IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 28952

JODIE M. FRYE-BYINGTON,

Plaintiff and Appellant,

vs.

RAPID CITY MEDICAL CENTER, LLP;
GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.;
and MICHAEL C. RAFFERTY, M.D.,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE THOMAS L. TRIMBLE

(Retired) Circuit Court Judge

APPELLANT'S BRIEF

R. SHAWN TORNOW
TORNOW LAW OFFICE, P.C.
PO Box 90748
Sioux Falls, South Dakota 57109-0748
Attorney for Appellant

LONNIE R. BRAUN
THOMAS BRAUN BERNARD BURKE, LLP
4200 Beach Drive – Suite 1
Rapid City, South Dakota 57702
One of the Attorneys for Appellees

NOTICE OF APPEAL FILED APRIL 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITES

STATE SUPREME COURT CASES CITED:

OUT-OF-STATE AUTHORITIES CITED:

STATUTES CITED:

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 28952

JODIE M. FRYE-BYINGTON,

Plaintiff and Appellant,

vs.

RAPID CITY MEDICAL CENTER, LLP;
GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.;
and MICHAEL C. RAFFERTY, M.D.,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE THOMAS L. TRIMBLE

(Retired) Circuit Court Judge

PRELIMINARY STATEMENT

For ease of reference, Appellant, Jodie Frye-Byington, will be referred to as either "Appellant" or "Jodie." Appellees in this matter, will typically be referred to as Defendants; or, if to perhaps specifically reference a Defendant Doctor, such as Defendant Doctor Burgess, such doctors may be so named. Any references to the settled record, that being the register of actions, if any, will be made where and when possible by

the letters "SR" followed by the applicable page number(s). References to the Transcript Volume(s) of the February-March 2019 jury trial in Pennington County, will be made by reference to the Volume number and the letters "JT:" followed by the applicable page number(s). Any references to the transcript volume(s) of the various pre-trial hearing(s) prior to the jury trial, will be made by reference to such transcript by the letters "PTHT:" followed by the date (in parenthesis) and the applicable page number(s)

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

The appeal herein is taken pursuant to Appellant's statutory right to appeal to this Honorable Court pursuant to SDCL §15-26A-3 and SDCL §15-26A-4.

Jodie timely commenced her medical malpractice action against the named Defendants herein, by and through her July 15, 2016, complaint as prepared and filed by and through separate counsel on July 18, 2016.[1] Jodie's complaint and corresponding malpractice action herein stems from continuing and ongoing medical care from Defendants and their employee agents from 2008 through 2014 which she, through expert witness testimony presented on her behalf at the jury trial herein by Doctor Molly Wright, submitted to the jury as falling below the standard of care over the course of approximately 55-60 visits to Defendants between 2008 through 2014, and being referred to and utilizing Defendant Rapid City Medical Center, LLP's (hereinafter referenced as "RCMC") Urgent Care facility, including being seen by various employee agents of RCMC. Defendant RCMC and its Urgent Care facility and its employee agents working therein, as well as the Defendant doctors, worked and attempted to treat patients in Pennington County. Over the course of years and years in seeking treatment from

[1] *See*, Appendix A; SR 1-4, 5-9, as filed by Jodie Frye-Byington's originally retained counsel in this matter, Lance Russell, Hot Springs, S.D.

Defendants its employee agents, Jodie lived and worked in Pennington County. As such, the action herein was properly commenced in Pennington County and, as such, was appropriately venued in Pennington County. *See*, Appendix A; SR 1-4, 5-9; JT-Vol. 2, pgs. 272-274.

This appeal follows from Judgment entered by Retired Judge Thomas Trimble, based on a jury trial that concluded and resulted in a verdict for Defendants as returned by the jury on March 5, 2019 (SR 587), with the trial court's Judgment entered thereafter on March 7, 2019 (Appendix B), and with the Notice of Entry thereof being similarly filed on March 7, 2019. SR 1848. Jodie, as Appellant, appealed her case to this Honorable Court on April 5, 2019, and then awaited transcription of the jury trial proceedings. SR 1864.

