IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29616

YANKTON COUNTY, STATE OF SOUTH DAKOTA

Plaintiff and Appellee,

v.

LUKE E. MCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC

Defendants and Appellants,

v.

YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; and ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY

Third-Party Defendants and Appellees.

Appeal from the Circuit Court, First Circuit
Yankton County, South Dakota

The Honorable Patrick T. Smith
Circuit Judge

APPELLANT'S BRIEF

ATTORNEYS FOR APPELLANTS:
Meredith A. Moore
Jonathan A. Heber
CUTLER LAW FIRM, LLP
140 N. Phillips Ave., 4th Floor
Sioux Falls, SD 57104

ATTORNEYS FOR APPELLEES:
Douglas M. Deibert
Cadwell Sanford Deibert & Garry LLP
200 E 10th Street, Suite 200
Sioux Falls, SD 57104

Mark D. Fitzgerald (*only for Garrity*)
Fitzgerald Vetter Temple & Bartell
1002 Riverside Blvd Suite 200
Norfolk NE 68702-1407

Notice of Appeal filed April 13, 2021

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PRELIMINARY STATEMENT

Appellant Luke E. McAllister will be referred to as "Luke." Appellant McAllister TD, LLC will be referred to as "MTD." Appellant B-Y Internet, LLC d/b/a South Dakota Wireless Internet will be referred to as "SDI." Appellee Yankton County, South Dakota will be referred to as the "County." Appellee Yankton County Commission will be referred to as the "County Commission." Appellee Yankton County Board of Adjustment will be referred to as the "Board of Adjustment." Appellee Yankton County Planning Commission will be referred to as the "Planning Commission." Appellee Patrick E. Garrity will be referred to as "Garrity." Appellee Robert W. Klimisch will be referred to as "Klimisch." Appellees will collectively be referred to as the "Yankton County Entities." References to the settled record will be designated as "SR." References to the transcript for the motions hearing on Appellee's motion for summary judgment will be designated as "MT." References to Appellants' appendix will be designated as "SDI App. "

JURISDICTIONAL STATEMENT

Appellants appeal from (1) the Order Granting Summary Judgment dated February 1, 2021, which incorporates the Memorandum Decision and Amended Memorandum Decision, and entered, filed, and recorded on February 1, 2021, and noticed on February 2, 2021, and (2) the Order of Dismissal dated March 12, 2021, entered, filed and recorded on March 12, 2021, and noticed on March 18, 2021. The Notice of Appeal was filed April 13, 2021.

STATEMENT OF LEGAL ISSUES

I. The Circuit Court Erred When it Determined that Appellants' Claims Were Barred by SDCL § 3-21-1.

The circuit court erroneously concluded that Appellants did not comply with SDCL § 3-21-1. Furthermore, the circuit court erroneously concluded that Appellants' counterclaims and third-party claims against the Yankton County Entities were barred by SDCL § 3-21-1. The circuit court also improperly weighed and resolved genuine issues of material fact regarding substantial compliance, waiver, and fraudulent concealment.

- *Anderson v. Keller*, 2007 S.D. 89, 739 N.W.2d 35
- *Budahl v. Gordon and David Associates*, 287 N.W.2d 489 (S.D. 1980)
- *Gakin v. City of Rapid City*, 2005 S.D. 68, 698 N.W.2d 493
- *Myears v. Charles Mix County*, 1997 S.D. 89, 566 N.W.2d 470
- *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995)

II. The Circuit Court Erred When it Determined that Appellant's Claims against Klimisch Were Barred by Prosecutorial Immunity.

The circuit court improperly weighed and resolved genuine issues of material fact regarding application of prosecutorial immunity.

- *Beard v. Udall*, 648 F.2d 1264 (9th Cir. 1981)
- *Boruchowitz v. Bettinger*, 654 Fed. Appx. 354 (9th Cir. 2016)
- *Stevens v. McGimsey*, 673 P.2d 499 (Nev. 1983)

INTRODUCTION

The long and tortured factual history of the Yankton County Entities' frivolous and malicious actions, which, at times, is difficult to imagine, is set forth in the statement of facts below. On or about June 8, 2018, the County commenced a lawsuit against Luke McAllister ("Luke"), McAllister TD, LLC ("MTD"), and B-Y Internet, LLC d/b/a South Dakota Wireless Internet ("SDI"), for a mandatory injunction to cease operating a wireless internet business due to alleged violations of county ordinances and for monetary fines. Luke and MTD, who do not operate and have not purported to operate a wireless internet business, filed a counterclaim against Yankton County for barratry on the basis that the claims against them were frivolous. Upon discovering information regarding the malicious nature of the lawsuit in 2019, Appellants amended their counterclaims to assert abuse of process on behalf of all Appellants and barratry on behalf of SDI, and also commenced a third-party action on behalf of Appellants to assert abuse of process and conspiracy to commit abuse of process against the County Commission, the Board of Adjustment, the Planning Commission, Garrity, and Klimisch.

On September 11, 2020, 799 days after the Luke and MTD's initial counterclaims, and 347 days after commencement of the third-party complaint and after years of extensive litigation and motion practice, the Yankton County Entities sought dismissal of Appellants' claims for the alleged failure to provide 180-day statutory notice under SDCL § 3-21-2 to the Yankton County Entities and, separately, for prosecutorial immunity of Klimisch. That motion for summary judgment was finally brought precisely one week after Appellants requested dates for depositions and a stipulation for an amended scheduling order.

The circuit court dismissed the Yankton County Entities from the lawsuit.

Thereafter, Appellants moved to dismiss the County's claims for want of prosecution. The County filed a resistance to the motion and advised the court of its intention to prosecute its claims against all Appellants. The circuit court set trial for the next week. Two days after Appellants served trial subpoenas, the County voluntarily filed a motion dismissing its claims against Appellants mere days before the trial, all but confirming the baseless nature of its claims.

STATEMENT OF THE FACTS

On August 23, 2016, McAllister TD, LLC d/b/a Fire and Ice ("Fire & Ice") entered into an agreement to lease real property located at 3804 W. 8th Street ("Real Property") from T.J. Land, Inc. ("TJ Land") with an option to purchase the Real Property. SDI App. 7 at ¶ 1 (00044). In March of 2017, Luke presented a business plan on behalf of Fire & Ice to the County Commission with the purpose of obtaining a malt beverage license to operate a recreational and seasonal business located at the Real Property, which was granted by the County Commission. *Id.* at ¶ 2. In the Spring and Summer of 2017, Fire & Ice operated the recreational and seasonal business Fire & Ice, which sold, *inter alia*, alcohol, water, ice, and camping supplies at an open-air building located at the Real Property near Lewis and Clark Recreation. *Id.* at ¶ 3. Due to low prices and an innovative business concept for the area, it became apparent that Fire & Ice was competitively disruptive to local and existing businesses located in the County and, primarily, in the City of Yankton. *Id.* at ¶ 4. On October 15, 2017, after repeated and constant pressure from Yankton County Zoning Administrator Garrity, Fire & Ice temporarily ceased business operations. *Id.* at ¶ 5.

On October 9 and 10, 2017, which was around that same time that Fire & Ice temporarily ceased business operations, Cam McAllister ("Cam") e-mailed Zoning

Administrator Garrity to inquire about whether B-Y Internet needed any kind of permit or license, such as a conditional use permit, to operate a wireless internet business in Yankton County. SDI App. 7 at ¶ 6 (00044-45). In an e-mail exchange with Garrity that followed, Cam stated, in part: "I am just clarifying if there is a permit required by Yankton County to provide internet services as these providers do and obtain the same permit as such if it is required." *Id*. Garrity did not respond to that e-mail or otherwise confirm that a conditional use permit was required or not. SDI App. 7 at ¶ 7 (00045).

On November 29, 2017, Luke formed B-Y Internet, LLC. *Id.* at ¶ 8. On February 2, 2018, B-Y Internet, LLC registered the fictitious business name "South Dakota Wireless Internet" ("SDI"). *Id.* ¶ 8.

A few months afterwards in February 2018, around the same time that SDI was getting off the ground with its wireless internet business operations, Fire & Ice communicated to TJ Land its intention to exercise its contractual lease option to purchase the Real Property. *Id.* at ¶ 9. Klimisch, who was the registered agent for TJ Land, prepared the purchase and mortgage documentation for Fire & Ice's purchase of the Real Property. *Id.* at ¶ 10.

On or about March 2, 2018, Garrity sent a threatening letter on behalf of Yankton County Planning & Zoning via certified mail to Luke with a courtesy copy to Klimisch, which stated that South Dakota Internet was required to obtain a conditional use permit under Yankton County Zoning Ordinance #16, Article 25, Section 2503, and failure to do so may results in fines, imprisonment, and injunctive relief. SDI App. 7 at ¶ 11 (00045-46).

Between March and April 2018, SDI, Klimisch, and Garrity engaged in further

communications about the March 2, 2018 letter and, in general, about whether SDI needed to apply for a conditional use permit to operate the wireless internet business. SDI App. 7 at ¶ 12 (00046). During that timeframe in late March, Luke, Garrity, and Klimisch met at the Yankton County Government Center to discuss in person. *Id.* at ¶ 13. On April 20, 2018, at 4:37 AM, Luke emailed Garrity and Klimisch a letter, as follows, summarizing the in-person meeting that occurred, acknowledging that Garrity stated he would place SDI on the agenda calendar the County Commission meeting, and reiterating SDI's position that it was expressly excluded from the zoning ordinance requirements of needing a conditional use permit to operate its business. SDI App. 7 at ¶ 13 (00046-47). In the letter, Luke requested a written letter of compliance "to convey compliance where necessary" because this matter "is impeding the progress of our business and causing a great deal of frustration for several of our customers throughout Yankton County." *Id.* Neither Garrity nor Klimisch responded to or otherwise disputed the contents of the letter from Luke. SDI App. 7 at ¶ 14 (00047).

Instead, on or about June 8, 2018, the County served Luke, MTD, and SDI with a Summons and Complaint, signed by Klimisch, seeking a mandatory injunction against them to "cease and desist from operating a wireless internet provider business in Yankton County, South Dakota" for violation of Yankton County Ordinance 16, Article 25, and also seeking "fines and other monetary relief as may be provided by law." *Id.* at ¶ 15; SR 2-3 (Complaint); SDI App. 9 (00065-66) (Complaint).

On July 5, 2018, SDI filed an Answer to the Complaint. SR 8-10. Luke and MTD filed an answer and counterclaims for barratry on the basis that Luke and MTD were not proper parties to a lawsuit that was purportedly seeking to enjoin them from operating a wireless internet business. SDI App. 10 (00067-69) (Luke Answer &

Counterclaim) & 11 (00070-72) (MTD Answer & Counterclaim).

On or about July 31, 2018, the County filed an answer to Luke and MTD's counterclaims, which notably did not allege any affirmative defense for alleged failure to provide notice under SDCL § 3-21-2. SDI App. 7 at ¶ 16 (00047) & 12 (00073-74). Between July 31, 2018, and April 3, 2019, Appellants engaged in extensive docket activity and, among things, served interrogatories, requests for production, request for admissions, an expert disclosure, subpoenas and notices of deposition, and a motion for scheduling order, a motion to compel, and a notice for hearing on the motion to compel, which culminated in the court granting the motion to compel discovery responses. SR 719-21 at ¶¶ 17-28; SDI App. 7 (00047-49).

On April 17, 2019, Luke attended a meeting at the Yankton County Government Center with Cam, Appellants' prior counsel Kasey L. Olivier and Ashley Miles M. Holtz, Klimisch,[1] County Commissioners Dan Klimisch and Joe Healy, Acting Zoning Administrator Brian McGinnis, and Planning and Zoning members John Harper and Donna Freng. SR 791 at ¶ 2 (Second Affidavit of Luke). At the April 17, 2019 meeting, Luke, on behalf of SDI, explained to the attendees that under the plain language of Section 2505 of the Yankton County Ordinances, SDI is excluded from all requirements of Article 25 of the Yankton County Ordinances and, in particular, the requirement of obtaining a conditional use permit under Section 2503. *Id.* at ¶ 3. County Commissioner Dan Klimisch recommended that SDI appear before the Yankton County Planning Commission and request a determination as to whether it is excluded from Article 25

1. Appellants were represented by Michael D. Stevens until on or about January 31, 2018. SR 30-31 (Motion to Withdraw) & 32 (Consent). Appellants were then represented by Kasey L. Olivier and Ashley Miles M. Holtz until on or about July 15, 2019. SR 211 (Substitution).

under Section 2505. *Id.* at ¶ 4. In response, County Commissioner Joe Healy recommended that SDI be added to the agenda for the Planning Commission meeting on May 14, 2019, so that ten days' notice could be circulated. *Id.* at ¶ 5. Klimisch advised Joe Healy that the parties needed something now and, instead, recommended that SDI be added to the agenda for the upcoming Planning Commission meeting on April 25, 2019, in eight days. *Id.* at ¶ 6. In response to Klimisch, Planning Commissioner John Harper advised that the Planning Commission could be tasked with the determination of interpreting the exclusion under Section 2505. SR 792 at ¶ 7.

Klimisch stated that the County's position was the question of exclusion should be heard at the Planning Commission and advised that the next Planning Commission meeting was on April 25, 2019, from 6:30 PM to 9:30 PM, and that 24-hour notice was thereby given to Acting Zoning Administrator Brian McGinnis. *Id.* at ¶ 10.

Concluding the April 17, 2019 meeting, the County and Appellants agreed to dismiss the lawsuit without prejudice to allow for SDI to appear before the Planning Commission on April 25, 2019, for a determination of whether SDI was excluded under Section 2505. *Id.* The parties to the meeting further agreed that if the Planning Commission determined that SDI was excluded, the County's claims would be dismissed with prejudice, and, in contrast, if the Planning Commission determined SDI was not excluded, SDI would apply for a conditional use permit from the County Commission. *Id.* at ¶ 11.

On that same day on April 17, 2019, the County and Appellants signed a stipulation for dismissal without prejudice, pending a prospective settlement and an order from the circuit court for dismissal. SR 720 at ¶ 29; SDI App. 7 (00049). At the regularly scheduled Planning Commission meeting on or about April 25, 2019, the

Planning Commission voted unanimously 7-0 in favor of finding that SDI was excluded from the requirements of Article 25 of the Ordinance under § 2505(3) and (5), and determined that SDI was never in violation of Article 25 of the Ordinance. SR 720-21 at ¶ 30; SDI App. 7 (00049-50).

On May 8, 2019, SDI sent a letter to Klimisch, County Commissioner Dan Klimisch, County Commissioner Joe Healy, and County Commissioner Cheri Loest, which put them on written notice of a prospective claim of barratry by SDI against the County. SDI App. 7 at ¶ 31 (00050).

On or about May 17, 2019, Cam, on behalf of Appellants, met with County Commissioners Don Kettering and Dan Klimisch to discuss the yet-to-be-dismissed lawsuit and a plan to resolve the matter. *Id*. at ¶ 32. At that meeting, the following noteworthy exchange occurred between Cam and County Commissioner Don Kettering:

> **Cam**: Ok. Do you recall, do you remember because you were on the commission previous? Do you remember when that decision was made to file suit?
>
> **Kettering**: Probably a year ago.
>
> **Cam**: But it was done by the commission. The commission did authorize and say –
>
> **Kettering**: I think so. I think so.
>
> **Cam**: To file the suit.
>
> **Kettering**: Yeah. Yeah.
>
> **Cam**: Ok, alright.
>
> **Kettering**: I think it was, the issue was over something out at Fire and Ice.
>
> **Cam**: And Fire and Ice has nothing to do with this business. It is a completely different business.

> **Kettering**: That – that was, the Fire and Ice reason was, the reason that– the, the issue at Fire and Ice had not been resolved so that was I think the logic of the commission at the time was –
>
> **Cam**: What, what issue with Fire and Ice wasn't, what was the issue?
>
> **Kettering**: Oh, wasn't there some stuff sitting around? Some, Firewood or bathroom or – I don't remember.
>
> **Cam**: But, yeah. Fire and Ice is not mentioned in this suit at all and is not part of this litigation and has nothing to do with this. Unless you guys were intending to send suit against Fire and Ice?
>
> **Kettering**: No.
>
> **Cam**: Because this is all with South Dakota Internet. That it, that it – that they wanted to put us out of business.
>
> **Kettering**: Yeah.

SDI App. 7 at ¶ 33 (00050-51); SR 644-83 (Affidavit of Cam, with recording and transcript of May 17 meeting).

A few days later on May 21, 2019, Cam, on behalf of Appellants, met with Klimisch, and County Commissioners Dan Klimisch, Don Kettering, Joe Healy, Cheri Loest, and Gary Swenson to discuss the still yet-to-be-dismissed lawsuit. SDI App. 7 at ¶ 34 (00051); SR 644-83 (Affidavit of Cam, with recording and transcript of May 21 meeting). The parties were unable to resolve all remaining claims in the lawsuit. *Id.*

On July 3, 2019, counsel for Appellants e-mailed and mailed an eight-page letter to Klimisch putting him, the County, the County Commission, the Planning Commission, and Garrity on notice of prospective claims of barratry, abuse of process, and conspiracy to commit abuse of process, among other claims that were still being investigated at the time. SDI App. 7 at ¶ 34 (00051). In part, the July 3, 2019 letter stated:

> Based on the information gathered, please consider this letter formal written notice of prospective claims of abuse of process against the following entities or individuals, including, but not limited to, Yankton County, Yankton County

> Commission, Yankton County Planning and Zoning Commission, Pat Garrity, and you.
>
> In addition to claims for abuse of process, we are actively investigating other potential claims, including, but not limited to, (1) a claim for Civil Conspiracy to Commit Abuse of Process . . . .
>
> . . .
>
> We respectfully encourage Yankton County to promptly notify its insurance carrier regarding these matters.
>
> . . .
>
> I trust you will immediately share this letter with the members of the Yankton County Commission and the Yankton County Planning & Zoning.

SDI App. 7 at ¶ 36 (00051-52).

On July 3, 2019, at 3:32 PM, counsel for Appellants e-mailed a copy of the July 3, 2019 letter to Klimisch, and further advised to share the letter with the Commission and the Planning Commission: SDI App. 7 at ¶ 37 (00052). On July 15, 2019, at 12:55 PM, Luke e-mailed a copy of the July 3, 2019 letter to the County Commissioners and Board of Adjustment Members Dan Klimisch, Joe Healy Cheri Loest, and Don Kettering. *Id.* at ¶ 38.

On July 15, 2019, Appellants filed with the Court a Withdrawal of Consent to Stipulation for Dismissal Without Prejudice. SR 782-789 at ¶ 2 (Second Affidavit of Counsel); SR 213 (Withdrawal of Consent). SR 783 at ¶ 3. On July 16, 2019, at 1:56 PM, counsel for Appellants responded via e-mail to Klimisch and stated, in part, Yankton County should file its own withdrawal of consent. SR 783 at ¶ 4. The County never filed with the Court a withdrawal of their consent to the stipulation for dismissal dated April 17, 2019. *Id.* at ¶ 5.

On August 20, 2019, the County served discovery requests upon Appellants that

referenced the July 3, 2019 letter. *Id.* at ¶ 39. On August 28, 2019, Klimisch e-mailed counsel for Appellants and stated: "This matter has been turned over to the insurance company." *Id.* at ¶ 40.

On September 30, 2019, Appellants served the Third-Party Complaint on the third-party Yankton County Entities. *Id.* at ¶ 41; SR 217-34 (Third-Party Complaint). On October 16, 2019, EMC Insurance sent a 12-page letter entitled "DEFENSE PROVIDED UNDER A RESERVATION OF RIGHTS" to County Auditor Patty Hojem, Garrity, and Klimisch. SDI App. 7 at ¶ 42 (00052-53); SR 578-89 (Letter).

On October 30, 2019, the Yankton County Entities, including the County, alleged for the first time in this lawsuit the affirmative defense of notice under SDCL § 3-21-2. SDI App. 7 at ¶ 43 (00053). Subsequently, the parties continued to engage in litigation, including, but not limited to, extensive written discovery, a motion by Appellants to compel discovery, and a hearing and order on the same. SDI App. 7 at ¶¶ 44-50 (00053-54).

On September 4, 2020, counsel for Appellants sent an e-mail to counsel for all opposing parties requesting their availability for depositions, requesting their agreement to a scheduling order, and requesting a letter of compliance that SDI was operating compliantly with local ordinances. SDI App. 7 at ¶ 52 (00054).

On September 11, 2020, the Yankton County Entities excluding Garrity filed a motion for summary judgment, which was later joined by Garrity. *Id.* The circuit court granted the motion for summary judgment on December 11, 2020. SR 802-14 (Memorandum Decision). Upon realization after issuance of the memorandum decision that the County was inadvertently omitted from the initial motion, the parties cooperated to stipulate, without waiver of defenses, to the issuance of an amended memorandum

decision addressing the arguments of the County. SR 817-21.

Afterwards, the County continued to refuse to dismiss its claims against Appellants. Consequently, Appellants filed a motion to dismiss for want of prosecution. SR 859-860 (Motion); SR 861-68 (Brief). Appellants explained in the motion that over the prior years, they had repeatedly sent correspondence to the County demanding it advise on whether the County intended to prosecute its claims and, if not, whether the County would issue a letter of compliance so that it could provide that letter to prospective customers, some of whom were withholding business due to the uncertain nature of the lawsuit. SR 861-68 (Brief); SR 869-902 (Affidavit of Counsel). Appellants noted that the circuit court had observed at the hearing on November 17, 2019, that the claims of the County seemed to exist in "purgatory." *Id.*; MT 11:3-14. Yet, the County strongly opposed the motion. SR 915-41 (Brief). In its resistance, the County "urge[d] that the Motion to Dismiss for Lack of Prosecution be denied." SR 926. At the hearing on Tuesday, March 9, 2021, the circuit court denied the motion to dismiss and set trial on the merits for the following Wednesday on March 17, 2021. *Compare* SR 903 (Notice of Hearing) *with* SR 948-951 (Trial Subpoenas). On March 10, 2021, Appellants served and filed trial subpoenas for County Commissioners Dan Klimisch and Joe Healy. SR 948-951. Two days later on March 12, 2021, and a mere *three* days after advising the Court of its intentions to prosecute its claims, the County voluntarily filed a motion to dismiss its claims, which was granted by the circuit court that same day. SR 952.

ARGUMENT

This is an appeal of an order granting a motion for summary judgment. Summary judgment is only proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact, and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c). Summary judgment is an extreme remedy, which is not intended as a substitute for trial. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 761. In adjudicating a motion for summary judgment, the circuit court must consider the evidence in the light most favorable to the non-movants and all reasonable inferences drawn from the facts must be made in non-movants' favor. *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995).

I. The Circuit Court Erred When it Determined that Appellants' Claims Were Barred by SDCL § 3-21-1

The circuit court erred when it concluded that Appellants failed to give statutory notice to the Yankton County Entities within 180 days as prescribed by SDCL § 3-21-2. SDI App. 5 (00026); *see also* SDCL § 3-21-3.

SDI App. 13 (00075).

This Court has recognized that the primary purpose of the notice provision in SDCL § 3-21-2 is to allow the public entities to investigate and evaluate claims. *See, e.g.*, *Budahl v. Gordon and David Associates*, 287 N.W.2d 489, 492 (S.D. 1980). Specifically, this Court set forth seven non-exclusive objectives for protecting a public entity with a shorter notice period:

> (1) To investigate evidence while fresh; (2) to prepare a defense in case litigation appears necessary; (3) to evaluate claims, allowing early settlement of meritorious ones; (4) to protect against unreasonable or nuisance claims; (5) to facilitate prompt repairs, avoiding further injuries; (6) to allow the [public entity] to budget for payment of claims; and (7) to insure that officials responsible for the above tasks are aware of their duty to act.

Id. (citing *DeHusson v. City of Anchorage*, 583 P.2d 791 (Alaska 1978) (Rabinowitz, J., concurring)); *see also Myears v. Charles Mix County*, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474 (considering whether the seven objectives were met).

However, to avoid unintended harsh results when the reasonable objective of the notice statute has been met, this Court has held that "substantial compliance is sufficient to satisfy the notice requirements of SDCL 3-21-2[.]" *Myears*, 1997 S.D. 89, ¶ 13, 566 N.W.2d at 474. Otherwise, it would "give the statute an unintended inflexibility and artificial importance." *Id.* at ¶ 15, 566 N.W.2d at 475. This Court has addressed the broad application of substantial compliance as follows:

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

Id. (quoting *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835). In addition, this Court recognized that substantial compliance adheres to the essential goals for giving a public entity notice:

> We must be mindful of the consequences of a construction that would impose a standard of absolute compliance on a claimant who has been injured by a public entity. A rule of absolute compliance would require the dismissal of a claim when a claimant, within 180 days after the discovery of an injury, makes a good faith effort to satisfy the notice requirements but inadvertently omits a minor detail, or makes an error with respect to such detail, notwithstanding the fact that the omission or error cannot prejudice the public entity in the least.
>
> . . .
>
> To be sure, the notice requirements . . . serve to enhance a public entity's ability to remedy a dangerous condition and to plan for and defend against any potential liability on a claim. These interests, however, are not the only public interests implicated by the notice requirements. We believe that permitting injured claimants to seek redress for injuries caused by a public entity also serves a public interest. These multiple public interests, in our view, would not be served by . . . a standard of strict compliance. . . .

Id. (quoting *Woodsmall v. Regional Transp. Dist.*, 800 P.2d 63, 68-69 (Colo. 1999))

(alterations in original).

"Claims statutes which are designed to protect governmental agencies from stale and fraudulent claims, provide an opportunity for timely investigation and encourage settling meritorious claims but should not be used as traps for the unwary when their underlying purposes have been satisfied." *Id.* at ¶ 12, 566 N.W.2d at 473. "Substantial compliance requires that the person who receives the notice be someone who could take necessary action to ensure that the statutory objectives are met." *Anderson v. Keller*, 2007 S.D. 89, ¶ 16, 739 N.W.2d 35, 40.

A. The 180-Day Notice Requirement in SDCL § 3-21-2 Did Not Begin to Run for the Barratry Claims Until on Or About March 12, 2021.

First, the circuit court erred when it dismissed the barratry claims against the County for failure to provide notice under SDCL § 3-21-2. In short, those claims were not ripe and had not accrued.[2] It is well recognized in South Dakota and in numerous jurisdictions that the accrual period to assert a claim for barratry does not begin to accrue until the lawsuit is dismissed favorably to the defendant.[3] *See, e.g.*, *Miessner v. All Dakota Ins. Associates, Inc.*, 515 N.W.2d 198, 201 (S.D. 1994) (holding that an element of malicious prosecution is the lawsuits "bona fide termination in favor of the [defendant]"); *see also, e.g.*, *Miller v. City of Philadelphia,* 2014 WL 3579295, at *1 (E.D. Penn. 2014) (holding that a claim for malicious prosecution does not accrue until lawsuit is terminated); *Noel v. Coltri*, 2013 WL 3276742, at *1 (N.D. Ill. 2013) (same); *McGuffie v. Herrington*, 966 So.2d 1274, 1278-79

2. At worst, the claims were not ripe and were prematurely pleaded. This could have been resolved by dismissing those claims without prejudice and then allowing them to be re-pleaded once those claims had accrued.

3. In most jurisdictions, the equivalent claim for barratry is known as "malicious prosecution."

(Miss. Ct. App. 2007) (same); *Doyle v. Crane*, 200 S.W.3d 581, 586 (Mo. Ct. App. 2006) (same); *Ray v. First Fed. Bank of California*, 61 Cal. App. 4th 315, 318 (Cal. Ct. App 1998) (same); *Cazares v. Church of Scientology of Cal., Inc.*, 444 So.2d 442, 447 (Fla. Ct. App. 1983); *Nelson v. Miller*, 607 P.2d 438 (Kan. 1980).

The circuit court concluded that SDCL 3-21-2 "states that notice is required 'within one hundred eighty days after the *injury*[,]" and, therefore, "[t]he notice requirement of § 3-21-2 would need to have happened within one hundred and eighty days after the Defendants responded to the initial complaint, because that is when their injury occurred." SDI App. 5 (00021) (emphasis in original). This rationale is flawed. It incorrectly presupposes that an "injury" that underlies a claim for barratry occurs at the moment a defendant responds to the initial complaint. The injury that occurs from barratry is one of a "continuing" nature that continues as the frivolous and/or malicious case is prosecuted. When the claim for barratry has accrued under the law, so does the time period accrue for providing notice under SDCL § 3-21-2.[4] *See, e.g.*, *Hone v. City of Oneonta*, 157 A.D.3d 1030, 1032 (N.Y. App. 2018) ("Thus, as defendants concede, the notice of claim is timely with respect to plaintiff's malicious prosecution claim because it was served within 90 days after the harassment charge was dismissed on June 25, 2015."); *Allen v. District of Columbia*, 533 A.2d 1259, 1264 (D. Col. App. Nov. 25, 1987) (concluding that the time for providing notice under the applicable notice statute began to accrue at the date of dismissal of the malicious suit); *Heron v. Strader*, 761 A.2d 56, 60 (Md. Ct. App. 2000); (citing *Allen*, 533 A.2d at 1264 with favor); *Kelly v. Kane*, 98 A.D.2d 861, 862 (N.Y. App. 1983) (concluding that notice requirement accrued began to accrue at the date of dismissal of the malicious suit).

4. That is, unless the time period has been tolled for a different reason.

Thus, because the accrual date had not started until Yankton County's action was dismissed on March 12, 2021, any requirement to provide notice under SDCL § 3-21-2 also had not begun to accrue. As such, Appellants should have until September 8, 2021, to provide notice of prospective claims of barratry. With that said, the affirmative defense is moot because the Yankton County Auditor has notice of the claim. SR 723. Consequently, the circuit court erred when it dismissed the claims of barratry for failure to provide notice under SDCL §3-21-2.

B. Appellants Substantially Complied with SDCL § 3-21-2.

The circuit court concluded that Appellants did not comply or otherwise substantially comply with the provisions of SDCL § 3-21-2. SDI App. 5 (00019-21, 23-24). In particular, the circuit court concluded that statutory notice for barratry, abuse of process, and conspiracy to commit abuse of process needed to be given "within one hundred and eighty days after the Defendants responded to the initial complaint" (SDI App. 5 (00021)), the notice requirement was not tolled under the doctrine of fraudulent concealment (SDI App. 5 (00023-24)), Luke and MTD's counterclaims against Yankton County did not constitute written notice under SDCL § 3-21-2, and Appellants did not otherwise substantially comply with SDCL § 3-21-2 (SDI App. 5 (00021)).

1. Fraudulent Concealment Tolled the Notice Period.

First, as stated in Section I(A) above, notice of the claim for barratry did not need to be given until within 180 days after March 12, 2021, when the County's claims were dismissed favorably to Appellants. Even assuming, *arguendo*, notice for barratry needed to be given within one hundred and eighty days "within one hundred and eighty days after the

Defendants responded to the initial complaint,"[5] along with notice for abuse of process and conspiracy to commit abuse of process, the notice requirement was tolled due to the fraudulent concealment of the County and, in total, the Yankton County Entities.

"[F]raudulent concealment applies not when an action remains merely undiscovered, but when actionable conduct or injury has been concealed by deceptive act or artifice." *Strassburg v. Citizens State Bank*, 1998 S.D. 72, ¶ 14, 581 N.W.2d 510, 515. Furthermore, this Court has acknowledged "'that fraudulent concealment may toll the statute of limitations' and 'this doctrine may be extended to a notice of claim provision.'" *Gakin v. City of Rapid City*, 2005 S.D. 68, ¶ 18, 698 N.W.2d 493, 499 (quoting *Purdy v. Fleming*, 2002 S.D. 156, ¶ 14, 655 N.W.2d 424, 430). "When a fiduciary or confidential relationship is present, mere silence on the part of the fiduciary may support the doctrine of fraudulent concealment." *Cleveland v. BDL Enters., Inc.*, 2003 S.D. 54, ¶ 20, 663 N.W.2d 212, 218; *see also Holy Cross Parish v. Huether*, 308 N.W.2d 575, 577 (S.D. 1981) (same). This Court has "defined a fiduciary relationship as one which 'imparts a position of peculiar confidence placed by one individual in another." *Cleveland*, 2003 S.D. 54, ¶ 20, 663 N.W.2d at 218 (quoting *Nelson v. WEB Water Dev. Ass'n, Inc.*, 507 N.W.2d 691, 698 (S.D. 1993)). "Generally, in such a relationship, the 'property, interest or authority of the other is placed in the charge of the fiduciary.'" *Id*. "Fiduciary duties . . . arise only when one undertakes to act primarily for another's benefit." *Gades v. Meyer Modernizing Co., Inc.*, 2015 S.D. 42, ¶ 12, 865 N.W.2d 155, 160. "The existence of a fiduciary duty and the scope of that duty are questions of law for the court." *Purdy*, 2002 S.D. 156, ¶ 18, 655 N.W.2d at 431 (quoting *High Plains Genetics Research, Inc. v. J.K. Mill–Iron Ranch*, 535

5. Or, even the earlier date of June 8, 2018, when the claims were commenced against Appellants.

N.W.2d 839, 842 (S.D.1995)).

"Absent a confidential or fiduciary relationship, fraudulent concealment consists of some affirmative act or conduct on the part of the defendant designed to prevent, *and does prevent*, the discovery of the cause of action." *Gakin*, 2005 S.D. 68, ¶ 18, 698 N.W.2d at 499 (quoting *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 14, 667 N.W.2d 651, 660) (emphasis in original) (internal quotation marks omitted). Fraudulent concealment is a question of fact. *McGill v. Am. Life & Cas. Ins. Co.*, 2000 S.D. 153, ¶ 14, 619 N.W.2d 874, 879; *see also Purdy*, 2002 S.D. 156, ¶ 51, 655 N.W.2d 424, 437-38 (Martin, R.C.J., concurring in part and dissenting in part) (recognizing "whether fraudulent concealment has occurred is a question off fact").

Here, there is a fiduciary between a county and its taxpaying residents and entities. The county is inherently designed to act primarily for the benefit of its taxpaying residents and entities. Likewise, this would extend to other public entities within that county, such as the county commission, the planning commission, the board of adjustment, the planning and zoning administrator, and the state's attorney, who all were involved in different ways in rendering advice to Appellants and discussing with them prior to the commencement of this lawsuit. As a result, no affirmative act is necessary and all that must be shown is a genuine issue of material fact that "concealed by deceptive act or artifice." *See Strassburg*, 1998 S.D. 72, ¶ 14, 581 N.W.2d at 515.

Viewing the evidence in the light most favorable to Appellants as was required in a motion for summary judgment, the Yankton County Entities concealed the true nature of the County's initial lawsuit against Appellants, which was about MTD's successful recreational business, and disguised it as one relating to SDI's wireless internet business. SR 217-234. Altogether, as alleged by Appellants, the purpose of the lawsuit was to exert improper

coercive pressure upon both entities and upon Luke, individually, in what appeared to be a calculated effort to "run them out of town." *Id.* As such, because there was a fiduciary duty between Appellants and the Yankton County Entities, Appellants were not required to prove an affirmative act and, in viewing the evidence presented in the light most favorable to them, should have overcame the motion for summary judgment.

Furthermore, even assuming, *arguendo*, no fiduciary relationship existed between Appellants and any one of the Yankton County Entities, the Yankton County Entities' affirmative conduct in this lawsuit was designed to prevent Appellants from discovering valid claims. Throughout the process of the lawsuit, in public hearings, and in various discovery responses, the County maintained to Appellants, time and time again, that the reason for the lawsuit was to enforce compliance with Article 25 of Yankton County Ordinances. SDI App. 9 (00065-66) (Complaint); SDI App. 7 at ¶ 19 (00048) (County discovery responses). As stated by the United States District Court for the District of Colombia, "It would be inequitable to read the time limit as beginning before plaintiff could possibly have known his rights may have been violated, especially since it was defendant's concealment of information that placed plaintiff in that position." *Connor v. Hodel*, 1984 WL 161338, at *2 (D. Col. 1984).

The circuit court suggested that "there was no affirmative action that prevented Defendants from talking with the County Commissioners, Garrity, or Klimisch" and that, "[i]n fact, several meetings between Garrity, Klimisch and the Defendants had taken place before May 17th, 2019." First, this conclusion incorrectly presumes that there must have been an affirmative act to prevent Appellants from speaking with the Yankton County Entities. But, what must actually be shown, assuming no fiduciary relationship, is an "affirmative act or conduct on the part of the defendant designed to prevent, *and does*

prevent, the discovery of the cause of action." *Gakin*, 2005 S.D. 68, ¶ 18, 698 N.W.2d at 499. Here, an aspect of the claims of barratry, abuse of process, and conspiracy to commit abuse of process was the "intent" of the Yankton County Entities with the purpose of the lawsuit. This is not a situation where there was concealment of some physical and tangible damage, like concealment of water damage that could be discoverable and seen with the naked eye. *Cf. Gades*, 2015 S.D. 42, 865 N.W.2d 155. The circuit court's conclusion assumes, and in doing so improperly weighs the evidence, that the Yankton County Entities would have laid out to Appellants their own malicious actions—as if they were some kind of cartoonish villain at the end of an episode of Scooby Doo laying out their plans for the viewer. Instead, what eventually happened, is County Commissioner Mr. Kettering let the "cat out of the bag" on May 17, 2019, *only after*—and this is a critical point—the competing lawsuits had been tentatively dismissed pending a resolution of the cases. SR 723.

As a result of the fraudulent concealment, the claim for abuse of process began to run at the earliest on May 17, 2019, when Mr. Kettering informed Appellants of the actual reason for commencing the lawsuit. Appellants then had 180 days from the date the claim began to accrue to comply or substantially comply with SDCL § 3-21-2, which, if May 17, 2019, was the appropriate date, the deadline would have then been November 13, 2019.

2. Appellants Substantially Complied with SDCL § 3-21-2.

On July 3, 2019, long before November 13, 2019, counsel for Appellants sent a single-spaced eight-page letter by US mail, certified mail, and e-mail to Klimisch, who was the Yankton County State's Attorney representing Yankton County in the underlying lawsuit, which provided notice of the time, place, and cause of injuries relating to prospective claims of abuse of process and conspiracy to commit abuse of process. SDI App. 8 (00057-64). Over the course of those eight pages, Appellants explained the factual

background for those prospective claims for abuse of process, how they discovered the basis for those claims, the investigation that they have done relating to those claims, their understanding of the law relating to those claims, their position on the law relating to the frivolous nature of Yankton County's initial complaint, and then asked that notice be given to Yankton County, the Commission, the Planning and Zoning Commission, Garrity, and Klimisch.. *See id.* It also asked Klimisch to provide notice to the County's insurance carrier. *Id.* at 00062-64 ("We respectfully encourage Yankton County to promptly notify its insurance carrier regarding these matters.").

In a separate e-mail to Klimisch, counsel for Appellants further stated: "I respectfully ask that you share this correspondence with the Yankton County Commission and the Yankton County Zoning & Planning." SR 723 at ¶ 37. Those identified individuals happen to be the exact same entities that comprise the Yankton County Entities. For clarification, the Yankton County Commission serves as the Yankton County Board of Adjustment. Regardless, SDCL § 3-21-2 does not require specific identification of each potential defendant nor does it require identification of each particular claim. It simply requires the "time, place, and cause of injury." SDCL § 3-21-2. That, and more, was given in the July 3, 2019 letter. *See* SDI App. 8 (00057-64).

Since the letter met the requirements of SDCL § 3-21-2, the question then is whether Appellants substantially complied with the objectives of SDCL § 3-21-3.

Here, it is undisputed Appellants did not provide notice directly to the county auditor. However, Appellants provided the July 3, 2019 letter to Klimisch, who is "someone who could take necessary action to ensure that the statutory objectives are met." *Anderson*, 2007 S.D. 89, ¶ 16, 739 N.W.2d at 40. This Court has recognized that is sufficient for substantial compliance of the statute. Moreover, Appellants also provided

actual notice of the July 3, 2019 letter via e-mail to the Yankton County Commissioners, who also served as the members of the Board of Adjustment. SR 723.

Then, on August 20, 2019—still before November 13, 2019, the County served discovery requests upon Appellants that referenced the July 3, 2019 letter, which confirmed Yankton County's receipt and review of the July 3, 2019 letter. SR 723 at ¶ 39. On August 28, 2019, Klimisch e-mailed counsel for Appellants and stated: "This matter has been turned over to the insurance company." *Id.* at ¶ 40. Thus, on August 28, 2019, the Yankton County Entities' insurance carrier EMC Insurance received notice of the alleged claims. *Id.*

On September 30, 2019, the Counterclaims and the Third-Party Complaint were commenced against the Yankton County Entities. SR 323-326, 447. On October 16, 2019, EMC Insurance sent a 12-page letter entitled "DEFENSE PROVIDED UNDER A RESERVATION OF RIGHTS" to County Auditor Patty Hojem, Garrity, Klimisch, confirming notice of the claims and Third-Party Complaint on August 28, 2019, and providing an analysis of the alleged claims and injuries. SR 723-24 ¶ 42. Thus, by September 30, 2019 or a few days thereafter, at the latest, all persons required to receive notice under SDCL § 3-21-3 had received actual knowledge.

In *Myears v. Charles Mix County*, legal counsel for the plaintiff sent notice of an injury to *only* the county engineer rather than the county auditor, who was statutorily identified in SDCL § 3-21-3 as the person to receive notice on behalf of the county. 1997 S.D. 89, ¶ 2, 566 N.W.2d at 471. The South Dakota Supreme Court concluded that while the notice was not provided to the county auditor as required by statute, the plaintiff nevertheless satisfied the objectives of SDCL § 3-21-2 because the county engineer was in a position to send the notice to the county auditor, and in fact did. *Id.* at ¶ 17.

Here, there is no question that the State's Attorney presently representing Yankton County in this lawsuit, and the County Commissioners who also received notice, were in the position to deliver the July 3, 2019 letter to the county auditor, insurance, and the appropriate persons required to receive notice. SDI App. 7 (00051-52). In fact, they did just that. The matter was turned over to the Yankton County Entities' insurance carrier prior to commencement of the lawsuit, which promptly investigated the claims and sent a 12-page letter analyzing those claims. SDI App. 7 (00052).

As a result, not only was SDCL § 3-21-2 actually satisfied, but all seven objectives of providing notice to public entities were satisfied. *Budahl v. Gordon and David Associates*, 287 N.W.2d 489 (S.D. 1980) (identifying the seven objective of the notice statute). Appellants further explained in detail how the seven objectives are met at the motions hearing on November 17, 2020. SDI App. 15 (00079-81). Consequently, Appellants substantially complied with the requirements of SDCL Chapter 3-21.

3. Luke and MTD's Counterclaims Constituted Written Notice of Their Claims of Barratry.

To the extent this Court concludes that notice needed to be given within 180 days of the commencement of the initial lawsuit, or in that same general timeframe, Luke and MTD's counterclaims for barratry constituted written notice of those claims. Those counterclaims were served upon the County 27 days after commencement of the lawsuit. Under SDCL § 3-21-2, those counterclaims constituted written notice to the County that provided the time, place, and cause of injury. *See* SDCL § 3-21-2. There is no rule or law for the manner or form of the notice other than it must be in writing. *Id.* The circuit court stated that "[i]f a counterclaim were considered sufficient written notice, there would be no need for SDCL § 3-21-3." However, that is simply not true. This is not the normal case. It

can be safely said that most cases do not involve claims against public entities relating to a malicious action by that same public entity or related public entities. Instead, for example, common actions may relate to physical injuries on public property, such as a slip-and-fall, or a vehicle accident involving a publicly-owned vehicle or a vehicle driven by a public employee, or damage, or real or personal damage to property by the public entity or its employees. In those instances, and many like it, there would be no opportunity to simply file a "counterclaim." To claim that the County did not have notice of claims filed against it and actually litigated is unreasonable and not supported by the record. Regardless, the Counterclaims were served on the County's State's Attorney Klimisch, who is "someone who could take necessary action to ensure that the statutory objectives are met," *see Anderson*, 2007 S.D. 89, ¶ 16, 739 N.W.2d at 40.

C. The Yankton County Entities Waived and are otherwise Estopped from Asserting SDCL§ 3-21-2.

Third, the Yankton County Entities are estopped from raising the affirmative defense of SDCL § 3-21-2.

This Court has recognized that "an estoppel can be applied against public entities in exceptional circumstances to 'prevent manifest injustice.'" *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995) (quoting *City of Rapid City v. Hoogterp*, 85 S.D. 176, 180, 179 N.W.2d 15, 17 (1970)); *see also Hanson v. Brookings Hosp.*, 469 N.W.2d 826 (S.D. 1991). The County did not plead any affirmative defense relating to SDCL § 3-21-2 in its initial answer to the counterclaims of Luke and MTD. SDI App. 12 (00073-74).

On or about June 8, 2018, the County served upon Appellants an intentionally baseless Complaint dated May 31, 2018, which sought a "mandatory injunction requiring [Defendants] to cease and desist from operating a wireless internet provider business in

Yankton County, South Dakota".[6] SDI App. 9 (00065-66). On or about July 5, 2018, within 30 days of the commencement of the lawsuit, Luke and MTD served their written Answers and Counterclaims of barratry against the County on the explained basis that neither Luke nor MTD was a proper party to the lawsuit under SDCL § 47-34A-201.[7] SDI App. 10 & 11 (00067-72). On or about July 31, 2018, the County filed an Answer to the Counterclaims and formally denied the barratry claims. SDI App. 12 (00073-74) Notably, the Answer did not contain any affirmative defense for failure to provide notice under SDCL § 3-21-2. *Id.* Such an affirmative defense would have been, of course, nonsensical in light of the fact that the County was well aware and on notice of its own actions and inactions in the litigation it initiated.

Instead, the parties proceeded onward with the lawsuit. Among the various docket activity in the lawsuit prior to the pleading of the affirmative defenses of SDCL 3-21-2, Appellants engaged in the following docket-activity:

- Scheduling Order;
- Discovery;
- Served discovery deficiency letters;
- Motion to Compel;
- Order Granting Motion to Compel;
- Notice of depositions and subpoenas; and
- Disclosed expert witnesses.

SDI App. 7 (00047-49).

On or about April 17, 2019, and a mere two weeks after Appellants served noticed of depositions various witnesses, the County and Appellants stipulated to dismiss all claims

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6. The Complaint was filed with the Court on June 13, 2018. SDI App. 9 (00065-66).

7. "A limited liability company is a legal entity distinct from its members. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company." SDCL § 47-34A-201.

in the lawsuit without prejudice pending a mutual settlement and a signed Order from the Court. SDI App. 7 (00049). On April 25, 2019, Yankton County Planning and Zoning voted 7-0 that SDI was *excluded* from the requirements of Article 25 pursuant to Section 2505, and that SDI was never in violation of Yankton County Zoning Ordinance Article 25.[8] SDI App. 7 (00049-50). At a meeting on May 17, 2019, between Appellants and County Commissioners Don Kettering and Dan Klimisch, Appellants learned and had reason to know for the first time Plaintiffs' ulterior motive for commencing the lawsuit relating to an unrelated recreational business McAllister TD, LLC d/b/a Fire and Ice. SDI App. 7 (00050).

