace or duty station. Under the Appellees' theory, if Stuart Hughes had been driving south on Highway 19 when the accident occurred, but intended to go to a party in Sioux Falls, then he would have substantially deviated from his work duties—even though his route was approved by his employer!

2. Hughes is different than *Terveen*.

Further, both Appellees attempt to compare the facts of this case to *Terveen*.[1] Such a comparison is disingenuous and ignores the distinctive factual differences of the travel by Stuart Hughes. The employer/employee relationship between Stuart Hughes and the UJS included much different expectations and duties than the employee in *Terveen*. Stuart Hughes was engaged in work related travel at the time of the accident because Stuart Hughes' employment included the expectation of travel and reimbursement for travel from the Parker Courthouse to Sioux Falls, Vermillion, or his duty station in Yankton.

The Appellees attempt to use *Terveen* to support that Stuart Hughes was taking a substantial deviation because he did not get "back on the beam." *Id.* at ¶ 21. Again, the difference between *Terveen* and Stuart Hughes' employment is that Stuart Hughes' employment allowed for him to be doing the travel that he was doing at the time of the accident. The UJS would reimburse Stuart Hughes for traveling to Sioux Falls. Further, if the "back to the beam" rule was applicable, Stuart Hughes was "back on the beam" when he started heading east towards the interstate because Stuart Hughes would be heading on a route that the UJS admitted was a route that one could take home from the Parker Courthouse to Vermillion.

3. A material dispute of fact exists as to foreseeability.

The Trial Court erred because it granted summary judgment when it found a substantial deviation occurred as a matter of law. Instead, the correct result, given the record before this Court, is that no substantial deviation occurred as a

[1] *Terveen v. S.D. Dept. of Transp.*, 2015 S.D. 10, 861 N.W.2d 775.

matter of law, and a jury should determine whether Stuart Hughes acted within the scope of his employment.

This process follows this Court's recent holding in *Tammen v. Tronvold*, 2021 S.D. 56, 965 N.W. 2d 161:

> Ordinarily, "the question of whether the act of a servant was within the scope of employment must, in most cases, be a question of fact for the jury." Whether an employee is within the scope of employment often involves questions of foreseeability that may require resolution by the trier of fact.

Id. at ¶ 20 (citations omitted).

Again, after a review of the record in a light most favorable to the Barrs, we are left with a factual dispute regarding the scope of employment and the foreseeability of Stuart Hughes' decision to travel three miles north of the courthouse where he worked and east towards Interstate 29.

4. The workers' compensation benefits story supports that the UJS believed Stuart Hughes acted within his scope of employment.

Appellees spend a significant portion of their Brief arguing that the payment of workers' compensation benefits is not helpful to show that Stuart Hughes acted within the scope of his employment. However, the Appellees' argument ignores that after the UJS knew that Stuart Hughes was driving with an intent to go to Sioux Falls, the UJS took no action to clarify that that conduct was outside the scope of his employment.

As Appellee Brewer described on p. 29 of his Brief, the workers' compensation file does not show that Stuart Hughes was intending to go to Sioux Falls instead of Vermillion or Yankton. However, it is undisputed that the UJS knew that information. (Allison Depo. pp. 21:24-23:20.) (SR 871-873.) Instead of

informing Lynn Job, the workers' compensation adjuster, the UJS took no action to clarify that Stuart Hughes was somehow not on work time because he was traveling to Sioux Falls. Further, the UJS took no action to attempt to recover any of the mileage it paid Stuart Hughes for the mileage on that day of the accident. The facts undisputedly show that Stuart Hughes was paid mileage that day for travel from Vermillion to Parker and back to Vermillion. Of course, Stuart Hughes did not travel all those miles—he was in an accident within 18 miles of the Parker courthouse. That said, the UJS still paid him those miles—affirming that the UJS continued to treat Stuart Hughes as though he was on work time at the time of the accident.

5. Summary judgment is not appropriate for a viable claim.

The Appellees argue that summary judgment is necessary because the Barrs must prove—at the summary judgment stage—that the underlying case would have had a 100% chance of success. To the contrary, the Barrs do not believe that is the legal malpractice standard this Court recently described in *Robinson v. Podoll*, which described that a legal malpractice claim requires a "viable claim for damages" in the underlying action.

The Barrs' position is not contrary to South Dakota law and is not abrogating the case-within-a-case requirement. Instead, the Barrs' position is that summary judgment is inappropriate when they can show a viable claim for damages existed when the Barrs' lawyers failed to put the Public Entity Pool for

Liability (PEPL Fund) on notice and then intentionally concealed that inaction from the Barrs.[2]

a. What is a viable claim?

