

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 30728

KAISER TRUCKING, INC. and DAVID SIMONS,
Plaintiffs and Appellants,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Defendant and Appellee.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Joshua Hendrickson
Circuit Court Judge

APPELLANTS' BRIEF

JARED D. NOONEY
NOONEY & SOLAY, LLP
326 Founders Park Drive
P.O. Box 8030
Rapid City, SD 57709-8030
*Attorneys for Plaintiffs and
Appellants,
Kaiser Trucking, Inc. and
David Simons*

JACK H. HIEB
ZACHARY W. PETERSON
RICHARDSON, WYLY, WISE,
SAUCK & HIEB, LLP
P.O. Box 1030
Aberdeen, SD 57402-1030
*Attorneys for Defendant and
Appellee, Liberty Mutual Fire
Insurance Company*

NOTICE OF APPEAL FILED JUNE 12, 2024

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUE	2
I. Whether the trial court erred when it granted Liberty Mutual Fire Insurance Company's Renewed Motion for Summary Judgment.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	7
ARGUMENT.....	13
I. THE TRIAL COURT ERRED WHEN IT GRANTED LIBERTY MUTUAL FIRE INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT.....	13
A. STANDARD OF REVIEW.....	13
B. SATISFACTION OF CONDITIONS PRECEDENT ARE NOT A REQUIREMENT UNDER SDCL 58-23-1	14
C. LIBERTY MUTUAL FIRE INSURANCE COMPANY WAS PROMPTLY NOTIFIED OF THE ACCIDENT	15
D. WHETHER LIBERTY MUTUAL FIRE INSURANCE COMPANY'S INSURED COOPERATED AFTER THE ACCIDENT IS A QUESTION OF FACT, WHICH PRECLUDED SUMMARY JUDGEMENT'.....	17
E. SERVICE OF MS. SPOTTED THUNDER IN 51CIV17-001270 WAS PROPERLY EFFECTUATED, BUT SUCH DOES NOT MEAN THAT ANY NOTICES OR LEGAL PAPERS WERE RECEIVED	21

F. THERE IS A QUESTION OF FACT AS IT CONCERNS THE CAUSE OF THE ACCIDENT, WHICH PRECLUDED SUMMARY JUDGMENT	24
CONCLUSION.....	26
CERTIFICATE OF COMPLIANCE.....	27
CERTIFICATE OF SERVICE	28
APPENDIX	29

TABLE OF AUTHORITIES

South Dakota Cases:

<i>Bertelsen v. Allstate Ins. Co.</i> , 2011 S.D. 13, 796 N.W.2d 685.....	13
<i>City of Rapid City v. Estes</i> , 2011 S.D. 75, 805 N.W.2d 714.....	2, 13, 17
<i>Gail M. Benson Living Tr. v. Physicians Off. Bldg., Inc.</i> , 2011 S.D. 30, 800 N.W.2d 340.....	14, 17
<i>Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.</i> , 2022 S.D. 64, 981 N.W.2d 645.....	2, 15
<i>Muhlbauer v. Est. of Olson</i> , 2011 S.D. 42, 801 N.W.2d 446.....	13
<i>Trouten v. Heritage Mut. Ins. Co.</i> , 2001 S.D. 106, 632 N.W.2d 856.....	15
<i>Tucek v. Mueller</i> , 511 N.W.2d 832 (S.D. 1994)	14
<i>Wilson v. Great N. Ry. Co.</i> , 83 S.D. 207, 157 N.W.2d 19 (1968)	14

Other Cases:

<i>Terra Indus., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA</i> , 383 F.3d 754 (8th Cir. 2004)	15
--	----

Statutes:

SDCL § 15-6-56(c)	2, 13
-------------------------	-------

SDCL § 15-6-56(f)	5
SDCL § 15-6-30(b)	10
SDCL § 15-26A-3	2
SDCL § 15-7-6	21, 22
SDCL § 15-7-7	21, 22
SDCL § 58-23-1	14, 15

PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record (“SR”) and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. “SR 601, Summary Judgment.” References to the documents in the Appendix will be referred to as, “Document” and Appendix (“App.”) with the appropriate page number or paragraph assigned, e.g. Order Granting Defendant’s Renewed Motion for Summary Judgment, App. at A 001.” Citations to transcripts will be designated by transcript, date of hearing, and page & line number, e.g. “Transcript (10/23/2023), p. 5, ln. 25 – p. 6, ln. 6.”

The Appellants, Kaiser Trucking, Inc. and David Simons will be referred to as “Kaiser Trucking” and “Simons”, or collectively as “Plaintiffs”. The Appellee, Liberty Mutual Fire Insurance Company will be referred to as “Liberty Mutual.”

JURISDICTIONAL STATEMENT

This is an appeal from the trial court’s Order Granting Defendant, Liberty Mutual’s Renewed Motion for Summary Judgment and Summary Judgment. SR 599, Order Granting Defendant’s Renewed Motion for Summary Judgment; SR 601, Summary Judgment. On May 15, 2024, the trial court executed both the Order Granting Defendant’s Renewed Motion for Summary Judgment and Summary Judgment. SR 599, Order Granting Defendant’s Renewed Motion for Summary Judgment; SR 601,

Summary Judgment. On May 16, 2024, Liberty Mutual filed a Notice of Entry of Summary Judgment and Order Granting Defendant's Renewed Motion for Summary Judgment. SR 602, Notice of Entry of Summary Judgment and Order Granting Defendant's Renewed Motion for Summary Judgment.

On June 12, 2024, Kaiser Trucking and Simons filed a Notice of Appeal. SR 607, Notice of Appeal (dated 6/12/2024). This Court has jurisdiction over this action pursuant to SDCL § 15-26A-3.

STATEMENT OF ISSUE

I. Whether the trial court erred when it granted Liberty Mutual Fire Insurance Company's Renewed Motion for Summary Judgment.

The trial court held in the negative.

MOST RELEVANT AUTHORITIES

City of Rapid City v. Estes, 2011 S.D. 75, 805 N.W.2d 714

Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co., 2022 S.D. 64, 981 N.W.2d 645

SDCL § 15-6-56(c)

STATEMENT OF THE CASE

The Plaintiffs, Kaiser Trucking and Simons, commenced this action in South Dakota State Court, in Pennington County, against Liberty Mutual Group, Inc. SR 003, Complaint. After commencing the suit, and upon receiving the Liberty Mutual Insurance policy at issue (Policy Number A02-248-403754-70 4 8) (the "Policy"), it was discovered that the

Policy was written by Liberty Mutual Fire Insurance Company, who was later substituted as the Defendant. SR 070, Motion to Amend Plaintiffs' Complaint; SR 186, First Amended Complaint.

Kaiser Trucking and Simons brought a declaratory action against Liberty Mutual. SR 186, First Amended Complaint, ¶¶ 4, 16-17. The declaratory action arose after Kaiser Trucking and Simons received default judgments against, Bianca Spotted Thunder¹ ("Ms. Spotted Thunder"), in 51CIV17-001270. SR 186, First Amended Complaint, ¶¶ 9-11. The litigation in 51CIV17-001270, was filed by Kaiser Trucking and Simons, seeking damages due to an automobile accident caused by Ms. Spotted Thunder that occurred on September 8, 2015 ("accident"). SR 186, First Amended Complaint, ¶ 6. Ms. Spotted Thunder was in the accident with Simons, an agent of Kaiser Trucking. SR 186, First Amended Complaint, ¶¶ 8, 9.

To date, there remains a Judgment in favor of Kaiser Trucking and against Ms. Spotted Thunder, in the amount of \$36,977.06, plus pre-judgment interest of \$12,672.60, plus post-judgment as provided for by South Dakota law, which will continue to accrue. SR 186, First Amended Complaint, ¶11. To date, there remains a Judgment in favor of Simons, and against Ms. Spotted Thunder, in the amount of \$146,619.80, plus pre-judgment interest of \$58,382.01, plus post-judgment interest as

¹ A permissive user under the Policy.

provided for by South Dakota law, which will continue to accrue. SR 186, First Amended Complaint, Complaint, ¶ 12.

This case previously came before this Court on an appeal related to the trial court granting Liberty Mutual's Motion to Dismiss. SR 107, Notice of Appeal (dated 4/08/2021). This Court entered a Judgment that in pertinent part, reversed and remanded this case to the trial court for further proceedings. SR 185, Judgment.

On August 30, 2023, Liberty Mutual filed a Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Statement of Undisputed Material Facts, and Affidavit of Zachary Peterson. SR 198, Defendant's Motion for Summary Judgment; SR 200, Brief in Support of Defendant's Motion for Summary Judgment; SR 210, Statement of Undisputed Material Facts; SR 214, Affidavit of Zachary Peterson. On October 6, 2023, Kaiser Trucking and Simons filed Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment, Plaintiffs' Response to Defendant's Statement of Material Facts, and Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts. SR 357, Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment; SR 371, Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts; SR 377, Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts.

On October 6, 2023, Kaiser Trucking and Simons also filed an Affidavit of Compliance with SDCL § 15-6-56(f), seeking to complete additional discovery. SR 460, Affidavit of Compliance with SDCL § 15-6-56(f).

On October 16, 2023, Liberty Mutual filed a Reply Brief in Support of Motion for Summary Judgment & Notice of Hearing and an Affidavit of Diana Fox. SR 464, Reply Brief in Support of Defendant's Motion for Summary Judgment and Notice of Hearing; SR 477, Affidavit of Diana Fox. A hearing was held on October 23, 2023, where the trial court granted Kaiser Trucking and Simons' request to complete additional discovery pursuant to SDCL § 15-6-56(f) and held Liberty Mutual's Motion for Summary Judgment in abeyance to allow for more discovery to take place. Transcript (10/23/2023), p. 5, ln. 25 – p. 6, ln. 6.

On April 8, 2024, Liberty Mutual filed Defendant's Renewed Motion for Summary Judgment & Notice of Hearing. SR 485, Defendant's Renewed Motion for Summary Judgment and Notice of Hearing. On April 22, 2024, Kaiser Trucking and David Simons filed Plaintiffs' Response in Opposition to Defendant's Renewed Motion for Summary Judgment. SR 488, Plaintiffs' Response in Opposition to Defendant's Renewed Motion for Summary Judgment. On April 23, 2024², Kaiser Trucking and David Simons filed an Affidavit of Jared D. Nooney in Response to Defendant's

² Filed on April 22, 2024, but was rejected by the clerk and re-filed on April 23, 2024.

Renewed Motion for Summary Judgment. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment. On April 29, 2024, Liberty Mutual filed a Reply Brief in Support of Defendant's Renewed Motion for Summary Judgment. SR 591, Reply Brief in Support of Defendant's Renewed Motion for Summary Judgment.

A hearing was held on May 6, 2024, where the trial court granted Liberty Mutual's Renewed Motion for Summary Judgment and held as follows:

All right, having considered all the submissions of the parties and hearing argument of counsel, at this time I recognize that summary judgment is an extreme remedy. I do recognize that. In this case what I'm looking at is, specifically, the Part E of the contract, for the duties after an accident or loss. Parts A and B, I don't think that Part A -- there's obviously some question of, or dispute of fact of Part A. Part B is the requirement that, one, that the person seeking coverage cooperate with the insurance company in the settlement or defense of any claim or suite [sic]; two, that they promptly send copies of any notices or legal papers received in connection with the accident or loss. I don't see that there's any dispute of material fact in regard to these two items. I don't see that the plaintiff can present material facts that show there was compliance with those. Without that showing, I don't believe the plaintiffs can be covered under the terms of the policy; therefore, the condition precedent is not met and I believe the defendant is entitled to the granting of the summary judgment motion. So I'll grant the motion based upon that and ask defense to prepare an Order in that regard.