On October 30, 2019—more than one year after Luke and MTD served their claims for barratry on July 5, 2019, against the County—the County served an Answer to Counterclaim alleging for the first time in the lawsuit the affirmative defense of SDCL § 3-21-2. Then, it was not until almost a *second year* later on September 11, 2020, when the County finally brought this Motion. All the while, Appellants' continued to suffer damages while the County repeatedly refused to dismiss its baseless lawsuit. SDI App. 7 (00054-55). *See Smith*, 539 N.W.2d at 682 (S.D. 1995) (quoting *City of Rapid City*, 85 S.D. at 180, 179 N.W.2d at 17 (1970)). Then, mere days before trial on the County's claims, the County voluntarily dismissed its own lawsuit. SR 952.

Ultimately, rather than plead the affirmative defense under SDCL § 3-21-2 in its

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8. Under Section 2505 of Yankton County Ordinances, certain devices and facilities are deemed "excluded" under Article 25. SDI App. 14 (00077). If the exclusion is met, there is no rule, ordinance, or requirement that a person or entity must affirmatively seek recognition of the exclusion from the Yankton County Commission, Planning Commission, Board of Adjustment or any other similar governmental body. To that end, if an entity is excluded, such as SDI, then any alleged requirement under Article 25 to obtain a conditional use permit is not applicable. *See id.*

initial Reply, the County instead actively participated in the lawsuit for over one year before raising the affirmative defense on October 30, 2019, and then continued to participate in the lawsuit for a second year before bringing a motion for summary judgment. It would result in manifest injustice and an unfairly harsh result to dismiss the claims when the County did not avail itself to the affirmative defense until two years after the claims were alleged. *See, Wolff v. Secretary of South Dakota Game, Fish and Parks Dep't*, 1996 S.D. 23, 544 N.W.2d 531, 538 (Sabers, J. dissent) (stating that defendant should be estopped from asserting notice defense when defendant "answered Wolffs' complaint, filed motions, participated in hearings, and continued discovery"); *see also, e.g., Erickson v. County of Brookings*, 1996 S.D. 1, ¶ 15, 541 N.W.2d 734, 737 (holding that defendant County of Brookings was estopped from raising the notice defense after it allowed the 180 days to expire); *Furgeson v. Bisbee*, 932 F. Supp. 1185, 1188 (D.S.D. 1996) (holding that the defendants were "estopped from raising the notice defense under SDCL ch. 3-21").[9]

II. The Circuit Court Erred When it Determined that Appellant's Claims against Klimisch Were Barred by Prosecutorial Immunity

The circuit court erred when it held that Klimisch was protected by absolute prosecutorial immunity. SDI App. 5 (00024-26). Absolute prosecutorial immunity is not applicable nor is it appropriate in this case for county prosecutor Klimisch. There is a genuine issue of material fact still to be resolved as to whether Klimisch had an actual

9. While the County should be estopped from asserting SDCL § 3-21-2 for the reasons above, the other Yankton County Entities should also be estopped from asserting the defense given their involvement in the lawsuit since the inception. The County Commission and the Planning Commission advises the County. The Board of Adjustment is comprised of the same individuals as the County Commission. Klimisch was the attorney who represented the County. Garrity was principally involved prior to the commencement of the lawsuit and was the one who wrote the cease and desist letter to Luke. SR 716-17.

personal conflict of representation and knew the claims he brought against Appellants were baseless.

Generally, prosecutors enjoy a common-law immunity from civil suits when they are acting within the scope of their duties. *Imbler v. Pachtman*, 424 U.S. 409, 422-23, 96 S. Ct. 984, 991, 47 L. Ed. 128 (1976) (relied upon by circuit court in memorandum decision). "Absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Christensen v. Quinn*, 45 F. Supp. 3d 1043, 1086 (D.S.D. Sep. 10, 2014) (quoting *Van de Kamp v. Goldstein*, 555 U.S. 335, 342, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009)).

While it has not yet been considered by this Court, the Nevada Supreme Court considered an exception, which was also considered by the Ninth Circuit Court of Appeals, "to the general rule of absolute prosecutorial immunity where a plaintiff alleges that a prosecutor has both an actual conflict of interest and knowledge that the charges filed are baseless." *Stevens v. McGimsey*, 673 P.2d 499, 500 (Nev. 1983); *see also, e.g.*, *Boruchowitz v. Bettinger*, 654 Fed. Appx. 354, 355 (9th Cir. 2016) (recognizing "that absolute immunity extends only insofar as a judicial officer is engaged in duties that are integral to the court's decision-making process-which does not include acts that could properly be characterized as malicious prosecution, such as filing baseless charges for personal gain or retribution.").

This narrow exception to the general rule of absolute prosecutorial immunity—to the extent this Court would adopt the exception—applies in this matter. Here, Appellants have produced evidence, which when viewed in the light most favorable to them, demonstrates that Klimisch had a personal conflict when he represented a client, TJ Land, in connection with his private law practice in a real estate transaction involving Fire and

Ice. After representing TJ Land on a transaction involving Fire & Ice's business intentions to reopen in 2018 and purchase certain land it was leasing from TJ Land, Klimisch simultaneously proceeded to communicate with Garrity and commence a baseless lawsuit against Appellants on the purported basis that they were violating Yankton zoning ordinances by operating a wireless internet business without a conditional use permit. As Mr. Kettering stated, however, the actual reason for the lawsuit against Appellants was because of past issues involving Fire & Ice. Prosecutorial immunity should not protect conduct such as this which falls outside the duties that are integral to his position as a State's Attorney for Yankton County.

Specifically, Fire & Ice, which is an entity separate and distinct from SDI, communicated to TJ Land in February 2018 its intention to exercise its option to purchase the Real Property that it had been leasing from TJ Land since 2016. SR 716. Klimisch was the registered agent and personal attorney for TJ Land. *Id.* In fact, Klimisch prepared the transactional documents and mortgage in order to effectuate the option to purchase the Real Estate. *Id.* His name appears at the top of the Mortgage. *Id.* The effect of this option to purchase was to convey Fire & Ice's intention to continue operating its recreational and seasonal business, which was competitively disruptive to existing businesses in the area. SDI App. 7 (00045). Due to his own involvement with preparing the transaction documents for the lease and purchase, Klimisch was intimately familiar with McAllister TD, LLC d/b/a Fire and Ice and also aware of Luke as the member of McAllister TD, LLC.

A few weeks after this transaction, Planning and Zoning Administrator Garrity sent a letter on behalf of Yankton County Planning & Zoning via certified mail to Luke, threatening fines, imprisonment, and injunctive relief. SDI App. 7 (00045). The letter was provided via courtesy copy to Klimisch. *Id.* Over the following weeks and months, B-

Y Internet, LLC d/b/a South Dakota Wireless Internet met with Klimisch and Garrity and explained how it—B-Y Internet, LLC d/b/a South Dakota Wireless Internet—was the entity operating the wireless internet business and how it was excluded from Article 25 under Section 2505. SDI App. 7 (00046) (e-mail summary from Luke to Klimisch and Garrity on April 20, 2018) ("We discussed B-Y Internet, LLC possibly requiring a conditional use permit under Article 25").

Yet, on June 8, 2018, Yankton County commenced this lawsuit against not only B-Y Internet, LLC d/b/a South Dakota Wireless Internet as the entity operating a wireless internet business, but also against Luke and MTD. There remain genuine issues of material fact as to the reasons the Yankton Count Entities, including Klimisch, commenced a lawsuit against all Appellants, but also, in particular, the reasons the lawsuit was commenced against Luke and MTD. The decision to commence a lawsuit against all three Appellants is made even more puzzling because Klimisch had only recently assisted with finalizing real estate transactional documents with Fire & Ice, which involved Luke as a member of Fire & Ice, and would therefore import a level of personal knowledge regarding the nature and structure of Fire & Ice as a separate entity from B-Y Internet, LLC d/b/a South Dakota Wireless Internet.

Appellants have produced evidence, when viewed in the light most favorable to them, that demonstrate that Klimisch was well aware that the claims against Appellants were baseless and, nevertheless, conspired with the other Yankton County Entities, including Garrity who was involved in the early communications with SDI, to bring the claims against Appellants. Thereafter, the County refused to dismiss the lawsuit for years, and even after the Planning Commission voted unanimously 7-0 in favor of finding that SDI was excluded from the requirements of Article 25 of the Ordinance under §

2505(3) and (5). SDI App. 7 at ¶ 30 (00049-50). The Planning Commission further determined that SDI was never in violation of Article 25 of the Ordinance.[10] *Id.* Yet, the County and Klimisch still did not dismiss the lawsuit despite repeated pleas from SDI that the lawsuit continued to cause irreparable damage to its business. SDI App. 7 at ¶¶ 51-53 (00059-60). Indeed, throughout the course of the litigation, until its bitter end, SDI repeatedly requested a letter of compliance from the County and Klimisch that it is operating its business lawfully within the County and, yet, the County and Klimisch have, time and time again, refused to provide the letter and refused to dismiss the baseless lawsuit. *Id.* Then, five days before trial, the County voluntarily dismissed the lawsuit.

At minimum, there are genuine issues of material fact regarding whether Klimisch had an actual conflict of interest and knowledge that the charges filed were and still are baseless. As such, the circuit court erred when it granted summary judgment despite the existence of those genuine issues of material fact.

CONCLUSION

The circuit court improperly granted summary judgment in favor of the Yankton County Entities on the basis of failure to provide notice under SDCL 3-21-2. In doing so, the circuit court improperly weighed and resolved genuine issues of material fact. The circuit court also weighted and resolved genuine issues of material fact regarding the application of prosecutorial immunity. Consequently, Appellants respectfully ask the Court to reverse the granting of summary judgment and remand to the circuit court.

10. This Planning Commission meeting is video recorded and is publically available on Yankton County's website.

Dated this 28th day of June, 2021.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Jonathan A. Heber
Meredith A. Moore
Jonathan A. Heber
140 N. Phillips Ave., 4th Floor
P.O. Box 1400
Sioux Falls, SD 57101-1400
(605) 335-4950
meredithm@cutlerlawfirm.com
jonathanh@cutlerlawfirm.com
Attorneys for Appellants

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument before the Court.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,932 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2021, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Clerk of the Supreme Court
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 28th day of June, 2021, I sent an electronic copy of Appellants' Brief via email to counsel for Appellee as follows:

Douglas M. Deibert
Cadwell Sanford Deibert & Garry LLP
200 E 10th Street, Suite 200
Sioux Falls, SD 57104
Email: ddeibert@cadlw.com

and

Mark D. Fitzgerald
Fitzgerald Vetter Temple & Bartell
1002 Riverside Blvd Suite 200
Norfolk NE 68702-1407
Email: fitz@fvtlawyers.com

/s/ Jonathan A. Heber
Jonathan A. Heber

INDEX TO APPELLANTS' APPENDIX

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff/Respondent, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants/Petitioners, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants/ Respondents.	66 Civ. 18-178 NOTICE OF ENTRY OF ORDER OF DISMISSAL

To all parties above named:

PLEASE TAKE NOTICE that an Order of Dismissal was entered in the above-captioned case, said Order having been executed and filed March 12, 2021. A true and correct copy is attached hereto.

Dated at Yankton, South Dakota, this 18 day of March, 2021.

YANKTON COUNTY

By_____

Robert Klimisch
Yankton County State's Attorney
410 Walnut # 100
Yankton, SD 57078
rob@co.yankton.sd.us

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was filed electronically with the Court and that the following were served by the state's electronic service system:

Jonathan A. Heber — **jonathanh@cutlerlawfirm.com**
Meredith A. Moore — **meredithm@cutlerlawfirm.com**
Cutler Law Firm
140 North Phillips Avenue
P.O. Box 1400
Sioux Falls, SD 57101-1400

Mark D. Fitzgerald — **Fitz@FVTLawyers.com**
Fitzgerald, Vetter, Temple & Henderson
1002 Riverside Boulevard, Suite 200
Norfolk, NE 68701

Douglas M. Deibert — **ddeibert@cadlaw.com**
Cadwell Sanford Deibert & Garry
200 East 10th Street - Suite 200
Sioux Falls, SD 57104

this 18 day of March, 2021.

YANKTON COUNTY

By _____
Robert Klimisch
Yankton County State's Attorney
410 Walnut # 100
Yankton, SD 57078
rob@co.yankton.sd.us

Filed: 3/18/2021 1:07 PM CST Yankton County, South Dakota 66CIV18-000178

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff,	*	66CIV. 18-000178
vs.	*	MOTION AND ORDER FOR DISMISSAL OF CIVIL FILE
LUKE E. MCALLISTER, MCALLISTER TD, LLC and B-Y INTERNET, LLC Defendants.	*	

COMES NOW the above-named Plaintiff, Yankton County, State of South Dakota, by and through the Yankton County State's Attorney attorney, Robert W. Klimisch, and hereby requests the Court to dismiss the Complaint filed in this matter on the 13th day of June 2018.

Dated this 12th day of March, 2021.

Robert W. Klimisch
State's Attorney

ORDER

The Court having duly considered the above Motion for dismissing the above matter and being fully advised in the premises and it appearing that the State's Attorney's office has good cause, it is hereby

ORDERED that the Complaint filed in this matter shall be dismissed without prejudice.

Dated this _____ day of March, 2021.

BY THE COURT:

Signed: 3/12/2021 12:56:21 PM

Hon. Patrick T. Smith
Circuit Court Judge

Attest:
Chambers, Tracy
Clerk/Deputy

ATTEST:

STATE OF SOUTH DAKOTA) :SS COUNTY OF YANKTON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	)	66 Civ. 18-178 NOTICE OF ENTRY OF ORDER GRANTING SUMMARY JUDGMENT

To all parties above named:

PLEASE TAKE NOTICE that an Order Granting Summary Judgment was entered in the above-captioned case, said Order having been executed and filed February 1, 2021. A true and correct copy is attached hereto.

Filed: 2/2/2021 3:25 PM CST Yankton County, South Dakota 66CIV18-000178

Dated at Sioux Falls, South Dakota, this 2 day of February, 2021.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was filed electronically with the Court and that the following were served by the state's electronic service system:

Jonathan A. Heber — **jonathanh@cutlerlawfirm.com**
Meredith A. Moore — **meredithm@cutlerlawfirm.com**
Cutler Law Firm
140 North Phillips Avenue
P.O. Box 1400
Sioux Falls, SD 57101-1400

Mark D. Fitzgerald — **Fitz@FVTLawyers.com**
Fitzgerald, Vetter, Temple & Henderson
1002 Riverside Boulevard, Suite 200
Norfolk, NE 68701

this 2 day of February, 2021.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

Filed: 2/2/2021 3:25 PM CST Yankton County, South Dakota 66CIV18-000178

STATE OF SOUTH DAKOTA) :SS COUNTY OF YANKTON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	)	66 Civ. 18-178 ORDER GRANTING SUMMARY JUDGMENT

Third-Party Defendants Yankton County Board of Adjustment; Yankton County Planning Commission; Patrick E. Garrity, in his capacity as Yankton County Zoning Administrator and in his individual capacity; and Robert W. Klimisch, in his capacity as Yankton County State's Attorney and in his individual capacity, all having made Motions for Summary Judgment, supported by

Filed: 2/2/2021 3:25 PM CST Yankton County, South Dakota 66CIV18-000178

Affidavits and other documents, required by SDCL 15-6-56; and

Defendants B-Y Internet, LLC, McAllister TD, LLC, and Luke McAllister, having submitted Affidavits and documents in opposition to the Motions for Summary Judgment, all further in accordance with SDCL 15-6-56; and

The Court having heard oral argument on the Motions, and the opposition thereto, by conference phone call on November 17, 2020; and the Court having considered the Motions, all matters submitted in support thereof; and all matters submitted in opposition; and

The Court having entered its Memorandum Decision on December 11, 2020, filed December 14, 2020, granting the Motions for Summary Judgment brought by Third Party Defendants; and

Plaintiff Yankton County having submitted its Motion for Summary Judgment on January 19, 2021; and

Counsel for the parties having entered into a Stipulation on January 19, 2021, addressing matters, positions, and points of law relating to the Motion for Summary Judgment brought by Plaintiff Yankton County, as it relates to matters, positions, and points of law previously made by all Third Party Defendants; and

The Court having entered its Amended Memorandum Decision on _____, 2021, the contents of both Memorandum Decisions being incorporated herein by reference,

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the Motions for Summary Judgment brought by Yankton County, State of South Dakota, a Political subdivision; Third-Party Defendants Yankton County Board of Adjustment; Yankton County Planning Commission; Patrick E. Garrity, in his capacity as Yankton County Zoning Administrator and in his individual capacity; and Robert W. Klimisch, in his capacity as Yankton County State's Attorney and in his individual capacity are hereby in all respects granted.

Signed: 2/1/2021 4:44:35 PM

Attest:
Chambers, Tracy
Clerk/Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF YANKTON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	)	66 Civ. 18-178 NOTICE OF ENTRY OF AMENDED MEMORANDUM DECISION

To all parties above named:

PLEASE TAKE NOTICE that an Amended Memorandum Decision was entered in the above-captioned case, said Amended Memorandum Decision having been executed and filed February 1, 2021. A true and correct copy is attached hereto.

Filed: 2/2/2021 3:25 PM CST Yankton County, South Dakota 66CIV18-000178

Dated at Sioux Falls, South Dakota, this 2 day of February, 2021.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was filed electronically with the Court and that the following were served by the state's electronic service system:

Jonathan A. Heber **jonathanh@cutlerlawfirm.com**
Meredith A. Moore **meredithm@cutlerlawfirm.com**
Cutler Law Firm
140 North Phillips Avenue
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Sioux Falls, SD 57101-1400

Mark D. Fitzgerald **Fitz@FVTLawyers.com**
Fitzgerald, Vetter, Temple & Henderson
1002 Riverside Boulevard, Suite 200
Norfolk, NE 68701

this 2 day of February, 2021.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

Filed: 2/2/2021 3:25 PM CST Yankton County, South Dakota 66CIV18-000178

STATE OF SOUTH DAKOTA) :SS COUNTY OF YANKTON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	)	66 Civ. 18-178 AMENDED MEMORANDUM DECISION

This Court previously entered its Memorandum Decision containing ruling on Motions for Summary Judgment brought by various parties. Since then, Defendant Yankton County has served and filed its Motion for Summary Judgment.

In a Stipulation dated January 19, 2021, signed by counsel for all parties, the parties have agreed, that without oral

argument or additional briefing, this Court may enter either an Amended Memorandum Decision, or a separate Memorandum Decision, that addresses the Motion for Summary Judgment brought by Yankton County. Counsel for the parties have further stipulated that briefing and oral argument that would have been presented by the parties relating to the Motion for Summary Judgment now brought by Yankton County, would not have been materially different than that already contained in the existing record, as it relates to the positions and arguments of Motions for Summary Judgment previously brought by Third Party Defendants. Counsel for the parties have further agreed that Defendants and Third-Party Plaintiffs have not waived their arguments in opposition to Yankton County's Motion for Summary Judgment. Defendant and Third-Party Plaintiffs incorporated their Brief in Opposition to Motion for Summary Judgment dated October 30, 2020, and all related and accompanying affidavits, exhibits, documents, and oral argument.

Based on the Stipulation of the parties dated January 19, 2021, and based further on all matters submitted in support of Motions for Summary Judgment filed by Third Party Defendants; and based now on the Motion for Summary Judgment served and filed by Plaintiff Yankton County, this Court's Memorandum Decision dated December 11, 2020 and filed December 14, 2020, is amended as follows:

The Court incorporates all matters contained in its

Filed: 2/2/2021 3:25 PM CST Yankton County, South Dakota 66CIV18-000178

Memorandum Decision dated December 11, 2020, filed December 14, 2020, as if fully set forth herein.

Consequently, the Motion for Summary Judgment brought by Plaintiff Yankton County, along with the Motions for Summary Judgment brought by all Third Party Defendants, are hereby granted. An Order to that effect shall be submitted by the prevailing parties, for the Court's consideration. The parties are also directed to prepare submissions they deem necessary on this decision pursuant to the South Dakota Rules of Civil Procedure.

Dated: Signed: 2/1/2021 4:44:05 PM

Attest:
Chambers, Tracy
Clerk/Deputy

STATE OF SOUTH DAKOTA

COUNTY OF YANKTON

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, SOUTH DAKOTA,
A Political Subdivision,

Plaintiff,

vs.

B-Y INTERNET, LLC, MCALLISTER TD, LLC, LUKE MCALLISTER

Defendant.

and

YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION PATRICK GARRITY, YANKTON COUNTY ZONING ADMINISTRATOR, in both his Official and Individual Capacities; and, **ROBERT KLIMISCH, YANKTON COUNTY STATE'S ATTORNEY**, in both his Official and Individual Capacities;

Third Party Defendants.

66CIV18-178

MEMORANDUM DECISION ON THIRD PARTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND THIRD PARTY DEFENDANTS' MOTION TO STRIKE

PROCEDURAL HISTORY

This matter came before the court on a Motion for Summary Judgment of Third Party Defendant Patrick Garrity, through his attorney Mark Fitzgerald, as well as a Motion for Summary Judgment by Third Party Defendants Robert Klimisch, Yankton County Board of Adjustment, Yankton County Commission, and Yankton County Planning Commission (hereinafter Movants), through their attorney Doug Deibert. The Movants also brought a Motion

to Strike Defendants' Statement of Additional Material Facts. Defendants B-Y Internet, McAllister TD, and Luke McAllister (hereinafter Defendants) filed their Resistance to Defendant's Motion for Summary Judgment as well as their Motion in Opposition to Strike the Statement of Material Facts through their attorneys Joseph Heber and Meredith Moore. A hearing was held in the Davison County Courthouse on November 17, 2020. The parties' attorneys appeared telephonically for argument on the motion. The court having read the briefs and heard the parties' arguments now issues this memorandum decision.

FACTUAL BACKGROUND

On September 30th, 2017, McAllister TD, LLC registered for the business name "B-Y Internet" for the purpose of providing wireless internet services to Yankton County and the surrounding areas. Cam McAllister, one of the co-owners of B-Y Internet, exchanged emails with then Yankton County Zoning Administrator Patrick Garrity on any permits that B-Y Internet may need in order to operate their services. Garrity responded, stating that a similar provider had received a Conditional Use Permit (CUP) for this type of work and asked if they were included with that provider. Cam McAllister responded by stating they were not associated and explained the different services that B-Y Internet provided. Garrity never responded, and B-Y Internet, LLC, was formed by Luke McAllister on November 29th, 2017. B-Y Internet would then register the business name "South Dakota Wireless Internet" which operates in Yankton County.

Garrity sent a letter to Luke McAllister on March 12th, 2018, stating that he believed South Dakota Wireless Internet was currently in violation of a Yankton County Ordinance and needed a CUP in order to become compliant. This letter was also sent to Yankton County State's Attorney Robert Klimisch as well as the Yankton County Commissioners. A number of emails

and meetings were had between Garrity, Klimisch, and the McAllisters to discuss whether B-Y Internet needed a CUP to operate. Some of these meetings also included discussions about "Fire and Ice", a gas station that was owned by Luke McAllister and operated by TD McAllister, LLC, and whether they also needed permits or were in violation of zoning ordinances.

On May 31st, 2018, Klimisch filed a civil complaint against the Defendants in his official capacity as Yankton County State's Attorney which was served on Defendants on June 8th, 2018. The complaint alleged that B-Y Internet was in violation of a Yankton County ordinance that prohibited operating a wireless telecommunication facility without a conditional use permit. The Defendants responded on July 5th, 2018 denying that were they operating a wireless Communication facility, that Luke McAllister or McAllister TD, LLC, were not personally liable, and made a counterclaim for barratry against Yankton County. The parties entered into a stipulated agreement to dismiss all claims so long as they can come to an agreement on April 18th, 2019. On April 25th, 2019 the Planning and Zoning Board of Yankton County met and considered whether South Dakota Wireless Internet would need a CUP to operate, or whether it fit within an exception to the ordinances. They voted unanimously that it did in fact fit within the exception and recommended that to the County Commissioners.

There is no indication whether the County Commissioners voted to approve the Planning and Zoning Board's recommendation. The complaint against the Defendants has not been dismissed. Klimisch claimed that he had tried to reach a resolution with the Defendants counsel, but the negotiations failed. The Defendants sent a demand letter to Klimisch on July 3rd, 2019 stating that the parties had failed to come to a resolution and that Defendants were withdrawing their consent to dismiss their claims against Yankton County.

From there, Defendants filed a third-party complaint for abuse of process and civil conspiracy to commit abuse of process against the Movants on August 23rd, 2019. The Defendants alleged that Pat Garrity, Rob Klimisch, and the Yankton County entities had conspired against McAllister TD in operating "Fire and Ice". The Defendants claimed that the lawsuit alleging that B-Y Internet was not in compliance with the Yankton County ordinances was improperly and wrongfully commenced to give the Movants leverage to put Defendants out of business. The Defendants subsequently filed an amended complaint on September 27th, 2019, alleging barratry, abuse of process, and civil conspiracy to commit barratry and abuse of process against the Movants.

SUMMARY JUDGMENT STANDARD

The summary judgment standard in South Dakota is well settled:

> Summary judgment is authorized 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…All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.

Delka v. Cont'l Cas. Co., 2008 S.D. 28, ¶ 8, 748 N.W.2d 140, 144 (quoting *Schwaiger v. Avera Queen of Peace Health Serv.*, 2006 SD 44, ¶ 7, 714 N.W.2d 874, 877.

A disputed fact will not be considered material unless it would affect the outcome of the case under the law. *Niesche v. Wilkinson*, 2013 S.D. 90 ¶ 9, 841 N.W.2d 250, 253-54 (citations omitted). "Mere general allegations and denials by the nonmoving party which do not set forth specific facts will not prevent the issuance of summary judgment." *Id.* (quoting *State Auto Ins. Cos. v. B.N.C.*, 2005 S.D. 89, ¶ 6, 702 N.W.2d 379, 383).

A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. SDCL §15-6-56(C). The adverse party may also set forth specific facts showing that there is a genuine issue for trial. SDCL §15-6-56(e).

Here, the Defendants answered the Movants Statement of Material Facts with short and concise statements as to the facts that they believed a genuine issue existed to be tried in compliance with SDCL §15-6-56(c). Along with this, they also set forth additional specific facts showing that there may be a genuine issue for trial, in accordance with SDCL §15-6-56(e). There is nothing in the South Dakota Rules of Civil Procedure that does not allow this practice. Movants Motion to Strike Additional Material Facts is denied.

I. Whether the Notice Requirements of SDCL §3-21-3 Were Satisfied by Defendants

"The intent of a statute is determined from what the legislatures said, rather than what the courts think it should have said, and the court must confine itself to the language used." *Appeal of AT&T Information Systems*, 405 N.W.2d 24, 27 (S.D. 1987). If the language of the statute is "clear, certain and unambiguous, there is no occasion for construction and the court's only function is to declare the meaning of the statute as clearly expressed in the statute." *Goin v. Houdashelt*, 2020 S.D. 32, ¶ 13, 945 N.W.2d 349, 353. SDCL §3-21-2 states:

> No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury. Nothing in this chapter tolls or extends any applicable limitation on the time for commencing an action.

SDCL §3-21-2. Notice must also be given to the correct government official. If the suit is against the county, written notice must be given to the county auditor. SDCL § 3-21-3.

Defendant's claim that their counterclaim of barratry filed on July 5th, 2018 constitutes written notice that satisfies, or at least substantially complies with SDCL §3-21-2. This is the sole claim filed by Defendants that occurred before the 180-day requirement. However, the barratry claim does not state the time, place, or cause of the injury that is required by SDCL §3-21-2. These three things are required to give the public entity notice. The only statement the counterclaim makes is that the complaint constitutes "a frivolous and meritless claim by Plaintiff against Defendant." Furthermore, this counterclaim is only made against Yankton County and not the third-party Defendants. The argument fails. If a counterclaim were considered sufficient written notice, there would be no need for SDCL §3-21-3. The only other notice that Defendants are alleging is the July 3rd, 2019 letter from Defendant's counsel to Robert Klimisch. Even if this were written notice of the claims against them, it was 363 days after the initial action was filed—well past the 180-day requirement.

Along with this, the plain reading of SDCL §3-21-3 states that "*No action* for the recovery of damages for personal injury, property damage, error or omission or death caused by a public entity or its employees" unless written notice is provided to the correct government official. A counterclaim is an action for the recovery of damages. Therefore, a counterclaim cannot be maintained against the county unless written notice is given to the county auditor within 180 days or the statutes have been substantially complied with.

A. Substantial Compliance

The South Dakota Supreme Court has held that a claimant should be allowed to produce evidence to show "reasonable compliance with the notice statute." *Mount v. City of Vermillion*, 250 N.W.2d 686, 689 (S.D. 1977). Substantial compliance is defined as:

> Actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute

> has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Anderson v. Keller, 2007 S.D. 89, ¶ 13, 739 N.W.2d 35, 40 (quoting *Myears v. Charles Mix County*, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474). South Dakota requires written notice of suit against a public entity for the following reasons:

> (1) To investigate evidence while fresh; (2) to prepare a defense in case litigation appears necessary; (3) to evaluate claims, allowing early settlement of meritorious ones; (4) to protect against unreasonable or nuisance claims; (5) to facilitate prompt repairs, avoiding further injuries; (6) to allow the public entity to budget for payment of claims; and (7) to insure that officials responsible for the above tasks are aware of their duty to act.

Myears, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474 (quoting *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835 (citations omitted)). "Substantial compliance requires that the person who receives the notice be someone who could take necessary action to ensure that the statutory objectives are met." *Anderson*, ¶ 16, 739 N.W.2d, 35, 40.

In *Anderson*, the Court held that the Plaintiff did not substantially comply with the statute because they did not include any information in the personal injury section of insurance forms after the Plaintiff's collided with an Angostura state park employee. *Anderson*, ¶ 15, 739 N.W.2d 35, 40. While the form had the date and location of the collision, "the fact that the personal injury section is left blank falls short of meeting the objectives of the statute and hence defeats any notion of substantial compliance." *Id.* Furthermore, there was no indication to whom the Plaintiff submitted the insurance form to, therefore, no way to determine whether the Plaintiff also complied with SDCL §3-21-3. *Id.*, ¶ 16, 739 N.W.2d 35, 40.

The Defendants claim that they at least substantially complied with SDCL §3-21-2 in serving their counterclaim on July 3rd, 2018 on Klimisch, the Yankton County State's Attorney.

They also claim that the purpose of the statute was fulfilled because Yankton County then answered the counterclaim of barratry and proceeded onward with the civil action. However, that is not the purpose of the statute. As stated above, the counterclaim *was not* written notice that stated the time, place, and cause of injury. The county has no duty to inform Defendants of the statutory deadline and participating in the civil action does not constitute notice.

Defendants also did not give written notice to the county auditor within 180 days in accordance with §3-21-3. The Defendants claim that Klimisch was a person who could take necessary action to ensure that the statutory objectives are met, but they did not file a written notice with Klimisch—only a counterclaim was filed. Klimisch, as acting State's Attorney, is not required to inform the county auditor or the county commissioners every time a counterclaim has been filed against the county or its entities. Therefore, Defendants did not substantially comply with the notice requirements of SDCL §3-21-2 or §3-21-3.

Defendants also argue that the time period to assert a barratry claim had not begun to accrue because the lawsuit had not been dismissed favorably to them. However, that overlooks §3-21-2, which states that notice is required "within one hundred eighty days after the *injury*." The notice requirement of §3-21-2 would need to have happened within one hundred and eighty days after the Defendants responded to the initial complaint, because that is when their injury occurred. Furthermore, the last sentence of §3-21-2 states "Nothing in this chapter tolls or extends any applicable limitation on the time for commencing an action." Looking at the plain language of this statute, the Defendants would not be able to toll or extend the notice requirement.

B. Estoppel

In order for a party to prove equitable estoppel:

> False representations or concealment of material facts must exist; the party to whom it was made must have been without knowledge of the real facts; the representations or concealment must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied thereon to his prejudice or injury.

Cooper v. James, 2001 S.D. 59, ¶ 16, 627 N.W.2d 784, 789. "A defendant cannot egregiously lead the Plaintiff to believe that service was sufficient and then delay until the statute of limitation has run." *Id.* Furthermore, estoppel can be applied against public entities "in exceptional circumstances to 'prevent manifest injustice.'" *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995) (quoting *City of Rapid City v. Hoogterp*, 85 S.D. 176, 180 179 N.W.2d 15, 17 (1970)).

Defendants claim that because Movants did not plead their affirmative defense under SDCL §3-21-2 in its initial reply, manifest injustice and unfairly harsh results would occur if the barratry claim was dismissed. The Defendants point to no facts that misled them to believe that Movants were waiving the notice requirement, though. Moreover, the only party to the lawsuit when the initial reply was filed on July 31, 2018 was Yankton County. None of the specific entities, Klimisch, nor Garrity were named in the suit. Therefore, they would not have had the opportunity to plead the notice defense until they did on October 30th, 2019. As mentioned before, the county has no duty to inform the Defendants that they needed to provide written notice of the claim to the county auditor under §3-21-2. Therefore, the county did not have to plead that affirmative defense in the initial response.

C. Abuse of Process

Defendants claim that there was a "cat out of the bag" moment at a meeting between County Commissioner Don Kettering, Don Klimisch, and owner of McAllister, T.D., LLC, Cam McAllister that showed the ulterior motive of the Movants to bring the initial suit against the Defendants and proves abuse of process. This meeting was recorded by McAllister, in which Don Kettering mentions issues that the Planning and Zoning Commission had with Fire and Ice and took place on May 17th, 2019. The Defendants claim that this shows the suit was brought just to run Fire and Ice out of business. They claim that because they didn't have notice of the ulterior motive of the Movants until May 17th, 2019, the July 3rd letter to Klimisch would be within the 180-day notice requirement of SDCL §3-21-2.

In *Gakin v. City of Rapid City*, the South Dakota Supreme Court took up fraudulent concealment of a governmental entity. They found that "'fraudulent concealment may toll the statute of limitations' and 'this doctrine may be extended to a notice of claim provision.'" *Gakin v. City of Rapid City*, 2005 S.D. 68, ¶ 18, 698 N.W.2d 493, 499 (quoting *Purdy v. Fleming*, 2002 S.D. 156 ¶ 14, 655 N.W.2d 424, 430). "Fraudulent concealment consists of 'some affirmative act or conduct on the part of the defendant designed to prevent, and does prevent, the discovery of the cause of action.'" *Id.*, ¶ 21 698 N.W.2d 493, 499 (quoting *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 14 667 N.W.2d 651, 650). In *Gakin*, however, the Court found that even though the defendant's fraudulent actions may have constituted affirmative conduct designed to prevent the discovery of the cause of action, the Plaintiffs had suspected wrongdoing from the very beginning, so nothing the Defendants did prevented them from discovering the claimed cause of action. *Id.*

Here, the underlying suit was brought by Klimisch because Garrity believed the Defendants were in violation of a zoning ordinance. The Defendants claim that the Yankton County Commissioners wanted to bring this lawsuit to put Fire and Ice out of business. However, there was no affirmative action that prevented Defendants from talking with the County Commissioners, Garrity, or Klimisch. In fact, several meetings between Garrity, Klimisch and the Defendants had taken place before May 17th, 2019. There is also nothing to indicate that the Defendants could not have met with the County Commissioners to discuss either South Dakota Internet or Fire and Ice and why they were having issues with Garrity or Klimisch. Since there was no fraudulent concealment on behalf of the Movants, the notice provision will not be tolled and the defendants cannot rely on the July 3rd letter as proper notice under SDCL §3-21-2.

II. Whether Klimisch can Exercise Prosecutorial Immunity

Prosecutors enjoy the same common-law immunity from civil suit that judges and grand jurors do when they are acting within the scope of their duties. *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976). A prosecutor must be able to exercise the independence of their judgment without the concern of harassment by unfounded civil litigation. *Id.* at 423. Therefore, the United States Supreme Court has held that prosecutors enjoy absolute immunity from civil suit. *Id.* at 427.

Prosecutors are open to some liability, though. "Absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court', but is instead engaged in other tasks, say, investigative or administrative tasks." *Christensen v. Quinn*, 456 F.Supp.3d 1043, 1086 (D.S.D. 2014) (quoting *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009)). Courts are tasked with evaluating the nature of the function performed by the prosecutor in determining whether it was

within their duties as an officer of the court or within the realm of investigation or an administrative task. *Id.* (citing *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997)). Acts performed by a prosecutor that "are not associated with the prosecutor's role as advocate in the judicial process are protected by qualified immunity." *Id.*

Here, Klimisch brought suit on behalf of Yankton County in his capacity as Yankton County State's Attorney. He received information from Zoning Administrator Pat Garrity that the Defendants may be in violation of a Yankton County zoning ordinance. Using this information, Klimisch initiated the action against the Defendants. He was not engaged in an investigative or administrative role when he initiated the suit, rather, he was acting as an advocate in the judicial process which grants him absolute immunity from civil suit.

Defendants write in their brief that other jurisdictions recognize a general exception to absolute prosecutorial immunity when the prosecutor has a conflict of interest and knowledge that the claims are baseless. It is alleged by Defendants that Klimisch had a conflict of interest when he brought suit against them because he had represented an opposing party in a real estate transaction with Defendant McAllister, T.D., LLC, in February of 2018. They claim that because he could have gained confidential knowledge about the Defendants through this transaction, it created a conflict when he later brought suit against them as State's Attorney. Klimisch did not represent any of the Defendants at any time during the real estate transaction.

There was also no conflict of interest for Klimisch in this case. Klimisch did not gain privileged knowledge about McAllister, T.D. in this transaction, nor is there any evidence that Klimisch used this transaction to improperly initiate a suit against McAllister, T.D. four months after the transaction was completed. The real estate transaction was completely separate from the suit initiated against the Defendants, Klimisch did not gain any privileged knowledge about

McAllister, T.D. from the transaction, and Klimisch did not engage in an investigative or administrative role when he initiated the suit against Defendants. Therefore, absolute prosecutorial immunity applies to him.

Furthermore, Klimisch was acting on information provided to him by Garrity—the Zoning Administrator—for a possible violation of a zoning ordinance. That does not constitute knowledge of a baseless claim, even if it was later found that the Defendants were not in violation of the zoning ordinance.

CONCLUSION

The Defendants failed to give written notice to the third party public entity Defendants within 180 days as prescribed by SDCL §3-21-2. There actions did not substantially comply with either SDCL §3-21-2 or §3-21-3. Furthermore, Robert Klimisch can exercise absolute prosecutorial immunity as he brought the suit within his capacity as Yankton County States Attorney. The Motion for Summary Judgment is hereby GRANTED and an order to that effect should be submitted by the prevailing party for the court's consideration. Parties are also directed to prepare submissions they deem necessary on this decision pursuant to the South Dakota rules of civil procedure.

Dated this 11 day of December 2020.

BY THE COURT:

Hon. Patrick T. Smith
First Circuit Court Judge

ATTEST:

Clerk of Courts/Deputy

STATE OF SOUTH DAKOTA) :SS COUNTY OF YANKTON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	)	66 Civ. 18-178 STATEMENT OF UNDISPUTED FACTS

PARTIES

For what is intended to be ease of reference, in this Statement of Undisputed Facts, the parties will be referred to as follows:

1. Yankton County; Yankton County Commission; Yankton County Board of Adjustment; and Yankton County Planning Commission will be referred to as the YANKTON COUNTY ENTITIES.

2. State's Attorney Robert Klimisch will be referred to as KLIMISCH.

3. Former Yankton County Zoning Administrator Patrick E. Garrity will be referred to as GARRITY.

4. Luke E. McAllister, McAllister TD, LLC and BY Internet, LLC will be referred to as McALLISTERS.

The YANKTON COUNTY ENTITIES and KLIMISCH hereby submit the following as their Statement of Undisputed Material Facts, in accordance with SDCL 15-6-56(c)(1).

1. Since June 2005 and to the date of this Statement of Undisputed Facts, Robert Klimisch (hereinafter Klimisch), has been the elected State's Attorney for Yankton County, South Dakota. (Affidavit of Robert Klimisch dated September 11, ¶ 1). This Affidavit will be referred to as the Klimisch Affidavit in other Facts herein.

2. As part of his official duties as Yankton County State's Attorney, and in his capacity as Yankton County State's Attorney, on May 31, 2018, on behalf of Yankton County, Klimisch initiated an action against Luke McAllister; McAllister TD, LLC; and B-Y Internet, LLC, the caption of which is as follows:

> Yankton County, State of South Dakota, A Political subdivision, Plaintiff v. Luke E. McAllister, McAllister TD, LLC, and BY Internet, LLC, Defendants, 66 CIV. 18-178.

(hereinafter the Civil Action) (Klimisch Affidavit, Exhibit 1, ¶ 2)

3. The decision to bring the action referenced in paragraph 2 was the decision of Klimisch, and Klimisch's alone. (Klimisch Affidavit, ¶ 3, Defendant Robert Klimisch's Answers to Interrogatories and Request for Production of Documents (First Set) dated July 6, 2020.)

4. No members of the Yankton County Commission, Yankton County Board of Adjustment, Yankton County Commission, Yankton County, or Garrity, had any role or any input into the bringing of the Civil Action. (See Fact No. 3 above, and Answers to Interrogatories made by the Yankton County Entities.)

5. On July 5, 2018, attorney Michael Stevens, representing McAllister, answered the Civil Action, and asserted Counterclaims on behalf of McAllister TD, LLC and Luke E. McAllister. (Court file)

6. At no time prior to July 5, 2018, the date of the Answers and Counterclaims served and filed by attorney Stevens, had any of the McAllisters, served notice pursuant to SDCL 3-21-2. (Klimisch Affidavit, ¶4)

7. In the Counterclaims referenced in paragraphs 7 and 8 above, each alleged:

> The Plaintiff's Complaint against Defendant MCALLISTER TD, LLC constitute (sic) a frivolous and meritless claim by Plaintiff against Defendant MCALLISTER TD, LLC, and thus constitutes barratry pursuant to SDCL § 20-9-6.1. (¶12 of Counterclaim)

8. In the Counterclaims referenced in paragraphs 7 and 8,

each alleged:

> The Plaintiff's Complaint was undertaken without probable cause to believe it would succeed on the merits against MCALLISTER TD, LLC. Defendant MCALLISTER TD, LLC is entitled to damages including, but not limited to attorney's fees disbursements of defending this frivolous and meritless claim. (¶ 13 of the Counterclaim)

9. In the ad damnum portion of the Answers and Counterclaims referenced in paragraphs 7 and 8 above, part of the prayer for relief was:

> (2) For a Judgment against the Plaintiff for barratry awarding the Defendant damages for his attorney fees and disbursements in an amount to be determined by the court. (¶ 2 of ad damnum portion of the Answers and Counterclaims, Court file)

10. At no time while attorney Stevens represented McAllister TD, LLC, and Luke E. McAllister, did he or his two clients serve any notice pursuant to SDCL 3-21-2. (See Klimisch Affidavit)

11. On and after February 4, 2019, attorneys Kasey L. Olivier and Ashley M. Miles represented the McAllister Defendants in the Civil Action. (Notice of Appearance, February 4, 2019)

12. At no time while Luke McAllister, McAllister TD, LLC and B-Y Internet, LLC were represented by attorneys Olivier and Miles, did those attorneys or the McAllisters serve any notice pursuant to SDCL 3-21-2. (Klimisch Affidavit, ¶5)

13. From on or about July 15, 2019, McAllisters were represented by attorneys Meredith Moore and Jonathan Heber of the Cutler Law Firm. (Notice of Substitution of Counsel dated July

15, 2019)

14. On September 25, 2019, Circuit Judge David Knoff entered an Order permitting service and filing of an Amended Answer and Counterclaim; and service and filing of a Third Party Claim by McAllisters against the Yankton County Entities, Klimisch, and Garrity. (Court file)

15. On September 27, 2019, McAllisters, through their attorneys, each served an identical Amended Answer and Counterclaim. (Court file)

16. On August 23, 2019, pursuant to the Order dated September 25, 2019, McAllisters initiated a Third Party Summons and Complaint (hereinafter Third Party Action) against the Yankton County Entities, Klimisch, and Garrity.

17. At no time prior to September 27, 2019, did McAllisters serve notice pursuant to SDCL 3-21-2. See Fact Nos. 11, 12 and 13 above.

18. On October 30, 2019, the Yankton County Entities replied to the Counterclaim referred to in paragraph 17 above, in three separate Replies, which replies pleaded the failure of McAllisters to provide the required statutory notice pursuant to SDCL 3-21-2. (See the three Replies to Counterclaim dated November 4, 2019, ¶9; Deibert Affidavit, ¶1)

19. On October 30, 2019, through their counsel, the Yankton County Entities, Klimisch and Garrity served discovery requests,

consisting of Interrogatories and Requests for Production of Documents, with four Interrogatories and three Requests for Production of Documents. (Affidavit of Douglas M. Deibert dated September 11, 2020, ¶7) This Affidavit will be referred to herein as the Deibert Affidavit.

20. One of the questions posed in the Interrogatories referenced in paragraph 21 above, was the following question:

> **INTERROGATORY NO. 1:** Do you claim to have given proper notice of this claim as required by SDCL Chapter 3-21?

(See Deibert Affidavit, ¶7)

21. On December 6, 2019, McAllisters answered the discovery referred to paragraph 14 above. The answers from each of the three Defendants and Third Party Plaintiffs were identical in stating:

> **OBJECTION AND RESPONSE:** Defendant objects to Interrogatory 1 by incorporating their General Objections. Defendant also objects to Interrogatory 1 to the extent it calls for information protected by the attorney-client privilege or attorney work product. Defendant further objects to Interrogatory No 1 insofar as it calls for a legal conclusion.

(See Deibert Affidavit, ¶8)

22. In the written discovery referenced in paragraph 21 above, the following Request for Production was made:

> **REQUEST FOR PRODUCTION NO. 1:** If your answer to Interrogatory No. 1 is in the affirmative, please attach copies of any and all documents you claim that constitute notice, and indicate to whom notice was given, and attach copies of any and all documents you claim verify mailing, service and receipt of such notice.

(See Klimisch Affidavit, ¶8)

23. The objection and response to Interrogatory No. 1 was identical for each of the McAllisters, stating:

> **OBJECTION AND RESPONSE:** Third-Party Plaintiffs object to Request for Production of Documents No. 1 by incorporating their General Objections. Third-Party Plaintiffs also object to Interrogatory No. 1 to the extent it calls for information protected by the attorney-client privilege or attorney work product. Third-Party Plaintiffs further object to Interrogatory No. 1 insofar as it calls for a legal conclusion.
>
> Subject to and without waiving the foregoing objections, see correspondence sent to Rob Klimisch on July 3, 2019. Third-Party Plaintiffs will produce responsive information. Discovery is ongoing and Third-Party Plaintiffs reserve the right to supplement this response as additional information becomes available.

(See Deibert Affidavit, ¶8)

24. Based on the responses to the Interrogatories and Document Production Request referred to in Facts 22-25 above, the only document McAllisters claim complied with the statutory notice provision of SDCL 3-21-2, was the July 3, 2019 letter from attorney Heber to State's Attorney Klimisch. (See Fact No. 23)

25. In the July 3, 2019 letter which McAllisters claim constituted compliance with SDCL 3-21-2, the letter contains no reference to any alleged intent to comply with SDCL 3-21-2. (See the July 3, 2019 letter)

26. The July 3, 2019 letter was sent to State's Attorney Robert Klimisch, and was not sent to the Auditor of Yankton County. (See the July 3, 2019 letter)

27. The July 3, 2019 letter was not addressed to any of the Yankton County Entities. (See the July 3, 2019 letter)

28. The July 3, 2019 letter contains the following statement:

> Unless we can reach an expedited mutual settlement based upon the new terms provided below ... see July 3, 2019 letter, P. 2.