The Barrs agree with the Appellees' recitation of the South Dakota law on the elements for malpractice and the requirement of a case-within-a-case legal standard. The distinction between the Barrs' position and the Appellees' position is regarding the meaning of a viable claim and where that fits within the elements of a legal malpractice claim. Frankly, based on the South Dakota cases, the question seems to be fairly unanswered by this Court. This appeal allows the Court to clarify the prima facie showing a Plaintiff must have at the summary judgment stage.

In a case cited by Appellee Brewer on p. 15, *Lebair v. Carey*, in the context of a legal malpractice case that involved a blown statute of limitations on a medical malpractice case, the Montana Supreme Court held:

> In light of our conclusion that the Labairs presented the requisite expert testimony and evidence to avoid a summary judgment ruling against them, it is clear that what the Labairs lost was the real opportunity to pursue a claim that was capable of surviving summary judgment, and thus may also have been capable of generating a favorable outcome by way of settlement or trial.

Labair v. Carey, 2012 MT 312, ¶ 34, 367 Mont. 453, 465–66, 291 P.3d 1160, 1168.

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[2] Contrary to both Appellees' remarks, this argument in Appellants' opening Brief thoroughly cited the *Robison-Podoll* decision. (See Appellants' Brief at pp.15-17.) Further, at the Trial Court level, this argument was preserved by the Barrs' attachment of their expert opinion from attorney Ken Barker. (See Barrs' Reply Brief in Supp. Mot. for Summ. Judgment at SR 1246-1258 and Barker report at SR 1254-1255.)

Therefore, this Montana case provides guidance that a viable claim could be defined as one that could survive summary judgment.

The Barrs request that this Court define what a viable claim is and whether it is accomplished if the underlying claim would have survived summary judgment. Like the case in Montana, the Barrs retrieved and presented an expert opinion that the missed statute of limitations by the Appellees caused damages to the Barrs that could total $500,000. (Appellants' App. 23-37; SR 959-973.)

In summary, the question before the Court on the "viable claim" standard is where does it fit in the prima facie showing of the legal malpractice elements? Based on the Montana reasoning, and the description in the *Robinson-Podoll* decision, it is the Barrs' position that a showing of viable claim goes towards the extent of damages rather than causation. Because an injury is required for the causation element, the Barrs believe this Court's use of *viable claim* sets the standard for what an injury may be in the context of a legal malpractice case.

To the contrary, the Appellees argue that *Haberer* and the Loss of Chance statute, SDCL 20-9-1.1, prevent the Barrs' malpractice case when the underlying case was viable, instead of absolute. First, if the Loss of Chance statute applied to the facts where an attorney missed a statute of limitations, it would make a recovery for a victim of such attorney malpractice nearly impossible. A review of *Jorgenson v. Vener*, 2002 S.D. 20, 640 N.W.2d 485, which is the case the legislature abrogated with SDCL 20-9-1.1, describes the loss of chance cases as medical malpractice cases that involve statistical probabilities that are not available outside of the medical industry. *Jorgensen*, at ¶ 18. Of course, that is not applicable to a legal malpractice case. In regard to *Haberer*, the Barrs concede that case has language that appears to require 100% certainty of the

underlying claim. *Haberer v. Rice*, 511 N.W.2d 279, 284 (S.D. 1994). However, the Barrs believe *Robinson-Podoll* clarified that language and provides a more logical standard—the plaintiff must show he has a viable claim at the summary judgment stage.

Thus, this Court has an opportunity to clarify this issue. That said, it will be a moot point if this Court agrees with the Barrs that the Trial Court erred when it granted summary judgment based upon a substantial deviation.

CONCLUSION

Summary Judgment was improperly granted to the Appellees. As a matter of law, when applying the correct lens to view the summary judgment facts, the actions by Stuart Hughes were not a substantial deviation. Thus, a jury should determine whether the acts of Stuart Hughes were foreseeable and within the scope of his employment.

Additionally, and likely only applicable if this Court affirms the Trial Court's summary judgment based upon a substantial deviation, the Barrs assert that *Robinson-Podoll* supports that their malpractice claim is founded upon a viable claim. Therefore, a jury should determine what damages, if any, exist on the loss of that viable claim.

DATED this 20th day of July, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements set forth in SDCL 15-26A-66(b)(4). This brief was prepared using Microsoft Word 2013, with 12 point Georgia font. This brief contains 3,327 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificate of counsel. I relied on the word count feature in Microsoft Word 2013 to prepare this certificate.

DATED this 20th day of July, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 20, 2023, I served a true and correct copy of the foregoing *Appellants' Reply Brief* via electronic means on the following:

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