Transcript (5/06/2024), p. 14, ln. 9 – p. 15, ln. 9 (emphasis added).

On May 15, 2024, the trial court executed both the Order Granting Defendant's Renewed Motion for Summary Judgment and Summary Judgment. SR 599, Order Granting Defendant's Renewed Motion for Summary Judgment; SR 601, Summary Judgment. On May 16, 2024, Liberty Mutual filed a Notice of Entry of Summary Judgment and Order Granting Defendant's Renewed Motion for Summary Judgment. SR 602, Notice of Entry of Summary Judgment and Order Granting Defendant's Renewed Motion for Summary Judgment.

STATEMENT OF THE FACTS

On September 8, 2015, Ms. Spotted Thunder operated a motor vehicle covered by the Policy on a highway in Oglala Lakota County, South Dakota. SR 186, First Amended Complaint, ¶ 6. Liberty Mutual provided a policy of insurance to Charles Spotted Thunder ("Mr. Spotted Thunder"), who is the father of Ms. Spotted Thunder. SR 186, First Amended Complaint, ¶ 4. The Policy was in effect on September 8, 2015, the day of the accident. SR 186, First Amended Complaint, ¶ 5. Pursuant to the Policy, Ms. Spotted Thunder was a permissive user of the motor vehicle. SR 186, First Amended Complaint, ¶ 7.

On September 8, 2015, Ms. Spotted Thunder was in an automobile accident with Simons, an agent of Kaiser Trucking. SR 186, First Amended Complaint, ¶ 8. At the time of the accident, Mr. Spotted Thunder, Liberty Mutual's insured, was not in the vehicle. SR 504,

Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 57, ln. 3-6; SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 31, ln. 25 – p. 32, ln. 2; p. 50, ln. 5-10.

Part E of the Policy, entitled "Duties After an Accident or Loss," provides in pertinent part as follows:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
- B. A person seeking any coverage must:
 - 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
 - 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.³

SR 377, Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts, Exhibit 4, LM 14.

³ There is an Amendatory Endorsement to subpart B., which provides that a person seeking coverage must "[c]ooperate with us in the investigation, settlement or defense of any claim or suit. This includes, but is not limited to, allowing us to inspect damage to a vehicle covered by this policy." SR 214, Affidavit of Zachary W. Peterson, Exhibit A, LM 26.

On September 8, 2015 (the same day of the accident), Liberty Mutual's insured, Mr. Spotted Thunder called Liberty Mutual to report the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 16, ln. 3-7. Liberty Mutual had notice of the accident on September 8, 2015, the same day the accident occurred. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 16, ln. 19-22.

Liberty Mutual made two payments to its insured, Mr. Spotted Thunder as it concerns property damage to the vehicle that was in the accident and driven by the permissive user, Ms. Spotted Thunder. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 53, ln. 11-20. Diana Fox, a Senior Claims Resolution Specialist III for Liberty Mutual testified that she was unaware whether Liberty Mutual ever sought the monies back that it paid its insured, Mr. Spotted Thunder or initiated litigation against Mr. Spotted Thunder for the monies that it paid pursuant to the Policy, related to the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 53, ln. 21 – p. 54, ln. 3.

After the accident, Mr. Spotted Thunder had any number of telephone conversations with his insurer, Liberty Mutual. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 59, ln. 8-24. From September 8, 2015, until October 27, 2015, Mr. Spotted Thunder remained in contact with Liberty Mutual related to the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 32, ln. 11-20. From September 8, 2015, until October 27, 2015, Liberty Mutual did not attempt to contact Ms. Spotted Thunder, the permissive user of the vehicle at the time of the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 32, ln. 3-10. Damon Taggart, a Senior Claims Resolution Specialist BI IV for Liberty Mutual (who was designated by Liberty Mutual's counsel to testify pursuant to SDCL § 15-6-30(b)(6))⁴, testified that he did not know what additional information its insured,

⁴ SDCL § 15-6-30(b)(6) provides as follows: "A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules."

Mr. Spotted Thunder, could provide to Liberty Mutual since he was not in the vehicle at the time of the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggert, p. 35, ln. 10-21.

On April 8, 2016 Liberty Mutual sent a denial letter to denial letter to Mr. Spotted Thunder and Ms. Spotted Thunder, which stated in pertinent part as follows:

Information from the police report states that this accident may have been caused by an intentional act by Bianca Thunder [sic]. We have tried several times to get a statement from Bianca Thunder [sic] and yourself to determine if this accident was indeed caused by an initial [sic] act. Due to lack of cooperation from both you and Ms. Thunder [sic], Liberty Mutual will be unable to afford coverage for this claim.

Our denial of coverage is based on the language within your policy, which states as follows:

Part E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 6, LM 139-140.

On July 19, 2017, Kaiser Trucking and Simons commenced an action against Ms. Spotted Thunder in 51CIV17-001270. SR 003, Complaint, ¶ 9. Liberty Mutual's insured, Mr. Spotted Thunder, was not a named party in 51CIV17-001270. SR 003, Complaint; SR, SR 186, First Amended Complaint; SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 75, ln. 21 – p. 76: ln. 2. Diana Fox testified that she did not know what information Mr. Spotted Thunder would provide to Liberty Mutual related to the litigation commenced against his daughter, Ms. Spotted Thunder in 51CIV17-001270. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 57, ln. 25 – p. 58, ln. 6. Diana Fox further testified that she did not know how Mr. Spotted Thunder could cooperate in the defense related to the litigation commenced against his daughter, Ms. Spotted Thunder in 51CIV17-001270. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 58, ln. 7-10.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED LIBERTY MUTUAL FIRE INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

A. STANDARD OF REVIEW

SDCL § 15-6-56(c) governs a motion for summary judgment, providing in pertinent part as follows:

The judgment sought shall be rendered forthwith 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 a judgment as a matter of law.

This Court has identified the following standard of review when a trial court grants or denies a motion for summary judgment:

The standard of review for a grant or denial of a motion for summary judgment is settled.

In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we determine whether the moving party has demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. In considering a trial court's grant or denial of summary judgment, this Court will affirm only if all legal questions have been decided correctly.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 10, 805 N.W.2d 714, 718

(citing *Muhlbauer v. Estate of Olson*, 2011 S.D. 42, ¶ 7, 801 N.W.2d 446,

448); (quoting *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 5, 796

N.W.2d 685, 692-93). “All reasonable inferences drawn from the facts

must be viewed in favor of the non-moving party.” *Id.* (citing *Benson*

Living Trust v. Physicians Office Bldg. Inc., 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 342–43). The burden is on the moving party to show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968). “[S]ummary judgment is an extreme remedy which should be awarded only when truth is clear and all reasonable doubts touching the existence of a material fact should be resolved against the movant.” *Tucek v. Mueller*, 511 N.W.2d 832, 835 (S.D. 1994).

B. SATISFACTION OF CONDITIONS PRECEDENT ARE NOT A REQUIREMENT UNDER SDCL § 58-23-1

It is seemingly undisputed that this case arises out of SDCL 58-23-

1. SDCL § 58-23-1 governs an action against an insurer by an injured party, which provides as follows:

All liability insurance policies issued in this state shall provide in substance that if an execution upon any final judgment in an action brought by the injured or by another person claiming, by, through, or under the injured, is returned unsatisfied, then an action may be maintained by the injured, or by such other person against the insurer under the terms of the policy for the amount of any judgment recovered in such action, not exceeding the amount of the policy, and every such policy shall be construed to so provide, anything in such policy to the contrary notwithstanding.

In this very case that previously came before this Court on appeal⁵, this Court stated as follows:

Based on our review of the Policy, as between Liberty Mutual and Spotted Thunder (insured), Section E(A) may be a

⁵ On the trial court granting Liberty Mutual’s Motion to Dismiss.

condition precedent to coverage because it sets forth a requirement for coverage under the Policy, rather than carving out an event from the Policy's general coverage as an exclusion. *See Terra Indus.*, 383 F.3d at 759. However, Kaiser Trucking is not a party to the contract of insurance between Liberty Mutual and Spotted Thunder. Rather, its claim against Liberty Mutual is created by the Legislature as a matter of public policy when an injured party obtains a judgment against an insured and the judgment remains unsatisfied. *See Trouton*, 2001 S.D. 106, ¶ 24, 632 N.W.2d at 862 (noting the “legislative public policy” of SDCL 58-23-1). As discussed above, SDCL 58-23-1 allows an injured party to maintain a direct action against the insurer of the party that caused their injury (the insured) if he or she can show the existence of an unsatisfied final judgment relating to an action “brought by the injured or by another person claiming by, through, or under the insured.” While SDCL 58-23-1 authorizes the direct action “against the insurer under the terms of the policy,” the statute does not require the injured party to plead any other element or condition precedent to maintain the action. Satisfaction of conditions precedent in the applicable insurance contract is not, therefore, a requirement under SDCL 58-23-1.

Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co., 2022 S.D. 64, ¶ 28, 981 N.W.2d 645, 655–56 (emphasis added). The trial court erred by granting Liberty Mutual’s Motion for Summary Judgment, given that “[s]atisfaction of conditions precedent in the applicable insurance contract is not, therefore, a requirement under SDCL 58-23-1.” *Kaiser Trucking, Inc.*, 2022 S.D. 64, ¶ 28, 981 N.W.2d 645, 656.

C. LIBERTY MUTUAL FIRE INSURANCE COMPANY WAS PROMPTLY NOTIFIED OF THE ACCIDENT

In a nutshell, Liberty Mutual based its’ Motion for Summary Judgment and Renewed Motion for Summary Judgment on the argument

that “Plaintiffs cannot produce facts showing they are entitled to relief ‘under the terms of the policy’”. SR 200 Brief in Support of Defendant’s Motion for Summary Judgment, p. 9. Part E of the Policy, entitled “Duties After an Accident or Loss,” provides in pertinent part as follows:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
- B. A person seeking any coverage must:
 - 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
 - 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

SR 377, Affidavit of Jared D. Nooney in Response to Defendant’s Statement of Material Facts, Exhibit 4, LM 14.

Diana Fox, a Senior Claims Resolution Specialist III for Liberty Mutual testified during her deposition as follows:

Q: Is it fair to say that on September 8, 2015, Liberty Mutual Fire Insurance Company had knowledge of this accident?

A: Yes.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant’s Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 16, ln. 19-22. There is no question that Liberty Mutual was

promptly notified of the accident on September 8, 2015, the same day the accident occurred, satisfying Subpart A. of Part E. of the Policy. SR 377, Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts, Exhibit 4, LM 14; SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 16, ln. 19-22.