(See the July 3, 2019 letter)

29. The July 3, 2019 letter contains the following statement:

> Our new settlement offer is **$248,710.00.** (Emphasis in the original)

(See the July 3, 2019 letter)

Dated at Sioux Falls, South Dakota, this 11 day of September, 2020.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____

Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was filed electronically with the Court and that the following were served by the state's electronic service system:

Jonathan A. Heber **jonathanh@cutlerlawfirm.com**
Meredith A. Moore **meredithm@cutlerlawfirm.com**
Cutler Law Firm
140 North Phillips Avenue
P.O. Box 1400
Sioux Falls, SD 57101-1400

this 11 day of September, 2020.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

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STATE OF SOUTH DAKOTA) : SS COUNTY OF YANKTON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff, vs. LUKE E. MCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; and ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	66CIV18-000178 **DEFENDANTS' OBJECTIONS AND RESPONSES TO UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS**

COMES NOW the Defendants and Third-Party Plaintiffs, Luke E. McAllister, McAllister TD, LLC, and B-Y Internet, LLC d/b/a South Dakota Wireless Internet ("***Defendants***"), by and through their undersigned counsel of record, and hereby submit their Objections and Responses to Plaintiff and Third-Party Defendants' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment.

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Defendants generally object to collectively referring to Luke McAllister and two separate limited liability companies McAllister TD, LLC d/b/a Fire and Ice and B-Y Internet, LLC d/b/a South Dakota Wireless Internet, which are legally distinct from their members, as "McAllisters." There is a pattern of conduct by Plaintiff and the Third-Party Defendants in this lawsuit and at public meetings of intentionally and publically attempting to disparage Luke E. McAllister, in his personal capacity, by referring to him and the separate entities as the "McAllisters." The wireless internet business purported and alleged to be at issue in the Civil Action is B-Y Internet, LLC d/b/a South Dakota Wireless Internet ("***South Dakota Internet***"). It is not the McAllisters.

1. Since June 2005 and to the date of this Statement of Undisputed Facts, Robert Klimisch has been the elected State's Attorney for Yankton County, South Dakota.

ANSWER: Undisputed.

2. As part of his official duties as Yankton County State's Attorney, and in his capacity as Yankton County State's Attorney, on May 31, 2018, on behalf of Yankton County, Klimisch initiated an action against Luke McAllister; McAllister TD, LLC; and B-Y Internet, LLC, the caption of which is as follows:

> Yankton County, State of South Dakota, A Political subdivision, Plaintiff v. Luke E. McAllister, McAllister TD, LLC, and BY Internet, LLC, Defendants, 66 CIV. 18-178.

ANSWER: Disputed. It was not part of Klimisch's official duties as Yankton County State's Attorney to commence a baseless action with an ulterior motive against Defendants while he had a conflict of interest due to prior and simultaneous business dealings in his private law practice while assisting a client complete a real estate transaction with Luke McAllister and McAllister TD, LLC d/b/a Fire and Ice. *See* Aff. of Luke E. McAllister ("Aff. of LEM") at ¶¶ 2-5, 8-9. It is further disputed that Klimisch initiated the action alone. Aff. of LEM at ¶ 10, Ex. E; Affidavit of Cam McAllister ("Aff .of CM") at ¶ 4, Ex. B & C. Finally, the lawsuit was not commenced until June 8, 2018. *See* Sheriff's Return of Personal Service (filed with the Court).

3. The decision to bring the action referenced in paragraph 2 was the decision of Klimisch, and Klimisch's alone.

ANSWER: Disputed. It is disputed that it was Klimisch's decision to bring the action, and his alone. Aff. of LEM at ¶ 10, Ex. E; Aff. of CM at ¶ 4, Ex. B & C.

4. No members of the Yankton County Commission, Yankton County Board of Adjustment, Yankton County Commission, Yankton County, or Garrity, had any role or any input into the bringing of the Civil Action.

ANSWER: Disputed. Yankton County Commissioner Don Kettering, who also served on the Yankton Count Board of Adjustment, advised Defendants that the decision to file the suit was done by the Commission and that the reason was "the issue at Fire and Ice had not been resolved so that was I think the logic of the commission at the time[.]" Aff. of CM at ¶ 4, Ex. B & C. Chair of the Yankton County Commission, Dan Klimisch, who was also present for that statement, did not contradict Don Kettering's statement to Defendants. *Id.* Furthermore, prior to bringing the Civil Action, Garrity sent a letter to Luke McAllister threatening the Civil Action, with copies of the letter being provided to the Yankton County Commission. Aff. of LEM at ¶ 10, Ex. E.

5. On July 5, 2018, attorney Michael Stevens, representing McAllister, answered the Civil Action, and asserted Counterclaims on behalf of McAllister TD, LLC and Luke E. McAllister.

ANSWER: Undisputed.

6. At no time prior to July 5, 2018, the date of the Answers and Counterclaims served and filed by attorney Stevens, had any of the McAllisters, served notice pursuant to SDCL 3-21-2.

OBJECTION AND ANSWER: Defendants object to this statement on the basis that it is a legal conclusion when notice is required and whether notice was served pursuant to SDCL 3-21-2. Likewise, there remains a genuine dispute whether Plaintiff Yankton County has waived its notice defense and is estopped from raising the notice defense. Regardless, the time period for serving notice for barratry does not begin to accrue until the Civil Action has been dismissed favorably for Defendants.

7. In the Counterclaims referenced in paragraphs 7 and 8 above, each alleged:

> The Plaintiff's Complaint against Defendant MCALLISTER TD, LLC constitute (sic) a frivolous and meritless claim by Plaintiff against Defendant MCALLSTER TD, LLC, and thus constitutes barratry pursuant to SDCL § 20-9-6.1.

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ANSWER: Undisputed. The Counterclaims speak for themselves.

8. In the Counterclaims referenced in paragraphs 7 and 8 above, each alleged:

> The Plaintiff's Complaint was undertaken without probable cause to believe it would succeed on the merits against MCALLISTER TD, LLC. Defendant MCALLISTER TD, LLC is entitled to damages including, but not limited to attorney's fees disbursements of defending this frivolous and meritless claim.

ANSWER: Undisputed. The Counterclaims speak for themselves.

9. In the ad damnum portion of the Answers and Counterclaims referenced in paragraphs 7 and 8 above, part of the prayer for relief was:

> (2) For a Judgment against the Plaintiff for barratry awarding the Defendant damages for his attorney fees and disbursements in an amount to be determined by this court.

ANSWER: Undisputed. The Counterclaims speak for themselves.

10. At no time prior to July 5, 2018, the date of the Answers and Counterclaims served and filed by attorney Stevens, had any of the McAllisters, served notice pursuant to SDCL 3-21-2.

OBJECTION AND ANSWER: Defendants object to this statement on the basis that it is a legal conclusion when notice is required and whether notice was served pursuant to SDCL 3-21-2. Likewise, there remains a genuine dispute whether Plaintiff Yankton County has waived its notice defense and is estopped from raising the notice defense. Regardless, the time period for serving notice for barratry does not begin to accrue until the Civil Action has been dismissed favorably for Defendants.

11. On and after February 4, 2019, attorneys Kasey L. Olivier and Ashley M. Miles represented the McAllister Defendants in the Civil Action.

OBJECTION AND ANSWER: Defendants object to this statement on the basis that it is not a material statement. With that said, it is undisputed.

12. At no time while Luke McAllister, McAllister TD, LLC, and B-Y Internet, LLC were represented by attorneys Olivier and Miles, did those attorneys or the McAllisters serve any notice pursuant to SDCL 3-21-2.

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OBJECTION AND ANSWER: **Defendants object to this statement on the basis that it is a legal conclusion when notice is required and whether notice was served pursuant to SDCL 3-21-2. Likewise, there remains a genuine dispute whether Plaintiff Yankton County has waived its notice defense and is estopped from raising the notice defense. Regardless, the time period for serving notice for barratry does not begin to accrue until the Civil Action has been dismissed favorably for Defendants.**

13. From on or about July 15, 2019, McAllisters were represented by attorneys Meredith Moore and Jonathan Heber of the Cutler Law Firm.

OBJECTION AND ANSWER: **Defendants object to this statement on the basis that it is not a material statement. With that said, it is undisputed.**

14. On September 25, 2019, Circuit Judge David Knoff entered an Order permitting service and filing of an Amended Answer and Counterclaim; and service and filing of a Third Party Claim by McAllisters against the Yankton County Entities, Klimisch, and Garrity.

ANSWER: **Undisputed. The Order speaks for itself.**

15. On September 27, 2019, McAllisters, through their attorneys, each served an identical Amended Answer and Counterclaim.

ANSWER: **Disputed. The respective Amended Answer and Counterclaims of Defendants are not identical. The Amended Answer and Counterclaims speak for themselves.**

16. On August 23, 2019, pursuant to the Order dated September 25, 2019, McAllisters initiated a Third Party Summons and Complaint against the Yankton County Entities, Klimisch, and Garrity.

ANSWER: **Undisputed. The Order, Third-Party Summons, Third-Party Complaint, and Admissions of Service speak for themselves.**

17. At no time prior to September 27, 2019, did McAllisters serve notice pursuant to SDCL 3-212.

OBJECTION AND ANSWER: **Defendants object to this statement on the basis that it is a legal conclusion when notice is required and whether notice was served pursuant to SDCL 3-21-2. Likewise, there remains a genuine dispute whether Plaintiff Yankton**

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County has waived its notice defense and/or is estopped from raising the notice defense. Furthermore, the time period for serving notice for barratry does not begin to accrue until the Civil Action has been dismissed favorably for Defendants. In addition, Defendants served a letter dated July 3, 2019, upon Third-Party Defendant Robert Klimisch, who represents Plaintiff. Aff. of JAH at ¶¶ 2-3, Ex. A & B. The letter was also e-mailed to Yankton County Commissioners Dan Klimisch, Joe Healy, Cheri Loest, and Don Kettering. Aff. of LEM at ¶ 15, Ex. H. The matter was turned over to insurance for Plaintiff and Third-Party Defendants, which confirmed notice to Plaintiff and all Third-Party Defendants, as well as the Yankton County Auditor. Aff. of JAH at ¶ 6, Ex. E.

18. On October 30, 2019, the Yankton County Entities replied to the Counterclaim referred to in paragraph 17 above, in three separate Replies, which replies pleaded the failure of McAllisters to provide the required statutory notice pursuant to SDCL 3-21-2.

ANSWER: Undisputed. The Replies speak for themselves.

19. On October 30, 2019, through their counsel, the Yankton County Entities, Klimisch and Garrity served discovery requests, consisting of Interrogatories and Requests for Production of Documents, with four Interrogatories and three Requests for Production of Documents.

ANSWER: Undisputed. The discovery requests speak for themselves.

20. One of the questions posed in the Interrogatories referenced in paragraph 21 above, was the following question:

> **INTERROGATORY NO. 1**: Do you claim to have given proper notice of this claim as required by SDCL Chapter 3-21?

ANSWER: Undisputed. The discovery request speaks for itself.

21. On December 6, 2019, McAllisters answered the discovery referred to paragraph 14 above. The answers from each of the three Defendants and Third Party Plaintiffs were identical in stating:

> **OBJECTION AND RESPONSE:** Defendant objects to Interrogatory 1 by incorporating their General Objections. Defendant also objects to Interrogatory 1 to the extent it calls

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for information protected by the attorney-client privilege or attorney work product. Defendant further objects to Interrogatory No 1 insofar as it calls for a legal conclusion.

ANSWER: Undisputed. The discovery responses speak for themselves.

22. In the written discovery referenced in paragraph 21 above, the following Request for Production was made

REQUEST FOR PRODUCTION NO. 1: If the answer to Interrogatory No. 1 is in the affirmative, please attached copies of any and all documents you claim that constitute notice, and indicate to whom notice was given, and attach copies of any and all documents you claim verify mailing, service and receipt of such notice.

ANSWER: Undisputed. The discovery requests speak for themselves.

23. The objection and responses to Interrogatory No. 1 was identical for each of the McAllisters, stating:

OBJECTION AND RESPONSE: Third-Party Plaintiffs object to Request for Production of Documents No. 1 by incorporating their General Objections. Third-Party Plaintiffs also object to Interrogatory No. 1 to the extent it calls for information protected by the attorney-client privilege or attorney work product. Third-Party Plaintiffs further object to Interrogatory No. 1 insofar as it calls for a legal conclusion.

Subject to and without waiving the foregoing objections, see correspondence sent to Rob Klimisch on July 3, 2019. Third-Party Plaintiffs will produce responsive information. Discovery is ongoing and Third-Party Plaintiffs reserve the right to supplement this response as additional information becomes available.

24. Based on the responses to the Interrogatories and Document Production request referred to in Facts 22-25 above, the only document McAllisters claim complied with the statutory notice provision of SDCL 3-21-2, was the July 3, 2019 letter from attorney Heber to State's Attorney Klimisch.

OBJECTION AND ANSWER: Disputed. First, Defendants objected to all the Interrogatories and Document Production requests for a myriad of reasons, which are stated in those discovery responses. Second, at no time did Defendants claim that the July 3, 2019 was the only notice that complied with SDCL 3-21-2. In fact, Defendants provided a copy of the letter to the County Commissioners. Furthermore, notice was in fact provided to Plaintiff and all Third-Party Defendants as confirmed by the insurance coverage letter. Aff. of JAH at ¶ 6, Ex. E. Ultimately, whether notice complied with SDCL 3-21-2 is a legal conclusion. *See* Defendants' Opposition to Motion for Summary Judgment.

25. In the July 3, 2019 letter which McAllisters claim constituted compliance with SDCL 3-21-2, the letter contains no reference to any alleged intent to comply with SDCL 3-21-2.

OBJECTION AND ANSWER: Defendants object to this statement on the basis that it calls for a legal conclusion. Furthermore, disputed. There is no requirements as to the form of the notice other than it must state "the time, place, and cause of the injury," which the July 3, 2019 letter provided.

26. The July 3, 2019 letter was sent to State's Attorney Robert Klimisch, and was not sent to the Auditor of Yankton County.

ANSWER: Disputed. The letter from Plaintiff and Third-Party Defendants' insurance carrier confirms that the letter was referenced and provided to the Auditor of Yankton County. Aff. of JAH at ¶ 6, Ex. E. Klimisch turned the matter over to insurance on or about August 28, 2020. *Id.* at ¶ 5, Ex. D.

27. The July 3, 2019 letter was not addressed to any of the Yankton County Entities.

ANSWER: Disputed. The letter speaks for itself. Furthermore, the letter was sent to Robert Klimisch, who was representing Plaintiff Yankton County in the Civil Action. Furthermore, the letter was e-mailed to e-mailed to Yankton County Commissioners Dan Klimisch, Joe Healy, Cheri Loest, and Don Kettering. Aff. of LEM at ¶ 15, Ex. H. The letter stated, "I trust you will immediately share this letter with the members of the Yankton County Commission and the Yankton County Planning & Zoning." The matter was turned over to insurance for Plaintiff and Third-Party Defendants, which confirmed notice to Plaintiff and all Third-Party Defendants, as well as the Yankton County Auditor. Aff. of JAH at ¶ 6, Ex. E.

28. The July 3, 2019 letter contains the following statement:

> Unless we can reach an expedited mutual settlement based upon the new terms provided below[.]

ANSWER: Undisputed. The July 3, 2019 letter speaks for itself.

29. The July 3, 2019 letter contains the following statement:

> Our new settlement offer is $248,710.00.

ANSWER: Undisputed. The July 3, 2019 letter speaks for itself.

DEFENDANTS' STATEMENT OF ADDITIONAL MATERIAL FACTS

1. On August 23, 2016, McAllister TD, LLC d/b/a Fire and Ice ("***Fire & Ice***" or "***MTD***") entered into an agreement to lease real property located at 3804 W. 8th Street ("***Real Property***") from T.J. Land, Inc. ("***TJ Land***") with an option to purchase the Real Property. Third-Party Complaint ("***TPD***") at ¶ 10; Affidavit of Luke E. McAllister at ¶ 2, Ex. 1 ("***Aff. of LEM***").

2. In March of 2017, Luke E. McAllister presented a business plan on behalf of Fire & Ice to the Yankton County Commission with the purpose of obtaining a malt beverage license to operate a recreational and seasonal business located at the Real Property, which was granted by the Commission. TPD at ¶ 11; Aff. of LEM at ¶ 3.

3. In the Spring and Summer of 2017, Defendant McAllister TD operated the recreational and seasonal business Fire & Ice, which sold, *inter alia*, alcohol, water, ice, and camping supplies at an open-air building located at the Real Property near Lewis and Clark Recreation. TPD at ¶ 12; Aff. of LEM at ¶ 4.

4. Due to the low prices and innovative business concept, Fire & Ice was competitively disruptive to local and existing businesses located in Yankton County and primarily in the City of Yankton. TPD at ¶ 13; Aff. of LEM at ¶ 5.

5. On or about October 15, 2017, and after repeated pressure from Yankton County Zoning Administrator Patrick Garrity, Fire & Ice temporarily ceased business operations. TPD at ¶ 16; Aff. of LEM at ¶ 6.

6. On October 9 and 10, 2017, Cam McAllister and Yankton County Zoning Administrator Garrity exchanged correspondence regarding whether B-Y Internet would need a conditional use permit to operate a wireless internet business, which chain of e-mail

correspondence culminated with Cam McAllister stating, in part: "I am just clarifying if there is a permit required by Yankton County to provide internet services as these providers do and obtain the same permit as such if it is required." TPD at ¶¶ 18-22; Affidavit of Cam McAllister at ¶ 2, Ex. A ("***Aff. of CM***").

7. Garrity did not respond to the last e-mail in the above-referenced e-mail chain from October 9 to October 10, 2017. TPD at ¶ 23; Aff. of CM at ¶ 3.

8. On or about November 29, 2017, Luke McAllister formed Third-Party Plaintiff B-Y Internet, LLC, and on or about February 2, 2018, B-Y Internet filed a fictitious business name registration for "South Dakota Wireless Internet." TPD at ¶ 24-25; Aff. of LEM at ¶ 7.

9. In February 2018, McAllister TD d/b/a Fire & Ice communicated to TJ Land its intention to exercise its option to purchase the Real Property. TPD at ¶ 26; Aff. of LEM at ¶ 8.

10. Klimisch, who is the registered agent for TJ Land, prepared the purchase and mortgage documentation for McAllister TD's purchase of the Real Property from TJ Land. TPD at ¶ 27; Aff. of LEM at ¶ 9, Ex. C & D.

11. On or about March 2, 2018, Garrity sent a letter on behalf of Yankton County Planning & Zoning via certified mail to Luke McAllister, stating as follows:

> The Yankton County Zoning Ordinance #16, Article 25, Section 2503 requires a Conditional Use Permit for any new, co-location or modification of a Wireless Telecommunications Facility. Section 2506 Conditional Use Permit Application and Other Requirements are necessary to operate any wireless communications facility in Yankton County.
>
> Yankton County Zoning Ordinance #16, Article 23, Section 2301 requires all parties notified of a violation respond to the Yankton County Planning & Zoning office, within seven (7) days of receipt of this letter. Article 23, Section 2303 Penalties For Violations, specifically states 1. Fine not to exceed $200.00 per violation. 2. Imprisonment for a period no [sic] to exceed thirty (30) days per violation. 3. Both fine and imprisonment. 4. An action for civil injunctive relief, pursuant to SDCL 21-8.

> Please contact the Planning & Zoning Office of the Yankton County Government Center to begin the Conditional Use Permit.

TPD at ¶ 30; Aff. of LEM at ¶ 10.

12. Between March and April, 2018, B-Y Internet, LLC d/b/a South Dakota Wireless Internet, Klimisch, and Garrity engaged in further communications about the alleged requirement for a conditional use permit. TPD at ¶¶ 31-43; Aff. of LEM at ¶ 11.

13. On or about April 20, 2018, at 4:37 AM, Luke McAllister emailed Garrity and Klimisch a letter stating as follows:

> Dear Mr. Klimisch,
>
> We (myself, you and Mr. Garrity) met late March 2018 at the Yankton County Government Center. We discussed B-Y Internet, LLC possibly requiring a conditional use permit under Article 25. It remains B-Y Internet's position that its Fixed Wireless Internet business and all operations of the business fall under the exclusions of Article 25. After discussion, yourself and Mr. Garrity agreed and stated that B-Y Internet, LLC fell under the exclusions however yourself and Mr. Garrity were unsure whether or not B-Y Internet's mounting brackets were considered as erecting 'new towers.' It was determined by yourself and Mr. Garrity that B-Y Internet should go before the commissioners to get their judgement on whether or not B-Y Internet's mounting brackets were considered 'new towers.' Mr. Garrity informed myself multiple times during that meeting that he would be placing B-Y Internet on the commission meeting agenda either for the April 3rd, or April 17th meeting to enable B-Y Internet to present this matter to the commissioners. Mr. Garrity had said multiple times that no action by myself or B-Y Internet was required to be placed on the agenda for either meeting and that he would take the action to place B-Y Internet on the agenda. B-Y Internet was not placed on the agenda for either meeting. I reached out to Mr. Garrity's office via phone call before the April 3rd and before the April 17th meeting to confirm B-Y Internet had been placed on the agenda, only to find B-Y Internet had not been placed on the agenda for either meeting date.
>
> It is still B-Y Internet's position that no conditional use permit is required, and that B-Y Internet clearly falls under the exclusions of Article 25. The mounting brackets used by B-Y Internet are similar or identical to the ones that dozens of companies and contractors use (such as satellite tv and satellite internet.) Per your recognition during our meeting, these companies do not have a conditional use permit under Article 25. If B-Y Internet desires to operate in licensed frequencies or to erect a 'new tower' B-Y Internet would follow the appropriate steps for obtaining a conditional use permit under Article 25. At this time B-Y Internet is requesting a written letter from you, Mr. Klimisch that it has been deemed not necessary for B-Y Internet to require a conditional use permit. I need

> this letter to convey compliance where necessary. We need to bring this to a close immediately as it is impeding the progress of our business and causing a great deal of frustration for several of our customers throughout Yankton County.
>
> I look forward to hearing from you soon for resolution.

TPD at ¶ 44; Aff. of LEM at ¶ 12.

14. Neither Garrity nor Klimisch responded to the email or letter from Luke McAllister dated April 20, 2018. TPD at ¶¶ 45; Aff. of LEM at ¶ 13.

15. On or about June 8, 2018, Yankton County, South Dakota, acting through and at the direction of State's Attorney Klimisch, served Third-Party Plaintiffs Luke McAllister, McAllister TD, and B-Y Internet with a Summons and Complaint to commence the Underlying Lawsuit. The Underlying Lawsuit sought a mandatory injunction requiring Defendants to "cease and desist from operating a wireless internet provider business in Yankton County, South Dakota." The Complaint also asked the Court for "fines and other monetary relief as may be provided by law." *See* Complaint dated May 31, 2018.

16. On or about July 31, 2018, Plaintiff Yankton County filed "PLAINTIFF'S REPLY TO DEFENDANT, LUKE E. MCALLISTER AND MCALLISTER TD, LLC'S COUNTERCLAIM," which Reply did not allege any affirmative defense for alleged failure to provide notice under SDCL § 3-21-2. *See* Reply dated July 31, 2018 (filed with the Court).

17. On September 5, 2018, Defendants served Interrogatories, Request for Production of Documents and Request for Admissions upon Plaintiff Yankton County. *See* Affidavit of Ashley M. Miles Holtz dated March 5, 2019, Ex. 1 ("***Aff. of Holtz***") (filed with the Court).

18. On or about September 6, 2018, Plaintiff Yankton County filed a Motion for Scheduling Order and served a Notice of Hearing upon Defendants. *See* Motion for Scheduling Order and Notice of Hearing dated September 6, 2018 (filed with the Court).

19. On or about October 1, 2018, Plaintiff Yankton County served responses to the discovery requests served on September 6, 2018. Aff. of Holtz, Ex. 2 (filed with the Court).

20. On or about January 14, 2019, counsel for Defendants sent a meet-and-confer letter to Plaintiff, demanding supplementation of answers and responses. *Id.*, Ex. 3 (filed with the Court).

21. On or about Thursday, February 7, 2019, Klimisch sent an e-mail to Holtz, which stated:

> Ashley,
> Yankton County has decided not to pursue the McAllister matter any further. Yankton County is in the process of amending the Zoning Ordinance and Yankton will be addressing as to whether this type of matter needs to be regulated and if so, how. If this is acceptable to your client, I would proposed [sic] that we do a joint stipulation to dismiss this matter.
> Rob Klimisch

Id., Ex. 4.

22. On or about Tuesday, February 12, 2019, Klimisch sent an e-mail to Holtz, which stated:

> Ashley,
> Sorry I was unable to respond to your request prior. At this time, Yankton County does intend to proceed with this matter. As for the information you are requesting in the Mike Stevens' letter dated January 14, 2019, I will have that information to you by February 28, 2019. If you could get me your proposed Amended Scheduling Order for my review, that would be great. Also, regarding the depositions, I would like to get those scheduled as soon as possible. If you have any questions, please contact me at your earliest convenience. Rob Klimisch.

Id., Ex. 5 (filed with the Court).

23. On or about February 12, 2019, Plaintiff Yankton County and Defendants signed a Stipulation for Scheduling Order, which was filed with the Court that same day. *See* Stipulation for Scheduling Order dated February 12, 2019 (filed with the Court).

24. On or about February 19, 2019, the Court signed and filed a Scheduling Order. *See* Scheduling Order dated February 19 (filed with the Court).

25. On or about March 5, 2019, Defendants filed a Motion to Compel Answers and Responses to Defendants' Interrogatories, Request for Production of Documents and Admissions (First Set). *See* Motion dated March 5, 2019 (filed with the Court).

26. On or about March 25, 2019, Plaintiff and Defendants both appeared through counsel at a hearing on Defendants' Motion to Compel, which Motion was granted by Order of Court on April 4, 2019. *See* Order dated April 4, 2019 (filed with the Court).

27. On or about April 2, 2019, Defendants filed an Expert Witness Disclosure with the Court. *See* Defendants' Expert Witness Disclosure dated April 2, 2019 (filed with the Court).

28. On or about April 3, 2019, Defendants filed the following documents with the Court:

- Defendants' Deposition Notice of Gary Wood and Subpoena Duces Tecum to Gary Wood;
- Defendants' Deposition Notice of Patrick Garrity and Subpoena Duces Tecum to Patrick Garrity;
- Defendants' Deposition Notice of Yankton Wireless, LLC Pursuant to SDCL § 15-6-30(b);
- Subpoena Duces Tecum of Yankton Wireless, LLC;
- Defendants' Deposition Notice of Yankton County Zoning & Planning; and
- Subpoena Duces Tecum of Yankton County Zoning & Planning.

See above-referenced documents filed with the Court on April 3, 2019.

29. On or about April 17, 2019, Plaintiff and Defendants signed a Stipulation for Dismissal Without Prejudice, pending settlement and an Order from the Court for dismissal. *See* Stipulation dated April 17, 2019 (filed with the Court); *see also* Aff. of LEM at ¶ 14, Ex. G.

30. On or about April 25, 2019, the Planning Commission voted unanimously 7-0 in favor of finding that B-Y Internet, LLC d/b/a South Dakota Wireless Internet ("***South Dakota***

Internet") was excluded from the requirements of Article 25 of the Ordinance under § 2505(3) and (5), and determined that South Dakota Internet was never in violation of Article 25 of the Ordinance. *See* Third-Party Complaint at ¶ 57; *see also* http://www.co.yankton.sd.us/custom/2019-planning-and-zoning-meetings.

31. On May 8, 2019, South Dakota Internet sent a letter to Defendant Klimisch, Yankton County Commissioner Dan Klimisch, Commissioner Joe Healy, and Commissioner Cheri Loest, which put them on written notice of a prospective claim of barratry by South Dakota Internet and against Plaintiff Yankton County. Aff. of LEM at ¶ 14, Ex. G (Letter).

32. On or about May 17, 2019, Cam McAllister, on behalf of Defendants, met with Yankton County Commissioners Don Kettering and Dan Klimisch to discuss the Civil Action. *See* Aff. of CM at ¶ 4, Ex. B (recording of meeting); Ex. C (transcript of meeting).

33. At the meeting on May 17, 2019, the following verbal exchange occurred between Cam McAllister and Don Kettering with Dan Klimisch present:

> **Mr. McAllister**: Ok. Do you recall, do you remember because you were on the commission previous? Do you remember when that decision was made to file suit?
>
> **Mr. Kettering**: Probably a year ago.
>
> **Mr. McAllister**: But it was done by the commission. The commission did authorize and say –
>
> **Mr. Kettering**: I think so. I think so.
>
> **Mr. McAllister**: To file the suit.
>
> **Mr. Kettering**: Yeah. Yeah.
>
> **Mr. McAllister**: Ok, alright.
>
> **Mr. Kettering**: I think it was, the issue was over something out at Fire and Ice.
>
> **Mr. McAllister**: And Fire and Ice has nothing to do with this business. It is a completely different business.

> **Mr. Kettering**: That – that was, the Fire and Ice reason was, the reason that– the, the issue at Fire and Ice had not been resolved so that was I think the logic of the commission at the time was –
>
> **Mr. McAllister**: What, what issue with Fire and Ice wasn't, what was the issue?
>
> **Mr. Kettering**: Oh, wasn't there some stuff sitting around? Some, Firewood or bathroom or – I don't remember.
>
> **Mr. McAllister**: But, yeah. Fire and Ice is not mentioned in this suit at all and is not part of this litigation and has nothing to do with this. Unless you guys were intending to send suit against Fire and Ice?
>
> **Mr. Kettering**: No.
>
> **Mr. McAllister**: Because this is all with South Dakota Internet. That it, that it – that they wanted to put us out of business.
>
> **Mr. Kettering**: Yeah.

Id.

34. On May 21, 2019, Cam McAllister, on behalf of Defendants, met with State's Attorney and Defendant Rob Klimisch, and County Commissioners Dan Klimisch, Don Kettering, Joe Healy, Cheri Loest, and Gary Swenson to discuss the Civil Action. Aff. of CM at ¶ 5, Ex. D (recording); Ex. E (transcript of meeting).

35. On July 3, 2019, counsel for Defendants e-mailed and mailed an eight-page letter to Klimisch, who is counsel for Plaintiff Yankton County. Aff. of JAH at ¶ 2, Ex. A (Letter).

36. The July 3, 2019 letter provided in part:

> Based on the information gathered, please consider this letter formal written notice of prospective claims of abuse of process against the following entities or individuals, including, but not limited to, Yankton County, Yankton County Commission, Yankton County Planning and Zoning Commission, Pat Garrity, and you.
>
> In addition to claims for abuse of process, we are actively investigating other potential claims, including, but not limited to, (1) a claim for Civil Conspiracy to Commit Abuse of Process . . . .

> . . .
>
> We respectfully encourage Yankton County to promptly notify its insurance carrier regarding these matters.
>
> . . .
>
> I trust you will immediately share this letter with the members of the Yankton County Commission and the Yankton County Planning & Zoning.

Id. (footnotes omitted).

37. On July 3, 2019, at 3:32 PM, counsel for Defendants e-mailed a copy of the July 3, 2019 letter to counsel for Plaintiff, Rob Klimisch, which e-mail stated in part:

> I respectfully ask that you share this correspondence with the Yankton County Commission and the Yankton County Zoning & Planning.

Id. at ¶ 3, Ex. B (E-mail).

38. On July 15, 2019, at 12:55 PM, Defendant Luke McAllister e-mailed a copy of the July 3, 2019 letter to Yankton County Commissioners and Board of Adjustment Members Dan Klimisch, Joe Healy Cheri Loest, and Don Kettering. Aff. of LEM at ¶ 15, Ex. H (E-mail).

39. On August 20, 2019, Plaintiff Yankton County served discovery requests upon Defendants, which referenced the July 3, 2019 letter. Aff. of JAH at ¶ 4, Ex. C (Discovery Requests).

40. On August 28, 2019, Klimisch e-mailed counsel for Defendants and stated: "This matter has been turned over to the insurance company." Aff. of JAH at ¶ 5, Ex. D (E-mail).

41. On September 30, 2019, the Third-Party Complaint was commenced against the Third-Party Defendants. *See* Admissions of Service (filed with the Court).

42. On October 16, 2019, EMC Insurance sent a 12-page letter entitled "DEFENSE PROVIDED UNDER A RESERVATION OF RIGHTS" to County Auditor Patty Hojem, Defendant Pat Garrity, Defendant Robert Klimisch, which confirmed that notice of the claims

was given to EMC on August 28, 2019, and which provided an analysis of the alleged claims and injuries. Aff. of JAH at ¶ 6, Ex. E (Letter).

43. On October 30, 2019, Plaintiff Yankton County and Third-Party Defendants alleged for the first time in this lawsuit the affirmative defense of notice under SDCL § 3-21-2. *See* Third-Party Defendants' Answer to Third-Party Complaint dated October 30, 2019 (filed with the Court); Plaintiff's respective Replies to Defendants' Counterclaims dated October 30, 2019 (filed with the Court).

44. On February 21, 2020, Defendants filed a Motion to Compel outstanding discovery responses from Plaintiff and all Third-Party Defendants. *See* Motion to Compel dated February 21, 2020 (filed with the Court).

45. After the recusal of Judge Knoff based on a conflict of interest, the parties scheduled the Motion to Compel to be heard on June 18, 2020. *See* Recusal of Judge dated May 15, 2020 (filed with the Court); *see* Notice of Hearing dated May 27, 2020 (filed with the Court).

46. On May 27, 2020, at 8:37 AM, counsel for Plaintiffs and all Third-Party Defendants except for Garrity indicated to the Court as follows: "I don't believe I can complete the more lengthy motion I anticipate, so that can wait for another day."

47. At the hearing with the Court on June 18, 2020, regarding Defendants' Motion to Compel discovery responses, which Motion was granted by the Court, the Court advised Plaintiff and Third-Party Defendants' counsel to promptly schedule their alleged prospective Motion for alleged failure to provide notice under SDCL § 3-21-2, which the parties agreed at the hearing would be set for September 2020. Aff. of JAH at ¶ 7.

48. Immediately after the hearing on June 18, 2020, and in accordance with the representations made to the Court, counsel for Plaintiff and all Third-Party Defendants (except for Garrity) requested a briefing schedule as follows:

July 24, 2020	My deadline for filing all MSJ motions
August 21	Your deadline for response
September 1	My deadline for final Reply Brief

Aff. of JAH at ¶ 8, Ex. F (Letter).

49. On June 19, 2020, counsel for all parties agreed to the briefing schedule provided by Mr. Deibert, and Mr. Deibert indicated he would secure a hearing date in September, 2020. Aff. of JAH at ¶ 9, Ex. G (E-mail exchange).

50. Plaintiff and Third-Party Defendants did not attempt to secure a hearing date in September nor did they file any Motions for Summary Judgment by July 24, 2020.

51. On September 4, 2020, after the final deadline for the reply brief was passed, counsel for Defendants sent an e-mail to counsel for all opposing parties requesting their availability for depositions, requesting their agreement to a scheduling order, and requesting a letter of compliance that South Dakota Internet was operating compliantly. *See* Aff. of JAH at ¶ 10, Ex. H (E-mail with attachments).

52. On September 11, 2020, without prior any notice to Defendants or explanation for not abiding by the agreed-upon briefing schedule, counsel for Plaintiff and all Third-Party Defendants except Garrity filed this Motion for Summary Judgment. *See* Motion for Summary Judgment (filed with the Court).

53. Counsel for Defendants previously requested a letter from Plaintiff Yankton County that South Dakota Internet was operating compliantly on January 7, 2020. Aff. of JAH at ¶ 11, Ex. I (Letter).

54. Despite Klimisch claiming in an e-mail dated March 15, 2019, at 2:45 PM, that "I will be asking for a Motion for Summary Judgment" because "the facts are simple, either your client needs to obtain a conditional use permit or our client does not pursuant to the Yankton County Zoning Ordinance," Plaintiff Yankton County has not brought an application for a temporary restraining order or preliminary injunction nor has it brought a motion for summary judgment on the merits. Aff. of JAH at ¶ 12, Ex. J (E-mail exchange).

55. Rather than also seek summary judgment of its own self-described simple claim of summary judgment against Defendants, Plaintiff Yankton County only noticed for hearing with the Court this Motion. Aff. of JAH at ¶ 13.

Dated this 30th day of October, 2020.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Jonathan A. Heber
Meredith A. Moore
Jonathan A. Heber
140 North Phillips Avenue, 4th Floor
PO Box 1400
Sioux Falls, SD 57101-1400
Telephone: (605) 335-4950
Facsimile: (605) 335-4961
meredithm@cutlerlawfirm.com
jonathanh@cutlerlawfirm.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 30th day of October, 2020, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

Robert Klimisch
Yankton County State's Attorney
410 Walnut, Suite #110
Yankton, SD 57078
Attorney for Yankton County, South Dakota

Douglas Deibert
Cadwell Sanford Deibert & Garry LLP
200 East 10th Street, Suite 200
Sioux Falls, SD 57104
Attorney for Plaintiff and Third-Party Defendants except Third-Party Defendant Patrick Garrity

Mark D. Fitzgerald
Fitzgerald, Vetter, Temple, Bartell & Henderson
PO Box 1407
Norfolk, NE 67802
Attorneys for Patrick E. Garrity

/s/ Jonathan A. Heber
One of the Attorneys for Defendants

Filed: 10/30/2020 4:46 PM CST Yankton County, South Dakota 66CIV18-000178

KENT R. CUTLER
STEVEN J. SARBACKER
MICHAEL D. BORNITZ ‡
TRENT A. SWANSON *
RYAN J. TAYLOR °
KIMBERLY R. WASSINK
MEREDITH A. MOORE
NATHAN S. SCHOEN *#‡
NICHOLE J. MOHNING %
DANIEL J. DOYLE
ALEX S. HALBACH *
ERIC E. ERICKSON
JOSEPH P. HOGUE °
JONATHAN A. HEBER
BRENDAN F. PONS
ERIK K. NYBERG
TRINETTE R. LAFLEUR*
SAMUEL A. KRYSTOSEK*
ERIC R. MATT*^
TANNER J. FITZ

CUTLER LAW FIRM, LLP
ATTORNEYS AT LAW

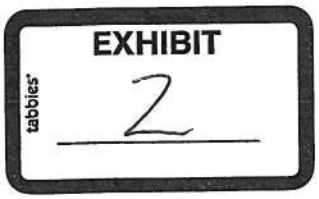
140 N. PHILLIPS AVENUE, 4TH FLOOR
POST OFFICE BOX 1400
SIOUX FALLS, SOUTH DAKOTA 57101-1400
TELEPHONE (605) 335-4950
www.cutlerlawfirm.com

RICHARD A. CUTLER
(1941-2019)

JEAN BROCKMUELLER, CPA (Inacti
BUSINESS MANAGER

*Also licensed to practice in Minnesota
#Also licensed to practice in Iowa
‡Also licensed to practice in Nebraska
%Also licensed to practice in Kansas
°Also licensed as a Certified Public Accountant (Inactive)
^Also licensed to practice in North Dakota

July 3, 2019



Via U.S. Mail, Certified Mail & E-mail
Mr. Robert Klimisch (rob@co.yankton.sd.us)
Yankton States Attorney
410 Walnut, Suite 100
Yankton, South Dakota 57078

Re: YANKTON COUNTY V. LUKE MCALLISTER, ET AL.; CIV. 18-178 DEMAND LETTER

Dear Mr. Klimisch:

Please be advised our office represents Luke McAllister, McAllister TD, LLC, and B-Y Internet, LLC d/b/a South Dakota Internet. We have received and carefully reviewed the various pleadings, filings, correspondence, and discovery material related to the above-referenced lawsuit (the "***Lawsuit***").

1. WITHDRAW STIPULATION FOR DISMISSAL.

We understand Plaintiff and Defendants signed a Stipulation for Dismissal Without Prejudice on or about April 17, 2019, and filed the same with the Court the next day on April 18, 2019, but did not ask the Court to sign a corresponding Order for Dismissal. Instead, the parties agreed to submit an Order for Dismissal to the Court if the parties reached a mutual settlement.

Defendants were optimistic about their chances of reaching a mutual settlement with Plaintiff and, in a good-faith attempt to achieve an expedited resolution, Defendants provided Plaintiff with an offer far below their actual damages. We believe this offer was not met with good faith. Instead, we believe Plaintiff engaged in bad-faith negotiations, highlighted by the unproductive settlement conference on May 21, 2019, which began with a low-ball offer from Yankton County and then devolved into a drawn-out discussion about the seasonal recreational business, Luke McAllister d/b/a Fire and Ice, which was temporarily shut down almost two years ago and which is not a party to the lawsuit. These bad-faith negotiations follow a pattern of conduct in this case. Since Plaintiff has instilled no confidence that it will change its conduct, please be advised Defendants hereby rescind and withdraw their consent to the Stipulation for Dismissal Without Prejudice.

For your review, please find enclosed a proposed Stipulation for Withdrawal of Stipulation for Dismissal Without Prejudice. A true and correct copy is attached hereto as Exhibit A and incorporated herein by this reference. I respectfully ask that you sign the

Stipulation and return a copy to me prior to 5:00 p.m. on Friday, July 12, 2019. If I do not receive a signed copy, at minimum, a positive response indicating your consent and intention to sign by that date, we will promptly file a Motion to Withdraw Consent to the Stipulation for Dismissal on Monday, July 15, 2019. My hope, however, is that we do not need to waste the Court's time with unnecessary motion practice, especially when the circumstances, when explained to the Court, will not lead to a favorable result for Plaintiff.

2. ABUSE OF PROCESS.

Unless we can reach an expedited mutual settlement based upon the new terms provided below, we intend to proceed onward with the Lawsuit and recover the actual and economic damages to Defendants, including, in particular, B-Y Internet, LLC d/b/a South Dakota Internet ("***South Dakota Internet***"). Among other potential claims we are actively investigating, we intend to amend Defendants' Counterclaims to add a claim for abuse of process.

In South Dakota, sovereign immunity does not apply to intentional torts, such as abuse of process, committed by its employees and officers. *See, e.g.*, *Hart v. Miller*, 2000 S.D. 53, ¶ 37, 609 N.W.2d 138, 148; *Swedlund v. Foster*, 2003 S.D. 8, ¶ 43, 657 N.W.2d 39, 56; *Bego v. Gordon*, 407 N.W.2d 801, 808 (S.D. 1987). Abuse of process occurs when one "uses a legal process whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed[.]" *Miessner v. All Dakota Ins. Associates, Inc.*, 515 N.W.2d 198, 204 (quoting *Brishky v. State*, 479 N.W.2d 489, 493-94 (S.D. 1991)). "The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to *take some action or refrain from it*." *Id.* (quoting Restatement (Second) of Torts § 682 (1977)) (emphasis added).

The Lawsuit is a textbook example of abuse of process. B-Y Internet, while exercising its due diligence, approached the Administrator for the Board of Planning and Zoning, Pat Garrity, to ensure that it was in compliance with the laws of the County before launching its wireless internet business. Despite request, Pat Garrity failed to state whether a conditional use permit was necessary. Five months later out of the blue, Pat Garrity sent a letter to B-Y Internet advising that it needed a conditional use permit to operate its wireless internet business and threatened fines, imprisonment, and injunction. B-Y Internet immediately cooperated with Pat Garrity and explained in clear and convincing terms that it was excluded, by Section 2505, from the requirements imposed under Article 25 of the Planning and Zoning Ordinances. Instead of responding to that position, Yankton County sued South Dakota Internet for an injunction and monetary fines months later, again out of the blue. Yankton County, however, had never sued any other similar wireless internet provider in the county for this alleged violation nor has any other similar wireless internet provider ever obtained or otherwise received a conditional use permit for this kind of business, despite other wireless internet providers offering the same kind of service. Below is a non-exhaustive list of a few facts that support this claim:

- On September 30, 2017, McAllister TD, LLC registered for the fictitious business name "B-Y Internet."
- On October 9, 2017, at 2:52 PM, Cam McAllister, on behalf of B-Y Internet, e-mailed Pat Garrity, who is the former Administrator for the Yankton County

Board of Planning and Zoning, and asked him: "Other than the appropriate Sales and Use Tax permit, is there any permit or licenses I am not aware of that we need to obtain from Yankton County to provide Internet Services?"

- On or about October 9, 2017, at 3:19 PM, Pat Garrity responded to Cam McAllister and asked: "Is the infrastructure poles, antenna or other visible components?"

- On October 9, 2017, at 3:24 PM, Cam McAllister responded: "The equipment would be placed on existing structures, (antennas, grain elevators, towers, buildings). The same as other existing providers. Not looking to erect any new towers at this point."

- On October 9, 2017, at 4:35 PM, Pat Garrity e-mailed Cam McAllister and stated: "A few years ago Yankton Wireless received a Conditional Use Permit to do this type of work. Are you associated with this project?"

- On October 10, 2017, at 12:29 PM, Cam McAllister e-mailed Pat Garrity a long response and stated, among other things, that B-Y Internet is a separate entity from Yankton Wireless, that B-Y Internet offers the same services as a multitude of other providers in the county, and explained what kind of services B-Y Internet would provide.

- B-Y Internet never received a response from Pat Garrity to the October 10, 2017 e-mail.

- On November 29, 2017, Luke McAllister formed B-Y Internet, LLC.

- On February 2, 2018, B-Y Internet, LLC registered a fictitious business name for "South Dakota Wireless Internet."

- On March 12, 2018—more than five months after B-Y Internet asked if a permit was required and no response was given—Luke McAllister received a letter out of the blue from Pat Garrity dated March 2, 2018, which advised Luke McAllister that a Conditional Use Permit was required for "any new, co-location or modification of a Wireless Telecommunications Facility" and threatened monetary penalties and imprisonment for violations of the Article 25 if B-Y Internet did not "begin the Conditional Use Permit." A courtesy copy was given to you and the Yankton County Commission. Luke McAllister visited with you that same day to discuss the letter.

- On March 19, 2018, at 4:53 AM, Luke McAllister, on behalf of South Dakota Internet, e-mailed you and Pat Garrity a responsive letter stating that Yankton County never indicated that a permit was required despite multiple requests from B-Y Internet, and then explained that its business was excluded from Article 25 pursuant to Section 2505.

- On March 23, 2018, at 4:51 PM, Luke McAllister inadvertently sent Pat Garrity an e-mail intended for you stating that he called your office and tried to contact you to discuss the conditional use permit. On March 26, 2018, at 11:45 AM, Luke McAllister forwarded the e-mail to you.

- On March 28, 2018, Luke McAllister, Pat Garrity, and you met at the Yankton County Government Center to discuss the conditional use permit. You and Pat Garrity determined that South Dakota Internet should meet with the Yankton County Commission about whether a conditional use permit was required or whether South Dakota Internet was excluded from the provisions of Article 25 under Section 2505. Pat Garrity advised Luke McAllister that he would place South Dakota Internet on the commission meeting agenda for either April 3 or April 17, 2018.

- South Dakota Internet was never placed on the agenda for either April 3 or April 17, 2018. Luke McAllister called you before each meeting to confirm that South Dakota Internet was placed on the calendar and, yet, South Dakota Internet was not placed on the calendar for either meeting.