STATEMENT OF LEGAL ISSUES

ISSUE 1

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, BASED ON EVIDENCE PRODUCED AT TRIAL BY DEFENDANTS AFTER PLAINTIFF'S OFFER OF PROOF, THE COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF HER RIGHT TO CALL TWO (2) MEDICAL PROVIDER REBUTTAL WITNESSES TO DIRECTLY REFUTE THE TRIAL TESTIMONY OF DEFENDANT DOCTOR BURGESS.

> Appellant submits that the trial court, Judge Trimble, in light of the facts presented at trial, committed reversible error when it denied Plaintiff her right pursuant to statute to call rebuttal witnesses following Defendants case. JT-Vol. 6, pgs. 1180-1186, including the lower court's ruling at pg. 1186.

Schrader v. Tjarks, 522 NW2d 205 (S.D. 1994);
Sorensen v. Harbor Bar, LLC, 2015 SD 88, 871 NW2d 851;
SDCL 15-14-1(6).

ISSUE 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, BASED ON THE EVIDENCE RECEIVED AT TRIAL, IT FAILED TO PROVIDE THE JURY WITH COMPLETE JURY INSTRUCTIONS RELATED TO THE AGENCY RELATIONSHIPS OF ALL OF DEFENDANT RAPID CITY MEDICAL CENTER'S EMPLOYEES AS EMPLOYEE AGENTS WHO – FOR 6 YEARS – FAILED TO INFORM JODIE OF THE LARGE GROWING MASS IN HER CHEST.

> Appellant submits that the trial court, Judge Trimble, in light of the facts presented at trial, committed reversible error in failing to provide Plaintiff's

requested and argued full proposed jury instruction as related to the agency relationship of all of Defendant Rapid City Medical Center, LLP's employees who long-failed to inform Plaintiff about the problematic growing mass in her chest prior to the jury's consideration and deliberation of Jodie's case. SR 444-445; PTHT (February 11, 2019), pgs. 21-31; JT-Vol. 6, pgs. 1200-1202, including lower court's ruling at pg. 1202.

SDCL 59-6-9;
Rumpza v. Larsen, 1996 S.D. 87, 551 NW2d 810;
McKinney v. Pioneer Life Ins. Co., 465 NW2d 192 (1991);
Clark v. Southview Hosp. & Family Health Ctr., 68 Ohio St.3d 435, 628 NE2d 46 (1994);
SDCL 15-6-51(a) & SDCL 15-6-51(c).

STATEMENT OF THE FACTS

This is a medical malpractice action where the Defendants' patient, Plaintiff Ms. Jodie-Frye Byington, was harmed and damaged by the plain and simple fact(s) in this case indicating that she was kept in the proverbial dark about a growing mass in her chest not for just a month or two or three; and not even for a year or two (2) or three (3); rather, as Jodie's case outlined to the jury at trial, she was not informed by the Defendants, nor also informed by their employee agents, of a significant and growing mass in her chest for six (6) years from 2008 to 2014. That is, six long-suffering years during which Jodie experienced, in part, tremendous pain, irritation, embarrassment, sleep deprivation, mental anxiety and damages as Defendant's, and also noted employee agents, inexplicable actions and (more typically) inactions kept Jodie from the troubling truth about the debilitating mass in her chest. *See*, JT-Vol. 2, pgs. 138-139; 163-170 (Dr. Wright's testimony); 277-281; 289-304 (Jodie's testimony).

As testified to at trial, beginning in 2008 and continuing on and growing more severe over the next six (6) long years, Appellant, Jodie Frye-Byington, suffered from protracted and debilitating health-related maladies, including coughing attacks, excessive throat clearing, unnatural hoarseness, inability to sleep, as well as chest pains and

shortness of breath. *See*, JT-Vol. 1, pgs. 61-74 (Julie Mueller); pgs. 91-96 (Shannon Casey Ballard); JT-Vol. 3, pgs. 450-460 (Cris Matthews); pgs. 595-601 (Barbara Landers).