Again, "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *City of Rapid City*, 2011 S.D. 75, ¶ 10, 805 N.W.2d 714, 718 (citing *Benson Living Trust v. Physicians Office Bldg. Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 342-43). Kaiser Trucking and Simons were the non-moving parties at the trial court level on Liberty Mutual's Motion for Summary Judgment and Renewed Summary Judgment, so "[a]ll reasonable inferences drawn from the facts [were] to be viewed in favor of the non-moving parties, Kaiser Trucking and Simons." See *City of Rapid City*, 2011 S.D. 75, ¶ 10, 805 N.W.2d 714, 718 (citing *Benson Living Trust v. Physicians Office Bldg. Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 342-43).

D. WHETHER LIBERTY MUTUAL FIRE INSURANCE COMPANY'S
INSURED COOPERATED AFTER THE ACCIDENT IS A
QUESTION OF FACT, WHICH PRECLUDED SUMMARY
JUDGEMENT

Cooperation after the accident is a question of fact that precluded Summary Judgment in favor of Liberty Mutual. Damon Taggert, a Senior Claims Resolution Specialist BI IV for Liberty Mutual, testified that from

September 8, 2015, until October 27, 2015, Liberty Mutual did not attempt to contact Ms. Spotted Thunder, as follows:

Q: And if you need to, you can surely take an opportunity to review it, but I'm looking at LM230 through LM223.⁶ Do you believe that Liberty Mutual, between those date ranges, from the date of the accident, September 8, 2015, until October 27, 2015, ever attempted to contact Bianca Spotted Thunder?

A: Based on the notes, no.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 32, ln. 3-10; SR 214, Affidavit of Zachary W. Peterson, Exhibit K, LM 230-223. One would expect that Liberty Mutual would attempt to contact the driver, Ms. Spotted Thunder after the accident if there were in fact any coverage questions. Clearly Liberty Mutual did not have any coverage concerns, given that Liberty Mutual paid its insured, Mr. Spotted Thunder for property damage to the vehicle involved in the accident. Despite this payment and Liberty Mutual independently deciding there was coverage under the Policy for the accident, Liberty Mutual now argues after the fact that there is no coverage for the accident.

⁶ The order of the Liberty Mutual "LM" claim notes are not in chronological order and are from back (higher LM BATES number) to front (lower LM BATES number) based on the date range of the claim notes. For example LM 230 contains a claim note from the date of the accident on September 8, 2015 and LM 223 contains a claim note dated October 27, 2015.

Again, on September 8, 2015, Mr. Spotted Thunder promptly provided notice to Liberty Mutual of the accident (the same day it occurred). *See* SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 16, ln. 19-22.

From September 8, 2015, until October 27, 2015, Liberty Mutual's insured, Mr. Spotted Thunder remained in contact with Liberty Mutual related to the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 32, ln. 11-20. As testified to by Diana Fox:

Q: And you'd agree with me there is [sic] any number of claim notes that identify where Mr. Spotted Thunder had called Liberty Mutual as it concerns this accident claim, correct?

A: Yes. He called concerning the accident.

Q: And you'd agree with me it was, in fact, Charles Spotted Thunder who provided the actual notice to Liberty Mutual of the accident occurring in the first place on September 8, 2015, correct?

A: Yes, he did tell us about the accident.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 51, ln. 5-14.

Damon Taggert, a Senior Claims Resolution Specialist BI IV for Liberty Mutual, testified that he did not know what additional information its insured, Mr. Spotted Thunder, could provide to Liberty Mutual since he was not in the vehicle at the time of the accident. SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggert, p. 35, ln. 10-21. Given that Mr. Spotted Thunder was not in the vehicle at the time of the accident, what additional information did Liberty Mutual expect to receive from Mr. Spotted Thunder?

Damon Taggert went so far to testify as follows:

Q: Okay. And you would agree with me that those individuals who I identified in the various claim notes did not make a claim note stating that Charles Spotted Thunder was not cooperating in the investigation, correct?

A: Correct.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggert, p. 33, ln. 20-25.

The question of whether there was cooperation of Liberty Mutual's insured, is a factual question, which precluded Summary Judgment in favor of Liberty Mutual. The facts in this case suggest that Liberty Mutual did not have coverage concerns, in that Liberty Mutual paid Mr. Spotted Thunder monies for the property damage claim (i.e. the vehicle involved in the accident). Despite this payment made by Liberty Mutual

to its insured, Mr. Spotted Thunder, Liberty Mutual now argues after the fact that there is no coverage for the accident.

E. SERVICE OF MS. SPOTTED THUNDER IN 51CIV17-001270 WAS PROPERLY EFFECTUATED, BUT SUCH DOES NOT MEAN THAT ANY NOTICES OR LEGAL PAPERS WERE RECEIVED

At the trial court Liberty Mutual argued that Ms. Spotted Thunder did not provide “copies of any notices or legal papers received in connection with the accident or loss”; however, the reality is that Ms. Spotted Thunder did not receive any notices or legal papers in connection with the accident given that Ms. Spotted Thunder was properly served pursuant to SDCL §§ 15-7-6 and 15-7-7. SR 200 Brief in Support of Defendant’s Motion for Summary Judgment, p. 4 (emphasis added). SDCL § 15-7-7 provides as follows:

Service of process as authorized by § 15-7-6⁷ shall be made by serving a copy thereof upon the secretary of state, or by filing the copy in the office of the secretary of state, together with payment of a fee of fifteen dollars. The service shall be sufficient service upon the absent resident or the

⁷ SDCL § 15-7-6 provides as follows: The use and operation by a resident of this state or the resident's agent, or by a nonresident or the nonresident's agent of a motor vehicle within the State of South Dakota, shall be deemed an irrevocable appointment by the resident or the resident's agent when the resident has been absent from this state continuously for ninety days or more following a motor vehicle accident, or by the nonresident or the nonresident's agent at any time, of the secretary of State of South Dakota to be his or her true and lawful attorney upon whom may be served all legal process in any action or proceeding against the resident or nonresident or his or her personal representative growing out of such use and operation of a motor vehicle within this state, resulting in damages or loss to person or property, whether the damage or loss occurs on a highway or on abutting public or private property. The appointment is binding upon the nonresident's personal representative. The use or operation of a motor vehicle by the resident or nonresident is a signification of the resident's or nonresident's agreement that any such process in any action against the resident or nonresident or his or her personal representative which is so served, shall be of the same legal force and validity as if served upon the resident or nonresident personally or on the resident's or nonresident's personal representative.

nonresident or the resident's or nonresident's personal representative if the notice of the service and a copy of the process are within ten days thereafter sent by mail by the plaintiff to the defendant at the defendant's last-known address and that the plaintiff's affidavit of compliance with the provisions of this section is attached to the summons. The secretary of state shall keep a record of any process so served. The record shall show the day and hour of the service. The fee of fifteen dollars paid by the plaintiff to the secretary of state at the time of service of the process shall be recovered as taxable costs if the plaintiff prevails in the suit.

As is established by the Admission of Service from the South Dakota Secretary of State and the Affidavit of Compliance, Ms. Spotted Thunder was properly served in 51CIV17-001270 pursuant to SDCL §§ 15-7-6 and 15-7-7. SR 214, Affidavit of Zachary Peterson, Exhibit E; SR 214, Affidavit of Zachary Peterson, Exhibit F.

Subpart B.(2) of Part E of the Liberty Mutual Policy, requires that “[a] person seeking any coverage must: [] [p]romptly send us copies of any notices or legal papers received in connection with the accident or loss.” SR 377, Affidavit of Jared D. Nooney in Response to Defendant’s Statement of Material Facts, Exhibit 4, LM 14 (emphasis added). The fact that Ms. Spotted Thunder was properly served in 51CIV17-001270 pursuant to SDCL §§ 15-7-6 and 15-7-7, does not mean that she in fact received “any notices or legal papers [] in connection with the accident[.]” SR 377, Affidavit of Jared D. Nooney in Response to Defendant’s Statement of Material Facts, Exhibit 4, LM 14.

At the trial court, Liberty Mutual further emphasized that Ms. Spotted Thunder “*did not* receive correspondence mailed to the California address” because it had been “**retuned to sender.**” (emphasis in original). SR 200 Brief in Support of Defendant’s Motion for Summary Judgment, p. 4. One must ask the question, if the South Dakota Secretary of State was served with the Summons and Complaint in 51CIV17-001270 and correspondence mailed to Ms. Spotted Thunder had been “**retuned to sender[,]**” how would Ms. Spotted Thunder have “received” any notice or legal papers in connection with the accident, let alone provided such to Liberty Mutual. (emphasis in original). SR 200 Brief in Support of Defendant’s Motion for Summary Judgment, p. 4; SR 214, Affidavit of Zachary Peterson, Exhibit E; SR 214, Affidavit of Zachary Peterson, Exhibit F.

Mr. Spotted Thunder was not a named party to the underlying litigation in 51CIV17-001270, hence he did not receive “copies of any notices or legal papers [] in connection with the accident or loss”; therefore, he could not provide Liberty Mutual with “copies of any notices or legal papers [] in connection with the accident”. SR 377, Affidavit of Jared D. Nooney in Response to Defendant’s Statement of Material Facts, Exhibit 4, LM 14 (emphasis added). Furthermore, given that Ms. Spotted Thunder never received the pleadings in the Underlying Case, by mail or otherwise and “*did not* receive correspondence mailed to the California

address” because it had been “retuned to sender” it is clear that Ms. Spotted Thunder did not “receive” “copies of any notices or legal papers [] in connection with the accident or loss”; therefore, she could not provide Liberty Mutual with “copies of any notices or legal papers [] in connection with the accident”. SR 377, Affidavit of Jared D. Nooney in Response to Defendant’s Statement of Material Facts, Exhibit 4, LM 14. The trial court erred by granting Liberty Mutual’s Motion for Summary Judgment.

F. THERE IS A QUESTION OF FACT AS IT CONCERNS THE CAUSE OF THE ACCIDENT, WHICH PRECLUDED SUMMARY JUDGMENT

The cause of the accident and more specifically, whether the accident was intentional is a question of fact that precluded Summary Judgment in favor of Liberty Mutual. On April 8, 2016, Liberty Mutual sent a denial letter to Mr. Spotted Thunder and Ms. Spotted Thunder. SR 504, Affidavit of Jared D. Nooney in Response to Defendant’s Renewed Motion for Summary Judgment, Exhibit 6, LM 139-140. The April 8, 2016 denial letter, stated in pertinent part as follows:

Information from the police report states that this accident may have been caused by an intentional act by Bianca Thunder [sic]. We have tried several times to get a statement from Bianca Thunder [sic] and yourself to determine if this accident was indeed caused by an initial [sic] act. Due to lack of cooperation from both you and Ms. Thunder [sic], Liberty Mutual will be unable to afford coverage for this claim.

Our denial of coverage is based on the language within your policy, which states as follows:

Part E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 6, LM 139-140. It must be noted that in Liberty Mutual denial letter, it makes no mention of Subpart B.(2.),⁸ as argued by Liberty Mutual to the trial court as it concerns the Motion for Summary Judgment and Renewed Motion for Summary Judgment. SR 200, Brief in Support of Defendant's Motion for Summary Judgment, pp. 5-9; SR 591, Reply Brief in Support of Defendant's Renewed Motion for Summary Judgment, pp. 1-3, 7.