- On April 20, 2018, at 4:37 AM, Luke McAllister e-mailed you and Pat a letter about the failure to place South Dakota Internet on the commission meeting agenda. The letter stated, among other things, that it remained South Dakota Internet's position that no conditional use permit was required because the business fell within the Section 2505 exclusions. The letter specifically requested "a written letter from you, Mr. Klimisch that it has been deemed not necessary for B-Y Internet to require a conditional use permit" because it needed "this letter to convey compliance where necessary." In addition, the letter explained that this unresolved issue is "impeding the progress of our business and causing a great deal of frustration for several of our customers throughout Yankton County." Neither Pat nor you responded to this letter. This was the last communication until June 8, 2018.

- On June 8, 2018, Yankton County served Luke McAllister, McAllister TD, LLC, and B-Y Internet, LLC, with a Summons and Complaint dated May 31, 2018, which sought an injunction requiring Defendants to "cease and desist from operating a wireless internet provider business in Yankton County, South Dakota," and sought "fines and other monetary relief as may be provided by law." Notably, the Complaint cites the provision that Defendants allegedly failed to follow, but ultimately fails to connect the dots and explain the reason that Defendants violated that provision.

- On April 17, 2019, the parties stipulated to dismiss the Lawsuit without prejudice.

- On April 25, 2019, Yankton County Planning and Zoning voted 7-0 that South Dakota Internet was *excluded* from the requirements of Article 25 pursuant to Section 2505, and that South Dakota Internet was never in violation of Yankton County Zoning Ordinance Article 25.

What is clear from even a cursory review of the factual background is that my clients exercised the utmost due diligence and used all reasonable efforts to investigate their compliance with the law. From the beginning, my clients were proactive by first seeking approval from Yankton County. At every significant stage, my clients clearly and consistently stated their position regarding their exclusion from the requirements of Article 25, which, when *finally* put to a vote before the Yankton County Planning and Zoning on April 25, 2019, was approved 7-0. Yet, my clients' due diligence was met with a lack of follow through and investigation by Yankton County, such as failing to respond to e-mails and letters, failing to communicate their purported reason that South Dakota Internet did not meet the exclusion requirements in Section 2505 beyond simple blanket statements, failing to place my clients on the commissioner meeting agenda, and failing to communicate their intent to bring a lawsuit against my clients.

When Yankton County commenced the Lawsuit, the generic explanation given was that every similar wireless internet business is expected to obtain a conditional use permit and, as you publically stated multiple times at the commission meeting on March 19, 2019, all my clients needed to do was pay $100.00 for a conditional use permit. But, that position is either willfully disingenuous or willfully ignorant insofar as Article 25 imposes much more stringent requirements than simply paying $100.00 for a conditional use permit. Among numerous other requirements, Article 25 requires that the applicant produce a survey of the land, a "design plan," a "site plan," an "FCC license," and a "geotechnical sub-surface soils investigation, evaluation report and foundation recommendation for a proposed or existing Tower site and if existing Tower or water tank site, a copy of the installed foundation design" *See* Section 2506(9)(G), (M), (N), (S), and (T). It also requires "a written copy of an analysis, completed by a qualified individual or organization, to determine if the proposed new Tower or existing structure intended to support wireless facilities is in compliance with Federal Aviation Administration Regulation Part 77 and if it requires lighting." *See* Section 2506(10). If the proposal is for a co-location or modification of an existing Tower, the applicant must "provide sign documentation of the Tower condition such as ANSI report as per Annex E, Tower Maintenance and Inspection Procedures, ANSI/TIA/EIA-222F or most recent version." In fact, an applicant must pay a non-refundable application fee of $2,500 for co-location on an existing structure, *see* Section 2518, and must execute and file with the County a bond "in an amount of at least . . . $25,000 for a co-location on an existing tower or other structure and with such sureties as are deemed sufficient by the County," *see* Section 2519. Requiring South Dakota Internet to follow Article 25 would make it economically infeasible to do business, which we believe was obvious to Yankton County Planning and Zoning and very likely the intent of the demand. After all, these are their ordinances. The purpose of the exclusions is to provide relief from Article 25 for those certain businesses, such as a wireless internet business, where it would not only be infeasible, but also illogical to require compliance.

Over the course of the Lawsuit, Defendants learned that Yankton County has never sued or taken legal action against any other similar wireless internet provider for alleged failure to obtain a conditional permit. We also know there are other wireless providers in Yankton County who operate a similar wireless internet business as South Dakota Internet: e.g., Yankton Wireless, SpeedConnect, Excede Internet, HughsNet, WildBlue Internet, 4G Antenna Shop, and Rise Broadband. Not even one of these similar wireless internet providers has ever obtained an Article 25 conditional use permit from Yankton County. Yet, when B-Y Internet directly asked

whether any of these specific companies have ever obtained a conditional use permit, Pat Garrity replied that Yankton Wireless "received a Conditional Use Permit," which was later discovered to be untrue, and then conveniently did not respond, let alone acknowledge, any of the other wireless internet providers. To make matters worse, you stated at the Board of Commissioners meeting on March 19, 2019—almost one year after the Lawsuit was commenced—that you had "*no idea*" if the Yankton Wireless conditional use permit application was completed because you had "*never seen the paperwork.*"

We also now have good reason to suspect this Lawsuit was motivated, in part, due to a general dislike of a completely separate business owned by Luke McAllister, "Fire and Ice," which was in essence a convenience store of sorts. Luke McAllister operated this seasonal recreational business in the Spring and Summer of 2017 and it was very successful. As a result, it was competitively disruptive to existing businesses in the Yankton area, which customers strongly supported and competitors disfavored. On numerous occasions, for reasons unknown but nevertheless suspected, Pat Garrity singled out Fire and Ice and attempted to cause it a variety of issues, including, but not limited to, stating that Fire and Ice could not use certain beer posters despite other similar businesses with the exact same posters, stating that it could not store its firewood out in the open despite other similar business storing firewood the same way, stating that selling water was subject to certain "manufacturing" laws and requirements, and advising that Fire and Ice needed a certain bathroom permit. Unfortunately, Pat Garrity was successful in his efforts because eventually Luke McAllister said "enough is enough" with the intentional discrimination, and decided to shut down the business. But, this was not enough for Pat Garrity, who apparently was set on running Luke McAllister and his businesses out of town. When Luke McAllister decided to start operating a wireless internet business in the area, Luke McAllister and his business were once again singled out by various individuals, including you and Pat Garrity, and sued personally. Over the course of this Lawsuit, Yankton County's thinly-veiled motivation for commencing it has become transparent. On December 11, 2018, for example, Pat Garrity publically stated at the Yankton County Planning and Zoning Meeting—perhaps with a slip of the tongue—that there was an ongoing lawsuit against *Fire and Ice*, not South Dakota Internet or any of the other co-Defendants. Then, cat completely out of the bag, Don Kettering conceded at the first settlement meeting on May 17, 2019, that the initial reason the Lawsuit was commenced against South Dakota Internet was because of an "unresolved" issue with Fire and Ice, something about "firewood" or "bathrooms." In the same breath, Don Kettering admitted that no suit was ever intended to be commenced against Fire and Ice.[1]

The factual background in this case is remarkable and yet, still, there are even more facts in this case, including more damning facts, as well as undiscovered facts we suspect, that support a claim for abuse of process; but, we cannot possibly condense all of these facts into one single letter. Based on the information gathered, please consider this letter formal written notice of prospective claims of abuse of process against the following entities or individuals, including,

1. We also have good reason to suspect that the Lawsuit was motivated by Pat Garrity's close relationship with Gary Wood, who owns the competing business, Yankton Wireless. This suspicion will be tested through further discovery, including depositions of both Gary Wood and Pat Garrity.

but not limited to, Yankton County, Yankton County Commission, Yankton County Planning and Zoning Commission, Pat Garrity[2], and you[3].

In addition to claims for abuse of process, we are actively investigating other potential claims, including, but not limited to, (1) a claim for Civil Conspiracy to Commit Abuse of Process, (2) a claim for Defamation based upon intentionally false and misleading claims made to the public about Defendants, which has caused actual harm, (3) and federal claims for § 1983 civil relief and violations of the Telecommunications Act 47 U.S.C. § 332. This is by no means an exhaustive list of the potential claims that may exist.

3. DEMAND.

Despite the litany of facts set forth above and the significant loss of time and money, my clients were willing to attempt to resolve this matter with the County. After stipulating to dismiss the Lawsuit without prejudice, Defendants made a good-faith settlement offer of $56,480.36 to Yankton County. As Defendants originally explained during the first settlement conference on May 17, 2019, this low offer was made in the interest of reaching an immediate or at least expedited resolution. As you know, this offer was rejected by Yankton County. Due to Plaintiff's failure to negotiate in good faith, as well as the tortured history of this matter, this offer is no longer on the table.

Our new settlement offer is **$248,710.00**. This offer is equal to the amount of past damages as well as costs and disbursements. Attached hereto as Exhibit B and incorporated herein by this reference is a detailed calculation of this amount.

Damages as of July 1, 2019:	$210,857.16
Prejudgment Interest @ 10.00%:	$14,205.58
Legal / Admin cost:	$21,600.58
Legal / Admin interest:	$179.28
Total Past Damages:	$248,710.00

Please be advised that should this matter proceed to trial, we intend to prove both past and future damages. Defendants have drawn a vast collection of resources and individuals to calculate their future damages, including, but not limited, the industry knowledge of South Dakota Internet, the employment of technicians and contractors in the field, consultants in the field, other wireless internet service providers (WISPs), Ehresmann Engineering, Inc., an accounting firm, and recorded calls from customers, among others. As of this date, using that future valuation model, Defendants calculate their present and future damages to be at least

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2. As we understand, Yankton County Commission, Yankton County Planning Commission, and Patrick Garrity are currently being sued for similar corrupt conduct. *Herrig et al. v. Yankton County Commission et al.*, 66CIV19-28.

3. A claim of abuse of process is allowed against the attorney who initiated the malicious lawsuit in certain instances. *See Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶¶ 5-6, 807 N.W.2d 612, 615 (involving claim against a bank and the state's attorney; state's attorney settled before trial for $50,000.00). For further consideration, other jurisdictions also allow these claims to proceed against attorneys. *See, e.g., Mozzochi v. Beck*, 529 A.2d 171 (Conn. 1987); *Hewes v. Wolfe*, 330 S.E.2d 16 (N.C. App. 1985); *Epps v. Vogel*, 454 A.2d 320 (D.C. App. 1982); *Journeymen, Inc. v. Judson*, 608 P.2d 563 (Ore. App. 1980).

$786,240.00, which Defendants believe is a conservative estimate. A copy of this calculation is attached hereto as Exhibit C and incorporated herein by this reference. If you have any questions about these calculations, we would be happy to arrange a time to discuss them with you and provide you with more information.

Please be further advised that should this matter proceed to trial, we will continue to seek recovery of attorneys' fees, which, as this matter continues, the amount will only increase.

This demand remains open until **5:00 p.m. on Friday, July 12, 2019**. We respectfully encourage Yankton County to promptly notify its insurance carrier regarding these matters. If we do not receive a positive response from Yankton County by then, we will have no choice but to proceed forward with the Lawsuit, including, but not limited to, amending and adding counterclaims, adding parties, moving for a new scheduling order, compelling a supplementation of Plaintiff's deficient discovery responses, and scheduling depositions of you, Pat Garrity, Gary Wood, Don Kettering, among others.

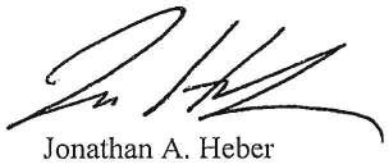
4. CONCLUSION.

I trust you will immediately share this letter with the members of the Yankton County Commission and the Yankton County Planning & Zoning. If you would like to discuss, please contact me via e-mail at jonathanh@cutlerlawfirm.com or on my direct line at 605-271-4947. This letter is written without prejudice to any of Defendants' rights, all of which are hereby expressly reserved.

I look forward to hearing from you soon and am available to engage in discussions at any time.

Sincerely,

CUTLER LAW FIRM, LLP



Jonathan A. Heber
For the Firm

JAH/dlu
Enclosures

cc: Luke McAllister (*via e-mail*)
McAllister TD, LLC (*via e-mail*)
B-Y Internet, LLC d/b/a South Dakota Internet (*via e-mail*)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff,	*	CIV. 18-
Vs.	*	COMPLAINT (VIOLATION OF COUNTY ORDINANCE)
LUKE E. MCALLISTER, MCALLISTER TD, LLC and B-Y INTERNET, LLC Defendants.	*	

COMES NOW, the above-named Plaintiff, Yankton County, by and through Yankton County State's Attorney, Robert W. Klimisch, and for its cause of action against the Defendant, Luke E. McAllister, the Defendant, McAllister TD, LLC, and the Defendant, B-Y Internet, LLC states and alleges as follows:

1. The Plaintiff, Yankton County, is a political subdivision situated in the State of South Dakota.

2. The Defendant, Luke E. McAllister, does business and resides in Yankton County, State of South Dakota.

3. The Defendant, McAllister TD, LLC, is a limited liability company organized pursuant to the laws of the State of South Dakota.

4. The Defendant, B-Y Internet, LLC, is a limited liability company organized pursuant to the laws of the State of South Dakota.

5. An entity known as "B-Y Internet" and/or "South Dakota Wireless Internet" is operating a wireless internet provider business in Yankton County, South Dakota.

6. Yankton County Ordinance #16, Article 25, requires a Conditional Use Permit for a new . . . Wireless Telecommunications Facility unless exempt pursuant thereto.

7. Yankton County Ordinance #16, Article 25, defines a Wireless Telecommunication Facility as:

> "It means a structure, facility or location designed, or intended to be used as, or used to support Antennas or other transmitting or receiving devises. This includes without limit, Towers of all types and kinds and structures, including, but not limited to buildings, . . or other structures that can be used as a support structure for Antennas or the functional equivalent of such . . . . It is a structure and facility intended for transmitting and/ or receiving radio, television, cellular

. . . commercial satellite services, microwave services and any commercial wireless telecommunication service not licensed by the FCC."

8. Yankton County Ordinance #16, Article 25, sets forth the requirements which are necessary to operate a Wireless Communication Facility in Yankton County, South Dakota.

9. The Defendant, Luke E. McAllister and the Defendant, McAllister TD, LLC have filed with the Secretary of State of South Dakota a fictitious business name registration for the name "B-Y Internet" filing date of September 30, 2017, ID: UB137753 as the owners of said name.

10. The Defendant, B-Y Internet, LLC has filed with the Secretary of State of South Dakota a fictitious business name registration for the name "South Dakota Wireless Internet" filing date of February 2, 2018, ID: UB143478 as the owner of said name.

11. The Defendant, Luke E. McAllister, is the agent for and an organizer of the Defendant, B-Y Internet, LLC.

12. The Defendant, Luke E. McAllister, is the agent for and an organizer of the Defendant, McAllister TD, LLC.

13. Upon information and belief, the Defendant, B-Y Internet, LLC, is doing business as "B-Y Internet" and "South Dakota Wireless Internet".

14. The businesses known as "B-Y Internet, LLC" and/ or "South Dakota Wireless Internet" have not complied with the requirements of Yankton County Ordinance #16, Article 25 requiring a conditional use permit prior to the operation of a wireless internet business in Yankton County, South Dakota.

WHEREFORE, the Plaintiff prays for judgment against the Defendants both jointly and severally as follows:

A. For a mandatory injunction requiring the Defendant, Luke E. McCallister, the Defendant, McAllister TD, LLC, and the Defendant, B-Y Internet, LLC to cease and desist from operating a wireless internet provider business in Yankton County, South Dakota.

B. For such fines and other monetary relief as may be provided by law.

C. For such other and further relief that the Court deems just and equitable.

Dated this 31st day of May, 2018.

Robert W. Klimisch
Yankton County State's Attorney
410 Walnut St., Ste 100
Yankton, SD 57078
(605) 665-4301

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):ss	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT
	)	
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff,	)	CIV. 18-178
v.	)	ANSWER AND
LUKE E. MCALLISTER, MCALLISTER TD, LLC and B-Y INTERNET, LLC. Defendants.	)	COUNTERCLAIM (LUKE E. MCALLISTER)

COMES NOW the Defendant, Luke E. McAllister, by and through his attorney, Michael D. Stevens, and for his Answer to the Plaintiff's Complaint, states and alleges as follows:

1. Defendant Luke E. McAllister states that the Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.
2. The Defendant denies each and every allegation as contained in said Complaint except for those matters specifically admitted herein.
3. The Defendants admits paragraph 1, 3, 9 and 10.
4. The Defendant admits that part of paragraph 2 that states that Defendant Luke E. McAllister resides in Yankton County, State of South Dakota. The Defendant states that part of the paragraph which alleges that Luke E. McAllister "does business" is vague and ambiguous and thus the Defendant is unable to either admit or deny.
5. The Defendant denies paragraph 4, 5, 6, 7, 8, 13 and 14.
6. The Defendant admits that part of paragraph 11 that states that Luke E. McAllister is the agent for B-Y Internet, LLC and denies the rest of the paragraph.

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7. The Defendant admits that part of paragraph 12 that states Luke E. McAllister is the agent for McAllister TD, LLC and denies the rest of the paragraph.

AFFIRMATIVE DEFENSES

8. The Defendant Luke McAllister, does not operate a Wireless Communication Facility in Yankton County, South Dakota, and therefore does not need to comply with the requirements of Yankton County Ordinance #16, Article 25.
9. The Defendant Luke McAllister is not personally liable for an obligation or liability of McAllister, TD, LLC or B-Y Internet, LLC, solely by reason of being or acting as a member or manager under SDCL § 47-34A-303.

WHEREFORE, the Defendant prays that the Plaintiff's Complaint be dismissed with prejudice and that he be awarded his attorney fees, tax and disbursements and any other relief that the Court deems just and equitable.

COUNTERCLAIM

COMES NOW the Defendant, Luke E. McAllister and for his cause of action against the above named Plaintiff, Yankton County, State of South Dakota, states and alleges as follows:

10. B-Y Internet, LLC, is a legal entity distinct from its members.
11. Defendant Luke E. McAllister is a member of B-Y Internet, LLC, a limited liability company, however, he is not a proper party to these proceedings under SDCL § 47-34A-201.
12. The Plaintiff's Complaint against Defendant Luke E. McAllister constitute a frivolous and meritless claim by Plaintiff against Defendant Luke E. McAllister and thus constitutes barratry pursuant to SDCL § 20-9-6.1.

Filed: 7/5/2018 3:27 PM CST Yankton County, South Dakota 66CIV18-000178

13. The Plaintiff's Complaint was undertaken without probable cause to believe it would succeed on the merits against Luke E. McAllister. Defendant, Luke E. McAllister, is entitled to damages including, but not limited to, attorney's fees and disbursements of defending this frivolous and meritless claim.

WHEREFORE, Defendant respectfully prays for the following relief:

1. A dismissal of the Plaintiff's Complaint with prejudice;
2. For a judgment against the Plaintiff for barratry awarding the Defendant damages for his attorney fees and disbursements in an amount to be determined by the court.
3. For such further relief the Court determines just and equitable.

Dated this 5th day of July, 2018.

Michael D. Stevens
BLACKBURN & STEVENS, PROF. L.L.C.
100 West 4th Street
Yankton, South Dakota 57078
(605) 665-5550
Attorney for Defendants
Attymike07@gmail.com

CERTIFICATE OF SERVICE

I, Michael D. Stevens, hereby certifies that on the 5th day of July, 2018, a true and correct copy of the **Answer and Counterclaim (Luke E. McAllister)** was served upon Robert W. Klimisch, Yankton County State's Attorney, either 1) by Odyssey File and Serve; or 2) by e-mail; or 3) by mailing U.S. Mail, first class mail, postage prepaid.

Michael D. Stevens

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):ss	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT
	)	
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff,	)	CIV. 18-178
v.	)	ANSWER AND
LUKE E. MCALLISTER, MCALLISTER TD, LLC and B-Y INTERNET, LLC. Defendants.	)	COUNTERCLAIM (MCALLISTER TD, LLC)

COMES NOW the Defendant, McAllister TD, LLC, by and through its attorney, Michael D. Stevens, and for its Answer to the Plaintiff's Complaint, states and alleges as follows:

1. Defendant MCALLISTER TD, LLC states that the Plaintiff's Complaint fails to state a cause of action upon which relief may be granted.
2. The Defendant denies each and every allegation as contained in said Complaint except for those matters specifically admitted herein.
3. The Defendants admits paragraph 1, 3, 9 and 10.
4. The Defendant admits that part of paragraph 2 that states that Defendant Luke E. McAllister resides in Yankton County, State of South Dakota. The Defendant states that part of the paragraph which alleges that Luke E. McAllister "does business" is vague and ambiguous and thus the Defendant is unable to either admit or deny.
5. The Defendant denies paragraph 4, 5, 6, 7, 8, 13 and 14.
6. The Defendant admits that part of paragraph 11 that states that Luke E. McAllister is the agent for B-Y Internet, LLC and denies the rest of the paragraph.

Filed: 7/5/2018 3:27 PM CST Yankton County, South Dakota 66CIV18-000178

7. The Defendant admits that part of paragraph 12 that states Luke E. McAllister is the agent for McAllister TD, LLC and denies the rest of the paragraph.

AFFIRMATIVE DEFENSES

8. The Defendant MCALLISTER TD, LLC, does not operate a Wireless Communication Facility in Yankton County, South Dakota, and therefore does not need to comply with the requirements of Yankton County Ordinance #16, Article 25.
9. The Defendant MCALLISTER TD, LLC is not liable for an obligation or liability of B-Y Internet, LLC.

WHEREFORE, the Defendant prays that the Plaintiff's Complaint be dismissed with prejudice and that he be awarded his attorney fees, tax and disbursements and any other relief that the Court deems just and equitable.

COUNTERCLAIM

COMES NOW the Defendant, MCALLISTER TD, LLC and for its cause of action against the above named Plaintiff, Yankton County, State of South Dakota, states and alleges as follows:

10. B-Y Internet, LLC, is a legal entity distinct from its members.
11. Defendant MCALLISTER TD, LLC is not a proper party to these proceedings under SDCL § 47-34A-201.
12. The Plaintiff's Complaint against Defendant MCALLISTER TD, LLC constitute a frivolous and meritless claim by Plaintiff against Defendant MCALLISTER TD, LLC and thus constitutes barratry pursuant to SDCL § 20-9-6.1.
13. The Plaintiff's Complaint was undertaken without probable cause to believe it would succeed on the merits against MCALLISTER TD, LLC. Defendant, MCALLISTER

Filed: 7/5/2018 3:27 PM CST Yankton County, South Dakota 66CIV18-000178

TD, LLC is entitled to damages including, but not limited to, attorney's fees and disbursements of defending this frivolous and meritless claim.

WHEREFORE, Defendant respectfully prays for the following relief:

1. A dismissal of the Plaintiff's Complaint with prejudice;
2. For a judgment against the Plaintiff for barratry awarding the Defendant damages for his attorney fees and disbursements in an amount to be determined by the court.
3. For such further relief the Court determines just and equitable.

Dated this 5th day of July, 2018.

Michael D. Stevens
BLACKBURN & STEVENS, PROF. L.L.C.
100 West 4th Street
Yankton, South Dakota 57078
(605) 665-5550
Attorney for Defendants
Attymike07@gmail.com

CERTIFICATE OF SERVICE

I, Michael D. Stevens, hereby certifies that on the 5th day of July, 2018, a true and correct copy of the **Answer and Counterclaim (McAllister TD, LLC)** was served upon Robert W. Klimisch, Yankton County State's Attorney, either 1) by Odyssey File and Serve; or 2) by e-mail; or 3) by mailing U.S. Mail, first class mail, postage prepaid.

Michael D. Stevens

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff, Vs. LUKE E. MCALLISTER, MCALLISTER TD, LLC and B-Y INTERNET, LLC Defendants.	*	CIV. 18-178 PLAINTIFF'S REPLY TO DEFENDANT, LUKE E. MCALLISTER'S AND MCALLISTER TD, LLC'S COUNTERCLAIM

COMES NOW, the above-named Plaintiff, Yankton County, State of South Dakota, a Political Subdivision, by and through Yankton County State's Attorney, Mr. Robert W. Klimisch, and for its Reply to Defendant Luke E. McAllister's AND McAllister TD, LLC's Counterclaim, states and alleges as follows:

1. The Defendant fails to state the cause of action from which relief can be granted.

2. The Plaintiff denies each and every matter, allegation and thing contained therein except that which is hereinafter admitted or qualified admitted.

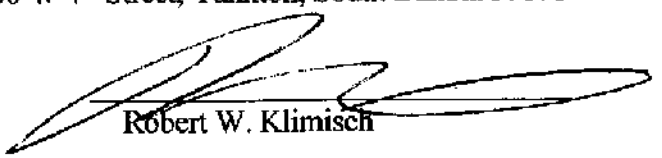
WHEREFORE, the Plaintiff prays that the Court grant the relief prayed for in its Complaint and that the Defendant recover nothing by reason of his Counterclaim and that the Court grant such other relief as may be proper in the premises.

Dated this 31st day of July, 2018.

Robert W. Klimisch
Yankton Co. State's Attorney
410 Walnut St. Suite 100
Yankton, SD 57078
(605)665-4301

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2018, I mailed, by first class mail, postage prepaid, a true and correct copy of the foregoing Plaintiff's Reply to Defendant, Luke E. McAllister's and McAllister TD, LLC's Counterclaim to: Mike Stevens, Blackburn & Stevens, 100 W 4th Street, Yankton, South Dakota 57078



Robert W. Klimisch

3-21-2. Notice prerequisite to action for damages--Time limit.

No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury. Nothing in this chapter tolls or extends any applicable limitation on the time for commencing an action.

Source: SL 1986, ch 4, § 2; SL 2007, ch 23, § 1.

3-21-3. Persons to whom notice must be given.

Notice shall be given to the following officers as applicable:

(1) In the case of the State of South Dakota, to the attorney general and the commissioner of administration;
(2) In the case of a county, to the county auditor;
(3) In the case of a municipality, to the mayor or city finance officer;
(4) In the case of a school district, to the superintendent of schools;
(5) In the case of other public entities, to the chief executive officer or secretary of the governing board.

Source: SL 1986, ch 4, § 3; SL 1994, ch 40.

Yankton County Zoning Ordinance, Article 25, Section 2503

Wireless Telecommunication Facilities established as Conditional Uses in Yankton County

In order to ensure that the placement, construction, and modification of Wireless Telecommunications Facilities protects the County's health, safety, public welfare, environmental features, the nature and character of the community and neighborhood and other aspects of the quality of life specifically listed elsewhere in this Section, the County hereby adopts an overall policy with respect to a Conditional Use Permit for Wireless Telecommunications Facilities for the express purpose of achieving the following goals:

1. Requiring a Conditional Use Permit for any new, co-location or modification of a Wireless Telecommunications Facility.

2. Implementing an Application process for person(s) seeking a Conditional Use Permit for Wireless Telecommunications Facilities.

3. Establishing a policy for examining an application for and issuing a Conditional Use Permit for Wireless Telecommunications Facilities that is both fair and consistent.

4. Promoting and encouraging, wherever possible, the sharing and/or co-location of Wireless Telecommunications Facilities among service providers.

5. Promoting and encouraging, wherever possible, the placement, height and quantity of Wireless Telecommunications Facilities in such a manner, including but not limited to the use of stealth technology, to minimize adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and in generally the same area as the requested location of such Wireless Telecommunications Facilities, which shall mean using the least visually and physically intrusive facility that is not technologically or commercially impracticable under the facts and Yankton County 150 circumstances. 6. That in granting a Conditional Use Permit, the County has found that the facility shall be the most appropriate site as regards being the least visually intrusive among those available in the County.

Yankton County Zoning Ordinance, Article 25, Section 2505

Exclusions

The following shall be exempt from this Article:

1. Fire, police and highway departments or other public service facilities owned and operated by the local government and located in Yankton County.

2. Any facilities expressly exempt from the County's siting, building and permitting authority.

3. Over-the-Air reception Devices including the reception antennas for direct broadcast satellites (DBS), multichannel multipoint distribution (wireless cable) providers (MMDS), television broadcast stations (TVBS) and other customer-end antennas that receive and transmit fixed wireless signals that are primarily used for reception.

4. Facilities exclusively for private, non-commercial radio and television reception and private citizen's bands, licensed amateur radio and other similar non-commercial Telecommunications.

5. Facilities exclusively for providing unlicensed spread spectrum technologies (such as IEEE 802.11a, b, g (Wi-Fi) and Bluetooth) where the facility does not require a new tower.

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF YANKTON — FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, a Political Subdivision, Plaintiff, vs. LUKE E. McALLISTER, McALLISTER, TD, L.L.C., and BY INTERNET, L.L.C., Defendants and Third-party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in His Capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in His Individual Capacity; and ROBERT W. KLIMISCH, in His Capacity as YANKTON COUNTY STATE'S ATTORNEY and in His Individual Capacity, Third-party Defendants.	No. 66CIV18-000178 MOTIONS HEARING MOTION FOR SUMMARY JUDGMENT

BEFORE: THE HONORABLE PATRICK SMITH
Circuit Court Judge

For Yankton County Plaintiff and Third-party Defendants (By telephone): DOUGLAS M. DEIBERT
CADWELL, SANFORD, DEIBERT & GARRY
P.O. Box 2498
Sioux Falls, SD 57101

(By telephone): ROBERT W. KLIMISCH
YANKTON COUNTY STATE'S ATTORNEY
410 Walnut, Suite 100
Yankton, SD 57078

PROCEEDINGS: The above-entitled proceeding commenced at approximately 3:13 p.m. on the 17th day of November 2020 in the courtroom of the Davison County Courthouse, Mitchell, South Dakota.

received notice. Indeed EMC Insurance investigated the claims and sent a letter to the County Auditor. The County Auditor had notice; Patrick Garrity had notice; Robert Klimisch of course had notice; the Planning Commission had notice; the Yankton County Commission had notice; Yankton County had notice; the Board of Adjustment had notice. Everyone had notice.

And they had notice prior to the running of the 180 days, which, by our calculation, occurred at the earliest on November 13, 2019. That date is 180 days after May 17th, 2019, the date up until the ulterior motive was concealed to Defendants. At that date on that notice, the 180 days began to run.

The South Dakota Supreme Court has recognized seven objectives who, quote, provide notice to public entities. The first objective is "to investigate evidence while fresh." Here the evidence consists largely of documentary evidence and testimonial evidence of which Yankton County Movants would possess. The claims relate to intentional acts committed by Movants. This is not a situation where there is a risk of exploitation of evidence. And in any event, no one would know the evidence, frankly, better than Movants. These were their intentional acts.

The second objective is "to prepare a defense in case litigation appears necessary." Litigation was already

brought by Yankton County. It already existed. It was already occurring and, in fact, was the basis for the claims by Defendants. So that objective is met.

The third objective is "to evaluate claims allowing early settlement of meritorious ones." This objective is also met. The notice letter on July 3rd included - didn't need to but included an estimation of damages and asks that the matter be turned over to insurance. The objective was to potentially achieve their own settlement and avoid this.

The fourth objective is "to protect against unreasonable abuse of parties." The 8-page, single-spaced letter provided the background, the factual background, citations to law. It provided all that information so that insurance could evaluate the claim and determine whether or not it believed it was a meritorious one or unreasonable nuisance claim. That claim is met - objective is met.

The fifth objective is "to facilitate prompt repairs avoiding further injuries." Well, there's nothing to repair in this lawsuit. Yankton County could have formally dismissed its claims, which would have ceased the ongoing injuries and has not done so today.

The sixth objective is "to allow the public entity to budget for payment of claims." Again, Defendants provided an estimation of damages allowing the budgeting of claim; moreover, insurance was notified and sent a 12-page letter

with its investigation or, presumably, budget as well involved in that analysis. We're not required - again, Defendants provided their own damages estimate - estimation. So that objective is met.

The seventh objective is "to ensure the officials responsible for the above tasks are aware of their duty to act." Everyone was aware.

All seven objectives are soundly met. The purpose of the notice requirements were fulfilled. Thus, at minimum, Defendants substantially complied with requirements under the statutes. If substantial compliance is not met in this case, then it is not met in any case. It would shut the door on the doctrine of substantial compliance, which would be in contravention of the South Dakota Supreme Court's rulings of the substantial compliance doctrine.

Your Honor, I would like to end on observation. Movants are requesting that this Court render a harsh ruling against Defendants based on a perceived timeliness issue, when, in this case, Movant failed to raise an affirmative defense or failure to provide notice more than 1 year after the original counterclaims were filed. They filed - they failed to bring this motion until 1 year after those affirmative defenses were finally raised.

They failed for months to provide complete discovery responses that were compelled by this Court to provide those

answers on two separate occasions. And they abandoned their own briefing schedule for bringing this motion without any explanation. And when they finally did bring this motion, it was brought exactly one week after Defendants requested numerous depositions. Again, the case was dismissed - or stipulated to be dismissed on April 17th, 2 weeks after notice of the depositions were served.

In a case that has been fraught with delay, it's ironic that Movants would stick to their position on this claim. Apparently "rules for me but not for you. The king can do no wrong." This has been the theme of the lawsuit. In fact, today plaintiffs will not dismiss their claim against any of Defendants despite agreement to dismiss with prejudice if the Planning Commission voted in favor of exclusion, which the Planning Commission did unanimously; in fact, apologized to Defendants for having to go through what they're going through.

So on one hand, Movants have handcuffed Defendants to this lawsuit, and in the other hand, they claim no notice. And they had notice. And that's the point of this motion. That is all, Your Honor.

THE COURT: Thank you. Mr. Deibert, do you need a moment?

MR. DEIBERT: Yes, Your Honor.

THE COURT: Whenever you're ready. . . .

MR. DEIBERT: Of course much of the last 45 minutes of

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29616

YANKTON COUNTY, STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

v.

LUKE E. MCALLISTER, MCALLISTER TD, LLC and BY INTERNET, LLC
Defendants and Appellants
v.

YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR And in his INDIVIDUAL CAPACITY; and ROBERT W. KLIIMISCH, in his Capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY
Third Party Defendants and Appellees

Appeal from the Circuit Court, First Circuit
Yankton County, South Dakota

The Honorable Patrick T. Smith
Circuit Judge

APPELLEES' BRIEF
(Yankton County Entities and Klimisch)

Attorneys for Appellants:
Meredith A. Moore
Jonathan A. Heber
Cutler Law Firm, LLP
140 N. Phillips Ave., 4th Floor
Sioux Falls, SD 57104

Attorneys for Appellees:
Douglas M. Deibert
Cadwell Sanford Deibert & Garry, LLP
200 E. 10th Street, Suite 200
Sioux Falls, SD 57104

Mark D. Fitzgerald (only for Garrity)
Fitzgerald Vetter Temple, Bartell
& Henderson
1002 Riverside Blvd, Suite 200
Norfolk, NE 68702-1407

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SOUTH DAKOTA CASES

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SOUTH DAKOTA STATUTES

PRELIMINARY STATEMENT

In this Brief, Defendants/Appellants Luke E. McAllister; McAllister TD, LLC; and BY Internet, LLC, will be referred to as "Appellants" or "McAllisters," using the last name of the individual; and since ownership of the entities involves one of the McAllisters. Appellees Yankton County, Yankton County Commission, Yankton County Board of Adjustment, and Appellee Yankton County Planning Commission will be referred to as "the Yankton County entities." Appellee Robert W. Klimisch will be referred to as "Klimisch." Appellee Patrick E. Garrity will be referred to as "Garrity." References to the four Yankton County entities and Klimisch will sometimes be referred to as "these Appellees," or a similar term. The Clerk's Alphabetical Index will be referred to as "CI."

JURISDICTIONAL STATEMENT

These Appellees generally agree with the Jurisdictional Statement, and agree the appeal was timely filed.

STATEMENT OF LEGAL ISSUES

I. The Circuit Court was correct in determining Appellants' claims were barred by the notice provision of SDCL 3-21-1.

The Circuit Court was correct in determining that Appellants' claims were barred by their failure to comply with SDCL 3-21-1. To the extent these issues were involved in the determination, the Circuit Court also properly determined issues regarding the significance of the term "injury," fiduciary duty, substantial compliance, waiver, fraudulent concealment, prosecutorial immunity, and any and all other issues relating to the referenced notice provision.

- *Anderson v. Keller, 739 N.W.2d 35 (S.D. 2007);*
- *Gakin v. City of Rapid City, 698 N.W.2d 493 (S.D. 1005);*
- *Purdy v. Fleming,* 655 N.W.2d 424 (S.D. 2002);
- *Myears v. Charles Mix County,* 566 N.W.2d 470 (S.D. 1997); and
- *Smith v. Neville*, 539 N.W.2d 679 (S.D. 1995)

II. The Circuit Court correctly determined that Appellants' Claims Against Klimisch were Barred by the Doctrine of Prosecutorial Immunity.

This issue was likewise properly considered and ruled upon by the Circuit Court.

- *Imbler v. Pachtman,* 424 U.S. 409 (1976); and
- *Christensen v. Quinn, et al*, 45 F.Supp.3d 1043 (U.S. D.C. D SD 2014).

INTRODUCTION

Despite the dramatic rhetoric in Appellants' Brief, starting with the first sentence, this case started with State's Attorney Robert Klimisch filing an action against parties including Appellants, seeking a court order regarding alleged violations of county ordinances. These Appellees will not follow the lead of Appellants in their Introduction Section, starting with the first sentence.

Along with that, for reasons unknown, both in the Introduction section and in other argument, apparently it was determined that counting the numbers of days between events is somehow important. Overlooked in the Introduction and other parts of the Brief, is that the complexity and volume of documents generated, were largely the product of Appellants' Counterclaims against the County; and then third-party actions against five other parties, including three county entities, the Yankton County Zoning Administrator, and the Yankton County State's Attorney. The only matter at issue in this appeal is whether McAllister's gave proper notice required by SDCL 3-21-2.

After limited discovery and no depositions, all Appellees made motions for summary judgment, which were granted. The order granting that motion, and the issues involved, are what these Appellees will focus on, in this Brief.

STATEMENT OF THE FACTS

The alleged facts set forth in Appellants' Brief, which run on for the better part of ten pages, constitute more argument than they do actual facts. To the extent they might recite facts, most or many have nothing to do with the very limited issue before this Court.

The recitation of dates, claimed events, and somewhat of a play-by-play regarding communications between County entities and Appellants, at least those with the exception of the final paragraph at page 10 of the Brief, state no real facts that require response.

The initial Complaint was filed June 13, 2018 (CI 2). On July 5, 2018, B-Y Internet, LLC, and Luke A. McAllister served Answers and Counterclaims against Yankton County for barratry. (CI 8, 11)

More than a year later, on September 27, 2019, Counterclaims were brought by Luke E. McAllister, B-Y Internet, LLC, and McAllister TD, LLC. (CI 292, 297, 302). A Third Party Summons and Complaint are dated August 23, 2019. (CI 217, 235), impleading three county entities, Planning and Zoning Director Patrick Garirty, and State's Attorney Robert Klimisch. On October 30, 2019, the Yankton County entities and Klimisch filed responsive pleadings to the Amended Answer and Counterclaim, and the Third Party Complaint.

Responses to the Amended Counterclaim and the Third Party claims were made October 26, 2019. After service of several sets of written discovery on both parties, the

Motion for Summary Judgment was brought September 11, 2019, barely ten months after responses were made to the Amended Counterclaim, and to the three third-party claims. No depositions were ever taken. Consequently, the referenced "years of extensive litigation and motion practice" are argumentative at best; untrue at the least; and totally irrelevant to any issue involved in this Appeal.

After limited discovery, these Appellees brought a Motion for Summary Judgment on September 11, 2020. (CI 460) After submissions by both parties under SDCL 15-6-56, oral argument was held before the Honorable Patrick Smith on November 17, 2020. The Memorandum Decision granting the Motions for Summary Judgment brought by all Appellees was entered December 14, 2020. (CI 802). After a clerical error was remedied, an Order Granting Summary Judgment was entered February 1, 2021, (CI 831), Noticed for Entry on February 2, 2021 (CI 854). This appeal follows.

ARGUMENT

I. Summary Judgment Standards.

These Appellees will not repeat the numerous authorities which recite the legal elements and requirements necessary to support a Motion for Summary Judgment. Regarding the issues involved in the Motion for Summary Judgment, the Memorandum Decision rendered thereon, and this Appeal involve undisputed facts, and a substantial, if not overwhelming, authority in favor of Appellees' arguments. The very limited issues, and the underlying facts, supported the bringing of the motion, and the Trial Court was correct in granting Summary Judgment to all Appellees. That decision and the resulting Order and Judgment should be affirmed.

II. Application of SDCL 15-26A-67.

While these Appellees are separately represented, and separately filed their own

Motions for Summary Judgment, Third Party Defendant Garrity is a party to the Third Party Action brought against the five new parties in late September of 2019. Third Party Defendant Garrity is a party to Third Party Defendant's Answers to that pleading. Pursuant to SDCL 15-26A-67, these Appellees hereby adopt the contents of the Brief of Appellee Garrity, to the extent there are common issues, arguments and responses to the matters contained in Appellants' Brief.

III. SDCL 19-19-408 Bars Use of the July 3, 2019 Letter as Proof or Evidence Of any Fact, Including the Intent to Claim the Letter Constituted Compliance With SDCL 3-21-2.

Initially, before even getting to the legal challenges the Appellants make in attempting to convince this Court that the Trial Court's ruling regarding non-compliance with SDCL 3-21-2 was error, there is one issue upon which this case can be decided, before getting to any issues of notice or prosecutorial immunity, or any issues related to thereto. As admitted in their Brief and in discovery answers, Appellants rely only upon counsel's July 3, 2019, letter as evidence the notice statute was complied with. (SDI APP 00057 – SDI APP 00064). Clearly, that letter now relied upon as Appellants' only evidence they claim constitutes compliance with the statutory notice provision, is being used to "prove … the validity… of a disputed claim," citing the language of SDCL 19-19-408.

In its entirety, SDCL 19-19-408 provides as follows:

> Compromise offers and negotiations.
>
> (a) Prohibited uses**.** Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) Furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and

> (2) Conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

To begin with, the very heading of the letter, all of which is in capital letters, contains the phrase "DEMAND LETTER." After eight pages of a recitation of events as viewed by Appellants, and lectures on various legal theories, page 7 of the letter contains a section: "3. DEMAND."

The final sentence in that section indicates "Our new settlement offer is $248,710.00."

Next, the final letter of Section 3, "the DEMAND", imposed a deadline of 5:00 p.m. on Friday, July 12, 2019.

Clearly this was a communication which falls squarely within the definition that the letter is being offered to "prove the validity of a disputed claim." By relying on the July 3, 2019, settlement demand letter as the only evidence which constitutes alleged compliance with the notice requirement of SDCL 3-21-2, use of that letter is offered for no reason other than to prove the validity of the disputed claim, involving the notice issue.

While Appellants now seek to claim this letter is their proof of compliance with the statutory notice requirement, the fact is inescapable that it was part of settlement negotiations. The very terms "DEMAND LETTER," and "DEMAND," clearly make this an "offering to accept a valuable consideration ($786,240), in compromising or attempting to compromise their claim," to utilize other words of the statute.

Although this was not the basis for the Trial Court's Summary Judgment ruling, since the issue was raised during Summary Judgment Proceedings (See Reply Brief In Support of Motion for Summary Judgment of these Appellees, dated November 10, 2020, Appendix 1-35, pages 32-33), it is proper for this Court to consider this issue and the statute on this appeal. As numerous cases have held, an appellate court will affirm a lower Court's decision, so long as there is a legal basis to support its decision. *See e.g. State v. BP PLC,* 948 N.W.2d 45 (S.D. 2020); *Coburn v. Hartshorn,* 841 N.W.2d 267, (S.D. 2013); *Krier v. Dell Rapids Tp.,* 709 N.W.2d 841 (S.D. 2006). Some number of these cases involved issues where the Trial Court might have been incorrect in its basis for granting the relief sought. Here, there is no argument that the Trial Court erred in its decision. Rather, the failure of the Trial Court to rely on SDCL 19-19-408 as a basis for its granting the motion for summary judgment, does not preclude this Court from considering the statute and facts relating thereto now.

IV. SDCL 3-21-2 Issues.

A. The Date of the "Injury" contained in SDCL 3-21-2 was on or before July 5, 2018.

At page 14 of their Brief, McAllisters argue the time frame with which to calculate the 180-day notice requirement in SDCL 3-21-2, began on or about March 12, 2019. In making this argument, McAllisters seek to distort, disguise, re-define, or otherwise defeat the clear meaning and intent of the statute, along with significant case authority decided by this Court on the very issue.

That flaw in logic begins early in Section I.A. of the Brief, page 14, where Appellants argue that "those claims (for barratry) were not ripe and had not accrued." The Brief then notes the usual rule that a claim for barratry does not begin to accrue until

the underlying lawsuit is dismissed favorable to the defendant. That argument misses the point regarding the term "injury" which is the triggering event for notice, required by SDCL 3-21-2. Events and issues such as accrual, ripeness, being prematurely pleaded, or other such words and phrases, have nothing to do with the date of the **triggering event** for SDCL 3-21-2 purposes, using a term which this Court has utilized in prior rulings regarding the beginning date from which to calculate the 180-day notice time frame of SDCL 3-21-2.

There is substantial authority in prior decisions of this Court which defeat Appellants' attempt to re-define the term "injury," to fit and suit their purposes in attempting to overcome their failure to comply with the notice statute. These authorities fully support these Appellees' argument, and the Trial Court's ruling.

First, in *Purdy v. Fleming,* 655 N.W.2d 424 (S.D. 2002), this Court determined the issue regarding the date of the "injury" for SDCL 3-21-2 purposes. In that case, a five-year old girl, designated "Amanda" in the decision, died on May 31, 1995, in a house fire in Bowman, North Dakota. At the time, she lived with her biological father, who had physical custody of the little girl. Initially, a law enforcement investigation determined the fire to be accidental.

Three years later, the father confessed in an Internet chatroom that he had murdered Amanda. During the ensuing criminal investigation, it was revealed he had been sexually abusing Amanda for years before her murder. That investigation also determined that Social Service agencies in both South Dakota and North Dakota had received reports of the abuse of Amanda, made in July of 1994.

After learning of these events, Purdy, the biological mother of Amanda, brought civil actions against several individuals and entities, two of them being Fleming and

Cummings, the South Dakota DSS caseworkers. Summary Judgment against the two state employees was granted, on the issue of failure to comply with the 180-day requirement of SDCL 3-21-2. This Court affirmed.

Despite the fact that it might have been difficult, if not nearly impossible, for plaintiff mother to have discovered matters that occurred in 1994 and 1995, this Court held that despite arguments as to the start of the time frame, and a claim of fraudulent concealment, there was no legal authority to support Purdy's claim that the late notice should be of any effect. In its discussion, this Court noted:

> When the time requirement of this statute has been in dispute, we have continuously held that the date of the injury is the triggering event for the 180-day period. The statute clearly says, "after the injury," not "after discovery of the injury." 655 NW2d at 430 (citation omitted).

Next, in *Gakin v. City of Rapid City,* 698 N.W.2d 493 (S.D. 2005), this Court again decided this issue, again in a situation in which plaintiffs claimed a later date than the true date of the "injury" should govern the notice requirement of SDCL 3-21-2.

In that case, a 2 ½ year old boy had been buried on October 15, 1999. Parents had questions about the burial, which ultimately led to a disinterment on May 9, 2002. While that disinterment revealed that the boy had been buried in the proper grave, a question that had existed in the parents' minds following the burial, the casket faced east, rather than west, contrary to a traditional manner. A lawsuit followed against the City of Rapid City, which owned the cemetery. SDCL 3-21-2 was pleaded as a defense. [1]

[1] Our reading of *Gakin* does not find a clearly defined date, when the 3-21-2 notice was given. It appears it was September 27, 2001, at which time parents' attorney sent a letter to the cemetery repeating the parents' accusations and asking for an explanation.