During her long and protracted six (6) years of suffering from such conditions, Jodie attempted to seek regular care and treatment from her longtime friend, Dr. Robert Burgess. JT-Vol. 1, pg. 65; JT-Vol. 2, pgs. 276-281; 289-304; JT-Vol. 4, pg. 803. However, Dr. Burgess had his Rapid City Medical Center staff, by and through Mercy Hankins, regularly direct Jodie to instead present to RCMC's Urgent Care clinic. *See*, JT-Vol. 2, pgs. 276-281; 289-304. As part of her ongoing health concerns related to the pain(s) in her chest (in the area of the growing mass) that Jodie only learned about years after-the-fact, at trial she offered her own testimony as well as Doctor Wright's required medical expert testimony to the jury that – over time – she had been injured as a result of the following failed treatments as well as through the ongoing failure by Defendants and its employee agents to provide necessary medical information to her as a result of at least the following representative incidents [through medical expert trial testimony of Dr. Wright, at JT-Vol. 2, pgs. 138-172, and 254-257; however, Appellant being arbitrarily "stopped" by the trial court's ruling from also being permitted to go into b. (below), regarding RCMC's employee agent medical providers Deb Brandt and Devon Graham[2]]:

a. September 25, 2008, (CT Neck) *Dr. Burgess failed to notify Jodie of results and order a work up*;

b. May 18, 2010, (Thyroid U/S) Ordered by Deb Brandt, results called to Devon Graham, and copy to Dr. Burgess, *all of whom failed to discuss with [Jodie] and plan further evaluation*;

c. March 21, 2011, (CT Chest) Ordered STAT with patient to wait

[2] *See/cf.*, Issue 2; JT-Vol. 2, pg. 244, within Appendix G-1 through G-14, at Appendix G-12.

for result which was called to Dr. Gillen. *However, Jodie was not notified of the mass (in her chest)*;

d. April 1, 2011, *Dr. Gillen again saw patient for persistent symptoms and failed to discuss the CT that had been done 11 days prior* and pertained to the reason for Jodie's visit;

e. July 24, 2014, Medical visit and (CXR) done by Dr. Rafferty, read as normal, however, failed to be over-read by radiology, likely had widened mediastinum as was mentioned on the CXR done at Mayo Clinic 18 days later; and

f. August 6, 2014, Another medical visit with Dr. Welsh for chest pain; however, he failed to explain the mass in her chest and dismissed and disregarded Jodie's concerns of something pressing against her heart when he otherwise diagnosed costochondritis.

Following Dr. Welsh's relatively flippant care and, after admittedly failing to review her medical records, non-treatment of her on August 6, 2014[3], Jodie made an urgent follow-up appointment at Mayo Clinic. JT-Vol. 2, pgs. 327-328. Within days Jodie traveled to Mayo Clinic once again and still complaining of chest pain and shortness of breath. SR 664. A CT scan authorized by Mayo Clinic showed a large growing anterior mediastinal mass ("at least 5 cm in size") in her chest. On August 15, 2014, shortly before removing the large mass, Mayo Clinic's Dr. Blackmon, Thoracic Surgeon, specifically noted that she was "*concerned regarding the enlarging nature of the lesion. [Jodie] does appear to have symptoms attributed to this lesion, and certainly enlargement will only cause progressive problems*." [Emphasis added.] *See*, Appendix C; SR 669; JT-Vol. 2, pgs. 157-159

[3] *See*, JT-Vol. 2, pgs. 325-327 (Jodie's testimony about not being treated and being "flicked" on the arm by Dr. Welsh); *cf.*, JT-Vol. 6, pgs. 1164-1171 (Dr. Welsh's testimony).

Within a short time after these concerning and pressing findings at Mayo Clinic, by happenstance, Jodie (along with her son) ran into Dr. Rafferty at Scheels and she confronted him about "how could you miss [the tumor]? Jodie clearly testified at trial that Doctor Rafferty replied to Jodie "*I'm sorry, I should have read your file*" after he had only a few weeks before indicated that her chest x-ray was "clear", without having read her prior medical records that were available to him for his review. JT-Vol. 2, pgs. 158-163; 280-282; JT-Vol. 6, pgs. 1126-1136. Shortly thereafter the large mediastinal mass, measuring as a significantly large tumor – 7 centimeters wide, by 4.8 centimeters high, by 3.7 centimeters deep – was finally explained to Jodie and, ultimately, surgically removed from Jodie's chest at Mayo Clinic on September 8, 2014. *See,* Appendix C; SR 669-670 (from Plaintiff's trial Exhibit L); JT-Vol. 2, pgs. 157-163.