The police report raises a question as to the cause of the accident. However, Liberty Mutual had already reached its own conclusion that the cause of the accident was not a basis to deny coverage, given the fact

⁸ Again which provides as follows: "A person seeking any coverage must: [] 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss." SR 377, Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts, Exhibit 4, LM 14.

that it paid its' insured for the property damage claim (i.e. the vehicle involved in the accident). Liberty Mutual's own actions acknowledge the existence of coverage under the Policy, but regardless, if there is a question as to the cause of the accident, that is a question of fact that precludes Summary Judgment in favor of Liberty Mutual. The trial court erred when it found that there was no question of fact as it concerns the cause of the accident.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellants, Kaiser Trucking, Inc. and David Simons, respectfully request that this Court reverse the trial court's Order Granting Defendant's Renewed Motion for Summary Judgment and Summary Judgment, and to reverse and remand this case to the trial court.

Dated this 9th day of December, 2024.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney

JARED D. NOONEY

Attorneys for Plaintiffs and Appellants

326 Founders Park Drive / P. O. Box 8030

Rapid City, SD 57709-8030

(605) 721-5846

jared@nooneysolay.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellants' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 6,180 words and 30,878 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 9th day of December, 2024.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney

JARED D. NOONEY

Attorneys for Plaintiffs and Appellants

326 Founders Park Drive / P. O. Box 8030

Rapid City, SD 57709-8030

(605) 721-5846

jared@nooneysolay.com

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

KAISER TRUCKING, INC. and DAVID SIMONS, Plaintiffs, vs. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant.	APPEAL NO. 30728 CERTIFICATE OF SERVICE
---	---

I, Jared D. Nooney, attorney for the Appellants, Kaiser Trucking, Inc. and David Simons, hereby certify that one (1) true and correct copies of the foregoing *Appellants' Brief* was sent by U.S. Mail, first-class postage prepaid to:

JACK H. HIEB
ZACHARY W. PETERSON
RICHARDSON, WYLY, WISE,
SAUCK & HIEB, LLP
P.O. Box 1030
Aberdeen, SD 57402-1030
*Attorneys for Defendant and
Appellee, Liberty Mutual Fire
Insurance Company*

I further certify that on the 9th day of December, 2024, I served via Odyssey, emailed, and sent one (1) original and one (1) copy of the foregoing *Appellants' Brief* by U.S. Mail, first-class postage prepaid, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070
scclerkbriefs@uds.state.sd.us

/s/ Jared D. Nooney
JARED D. NOONEY

APPENDIX

TABLE OF CONTENTS

I.	Order Granting Defendant's Renewed Motion for Summary Judgment.....	A 001-002
II.	Summary Judgment.....	B 001

STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

KAISER TRUCKING, INC. and * 51 CIV 20-1544
DAVID SIMONS, *
 *
Plaintiffs, *
 *
-vs- * **ORDER GRANTING DEFENDANT'S**
 * **RENEWED MOTION FOR**
LIBERTY MUTUAL FIRE * **SUMMARY JUDGMENT**
INSURANCE COMPANY, *
 *
Defendant. *

On August 30, 2023, Liberty Mutual Fire Insurance Company ("Liberty Mutual") filed a Motion for Summary Judgment. Plaintiffs opposed the Motion. On October 23, 2023, the Motion came on for hearing before the Circuit Court, the Honorable Joshua K. Hendrickson, presiding. Following the parties' argument, the Court granted plaintiffs' request for leave to conduct discovery pursuant to SDCL 15-6-56(f). On February 20, 2024, plaintiffs deposed a Liberty Mutual employee, Diana Fox, and Liberty Mutual's SDCL 15-6-30(b)(6) designee, Damon Taggart.

On April 8, 2024, Liberty Mutual filed Defendant's Renewed Motion for Summary Judgment. Plaintiffs opposed the Motion. The Motion came on for hearing on May 6, 2024 before the Circuit Court, the Honorable Joshua K. Hendrickson, presiding. Plaintiffs appeared through their attorney, Jared Nooney. Liberty Mutual appeared through its attorney, Jack H. Lieb.

The Court has considered the parties' filings and the evidence submitted. The Court concludes that plaintiffs have failed to introduce any facts to show there

Order Granting Defendant's Renewed Motion for Summary Judgment

is a genuine issue for trial regarding compliance with the following conditions precedent in Liberty Mutual's insurance policy:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties: . . .

- B. A person seeking any coverage must:
1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

Now, therefore, it is hereby:

ORDERED that Liberty Mutual's Renewed Motion for Summary Judgment is GRANTED.

5/15/2024 2:52:26 PM

BY THE COURT:



Honorable Joshua K. Hendrickson
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy



STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

KAISER TRUCKING, INC. and
DAVID SIMONS,

*
*
*
*
*
*
*
*
*
*

51 CIV 20-1544

Plaintiffs,

-VS-

SUMMARY JUDGMENT

LIBERTY MUTUAL FIRE
INSURANCE COMPANY,

Defendant.

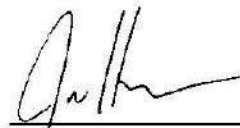
Pursuant to the Order Granting Defendant's Renewed Motion for Summary
Judgment, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That this action be, and it hereby is, dismissed;
2. That the plaintiffs take nothing; and
3. That the defendant, Liberty Mutual Fire Insurance Company, recover of
the plaintiffs, Kaiser Trucking, Inc., and David Simons, its costs and
disbursements of this action in the sum of \$ _____ (to be hereinafter
inserted by the Clerk of this Court).

5/15/2024 2:52:18 PM

BY THE COURT:



Honorable Joshua K. Hendrickson
Circuit Court Judge

Attest:
Marzluf, Patty
Clerk/Deputy



{0072978} CX / 1}

1 of 1

Filed on: 05/15/2024 Pennington County, South Dakota 51CIV20-001544

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

KAISER TRUCKING, INC. and DAVID SIMONS,

Plaintiffs/Appellants,

-vs-

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant/Appellee.

Appeal No. 30728

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JOSHUA HENDRICKSON,
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE

Mr. Jared D. Nooney
Mr. Robert J. Galbraith
NOONEY & SOLAY, LLP
326 Founders Park Drive
Post Office Box 8030
Rapid City, SD 57709-8030
Telephone No: (605) 721-5846
Email: Jared@NooneySolay.com
Email: Robert@NooneySolay.com
***Attorneys for Appellants Kaiser
Trucking, Inc. and David Simons***

Mr. Zachary W. Peterson
Mr. Jack H. Hieb
RICHARDSON, WYLY, WISE,
SAUCK & HIEB, LLP
1 Court Street
Aberdeen, SD 57401
Telephone No: (605) 225-6310
Email: ZPeterson@rwwsh.com
Email: JHieb@rwwsh.com
***Attorneys for Appellee Liberty
Mutual Fire Insurance Company***

NOTICE OF APPEAL FILED
JUNE 12, 2024

{00781778.DOCX / 1}

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement	1
Jurisdictional Statement	1
Questions Presented	1
I. Whether the Circuit Court Correctly Granted Liberty Mutual's Motion for Summary Judgment	1
Statement of the Case.....	2
Statement of Facts	3
A. The crash and attempted investigation as to liability coverage..	3
B. Great West Casualty Company's pursuit of subrogation.....	5
C. The underlying case.....	6
D. This action under SDCL 58-23-1.....	7
E. Policy provisions	7
Argument.....	8
A. The Circuit Court correctly granted summary judgment.....	8
1. SDCL 58-23-1 permits a recovery against the insurer only under the terms of the policy.....	9
2. It is undisputed that Liberty Mutual had neither cooperation from anyone seeking liability coverage nor notice of the underlying lawsuit	10
3. Conditions precedent remain a part of the Policy, and plaintiffs must prove an entitlement to recover "under the terms of the policy"	12
4. Notice of the accident in 2015 is not pertinent to Liberty Mutual's summary judgment argument.....	14
5. There is no question of material fact about notice of the lawsuit or cooperation in the defense	15

6.	Plaintiffs' new argument about Bianca Spotted Thunder not receiving the pleadings in the Underlying Case does not create an issue of fact	17
7.	Liberty Mutual's motion does not concern the cause of the accident	18
	Conclusion	20
	Certificate of Compliance.....	21
	Certificate of Service	22

TABLE OF AUTHORITIES

<u>STATUTES:</u>	<u>Page(s)</u>
SDCL 15-6-12(b)(5)	2
SDCL 15-6-56(f).....	1, 3, 10
SDCL 15-6-60(b)(1)	7
SDCL 15-6-60(b)(2)	7
SDCL 15-6-60(b)(3)	7
SDCL 15-7-6	6
SDCL 15-7-7	6
SDCL 15-26A-3(1)	1
SDCL 58-23-1	2, 7, 10, 13-14

<u>CASES:</u>	<u>Page(s)</u>
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242, 248 (1986)	19
<u>Bordeaux v. Shannon County Schools</u> , 2005 S.D. 117, ¶14, 707 N.W.2d 123, 127)	9
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317, 324 (1986).....	9
<u>Citibank S.D., N.A. v. Schmidt</u> , 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832	9
<u>Domson, Inc. v. Kadrmas Lee & Jackson, Inc.</u> , 2018 S.D. 67, ¶ 11, 918 N.W.2d 396, 401	18
<u>Henschel v. Hawkeye-Security Ins. Co.</u> , 178 N.W.2d 409, 417 (Iowa 1970).....	11
<u>Kaiser Trucking v. Liberty Mut. Fire Ins. Co.</u> , 2022 S.D. 64, 981 N.W.2d 645	2, 12-13
<u>Parker v. Sony Pictures Entm't, Inc.</u> , 260 F.3d 100, 111 (2d Cir. 2001).....	9, 18
<u>Railsback v. Mid-Century Ins. Co.</u> , 2004 S.D. 64, 680 N.W.2d 652	2, 10, 14

<u>Rush v. U.S. Bancorp Equip. Finance, Inc.</u> , 2007 S.D. 119, ¶ 8 n.1, 742 N.W.2d 266, 269 n.1).....	18
<u>Terra Indus. v. Nat'l Union Fire Ins.</u> , 383 F.3d 754, 759 (8th Cir. 2004)	11

SECONDARY AUTHORITY:

Page(s)

10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983)	19
Wright & Miller, 5A Federal Practice & Procedure § 1303.....	13

PRELIMINARY STATEMENT

In this brief, the Appellants, Kaiser Trucking, Inc., and David Simons will be collectively referred to as “plaintiffs.” Appellee Liberty Mutual Fire Insurance Company will be referred to as “Liberty Mutual.” The Pennington County Clerk of Courts’ record will be referred to by the initials “CR” and the corresponding page numbers. Citations to transcripts will be designated by “Trans.”, the date of the hearing, and the corresponding page and line number. The Pennington County civil case captioned Kaiser Trucking, Inc., and David Simons, plaintiffs, vs Bianca Spotted Thunder, 51CIV17-001270 will be referred to as the “Underlying Case.”

JURISDICTIONAL STATEMENT

Plaintiffs appeal from the Circuit Court’s Order Granting Defendant’s Renewed Motion for Summary Judgment and Summary Judgment, which were both filed on May 15, 2024. (CR 599, 601.) Liberty Mutual served Notice of Entry on May 16, 2024. (CR 602.) Plaintiffs served and filed a Notice of Appeal on June 12, 2024. (CR 107.) This Court may exercise jurisdiction pursuant to SDCL 15-26A-3(1), because the Circuit Court entered summary judgment and dismissed plaintiffs’ case.