City prevailed on its motion for summary judgment. This Court affirmed, holding, among other things, that the date of the burial, October 15, 1999, was the date of the "triggering event," or "the injury." The parents had made the argument that the date of the "triggering event" of "the injury", should have been treated as May 9, 2002, the date of the disinterment, and the date the positioning of the casket had been determined. In rejecting the argument, and utilizing the identical language quoted above from *Purdy*, this Court stated:

> When the time requirement of this statute has been in dispute, we have continuously held that the date of the injury is the triggering event for the 180-day period. *The statute clearly says, "after the injury," not "after the discovery of the injury."* 698 N.W.2d at 498 (emphasis in the original; citations omitted).

The only difference in language from the two decisions involved italicizing the language, apparently to make the contents of the ruling even more clear in *Gakin*.

Consequently, this Court has consistently held that "the injury" occurred at the time of the alleged action or inaction of the public entity, here on or before June 16, 2018, the date the Complaint was first filed.

McAllisters' argument containing such terms as "ripe," "had not accrued," "were prematurely pleaded," and others, ignore these very clear authorities that the date of the "injury" occurs on the date of the event which brings the case within SDCL 3-21-2. In fact, McAllisters' argument in this respect is even weaker than the facts and arguments that were present in *Purdy* and *Gakin.* As demonstrated by the fact that the Counterclaims for barratry were initiated July 5, 2018, at least by that date, the alleged "injury" had occurred, which led to the affirmative pleadings of counterclaims. In pleading theories of barratry as early as July 5, 2018, Appellants obviously had knowledge of information from which they claimed the basis for the barratry action counterclaim. The fact that

later pleadings included two other theories does not negate the fact that at least by July 5, 2018, Appellants believed they had the basis for, and knowledge of, alleged misconduct by county entities and individuals. Obviously that knowledge makes *Purdy* and *Gakin* even stronger authority with which to support the ruling that SDCL 3-21-2 had not been followed.

The cases cited by Appellants at page 15 of their Brief involve authorities from other jurisdictions, different types of cases, different theories of recovery, and different statutes and other laws. *Purdy* and *Gakin* both were decided in the specific context of SDCL 3-21-2. Consequently, for all these reasons, along with the strong, consistent authority set forth in the two decisions cited above, specifically within the context of SDCL 3-21-2, the date of the "injury," was no later than July 5, 2018.

B. Fiduciary Duty

In another significant stretch of both fact and law, Appellants' Brief now attempts to claim a fiduciary duty existed between some or all of the County Defendants, and the McAllisters. *See* Appellants' Brief, pages 18-20. From the attempt to interject fiduciary duty into the case, the Brief then attempts to connect dots which don't exist, and bootstrap the fiduciary duty claim into a fraudulent concealment argument.

Initially, this argument is the first time McAllisters have attempted to raise the issue of fiduciary duty. To properly address this new argument, as a part of this Brief, the Yankton County Appellees have included in Appellees' Index a copy of the Brief in Opposition to Motion for Summary Judgment, dated October 30, 2020. *See* these Appellees' Index, YC APP 001-023. This was in the response to these Appellees' Brief in Support of their Motion for Summary Judgment.

We have scoured that earlier Brief in Opposition, and a Word Search has been conducted. The only reference we can find to the term "fiduciary relationship," occurs at page 12 of that Brief (YC APP 12), in Appellants' argument on a fraudulent concealment theory. The single use of the term "fiduciary relationship" occurs in the context of that argument, and only in passing, as part of a quote from a case cited in that argument. There was certainly no argument made to the extent it is now as a significant issue, at pages 18-20 of Appellant's Brief. It is well settled that failure to raise an issue before the Circuit Court constitutes a waiver of that issue. *See LP6 Claimants, LLC v. South Dakota Department of Tourism and State Development*, 925 N.W.2d 911 (S.D. 2020); *Lindblom v. Sun Aviation, Inc.*, 862 N.W.2d 549 (S.D. 2015); and *Kreisers, Inc. v. First Dakota Title Ltd. Partnership*, 852 N.W.2d 413 (S.D. 2014). Consequently, the fiduciary relationship issue should not even be considered.

Assuming for the sake of argument that further response is necessary, the very idea that County Commissioners and County entities such as a Board of Adjustment or Planning Commission could have a fiduciary relationship with any citizen of the County, borders on the absurd. The very term "fiduciary duty" is the equivalent of a confidential relationship. *See Cleveland v. BDL Enterprises, Inc.*, 663 N.W.2d 212 (S.D. 2003). That case involved a lawsuit brought by a number of individuals against the City of Lead, the owner of a mall in Lead, and the engineering firm which had done a geotechnical study of the proposed building site, before construction. The numerous homeowners-plaintiffs claimed a fiduciary duty existed between these citizens, the mall and the engineers.

In rejecting that idea, this Court held:

> We have defined a fiduciary relationship as one which 'imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person

> with a duty to act primarily for the benefit of another.' 663 N.W.2d at 218, citations omitted.

This Court further discussed the fact that no confidential or fiduciary relationship existed between the engineers and the homeowners. The engineers had been hired by the mall developers, to conduct soil engineering work. This Court held that the engineering firm "stood in the shoes of (the mall owner) and had an arms-length relationship with the Homeowners. *Id,* citation omitted. The decision also noted that if a fiduciary duty were found to exist between the engineers and the Homeowners, the engineers would, in effect "be required to serve two masters who have antagonistic interests." *Id.*

In a very simple analysis, how can county commissioners, members of county boards, and the boards themselves, ever have a fiduciary relationship with one or a group of citizens, out of several thousand county residents? The very definition of a fiduciary duty involves a personal relationship, a personal position and relationship of trust, and the principle that the fiduciary must do everything possible to advance only the interest of the other party to this relationship. Typically, that would involve someone such as a trustor, or a lawyer. It could not involve public entities consisting of public servants who, by law, are entrusted with the duty to serve all citizens, not a chosen few. Starting with the State Legislature, through county commissioners, city and municipal officers, and township supervisors, there normally, if not always, is a difference of opinion on virtually each and every issue a governing body needs to consider. To claim any member serving on a governing board of a public entity owed a fiduciary duty to anyone, would require that person to "choose sides." From that point on, the fiduciary relationship Appellants claim exists, would only exist with relation to which side of the issue the public servant had chosen to support. It should be similarly rejected.

C. There Was No Fraudulent Concealment on the Part of Any Appellee.

After slogging through the fiduciary duty argument at pages 16-19 of their Brief, Appellants then attempt to slide into the fraudulent concealment argument. Beginning at page 19, the argument is made that even assuming there was no fiduciary relationship, the "Yankton County entities' affirmative conduct in this lawsuit was designed to prevent Appellants from discovering valid claims." As is true with numerous statements made by Appellants in their Brief, once again, other than the bare-faced statement, Appellants fail to state anything which is a true fact, upon which the theory can be supported.

Moreover, with the exception of the citation of a single unreported 1984 case, Appellants cite no authority whatsoever for their proposition. See the discussion herein, at pages 30-31 regarding the consequences of failure to cite authority.

The *Connor v. Hodel* case cited at page 19 of the Brief involved an EEOC case, with the issue being whether a 180-day filing requirement was subject to equitable tolling. Plaintiff alleged that because Defendant employer failed to disclose the identity of the selectee who replaced him, the time frame should be tolled. The Court agreed, denying Defendant's Rule 12 and Rule 56 motions, and granting Plaintiff's motion for an order compelling discovery. The case had absolutely nothing to do with fraudulent concealment.

McAllisters continue to argue that certain county entity members concealed facts from them, and consequently, the 180-day time frame was tolled. This is caught up in the claims that somehow the Fire and Ice entity had something to do with what McAllisters claim is a complicated, evil conspiracy against one or more of their businesses or proposed businesses. The alleged factual basis for the claim is, according to McAllisters, that County Commissioner Donald Kettering "let the cat out of the bag" on May 17,

2019, *only after* – and this is a critical point – the competing lawsuits had been tentatively dismissed pending a resolution of the cases." *See* Appellant's Brief, page 20.

In the next paragraph, in arguing that the fraudulent concealment allegation, and the claim for abuse of process "began to run at the earliest on May 17, 2019, when Mr. Kettering informed Appellants of the actual reason for commencing the lawsuit." The Brief provides no specific facts, and conveniently overlooks what Kettering actually said; and the fact that state's attorney Robert Klimisch has asserted through an unchallenged affidavit, that the decision to bring the lawsuit was his, and his alone. *See* Klimisch Affidavit dated September 11, 2020. (CI 525)

Starting with what Commissioner Kettering actually said, noting this was nearly a year after the subject Complaint had been initiated, see the question and answer dialogue that occurred between Cam McAllister and Commissioner Kettering, contained in Defendant's Statement of Additional Material Facts, SDI App. 44-55, in particular SD IAPP 50-51, at Fact No. 33.

Kettering was essentially being given a quiz roughly one year after the Complaint had been initiated. In several responses, he used the phrase "I think," or "I think so." Near the end of one response, he indicated "I don't remember."

Further, based on the Affidavit of State's Attorney Klimisch dated September 11, 2020 (CI 525), there should be no question that the bringing of the action was the decision of Klimisch, and Klimisch alone. Consequently, what Appellants claim to be the secret behind The Wizard's screen, is really nothing.

In its Decision, the Trial Court indicated it could not find, and Appellants cite no conduct by any of these Appellees, which amount to any act of concealment. *See* Memorandum Decision, CI 802, SDI APP 14-26, in particular SDI App 23-24. As is true

with all other issues Appellants attempt to raise now, the fraudulent concealment argument should be rejected.

D. Substantial Compliance

In a sort of piecemeal fashion, Appellants' Brief argues the substantial compliance issue at three different places, pages 12-13, page 16, and pages 20-23. The effort to make that argument is not surprising, since McAllisters are obviously well aware that there was no compliance with the statute, in failing to give written notice within 180-days of the triggering event for notice. The very nature of the July 3, 2019 letter, now relied upon to meet the statutory notice timeline requirement, was never intended to be compliance with SDCL 3-21-2. If nothing else, the very title of that letter, "SETTLEMENT DEMAND," makes it very clear that lengthy letter was intended to be part of settlement negotiations. In addition to the heading of the letter, the letter made a specific dollar demand; imposed a deadline for response, July 12, 2019; and contained other earmarks typical of a demand letter, not a 3- 21-2 notice.

In addition, *see* also Section III of this Brief, above, pages 6-8, discussing the implications and application of SDCL 19-19-408.

There is no question that McAllisters claim the July 3, 2019, letter from counsel was and is the written notice required by SDCL 3-21-2. *See* Appellant's Brief, pages 20-21.

Next, SDCL 3-21-3 provides:

> Notice **shall** be given to the following officers applicable:
> ...
>
> (2) In the case of a county, to the county auditor;
>
> ...

(Emphasis added)

That compulsory language does not state that notice **may be** be given; **could** be given; **might** be given; or other such permissive language. Rather, the language is compulsory.

One of the arguments made regarding substantial compliance is the attempt to avoid service on the County auditor, as required by SDCL 3-21-3. This precise issue was discussed in *Olson v. Equitable Life Assur. Co.*, 681 N.W.2d 471 (S.D. 2004). That case involved a civil action brought by two citizens alleging illegal acts relating to a mortgage foreclosure action. The lawsuit was brought against the mortgagee, Equitable Life; and Jones County Sheriff Chris Jung.

The Trial Court granted summary judgment in favor of Defendants, based on the notice issue, particularly involving the failure to serve the auditor. That ruling was affirmed by this Court. The notice issue was discussed at 681 N.W.2d 477-478 of the opinion. In that case, Plaintiff attempted several avoidance strategies, regarding the requirement to serve the auditor. First, they alleged that SDCL 3-21-2 only applies when the claim against the government is tort-based. They contend that their negligence claim against the sheriff was based on SDCL 15-2-14. In addition, Plaintiffs argued they were not required to give notice to the auditor regarding their claim against the sheriff, because he was sued in his individual capacity. *See* the discussion in 681 N.W.2d 477. This Court rejected both arguments.

Instead, this Court stated:

> SDCL 3-21-3(2) requires notice to the *County Auditor* when any claim is made against the County or its employees, 681 N.W.2d at 477 (emphasis in the original).

Finally, the decision stated the strict compliance requirement in even stronger terms:

> When an employee of the government is sued, it is not enough to give notice to that employee. The statute specifically requires that notice be given to a person officially responsible to receive notice. (681 NW2d 477-478).

Thus, in *Olson,* service on the auditor was held compulsory, and accorded strict compliance in part, even though that case involved an ordinary citizen who gave the notice. Here, as we will discuss below, the strict compliance issue should be even more applicable, when licensed, experienced South Dakota lawyers were involved from the very beginning, in June or July of 2018.

There is no claim by McAllisters that any written notice required by SDCL 3-21-2 was provided to any of the Yankton County Entities, or Garrity. Consequently, there is absolutely no question that the purported notice relied on by the McAllisters, attorney Heber=s letter of July 3, 2019, totally fails to comply with statute, as to all the Yankton County Entities, and Garrity. The purported notice likewise fails against Klimisch. The *Olson* case cited above clearly discusses the issue of notice to a county. It **shall** be served on the County Auditor. It is uncontroverted that was not done here.

In addition, perhaps regrettably, it must be pointed out and acknowledged that beginning with the failure to give notice before the initial Answers and Counterclaims were asserted July 5, 2018, and in the July 3, 2019 letter effort, with its failure to fully comply with the notice statute, did not come from a pro se litigant, or even from an out-of-state lawyer. Such was the case in *Myears v. Charles Mix County,* 566 N.W.2d 470 (S.D. 1997). In that case, the nature of the out-of-state lawyer's knowledge of statute, or lack of it, along with a myriad of additional facts, led this Court to apply the substantial compliance principle to the facts of that case. Those facts are poles apart from the facts

here. Again, here, licensed capable South Dakota counsel were involved from the beginning. There simply was no excuse for full and complete compliance with the statute, including but not limited to the fact that the July 3, 2019 letter now claimed to be a 3-21-2 notice, was not addressed to the auditor, along with other material faults that constitute non-compliance within the statute.

Addressing *Myears*, the case involved a serious motor vehicle accident which occurred August 9, 1992, on a county road north of Lake Andes. The road was under construction, and Myears alleged no center line or other devices or warnings controlled traffic. An oncoming car strayed into his path and collided with him, causing personal injuries to Myears and his wife.

The following events then took place between the date of the accident, and February 5, 1993, the expiration of the 180-day time frame:

- The Myears hired a Minnesota lawyer, Richard Hilleren, who is unfamiliar with South Dakota law.
- Hilleren sent a letter to the County Engineer.
- The County Engineer submitted the Hilleren letter to the County Auditor and the state's Attorney, who in turn referred it to the County Commission.
- On November 2, 1992, the Commission denied the claim.
- Hilleren and the State's Attorney discussed the case by phone on December 9, 1992, still within the 180-day notice.
- By then, Crawford & Company, an independent adjusting firm, handling the case for the County's insurer, had contact with Hilleren, who sent the adjuster's information, photographs of the scene, and other documents.
- A Crawford adjuster discussed the claim with the County Highway Superintendent.
- On December 28, 1992, still within the 180-day notice period, Hilleren talked on the phone with Crawford Adjuster Jim Fleming.

- Hilleren and Fleming hoped to meet in late December, which meeting did not take place, although they had another lengthy phone conversation, apparently on December 31, 1992.

- Fleming's notes made reference to "2-5," referring to February 5, 1993, as the date when the 180-day notice time frame would expire.

- February 5, 1993, the 180th day passed without notice.

- Hilleren continued to discuss settlement with Crawford, but was advised outside counsel had been retained.

- The County made a motion for summary judgment which was granted. This Court reversed, agreeing there had been substantial compliance with statute.

The bullet point references above were discussed at 566 N.W.2d 475, where this Court noted:

> (That if a claimant) within 180 days after the discovery of an injury, makes a good faith effort to satisfy the notice requirements but inadvertently omits a minor detail, or makes an error with respect to such detail, notwithstanding the fact that the omission or error cannot prejudice the public entity in the least.

Significant in the opinion was also the fact that the County Auditor, the State=s Attorney, and County Commission all considered the matter within the notice period, and the Commission took official action on it. The insurer also investigated the claim within the 180 days.

At 566 N.W.2d 473, this Court noted that claims statute designed to protect governmental entities "should not be used as traps for the unwary." That statement obviously referred to the fact that while the case was still within the 180-day notice period, the adjusters "strung the plaintiff along."

Appellants also cite *Smith v. Neville,* 539 N.W.2d 679 (S.D. 1995), as authority in favor of their substantial compliance argument. However, once again, that case involved facts significantly different from those before the Court here. The following were the

salient facts from that case, upon which this Court determined plaintiff had substantially complied with statute:

- Motor vehicle-state snowplow accident February 13, 1993.
- Plaintiff filled out a claim form provided by the South Dakota DOT.
- Plaintiff received a check for his property damage claim.
- Plaintiff filled out a second claim form, several days within the 180-day time frame.

Based on these facts, this Court agreed that the facts in *Neville* supported application of the substantial compliance principle. Among other matters in the discussion, this Court stated:

> The feature that distinguishes this case from the foregoing authorities is the affirmative conduct of the State and its insurers. The notice statutes nowhere grant the State, its insurers or agents the authority or right to affirmatively create an objectively reasonable impression in a would-be claimant that the claimant has fully complied with the claims procedure and then pull the rug out from under the claimant after the time has expired for literal compliance with the statute. (emphasis added) 539 N.W.2d at 681.

Then at pages 14, 21 and 24 of their Brief, McAllisters attempt to rely on *Anderson v. Keller*, 739 N.W.2d 3 (S.D. 2007), as authority for failing to serve the Auditor. They make the argument that directing the letter to Klimisch excuses that statutory failure, since Klimisch was in the category of persons who could take necessary action to ensure that the statutory objectives are met. The Brief merely quotes a single line from that case, and urges that based on that single quote, the statutory notice defense should be rejected. Interestingly, from an initial viewpoint, that case involved a summary judgment dismissal in favor of Defendant at the Trial Court level, which was affirmed by this Court. The basis for the dismissal was failure to comply with SDCL 3-21-2.

In an attempt to succinctly demonstrate the key facts in the case, here is what *Anderson* involved:

- July 22, 2003, motor vehicle accident with irrigation district employee Keller.
- Anderson provided evidence that within 10-20 minutes of the accident, the District's manager and secretary Jennigers arrived at the scene.
- Jennigers spoke with Anderson and Keller at the scene, and later to a Fall River County Sheriff's Deputy.

Anderson did not file his personal injury complaint against Keller until March 17, 2006, just short of the three-year statute of limitations. The Trial Court granted Keller=s Motion for Summary Judgment. This Court affirmed.

First, citing *Myears, supra*, the Court indicated substantial compliance could not and would not be accepted as an excuse for failing to meet the requirements of SDCL 3-21-2, based on the facts of that case.

Similar to the *Myears* decision, *Anderson* does not stand for the authority Defendants claim it does, based on a single line from the authority. Rather, the facts here are in no way similar to the facts of the case in *Anderson*, in which summary judgment was granted, and then affirmed. The Memorandum Opinion (SDI APP 14-26) addresses the issue clearly and succinctly. There is no reason for this Court to reject the well-reasoned discussion of Appellants' claim of substantial compliance. Neither the facts nor well-settled law support that theory.

The barratry claim pleaded in Count I of the three Counterclaims is obviously barred by the lack of statutory notice. That barratry claim was first raised in the initial Counterclaim of July 5, 2018. The only notice McAllisters claim to have complied with

SDCL 3-21-2 is the Heber letter of July 3, 2019, which issued 363 days after the barratry claim was first made on July 3, 2019.

Furthermore, regarding the abuse of process and civil conspiracy claims, the notice defense bars those claims as well. Even assuming for the sake of argument the July 3, 2019 letter from Heber to Klimisch might constitute statutory compliance with SDCL 3-21-2, once again, as argued above, there was no attempt whatsoever to serve the Yankton County Entities, or Garrity. Thus, those parties cannot imagine what argument McAllisters might make, in an attempt to save their claims against those parties. Additionally, as to Klimisch, the notice was defective, in that it was not served upon the Auditor, as argued above. Nor, as we have argued, was the notice timely. Thus, the notice defense bars all the claims of Appellants.

E. Civil Conspiracy Theory.

Little need be said concerning the civil conspiracy claim. First, like all other claims, this theory is barred by the failure to provide notice in accordance with SDCL Ch. 3-21.

Further, civil conspiracy is not an independent tort. It must be supported by pleading and proving an independent tort. In *Huether v. MIHM Transportation Company,* 857 N.W.2d 854 (S.D. 2014), this Court discussed the elements of civil conspiracy, in a clear, concise analysis. In that case, this Court stated:

> **civil conspiracy** is not an independent cause of action, but rather means of imposing vicarious liability, emphasis in the original; (citations omitted). 857 N.W.2d at 860.

Worded differently, this Court has stated:

> **civil conspiracy** is not an independent cause of action, but is sustainable only after an underlying tort claim has been established. (Emphasis in the original)(citations omitted) *Id.*

Finally, the Court reiterated that:

> The purpose of a **civil conspiracy** claim is to impose civil liability for damages on those who agree to join in a tortfeasor=s conduct and, thereby become liable for the ensuing damage, simply by virtue of their agreement to engage in the wrongdoing. *Id.*

Civil conspiracy is not an independent tort, but requires allocations of a tort to which the civil conspiracy allegedly applied. Here, there is no such independent tort that is sustainable.

F. Estoppel Does Not Bar Appellees From Asserting the Notice Required by SDCL 3-21-2.

Beginning at page 24, McAllisters claim Appellees are estopped from raising the notice defense contained in SDCL 3-21-2. The only authority actually cited is *Smith v. Neville*, 539 N.W. 2d 679 (S.D. 1995) with the quote "An estoppel can be applied against public entities in exceptional circumstances to 'prevent manifest injustice.'" 539 N.W. 2d at 682.

That quote either overlooks or ignores the real elements of estoppel. In *Smith supra*, addressing the issue in the very context of SDCL Ch. 3-21, this Court stated:

> Furthermore, mere innocent silence or inaction will not work an estoppel unless one remains silent when he has a duty to speak. Generally, to work an estoppel, there must be some intended deception in the conduct or declaration of the party to be estopped. The conduct must have induced the other party to alter his position or do that which he would not otherwise have done to his prejudice.
>
> Here, Hanson has failed to point to any particular act or conduct on the part of the hospital that induced her to believe it was not a public entity. The argument she raises merely points to silence or inaction on the party of the hospital in failing to affirmatively notify her that it is a public entity. 539 N.W.2d at 682, citing *Hanson v. Brooking Hospital,* 469 N.W.2d 826 (S.D. 1991); other citation omitted.

From there, the discussion states as a basis for the allegation the claimed fact that the initial Complaint was "an intentionally baseless complaint." Appellants' Brief page

24. From there, the arguments on time frames and timeliness ramble on for the next three pages. We have previously addressed those issues relating to timeliness of pleadings and other related issues. *See* pages 36-38, infra.

On some number of occasions, this Court has set forth the elements of estoppel which the party, here Appellants, must prove. They are:

(1) False representations or concealment of material facts must exist;

(2) The party to whom it was made must have been without knowledge of the real facts;

(3) The representations or concealment must have been made with the intention that it should be acted upon; and

(4) The party to whom it was made must have relied thereon to his prejudice or injury. *Cooper v. James*, 627 N.W.2d 784, 789 (S.D. 2001).

Listing of those elements was followed by the statement that:

> There can be no estoppel with any of these essential elements are lacking, or if any of them have not been proved by clear and convincing evidence. *Id.*

Further, the *Cooper* decision mentioned that decisions from other jurisdictions Ahave applied the theory of estoppel to prevent a Defendant from lulling a Plaintiff >into a false sense of security....'@ *Id.*

So before going any further with the analysis, the question is: What did any of the County Defendants do, to lull Defendants into not complying with the notice requirement? The answer is: ANothing.@ Certainly nothing McAllisters identified.

Moreover, as noted in the Memorandum Opinion, SDI App 22:

> The Defendants point to no facts that has led them to believe that Movants were waiving the notice requirement, though. In addition, Appellants failed to point to any arguments that they relied to their detriment on anything any Appellee did or said. Consequently, as with other claims, the estoppel claim fails.

That decision also discussed the esteppel issue, another matter Appellants attempt to raise. This Court noted that estoppel "can be applied against public entities (only) in exceptional circumstances to 'prevent manifest injustice'." *City of Rapid City v. Hoogterp,* 179 N.W.2d 15, 17 (S.D. 1970).

This is similar to the adjuster's conduct in *Sander v. Wright,* 394 N.W.2d 896 (S.D. 1986), a case involving a statute of limitations issue. In that case, this Court determined an insurance adjuster's contacts with Plaintiff, including advance payment of medical expenses, raised a question of fact as to whether the adjuster's conduct rose to a level that the statute of limitations defense ultimately made by Defendant, after the limitations expired. This is the same sort of conduct condemned in *Myears and Smith,* supra. It was the affirmative actions of Defendants or their representatives, which lead to this Court's invoking the substantial compliance principal. No such conduct exists here.

Appellants also cite *Hanson v. Brookings Hospital,* 469 N.W.2d 826 (S.D. 1991) in their Brief. Curiously, that case resulted in summary judgment dismissal in favor of Defendant, for failure to comply with SDCL 3-21-2. Despite that dismissal, in discussing the criteria necessary for an estoppel to exist, this Court stated:

> Furthermore, mere innocent silence or inaction will not work an estoppel unless one remains silent when he has a duty to speak. Generally, to work an estoppel, there **must be some intended deception** in the conduct or declaration of the party to be estopped. The conduct must have induced the other party to alter his position or do that which he would not otherwise have done to his prejudice.
>
> Here, Hanson has failed to point to any particular act or conduct on the part of the hospital that induced her to believe it was not a public entity. The argument she raises merely points to silence or inaction on the party of the hospital in failing to affirmatively notify her that it *is* a public entity. 539 N.W.2d at 682 (emphasis added).

Here, none of these elements occurred following the May 31, 2018 Summons and Complaint, or the July 5, 2018 Counterclaims. Nor did any of those kinds of events

which were relied upon in *Myears and Smith* occur within the next 363 days, until the July 3, 2019 letter from Defendants= counsel. Consequently, none of the significant combination of facts and events exist here, nor was there any intended deception on the part of any member of the Yankton County entities, or Klimisch, certainly nothing which McAllsiters even claim induced them or their counsel to alter their position.

G. PROSECUTORIAL IMMUNITY ISSUE

1. Failure to cite authority.

In Section II of the Brief, beginning at page 27, Appellants argue the Trial Court erred in determining State's Attorney Klimisch was entitled to assert the defense of prosecutorial immunity, regarding any claims against him. Given the fact that the notice issue clearly extends to Klimisch, as well as the other Yankton County entities and Planning & Zoning Director Garrity, argument on this subject may not be necessary.

First, in the four pages devoted to this issue, Appellants fail to cite any authority in support of their claim. SDCL 15-26A-60 addresses this very issue. As this Court has previously held on a number of occasions, failure to cite authority in support of an argument waives the issue. *See Accounts Management, Inc. v. Nelson,* 663 N.W.2d 237, 241 (S.D. 2003). That case held:

> It is well settled that the failure to cite supporting authority is a violation of SDCL 15-26A-60(6), and the issue is thereby deemed waived. *State v. Pellegrino,* 1998 SD 39, ¶22, 577 N.W.2d 590, 599 (quoting *State v. Knoche,* 515 N.W.2d 834 840 (S.D. 1994); *Cooper v. Hauschild,* 527 N.W.2d 908, 912 (1995); *Kanaly v. State,* 403 N.W.2d 33, 34 (S.D. 1987); *Kostel Funeral Home v. Duke Tufty Co.*, 393 N.W. 2d, 449-452 (S.D. 1986). 663 N.W.2d at 242.

It should be noted that in opposing the Motion for Summary Judgment, Appellants did attempt to cite claimed authorities in support of their argument seeking to nullify the prosecutorial immunity defense. *See* the Brief in Opposition to Motion for

Summary Judgment, YC APP 020. There, Appellants cited four cases in support of their claim that Klimisch's conduct fell within exceptions to the usual prosecutorial immunity a state's attorney is entitled to assert.

In our Reply Brief submitted in response to the opposition to the Motion (Appellees' Index 2), we devoted several pages to addressing each of the four cases cited by Appellants in support of their claim that prosecutorial immunity did not apply. *See* YC APP 037-042. In light of page limitations and other factors, we have simply referred to Appellants' weak attempt to raise the issue, along with our response. It is now interesting to note that in Appellants' Brief, no authority whatsoever is cited, certainly not the four cases cited at the Trial Court level.

2. Conflict of Interest Claim

Here, Appellants argue that simply because Klimisch, a part-time state's attorney who was also engaged in private practice, was involved in a real property transaction involving McAllister TD, LLC, a conflict of interest automatically results. Prosecutorial immunity and conflict of interest are two totally separate, distinguishable legal principles. It is the scope of the duty which is put under a microscope, in determining whether the prosecutor's acts were within the scope of his duties in initiating and pursuing a criminal prosecution. That has been the law since *Imbler v. Pachtman*, 424 U.S. 409 (1976), as was detailed in *Christensen v. Quinn et al*, 45 F. Supp. 3d 1043 (U.S. D.C. D SD 2014). In view of the above argument relating to the failure to cite authority, it may be unnecessary to address this issue. Nonetheless, we direct this Court's attention to the following.

Using such phrases as "filing baseless charges for personal gain or retribution (Brief page 28); Klimisch was intimately familiar with McAllister entities (Brief page

29); and "(Klimisch had) a level of personal knowledge regarding the nature and structure of Fire and Ice as a separate entity from BY Internet, . . ." (Brief page 30).

Much of the rest of the argument relies upon the unsupported conclusion that Klimisch knew the charge was baseless (Brief pages 28, 30 and 31).

Recognizing the total absence of any facts regarding conflict of interest, this subject was considered by the Trial Court, and addressed in the well-written portion of the Memorandum Decision (SDI App 24-26). The Decision noticed Klimisch was not engaged in an investigative or administrator role when he initialed the suit. He was acting as an advocate in the judicial process, which grants him absolute immunity from civil suit. (SDI App 25)

The Trial Court also addressed the claim that because Klimisch could have gained confidential knowledge about the defendants through this transaction, it created a conflict. However, Klimisch did not represent any of the Defendants at any time during the real estate transaction. Nor is there any evidence whatsoever that Klimisch obtained personal, proprietary information from any of the three defendants, which used in any way in either the real estate transaction work, or the initiation of the Complaint. The Trial Court also discussed the fact that Klimisch did not gain privileged information about McAllister TD. (SDI App 25)

Finally, a conflict of interest does not automatically occur simply because a lawyer represents a party in one transaction; then is involved later, here in a totally different capacity as a prosecutor.

H. TIME FRAMES

In several sections of the Brief, Appellants complain about time frames involved in this case, regarding several claimed issues. Their primary argument in this regard

starts at page 25 of their Brief.

The initial pleadings are well documented, and relatively simple to follow. The initial May 31, 2018, Complaint was served June 8, 2018. On July 5, 2018, two of the parties served Answers and Counterclaims alleging barratry against the County. On July 31, 2018, the County answered the counterclaims and denied the barratry claims. *See* Appellants' Brief pages 24-25.

Between July 31, 2018, and July 3, 2019, the date of the Heber letter, limited discovery occurred, including one Motion to Compel. Heber and his firm were the third law firm to become involved in the case in 11 months.

Page 25 of the Brief lists some bullet points regarding several matters apparently claimed to be of some importance. No depositions were ever taken. The July 3, 2019, letter should put to rest anything regarding a "mutual settlement," since such settlement never did occur. (*See* the July 3, 2019, letter page 1). The July 3, 2019, letter, a demand letter, clearly casts that idea aside.

Appellants have one inescapable problem: There never was written 3-21-2 notice, regarding the July 5, 2018, counterclaims. There was no attempt to give such notice. While not initially pleaded, Yankton County, then the only party to this action, could have moved to later amend under SDCL 15-6-15. Nonetheless, as Appellants indicate, continued attempts were made, to settle the case. Those attempts continued through the July 3, 2019 letter, with a deadline of July 12, 2019 imposed. In these attempts, Appellants' numbers kept getting higher, to include the $786,240.00 contained in the July 3, 2019 letter. Consequently, the complaint the Appellants make regarding the failure to include the 3-22-2 defense is of no merit whatsoever.

When the Amended Answers and Counterclaims were asserted September 27,

2019, Yankton County was of course permitted to plead responsively to the Counterclaims, which it did. One of the defenses asserted was lack of notice. Confining this discussion to Yankton County, first, Yankton County was permitted to assert any defense whatsoever, in its responsive pleading to the Amended Counterclaim.

Second, had Appellants believed the assertion of that defense was somehow improper, their remedy would have been a motion to strike the defense. No such motion was ever made. Consequently, Appellants cannot now be heard to complain as they do.

Additionally, and not to attach any importance, admissibility or relevance to the fact, Appellants now claim May 17, 2019 was the "triggering events," using terminology contained in several South Dakota Supreme Court opinions regarding 3-21-2 notices. The responsive pleadings to the Counterclaims were made October 30, 2019, still within the 180-day time frame claimed by Appellants. Thus, by the end of October, 2019, the notice defense was on the table. Even though Appellants were still within the 180-day time frame measured from the date most favorable to their position, albeit ignoring other facts and circumstances, there was no attempt to send the written notice required by statute, nor was there any attempt to claim that the July 3, 2019 letter constituted compliance with the statutory notice requirement.

At page 26, Appellants utilize italics to make the point that it was "almost a *second year later on September 11, 2020, when the County finally brought this Motion."* That statement overlooks, ignores, or seeks to minimize the fact that the Motion for Summary Judgment was also made by the five newly impleaded parties who were the subjects of the Third Party Complaint. Consequently, that motion made barely ten months after the issues were joined in the Amended Counterclaim against Yankton County, and in the Third Party Complaints regarding the five new parties.

Consequently, this "almost a second year later claim," to the extent it might have any importance whatsoever on the substantive issues, is imply incorrect.

The only other comment to be made is that if Appellants required additional discovery on the notice and prosecutorial immunity issues, the only issues raised in Appellees' Motions for Summary Judgment, Appellants could have invoked SDCL 15-6-56(f), which they did not.

Obviously, the same issues were involved in the motions brought by the five third-party Defendants, as were involved in the County's defense. It is difficult to understand just why this tiresome criticism of dates and passage of time, continue to be a main theme of Appellants' arguments. The attempt to create a substantive issue out of these matters should be rejected.

I. Service of the Counterclaims did not constitute the notice necessary under SDCL 3-21-2.

On pages 23 and 24 of their Brief, Appellants argue that "the counterclaims for barratry constituted written notice of those claims." As we argued in our Motion for Summary Judgment, if a counterclaim were considered sufficient written notice, there would be no need for SDCL 3-21-3. Appellants mention the Trial Court reached the identical conclusion. Nonetheless, the Brief attempts to convince this Court otherwise.

In their argument, again at page 23, Appellants conclude:

However, that is simply not true. This is not the normal case.

The reason given is Appellants claim a malicious action on the part of Yankton County. They seek to distinguish the claim from a slip-and-fall, or a vehicle accident, with nothing other than their argument.

As is true with the issue in Appellants' arguments regarding prosecutorial immunity, the Brief cites no authority in support of the idea. The citation of the *Anderson* case in the last sentence of the section does not meet the requirement of a citation of authority in support of their position, since *Anderson* did not rule that service of a counterclaim constitutes statutory notice under SDCL 3-21-2.

As with other unsupported arguments made by Appellants, this Court should reject the argument that the pleading involving a claim against a public entity, be it a counterclaim, complaint, third-party claim, or other claim, constitutes the notice required by SDCL 3-21-2.

J. Seven Objectives.

Appellants' Brief also tries to save the claim from the notice defense, by quoting seven objectives mentioned in several cases regarding notice. They are listed at page 12 of the Brief. This Court has never held that meeting these seven objectives, standing alone, would constitute an excuse from complying with statute. Certainly items 1, 2 and 3 did not exist. This not to concede that any of the other elements exist. Consequently, the argument that the claimed existence of the seven objectives of the notice statute should determine this case, should be rejected.

K. Statutory Construction.

In general, statutes mean what they say. When it comes to statutory construction, "[t]he intent of the legislature is derived from the plain, ordinary and popular meaning of statutory language'" (Petition of *Northwestern Pub. Serv. Co.,* 1977 S.D. 35, ¶14, 560 N.W.2d 925), (citations omitted). This Court has held "[i]n arriving at the intention of the legislature, it is presumed that the words of the statute have been used to convey their

ordinary, popular meaning." (*Appeal of AT&T Inform. Sys.*, 405 N.W.2d 24 (S.D. 1987)).

CONCLUSION

There is no question that Appellants failed to give the notice required by SDCL 3-21-2, prior to first asserting their counterclaims on July 5, 2018. Now they attempt to obscure that fact, and try to fit a late demand letter into the statutory requirement. Those efforts totally fail. From there, Appellants make some number of efforts, attempting to invoke some number of legal theories which do not apply here, to escape that failure to provide notice.

The undisputed facts, along with substantial, if not overwhelming, case law from this Court, specifically on the statutory notice involved here, clearly support the Trial Court's ruling in granting summary judgment to these Appellees. The Memorandum Opinion and Order Granting Summary Judgment should be affirmed in all respects.

Dated at Sioux Falls, South Dakota, this ___ day of September, 2021.

CADWELL SANFORD DEIBERT & GARRY, LLP

Douglas M. Deibert
200 E. 10th Street, Suite 200
Sioux Falls, SD 57104
(605)336-0828
ddeibert@cadlaw.com

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL § 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 9,982 words and 51,882 characters.

CADWELL SANFORD DEIBERT & GARRY, LLP

Douglas M. Deibert
200 E. 10th Street, Suite 200
Sioux Falls, SD 57104
(605)336-0828
ddeibert@cadlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed Brief of Appellees Yankton County, South Dakota with the Clerk of Court at SCClerkBriefs@ujs.state.sd.us pursuant to Rule 13-11 and served by e-mail to the following:

Jonathan A. Heber
Cutler Law Firm, LLP
140 N. Phillips Ave., 4th Floor
PO Box 1400
Sioux Falls, SD 57101

Mark D. Fitzgerald
Fitzgerald, Vetter, Temple, Bartell
& Henderson
1002 Riverside Blvd., Ste. 200
P.O. Box 1407
Norfolk, NE 68702-1407
Fitz@fvtlawyers.com

this ____ day of September, 2021.

The undersigned further certifies that the original and two (2) copies of the foregoing Brief of Appellees Yankton County, South Dakota were mailed to:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

by U.S. Mail, postage prepaid, this ____ day of September, 2021.

CADWELL SANFORD DEIBERT & GARRY, LLP

Douglas M. Deibert
200 E. 10th Street, Suite 200
Sioux Falls, SD 57104
(605)336-0828
ddeibert@cadlaw.com

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29616

YANKTON COUNTY, STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

v.

LUKE E. MCALLISTER, MCALLISTER TD, LLC and BY INTERNET, LLC
Defendants and Appellants
v.

YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR And in his INDIVIDUAL CAPACITY; and ROBERT W. KLIMISCH, in his Capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY
Third Party Defendants and Appellees

Appeal from the Circuit Court, First Circuit
Yankton County, South Dakota

The Honorable Patrick T. Smith
Circuit Judge

APPENDIX
APPELLEES' BRIEF
(Yankton County Entities and Klimisch)

Attorneys for Appellants:
Meredith A. Moore
Jonathan A. Heber
Cutler Law Firm, LLP
140 N. Phillips Ave., 4th Floor
Sioux Falls, SD 57104

Attorneys for Appellees:
Douglas M. Deibert
Cadwell Sanford Deibert & Garry, LLP
200 E. 10th Street, Suite 200
Sioux Falls, SD 57104

Mark D. Fitzgerald (only for Garrity)
Fitzgerald Vetter Temple, Bartell
& Henderson
1002 Riverside Blvd, Suite 200
Norfolk, NE 68702-1407

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(Appellees Yankton County, State of South Dakota; Yankton County Commission; Yankton County Board of Adjustment; Yankton County Planning Commission; Robert Klimisch, in his Capacity as Yankton County State's Attorney and in his Individual capacity)

Appendix 1

STATE OF SOUTH DAKOTA) : SS COUNTY OF YANKTON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political Subdivision, Plaintiff, vs. LUKE E. MCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, And YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; and ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	66CIV18-000178 **BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

COME NOW Luke E. McAllister, McAllister TD, LLC, and BY Internet, LLC (collectively, "***Defendants***"), by and through their undersigned counsel of record, and hereby respectfully submit their joint Brief in Opposition to the Joint Motion for Summary Judgment of Plaintiff Yankton County, South Dakota and Defendants Yankton County Commission, Yankton

County Board of Adjustment, Yankton County Planning Commission, and Robert W. Klimisch, and to the Motion for Summary Judgment of Patrick E. Garrity (collectively, "***Movants***").[1]

FACTUAL BACKGROUND

The long and tortured history of Movants' frivolous, malicious, and tortious conduct is outlined extensively in Defendants' Statement of Additional Material Facts as well as in the Third-Party Complaint. *See generally* Statement of Additional Material Fact ("***SAMF***") at ¶¶ 1-55; Third-Party Complaint ("***TPC***") at ¶¶ 10-64.

On September 11, 2020, **799** days after the date of Defendants Luke E. McAllister ("***Luke***") and McAllister TD, LLC's ("***MTD***" or "***Fire & Ice***") Counterclaim for Barratry (July 5, 2018),[2] and **347** days after commencement of Defendants' Third-Party Complaint for Abuse of Process and Conspiracy to Commit Abuse of Process (September 30, 2019), and after extensive and time-consuming litigation, Movants requested dismissal of Defendants' claims on September 11, 2020, for the alleged failure to provide statutory notice and for prosecutorial immunity of Robert W. Klimisch ("***Klimisch***"). In fact, this Motion was brought exactly one week after Defendants requested dates for depositions[3] and a stipulation for an amended scheduling order in this lawsuit. SAMF at ¶ 51.

The Court should deny this Motion for the reasons provided herein.

---

1. Mr. Garrity filed his own Motion for Summary Judgment dated September 16, 2020, but, in support, he adopted "the Statement of Undisputed Facts and the applicable arguments for this third-party defendant contained in the other third-party defendants' brief in support of motion for summary judgment[.]" To that end, in the interest of efficiency and to avoid cumulative and duplicate pleadings, this Opposition responds to and opposes both Motions for Summary Judgment.

2. B-Y Internet, LLC d/b/a South Dakota Wireless Internet filed a Counterclaim for Barratry on September 27, 2020, as discussed below.

3. Despite multiple attempts from Defendants' to schedule depositions in 2019 and in 2020, depositions have not yet been conducted in this lawsuit. *See* SAMF at ¶¶ 28, 51.

ARGUMENT AND AUTHORITIES

1. SUMMARY JUDGMENT STANDARD.

Summary judgment is only proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c). Summary judgment is an extreme remedy, which is not intended as a substitute for trial. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 761. In adjudicating Plaintiff's Motion, the Court must consider the evidence in the light most favorable to Defendant, and all reasonable inferences drawn from the facts must be made in Defendant's favor. *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995).

2. DEFENDANTS COMPLIED WITH SDCL § 3-21-2.

Movants allege that Defendants failed to comply with SDCL § 3-21-2 and, therefore, Defendant' claims should be summarily dismissed and, as a result, Movants' should not have to face any consequences of their own, ongoing tortious actions. SDCL § 3-21-2 provides:

> No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury. Nothing in this chapter tolls or extends any applicable limitation on the time for commencing an action.

The primary purpose of the notice provision is to allow the public entities to investigate and evaluate claims. Seven objectives have been recognized for providing notice of injuries to public entities:

> (1) To investigate evidence while fresh; (2) to prepare a defense in case litigation appears necessary; (3) to evaluate claims, allowing early settlement of meritorious ones; (4) to protect against unreasonable or nuisance claims; (5) to facilitate prompt repairs, avoiding further injuries; (6) to allow the [public entity] to budget for payment of claims; and (7) to insure that officials responsible for the above tasks are aware of their duty to act.

Budahl v. Gordon and David Associates, 287 N.W.2d 489 (S.D. 1980).

To avoid unintended harsh results when the reasonable objective of the notice statute has been met, the South Dakota Supreme Court has consistently recognized that "substantial compliance is sufficient to satisfy the notice requirements of SDCL 3-21-2[.]" *See, e.g.*, *Myears v. Charles Mix County*, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474.

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

Id. (quoting *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835). "Substantial compliance requires that the person who receives the notice be someone who could take necessary action to ensure that the statutory objectives are met." *Anderson v. Keller*, 2007 S.D. 89, ¶ 16, 739 N.W.2d 35, 40.

A. Barratry: Claims by Defendants Luke McAllister and McAllister TD, LLC

On or about June 8, 2018, Plaintiff Yankton County served upon Defendants an intentionally baseless Complaint dated May 31, 2018, which sought a "mandatory injunction requiring [Defendants] to cease and desist from operating a wireless internet provider business in Yankton County, South Dakota" ("***Civil Action***").[4] *See* Complaint; SAMF at ¶ 15. On or about July 5, 2018, within 30 days of the commencement of the Civil Action, Defendants Luke and MTD served their written Answers and Counterclaims of barratry against Plaintiff Yankton County on the explained basis that neither Luke nor MTD was a proper party to the Civil Action under SDCL §

4. The Complaint was filed with the Court on June 13, 2018.

47-34A-201.[5] *See* Answers and Counterclaims. On or about July 31, 2018, Plaintiff Yankton County filed an Answer to the Counterclaims and formally denied the barratry claims. Notably, the Answer did not contain any affirmative defense for failure to provide notice under SDCL § 3-21-2. Such an affirmative defense would have been nonsensical in light of the fact that Plaintiff Yankton County was well aware and on notice of its own actions and inactions in the litigation it initiated.

Instead, the parties proceeded onward with the Civil Action. Among the various docket activity in the Civil Action

- Defendants stipulated to a scheduling order with Plaintiff Yankton County;
- Defendants served written discovery requests;
- Defendants served discovery deficiency letters;
- Defendants filed a Motion to Compel;
- Defendants obtained an Order from the Court compelling complete discovery responses after a contested hearing with all parties present;
- Defendants served notices of depositions and subpoenas duces tecum; and
- Defendants disclosed and retained expert witnesses.

SAMF at ¶¶ 17-28.

On or about April 17, 2019, and a mere two weeks after Defendants served noticed of depositions various witnesses, Plaintiff and Defendants stipulated to dismiss all claims in the Civil Action without prejudice pending a mutual settlement and a signed Order from the Court. SAMF at ¶¶ 28-29. On April 25, 2019, Yankton County Planning and Zoning voted 7-0 that South Dakota Internet was *excluded* from the requirements of Article 25 pursuant to Section 2505, and that South Dakota Internet was never in violation of Yankton County Zoning Ordinance Article 25.[6] SAMF at

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5. "A limited liability company is a legal entity distinct from its members. A member of a limited liability company is not a proper party to proceedings by or against a limited liability company." SDCL § 47-34A-201.