Jodie subsequently brought this action against Rapid City Medical Center, Dr. Welsh, Dr. Rafferty and Dr. Burgess as Defendants and within her complaint asserting that Defendants were negligent in failing to inform her – over the course of ongoing visits and attempted treatments over six (6) long years – of her test results over those years showing her significantly large mediastinal tumor/mass[4] enlarging and growing and causing her prolonged adverse health consequences, such as nearly non-stop coughing and throat-clearing, shortness of breath, hoarseness and great difficulty in sleeping, over those years and culminating (in 2014) with her major surgical procedure to remove that

[4] *See*, JT-Vol. 2, pg. 163 (Dr. Wright's testimony about the size of the removed mass being "*like an oblong [1½ times thicker] hockey puck…sitting underneath her sternum and, therefore, pushing on everything that was behind [her] sternum, including the big vessels that go to her - in and out of her heart, and it was pushing against her trachea, which was what would cause the cough and her shortness of breath, and even some of the - probably some of the wheezing that she had when she would []present to [RCMC]* saying, I have this cough, and [RCMC employee agents] would say, well, the wheezing is just asthma, …but the cough never went away with asthma treatment."). Emphasis added.

large mass in her chest, including a long recovery period for Jodie over the course of a number of months after the sternotomy that split her chest open for removal of the mass in September 2014. JT-Vol. 2, pgs. 297-305; 320-321; JT-Vol. 1, pgs. 103-111 (Michael Mueller); 116-123 (Tonchi Weaver).

The Pennington County jury trial herein began on February 25, 2019, and following the March 5, 2019, reported jury verdict, the trial court entered its Judgment in this file on March 7, 2019, therein also indicating by its Order that Defendants were to recover nothing from Jodie for the costs of her malpractice action. *See*, Appendix B.

LEGAL ARGUMENT(S):

-ISSUE 1-

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, BASED ON EVIDENCE PRODUCED AT TRIAL BY DEFENDANTS AFTER PLAINTIFF'S OFFER OF PROOF, THE COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF HER RIGHT TO CALL TWO (2) MEDICAL PROVIDER REBUTTAL WITNESSES TO DIRECTLY REFUTE THE TRIAL TESTIMONY OF DEFENDANT DOCTOR BURGESS.

As this Court is aware, in a case such as the medical malpractice case at bar, SDCL § 15-14-1(6) provides, in pertinent part, that following the defendants case before the jury:

> *The party [Plaintiff] having the burden of proof may then offer rebutting evidence only* … unless the court for good reason, in furtherance of justice, permit [her] to offer evidence upon [her] original case[.] [Emphasis added.]

Moreover, as this Court outlined in *Schrader v. Tjarks*, 522 NW2d 205, 209 (S.D. 1994), '[r]ebuttal evidence is that which explains, contradicts or refutes the defendant's evidence. Its purpose is to cut down defendant's case and not merely to confirm that of the plaintiffs.' *Schrader*, 522 NW2d at 209, citing, *Farmers U. Grain Term. v. Industrial Elec.*, 365 NW2d 275, 277 (Minn. App. 1985) (other citation omitted); *see also, Sorensen v. Harbor Bar, LLC*, 2015 SD 88, ¶¶ 31-33, 871 NW2d 851, 857-858. In *Schrader*, this

Court went on to note that '[r]ebuttal is appropriate only when the defense injects a new matter or new facts.' *Schrader*, 522 NW2d at 209, citing, *Pophal v. Siverhus*, 168 Wis.2d 533, 484 NW2d 555, 563 (App. 1992) (other citation omitted).

In addition, Appellant understands and accepts that, as related to the applicable abuse of discretion standard to be found herein, as the reviewing court, this Court needs to "find that the trial court abused its discretion in excluding the [two] rebuttal witnesses, but it must find that the jury's consideration of the erroneously excluded [rebuttal] might and probably would have resulted in a different finding by the jury in order to warrant a reversal of the trial court." *Schrader*, 522 NW2d at 209-210, citing, *Sander v. Geib, Elston, Frost Pro. Ass'n.*, 506 NW2d 107, 113 (S.D. 1993) (other citations omitted); *Shaffer v. Honeywell, Inc.*, 249 NW2d 251, 258 (S.D. 1976). Proposed rebuttal testimony, however, ought not be excluded if it may be deemed to hinder the truth-seeking process of trial. *See, Sorensen*, 2015 SD 88, ¶ 33, 871 NW2d at 858.