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT CORRECTLY GRANTED LIBERTY MUTUAL’S MOTION FOR SUMMARY JUDGMENT.

Despite their opportunity to conduct additional discovery consistent with SDCL 15-6-56(f), plaintiffs did not introduce any evidence showing that the Spotted Thunders or anyone seeking

coverage under the policy complied with certain conditions precedent. Accordingly, the Circuit Court concluded that plaintiffs failed to show a genuine issue for trial regarding compliance with (1) the condition requiring a person seeking coverage to cooperate in the investigation, settlement or defense of any claim or suit, and (2) the condition requiring that a person seeking coverage promptly send notices or legal papers.

Railsback v. Mid-Century Ins. Co., 2004 S.D. 64, 680 N.W.2d 652.

SDCL 58-23-1.

STATEMENT OF THE CASE

On December 1, 2020, plaintiffs started this lawsuit, naming “Liberty Mutual Group, Inc.,” as defendant. (CR 3-7.) In lieu of answering, on December 30, 2020, defendant filed a Motion to Dismiss pursuant to SDCL 15-6-12(b)(5). (CR 8.) Plaintiffs subsequently filed a Motion to Amend their Complaint, seeking to name “Liberty Mutual Fire Insurance Company” instead of Liberty Mutual Group, Inc., as the defendant. (CR 70-72.) The parties agreed that Liberty Mutual Fire Insurance Company should be substituted as the defendant and thus as the party making the Motion to Dismiss.

This case was previously before this Court on plaintiffs’ first appeal after the Honorable Joshua K. Hendrickson granted Liberty Mutual’s Motion to Dismiss. Kaiser Trucking v. Liberty Mut. Fire Ins. Co., 2022 S.D. 64, 981 N.W.2d 645. This Court reversed and remanded the case for further proceedings, concluding that plaintiffs’ pleading was sufficient to state a claim. (CR 185.)

On August 30, 2023, Liberty Mutual filed a Motion for Summary Judgment and accompanying materials. (CR 198-354.) Plaintiffs opposed the Motion and sought leave to conduct further discovery under SDCL 15-6-56(f). (CR 357-463.) Judge Hendrickson granted plaintiffs' request to complete additional discovery pursuant to SDCL 15-6-56(f) and held Liberty Mutual's Motion for Summary Judgment in abeyance. (Trans. (10/23/2023) 5:25-6:6.)

Following additional discovery, Liberty Mutual renewed its motion for summary judgment. (CR 485-487.) Judge Hendrickson granted Liberty Mutual's Renewed Motion for Summary Judgment at the hearing held on May 6, 2024. (Trans. (5/06/2024) 14:9–15:9.) On May 15, 2024, the Circuit Court entered the Order Granting Defendant's Renewed Motion for Summary Judgment and the Summary Judgment. (CR 599, 601.)

STATEMENT OF FACTS

A. The crash and attempted investigation as to liability coverage.

The genesis of this case is a motor vehicle accident that happened on September 8, 2015, when Bianca Spotted Thunder, in an apparent attempt to kill herself, collided head-on with a truck driven by David Simons. The truck was owned by Kaiser Trucking, Inc. The accident report prepared by Anthony Long Soldier contains the following excerpt:

I WAS THEN ADVISED BY THE MEDIC UNIT STAFF THE FEMALE MADE THE COMMENTS OF HURTING HERSELF AND SHE SAID SHE WAS DRIVING 75MPH IN A POSTED 65 MPH ZONE. I THEN MADE CONTACT WITH THE FEMALE

AND SHE STARTED TO ADVISE THE SAME AND I ADVISED HER OF HER RIGHTS AND SHE SAID SHE UNDERSTOOD. THEN LET THE FEMALE TALK AFTER SHE WAS ADVISED AND SHE ADVISED SHE WAS SUPPOSED TO DIE LIKE THEY DO IN THOSE SHOWS. SHE ALSO ADVISED THIS WOULDN'T HAVE HAPPENED IF SHE DID NOT PUT HERSELF IN THIS SITUATION. THE FEMALE ADVISED SHE WAS WITH HER FRIENDS AND SHE DROPPED THEM OFF BECAUSE SHE DID NOT WANT TO HURT THEM WHEN SHE WAS GOING TO DO WHAT SHE DID.

(CR 353.)

Recognizing the potential that Bianca Spotted Thunder intentionally caused the crash, Liberty Mutual made numerous attempts to contact the Spotted Thunders to investigate the circumstances of the crash and assess the availability of liability coverage. While the named insured, Charles Spotted Thunder, was initially willing to talk to Liberty Mutual to collect on his collision coverage, his attitude changed when Liberty Mutual sought information about whether the Policy's liability coverage applied.

Beginning in November 2015, Liberty Mutual attempted to call Charles Spotted Thunder, but his phone was disconnected. (CR 342.) On January 19, 2016, Great Western Casualty Company ("GWCC") reached out to Liberty Mutual by fax. (CR 323.) In response, Liberty Mutual left a voice mail at a new phone number for Charles on January 21, 2016, and followed with letters to the Spotted Thunders on January 21, 2016, urging cooperation. (CR 340.) Liberty Mutual continued its efforts to contact the Spotted Thunders in late January 2016 and throughout February 2016. (CR

339.) At the end of February, Liberty Mutual sent a field adjuster to California visit Charles and deliver a reservation of rights letter. (CR 338.) At that time, Charles told the adjuster that he did not want to be bothered. (Id.)

Around the same time, Bianca Spotted Thunder or someone at her address signed for Liberty Mutual's certified letter requesting that she cooperate in the investigation. (CR 338.) Bianca never called Liberty Mutual back. (CR 565.) In April 2016, Liberty Mutual determined that the Spotted Thunders' failure to cooperate required a denial of the claim. (CR 337.)

B. Great West Casualty Company's pursuit of subrogation.

GWCC is the insurer for Kaiser Trucking, Inc. (CR 272; 315-320.) Although plaintiffs' names appear on the caption, GWCC seeks a recovery in this lawsuit for the amounts it paid to plaintiffs. (CR 272; 277-308; 315-320.)

On January 14, 2016, Kathryn M. Reichenbach, Subrogation Attorney for GWCC, wrote to Liberty Mutual seeking payment on the claim. (CR 323.) Following the efforts described above, on April 8, 2016, Liberty Mutual wrote to Ms. Reichenbach and advised that its insured refused to cooperate and Liberty Mutual was unable to investigate the availability of coverage. (CR 324.) On May 16, 2016, Kathryn Hayden¹, Subrogation Attorney for GWCC, sent another fax seeking payment on the claim. (CR 325.) On May 17, 2016,

¹ It is unclear whether this is a different person or the same subrogation attorney with a new surname.

Liberty Mutual responded and advised that it was denying coverage based on the lack of cooperation. (CR 326-327.)

In early January, 2017, additional emails were exchanged between Kathryn Hayden and Julio Medina with Liberty Mutual concerning Liberty Mutual's denial and GWCC's continued pursuit of a recovery. (CR 328-332.) On January 26, 2017, Mr. Medina told Ms. Hayden: "If it is decided that suit will be filed, please contact me." (CR 331.)

C. The Underlying Case.

Neither plaintiffs nor GWCC notified Liberty Mutual when they sued Bianca Spotted Thunder. (CR 258-260; 336.) Plaintiffs admit in their answers to interrogatories they have no knowledge that Bianca or Charles sent any notices or legal papers to Liberty Mutual or otherwise cooperated with Liberty Mutual with respect to the Underlying Case. (CR 260-261.) Liberty Mutual's first notice of the Underlying Case was on December 4, 2020, nearly one year after judgment was entered against Bianca Spotted Thunder. (CR 336.)

On August 21, 2017, plaintiffs opened the civil file in Underlying Case. On September 25, 2017, the South Dakota Secretary of State admitted service of the pleadings. (CR 309.) On September 29, 2017, plaintiffs' counsel filed an Affidavit of Compliance, purporting to show compliance with SDCL 15-7-6 and 15-7-7. (CR 310-311.) In the Affidavit of Compliance, plaintiffs asserted that Bianca Spotted Thunder was a resident of Davis, California,

and she was being provided with the Affidavit of Compliance and a Notice of Service of Process. (Id.)

Plaintiffs filed an Affidavit of Default on September 12, 2018. (CR 313-314.) Plaintiffs also filed Affidavits in support of their damages, which recited the amounts paid by GWCC. (CR 315-320.) On December 6, 2019, the Circuit Court entered default judgment against Ms. Spotted Thunder. (CR 321-322.) Kaiser Trucking, Inc. was awarded \$36,977.06, plus prejudgment interest in the amount of \$15,672.60; and David Simons was awarded \$146,619.88, plus prejudgment interest in the amount of \$58,382.01. (Id.)

D. This action under SDCL 58-23-1.

Although neither GWCC nor plaintiffs contacted Liberty Mutual from September 2017 to December 2019 regarding the Underlying Case against its putative insured or the judgment ultimately entered, on December 1, 2020, plaintiffs commenced this action against Liberty Mutual.² (CR 7.) Plaintiffs' First Amended Complaint seeks to impose against Liberty Mutual a monetary judgment in the amount of the Default Judgment entered against Bianca Spotted Thunder in the Underlying Case. (CR 189.)

² Plaintiffs' decision to wait approximately 360 days to commence suit against Liberty Mutual has legal significance. Motions for relief from judgment under SDCL 15-6-60(b)(1)-(3) can only be filed within one year of after the judgment. By waiting until the eve of the expiration of the year, GWCC and plaintiffs were able to insulate their judgment from attacks based upon, *inter alia*, mistake, inadvertence, surprise, or excusable neglect; and fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

E. Policy provisions.

Liberty Mutual provided a policy of insurance to Charles Spotted Thunder, the father of Bianca Spotted Thunder, denominated as Policy Number A02-248-403754-70 4 8 (hereinafter the “Policy”). (CR 187.) In Part E, entitled “Duties After an Accident or Loss,” the Policy states:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
- B. A person seeking any coverage must:
 - 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
 - 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

(CR 230.)

An Amendatory Endorsement slightly modifies subpart B. to read that a person seeking coverage must: “Cooperate with us in the investigation, settlement or defense of any claim or suit. This includes, but is not limited to, allowing us to inspect damage to a vehicle covered by this policy.” (CR 242.)

ARGUMENT

A. The Circuit Court correctly granted summary judgment.

Liberty Mutual’s Motion for Summary Judgment presented a simple, narrow question: can plaintiffs present material facts showing there was

compliance with the conditions in the “Duties After an Accident or Loss” section of the Policy? More specifically, are there any material facts showing that a person seeking liability coverage:

- cooperated with Liberty Mutual in the investigation, settlement or defense of any claim or suit; and
- promptly sent Liberty Mutual copies of any notices or legal papers received in connection with the accident or loss?

“It should be unmistakable to lawyers and laypersons alike that when facing a motion for summary judgment, the opposing party must be diligent in resisting [the motion], and mere general allegations and denials which do not set forth specific facts will not prevent the issuance of a judgment.”