6. Under Section 2505 of Yankton County Ordinances, certain devices and facilities are deemed "excluded" under Article 25. If the exclusion is met, there is no rule, ordinance, or requirement that a person or entity must affirmatively seek recognition of the exclusion from the Yankton County Commission, Planning Commission, Board of Adjustment or any other similar governmental body. To that end, if an entity is excluded, such as South Dakota Internet, then any alleged requirement under Article 25 to obtain a conditional use permit is not applicable.

¶ 30. At a meeting on May 17, 2020, between Defendants and County Commissioners Don Kettering and Dan Klimisch, Defendants learned and had reason to know for the first time Plaintiffs' ulterior motive for commencing the Civil Action relating to an unrelated recreational business McAllister TD, LLC d/b/a Fire and Ice. SAMF at ¶¶ 33.

On October 30, 2019—more than one year after Defendants Luke and MTD served their claims for barratry on July 5, 2019, against Plaintiff Yankton County—Plaintiff served an Answer to Counterclaim alleging for the first time in the Civil Action the affirmative defense of SDCL § 3-21-2. *See* Reply to Answer and Counterclaims dated October 30, 2019. Then, it was not until almost a *second year* later on September 11, 2020, when Plaintiff finally brought this Motion.

Plaintiffs' Motion for Summary Judgment under SDCL § 3-21-2 should be denied for any of several different reasons.

First, Defendants Luke and MTD's written Answer and Counterclaims, which were served upon Plaintiff Yankton County 27 days after commencement of the Civil Action, constituted compliance with SDCL § 3-21-2. It was a written notice that provided the time, place, and cause of injury. *See* SDCL § 3-21-2. There is no rule or law for the manner or form of the notice other than it must be in writing. *Id.* At minimum, the Counterclaims substantially complied with the provisions of SDCL chapter 3-21 insofar as it was provided to as the notice was given to a Yankton County State's Attorney, who is "someone who could take necessary action to ensure that the statutory objectives are met," *see Anderson*, 2007 S.D. 89, ¶ 16, 739 N.W.2d at 40, and Movants reviewed the claim and denied it.[7] To now claim that Plaintiff did not have notice of the claim is absurd.

7. To hold that written notice must first be provided prior to serving a counterclaim in an existing lawsuit, which lawsuit forms the basis for the claim, would lead to an absurd and untenable result. Movants have cited to no authority or case law in support of that position.

Second, it is well recognized in South Dakota and in numerous other jurisdictions that the time period to assert a claim for barratry (i.e., frivolous and malicious prosecution) does not begin to accrue until the lawsuit is dismissed favorably to Defendants. *See, e.g., Miessner v. All Dakota Ins. Associates, Inc.*, 515 N.W.2d 198, 201 (S.D. 1994) (holding that an element of malicious prosecution is the lawsuits "bona fide termination in favor of the present plaintiff"); *see also, e.g., Miller v. City of Philadelphia*, 2014 WL 3579295, at *1 (E.D. Penn. 2014) (claim does not accrue until lawsuit is terminated); *Noel v. Coltri*, 2013 WL 327642, at *1 (N.D. Ill. 2013) (same); *McGuffie v. Herrington*, 966 So.2d 1274, 1278-79 (Miss. Ct. App. 2007) (same); *Doyle v. Crane*, 200 S.W.3d 581, 586 (Mo. Ct. App. 2006) (same). Thus, because the accrual date has not started since Plaintiffs' claim has not been dismissed,[8] it is axiomatic that any requirement to provide notice under SDCL § 3-21-2 also has not started. Regardless, the affirmative defense is moot because the Yankton County Auditor has notice of the claim. SAMF at ¶ 42.

Third, regardless of the fact that Defendants complied with SDCL § 3-21-2 and the accrual period for asserting a claim has not begun to run, Plaintiff is estopped from raising the affirmative defense of SDCL § 3-21-2. The South Dakota Supreme Court has recognized that "an estoppel can be applied against public entities in exceptional circumstances to 'prevent manifest injustice.'" *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995) (quoting *City of Rapid City v. Hoogterp*, 85 S.D. 176, 180, 179 N.W.2d 15, 17 (1970)); *see also Hanson v. Brookings Hosp.*, 469 N.W.2d 826 (S.D. 1991). Rather than plead the affirmative defense under SDCL § 3-21-2 in its initial Reply, Plaintiff instead actively participated in the Civil Action for over one year before raising the affirmative defense on October 30, 2019, and then continued to participate in the Civil Action for a second year

8. Defendants have repeatedly asked Plaintiff to either dismiss their claim or provide South Dakota Internet with a letter of compliance under Article 25. SAMF at ¶¶ 51, 53. Plaintiff has refused to do either. *See* SAMF at ¶ 55. As it stands, Plaintiff's claim has been stipulated to be dismissed, and stipulation not withdrawn, but the claim has not been formally dismissed by the Court. *See* SAMF at ¶ 29.

before bringing this Motion. It would result in manifest injustice and an unfairly harsh result to dismiss the claims of barratry when Plaintiff did not avail itself to the affirmative defense until two years after the claims were alleged. *See, Wolff v. Secretary of South Dakota Game, Fish and Parks Dep't*, 1996 S.D. 23, 544 N.W.2d 531, 538 (Sabers, J. dissent) (stating that defendant should be estopped from asserting notice defense when defendant "answered Wolffs' complaint, filed motions, participated in hearings, and continued discovery"); *see also, e.g., Erickson v. County of Brookings*, 1996 S.D. 1, ¶ 15, 541 N.W.2d 734, 737 (holding that defendant County of Brookings was estopped from raising the notice defense after it allowed the 180 days to expire); *Furgeson v. Bisbee*, 932 F. Supp. 1185, 1188 (D.S.D. 1996) (holding that the defendants were "estopped from raising the notice defense under SDCL ch. 3-21").

B. Defendants' Claims for Abuse of Process and Conspiracy to Commit Abuse of Process.

First, Defendants' claims against Plaintiff and Third-Party Defendants for abuse of process and conspiracy to commit abuse of process were timely made because the tortious conduct was fraudulently concealed and, as a result, the notice period under SDCL § 3-21-2 was equitably tolled. Within 180 days after the claims began to accrue, Defendants complied with SDCL 3-21-2.

When Plaintiff Yankton County commenced the Civil Action against Defendants on June 8, 2018, Defendants were unaware and had no reason to know of Plaintiff Yankton County's (and Third-Party Defendants') ulterior motive for bringing the claim for an injunction against them. The relief requested in the Civil Action is to enjoin Defendants from operating "a wireless internet provider business in Yankton County." *See* Complaint dated May 31, 2018. It was not until after Plaintiff and Defendants stipulated to dismiss the lawsuit on April 17, 2019 (SAMF at ¶ 29), when Defendants became aware that the motive for the Civil Action related to McAllister TD, LLC d/b/a

Fire and Ice, which was a recreational business operation and not a wireless internet business (SAMF at ¶¶ 33-34).

Specifically, on or about May 17, 2019, Defendants, by and through their consultant Cam McAllister, met with County Commissioners Dan Klimisch and Don Kettering. SAMF at ¶ 33. Four days later on May 21, 2020, Cam McAllister met with Third-Party Defendant Klimisch, and County Commissioners Dan Klimisch, Don Kettering, Joe Healy, Cheri Loest, and Gary Swenson. SAMF at ¶¶34.

At the meeting on May 17, 2019, County Commissioner Don Kettering bluntly advised Cam McAllister that the actual reason for the lawsuit seeking a "mandatory injunction requiring the [Defendants] to cease and desist from operating a wireless internet provider business in Yankton County, South Dakota" was because of alleged unrelated issues relating to a recreational business owned by Luke and commonly known as Fire and Ice—i.e., Defendant McAllister TD, LLC d/b/a Fire and Ice. SAMF at ¶ 33.

> **Mr. McAllister**: Ok. Do you recall, do you remember because you were on the commission previous? Do you remember when that decision was made to file suit?
>
> **Mr. Kettering**: Probably a year ago.
>
> **Mr. McAllister**: But it was done by the commission. The commission did authorize and say –
>
> **Mr. Kettering**: I think so. I think so.
>
> **Mr. McAllister**: To file the suit.
>
> **Mr. Kettering**: Yeah. Yeah.
>
> **Mr. McAllister**: Ok, alright.
>
> **Mr. Kettering**: I think it was, the issue was over something out at Fire and Ice.
>
> **Mr. McAllister**: And Fire and Ice has nothing to do with this business. It is a completely different business.

Mr. Kettering: That – that was, the Fire and Ice reason was, the reason that– the, the issue at Fire and Ice had not been resolved so that was I think the logic of the commission at the time was –

Mr. McAllister: What, what issue with Fire and Ice wasn't, what was the issue?

Mr. Kettering: Oh, wasn't there some stuff sitting around? Some, Firewood or bathroom or – I don't remember.

Mr. McAllister: But, yeah. Fire and Ice is not mentioned in this suit at all and is not part of this litigation and has nothing to do with this. Unless you guys were intending to send suit against Fire and Ice?

Mr. Kettering: No.

Mr. McAllister: Because this is all with South Dakota Internet. That it, that it – that they wanted to put us out of business.

Mr. Kettering: Yeah.

SAMF at ¶ 33. Then, on May 21, 2019, Cam McAllister and Third-Party Klimisch and County Commissioners continued to talk about Fire & Ice, rather than South Dakota Internet, for nearly the entirety of the meeting. *See* SAMF at ¶ 34.

Fire and Ice is a recreational and seasonal business located in Yankton County. On August 23, 2016, McAllister TD, LLC d/b/a Fire and Ice entered into an agreement to lease real property located at 3804 W. 8th Street ("***Real Property***") from T.J. Land, Inc. ("***TJ Land***") with an option to purchase the Real Property. SAMF at ¶ 1. In March of 2017, Luke presented a business plan on behalf of Fire & Ice to the Yankton County Commission with the purpose of obtaining a malt beverage license to operate a recreational and seasonal business located at the Real Property, which was granted by the Commission. *Id.* at ¶ 2. In the Spring and Summer of 2017, Defendant McAllister TD operated the recreational and seasonal business Fire & Ice, which sold, *inter alia*, alcohol, water, ice, and camping supplies at an open-air building located at the Real Property near Lewis and Clark Recreation. *Id.* at ¶ 3. Due to the low prices and

innovative business concept, Fire & Ice was competitively disruptive to local and existing businesses located in Yankton County and primarily in the City of Yankton. *Id.* at ¶ 4. On or about October 15, 2017, and after repeated pressure from Yankton County Zoning Administrator Patrick Garrity, Fire & Ice temporarily ceased business operations. *Id.* at ¶ 5.

In February 2018, McAllister TD d/b/a Fire & Ice communicated to TJ Land its intention to exercise its option to purchase the Real Property. SAMF at ¶ 9. In other words, Fire & Ice was there to stay. Within a few weeks later on March 2, 2018, Luke received an unsolicited letter from Zoning Administrator Patrick Garrity demanding that he obtain a conditional use permit to operate a "wireless communications facility in Yankton County" or he would be subject to fines and/or imprisonment. SAMF at ¶ 11. After repeated attempts of B-Y Internet, LLC d/b/a South Dakota Wireless Internet to explain to Defendant Patrick Garrity and Robert Klimisch that its business operation was excluded from the requirements of Article 25 under Section 2505, Yankton County commenced the lawsuit against all Defendants.

At the meetings on May 17 and 21, 2019, it became apparent how everything was connected. *See* SAMF at ¶¶ 33-34. County Commissioner Don Kettering aired it out while County Commissioner Dan Klimisch listened and did not object. *Id.* at ¶ 34. While depositions still have not been taken,[9] despite repeated attempts to schedule them (SAMF at ¶¶ 28, 51), it became apparent at the meetings on May 17 and 19, 2019, that Plaintiff brought the Civil Action against all Defendants, including Fire & Ice and Luke in his personal capacity and not simply against B-Y

9. Defendants have not yet had an opportunity to take depositions of any witnesses. Seven days prior to this Motion, Defendants mailed a request to counsel for Movants for their availability for depositions. SAMF at ¶ 51.

Internet, LLC, in an attempt to exert governmental and economic pressure upon them and perhaps drive Defendants "out of town."[10]

Through Movants' affirmative conduct in this lawsuit, they fraudulently concealed the true nature and motive for the lawsuit. The South Dakota Supreme Court has recognized "'that fraudulent concealment may toll the statute of limitations' and 'this doctrine may be extended to a notice of claim provision.'" *Gakin v. City of Rapid City*, 2005 S.D. 68, ¶ 18, 698 N.W.2d 493, 499 (quoting *Purdy v. Fleming*, 2002 S.D. 156, ¶ 14, 655 N.W.2d 424, 430). "Absent a confidential or fiduciary relationship, fraudulent concealment consists of some affirmative act or conduct on the part of the defendant designed to prevent, *and does prevent*, the discovery of the cause of action." *Id.* (quoting *Roth v. Farner-Bocken Co.*, 2003 S.D. 80, ¶ 14, 667 N.W.2d 651, 660) (internal quotation marks omitted). Fraudulent concealment is a question of fact. *McGill v. Am. Life & Cas. Ins. Co.*, 2000 S.D. 153, ¶ 14, 619 N.W.2d 874, 879; *see also Purdy*, 2002 S.D. 156, ¶ 51, 655 N.W.2d 424, 437-38 (Martin, R.C.J., concurring in part and dissenting in part) (recognizing "whether fraudulent concealment has occurred is a question off fact").

In viewing the evidence in the light most favorable to Defendants—as required in a Motion for Summary Judgment—Movants' affirmative conduct and claims in this lawsuit were designed to prevent Defendants from the discovery of a valid claim for abuse of process and conspiracy to commit abuse of process. Throughout the Civil Action, and in public hearings, and in their discovery responses, Plaintiff consistently maintained with a straight face that the actual reason for the Civil Action was to enforce compliance with Article 25 of Yankton County Ordinances. *See*

10. In this Motion, rather than referring to Defendants as simply "Defendants," or "Third-Party Plaintiffs," or a different general term mindful that Defendants are comprised of multiple different entities and an individual in his personal capacity, Movants instead repeatedly refer to Defendants as the "McAllisters." B-Y Internet, LLC d/b/a "South Dakota Wireless Internet" is not the McAllisters. It is a limited liability company engaged in providing wireless internet to Yankton County and the surrounding area. The use of the phrase "McAllisters" to refer to distinct businesses can only be described as an attempt to undermine and delegitimize the business operations, which is especially concerning in a lawsuit such as this where Plaintiff and Third-Party Defendants are accused of barratry and abuse of process.

Complaint; SAMF at ¶ 19 (Discovery responses). Presumably, if Defendants had brought a claim for abuse of process within 180 days of commencement of the lawsuit, there would have been no factual basis for Defendants to rely upon because they were not aware of their rights or the ulterior motive of Plaintiff Yankton County. As stated by the United States District Court for the District of Colombia, "It would be inequitable to read the time limit as beginning before plaintiff could possibly have known his rights may have been violated, especially since it was defendant's concealment of information that placed plaintiff in that position." *Connor v. Hodel*, 1984 WL 161338, at *2 (D. Col. 1984).

As a result of the fraudulent concealment, the claim for abuse of process began to run at the earliest on May 17, 2019. Defendants had 180 days from the date the claim began to accrue to comply or substantially comply with SDCL § 3-21-2, which, if May 17, 2019, is the appropriate date, the deadline would be November 13, 2019. On July 3, 2019, Defendants sent an eight-page letter by US mail, certifiedmail, and e-mail to Third-Party Rob Klimisch, who is a Yankton County State's Attorney and "someone who could take necessary action to ensure that the statutory objectives are met." *Anderson*, 2007 S.D. 89, ¶ 16, 739 N.W.2d at 40; SAMF at ¶ 35. Defendants also provided actual notice via e-mail to the Yankton County Commissioners, who also served as the members of the Board of Adjustment, and in that letter Defendants. SAMF at ¶ 38. The letter provided eight pages of information relating to the facts supporting the fraudulent concealment of the claim, their injury, and the prospective claim for abuse of process and conspiracy to commit abuse of process, among other potential claims. SAMF at ¶¶ 35-38. The July 3, 2019 letter stated, in part:

> Based on the information gathered, please consider this letter formal written notice of prospective claims of abuse of process against the following entities or individuals, including, but not limited to, Yankton County, Yankton County Commission, Yankton County Planning and Zoning Commission, Pat Garrity, and you.

SAMF at ¶ 35. The letter asked that Yankton County notify its insurance carrier. *Id.* In an e-mail to Klimisch, counsel for Defendants further stated: "I respectfully ask that you share this correspondence with the Yankton County Commission and the Yankton County Zoning & Planning." SAMF at ¶ 37.

On August 20, 2019, Plaintiff Yankton County served discovery requests upon Defendants that referenced the July 3, 2019 letter, which confirmed Yankton County's receipt and review of the July 3, 2019 letter. SAMF at ¶ 39. On August 28, 2019, Klimisch e-mailed counsel for Defendants and stated: "This matter has been turned over to the insurance company." On August 28, 2019, Movants' insurance carrier EMC Insurance received notice of the alleged claims.

On September 30, 2019, the Counterclaims and the Third-Party Complaint were commenced against Plaintiff and the Third-Party Defendants. *See* Admissions of Service (filed with the Court).

On October 16, 2019, EMC Insurance sent a 12-page letter entitled "DEFENSE PROVIDED UNDER A RESERVATION OF RIGHTS" to **County Auditor Patty Hoiem**, Defendant Pat Garrity, Defendant Robert Klimisch, confirming notice of the claims and Third-Party Complaint on August 28, 2019, and providing an analysis of the alleged claims and injuries. SAMF at ¶ 42.

In *Myears v. Charles Mix County*, in a lawsuit against a county, legal counsel for the plaintiff sent notice of an injury to *only* the county engineer rather than the county auditor. 1997 S.D. 89, ¶ 2, 566 N.W.2d at 471. The South Dakota Supreme Court concluded that while the notice was not provided to the county auditor, plaintiff nevertheless satisfied the objectives of

SDCL § 3-21-2 because the county engineer was in a position to send the notice to the county auditor, and in fact did. *Id.* at ¶ 17.

Here, there is no question that the State's Attorney presently representing Yankton County in this lawsuit, and the County Commissioners who also received notice, were in the position to deliver the July 3, 2019 letter to the county auditor, insurance, and the appropriate persons required to receive notice. *See* SAMF at ¶¶ 35-38. In fact, they did just that. The matter was turned over to insurance prior to commencement of the lawsuit, who investigated the claims and sent a 12-page letter analyzing those claims. SAMF at ¶ 42. As a result, not only was SDCL § 3-21-2 actually satisfied, but all seven objectives of providing notice to public entities were satisfied. *Budahl v. Gordon and David Associates*, 287 N.W.2d 489 (S.D. 1980).

Second, in the alternative Movants should be estopped from raising the notice defense or their notice defense should be deemed waived. Defendants commenced their claims for abuse of process and conspiracy to commit abuse of process on September 30, 2019. Movants failed to bring a Motion for one year. During that time, Defendants responded to discovery requests from Plaintiff and all Third-Party Defendants, including two separate sets from Yankton County. *See* SAMF at ¶ 39. Defendants also prepared and served their own discovery requests upon Plaintiff and all Third-Party Defendants on November 27, 2019, and when no responses were provided for months upon months, Defendants moved to compel those responses, which this Court granted on June 23, 2020. SAMF at ¶¶ 44-47.

At the motion to compel hearing on June 23, 2020, counsel for Plaintiff and Third-Party Defendants acknowledged an intent to bring a motion for summary judgment under SDCL § 3-21-2. SAMF at ¶ 47. The Court advised Plaintiff and Third-Party Defendants' counsel to promptly schedule their alleged prospective Motion for alleged failure to provide notice under SDCL § 3-

21-2, which the parties agreed at the hearing would be set for September 2020. *Id.* Immediately after the hearing on June 18, 2020, and in accordance with the representations made to the Court, counsel for Plaintiff and all Third-Party Defendants (except for Garrity) requested a briefing schedule as follows:

July 24, 2020	My deadline for filing all MSJ motions
August 21	Your deadline for response
September 1	My deadline for final Reply Brief

SAMF at ¶ 48. On June 19, 2020, counsel for all parties agreed to the briefing schedule provided by Mr. Deibert, and Mr. Deibert indicated he would secure a hearing date in September, 2020. SAMF at ¶ 49. Plaintiff and Third-Party Defendants did not attempt to secure a hearing date in September nor did they file any Motions for Summary Judgment by July 24, 2020. SAMF at ¶ 50. On September 4, 2020, after the final deadline for the reply brief was passed, counsel for Defendants sent an e-mail to counsel for all opposing parties requesting their availability for depositions, requesting their agreement to a scheduling order, and requesting a letter of compliance that South Dakota Internet was operating compliantly. SAMF at ¶ 51. On September 11, 2020, without prior any notice to Defendants or explanation for not abiding by the agreed-upon briefing schedule, counsel for Plaintiff and all Third-Party Defendants except Garrity filed this Motion for Summary Judgment. SAMF at ¶ 52. Plaintiff and Third-Party Defendants should be estopped from raising the notice defense as a shield and a sword as a result of their dilatory conduct in bringing the Motion. All the while, Defendants' continue to suffer damages while Plaintiff refuses to dismiss its baseless lawsuit. SAMF at ¶¶ 51, 53. *See Smith*, 539 N.W.2d at 682 (S.D. 1995) (quoting *City of Rapid City*, 85 S.D. at 180, 179 N.W.2d at 17 (1970)).

C. Defendant B-Y Internet, LLC's Claim for Barratry.

On or about September 27, 2019, Defendant B-Y Internet, LLC d/b/a South Dakota Wireless Internet filed a counterclaim for barratry against Plaintiff Yankton County. For the reasons expressed in Section 2A above and incorporated herein, Defendant B-Y Internet, LLC's claim for barratry does not accrue for statute of limitation and notice provision purposes until Plaintiff's claim is dismissed favorably to B-Y Internet, LLC. Furthermore, to the extent applicable, the claim for barratry against Yankton County should be equitably tolled for the same reasons expressed above in Section 2B, which are incorporated herein.[11]

As such, for all the reasons expressed above, this Court should deny Movants' Motion for Summary Judgment. Defendants complied or substantially complied with SDCL § 3-21-2.

3. Absolute Prosecutorial Immunity is Not Applicable.

Absolute prosecutorial immunity is not applicable not is it appropriate in this case for Third-Party Defendant Rob Klimisch. He had an actual personal conflict of representation and he knew the claims he brought against Defendants were baseless.

In February 2018, McAllister TD d/b/a Fire & Ice, which is a separate and distinct entity from B-Y Internet d/b/a South Dakota Wireless Internet, communicated to TJ Land its intention to exercise its option to purchase the Real Property that it had been leasing since 2016. SAMF at ¶ 9. Klimisch was the registered agent and personal attorney for TJ Land. SAMF at ¶ 10. Indeed, Klimisch prepared the transactional documents and mortgage in order to effectuate the option to purchase the Real Estate. *Id.* His name appears at the top of the Mortgage. *Id.* The effect of this option to purchase was to convey Fire & Ice's intention to continue operating its recreational and

11. B-Y Internet, LLC d/b/a South Dakota Wireless Internet immediately provided notice of the claim to the County Commissioners and Klimisch on May 8, 2019, after the Planning Commission voted 7-0 in favor of finding that South Dakota Internet was excluded from the provisions of Article 25 on April 25, 2019. SAMF at ¶ 31.

seasonal business. *See* SAMF at ¶ 9. Due to his involvement with preparing the transaction documents, Klimisch was intimately familiar with McAllister TD, LLC d/b/a Fire and Ice, which is referred to as *Fire and Ice* in the transactional documents, but he was also aware that Luke was the owner.

A few weeks later, Planning and Zoning Administrator Garrity sent a letter on behalf of Yankton County Planning & Zoning via certified mail to Luke McAllister, stating as follows:

> The Yankton County Zoning Ordinance #16, Article 25, Section 2503 requires a Conditional Use Permit for any new, co-location or modification of a Wireless Telecommunications Facility. Section 2506 Conditional Use Permit Application and Other Requirements are necessary to operate any wireless communications facility in Yankton County.
>
> Yankton County Zoning Ordinance #16, Article 23, Section 2301 requires all parties notified of a violation respond to the Yankton County Planning & Zoning office, within seven (7) days of receipt of this letter. Article 23, Section 2303 Penalties For Violations, specifically states 1. Fine not to exceed $200.00 per violation. 2. Imprisonment for a period no [sic] to exceed thirty (30) days per violation. 3. Both fine and imprisonment. 4. An action for civil injunctive relief, pursuant to SDCL 21-8.
>
> Please contact the Planning & Zoning Office of the Yankton County Government Center to begin the Conditional Use Permit.

SAMF at ¶ 11. The letter was provided via courtesy copy to Klimisch. *Id.* Over the following weeks and months, B-Y Internet, LLC d/b/a South Dakota Wireless Internet met with Klimisch and Garrity and explained how *it* was the entity operating the wireless internet business and how it was excluded from Article 25 under Section 2505. SAMF at ¶¶ 12-13 (e-mail summary from Luke to Klimisch and Garrity on April 20, 2018) ("We discussed **B-Y Internet, LLC possibly requiring a conditional use permit under Article 25**").

On June 8, 2018, Yankton County commenced the Civil Action against *all* Defendants, despite Klimisch's his knowledge that the claims were baseless because B-Y Internet, LLC was excluded and despite his intimate and personal knowledge that Luke, in his individual capacity, and

McAllister TD, LLC were not, in fact, operating a wireless internet business. *See* SAMF at ¶¶ 9-15. Instead, while simultaneously representing a client in private law practice to assist in negotiating a real estate transaction with McAllister TD, LLC d/b/a Fire and Ice through its owner Luke, Klimisch then immediately represented Yankton County in a lawsuit against Fire and Ice and Luke purporting that they were in fact operating a telecommunication business, which, with the pressure and claims made against McAllister TD, LLC and Luke, could have impacted the mortgage negotiated with TJ Land. *Id.* at ¶ 27.

Klimisch was well aware that the claims against Defendants were baseless and frivolous and, in fact, conspired with other Movants to bring those claims against Defendants. To this day, those claims still have not been dismissed by Plaintiff Yankton County. This is despite the fact that on or about April 25, 2019, the Planning Commission voted unanimously 7-0 in favor of finding that South Dakota Internet was excluded from the requirements of Article 25 of the Ordinance under § 2505(3) and (5). SAMF at ¶ 30. The Planning Commission further determined that South Dakota Internet was never in violation of Article 25 of the Ordinance.[12] *Id.* Yet, Plaintiff and Third-Party Defendant Rob Klimisch still have not dismissed the Civil Actiondespite repeated pleas from South Dakota Internet that the lawsuit is still causing irreparable damage to its business to this day. SAMF at ¶¶ 51-53. Indeed, South Dakota Internet has repeatedly requested a letter of compliance from Yankton County and Rob Klimisch that it is operating its business lawfully and Yankton County and Rob Klimisch have, time and time again, refused to provide the letter and will not dismiss its baseless lawsuit. *Id.*

Various jurisdictions recognize a general exception "to the general rule of absolute prosecutorial immunity where a plaintiff alleges that a prosecutor has both an actual conflict of

12. This Planning Commission meeting is video recorded and is publically available on Yankton County's website, which can be recognized by judicial notice. SAMF at ¶ 30.

interest and knowledge that the charges filed are baseless." *Stevens v. McGimsey*, 673 P.2d 499, 500 (Nev. 1983); *see also, e.g., Beard v. Udall*, 648 F.2d 1264 (9th Cir. 1981); *Jennings v. Shuman*, 567 F.2d 1213, 1221-22 (3d Cir. 1977); *Boruchowitz v. Bettinger*, 654 Fed. Appx. 354, 355 (9th Cir. 2016) (recognizing "that absolute immunity extends only insofar as a judicial officer is engaged in duties that are integral to the court's decision-making process-which does not include acts that could properly be characterized as malicious prosecution, such as filing baseless charges for personal gain or retribution.").

In a similar situation considered in *Beard v. Udall*, the Ninth Circuit Court of Appeals determined there was an actual conflict of interest when a part-time prosecutor in a rural area was also engaged in private practice and, in the course of representing his secretary in a civil custody dispute, brought baseless criminal charges against the secretary's ex-husband. 648 F.2d at 1266-67.

The general rule is also applicable in this case. Here, Klimisch had a personal conflict when he represented a client in private law practice in a real estate transaction with Defendant McAllister TD, LLC d/b/a Fire and Ice, and then after using that transaction to learn of its business intentions, and after executing a mortgage between his client and Fire and Ice, Klimisch immediately turned around within months and commenced a baseless lawsuit against Defendants, including Fire and Ice. Prosecutorial immunity is not intended to protect egregious and malicious conduct such as this, which falls outside the duties that are integral to his position as a State's Attorney for Yankton County.

At minimum, there are genuine issues of material fact regarding whether Third-Party Defendant Rob Klimisch had an actual conflict of interest and knowledge that the charges filed were

and still are baseless. As such, this Court should deny Third-Party Defendant Rob Klimisch's Motion for Summary Judgment based on prosecutorial immunity.

4. There Is a Genuine Issue of Material Fact Regarding Who Authorized the Underlying Lawsuit.

In a strategic attempt to avoid any all culpability and liability in this lawsuit, Plaintiff and Third-Party Defendants now conveniently attempt to pin the decision to initiate the Civil Action entirely upon Robert Klimisch, and only Klimisch, and have him then claim absolute prosecutorial immunity. Yet, these self-serving and retroactive representations made under oath contradict the prior statements in the record, which support the opposite conclusion: Klimisch did not act alone in commencing the Civil Action.

On May 17, 2019, Yankton County Commissioner Don Kettering explicitly advised Defendants that while it is the Yankton County Board of Adjustment that often authorizes Klimisch to file a lawsuit, it was the Yankton County Commission in this particular lawsuit that authorized Klimisch to commence the Civil Action. SAMF at ¶¶ 32-33. County Commissioner Kettering further stated that "we talked to Rob and gave him parameters." County Commissioner Kettering is no doubt a credible, reliable source of information considering he serves on the Yankton County Commission. *Id.* Present at that meeting with Don Kettering was Yankton County Chair and Commissioner Dan Klimisch, who did not correct the statement from Commissioner Kettering.

Furthermore, the fact that the Commission made the decision, or in combination with other Movants, is supported by the fact that when Defendant Patrick Garrity sent a letter to Defendant Luke McAllister on March 2, 2018—prior to commencement of the Civil Action—notifying Luke of alleged violations of Yankton Ordinances and threatening a lawsuit if a conditional use permit was not obtained, the letter was sent as a courtesy copy to the Yankton County Commission.

SAMF at ¶ 11. This confirms the involvement of the Yankton County Commission prior to the commencement of the Civil Action. *Id.*

Third-Party Defendant Rob Klimisch, who now conveniently accepts full responsibility of the decision to file the malicious and frivolous lawsuit while claiming absolute prosecutorial immunity, has repeatedly conveyed to Defendants that he is not the one who makes decisions in this lawsuit:

> February 7, 2019: "***Yankton County has decided*** not to pursue the McAllister matter any further. Yankton County is in the process of amending the Zoning Ordinance and Yankton will be addressing as to whether this type of matter needs to be regulated and if so, how. If this is acceptable to your client, I would proposed [sic] that we do a joint stipulation to dismiss this matter." *See* Affidavit of Miles dated March 5, 2019, Ex. 4 (emphasis added).
>
> February 12, 2019: "At this time, ***Yankton County does intend*** to proceed with this matter." *Id.*, Ex. 5 (emphasis added).
>
> May 21, 2019: "It's up to the commission to decide." SAMF at ¶ 34.
>
> May 21, 2019: "If this lawsuit continues, ***we*** will continue with our lawsuit because that is what we will do, we are going to continue with ***our*** lawsuit, ***it's up to the commission to decide***, but we will continue with the lawsuit and we will proceed with the stuff." *Id.* (emphasis added).
>
> May 21, 2019: "***I did not make any of the decisions***." *Id.* (emphasis added).

The self-serving statements made under oath by Plaintiff and Third-Party Defendants that Klimisch acted alone and made the sole decision to commence the Civil Action is contradicted by the credible and extensive evidence in the record. Klimisch did not act alone. At minimum, there is a genuine issue of material fact regarding who authorized Third-Party Defendant Klimisch to commence the lawsuit against Defendants.

CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to deny Movants' Motion for Summary Judgment.

Dated this 30th day of October, 2020.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/Jonathan A. Heber
Meredith A. Moore
Jonathan A. Heber
PO Box 1400
Sioux Falls, SD 57101-1400
Telephone: (605) 335-4950
Facsimile: (605) 335-4961
meredithm@cutlerlawfirm.com
jonathanh@cutlerlawfirm.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Jonathan A. Heber, do hereby certify that on this 30th day of October, 2020, I have electronically filed the foregoing with the Clerk of Court using the Odyssey File & Serve system which will send notification of such filing to the following:

Robert Klimisch
Yankton County State's Attorney
410 Walnut, Suite #110
Yankton, SD 57078
Attorney for Yankton County, South Dakota

Douglas Deibert
Cadwell Sanford Deibert & Garry LLP
200 East 10th Street, Suite 200
Sioux Falls, SD 57104
Attorney for Plaintiff and Third-Party Defendants except Third-Party Defendant Patrick Garrity

Mark D. Fitzgerald
Fitzgerald, Vetter, Temple, Bartell & Henderson
PO Box 1407
Norfolk, NE 67802
Attorneys for Patrick E. Garrity

/s/Jonathan A. Heber
One of the Attorneys for Defendants

Appendix 2

STATE OF SOUTH DAKOTA) :SS COUNTY OF YANKTON)		IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, STATE OF SOUTH DAKOTA, A Political subdivison, Plaintiff, v. LUKE E. MCCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC, Defendants and Third-Party Plaintiffs, and YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY, Third-Party Defendants.	)	66 Civ. 18-178 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; AND ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY)

The above-named parties, by counsel of record, submit the following Reply Brief in support of their Motion for Summary Judgment. Consistent with our Brief in Support of Motion for Summary Judgment, dated September 11, 2020, this Reply Brief will refer to the above entities and State's Attorney Robert Klimisch as the Yankton County Entities. Based on contents of the Brief in Opposition, Luke E. McAllister; McAllister TD, LLC; and BY

Internet, LLC will be referred to as Defendants, consistent with the Brief in Opposition.[1]

BARRATRY CLAIM

Initially, this story really involves two chapters, involving the barratry claim. That claim was first asserted in the following documents, following service of the Summons and Complaint dated May 31, 2018:

1) Answer to Counterclaim of McAllister TD, LLC, dated July 5, 2018;

2) Answer and Counterclaim (Luke E. McAllister), dated July 5, 2018;

The second chapter involves the claimed notice contained in the letter of counsel dated July 3, 2019.

Initially, the point should be made that the July 5, 2018 barratry claims contained in the two Counterclaims, were

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[1] In footnote 10 at page 12 of their Brief, Defendants complain that:

> The use of the phrase 'McAllisters' to refer to distinct businesses can only be described as an attempt to undermine and delegitimize the business operations,....

Nothing could be further from the truth. As explained at page 2, numbered paragraph 4, in our Brief of September 11, 2020, in what was intended to be ease of reference, various parties were referred to in brief form, rather than setting forth the names of parties in lengthy listings. The Yankton County Entities intended nothing so evil as "undermining and delegitimizing" any aspect of Defendants' business operations. The claim comes as a complete surprise, and as is true with a lot of things, has nothing to do with the merits of the case, or the validity of the Motion for Summary Judgment.

preceeded by no notice whatsoever. The Brief in Opposition makes no real argument in an attempt to save the pleadings of that date. Furthermore, it would be disingenuous to claim that BY Internet did not have notice of facts upon which it could claim a barratry theory, known to that entity and its principals at least by July 5, 2018.

BASIC ALLEGATIONS CLAIMING EITHER COMPLIANCE WITH SDCL 3-21-2; OR THE LACK OF NECESSITY TO GIVE SUCH NOTICE.

A. The bringing of a Complaint, Counterclaim, or third party claim does not constitute the written notice required by statute.

At page 6 of the Brief, McAllisters state the following:

> First, Defendants Luke and MTD's written Answer and Counterclaims, which were served upon Plaintiff Yankton County 27 days after commencement of the civil action, constituted compliance with SDCL 3-21-2. It was a written notice that provided the time, place and cause of injury. *See* SDCL §3-21-2 ....

The claim that a pleading or pleadings making a claim against a public entity constitutes compliance with the notice statute is a new one. If that were the case, there would be no need for SDCL 3-21-2, at all. In every case, in bringing a Complaint, a Counterclaim, or a third party claim seeking relief in the form of monetary damages based on a tort theory, there would be no need for SDCL 3-21-2 in the first instance. Decades of South Dakota Supreme Court decisions could be thrown out the

window, and the statute itself would be a complete nullity. The argument simply makes no sense at all.

B. The Counterclaim and the third party claim are "actions for the recovery of damages," the same as a Complaint is. Consequently, notice under SDCL 3-21-2 is required.

Also at page 6, Footnote 7, Defendants state:

> To hold that written notice first be provided prior to serving a counterclaim in an existing lawsuit, which lawsuit forms the basis for the claim, would lead to an absurd and untenable result.

First, we are not told why the result would be absurd and untenable. Defendants advance only the rhetoric.

On substance, a Counterclaim stands in the same position as a Complaint, in that it is a "action for the recovery of damages ...," as set forth in the first line of SDCL 3-21-2. Backing up a few words, the complete sentence of the statute provides:

> **No Action** for the recovery of damages for personal injury, property damage, error or omission or death caused by a public entity or its employees (may be brought unless written notice is provided.)

Consequently, neither a Complaint, a Counterclaim, nor a Third Party Complaint may be considered as the notice required by 3-21-2. The provision that "no action .... may be maintained" makes it clear that the required written notice is a **prerequisite** to the bringing of an affirmative claim for relief, which of course a Counterclaim is, and so is a Third Party Complaint. A Complaint, Counterclaim, or third party claim standing alone,

does not constitute compliance with the statute.

The Yankton County Defendants are then criticized for reciting no authority or case law in support of the claim. Of course, McAllisters cite no language or authority to support their position.

Furthermore, and not that the argument should be accorded any validity at all, the Counterclaim asserted on July 5, 2018 would apply only to Yankton County, the only party in the lawsuit at that point.

Finally, the fact that barratry is alleged in the counterclaims and third party claims brought by Defendants in their pleadings of July 5, 2008, followed by the re-assertion of the barratry claim made more than a year after it was initially made, does not entitle Defendants to a "do-over" regarding the barratry claim, and attempt to salvage it with the July 3, 2019 letter from counsel, followed by the September 27, 2019 amended pleadings and third party claim. Consequently, the barratry claim is completely barred.[2]

C. The notice defense raised in the October 26, 2020 Responses was timely, proper, and should be considered by the Court.

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[2] In their Brief, Defendants make several arguments, in an attempt to avoid the notice defense. At page 5, the argument is made that the initial response to the Counterclaim did not allege the notice defense.

At page 5 of their Brief, Defendants claim that the initial response to the Counterclaim, made in 2018, did not allege the notice defense. The statement is then made:

> Such an affirmative defense (the notice defense) would have been nonsensical in light of the fact that Plaintiff Yankton County was well aware and on notice of its own actions and inactions in the litigation it initiated.

Addressing those claims, first, the fact that the defense was not raised in response to the initial counterclaims made July 5, 2018, does not bar the Yankton County Entities from raising it now. Had there been no amendments to pleadings, such as the Counterclaims and the third party claims brought September 27, 2019, Yankton County, then the only party in the action, could have amended its Reply to Counterclaim at any time prior to the expiration of a deadline for amended pleadings. There was no such deadline in place.

Additionally, with the Amended Counterclaims and the third party claims brought September 27, 2019, the Yankton County Entities were perfectly within their rights to assert any defense believed to be proper. Consequently, this argument is totally without merit.

D. Accrual of claims argument.

At page 7 of their Brief, Defendants argue that time periods for statutes of limitations purposes do not begin to accrue until the lawsuit is dismissed on favorable terms to Defendants.

Hence, the notice statute does not apply. The argument overlooks several important facts.

First, under the provisions of SDCL 3-21-2, notice is required "within one hundred eighty days after the injury." The "injury," or at least a substantial part of it, for either of the two torts, especially barratry, requires a party to defend an action, which involves expense. Consequently, the alleged "injury," taking the term from the statute, accrued when Defendants were required to file their responsive pleading to the initial Complaint, which they did through their first counsel on July 5, 2018, in the initial Counterclaims.

The fact that the statute of limitations may not begin to run on the claim has nothing to do with the time in which notice for the "injury," contemplated by the notice statute begins to run. Although the right to sue on the claim may not accrue until later, that does not change the fact that the claimed "injury" began with the filing of the Complaint. The notice statute requires that notice be given "180 days after the injury." (Emphasis added) It does not indicate the notice period begins to run when the right to bring the action accrues, in actions such as barratry.

Finally, the last sentence in SDCL 3-21 states:

> Nothing in this chapter tolls or extends any applicable limitation on the time for commencing an action.

The intent is obvious. The requirements of the notice

statute are separate and distinct from any issue of the statute of limitations. Consequently, the argument that the notice time frame does not even begun, lacks merits and should be rejected.

ABUSE OF PROCESS CLAIM

As is the case regarding the civil conspiracy theory, we do not find any response made to our argument regarding abuse of process, found at pages 14-16 of our initial Brief in Support. This was based primarily on the "process" issue. *Fix v. Interstate Bank of Roscoe*, 807 N.W.2d 612 (S.D. 2011), made it absolutely clear that "process" applies to legal actions. The only "process" brought by Yankton County, the Summons and Complaint dated May 31, 2018, is and was the only proceeding fitting that definition. In fact, as we argued at pages 15 and 16 of our initial Brief, quoting five specific paragraphs in the Third Party Complaint, Defendants have admitted the "process" was the "Underlying Lawsuit" meaning the Summons and Complaint dated May 31, 2018. Consequently, the argument and authorities quoted in our Initial Brief really have no viable response to our argument.

Nonetheless, before getting to the substantive issues, Petitioners' Brief in Opposition to the Motion for Summary Judgment totally overlooks and fails to even mention this argument made by the Yankton County Entities. The law is clear regarding a proper response to arguments made by a moving party,

and corresponding failure to support any authority in support of their argument. Such failure to respond to arguments made in an opponent's brief, and failure to cite authority to their position, constitutes a waiver of the issue. See *State v. Pellegrino*, 577 N.W.2d 590 (S.D. 1998); *Kostel Funeral Home, Inc. v. Duke Tufty Company*, 393 N.W.2d 449 (S.D. 1986); *State of South Dakota v. Knoche*, 515 N.W.2d 834 (S.D. 1994); *Cooper v. Hauschild*, 527 N.W.2d 908 (S.D. 1995); and *Kanaly v. State*, 403 N.W.2d 33 (S.D. 1987).

This utter failure to make any attempt to respond to the Yankton County Entities' arguments, and authority in support, effectively amounts to a default on the part of the party failing to make a proper response to the movant's positions, and authorities.

CIVIL CONSPIRACY THEORY

We find nothing in the Brief in Opposition to counter the Yankton County Entities' discussion at pages 13 and 14, that the civil conspiracy claim cannot and does not stand alone. Since the barratry claim fails based on the failure to give proper statutory notice, so does the civil conspiracy claim. Since Defendants chose to ignore that argument, the argument is deemed waived.

ESTOPPEL

In several portions of their Brief in Opposition, Defendants

attempt to raise the Doctrine of Estoppel as a bar to the Yankton County Defendants' reliance on the notice defense. The first appears at pages 6-8 of the Brief. At page 6, Defendants list several time frames. Then after making an argument regarding elements of barratry, which were addressed above in this Brief, at pages 2-5, Defendants make the argument that estoppel should bar the notice defense. (P. 7)

As the Brief does several times, short passages from case law are quoted, without any real attempt to discuss the cases, the authorities, or how they tie or figure into the analysis. A classic example is the quote at page 7 of the Brief indicating:

> The South Dakota Supreme Court has recognized that 'an estoppel can be applied against public entities in exceptional circumstances to prevent manifest injustice,' citations omitted, but discussed further herein.

On some number of occasions, the South Dakota Supreme Court has set forth the elements of estoppel which the party, here Defendants, assert it must prove. They are:

> (1) False representations or concealment of material facts must exist;
>
> (2) The party to whom it was made must have been without knowledge of the real facts;
>
> (3) The representations or concealment must have been made with the intention that it should be acted upon; and
>
> (4) The party to whom it was made must have relied thereon to his prejudice or injury. *Cooper v. James*, 627 N.W.2d 784, 789 (S.D. 2001).

Listing of those elements was followed by the statement

that:

> There can be no estoppel with any of these essential elements are lacking, or if any of them have not been proved by clear and convincing evidence. *Id.*

Further, the *Cooper* decision mentioned that decisions from other jurisdictions "have applied the theory of estoppel to prevent a Defendant from lulling a Plaintiff 'into a false sense of security...." *Id.*

So before going any further with the analysis, the question is: What did any of the County Defendants do, to lull Defendants into not complying with the notice requirement? The answer is: "Nothing."

Several times in the Brief in Opposition, perhaps more than several, Defendants recite the transgressions they claim the County, its Boards, and Klimisch and Garrity, committed upon them. However, nowhere in those arguments, nor elsewhere in the Brief in Opposition, do Defendants indicate, or even both with, discussing what it was any County Defendant did to mislead any Defendant from asserting the notice defense. The reason is simple: No such facts exist.

The theory of estoppel is closely related to that of substantial compliance, which will be discussed later herein, at pages 19-25. Under either theory, the party against whom the theory is asserted, here the County, must have taken some action to "lull" the other party, here Defendants, into thinking they

need not comply with the notice statute. The phrase "lying in the weeds" has likewise been used. None of these actions on the part of the County occurred.

The Brief discusses the ongoing lawsuit before the amendments and the initiation of the Third Party Complaint (see Brief in Opposition, P. 14) Yet Defendants can point to no such conduct on the part of any County employee, which tricked them into a failure to give proper statutory notice.

PROSECUTORIAL IMMUNITY

In their Brief in Opposition to the motion, pages 17-21, Defendants attempt to defeat the absolute prosecutorial immunity defense. Indeed, State's Attorney Klimisch represented an entity by the name of T.J. Land, regarding a real estate transaction with McAllister TD d/b/a Fire & Ice, which is not a party to this action. Indeed, Klimisch was also aware that Luke McAllister was the owner. We have filed a Second Affidavit of Klimisch, setting forth the basic facts of that transaction, along with the fact that nothing he did in bringing this lawsuit against Defendants, or any of them, was affected in any way by his prior representation of that client.

With nothing on which to base the conclusion and statement, Defendants apparently claim that representation of T.J. Land automatically constituted a conflict of interest, which nullifies the prosecutorial immunity defense. Nothing could be further

from the truth.

As set forth in Klimisch's Affidavit of November 9, 2020, the transaction between T.J. Land and the Fire & Ice entity was routine in all respects, the only apparent issue, at least from T.J. Land's and the realtor's perspective, was whether the transaction should be handled as a note and mortgage, or a contract for deed. Ultimately, the documentation utilized the former.