In the case at bar, Appellant outlined her position to Judge Trimble at the time of calling her two intended rebuttal witnesses.[5] As noted, at that time it was explained to the trial court that Defendants, by and through the distinctively new trial testimony offered

[5] Appellant's rebuttal witnesses were intended to be two local radiologists, Dr. Robert Durst and Dr. Brian Baxter, to directly rebut Dr. Burgess' trial testimony to the effect that "no" he was not aware of the growing mass in Jodie's chest after 2009; and "no" that he had not been copied with the two (2) radiologists reports that specifically showed that Dr. Burgess was specifically and intentionally "cc'd" (carbon copied) with the 2 key reports in Jodie's medical files – which were specifically and identically shared with RCMC, which Dr. Burgess had direct records access to from 2009-2014. *See also*, JT-Vol. 6, pgs. 1180-1186, including Jodie's offer of proof in support of the key/important need of calling such rebuttal witnesses. *Cf.*, JT-Vol. 5, pgs. 934-938 (Dr. Burgess' testimony)-Appendix D-D-1; and *cf.*, Appendix E-1 through E-8, including the proposed trial exhibits V & V-1 to which Radiologists Durst and Baxter would have testified to insofar as directly refuting Dr. Burgess' trial testimony before the jury, once again, to the effect that "he did not know" about Jodie's significantly growing mediastinal mass and also that "he wasn't copied" with subsequent reports showing the growing/problematic mass. As indicated to the trial court, this key and pivotal issue would go directly to rebutting, refuting and cutting down the credibility of Dr. Burgess, as (one of the primary) RCMC's medical providers for Jodie, before what were all of the extremely attentive/note-taking jurors in this matter.

by Doctor Burgess, had now indicated that Burgess – as part of the key primary care case role that Jodie had asserted to the jury at trial – was *not* considered within the local medical community of providers to be Jodie's primary care provider (when such general belief or understanding was/is otherwise so indicated on the proposed rebuttal medical records, Appendix E-1-E-2 & Appendix E-5-E-6); however, most importantly, that Burgess claimed that he had not ever seen nor been copied with medical records within RCMC's medically-shared records system that Jodie's problematic and troublesome anterior mediastinal mass was significantly growing from and after he last saw her as a patient in 2009. JT-Vol. 5, pgs. 934-938 (Dr. Burgess' testimony)-Appendix D-D-1; and *cf.*, Appendix E-1 through E-8, including the proposed trial exhibits V & V-1 to which Radiologists Durst and Baxter would have testified to insofar as directly refuting Dr. Burgess' trial testimony before the jury. *Cf.*, SDCL § 15-14-1(6).

Plaintiff therefore submits that, in light of the totality of circumstances surrounding Jodie's case before the jury – when Defendants otherwise referred to Jodie as "hysterical"[6] – such a key credibility attack on Defendants case would have been pivotal for Plaintiff's case and, as such, probably would have resulted in a different finding by the jury. Appellant asserts and argues here that this is so given that: in light of Dr. Wright's expert testimony about the overall failed standard of care for the RCMC medical providers – starting and, arguably, ending with Dr. Burgess' oversight (or lack of oversight) of Jodie's continuing care and RCMC's overall lack of communication from 2008 through 2014 – Dr. Burgess was and is the essential lynchpin, if you will, for a reasonable jury to have focused its consideration on his failed oversight and lack of required and necessary communication with Jodie insofar (as Appellant attempted to

[6] *See/cf.*, JT-Vol. 6, pgs. 1160-1161 & 1171 (Dr. Welsh's testimony, "[Jodie] was hysterical…").

directly rebut his trial testimony) he was provided information about and knew, or should have known, about the significantly growing tumor during the duration of Jodie's damaging medical awareness time wondering and/or wandering "in-the-dark" from 2008 up to 2014's surgery to remove the large and problematic mediastinal mass in her chest.

As a result, much like in *Schrader* and *Sorensen,* Appellant's offered rebuttal testimony, ought *not* to have been excluded since to do so, as the trial court improperly did here, was an abuse of discretion that directly prejudiced Jodie insofar as denying her such rebuttal testimony which wrongfully and improperly hindered what should have been the truth-seeking process at trial.