Citibank S.D., N.A. v. Schmidt, 2008 S.D. 1, ¶ 8, 744 N.W.2d 829, 832

(quoting Bordeaux v. Shannon County Schools, 2005 S.D. 117, ¶14, 707

N.W.2d 123, 127) (further citations omitted). “A defendant need not prove a negative when [it] moves for summary judgment on an issue that the plaintiff must prove at trial. [It] need only point to an absence of proof on the plaintiff’s part, and, at that point, plaintiff must designate specific facts showing that there is a genuine issue for trial.” Parker v. Sony Pictures Entm’t, Inc., 260 F.3d 100, 111 (2d Cir. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

Liberty Mutual raised the issue concerning compliance with the conditions in the “Duties After an Accident or Loss” section. Plaintiffs opposed summary judgment and sought the chance to do more discovery

consistent with SDCL 15-6-56(f). Plaintiffs were given the chance to do more discovery. They returned to the Court with testimony about claim notes from 2015 showing that Charles Spotted Thunder gave notice of the accident so he could get paid for the damage to his vehicle. This unremarkable content does not bear upon the issues that Liberty Mutual raised. As below, plaintiffs present no material facts showing that Liberty Mutual gained cooperation from anyone seeking liability coverage or was ever advised of the Underlying Case by anyone seeking liability coverage.

1. SDCL 58-23-1 permits a recovery against the insurer only under the terms of the policy.

Where, as here, plaintiffs have obtained against a tortfeasor a Default Judgment which remains unsatisfied, the relief is confined to what is available under the terms of the Policy:

All liability insurance policies issued in this state shall provide in substance that if an execution upon any final judgment in an action brought by the injured or by another person claiming, by, through, or under the injured, is returned unsatisfied, then an action may be maintained by the injured, or by such other person against the insurer **under the terms of the policy** for the amount of any judgment recovered in such action, not exceeding the amount of the policy, and every such policy shall be construed to so provide, anything in such policy to the contrary notwithstanding.

SDCL 58-23-1 (emphasis added); see also Railsback v. Mid-Century Ins. Co., 2004 S.D. 64, ¶ 18, 680 N.W.2d 652, 657 (“The statute limits recovery by the injured claimant ‘under the terms of the policy.’”).

2. It is undisputed that Liberty Mutual had neither cooperation from anyone seeking liability coverage nor notice of the underlying lawsuit.

Plaintiffs presented no facts which demonstrate that Bianca Spotted Thunder, or anyone else seeking liability coverage under the Policy, complied with the obligations owed under the Policy. Such obligations are conditions precedent to Liberty Mutual's obligation to defend or indemnify.

"[A] condition precedent is one whose performance or occurrence plaintiff must prove in order to recover." Terra Indus. v. Nat'l Union Fire Ins., 383 F.3d 754, 759 (8th Cir. 2004) (quoting Henschel v. Hawkeye-Security Ins. Co., 178 N.W.2d 409, 417 (Iowa 1970)). "For example, many liability insurance policies require that the insured notify the insurer of any claim immediately or as soon as practicable as a condition precedent to coverage for a particular claim." Id. "The insured must demonstrate that he or she substantially complied with this condition or that noncompliance was excused, waived, or did not prejudice the insurer." Id. "Otherwise, the insurer does not have to indemnify the insured for damages awarded against him." Id.

"Conditions precedent frequently involve something that the insured must do while exclusions involve something that the insured must not do." Terra Indus., 383 F.3d at 760. Clearly, the "Duties After an Accident or Loss" provision sets forth things that were required to be done before Liberty Mutual had any obligations under the Policy. The record in this matter

makes clear that Liberty Mutual's attempts to gain cooperation from the Spotted Thunders were repeatedly rebuffed, and Liberty Mutual had no idea that a lawsuit was proceeding against Bianca Spotted Thunder. It learned of the Underlying Case, for the first time, when it was served with this lawsuit.

GWCC, under plaintiffs' names, seeks a recovery of the amounts it paid. GWCC was acutely aware of Liberty Mutual's involvement as Charles Spotted Thunder's liability insurer. GWCC corresponded with Liberty Mutual from early 2016 to early 2017. GWCC knew that Spotted Thunders were unwilling to cooperate with Liberty Mutual. (CR 326-327.) Julio Medina with Liberty Mutual also told GWCC on January 26, 2017: "If it is decided that suit will be filed, please contact me." (CR 331.) As evidenced by the claim notes, which skip from January 27, 2017, to Liberty Mutual's receipt of the lawsuit on December 4, 2020, neither GWCC nor anyone else ever did that. (CR 336.)

To resist summary judgment, plaintiffs had to produce facts showing they are entitled to relief "under the terms of the policy." Plaintiffs did not meet that burden.

3. Conditions precedent remain a part of the Policy, and plaintiffs must prove an entitlement to recover "under the terms of the policy."

Plaintiffs begin their appellate argument by misconstruing the Court's conclusion in its prior opinion. Plaintiffs seize on language from Kaiser Trucking v. Liberty Mut. Fire Ins. Co., 2022 S.D. 64, 981 N.W.2d 645, to

argue that satisfaction of conditions precedent is not required. Plaintiffs fail to read the Court's language in context.

The Court's prior decision concerned the content plaintiffs were required to *plead* in their complaint. Liberty Mutual argued that plaintiffs were required to plead that the requirements of the "Duties After an Accident or Loss" were met, as the same are conditions precedent. The Court ultimately adopted a middle ground on the pleading of conditions precedent, relying on a well-known federal practice treatise: "Wright & Miller, 5A Federal Practice & Procedure § 1303 suggests a middle ground between these two views that evaluates whether conditions precedent must be pled in a complaint based on the underlying substantive law and *whether the substantive law considers conditions precedent to be elements in the claim.*" *Id.*, 2022 S.D. 64, ¶ 24, 981 N.W.2d at 654. (Emphasis added.)

The Court concluded that "[w]hile SDCL 58-23-1 authorizes the direct action 'against the insurer under the terms of the policy,' the statute does not require the injured party *to plead* any other element or condition precedent to maintain the action." *Id.*, ¶ 28, 981 N.W.2d at 656 (emphasis added). The Court noted that its decisions comported with notice pleading requirements, as "[t]he complaint fully apprises Liberty Mutual of the nature of the claim asserted by Kaiser Trucking." *Id.*, ¶30, 981 N.W.2d at 656.

The fact that plaintiffs were not required *to plead* satisfaction of a condition precedent as an element of a claim under SDCL 58-23-1 does not

mean that the “Duties After an Accident or Loss” section simply drops out of the Policy. Indeed, the Court specifically included this sentence in its concluding comments: “Further, during litigation, Liberty Mutual is not limited or prejudiced in its ability to present any alleged conditions precedent to coverage or other defenses that may exist under the Policy.” Id.

While plaintiffs did not have to plead there was compliance with the “Duties After an Accident or Loss” portion of the Policy, they still must prove their entitlement to recover “under the terms of the policy.” SDCL 58-23-1; see also Railsback, 2004 S.D. 64, ¶ 18, 680 N.W.2d at 657 (“The statute limits recovery by the injured claimant ‘under the terms of the policy.’”). Liberty Mutual maintains, and the Circuit Court correctly concluded, that plaintiffs presented no material facts to show there was compliance with Part B of the “Duties After an Accident or Loss” portion of the Policy. Without this showing, plaintiffs cannot recover “under the terms of the policy.”

4. Notice of the accident in 2015 is not pertinent to Liberty Mutual’s summary judgment argument.

On pages 15-17 of Appellants’ Brief, plaintiffs make arguments about Liberty Mutual being on notice of the *accident* in 2015. Plaintiffs conflate notice of the accident with notice of the lawsuit. There is a difference.

In Part E, entitled “Duties After an Accident or Loss,” the Policy states:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
- B. **A person seeking any coverage must:**
 - 1. **Cooperate with us in the investigation, settlement or defense of any claim or suit.**
 - 2. **Promptly send us copies of any notices or legal papers received in connection with the accident or loss.**

(CR 230.) (Emphasis added.)

Plaintiff argue facts concerning subpart A. There is no need to resort to “reasonable inferences” regarding notice of the accident in 2015, however, because Liberty Mutual readily acknowledges that it was advised of the accident in 2015. Charles Spotted Thunder made a claim for the damage to his vehicle and that claim was paid. These facts are immaterial.

Plaintiffs present *no facts* which could possibly support compliance with subpart B as it relates to liability coverage. There is a stark difference between Liberty Mutual’s notice of the 2015 motor vehicle accident and provision of the collision coverage that Charles Spotted Thunder paid for, which is conceded; and cooperation in the investigation of the claim and notice of the lawsuit against Bianca Spotted Thunder in 2017, neither of which happened.

5. There is no question of material fact about notice of the lawsuit or cooperation in the defense.

In support of plaintiffs' argument that a question of fact precluded summary judgment on the issue of cooperation, plaintiff point exclusively to conversations with Charles Spotted Thunder in 2015 when he was trying to get paid for the damage to his vehicle. These conversations occurred approximately two years before the Underlying Case was filed, and approximately five years before Liberty Mutual first learned about the lawsuit against Bianca Spotted Thunder. They are utterly immaterial to the question before the Court.

Plaintiffs also ignore that, once Charles Spotted Thunder got paid for the damage, his attitude changed. Neither he nor Bianca Spotted Thunder wanted anything to do with Liberty Mutual. In the first part of 2016, Liberty Mutual repeatedly tried to contact the Spotted Thunders to investigate coverage and liability and obtain a statement. Liberty Mutual even sent a field investigator out in California to track down Charles. Once that investigator was able to meet Charles face-to-face, Charles immediately sent Liberty Mutual's investigator away. (CR 338; 564-565.) Similarly, Bianca Spotted Thunder or someone at her address signed for Liberty Mutual's certified letter requesting that she cooperate in the investigation, but she never called Liberty Mutual back. (CR 338; 565.)

Even if the Spotted Thunders had been responsive in 2016, the more critical time was a year later when the lawsuit commenced. Absent from

plaintiffs' submission is *anything* to show that *anyone* seeking coverage under the policy promptly sent "copies of any notices or legal papers received in connection with the accident or loss." Since Liberty Mutual did not even know about the underlying lawsuit until 2020, it certainly did not gain the cooperation required by the policy in defending against the underlying lawsuit - thus, the default judgment that GWCC is trying to collect via this case. The lack of any evidence that Liberty Mutual received cooperation or was timely notified of the Underlying Case is dispositive.

6. Plaintiffs' new argument about Bianca Spotted Thunder not receiving the pleadings in the Underlying Case does not create an issue of fact.

For the first time in this appeal, plaintiffs advance the curious argument that the lawsuit they use as a basis to impose judgment against Liberty Mutual never made it to Bianca Spotted Thunder. So, they argue, she could not have sent copies of the pleadings to Liberty Mutual, and this somehow creates an issue of fact about whether the conditions precedent of the Policy were satisfied. This is a strange argument coming from GWCC, considering it was orchestrating the Underlying Case, had previously communicated with Liberty Mutual, and was in the best position to ensure Liberty Mutual was, *at the very least*, informed of the Underlying Case. Regardless, this argument fails for two distinct reasons.