Nonetheless, nothing Klimisch did or did not do, from the date of the transaction in 2018, amounted to a conflict of interest of any kind. The only way that conflict could have occurred would have been if Klimisch wrongfully used his office to attempt to accomplish a result adverse to McAllister TD d/b/a Fire & Ice, but favorable to T.J. Land. Nothing could be further from the truth. For one thing, no adverse action of any kind has been taken against Fire & Ice. Further, the last thing T.J. Land wanted was for Fire & Ice to quit making payments under the contract for deed, and default. Consequently, Defendants' attempted reliance on the doctrine that conflict of interest existed, which Klimisch exploited, is totally lacking.

Similar to the handling of other issues such as estoppel and substantial compliance, the Brief in Opposition once again picks a few snippets or morsels from cases, at least as perceived by the author of the brief, to attempt to demonstrate authority for

the argument. Again, with apology to the Court for the length of briefing necessary to fully expose the Brief's lack of any real authority, the Yankton County Defendants address the four cases cited by Defendants at page 20 of their brief, citing four cases in "laundry list" fashion, followed by a single quote from one of the four cases.

First, *Stevens v. McGimsey*, 673 P.2d 499, involved a decision less than two pages in length. No facts regarding the allegations were discussed, other than the fact that Defendant McGimsey, a prosecutor, drafted and filed two criminal complaints against Stevens, who became the Plaintiff in the reported case. The charges were eventually dismissed. Stevens then filed an action based primarily upon malicious prosecution.

Prosecutor McGimsey filed a Rule 12(b)(5) Motion, which was granted under Rule 56. The Appellate Court reversed holding:

> The Court based its determination on the rule that prosecutors acting within the scope of their quasi-judicial duties are protected by absolute immunity from claims arising from those acts. 673 P.2d 500.

The Appellate Court was then critical of the Trial Court for assuming that acts complained of within the pleadings were within the scope of prosecutorial immunity. Consequently, the case was reversed. There was nothing about conflicts of interests.

Similarly, and in fact constituting even less authority in Defendants' favor than the *Stevens* case was, *Boruchowitz v. Bettinger*. That case, an unreported case, listed virtually no

facts that would be of assistance in comparing the prosecutor's alleged conduct, with Klimisch's. Rather, the case was decided on the basis that the Appellate Court ruled it lacked jurisdiction to review the lower Court's Order. Although terms such as absolute immunity, quasi-judicial duties, and other phrases commonly found in prosecutorial immunity cases appear, there is nothing in the *Borochowitz* case that provides any support for Defendants' arguments on this issue; and in fact, the case contains no facts that are helpful or applicable to anything.

Next, *Jennings v. Schuman*, 567 F.2d 1213 (3rd Cir. USCA 1977), involved a fact situation which the Appellate Court immediately commented "border(ed) on the bizarre," 567 F.2d at 1216. That case did indeed involve facts which constituted a conflict of interest, when applied to bringing false criminal charges against another. Those facts are poles apart from the facts regarding Klimisch in this case. In that case, Plaintiff Jennings was the county coroner. He investigated the death of a patient at a facility called the Hillcrest School. The owner of the school was initially charged with murder, and Defendant Schuman was appointed Assistant Special Prosecutor to prepare and try the murder case. While Coroner Jennings and prosecutor Schuman were working on the case, Schuman had an affair with Jennings' wife. Stated as a fact in the opinion, Schuman then

conspired with co-Defendant Conway, the Wayne County District Attorney, regarding an extortion scheme Schuman had cooked up, with the help of a police officer. As part of Schuman's plan, a criminal complaint charging Jennings with solicitation to commit burglary was sworn out, based on false statements knowingly, intentionally, and maliciously made by the police officer, Naring. Jennings' arrest, noted to be "in derogation of the normal procedure," was immediately made known to the local news media. Schuman spearheaded the investigation and prosecution of Jennings. Conway, on the sidelines, made an extortionary demand upon Jennings for Jennings to pay the Defendant conspirators $150,000.00, and give up his wife and son to Schuman. In return, Conway, the District Attorney, promised to take care of the criminal proceedings.

Consequently, *Jennings* involved a factual scenario, certainly bizarre, at the least, in which two prosecuting attorneys attempted to extort $150,000.00 from Plaintiff Jennings. This was certainly an abuse of process, to which the prosecutorial immunity defense did not apply. Again, nothing in Klimisch's actions representing his client, come even close to the facts in *Jennings*.

Finally, *Beard v. Udall*, 648 F.2d 1264 (9th Cir. 1981), also involved a true conflict of interest, coupled with use of an unjustified criminal prosecution.

This rather lengthy saga began with a divorce between Roger and Stephanie Beard. Roger was awarded custody of his two minor sons. Stephanie then moved to Apache county, where she married Bill Crabtree, and she began working as a secretary for the County Attorney, Stephen Udall. Three years after the decree was entered, Roger, a Maricopa County resident, brought his two sons into Apache County, where Udall was the County Attorney, for whom Stephanie worked. While the boys were with Stephanie, Udall, representing Stephanie in his private capacity, petitioned a Judge in Apache County, to modify the original divorce decree, and award custody of the children to Stephanie. The Judge set a hearing on an Order to Show Cause, and entered a Temporary Restraining Order prohibiting Beard from removing the children from Apache County. The hearing was set for July 29, the date the TRO was to expire.

Roger filed a Motion to Dismiss, which could not be immediately heard. Roger then took the children back to his home in Maricopa County. When it was discovered that the children were no longer in Apache County, a Complaint was sworn out and signed by a Deputy Sheriff, charging Roger and others with various felonies and misdemeanors, including kidnapping. Roger was arrested in Maricopa County.

A Maricopa County Judge became involved, who telephoned Udall, who admitted to the Maricopa County Judge that he (Udall)

was both Crabtree's private attorney and the County Attorney. Udall further stated that he had caused the charges to be brought against Beard. Udall allegedly also sought to mislead the Maricopa County Judge, as to the whereabouts of the Apache County Judge. The Maricopa County Judge reduced Beard's bond and ordered that he and his companions be released.

After additional proceedings in the civil case brought by Beard against Udall, summary judgment was entered in favor of Udall and a Sheriff. The Appellate Court reversed, holding Udall may not have been acting within the scope of his authority as prosecuting attorney, based on the fact that Stephanie worked for him. Consequently, the prosecutorial immunity defense was rejected.

Noting that the holding in the case was "a narrow one," 648 F.2d at 1271, the Court indicated there needed to be a finding as to whether Udall actual participated in the filing of the criminal charges, and whether Udall knew the charges were baseless when they were filed. Those complicated facts constitute a far cry from anything Klimisch did or did not do.

Before getting to the matters argued by Defendants, all arguments relating to the validity of the prosecutorial immunity defense should not even be considered until the notice issue is determined as to Klimisch. Other than the fact that the July 3, 2019 letter was delivered to him, all other arguments made above

regarding the notice issue apply to Klimisch. Those include the failure to serve the auditor, the lack of facts which would sustain a finding of substantial compliance or the Doctrine of Estoppel. Consequently, while this Court need look no further than the notice issue to decide the Motion for Summary Judgment as to Klimisch, the absolute prosecutorial immunity defense also warrant the granting of summary judgment in favor of Klimisch.

SUBSTANTIAL COMPLIANCE

Perhaps not surprisingly, Defendants attempt to rely on the Doctrine of Substantial Compliance. That argument is first made at page 4 of the Brief in Opposition, citing *Myears v. Charles Mix County*, 566 N.W.2d 470 (S.D. 1997); and *Anderson v. Keller*, 739 N.W.2d 35 (S.D. 2007). As with other arguments, notably the argument on the Doctrine of Estoppel, and the argument regarding prosecutorial immunity, the Brief and its citation of cases cherry picks several morsels from the decisions, and urges the Court to accept the argument thereon, with no recitation of the facts of the case, the basis of which substantial compliance was or was not accepted, and any comparison to this case.

First, *Myears* involved a serious motor vehicle accident which occurred August 9, 1992, on a county road north of Lake Andes. The road was under construction, and Myears alleged no center line or other devices or warnings controlled traffic. An oncoming car strayed into his path and collided with him, causing

personal injuries to Myears and his wife.

They hired a Minnesota lawyer, Richard Hilleren, who was not licensed in South Dakota. On October 19, 1992, Hilleren sent a notice letter to the County Engineer, who submitted it to the County Auditor and the State's Attorney, who in turn referred it to the County Commission. On November 2, 1992, the Commission denied the claim.

Hilleren and the State's Attorney then discussed the case over the telephone on December 9, 1992, still within the 180-day notice period. Hilleren then contacted Crawford & Company, an independent adjusting firm handling the case for the County's insurer, to whom Hilleren sent information, photographs of the scene, and other documents. A Crawford adjuster discussed the claim with the County Highway Superintendent. On December 28, 1992, still within the 180-day notice period, Hilleren talked on the phone with Jim Fleming, another Crawford adjuster. They tried to set up a meeting in late December, which did not take place, although another lengthy phone conversation did, apparently on December 31, 1992.

Fleming's notes from the conversation indicated "2-5," referring to February 5, 1993 as the date when the 180-day notice would expire. That notice issue had occurred to another Crawford adjuster, Wayne Kinonen, on November 24, 1992. Getting back to the December 31 conversation, Fleming prepared a status letter to

the insurer on January 18, 1993, mentioning the notice issue. On January 28, 1993, Fleming verified with the Attorney General that that office had not yet received any notice.[3]

February 5, 1993, the date the 180 days ran, passed without notice. Hilleren continued to pursue settlement, but Crawford advised him outside counsel had been retained. On April 5, 1993, defense counsel advised Hilleren of the 180-day rule, of which Hilleren had been unaware. On May 20, 1993, Hilleren belatedly submitted written notice to the County Auditor and the AG. Hilleren was discharged as counsel. The County made a motion for summary judgment on the notice issue, also claiming estoppel. Summary Judgment was granted to the County.

The South Dakota Supreme Court reversed, based on substantial compliance. The following facts were held to be significant. The County engineer had received a notice letter. The Auditor was aware of the claim within three months. The County Commission was, too. The County conducted their own inquiry. The County Commission specifically denied the claim. The insurer and an independent claims adjuster were aware of the accident several months before the time frame ran. These facts were detailed at length at 566 N.W.2d 475. This combination of facts led the Supreme Court to conclude substantial compliance

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[3] At that time, SDCL 3-21-2 required the State Attorney General be noticed on all claims. That statutory provision has been deleted.

barred assertion of the notice defense. In a quote at 566 N.W.2d 475, the Court noted importance with the fact that if a claimant:

> Within 180 days after the discovery of an injury, makes a good faith effort to satisfy the notice requirements but inadvertently omits a minor detail, or makes an error with respect to such detail, notwithstanding the fact that the omission or error cannot prejudice the public entity in the least.

Significant in the opinion was also the fact that the County Auditor, the State's Attorney, and County Commission all considered the matter within the notice period, and the Commission took official action on it. The insurer also investigated the claim within the 180 days.

Here, none of these elements occurred following the May 31, 2018 Summons and Complaint, or the July 5, 2018 Counterclaims. Nor did any of those kinds of events as those relied upon in *Myears* occur within the next 363 days, until the July 3, 2019 letter from Defendants' counsel. Consequently, none of the significant combination of facts and events exist here, such as they did in *Myears*. Consequently, *Myears* constitutes no authority upon which to apply substantial compliance, and disregard the notice defense.

Then at page 6 of their Brief, Defendants attempt to rely on *Anderson, supra.* The Brief again merely quotes a single line from the case, and urges that based on that single quote, the statutory notice defense should be rejected. Interestingly, from an initial view point, that case involved a summary judgment

dismissal in favor of Defendant at the Trial Court level, which was affirmed by the South Dakota Supreme Court.

The facts in *Anderson* involved a July 22, 2003 motor vehicle accident in which irrigation district employee Keller was involved in a collision with Plaintiff Anderson. During proceedings involving a Motion for Summary Judgment brought by employee Keller, which was ultimately granted, and affirmed by the Supreme Court in the referenced case, Plaintiff Anderson stated in an Affidavit that within 10 to 20 minutes of the accident, the District's manager and secretary Jenniges arrived at the scene. Anderson indicated Jenniges spoke to him (Anderson) and Keller at the scene, and a bit later to a Fall River County Sheriff's Deputy.

Anderson did not file his personal injury complaint against Keller until March 17, 2006, a few months short of the three years following the accident. The Trial Court granted Keller's Motion for Summary Judgment. The South Dakota Supreme Court affirmed.

First, citing *Myears, supra*, the Court indicated substantial compliance could not and would not be accepted as an excuse for failing to meet the requirements of SDCL 3-21-2, based on the facts of that case.

Similar to the *Myears* decision, *Anderson* does not stand for the authority Defendants claim it does, based on a single line

from the authority. Rather, the facts here are in no way similar to the facts of the case in *Anderson*, in which summary judgment was granted, and then affirmed.

Citing *Smith v. Neville*, 539 N.W.2d 679 (S.D. 1995), one of the two exceptions to the express notice requirements is evidence that the public entity or its agents have misled an objectively reasonable person to believe that the proper authority of the public entity received notice of the claim. In such a case, estoppel would apply.

Significantly,

> What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Significantly, the Supreme Court noted:

> Finally, for Anderson to claim there to have been *substantial compliance* on the basis of this record is a misnomer since it appears that *he did nothing* to comply with the statute during the 180-day notice period. 739 N.W.2d at 41 (emphasis in the original).

Here, Defendants claim the letter sent by attorney Heber to State's Attorney and Third Party Defendant Klimisch, constituted notice. Yet Defendants point to no acts of Klimisch, or any other member of the Yankton County Entities, that "affirmatively mis(led) any Defendant to believing the letter to Klimisch constituted proper notice.

Consequently, there is nothing upon which Defendants can attempt to rely on the Doctrine of Substantial Compliance, until

long after the claim for barratry was made July 5, 2018.

SEVEN OBJECTIVES

The Brief in Opposition also tries to save the claim from the notice defense, by quoting seven objectives mentioned in several cases regarding notice. They are quoted at page 3 of the Brief. The South Dakota Supreme Court has never held that meeting these seven objectives, standing alone, would constitute an excuse from complying with statute. Certainly items 1, 2, and 3, did not exist. This is not to concede that any of the other elements have been met.

TIME FRAMES

In several sections of the Brief in Opposition, Defendants go to great lengths detailing time frames, the number of days which elapsed between events, and other such matters. None make any difference when it gets down to the real issues here. See the discussion at pages 2, 5, 6. The added drama of highlighting the number of days addressed in the discussion also appears. In addition, Defendants emphasized "various docket activity." (P. 5) Nothing in these discussions lead to any real argument, certainly nothing that would justify this Court from denying the Motion for Summary Judgment. One of those arguments appeared at page 6, mentioning "*it was not until almost a second year* later on September 11, 2020, when Plaintiff finally brought this Motion." What impact or importance that has on anything is

unclear, as there is no further argument. The fact is there was no scheduling order in effect, nor was there a motions deadline. Those arguments regarding time frames should be rejected.

Additionally, at pages 15 and 16, the Brief recounted the well-intentioned effort to bring a Motion for Summary Judgment several weeks sooner than it actually was. Page 16 attempts to make much of this non-issue, then claims Defendants should be estopped from bringing this Motion based on the notice defense.

There was no active Scheduling Order in effect; there was no dispositive motion deadline; nor was there any other Order of the Court, setting a date certain, or deadline, for bringing the Motion for Summary Judgment. This happens with some frequency in this business, well intentioned plans for filing of motions, taking depositions, or tending to other matters during the course of litigation, sometimes are met with delays for one reason or another. More importantly, looking at the elements of estoppel, which Defendants urge be applied and imposed, Defendants say nothing about the four elements of estoppel, discussed above at page 10 herein; and as set forth in *Cooper* above.

Utilizing one of the terms Defendants used with some frequency in their Brief, it seems absurd that Defendants would even attempt to raise estoppel. Addressing the necessary elements, what false representations or concealment of material facts exist? What facts did Defendants or their counsel not

have? What representations or concealment did the Yankton County entities or their counsel make, and what was the intention that they should be acted upon? Finally, what reliance to their prejudice occurred to Defendants? With the lack of any facts or substance to any of the four necessary elements of estoppel are so totally lacking, it is surprising the argument was even made.

This similar issue was addressed by the South Dakota Supreme Court in *Dudley v. Huizenga*, 667 N.W.2d 644 (S.D. 2003). In that case, claimant's attorney missed a stipulated deadline for disclosing expert witnesses. The disclosure was made eight weeks late. The Department of Labor granted the employer's Motion to Strike claimant's experts. Since claimant then had no expert, the Department also granted summary judgment to the employer. The South Dakota Supreme Court reversed, holding that sanction of striking claimant's experts was too severe.

To the extent further discussion is necessary, the opinion discussed the factors to consider when imposing sanctions for discovery violations. See the discussion at 667 N.W.2d 649.

Not that this Court need even go so far as to consider sanctions or dismissal, since here, there was no Order setting a deadline for filing of dispositive motions. Consequently, the Court should reject Defendant's argument on what is really non-issue.

Further, the attempt to impose the sanction of dismissing

the Motion for Summary Judgment, this similar issue was addressed.

THE JULY 3, 2019 LETTER

1. Elements lacking.

Defendants have attempted to manufacture the July 3, 2019 letter from counsel, into statutory compliance with the notice provision of SDCL 3-21-2. That letter, issued just short of a year after the Counterclaim for barratry was made prior to any attempted notice whatsoever, fails as claimed compliance with the notice statute.

As mentioned elsewhere, it is difficult to believe this letter was ever intended to constitute statutory notice. The statute is never mentioned, nor is there any mention of the letters' intention to constitute statutory notice. The heading of the letter has the caption of the case, followed by the all capitalized words "SETTLEMENT DEMAND."

This transparent attempt to cover the tracks of any real notice issued within the statutory time frame, begins with the very heading of the letter. That heading states:

> RE: YANKTON COUNTY V. LUKE MCALLISTER, ET AL.;
> CIV.18-178 DEMAND LETTER

There is no heading in the letter, or anywhere else in the eight pages of text[4], or the exhibits that indicate any awareness

[4] The letter contains no page numbers. We will refer to page numbers as we have counted them.

of, or attempt to comply with, notice.

The letter contains four numbered, highlighted sections:

1. WITHDRAW STIPULATION FOR DISMISSAL;

2. ABUSE OF PROCESS;

3. DEMAND; AND

4. CONCLUSION.

The initial short paragraph, regarding the Stipulation for Dismissal, contains nothing to indicate compliance with the statutory notice provision was intended. The entire discussion has to do with prior settlement efforts, characterized as "bad faith negotiations," and other such discussion. There was nothing to indicate intended compliance with the notice statute.

The second section, "ABUSE OF PROCESS," begins in the first sentence with additional talk of settlement, and the threat to proceed with a lawsuit. In remembering the forest for the trees, the abuse of process claim is not a stand-alone tort. Rather, it requires the pleading and proof of an underlying claim.

Self-described as a "litany of facts," (P. 7 of the letter) at least facts Defendants claim are facts, with which conclusion the County Entities do not agree, the letter contains 18 unnumbered bullet points in pages 2-5.

Our count indicates 18 bullet points, all but two of which occurred on and prior to June 8, 2018, nearly 13 months before issuance of the letter. The last two bullet points recite events

of April 17 and 25, 2019, the first being the Stipulation to dismiss the action without prejudice; the second regarding a 7-0 vote of the Yankton Planning & Zoning Commission.[5]

A lengthy discussion then follows in that section, again containing nothing that would indicate an intention to comply with the notice statute, or even a recognition that it existed or need to be complied with.

Then in numbered section 3 came the demand, specifying a nine-day deadline. Although there was mention of "amending and adding counterclaims and adding parties," there was nothing to indicate attempted compliance with statutory notice provisions. Nor did the fourth section, the Conclusion.

Finally, the letter contained three exhibits, all highlighted in giant capital letters, each time listing the caption and the Civ. number, and ending with Demand Letter dated July 3, 2019. Again, nothing about statutory notice.

Consequently, the basic contents of the DEMAND LETTER was never intended to be compliance with the statutory notice provision, nor did it comply with the requirements of that

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[5] As discussed in the Second Affidavit of State's Attorney Klimisch, the vote was a part of settlement negotiations. P & Z has authority to deal only with conditional uses and variances. Further, the 7-0 vote was nothing but a recommendation. It was not binding on the Commission or the County. It proves absolutely nothing. Furthermore, had the vote allegedly been adverse to Defendants, the County could not raise that as proof of anything. Consequently, any reference to that vote, and its claimed intents and consequences, should be disregarded.

statute, despite the desperate attempts to cover the tracks of the earlier mistake, in not providing notice before the initial Counterclaim alleging barratry on July 5, 2018.

It is not without significance that Defendants' attempt to impose the beginning of the 180-day notice period as some date between May 17 and May 21, 2018, in the litany (Defendants' own words) of claimed transgressions, set forth in the bullet points referenced above, 16 of the 18 recite events and actions well known to Defendants on or before June 8, 2018, the date of the last bullet point, 13 months before the July 3, 2019 letter. The two bullet points listing events of late April, 2019, do not and did not revive the 180-day time frame.

Moreover, the pleadings of September 27, 2019, consisting of the Amended Counterclaims and the third party claim, contained the allegation of barratry. Consequently, the existence of facts, at least facts as perceived by the Defendants and their counsel, must have been known for nearly a year, since the theory was contained in the July 5, 2018 Counterclaims. The allegations of barratry certainly overlap with the other two theories. Further, those other two theories, in particular the alleged abuse of process claim, do not stand alone. They require allegation and proof of an underlying tort. See our discussion on this subject in our initial Brief, pages 13-14, and page 19 of this Brief. Here, that alleged underlying tort is barratry,

which clearly is barred by failure to give notice prior to bringing the action for barratry.

Getting back to the September 27 pleadings and the response thereto, the County Entities all responded on October 30. The Replies to Counterclaim alleged failure to comply with SDCL 3-21-2. So did the answers to the third party claim. The three sets of discovery served the same date each contained an identical Interrogatory, and an identical Document Production Request, directed to the notice issue. Apparently Defendants' best claimed case is that the date the 180 days began running was between May 17 and May 21, 2019. Consequently, the pleadings and discovery of October 26, 2019 were 22 or 26 days before the expiration of the 180 days, depending on whether May 17 or May 21 is considered the trigger date for calculating the 180 days. Despite having both the responses alleging failure to comply with the notice statute, along with having the discovery in hand specifically requesting Defendants' position on the statutory notice defense, Defendants made no attempt to amend or cure any potential failure to comply with the notice statute, despite having between 22 and 26 days to do so. Consequently, Defendants should be barred from attempting to concoct a bar to the notice defense, based on their own failures and oversights.

2. **Effects of SDCL 19-19-408.**

Notwithstanding these issues, there is one more issue that

may be even more significant. That issue involves SDCL 19-19-408, headed "Compromised offers and negotiations." The statute contains the following language:

> (a) **Prohibited uses**. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) Furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and

Putting the two paragraphs together, evidence is not admissible of anything that constitutes "furnishing, promising, or offering - or accepting, promising to accept, or offering to accept" anything of value in compromising or attempting to compromise a claim.

The very first paragraph under subparagraph (a) indicates the subject or subjects of what is not admissible involves evidence "either to prove or disprove the validity or amount of a disputed claim...."

Clearly Defendants are attempting to use the July 3, 2019 letter from counsel in an effort to "prove ... the validity ... of a disputed claim." Thus, there can be no conclusion other than a ruling that the referenced letter is not admissible as attempted evidence to comply with the statutory notice provision, which is certainly an effort, "to prove the validity of a disputed claim."

STATUTORY CONSTRUCTION

In general, statutes mean what they say. When it comes to statutory construction, "[t]he intent of the legislature is 'derived from the plain, ordinary and popular meaning of statutory language,'" (*Petition of Northwestern Pub. Serv. Co.*, 1997 S.D. 35, ¶14, 560 N.W.2d 925),(citations omitted). This Court has held "[i]n arriving at the intention of the Legislature, it is presumed that the words of the statute have been used to convey their ordinary, popular meaning." (*Appeal of AT&T Inform. Sys.*, 405 N.W.2d 24 (S.D 1987)

Those statutes include statutes imposing time limits of various sorts, on various aspects of claims. First, of course, there are the statutes of limitations set forth in SDCL Chapter 15-5. Then there is the 30-day time limit imposed by SDCL 15-26A-6, regarding the time in which an appeal to the South Dakota Supreme Court must be brought, following notice of entry of the final Order or Judgment.

Time periods imposed by other statutes deal with other subjects. The hospital lien statute, SDCL Chapter 44-12, contains several time requirements. SDCL 44-12-4 requires that a hospital must file and provide written notice concerning several mandatory subjects, to be made in writing to the person or entity alleged to be liable to the injured party. Such notice must issue before the payment of any amounts to the injured party or

their attorney. SDCL 44-12-6 requires mailing of that notice within the same time frame. Finally, under SDCL 44-12-8, if a payor does not honor the hospital lien, the hospital has one year from the date of payment of amounts which did not protect the hospital lien, must be sued.

Statutes relating to service of civil actions have several requirements. First, SDCL 15-2-31 provides a 60-day extension beyond the usual statute of limitations, when suit papers are placed in the hands of a sheriff or other person who may make legal service, if the intention of placing the papers in the hands of that person are with the intent that they be served.

In addition, regarding service, service of process made on a non-resident pursuant to SDCL 15-7-6 must include filing a copy of the Summons and Complaint with the Secretary of State within the statute of limitations, **and** mailing a copy of the process within 10 days **thereafter** to the Defendant at their last known address. See *Fredericks v. Elliot*, 716 F.2d 522, in which the Eighth Circuit held strict compliance with the statute was necessary, and that mailing of the process to the Defendant at or before the time filing was made with the Secretary of State was ineffective.

There are certainly more examples of statutes containing time frames which must be followed strictly. Words and phrases such as "shall" and "is given," the language that appears in SDCL

3-21-2 mean compliance with such time requirements is a legal necessity, not a suggestion, like the old joke about stop signs in Boston.

ACTUAL NOTICE AND STATUTORY COMPLIANCE

There is no question that Defendants failed to provide any notice before service of the July 5, 2018 Counterclaims. Nor was there any complete statutory compliance with SDCL 3-21-2, even in the July 3, 2019 letter.

Initially, in their Brief, Defendants also ignore the argument made by the Yankton County Defendants in their initial Brief in Support of Motion, at pages 9-11 of that Brief. This involves the holding and discussion in *Olson v. Equitable Life Assur. Co.*, 681 N.W.2d 471 (S.D. 2004).

The primary issue was proper notice on the proper party or officer, in that case, the County Auditor. The same applies here. Even if the July 3, 2019 letter from counsel can by some stretch of the imagination be considered notice, it was provided only to State's Attorney Klimisch. While the Brief in Opposition claims the Auditor has a copy of that letter (page 14 of the Brief), taking Defendants' best arguments, that did not come from Defendants or their representative, but rather from the County's liability carrier; and not until October 16, 2019. Thus, the claim that the auditor now has a copy of that letter does not change the fact that the letter was not timely, nor was it

conveyed to the Auditor, as statutory compliance. If indeed Defendants and counsel intended for the July 3, 2019 letter to constitute notice, surely they would have paid attention to other requirements of the statute, and transmitted it to the Auditor, not the State's Attorney.[6]

Once again, as is true with Defendants' failure to respond to arguments and authorities made by the Yankton County Entities regarding the abuse of process and civil conspiracy claims, failure to address the argument, and attempt to cite anything in response, constitutes a waiver of the right to respond. See the discussion at PP. ____ above.

One other matter merits consideration, in the discussion concerning statutory compliance. If indeed the July 3, 2019 letter was intended to be compliance with the notice statute, why was there no mention of the statute, and why was there no mention that the letter allegedly claimed it was intended to be compliance. Moreover, if the letter was intended to constitute statutory compliance, why were other requirements of the statutes not complied with? Failure to serve the auditor, while addressing the letter **only** to State's Attorney Klimisch, comes

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[6] Describing the defective notice of claim issue, Defendants state that argument is "absurd." (Brief, P. 6) At that page, they indicate that because notice was given to State's Attorney Klimisch, the statutory objectives were met. That does not excuse the failures to fully comply with the statute.

nowhere close to actual compliance.[7] How and why, if the letter was intended to comply with the statute, was the product so defective and deficient concerning compliance with details of the statute? The answer is clear: At the time of its issue, that letter was never intended to constitute compliance with SDCL 3-21-2. Rather, after the issue was raised, the letter is now being used in an attempt to clean up the mess that resulted from failure to give notice in the first place. This is yet another reason why Defendants' attempts to defeat the notice issue should be rejected.

Finally, and perhaps regrettably, it must be pointed out that the July 3, 2019 letter effort, with its failures to fully comply with the statute, did not come from a pro se litigant, or even from an out-of-state lawyer, such as was the case in *Myears, supra*. Rather, licensed, capable South Dakota counsel was involved. There simply was no excuse for full and complete compliance with the statute.

SUMMARY AND CONCLUSION

Based on all arguments on all issues above, in particular the statutory notice issue, along with the fact that there are no questions of fact on that issue, the Yankton County Entities,

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[7] If Defendants' argument that the letter addressed only to Klimisch gains any traction, which it should not, the attempted service on Klimisch would not be service on any other Yankton County Entity.

which include State's Attorney Klimisch, are entitled to dismissal on their Motion for Summary Judgment.

Dated at Sioux Falls, South Dakota, this 10 day of November, 2020.

CADWELL SANFORD DEIBERT & GARRY LLP

By /s/ Douglas M. Deibert
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing was filed electronically with the Court and that the following were served by the state's electronic service system:

Jonathan A. Heber — **jonathanh@cutlerlawfirm.com**
Meredith A. Moore — **meredithm@cutlerlawfirm.com**
Cutler Law Firm
140 North Phillips Avenue
P.O. Box 1400
Sioux Falls, SD 57101-1400

this 10 day of November, 2020.

CADWELL SANFORD DEIBERT & GARRY LLP

By /s/ Douglas M. Deibert
Douglas M. Deibert
200 East 10th Street - Suite 200
Sioux Falls, SD 57104
(605) 336-0828

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Appeal No. 29616

YANKTON COUNTY, STATE OF SOUTH DAKOTA

Plaintiff and Appellee,

v.

LUKE E. MCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC

Defendants and Appellants

v.

YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; and ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY

Third-Party Defendants and Appellees

Appeal from the Circuit Court, First Circuit
Yankton County, South Dakota

The Honorable Patrick T. Smith
Circuit Judge

APPELLEE' S BRIEF

(Patrick E. Garrity)

ATTORNEYS FOR APPELLANTS:
Meredith A. Moore

Jonathan A. Heber
Fitzgerald Vetter Temple, Bartell &
CUTLER LAW FIRM, LLP
140 N. Phillips Ave., 4th Floor
Sioux Falls, SD 57104

ATTORNEYS FOR APPELLEES:
Mark D. Fitzgerald
(only for Garrity)

Henderson
1002 Riverside Blvd Suite 200
Norfolk NE 68702-1407

Douglas M. Deibert
Cadwell Sanford Deibert & Garry LLP
200 E 10th Street, Suite 200

Sioux Falls, SD 57104

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PRELIMINARY STATEMENT

This appellee will be referred to as "Garrity" in this brief. The other appellees, including States Attorney Robert W. Klimisch, will be referred to collectively as the "Yankton County Entities". Appellant B-Y Internet, LLC, is referred to as "B-Y" and appellant McAllister TD, LLC, is referred to as "MTD". References to documents found in the alphabetical index prepared by the Clerk of Courts will be referred to as "CI" and then to corresponding page numbers found on the index.

JURISDICTIONAL STATEMENT

Garrity concurs with the appellants' jurisdictional statement.

STATEMENT OF LEGAL ISSUES

1. Did the appellants comply with the notice requirements of SDCL §§ 3-21-2 and 3-21-3? The circuit court ruled that the appellants had not complied with the notice requirements of the statutes.

Myears v. Charles Mix Cty., 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474.

Anderson v. Keller, 2007 S.D. 89, 739 N.W.2d 35.

Olson v. Equitable Life Assur. Co., 2004 S.D. 71, ¶ 31, 681 N.W.2d 471, 477–78.

Smith v. Neville, 539 N.W.2d 679, 682 (S.D. 1995).

Layton v. Chase, 82 S.D. 270, 274, 144 N.W.2d 561, 563 (1966).

2. Was State's Attorney Klimisch entitled to absolute prosecutorial immunity in connection with an injunction lawsuit filed against Luke McAllister, MTD and B-Y? The circuit court concluded that Klimisch was entitled to prosecutorial immunity.

Imbler v. Pachtman, 424 U.S. 409 (1976).

STATEMENT OF THE CASE

This is an appeal from a decision by Hon. Patrick T. Smith, First Circuit Court, Yankton County, South Dakota. The case was decided on motions for summary judgment filed by the Yankton County Entities and by Garrity.

Yankton County filed an action against Luke McAllister, MTD, and B-Y on June 13, 2018 seeking an injunction against them for violating a county zoning regulation which required a conditional use permit for the operation of a "wireless telecommunication facility". CI 2, ¶ 7-14. The three defendants filed separate answers and two of the defendants, Luke McAllister and MTD, filed counterclaims against Yankton for "barratry" alleging that they were not proper parties to the proceeding and B-Y was a separate "legal entity distinct from its members." CI 8 and 11. Approximately thirteen months after filing their initial responsive pleadings, on August 23, 2019, appellants filed an amended counterclaim against Yankton County and filed a third party complaint against the Yankton County Entities and Garrity seeking money damages and alleging the injunction lawsuit was an "abuse of process". CI 217.

In a separate count in the third party complaint, Count 2, appellants alleged that Garrity and States Attorney Robert Klimisch had engaged in a "civil conspiracy" to abuse process making each "vicariously liable" in the event either was not "directly liable" for abuse of process. CI 217, ¶ 76-78.

On September 11, 2020, the Yankton County Entities moved for summary judgment with regard to the third party complaint. CI 460. On September 16, 2020, Garrity separately filed a similar motion for summary judgment with regard to the third

party complaint. CI 545. The Yankton County Entities and Garrity asserted that the appellants had not complied with SDCL §§ 3-21-2 and 3-21-3 and that Klimisch was entitled to absolute prosecutorial immunity in connection with the initial injunction lawsuit against appellants. In a memorandum decision dated December 14, 2020, the circuit court agreed with the Yankton County Entities and Garrity and granted summary judgment in their favor. CI 802 (memorandum decision) and 831 (order granting summary judgment).

As related by the appellants in their Appellants' Brief (Appellants' Brief at 12), because the counterclaim made the same abuse of process allegations against Yankton County as were made in the third party complaint against the Yankton County Entities and Garrity, and because the defenses to the counterclaim matched the Yankton County Entities' and Garrity's defenses to the third party complaint, Yankton County moved for summary judgment on January 19, 2021. CI 815. On February 1, 2021, the circuit court issued its amended memorandum decision and order finding in favor of Yankton County and granting the County summary judgment on the counterclaim. CI 828 (amended memorandum decision) and 831 (order).

Following this order dismissing the counterclaim, the only claim remaining for trial was Yankton County's original injunctive claim. On March 12, 2021, Yankton County voluntarily moved to dismiss its injunction case. CI 952. On the same date, the circuit granted the motion to dismiss and a notice of entry of the order of dismissal was filed March 18, 2021. CI 953. Appellants filed their notice of appeal on April 13, 2021. CI 958.

STATEMENT OF THE FACTS

Garrity served as Yankton County Zoning Administrator from 2009 to 2019. CI 547, ¶ 1. It is undisputed in this record that Garrity began a medical leave from his job with the County on February 19, 2019 and had no contact with the County on job-related matters after that date. CI 547, ¶ 2. Garrity's employment with Yankton County formally ended on August 23, 2019. CI 547, ¶ 2.

Cam McAllister, an individual who identifies himself as a "consultant" for B-Y, includes in his affidavit email correspondence between himself and Garrity. CI 644, Exhibit A. In an email dated October 9, 2017, Cam McAllister tells Garrity that B-Y will be "deploying a Wireless Internet infrastructure" and asks Garrity if there are either permits and licenses, other than sales and use tax permits, required of a wireless internet service. In response, Garrity asks McAllister if the infrastructure includes "poles, antenna or other visible components" and McAllister replies that equipment will be attached to existing structures and that no towers are anticipated.

Garrity then tells Cam McAllister that "Yankton Wireless received a Conditional Use Permit to do this type of work" a few years previous, and asks McAllister if he is associated with that project. To this point, all of the emails are forwarded in the afternoon on October 9, 2017.

McAllister responds to Garrity's email about Yankton Wireless on October 10, 2017. He tells Garrity in his email that B-Y is "a separate entity" and describes services B-Y will offer customers. McAllister repeats that B-Y is not building structures and states that he is merely inquiring as to whether additional permits are needed to emit a wireless

signal. McAllister states in his affidavit that Garrity never responded to this October 10, 2017 email. CI 644, ¶ 3.

Chronologically, Garrity next appears in this record on March 2, 2018 when he writes a letter to Luke McAllister informing him that Yankton County Zoning Ordinance No. 16, Article 25, Section 2503 requires a conditional use permit to operate a wireless communications facility in Yankton County. CI 616, Exhibit C. The letter is copied to States Attorney Klimisch and to the Yankton County Planning Commission. Garrity's letter warns Luke McAllister that the Yankton County zoning ordinance:

> requires all parties notified of a violation respond to the Yankton County Planning & Zoning office, within seven (7) days of receipt of this letter. Article 23, Section 2303 Penalties For Violations, specifically states 1. Fine not to exceed $200.00 per violation. 2. Imprisonment for a period no [sic] to exceed thirty (30) days per violation. 3. Both fine and imprisonment. 4. An action for civil injunctive relief pursuant to SDCL 21-8.

CI 616, Exhibit C.

Luke McAllister states in his affidavit in opposition to summary judgment that B-Y engaged in further discussion with Garrity and Klimisch in March and April, 2018 concerning the demand that B-Y obtain a conditional use permit. CI 616, ¶ 11. According to the affidavit, a meeting occurred between Luke McAllister, Garrity, and Klimisch in late March, 2018. Luke McAllister attempted to summarize his version of

what occurred at the meeting in an email he wrote to States Attorney Klimisch on April 20, 2018. CI 616, ¶ 12 and Exhibit F. In the email to Klimisch, Luke McAllister initially maintains that the language of the zoning ordinance does not require that B-Y obtain a conditional use permit. He then summarizes the late March meeting with the county officials and notes that Garrity had suggested the issue be presented to the Yankton County Planning Commission for decision; that Garrity had advised McAllister that he, Garrity, would put the matter on the Commission's agenda; and that McAllister had checked twice in April to see if Garrity had put the matter on the Commission's agenda and had learned that Garrity had not. CI 616, ¶ 12. Luke McAllister concludes the email to Klimisch with a request that Klimisch write a letter confirming that B-Y did not need a conditional use permit. CI 616, ¶ 12. Luke McAllister states that neither Klimisch nor Garrity responded to the April 20, 2018 letter to Klimisch. CI 616, ¶ 13.

In his affidavit, Klimisch states that on May 31, 2018, on behalf of Yankton County, he filed the injunction lawsuit. CI 525, ¶ 2. Klimisch signed the complaint on that date. The complaint was actually filed approximately two weeks later on June 13, 2018. CI 2. Klimisch states that he alone made the decision to file the lawsuit. CI 525, ¶ 3. Yankton County's complaint quotes from its Zoning Ordinance. According to the complaint, a "wireless telecommunication facility" is defined:

> It means a structure, facility or location designed, or intended to be used as, or used to support Antennas or other transmitting or receiving devises. This includes without limit, Towers of all types and kinds and structures,

> including, but not limited to buildings, .. [sic] or other structures that can be used as a support structure for Antennas or the functional equivalent of such. ... It is a structure and facility intended for transmitting and! or receiving radio, television, cellular . . . commercial satellite services, microwave services and any commercial wireless telecommunication service not licensed by the FCC.

CI 2, ¶ 7.

The complaint signed by Klimisch alleges that Luke McAllister and MTD filed with the South Dakota Secretary of State a fictitious business name registration for "B-Y Internet"; that B-Y had filed with the Secretary of State a fictitious name registration for "South Dakota Wireless Internet"; that Luke McAllister is an agent and organizer for both B-Y and MTD; and that B-Y is doing business as "B-Y Internet" and "South Dakota Wireless Internet". CI 2, ¶ 9-13. The complaint concludes with an allegation that the defendants have not complied with Yankton County Zoning Ordinance No. 16 requiring a conditional use permit to operate a wireless internet business.

The three defendants filed separate answers of July 5, 2018. Luke McAllister's and MTD's responsive pleadings included counterclaims for barratry. CI 8 (Luke McAllister's July 5, 2018 answer and counterclaim), Appellants' "SDI App" at 00070 (MTD's similar July 5, 2018 answer and counterclaim). As a claim for relief from Yankton County's alleged barratry, both McAllister's and MTD's counterclaims seek damages for "attorneys fees and disbursements".

On August 23, 2019, B-Y, Luke McAllister and MTD, filed a third party complaint against the Yankton County Entities and Garrity. The lengthy third party complaint begins its narration with allegations concerning a different MTD business, "Fire & Ice", engaged in recreational and seasonal sales at roadside location in Yankton County. The gist of the Fire & Ice allegations are that the Yankton County Entities and Garrity intentionally harassed Fire & Ice with zoning regulations to the point that the business "temporarily ceased operations" in the Fall of 2017. CI 817, ¶ 10-16. The third party complaint then continues with the theme that the Yankton County Entities' and Garrity's handling of B-Y's wireless internet operations was *more of the same* – intentional harassment, stalling, and regulatory obstruction – culminating in the injunction lawsuit filed by Yankton County on June 13, 2018. CI 817, ¶ 17-46.

As related above, Garrity was no longer working for Yankton County as of February 19, 2019 and his employment with the county formally ended on August 23, 2019, the same day as the third party complaint was filed. Garrity states in his affidavit that he was unaware of any claim for damages against him until his wife was served with his summons and the third party complaint on September 7, 2019. CI 547, ¶ 3. CI 282 (sheriff's return for service on Garrity).

ARGUMENT

1. SDCL § 15-26A-67 permits adoption of arguments by reference.

While Garrity is now separately represented and separately filed his own motion for summary judgment, Garrity is a party to the third party defendants' answer to the third party complaint filed October 30, 2019. CI 307. Pursuant to SDCL § 15-26A-67,

Garrity hereby adopts in total the brief of appellees Yankton County Entities.

2. Substantial compliance with SDCL §§ 3-21-2 and -3 did not occur here.

SDCL § 3-21-2 provides:

> No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury.

SDCL § 3-21-3(2) states that in the case of a claim against a county, notice is to the county auditor.

In this case, there is no evidence that any writing expressing a claim against the county or a county employee was filed with the county auditor. All of the third-party defendants, and eventually Yankton County as defendant on the counterclaim, moved for summary judgment on the basis that the required statutory notice to the county and its employees was not provided by the appellants.

In *Myears v. Charles Mix Cty*., 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474, the South Dakota Supreme Court recognized, as a matter of law, that substantial compliance with SDCL § 3-21-2 was sufficient to maintain a claim against a public entity or employee. According to the *Myears* court, "substantial compliance" is

> actual compliance in respect to the substance essential to

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

In considering the intent of the SDCL § 3-21-2 , the *Myears* court observed that the notice statute had seven objectives:

> '(1) To investigate evidence while fresh; (2) to prepare a defense in case litigation appears necessary; (3) to evaluate claims, allowing early settlement of meritorious ones; (4) to protect against unreasonable or nuisance claims; (5) to facilitate prompt repairs, avoiding further injuries; (6) to allow the [public entity] to budget for payment of claims; and (7) to insure that officials responsible for the above tasks are aware of their duty to act.

Myears v. Charles Mix Cty., 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474, quoting from *Larson v. Hazeltine,* 1996 SD 100, ¶ 19, 552 N.W.2d 830, 835, which is quoting from *Budahl v. Gordon David Assoc*., 287 N.W.2d 489, 492 (S.D.1980).

Appellants contend there was substantial compliance with SDCL § 3-21-2.

Appellants' Brief at 22-28. One argument advanced by the appellants is a claim that the filing of the barratry counterclaims by Luke McAllister and MTD on July 5, 2018, constituted substantial compliance with the tort claims notice statutes. CI 6, 8. Noteworthy, the court in *Myears* began its opinion by observing that the compliance at issue in that case was made "[b]efore suing a public entity". *Myears v. Charles Mix Cty*., 1997 S.D. 89, ¶ 1, 566 N.W.2d 470. Appellants' argument that filing the actual claim in a court proceeding is tantamount to pre-action notice amounts to a waiver of the requirement of a claim. The South Dakota Supreme Court has never accepted that proposition and the circuit court did not accept that claim here either. As the circuit court succinctly stated, "[i]f a counterclaim were considered sufficient written notice, there would be no need for SDCL §3-21-3." CI 802, p. 6. The circuit court then added:

> Defendants claim that they at least substantially complied with SDCL §3-21-2 in serving their counterclaim on July 3rd, 2018 on Klimisch, the Yankton County State's Attorney. They also claim that the purpose of the statute was fulfilled because Yankton County then answered the counterclaim of barratry and proceeded with the civil action. However, that is not the purpose of the statute. As stated above, the counterclaim was *not* written notice that stated the time, place, and cause of injury. The county has no duty to inform Defendants of the statutory deadline and participating in the civil action does not constitute notice.

CI 802, pp 7-8.

Moreover, the actual "barratry" counterclaims which appellants suggest are substantial compliance with the notice requirements for a tort claim merely conclusively state that Yankton County's complaint against MTD and Luke McAllister are "frivolous", "meritless" constitute "barratry", and were "undertaken without probable cause". CI 8, ¶ 12-13. As appellants flatly observe in their brief, McAllister and MTD counterclaimed for barratry "on the basis that Luke and MTD were not proper parties to a lawsuit that was purportedly seeking to enjoin them from operating a wireless internet business." Appellants Brief at 6. Substantively, the counterclaims provide the public entity with little that would serve to accomplish the seven objectives identified in *Myears*.

With regard to the objectives of investigating the evidence while fresh, preparing defenses and evaluating claims, the barratry counterclaims merely infer that Yankton County was failing to recognize that B-Y was the wireless internet entrepreneur and had a separate legal existence apart from Luke McAllister and MTD. There is nothing in the barratry claim to give anyone a scintilla of notice that the Yankton County zoning apparatus was now under attack for a series of actions against Luke McAllister and his businesses.

With respect to the objectives of facilitating remedial action or insuring officials responsible for proper government action are made aware of their duty to act, there was nothing from the barratry counterclaim that would give any official involved with zoning any notice to do anything differently.

Anderson v. Keller, 2007 S.D. 89, 739 N.W.2d 35, involved a collision between a

driver and an irrigation district employee. In that case, the Supreme Court determined that substantial compliance was not accomplished by an insurance form stating the time and location of the alleged claim submitted by the injured driver and where there was also evidence that the driver actually told the manager and secretary of the district. Although not specifically stated in the court's opinion, presumably, the form would have also identified the claimant and the irrigation district. On appeal, the court affirmed the circuit court's conclusion that a failure by the driver to include in the insurance form that he sustained a personal injury was fatal with regard to substantial compliance. *Anderson v. Keller*, 2007 S.D. 89, ¶ 17, 739 N.W.2d 35, 41.