First, plaintiffs did not argue that ineffective service on Bianca Spotted Thunder obviated compliance with Subpart 2.(B.) to the Circuit Court. This

argument is being made for the first time in this appeal. Accordingly, the argument is waived. See Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 2018 S.D. 67, ¶ 11, 918 N.W.2d 396, 401 (Rush v. U.S. Bancorp Equip. Finance, Inc., 2007 S.D. 119, ¶ 8 n.1, 742 N.W.2d 266, 269 n.1).

Second, and more fundamentally, plaintiffs ignore that there are two parts to the “Duties After an Accident or Loss” that are part of Liberty Mutual’s motion and upon which the Circuit Court relied in granting the Motion. In addition to providing copies of any notices or legal papers, a person seeking coverage must “cooperate with [Liberty Mutual] in the investigation, settlement or defense of any claim or suit.” Liberty Mutual’s unsuccessful efforts to gain the cooperation of the Spotted Thunders are well documented in the claim notes. In 2016, Bianca Spotted Thunder or someone at her address signed for Liberty Mutual’s certified letter requesting that she cooperate in the investigation, but she never called Liberty Mutual back after receiving its certified letter. (CR 338; 565.) Liberty Mutual’s other attempts to gain the cooperation of Charles Spotted Thunder were similarly rebuffed.

Plaintiffs present no material facts that bear upon the Spotted Thunders’ cooperation relative to the Policy’s liability coverage. There simply was no cooperation. Once again, to prevail on summary judgment, Liberty Mutual does not have the burden of proving a negative on something plaintiffs must show to recover. See Parker v. Sony Pictures Entm’t, Inc., 260 F.3d 100, 111 (2d Cir. 2001).

7. Liberty Mutual's Motion does not concern the cause of the accident.

Plaintiffs argue on pages 24-26 about issues of material fact concerning an exclusion not argued in Liberty Mutual's Motion. Liberty Mutual's motion did not extend beyond part B. of the "Duties After an Accident or Loss." The Policy's intentional acts exclusion was neither raised nor considered by the Circuit Court. "Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983)).

Although plaintiffs' argument on this subject is entirely irrelevant and unnecessary, plaintiffs also add nonsensical assertions about the scope of Liberty Mutual's April 8, 2016 denial letter. They argue: "[i]t must be noted that in Liberty Mutual (sic) denial letter, it makes no mention of Subpart B.(2)." That subsection requires a person seeking coverage to "promptly send [Liberty Mutual] copies of any notices or legal papers received in connection with the accident or loss." GWCC, through plaintiffs, started the Underlying Case against Bianca Spotted Thunder in 2017, and never advised Liberty Mutual. It is difficult to surmise how Liberty Mutual could have possibly relied upon Subpart B.(2.) in April 2016, which was a full year before any legal papers existed. Indeed, Liberty Mutual's reliance on Subpart B.(2.) did not ripen until it first learned of the Underlying Case in 2020.

CONCLUSION

For these reasons, Liberty Mutual respectfully asks that the Circuit Court's Summary Judgment be affirmed.

Respectfully submitted this 23rd day of January, 2025.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Appellee Liberty
Mutual Fire Insurance Company

Zachary W. Peterson
Jack H. Hieb
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No: (605) 225-6310
E-mail: ZPeterson@rwwsh.com
E-mail: JHieb@rwwsh.com

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(b). This brief is 20 pages long, exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service; is typeset in Century Schoolbook (12 pt.) and contains 4,569 words. The word processing software used to prepare this brief is Microsoft Word 2019.

Dated this 23rd day of January, 2025.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Appellee Liberty
Mutual Fire Insurance Company

Zachary W. Peterson
Jack H. Hieb
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No: (605) 225-6310
E-mail: ZPeterson@rwwsh.com
E-mail: JHieb@rwwsh.com

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Appellee Liberty Mutual Fire Insurance Company, hereby certifies that on the 23rd day of January, 2025, a true and correct copy of **BRIEF OF APPELLEE** was served via Odyssey on:

Mr. Jared D. Nooney
Nooney & Solay
Jared@NooneySolay.com

and an electronic version of the brief was transmitted to the Clerk of the Supreme Court via electronic mail.

The original was mailed on _____ by first-class mail, postage prepaid, to:

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

Dated this 23rd day of January, 2025.

RICHARDSON, WYLY, WISE, SAUCK
& HIEB, LLP

By /s/ Zachary W. Peterson
Attorneys for Appellee Liberty
Mutual Fire Insurance Company

Zachary W. Peterson
Jack H. Hieb
Post Office Box 1030
Aberdeen, SD 57402-1030
Telephone No: (605) 225-6310
E-mail: ZPeterson@rwwsh.com
E-mail: JHieb@rwwsh.com

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 30728

KAISER TRUCKING, INC. and DAVID SIMONS,
Plaintiffs and Appellants,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
Defendant and Appellee.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Joshua Hendrickson
Circuit Court Judge

APPELLANTS' REPLY BRIEF

JARED D. NOONEY
NOONEY & SOLAY, LLP
326 Founders Park Drive
P.O. Box 8030
Rapid City, SD 57709-8030
*Attorneys for Plaintiffs and
Appellants,
Kaiser Trucking, Inc. and
David Simons*

JACK H. HIEB
ZACHARY W. PETERSON
RICHARDSON, WYLY, WISE,
SAUCK & HIEB, LLP
P.O. Box 1030
Aberdeen, SD 57402-1030
*Attorneys for Defendant and
Appellee, Liberty Mutual Fire
Insurance Company*

NOTICE OF APPEAL FILED JUNE 12, 2024

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
ARGUMENT.....	1
I. THE TRIAL COURT ERRED WHEN IT GRANTED LIBERTY MUTUAL FIRE INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT	1
A. SATISFACTION OF CONDITIONS PRECEDENT ARE NOT A REQUIREMENT UNDER SDCL § 58-23-1	1
B. WHETHER LIBERTY MUTUAL FIRE INSURANCE COMPANY'S INSURED COOPERATED AFTER THE ACCIDENT IS A QUESTION OF FACT, WHICH PRECLUDED SUMMARY JUDGEMENT.....	2
C. LIBERTY MUTUAL TRIES TO DISTINGUISH LIABILITY COVERAGE FROM PERSONAL PROPERTY COVERAGE	5
D. WHETHER BIANCA SPOTTED THUNDER RECEIVED THE LEGAL PAPERS IN 51CIV17-001270 GOES HAND-IN-HAND WITH COOPERATION, WHICH PRECLUDED SUMMARY JUDGMENT	7
E. LIBERTY MUTUAL IGNORES THE CAUSE OF THE ACCIDENT, IN AN ATTEMPT TO FAVOR ITS' ARGUMENTS	9
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE.....	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

South Dakota Cases:

Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co., 2022 S.D. 64, 981 N.W.2d 645..... 1, 2

Railsback v. Mid-Century Ins. Co., 2004 S.D. 64, 680 N.W.2d 652 9

Other Cases:

Terra Indus., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 383 F.3d 754 (8th Cir. 2004) 1, 2

Statutes:

SDCL § 15-6-30(b) 4

SDCL § 15-7-6..... 7

SDCL § 15-7-7..... 7

SDCL § 58-23-1 1, 2

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT GRANTED LIBERTY MUTUAL FIRE INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT

A. SATISFACTION OF CONDITIONS PRECEDENT ARE NOT A REQUIREMENT UNDER SDCL § 58-23-1

In Appellee's Brief, Liberty Mutual Fire Insurance Company ("Liberty Mutual") argues that SDCL § 58-23-1 allows recovery against the tortfeasor under the terms of the Liberty Mutual Insurance policy at issue (Policy Number A02-248-403754-70 4 8) (the "Policy"), but that there are conditions precedent that need to be met in order to recover. *See Brief of Appellee*, pp. 10, 13-14. Liberty Mutual cites to this Court's decision in *Terra Indus., Inc.*, to argue the requirements of conditions precedent, rather than cite to this Court's decision in this very case.¹ *Id.* at p. 11. In fact, Liberty Mutual disregards this Court's prior statement in the First Appeal, that "[b]ased on our review of the Policy, as between Liberty Mutual and Spotted Thunder (insured), Section E(A) *may* be a condition precedent to coverage because it sets forth a requirement for coverage under the Policy, rather than carving out an event from the Policy's general coverage as an exclusion." *Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.*, 2022 S.D. 64, ¶ 28, 981 N.W.2d 645, 655; *see Terra Indus., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 383 F.3d 754,

¹ That previously came before this Court on appeal, on Liberty Mutual's Motion to Dismiss that the trial court granted ("First Appeal").

759 (8th Cir. 2004) (emphasis added). In the First Appeal, this Court stated that Section E(A) *may* be a condition precedent and did *not* state that Section E(A) is a condition precedent, as argued by Liberty Mutual. *See Kaiser Trucking, Inc.*, 2022 S.D. 64, ¶ 28, 981 N.W.2d 645, 655; *see also Terra Indus., Inc.*, 383 F.3d 754, 759 (8th Cir. 2004).

Liberty Mutual further argues that “plaintiffs were not required to *plead* satisfaction of a condition preceded as an element of the a claim under SDCL § 58-23-1 does not mean that the ‘Duties After an Accidnet or Loss’ section simply drops out of the Policy.” *Brief of Appellee*, pp. 13-14 (emphasis in original). This Court stated that “Kaiser Trucking is *not* a party to the contract of insurance between Liberty Mutual and Spotted Thunder.” *Kaiser Trucking, Inc.*, 2022 S.D. 64, ¶ 28, 981 N.W.2d 645, 656 (emphasis added). In the First Appeal, this Court held that “[s]atisfaction of conditions precedent in the applicable insurance contract is not, therefore, a requirement under SDCL 58-23-1.” *Id.* Liberty Mutual over-looks this Court’s prior statements and ruling, as it concerns their arguments in Appellee’s Brief.

B. WHETHER LIBERTY MUTUAL FIRE INSURANCE COMPANY’S INSURED COOPERATED AFTER THE ACCIDENT IS A QUESTION OF FACT, WHICH PRECLUDED SUMMARY JUDGEMENT

Liberty Mutual generally argues that there is no dispute as to cooperation. *See Brief of Appellee*, pp. 11-12, 14-15. First, there is a dispute as to cooperation pursuant to Section E of the Policy, because

that was the reason for the alleged denial of coverage by Liberty Mutual in the first place.² SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 6, LM 139-140. Section E of the Policy states as follows:

Part E – DUTIES AFTER AN ACCIDENT OR LOSS

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

SR 377, Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts, Exhibit 4, LM 14. In Appellee's Brief, Liberty Mutual argues there is no reason to address subpart A of Section E of the Policy. *Brief of Appellee*, p. 15. It is undisputed that Liberty Mutual was promptly notified of the accident. *See Brief of Appellee*, p 10. In fact, on September 8, 2015, Charles Spotted Thunder promptly provided notice to Liberty Mutual of the accident (the same day the accident

² Even though Liberty Mutual paid monies to Charles Spotted Thunder for his personal property damage claim (i.e. the vehicle involved in the automobile accident caused by Ms. Spotted Thunder that occurred on September 8, 2015 ("accident")), which is contrary to Liberty Mutual's denial because if there was no coverage under the Policy there would have been no reason to pay Charles Spotted Thunder for the damage to the vehicle involved in the accident.

occurred). SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 1, Deposition of Diana Fox, p. 16, ln. 19-22.