Anderson demonstrates exactly how close to statutory notice the "substantial notice" must be to qualify as adequate notice. As construed by the Supreme Court, substantial notice truly must demonstrate "actual compliance in respect to the substance essential to every reasonable objective of the statute." *See Myears v. Charles Mix Cty*., 1997 S.D. 89, ¶ 13, 566 N.W.2d 470, 474. The barratry counterclaims fails almost entirely to accomplish any of the objectives of the *pre-suit* statutory notice statutes. In this case, and with regard to Garrity specifically, a claim that the McAllister and MTD barratry counterclaims are enough to put him on notice of a claim that he would be sued for abuse of process and for a civil conspiracy to commit abuse of process is particularly egregious.

In its memorandum decision, the circuit court also observed that appellants did not give timely written notice to the *county auditor* required by SDCL § 3-21-3(2). CI 802, p. 8. In *Myears*, the county auditor did not receive formal notice as required by the

statute, but the Supreme Court considered substantial compliance had been achieved and summarized the substantial compliance as follows:

> The auditor was aware of Myears' . . . well within the required notice period. Obviously, the county commission felt it had adequate notice and information to consider and deny the claim on its merits. Objectives (1), (2), and (3) from *Budahl* were attained, as the county and its insurer had adequate time to investigate within the 180 days. They conducted their own inquiry, including a site visit where pictures of the accident location were taken. Objectives (4), (5), and (6) were achieved, as the county commission evaluated the claim on its merits and denied it well within the 180 days, therefore having an opportunity to budget for any uninsured liability. *Id*. The engineer had notice within the statutory period, allowing an opportunity to 'facilitate prompt repairs' if necessary. Finally, objective (7) was also realized because all the necessary participants were aware of their duty to act, and in fact did respond.

Myears v. Charles Mix Cty., 1997 S.D. 89, ¶ 14, 566 N.W.2d 470, 474. Clearly, in *Myears,* in considering the substantial compliance issue, the court focused on whether the county auditor and the county commissioners had adequate, pre-suit notice, and determined that notice was sufficient under the circumstances because the commissioners

had acted on the claim and denied it.

Myears does not, however, stand for the proposition that actual notice to a county auditor is sufficient. In *Anderson v. Keller*, 2007 S.D. 89, ¶ 11, 739 N.W.2d 35, 39, where there was evidence that the secretary for the irrigation district had actual notice of the claim, the court considered the point important enough to note that the Supreme Court "had never recognized actual knowledge of a person designated to receive notice for a public entity as a substitute for a plaintiff's adequate notice of claim."

In this case, appellants concede that they "did not provide notice directly to the county auditor." Appellants' Brief at 24. Appellants take the position, however, that notice to States Attorney Klimisch is sufficient compliance with SDCL §§ 3-21-2 and -3 because Klimisch was presumably in a position to take appropriate action. Appellants' Brief at 23-24. That is not the law in South Dakota and the circuit court noted as much in its memorandum opinion. The court observed that Klimisch is not required to inform the county auditor or county commissioners every time a counterclaim is filed. CI 802, p. 8.

The South Dakota Supreme Court discussed the county auditor's unique position as the party to receive claim notice in *Olson v. Equitable Life Assur. Co.*, 2004 S.D. 71, ¶ 31, 681 N.W.2d 471, 477–78. According to the *Olson* court, when a government employee is sued, it is not sufficient to give notice to that employee because SDCL § 3-21-3 specifically requires that notice be given to a person officially responsible to receive notice. "This is presumably a person trained and authorized to act in the government's best interests." *Id.* In the situation of a tort claim against the county, this is specifically

the auditor who is the clerk for the county commissioners. SDCL § 7-10-1. The county auditor has a statutory duty to keep and preserve accurate records for the commissioners. Highlighting the significance of specific notice to the party statutorily identified in SDCL § 3-21-3, the *Olson* court observed, contrary to appellants arguments here, "Mere knowledge of the possibility of a claim by one employee of the county, without more, cannot serve as 'constructive notice' to the county auditor. Such a construction would eviscerate SDCL 3–21–2."

3. Garrity is not estopped from claiming a failure to give notice.

The South Dakota Supreme Court has recognized that a public entity may be estopped from requiring strict compliance with SDCL § 3-21-2. *See Anderson v. Keller*, 2007 S.D. 89, ¶ 11, 739 N.W.2d 35, 39 (recognizing estoppel but concluding it did not apply in that case). In *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995), the claimant received a check for property damages and filled out a claim form for the company adjusting the claim for the state. Under those circumstances, the Supreme Court determined that the claimant had essentially been mislead with respect to making a timely personal injury claim.

In this case, there are no facts upon which the appellants can rely upon to infer that any of the Yankton County Entities and Garrity – and particularly Garrity – mislead the appellants into believing that appellants had complied with notice requirements. As the Supreme Court notes in the *Smith v. Neville*, the public entity has no duty to provide legal advice respecting notice compliance. *Smith v. Neville*, 539 N.W.2d 679, 681–82 (S.D. 1995). The circuit court recognized this and twice observed in its memorandum

decision that Yankton County had no duty to tell McAllister, MTD, and B-Y that they had a duty to comply with the tort claims notice statutes. CI 802, pp 8 and 9.

Appellants' estoppel claim apparently proceeds as follows. First, when the barratry counterclaim was made by MTD and McAllister in July, 2018, appellants were prejudiced because Yankton County's reply did not affirmatively allege a failure to give notice required by SDCL §§ 3-21-2 and-3. According to the appellants, "[n]otably, the Answer [Reply] did not contain any affirmative defense for failure to provide notice under SDCL § 3-21-2." Appellants' Brief at 28-29. Again, the County had no duty to warn appellants of the tort claim notice requirements.

Second, appellants apparently seek to show the detrimental reliance needed for estoppel by claiming that they were somehow lulled into believing that Yankton County would never plead an affirmative defense of notice to the barratry claim because of stipulations, serving discovery, and making disclosures. Appellants' Brief at 29. With regard to these items – referred to by the appellants as "docket-related activities" – other than perhaps a motion to compel, the activities appear to be routine litigation matters. There is nothing about any of these actions that demonstrates Yankton County was misleading the defendants.

Third, appellants claim that – apparently suddenly – consistent with their characterization of the history of the case as being "long and tortured" – "[o]n October 30, 2019 – more than a year after Luke [McAllister] and MTD served their claims of barratry", Yankton County alleges the notice defense. Appellants' Brief at 30. Appellants fail to include in their estoppel chronology the appellants' filing of a third

party complaint on August 23, 2019, naming, for the first time, Garrity, Klimisch, and some Yankton County governmental units as additional parties to the case. Appellants fail to include in their estoppel analysis the fact that what was formerly merely a claim that Luke McAllister and MTD were not proper party defendants had now become a claim for abuse of process and civil conspiracy with respect to Garrity and Klimisch beginning years before and concerning other McAllister businesses.

Garrity's first responsive pleading in this case was the third party defendants' answer filed October 30, 2019. CI 307. In that pleading Garrity alleged as an affirmative defense the appellants' failure to comply with statutory notice provisions. Garrity did not sandbag anyone.

While estoppel does not work in this case against any of the appellees, including Yankton County, appellants makes an estoppel argument that is particularly inapplicable to Garrity. Appellants contend that rather than plead a failure to give proper tort claim notice in its initial reply to the 2018 barratry counterclaim, Yankton County "participated in the lawsuit for over one year before raising the affirmative defense." Appellants' Brief at 30. Appellants contend that a failure to estop to the appellees would be unjust and harsh. Appellants Brief at 30. Appellants fail to acknowledge that during this period where they say they were mislead, Garrity was not even a party to the suit.

Appellants' estoppel cases are distinguishable. In *Furgeson v. Bisbee*, 932 F. Supp. 1185 (D.S.D. 1996), the federal district court, deciding the case based on South Dakota public liability law, determined that a pre-suit letter to Governor Mickelson followed by a pre-suit letter from the governor to the claimant explaining that an

investigation of the claim was in progress and that the governor would ensure a proper investigation was done was sufficient notice. In the letter to the claimant, the governor did not advise her that she needed to notify any other official and, as such, the governor's letter would lead "an objectively reasonable person to believe that the proper authorities had received notice". *Id*. at 1188.

In this case, no such notice was made to anyone prior to the filing of the third-party complaint. No assurance was made by anyone that the matter was being handled for the claimants in such a way that the claimants would be relieved of a responsibility for giving notice.

In *Erickson v. County. of Brookings,* 1996 S.D. 1, 541 N.W.2d 734, adjusters for the defendant county made affirmative representations to the plaintiffs' lawyer that an investigation of the claim was ongoing and essentially admitted to a strategy to stringing plaintiff along until her opportunity to file a claim expired. This was not "'mere innocent silence or inaction . . .."' *Id. at* ¶ 15, 541 N.W.2d at 737. In this case, on the other hand, there are no similar affirmative representations.

Appellants cite the dissenting opinion in *Wolff v. Sec'y of S. Dakota Game, Fish & Parks Dep't,* 1996 S.D. 23, 544 N.W.2d 531. The majority opinion in *Wolff*, on the other hand, determined that the State did not waive a notice defense by failing to plead it as an affirmative defense in its answer filed years before it filed its motion to dismiss on the basis of failure to give pre-suit notice required by SDCL § 3-21-2. The facts of the case reveal years elapsed between the filing of the initial suit and the filing of the dispositive motion to dismiss and that significant discovery was conducted prior to the filing of the

motion for summary judgment. None of this was sufficient for estoppel to apply. Obviously, contrary to appellants' insinuation here that participation in a civil action amounts to estoppel conduct, the *Wolff* case is authority for the opposite.

Finally, Appellants' footnote 9 deserves comment. Appellants Brief at 31, n. 9. In that footnote, appellants contend that Garrity should be estopped from claiming a failure to provide proper notice because of his conduct "prior to the commencement of the lawsuit." The illogic of the argument is stunning. The claim here is the abuse of process injunction lawsuit. The appellants are contending that once the lawsuit was filed, they were mislead into not serving a tort claim notice by conduct of the appellees which somehow made them believe their abuse of process claim – when they ultimately decided to file it a year later – was exempt from SDCL § 3-21-2. With regard to Garrity, however, his conduct causing their detrimental reliance in not timely giving notice of their claim incredibly occurred before the claim existed.

4. Fraudulent concealment is not available here to toll the notice requirements of SDCL § 3-21-2.

Appellants argue that the third-party defendants fraudulently concealed their real motive for filing the injunction lawsuit in 2018 which was to harass and financially destroy Luke McAllister. Appellants' Brief at 21-22. *See Gakin v. City of Rapid City*, 2005 S.D. 68, ¶ 18, 698 N.W.2d 493, 499 (fraudulent concealment may toll a notice of claim provision). Fraudulent concealment consists of an affirmative act or conduct on the part of the party charged with it which is designed to prevent, *and does prevent*, the discovery of the cause of action. *Roth v. Farner–Bocken Co.*, 2003 SD 80, ¶ 14, 667

N.W.2d 651, 660.

Without identifying any conduct amounting to an act of fraudulent concealment, appellants argue they discovered the *true* reasons for the lawsuit about eleven months after it was filed. Appellants contend they learned of the true motive for the third-party defendants' actions on May 17, 2019 when a county commissioner in some manner revealed the "true" reason for the injunction lawsuit. Appellants Brief 20 and 22.

Appellants submit that the dialogue recorded at the meeting between Cam McAllister and two Yankton County commissioners on May 17, 2019 is significant and revealing. Appellants' Brief at 8-9. Actually, what appellants contend is an accurately transcribed dialogue in their brief – and even more so the actual recording – is more vague and confusing than significant and revealing. The circuit court's description of the meeting in its memorandum decision does not reflect that the circuit court believed the conversation revealed a county-government effort to cover up a true reason for the injunction suit. CI 802, 10-11.

The circuit court could not find, and appellants cite no conduct by this third-party defendant – indeed – by any third-party defendant, amounting to an act of concealment. Without accepting appellants' characterizations of the meetings in May, 2019, and further without accepting the accuracy of the transcriptions of the meetings submitted by the appellants, whatever was apparently "revealed" to Cam McAllister at those meetings was never concealed in the first place.

Appellants devote several pages of Brief to the notion that the third-party defendants concealed the "true motive" for their lawsuit, but never identify an action of

concealment by any of the third-party defendants– least of all this third-party defendant – amounting to an act or conduct designed to prevent the appellants from learning anything or which actually did prevent the appellants from learning whatever they needed to learn in order to file their third-party complaint.

Underlying appellants' claim that the injunction lawsuit was malicious and unfounded is the appellants' observation that the Yankton County Planning and Zoning Commission unanimously determined that B-Y did not need to obtain a conditional use permit. Appellants' Brief at 29. If the Planning Commission made that determination, continues the appellants' argument, then Garrity and Klimisch must have been attempting to harass Luke McAllister and put B-Y out of business. The circuit court did not agree the record demonstrated this and noted simply that "the underlying suit was brought by Klimisch because Garrity believed the Defendants were in violation of a zoning ordinance." CI 802, p. 11. Further, we note here that appellants' explanation for what they contend is the obvious fallacy of Garrity's position that B-Y was violating the Yankton County Zoning Ordinance is based upon construction of zoning ordinances that are not in the record. Appellants Brief at 29, n. 8, 34. The Zoning Regulations found at SDI App. 00076 and 00077 are not in the record.

5. SDCL § 3-21-2 requires notice within 180 days after injury.

SDCL § 3-21-2 is clear. It states that no action may be maintained against a public entity such as Yankton County or its employees, such as Garrity and Klimisch, unless written notice is provided within 180 days after *injury*. Appellants argue that the claim for barratry would not accrue until after a judgment of dismissal was achieved.

Appellants' Brief at 16-17. The circuit court disagreed with this "accrual" argument and focused on the language of the statute: "The notice requirement of §3-21-2 would need to have happened within one hundred and eighty days after the Defendants responded to the initial complaint, because that is when their injury occurred." CI 802, pl 8. When Luke McAllister and MTD filed their barratry counterclaims they impliedly agreed with this conclusion because they were certainly contending they were damaged. Their July 5, 2018 counterclaims claim they are "entitled to damages including, but not limited to, attorney's fees and disbursements of defending this frivolous and meritless claim." CI 8, ¶ 13.

In an attempt to avoid the consequence of having commenced a "barratry" claim for money damages in their July 5, 2018 counterclaims without having first given pre-suit notice required by SDCL § 3-21-2, Luke McAllister and MTD contend on appeal that the "accrual period to assert a claim for barratry does not begin until the lawsuit is dismissed favorably to the defendant." Appellants' Brief at 16. In their analysis of this contention, McAllister and MTD footnote two legal points, without citation, which deserve particular scrutiny:

(1). McAllister and MTD infer that perhaps their mistake was pleading the barratry claim in the first place as perhaps is was prematurely plead. The circuit court, they suggest, could have dismissed the claims without prejudice and allowed McAllister and MTD to re-file. Appellants' Brief at 16, n.2.

(2). McAllister and MTD state that in most jurisdictions barratry and malicious prosecution are the same tort and the elements of malicious prosecution require a

termination of proceedings favorable to the claimant. Appellants' Brief at 16, n. 3.

In South Dakota, the claim of barratry is statutorily described and the description specifically states that barratry does not require a favorable termination of the prior proceeding:

> Barratry is the assertion of a frivolous or malicious claim or defense or the filing of any document with malice or in bad faith by a party in a civil action. *Barratry constitutes a cause of action which may be asserted by filing a pleading in the same civil action in which the claim of barratry arises or in a subsequent action.* A claim of barratry shall be determined in the same manner as any other substantive cause of action asserted in that civil action. [Emphasis supplied].

SDCL § 20-9-6.1.

South Dakota has recognized the tort claim of malicious prosecution, but its elements are different SDCL § 20-9-6.1. The six elements include a termination of the prior proceeding:

> 1. the commencement or continuance of an original criminal or civil judicial proceeding;
>
> 2. its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding;
>
> 3. *its bona fide termination in favor of the present plaintiff*;

4. the absence of probable cause for such proceeding;

5. the presence of malice; and

6. damages conforming to legal standards resulting to plaintiff.

[Emphasis added]. *Miessner v. All Dakota Ins. Assocs., Inc.*, 515 N.W.2d 198, 200 (S.D. 1994).

Moreover, appellants are conflating barratry and malicious prosecution with "abuse of process" which is an entirely different claim and was the claim actually alleged in the appellants' third party complaint against Garrity. CI 217, ¶ 65-79. The case of *Layton v. Chase*, 82 S.D. 270, 144 N.W.2d 561 (1966), is particularly instructive in untangling the claims here. According to the court:

> Abuse of process consists of the malicious misuse or misapplication of legal process after its issuance to accomplish some collateral purpose not warranted or properly attainable thereby. [Citations omitted] It is not an action for maliciously causing legal process to be issued. [Citations omitted] Its essential elements are: (1) The existence of an ulterior purpose, and (2) A wilful act in the use of the process not proper in the regular prosecution of the proceeding. [Citations omitted].
>
> The wrong [citations omitted] is said to be 'committed when the actor employs legal process in a

> manner technically correct, but for a wrongful and malicious purpose to attain an unjustifiable end or an object which it was not the purpose of the particular process employed to effect. *It differs from malicious prosecution in that it is not necessary to show that the action in which the process was used was without probable cause or that it terminated favorably to the plaintiff.*

[Emphasis added]. *Layton v. Chase*, 82 S.D. 270, 274, 144 N.W.2d 561, 563 (1966).

The proper analysis is that appellants counterclaimed for barratry without giving proper pre-suit notice. A year later, appellants brought a claim for abuse of process, which is not barratry and is not malicious prosecution, against additional parties without giving pre-suit notice. The claim of abuse of process specifically does not require the favorable termination of a prior proceeding to be activated. See also *Cruz v. City of Tuscon*, 243 Ariz. 69, 401 P.3d 1018 (2017)(involving "accrual" public entity notice provision and abuse of process claim, court observes that claim accrues when plaintiff first aware she was injured and was put on notice to investigate and not when final judgment is issued in previous case).

South Dakota's tort claim notice statute states that notice must be given to the county auditor within 180 days from injury. SDCL § 3-21-2. The circuit court here observed that while appellants were claiming their "barratry" claim did not "accrue" until the suit against them was favorably terminated, the statute controlled and, therefore, notice would have been required 180 days from *injury* which the circuit court construed

to be having to file a responsive pleading to the initial injunction complaint. CI 802, p. 8. Presumably, this is when appellants began to incur attorney's fees damages as they claim were being caused by the filing of the injunction action.

As an abuse of process claim, the claim ultimately filed against Garrity in the third party complaint, the date of injury and the date of accrual are the same date in any event. The claim here is that Garrity and others had a true motive to drive McAllister out of business. Theoretically, the act which was the initial act constituting an abuse of process would have been the filing of the complaint on June 13, 2018. The date of injury for abuse of process was probably also June 13, 2018, or at the latest, July 5, 2018, when appellants were compelled to incur attorney's fees and respond to the alleged wrongful use of process.

6. Klimisch is entitled to prosecutorial immunity.

Robert Klimisch states in his affidavit that the decision to file a civil action was solely his decision. CI 525, ¶ 3. Klimisch continues in his affidavit by stating in the next paragraph that none of the other parties identified as the Yankton County Entities in this Brief, nor Garrity, had any role in connection with that decision. CI 525, ¶ 4. These statements are repeated as statements of undisputed facts made in connection with the motions for summary judgment file.

Appellants responses to these contentions are contained in appellants' objections and responses to undisputed material facts filing. CI 707, pp. 2-3. Appellants identify paragraph 10 and Exhibit E from Luke McAllister's affidavit and paragraph 4 and Exhibit B and C to Cam McAllister's affidavit as evidence controverting Klimisch's

claim of having sole responsibility for filing the injunction suit. The appellants' reference to paragraph 10 and Exhibit E in Luke McAllister's affidavit is simply to Garrity's letter dated March 2, 2018 stating that wireless communications facilities require conditional use permits and listing the possible penalties. CI 616, ¶ 10 and Exhibit E. The appellants' references to paragraph 4 and Exhibits B and C in Cam McAllister's affidavit are to his May 17, 2019 meeting with two county commissioners. None of this creates an issue of material fact respecting States Attorney Klimisch's statement that he was the sole individual who decided to file the injunction suit.

The circuit court below, citing *Imbler v. Pachtman*, 424 U.S. 409 (1976), observed that a State's Attorney such as Klimisch has absolute *prosecutorial* immunity from civil suit for acts done in the role of an advocate for the State. CI 707, p. 11. While prosecutorial immunity protects a state's attorney in connection with criminal or civil proceedings, prosecutorial immunity does not protect the state's attorney from administrative or investigative acts. *Imbler* at 430.

Citing cases from other jurisdictions, appellants claimed in the circuit court and on appeal here that there exists a narrow or limited exception to prosecutorial immunity for state's or district attorneys who have both a conflict of interest and knowledge that charges filed are baseless. Appellants' Brief at 32. *See Stevens v. McGimsey*, 99 Nev. 840, 673 P.2d 499 (1983) (recognizing such an exception in Nevada where charges were "baseless" and district attorney motivated by personal interest).

Without determining whether South Dakota should recognize this limited exception, the circuit court here determined that Klimisch did not have a conflict of

interest. CI 802, p. 12. Klimisch has merely represented another party to a real estate transaction with MTD. There was no evidence that Klimisch had acquired any confidential information from MTD or McAllister by reason of the real estate transaction. CI 802, pp. 12-13. The circuit court further determined that Klimisch action in filing the mandatory injunction lawsuit was obviously quasi-judicial and therefore conduct immune from suit, and that the injunction suit was not baseless but rather founded on Garrity's information. CI 802, p. 13. In response to the trial court's conclusions, appellants' response is to claim that Klimisch's refusal to dismiss the lawsuit was baseless and to urge that there remain genuine issues of material fact regarding whether or not Klimisch had a conflict of interest. Appellants' Brief at 35. *See Powers v. Turner Cty. Bd. of Adjustment*, 2020 S.D. 60, ¶ 10, 951 N.W.2d 284, 288 (nonmoving party must present specific facts showing that a genuine, material issue for trial exists).

Garrity is not Klimisch's employer nor supervisor. The only "proof" appellants offer that Garrity was somehow involved in the conspiracy to abuse process is Garrity's letter of March 2, 2018. The letter is attached to Luke McAllister's affidavit as Exhibit C. In that letter, Garrity merely states that a conditional use permit is required for operation of a wireless communication facility in Yankton County and quotes an ordinance on the consequences for failure to comply. Appellants offer nothing to contradict Klimisch's statement that he was sole official to decide to file a suit against the defendants.

CONCLUSION

Garrity respectfully requests the court affirm the circuit court in all respects. Garrity is entitled to dismissal of the claim against him as a matter of law. The filing of a counterclaim in a lawsuit in which he was not a party is not sufficient notice under SDCL

§ 3-21-2. The appellants are not entitled to a determination that they substantially complied with the notice statutes, SDCL §§ 3-21-2 and -3. Garrity is not responsible for any conduct which would give rise to an estoppel against him, nor is there any evidence that Garrity fraudulently concealed any information. State's Attorney Klimisch is entitled to absolute prosecutorial immunity in connection with the injunction lawsuit and he alone made the decision to file suit.

PATRICK E. GARRITY, Appellee.

BY /s/ Mark D. Fitzgerald
FITZGERALD, VETTER, TEMPLE, BARTELL & HENDERSON
Suite 200
1002 Riverside Boulevard
P.O. Box 1407
Norfolk, NE 68702-1407
(402) 371-7770

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitations of SDCL § 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 7,732 words and 40,733 characters.

/s/ Mark D. Fitzgerald
FITZGERALD, VETTER, TEMPLE, BARTELL & HENDERSON
Suite 200
1002 Riverside Boulevard
P.O. Box 1407
Norfolk, NE 68702-1407
(402) 371-7770

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29616

YANKTON COUNTY, STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

v.

LUKE E. MCALLISTER, MCALLISTER TD, LLC, and BY INTERNET, LLC
Defendants and Appellants,

v.

YANKTON COUNTY COMMISSION; YANKTON COUNTY BOARD OF ADJUSTMENT; YANKTON COUNTY PLANNING COMMISSION; PATRICK E. GARRITY, in his capacity as YANKTON COUNTY ZONING ADMINISTRATOR and in his INDIVIDUAL CAPACITY; and ROBERT W. KLIMISCH, in his capacity as YANKTON COUNTY STATE'S ATTORNEY and in his INDIVIDUAL CAPACITY
Third-Party Defendants and Appellees.

Appeal from the Circuit Court, First Circuit
Yankton County, South Dakota

The Honorable Patrick T. Smith
Circuit Judge

APPELLANT'S REPLY BRIEF

ATTORNEYS FOR APPELLANTS:
Meredith A. Moore
Jonathan A. Heber
CUTLER LAW FIRM, LLP
140 N. Phillips Ave., 4th Floor
Sioux Falls, SD 57104

ATTORNEYS FOR APPELLEES:
Douglas M. Deibert
Cadwell Sanford Deibert & Garry LLP
200 E 10th Street, Suite 200
Sioux Falls, SD 57104

Mark D. Fitzgerald (*only for Garrity*)
Fitzgerald Vetter Temple & Bartell
1002 Riverside Blvd Suite 200
Norfolk NE 68702-1407

Notice of Appeal filed April 13, 2021

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INTRODUCTION

Appellants have alleged sufficient facts and law in order to overcome summary judgment on both issues of this appeal. First, any evidentiary rulings of the circuit must remain based on the scope of this appeal and the procedural posture of the case. Second, there are genuine issues of material fact pertaining to compliance with SDCL § 3-21-2. The date as to when the statute began to run is plausibly in dispute based on the application of ripeness and Appellees' clear fraudulent concealment. Additionally, a jury could reasonably find that Appellants substantially complied with SDCL § 3-21-2 provisions by filing counterclaims and/or sending a letter detailing the injury to Appellee Klimisch. Moreover, Appellees' failure to initially plead SDCL § 3-21-2 as a defense and their misleading conduct estops them from asserting it now. Finally, Klimisch is not entitled to assert prosecutorial immunity as a defense to explicit his violations of duty based on his personal and professional conflicts of interests. Therefore, this Court should reverse the circuit court's issuance of summary judgment on all accounts.

ARGUMENT

I. REVIEWING THE CIRCUIT COURT'S EVIDENTIARY RULING IS PROCEDURALLY IMPROPER.

The circuit court's disposition of the underlying issues does not allow this Court to review the admissibility of Appellants' Letter. Where a "circuit court's disposition of the issue does not leave a justiciable controversy for this Court as to [a] evidentiary ruling," this Court will not provide review. *See State v. BP plc*, 2020 S.D. 47, ¶ 29, 948 N.W.2d 45, 54-55 (citing *Franklin v. Forever Venture, Inc.*, 2005 S.D. 53, ¶ 10, 696 N.W.2d 545, 549). Since summary judgment was granted, albeit erroneously, there is no justiciable controversy as to an evidentiary ruling on Appellants' Letter. Thus, this Court cannot "consider the merits of the circuit court's evidentiary ruling under SDCL 19-19-408." *Id.*

Assuming *arguendo* it was reviewed, the Appellants' Letter is not barred by any rule of evidence nor could it be excluded if it were. Evidence is inadmissible to prove or disprove the validity of the claim if designated for settlement purposes. SDCL § 19-19-408. Appellants' Letter is offered only to show compliance with SDCL § 3-21-2, not to prove the validity of the underlying claims. Even if Appellants' Letter was erroneously admitted, Appellees must demonstrate prejudicial error, "which, in all probability, has produced some effect upon the final result[.]" *Vivian Scott Trust v. Parker*, 2004 S.D. 105, ¶ 14, 687 N.W.2d 731, 736 (citations omitted). Fatally, Appellees do not allege any judgment issued in their favor ultimately precludes the possibility of prejudice. *See BP plc*, 2020 S.D. 47, ¶ 29, 948 N.W.2d at 54-55 (the consideration of settlement evidence during summary judgment was not prejudicial). As such, the circuit court's evidentiary ruling must stand.

II. A GENUINE ISSUE OF MATERIAL FACT IS OVERWHELMINGLY PRESENT IN ISSUES DECISIVE TO SDCL § 3-21-2 COMPLIANCE.[1]

A. The Doctrine of Ripeness dictates SDCL § 3-21-2 began to run on March 12, 2021, resulting in a 180-day deadline of September 8, 2021.

Off-handed handed dismissal of the ripeness doctrine's relationship to SDCL § 3-21-2 abdicates centuries of caselaw. *See* Yankton County Entities' Brief ("YCE Brief") at 8 ("[e]vents and issues such as . . . ripeness, being prematurely pleaded, or other such words and phrases, have nothing to do . . . with the date of the triggering event for SDCL 3-21-2[.]"). The ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" *Wigg v. Sioux Falls School District*, 259 F. Supp. 2d 967, 977 (D.S.D. 2003). Accordingly, "[t]he plaintiffs need not wait until the *threatened injury* occurs, but the injury must be 'certainly impending.'"

1. Appellants decline to address Section E of the Yankton County Entities' brief because it is not within the scope of this appeal. YCE Brief at 23. Furthermore, the circuit court did not consider or make a decision on the independent tort doctrine.

South Dakota v. Mineta, 278 F. Supp. 2d 1025, 1027 (D.S.D. 2003) (quoting *Paraquad, Inc. v. St. Louis Housing Auth.*, 259 F.3d 956, 958 (8th Cir. 2001)) (internal citations omitted) (emphasis added). Ripeness and determining date of injury are inextricably intertwined. *See Wigg*, 259 F. Supp. 2d at 977 ("the precise line between ripe actions and premature actions is not an easy one to draw."). Further, Appellants never postured that the "date of discovery" of the injury controls. *Purdy v. Fleming*, 2002 S.D. 156, ¶ 14, 655 N.W.2d 424, 429 ("Purdy contends that the date of discovery should trigger the 180-day notice period"); *Gakin v. City of Rapid City*, 2005 S.D. 68, ¶ 14, 698 N.W.2d 493, 498 (parents contending injury did not occur until remains were disinterred because "up until that time, they could only speculate as to [the injury]."). Rather, Appellants properly pleaded the counterclaim of barratry because it was "certainly impending," but it did not actually occur until March 12, 2021, at the earliest. *See e.g. Miessner v. All Dakota Ins. Associates, Inc.*, 515 N.W.2d 198, 201 (S.D. 1994) (holding that an element of malicious prosecution is the lawsuit's "bona fide termination in favor of the [defendant]"); *Purdy*, 2002 S.D. 156, ¶ 14, 655 N.W.2d at 429 ("[t]he date of the injury is the triggering event for the 180-day period.").

"[T]he result would be far-reaching beyond this case, to say the least[,]" if this Court were to determine the injury for barratry occurs when the lawsuit is commenced. *See* YCE Brief at 8. Under that reasoning, a party would need to provide notice of claim of barratry anytime they are sued by the county to avoid a risk of waiver. Otherwise, they risk finding out after 180-days have passed since filing, like the Appellants, that the suit was motivated for improper reasons.

B. Appellees' fraudulent concealment tolled SDCL § 3-21-2 until May 17, 2019, resulting in a 180-day deadline of November 13, 2019.

Determining if a fiduciary relationship exists is a prerequisite to the fraudulent concealment analysis. This rule was cited in Appellants' brief to the circuit court. SR at

695 (opposition brief p. 12). Where it is evident that an argument was not raised to the circuit court, "[g]enerally this Court will not address" it. *In re J.D.M.C.*, 2007 S.D. 97, ¶ 27, 739 N.W.2d 796, 805. "However, this rule is procedural and [the Court] has the discretion to ignore the rule when faced with a compelling case." *Id.* An evaluation of SDCL § 3-21-2 compliance necessitates an inquiry into whether Appellees engaged in fraudulent concealment. The first step for this Court in that determination is whether a fiduciary relationship existed—explaining why Appellants provided a recitation of that rule in their brief to the circuit court. *See Purdy*, 2002 S.D. 156, ¶ 18, 655 N.W.2d at 431 ("[a]lthough it appears that in this appeal Purdy does not allege such a [fiduciary] relationship existed, we nonetheless chose to address this issue."); *but see* YCE Brief at 11 (Appellants "bootstrap the fiduciary duty claim into a fraudulent concealment argument."). Moreover, this is a "compelling case" for consideration because "it presents an important question in public interest." *In re J.D.M.C.*, 2007 S.D. 97 ¶ 27, 739 N.W.2d at 805. A private citizen's ability to hold their government accountable for its fraudulent actions is an inquiry of public interest. Therefore, the issue of fiduciary duty is proper for this Court's evaluation.

Public officials are not immunized from fiduciary duties. "[F]iduciary principles require public officials to act for the good of others rather than for themselves or other private interests." Vincent R. Johnson, *The Fiduciary Obligations of Public Officials* 9 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE AND ETHICS 307 (2019). "[I]n a democracy, citizens elect public officials to act for the common good. When official action is corrupted . . . the essence of the political contract is violated." *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999); *see also United States v. Nelson*, 712 F.3d 498, 509 (11th Cir. 2013) (public officials owe a fiduciary duty to "make governmental decisions in the public's best interest."); *United States v. Sorich*, 523 F.3d 702, 712 (7th

Cir. 2008) ("by virtue of being public officials the defendants inherently owed the public a fiduciary duty to discharge their offices in the public's best interest."). Certainly, a public official does not discharge their duties in the public's best interest when misleading and filing a frivolous lawsuit against a citizen. *See e.g.*, *Sec & Exchange Comm'n v. Langford*, No. 2:08-cv-AKK, 2011 WL 13228240, at *5 (N.D. Ala. Aug. 8, 2011) (finding a county commissioner "flagrantly disregarded his 'fiduciary duty to the public to make governmental decision in the public's best interest,'" by making his decisions based on personal interests). Public officials have historically owed fiduciary duties to the public and a violation occurs when they act on personal interests.

First, the nature of the transaction and Appellees' authority created a fiduciary relationship. The inquiry into whether a fiduciary relationship existed is "fact specific and cannot be reduced to a particular set of facts or circumstances." *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 820–21 (Pa. 2017). In the way a client consults with their attorney, a citizen confers with public officials to comply with the law. Appellees advise on statutory compliance and have the authority to sue where there is non-compliance. A fiduciary relationship is undoubtedly present as "the relative position of the parties is such that one has the power and means to take advantage of . . . the other." *Id.* Appellees took advantage of Appellants' need for guidance by intentionally ignoring, misleading, and ultimately commencing a lawsuit for the alleged non-compliance. Due to the facts underlying the parties' relationship, a fiduciary relationship existed between Appellants and Appellees.

Second, fraudulent concealment requires inquiry into the facts that concealed discovery of the claims. Appellants were never given an indication that the lawsuit was sought for illogical retribution like the *Purdy* plaintiff. To say that "it might have been

difficult, if not nearly impossible, for [Purdy] to have discovered matters that occurred in 1994 and 1995" is objectively false; Purdy was told of the reports and acted on them by requesting a modification of custody. *Purdy*, 2002 S.D. 156, ¶ 5, 655 N.W.2d at 427; *see also Gakin*, 2005 S.D. 68, ¶ 3, 698 N.W.2d at 496 ("[a] month or two [after the burial] . . . Gakin accused the cemetery of moving the gravesite without her permission."). Appellants becoming aware of their cause of action based on admissions during settlement negotiations does not "overlook[] what Kettering actually said[]" as the record provides a transcript and a recording of those conversations. *See* YCE Brief at 15. If Kettering was unsure who the County sued and for what reason, it remains a mystery why Appellees sent him to negotiate a settlement for the same. *See id.* at 15 ("Kettering was essentially being given a quiz roughly one year after the Complaint had been initiated"—the "quiz" being in reference to Appellants asking when the decision was made to file suit). Admissions of liability or equivocations revealing Appellees' true motive are their consequence to bear.

Assuming *arguendo* there was no fiduciary duty, without repeating the Appellant's Brief, Appellees engaged in affirmative conduct that prevented Appellants' discovery of the motive for filing the lawsuit. *See Purdy*, 2002 S.D. 156, ¶ 21, 655 N.W.2d at 432 (finding no affirmative conduct by DSS because Purdy "was told South Dakota was not going to investigate further [and] . . . Purdy was privy to all information presented in the North Dakota custody proceeding."); *see also Gakin*, 2005 S.D. 68, ¶ 21, 698 N.W.2d at 500 ("since the parents suspected wrongdoing from the very beginning, did not believe or rely on [the cemetery's] denials, and had photographic evidence which they assert prove their accusations" there was no fraudulent concealment). As such, the Appellants have demonstrated material facts to support fraudulent concealment.

C. Appellants substantially complied with SDCL § 3-21-2.[2]

The Doctrine of Substantial Compliance is resolute with this Court. *See Inlagen v. Town of Gary*, 147 N.W. 965, 966 (S.D. 1914) (applying "sufficient compliance" in 1914). The Appellees attempt to convince this Court with no supporting authority that service on the county auditor must be *strictly* complied with. *See* YCE Brief at 19 (referring twice to service on the county auditor as requiring "strict compliance"). "On the contrary, the South Dakota code and 'the subjects to which it relates and its provisions and all proceedings under it are to be liberally construed with a view to effect its objects and promote justice." *Myears v. Charles Mix County*, 1997 S.D. 89, ¶¶ 9-10, 566 N.W.2d 470, 473 ("[i]n the county's view, only strict compliance will suffice[,]" but "[i]f our legislature wanted strict construction of its enactment, it could have so stated.").

Luke McAllister and McAllister TD, LLC's counterclaims that were pleaded twenty-seven days after commencement of the lawsuit constituted written notice to the County of the time, place, and cause of injury. SDCL 3-21-2; *see also* Appellant's Br. at 23-24.

Furthermore, Notice was sent to a "licensed, experienced South Dakota lawyer[]"—the prosecutorial authority for Yankton County. *See* YCE brief at 18; *see also Myears*, 1997 S.D. 89, ¶ 17, 566 N.W.2d at 475 (addressing that the state's attorney, among others, considered the matter within the notice period). Further, Appellants' Letter provided supernumerary references to potential lawsuits against Klimisch, Garrity, *and* the County, and that Klimisch should "immediately share [the] letter with the members of the Yankton County Commission and the Yankton County Planning & Zoning." *See e.g.* SDI App. 7 at ¶

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2. Appellants maintain their position that their counterclaims constituted written notice under SDCL § 3-21-2; however, Appellees provide no new authority to rebut this contention, thus Appellants do not argue the point further.

36 (00052). Klimisch not having an affirmative duty to convey Appellants' Letter does not change the result; otherwise, the law allows the County to plead willful blindness to escape liability on a procedural technicality. *See Myears*, 1997 S.D. 89, ¶ 12, 566 N.W.2d at 473 (claims statutes "should not be used as traps for the unwary[.]"); *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (a patent infringement suit defining "a willfully blind defendant [a]s one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."). The doctrine of substantial compliance was recognized to remedy these exact technical errors to avoid setting "traps for the unwary."

SDCL § 3-21-2 does not require that the author of the written notice possess any requisite intent in order to comply nor proscribe demands to settle in order to comply. *See Inlagen*, 147 N.W. at 966 (holding that receipt of a letter from "plaintiff's attorney demanding a settlement of such injury, and in a general way called the clerk's attention to the time, place, and cause" was sufficient compliance); *see also Walters v. City of Carthage*, 153 N.W. 881, 882 (S.D. 1915) ("[t]here is no particular formality required in giving of such notices."); *but see* YCE Brief at 16 (relying heavily on an allegation that Appellants' "lengthy" Letter was "intended" for settlement negotiations). Indeed, Appellees do not provide any authority for their reliance on these assertions.[3] *See* YCE Brief at 16 (alleging Appellants' Letter does not substantially comply because it "contained other earmarks typical of a demand letter, not a 3- 21-2 notice [sic]."). SDCL § 3-21-2 only requires that the contents provide time, place, and cause of injury—Appellants' Letter does that and was

3. The YCE Brief also states that along with not being addressed to the auditor, there were other "material faults that constitute non-compliance within the statute." YCE Brief at 19. The other "material faults" of Appellants' Letter are not elaborated on.

served within the time period prescribed whether the ripeness doctrine or fraudulent concealment is applied.[4]

D. Sufficient facts are alleged to estop Appellees from asserting SDCL § 3-21-2 as a defense.

Summary judgment cannot be granted if jury questions remain outstanding as to equitable estoppel. *See Cooper v. James*, 2001 S.D. 59, ¶¶ 15, 18, 627 N.W.2d 784,789 (finding outstanding jury questions where defendant employed counsel, consented to a deposition, and delayed and cancelled the deposition upon asserting the statute of limitation as a defense) *abrogated on other grounds by Robinson-Podoll v. Harmelink*, 2020 S.D. 5, 939 N.W.2d 32; *see also Sander v. Wright*, 394 N.W.2d 896, 899 (S.D. 1986) (reversing summary judgment where no activity by an insurance adjuster indicated acceptance of the claim or a necessity to bring suit); *see also L.R. Foy Const. Co., Inc. v. South Dakota State Cement Plant Com'n.*, 399 N.W.2d 340, 345-46 (S.D. 1987) (holding equitable estoppel was established in part because defendant's bad faith "should prevent it from claiming what would otherwise be its legal rights."). Appellants provide a litany of facts to demonstrate the elements of equitable estoppel that, at the very least, create genuine issue of material fact. *See* Appellants' Brief at 28-30. Therefore, summary judgment is precluded as to equitable estoppel.

The Yankton County Entities discussion of *Hanson v. Brookings Hospital* and *Myears* to refute equitable estoppel is misleading. *See* YCE Brief at 26. First, Appellees infer *Hanson* "*[c]uriously* . . . resulted in summary judgment dismissal . . . for failure to comply with SDCL 3-21-2." *See id.* at 26 (emphasis added). Appellees fail to inform the

4. Appellees do not rebut that Appellants' Letter and/or counterclaims provided notice of the time, place, and date of injury. As such, Appellants do not argue the point any further.

Court that *Myears* Court *declined* to follow *Hanson* when it applied substantial compliance. *See id.* at 26; *Myears*, 1997 S.D. 89, ¶ 9, 566 N.W.2d at 473 (rejecting the county's argument because "[i]n the county's view only strict compliance will suffice. It cites . . . *Hanson v. Brookings Hosp.*[.]"). Further, the *Myears* Court *expressly declined* to answer the appellant's estoppel question. *Myears*, 1997 S.D. 89, ¶ 19, 566 N.W.2d at 475 ("we need not reach this question" due to the reversal of summary judgment for substantial compliance); *see* YCE Brief at 26 ("This is the same sort of *conduct condemned in Myears* . . ." and "[n]or did any of those kinds of events *which were relied upon* in *Myears*" and "none of the significant combination of facts exist here, *such as they did* in *Myears* . . . ." (emphasis added)). Similar to Appellees' brief, there is a genuine issue of material fact as to equitable estoppel that requires reversal of summary judgment.

III. THE APPLICATION OF PROSECUTORIAL IMMUNITY IS FRAUGHT WITH GENUINE ISSUES OF MATERIAL FACT.

Appellants properly argue that Klimisch is not entitled to assert prosecutorial immunity. This Court previously held that "an issue that is not supported by argument and authority is waived." *See e.g.*, *Lagler v. Menard, Inc.*, 2018 S.D. 53, ¶ 56, 915 N.W.2d 707, 723. The Court has effectuated the waiver where an appealed issue was completely or nearly devoid of argument and supporting authority. *See id.* (appellant devoted three sentences to an issue, did not provide material facts, nor explain application of the statute); *State v. Patterson*, 2017 S.D. 64, ¶ 31, 904 N.W.2d 43, 52 (issue waived because the "State did not address [the issue] in its appellate brief or provide any argument in support."). Here, the prosecutorial immunity of Klimisch presented an issue of first impression for this Court—whether to apply a delineated exception to general rule. Further, Appellants devote over three pages of their brief and provide five case citations to establish the rule of immunity and the exception thereto. *See* Appellant's Brief at 27-31. As such, Appellants

have not waived the issue for failure to argue or provide authority.

A. Klimisch is exempted from prosecutorial immunity by virtue of personal and professional conflicts of interest.[5]

Other jurisdictions recognize exceptions to a right of prosecutorial immunity where a plaintiff alleges a prosecutor had an actual conflict of interest and knowledge the charges filed were baseless. *See e.g. Stevens v. McGimsey*, 673 P.2d 499, 500 (Nev. 1983). As an attorney and a public official, Klimish's duties to remedy conflicts are two-fold. Further, the facts demonstrate Klimisch is inextricably tied to the underlying actions of Garrity and Yankton County. As such, sufficient facts are alleged to preclude summary judgment on the issue of prosecutorial immunity.

First, as demonstrated in Appellants' Brief, Klimisch had a personal conflict of interest through representation provided to clients of his private law practice. *See* Appellants' Brief at 32-35. Second, Klimisch had a professional conflict of interest because of his duty to perform the function of the state's attorney office free from interest that *might* affect his judgment. *See Hanig v. City of Winner*, 2005 S.D. 10, ¶ 15, 692 N.W.2d 202, 207. A public official has a conflict of interest if the circumstances "could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." *Id.* (quoting *Voeltz v. Morrell*, 1997 S.D. 69, ¶ 14, 564 N.W.2d 315, 318). As the state's attorney, Klimisch is required to serve the "government and the people, uninfluenced by adverse motives and interests." *Id.* ¶ 15 (quoting *Speckels v. Baldwin*, 512 N.W.2d 171, 175 (S.D. 1994)). A conflict of interest arose between government and people when Garrity sought out Klimisch to further his quest to disenfranchise the Appellants

5. The Yankton County Entities fail to cite any supporting authority, other than the lower court's opinion, in denying Klimisch's conflict of interest. *See* YCE Brief at 28-29.

through filing a frivolous lawsuit. Klimisch cannot claim unawareness to this truth when he and Garrity communicated with Appellants together, and Klimisch ultimately made the decision to file a lawsuit based in part on Garrity's statements. *See Hanig*, 2005 S.D. 10, ¶ 20, 692 N.W.2d at 209 (finding a councilwoman had a conflict of interest because she knew of her employer's opposition to the matter). Thereby, the malicious motive of Yankton County as to Appellants' business pursuits presented circumstances that had the capacity to tempt Klimisch from his sworn public duty. This fact is compounded by Klimisch filing a frivolous lawsuit against the Appellants. *Id.* ¶ 13, 692 N.W.2d at 206 (when such a conflict exists, "an unacceptable risk of actual bias will normally exist and the official should not participate in the proceedings.").

CONCLUSION

It is for the aforementioned reasons that Appellants respectfully request this Court reverse the circuit court's granting of summary judgment.

Dated this 13th day of October, 2021.

CUTLER LAW FIRM, LLP
Attorneys at Law

Meredith A. Moore
Jonathan A. Heber
140 N. Phillips Ave., 4th Floor
P.O. Box 1400
Sioux Falls, SD 57101-1400
(605) 335-4950
meredithm@cutlerlawfirm.com
jonathanh@cutlerlawfirm.com
Attorneys for Appellants

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument before the Court.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Reply Brief include 3818 words, exclusive of the table of contents, table of cases, any addendum materials, and any certificates of counsel.

/s/ Jonathan A. Heber
Jonathan A. Heber

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2021, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Clerk of the Supreme Court
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 13th day of October, 2021, I sent an electronic copy of Appellants' Brief via email to counsel for Appellee as follows:

Douglas M. Deibert
Cadwell Sanford Deibert & Garry LLP
200 E 10th Street, Suite 200
Sioux Falls, SD 57104
Email: ddeibert@cadlw.com

and

Mark D. Fitzgerald
Fitzgerald Vetter Temple & Bartell
1002 Riverside Blvd Suite 200
Norfolk NE 68702-1407
Email: fitz@fvtlawyers.com

/s/ Jonathan A. Heber
Jonathan A. Heber