In Appellee's Brief, Liberty Mutual argues that "Plaintiffs present no facts which could possibly support compliance with subpart B as it relates to liability coverage." *Brief of Appellee*, p 15. Contrary to this argument, as it concerns Liberty Mutual alleging lack of cooperation, Damon Taggart (the designee of the deposition of Liberty Mutual pursuant to SDCL § 15-6-30(b)(6)), went so far to testify as follows:

Q: Okay. And you would agree with me that those individuals who I identified in the various claim notes did not make a claim note stating that Charles Spotted Thunder was *not* cooperating in the investigation, correct?

A: Correct.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's Renewed Motion for Summary Judgment, Exhibit 2, Deposition of Damon Taggart, p. 33, ln. 20-25 (emphasis added). Again, as testified to by Damon Taggart on behalf of Liberty Mutual, there were *no* claim notes to suggest a lack of cooperation from Liberty Mutual's insured, Charles Spotted Thunder.

What is in dispute is cooperation. The question of cooperation after the accident is not a legal question, but rather, cooperation is a question of fact that precluded Summary Judgment in favor of Liberty Mutual.

C. LIBERTY MUTUAL TRIES TO DISTINGUISH LIABILITY
COVERAGE FROM PERSONAL PROPERTY COVERAGE

In Appellee's Brief, Liberty Mutual attempts to distinguish liability coverage from personal property coverage, solely for purpose of attempting to circumvent coverage where Liberty Mutual had paid Charles Spotted Thunder for the personal property damage claim (i.e. the vehicle involved in the accident). *See Brief of Appellee*, pp. 11, 15, 18. Pursuant to the Policy, Liberty Mutual determined there was coverage for the personal property damage claim (i.e. the vehicle involved in the accident) and based on this determination by Liberty Mutual, liability coverage also exists. It is undisputed that Liberty Mutual paid its insured Charles Spotted Thunder pursuant to the Policy, for Charles Spotted Thunder's personal property damage claim related to the accident. Specifically, Damon Taggart on behalf of Liberty Mutual testified as follows:

Q: And do you see it states, Topic, claim status, and 11 then it identifies a text, in part, stating, 10-28 -- 10 dash 28 dash 2015, 2:26 p.m. Sent check number 37492758 for \$3,016.89, UPS tracking with a tracking number?

A: Yes.

Q: And would you agree with me that is identifying a payment that Liberty Mutual Fire Insurance Company made to the insured, Charles Spotted Thunder, as it concerns this claim?

A: Correct.

SR 504, Affidavit of Jared D. Nooney in Response to Defendant's
Renewed Motion for Summary Judgment, Exhibit 2, Deposition of

Damon Taggert, p. 70, ln. 10-20. When Liberty Mutual made payment to its insured, Charles Spotted Thunder, it acknowledged that there was coverage for the accident pursuant to the Policy.

Liberty Mutual misplaces the issues on appeal before this Court, by referencing discussions between Liberty Mutual and Great West Casualty Company (“GWCC”)³, who was Kaiser Trucking, Inc.’s (“Kaiser Trucking”) insured. What Liberty Mutual does not inform this Court of, is that Liberty Mutual had informed GWCC that Liberty Mutual was denying Charles Spotted Thunder’s claim related to the accident.⁴

Damon Taggert on behalf of Liberty Mutual, testified as follows:

Q: And, generally, would you agree with me that this was a letter where Liberty Mutual stated to Kathryn Hayden on behalf of Great West Casualty that coverage for the claim was going to be denied?

A: Yes.

Q: And, essentially, then what this letter was stating is Liberty Mutual would not be dealing with any subrogation with Great West Casualty, correct?

A: Essentially, correct.

Id. at p. 63, ln. 3-13. This was not a scenario where GWCC and Liberty Mutual were having ongoing negotiation or settlement discussions as it concerns insurance or subrogation claims related to the accident.

³ The suggestion by Liberty Mutual as to GWCC seeking recovery for monies paid to Plaintiffs is a red herring, which is irrelevant as it concerns the trial court granting Summary Judgment in favor of Liberty Mutual. *See Brief of Appellee*, p. 5.

⁴ Again, despite Liberty Mutual paying monies to Charles Spotted Thunder for his personal property damage claim (i.e. the vehicle involved in the accident).

D. WHETHER BIANCA SPOTTED THUNDER RECEIVED THE LEGAL PAPERS IN 51CIV17-001270, GOES HAND-IN-HAND WITH COOPERATION, WHICH PRECLUDED SUMMARY JUDGMENT

Liberty Mutual argues in Appellee's Brief that Kaiser Trucking and David Simons ("Simons") did not argue in this appeal whether Bianca Spotted Thunder received the legal papers. *See Brief of Appellee*, pp. 17-18. Kaiser Trucking and Simon's argument goes hand-in-hand with the fact question of cooperation pursuant to the Policy. Specifically, subpart B.(2) of Part E of the Policy, requires that "[a] person seeking any coverage must: [] [p]romptly⁵ send us copies of any notices or legal papers received in connection with the accident or loss." SR 377, Affidavit of Jared D. Nooney in Response to Defendant's Statement of Material Facts, Exhibit 4, LM 14.

At the trial court, Kaiser Trucking and Simons made objections in Plaintiffs, Kaiser Trucking, Inc. and David Simon's Response to Defendant's Statement of Material Facts, related to service of the Summons and Complaint in the underlying case, 51CIV17-001270, in compliance with SDCL §§ 15-7-6 and 15-7-7. SR 371, Plaintiffs, Kaiser Trucking, Inc. and David Simon's Response to Defendant's Statement of Material facts. Contrary to Liberty Mutual's argument that Kaiser

⁵ There was an additional partial payment to Liberty Mutual's insured, Charles Spotted Thunder in the amount of \$120.21. *Id.* at p. 71, ln. 2-6.

Trucking and Simons had not previously argued that Bianca Spotted Thunder could not cooperate if she was not served with legal papers in 51CIV17-001270, Kaiser Trucking and Simons previously raised this in Plaintiffs, Kaiser Trucking, Inc. and David Simon's Brief in Opposition to Defendants' Motion for Summary Judgment.⁶ SR 357, Plaintiffs, Kaiser Trucking, Inc. and David Simon's Brief in Opposition to Defendants' Motion for Summary Judgment. Specifically, in Plaintiffs, Kaiser Trucking, Inc. and David Simon's Brief in Opposition to Defendants' Motion for Summary Judgment, Kaiser Trucking and Simons stated as follows:

Interestingly enough, Liberty Mutual argues that Bianca Spotted Thunder did not receive the Pleadings in "the underlying case" 51CIV17-001270. *See Brief in Support of Defendant's Motion for Summary Judgment*, p. 9. If Bianca Spotted Thunder did not receive pleadings in 51CIV17-001270, as suggested by Liberty Mutual, how could she have cooperated with Liberty Mutual in the defense?

Id. at p. 8, ft. nt. 2.

Appellants, Kaiser Trucking and Simon's argument regarding cooperation related to Section E(B)(1) of the Policy and how Bianca Spotted Thunder could not have cooperated if she did not receive the

⁶ In Plaintiffs, Kaiser Trucking, Inc. and David Simons' Response in Opposition to Defendant's Renewed Motion for Summary Judgment, Kaiser Trucking and Simons specifically incorporated all pleadings in opposition to Liberty Mutual's Motion for Summary Judgment, including but not limited to Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment. SR 488, Plaintiffs, Kaiser Trucking, Inc. and David Simons' Response in Opposition to Defendant's Renewed Motion for Summary Judgment.

pleadings in the underlying case, 51CIV17-001270 was made to the trial court, is not a new argument on appeal, and is properly before this Court. As stated by this Court in *Railsback v. Mid-Century Ins. Co.*, “[w]e view all reasonable inferences drawn from the facts in the light most favorable to the non-moving part[ies]”, here, Kaiser Trucking and Simons. *Railsback*, 2004 S.D. 64, ¶ 6, 680 N.W.2d 652, 654. All reasonable inferences related to cooperation, must be viewed in the light most favorable to Kaiser Trucking and Simons, which precluded Summary Judgment in favor of Liberty Mutual. *Id.*

E. LIBERTY MUTUAL IGNORES THE CAUSE OF THE ACCIDENT, IN AN ATTEMPT TO FAVOR ITS’ ARGUMENTS

In Appellee’s Brief, Liberty Mutual argues that its’ Motion for Summary Judgment does not concern the cause of the accident. *See Brief of Appellee*, p. 19. Despite this argument, Liberty Mutual stated as follows in Defendant’s Motion for Summary Judgment, “Liberty Mutual states that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.” SR 198, Defendant’s Motion for Summary Judgment. Similarly, Liberty Mutual stated as follows in Defendant’s Renewed Motion for Summary and Notice of Hearing, “Liberty Mutual continues to assert there are no genuine issues of material fact in dispute. It is entitled to judgment as a matter of law.” SR 485, Defendant’s Renewed Motion for Summary and Notice of Hearing. Despite these positions taken by Liberty Mutual in Appellee’s Brief, the

cause of the accident is a genuine issue of material fact in dispute, which precluded Summary Judgment in favor of Liberty Mutual. Specifically, the police report raises a question as to the cause of the accident, which as alleged by Liberty Mutual was the reason behind Liberty Mutual investigating the “circumstances of the crash” in the first place. *See Brief of Appellee*, p. 4.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellants, Kaiser Trucking, Inc. and David Simons, respectfully request that this Court reverse the trial court’s Order Granting Defendant’s Renewed Motion for Summary Judgment and Summary Judgment, and to reverse and remand this case to the trial court.

Dated this 24th day of February, 2025.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney

JARED D. NOONEY

Attorneys for Plaintiffs and Appellants

326 Founders Park Drive / P. O. Box 8030

Rapid City, SD 57709-8030

(605) 721-5846

jared@nooneysolay.com

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellants' Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 2,330 words and 12,242 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 24th day of February, 2025.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney

JARED D. NOONEY

Attorneys for Plaintiffs and Appellants

326 Founders Park Drive / P. O. Box 8030

Rapid City, SD 57709-8030

(605) 721-5846

jared@nooneysolay.com

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

KAISER TRUCKING, INC. and DAVID SIMONS, Plaintiffs, vs. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant.	APPEAL NO. 30728 CERTIFICATE OF SERVICE
---	---

I, Jared D. Nooney, attorney for the Appellants, Kaiser Trucking, Inc. and David Simons, hereby certify that one (1) true and correct copies of the foregoing *Appellants' Reply Brief* was sent by U.S. Mail, first-class postage prepaid to:

JACK H. HIEB
ZACHARY W. PETERSON
RICHARDSON, WYLY, WISE,
SAUCK & HIEB, LLP
P.O. Box 1030
Aberdeen, SD 57402-1030
*Attorneys for Defendant and
Appellee, Liberty Mutual Fire
Insurance Company*

I further certify that on the 24th day of February, 2025, I served via Odyssey, emailed, and sent one (1) original and one (1) copy of the foregoing *Appellants' Reply Brief* by U.S. Mail, first-class postage prepaid, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070
scclerkbriefs@ujs.state.sd.us

/s/ Jared D. Nooney
JARED D. NOONEY