-ISSUE 2-

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN, BASED ON THE EVIDENCE RECEIVED AT TRIAL, IT FAILED TO PROVIDE THE JURY WITH COMPLETE JURY INSTRUCTIONS RELATED TO THE AGENCY RELATIONSHIPS OF ALL OF DEFENDANT RAPID CITY MEDICAL CENTER'S EMPLOYEES AS EMPLOYEE AGENTS WHO – FOR 6 YEARS – FAILED TO INFORM JODIE OF THE LARGE GROWING MASS IN HER CHEST.

STANDARD OF REVIEW

As this Court has clarified in recent years, and as Appellant seeks this Court's full scale review herein, the applicable standard of review on the key issue of proper civil jury instructions in total, as Appellant respectfully urges herein, was previously outlined in *Vetter v. Cam Wal Elec. Co-op, Inc.*, 2006 SD 21, ¶ 10, 711 NW2d 612, 614, "…when the question is whether a jury was properly instructed overall, th[e] issue becomes a question of law reviewable de novo. Under this de novo standard, '[this Court] construe[s] jury instructions as a whole to learn if they provided a full and correct statement of the law.' *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 SD 92, ¶ 40, 686 N.W.2d 430, 448 (citations omitted) (quoting *State v. Frazier*, 2001 SD 19, ¶ 35, 622

N.W.2d 246, 259 (citations omitted))"; *see also*, SDCL 15-6-51(a) & SDCL 15-6-51(c). In addition, "[i]t is the parties duty to request jury instructions … for their theory of the case. *See, City of Sioux Falls v. Kelley*, 513 NW2d 97, 108 (S.D. 1994) (citing *Glanzer v. St. Joseph Indian Sch.*, 438 NW2d 204 (S.D. 1989)).

In her case, prior to trial on February 5, 2019 (SR 444), Appellant offered and proposed to the trial court the full context of her pattern-based agency jury instruction (appropriately modified to the facts of her case) following, in large part, SDCL § 59-6-9, as well as on S.D. Civil Pattern Jury Instruction 30-50-110 (modified). *See*, Appx. F-1 - F-2; *cf.*, Appx. F-3 - F-4, which was the trial court's final jury Instruction No. 22; as followed by Appx. F-5, the trial court's final jury Instruction No. 23 (with notation added, demonstrating the improper limitation of what Appellant sought to properly address with her pattern agency instruction, as she had originally proposed to the trial court). Appellant made her offer for her legally supported agency instruction because of Defendants pre-trial arguments and proposed motion in limine – which Appellant opposed prior to and during trial as well as part of jury instruction settlement at the close of trial.[7]

> As the Court is aware, SDCL § 59-6-9 provides, in pertinent part, that:
>
> [A] principal is responsible to third persons for the negligence of [its] agent[s] in the transaction of the business of the agency, including wrongful acts committed by such agent[s] in and as part of the transaction of such business; and for his [or her] willful omission to fulfill the obligation of the principal.

See also, S.D. Civil Pattern J.I., 30-50-110 (Appendix F-1 - F-2); *cf.*, *Rumpza v. Larsen*, 1996 S.D. 87, 551 NW2d 810, 812; *McKinney v. Pioneer Life Ins. Co.*, 465 NW2d 192, 194-195 (S.D. 1991); *Leafgreen v. American Family Ins. Co.*, 393 NW2d 275, 280-281 (S.D. 1986).

[7] *See*, PTHT (February 11, 2019), pgs. 21-31; Appendix G-1 through G-14 (JT-Vol. 2, pgs. 233-246); and JT-Vol. 6, pgs. 1200-1202.

As argued to the trial court below, Appellant submits that – as related to medical malpractice cases within or as a part of larger medical facilities such as hospitals, or, large medical clinics with agency-related urgent care facilities – *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 NE2d 46 (1994), is both an instructive and persuasive case which offers support to Appellant's agency arguments in the present case.[8] *Southview* was an Ohio medical malpractice case that the Ohio Supreme Court considered as related to a claim brought against a hospital by the estate of a deceased patient whose death occurred as a result of claimed negligence in the emergency room care provided by such hospital by and through the employee agents of the hospital. After considering and analyzing the agency/negligence aspects of the case, the *Southview* Court opined that:

> "…[T[he public has every right to assume and expect that the [medical facility] is the medical provider it purports to be.
>
> A [medical facility] may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing

[8] As outlined within her outlined facts here (pgs. 8-9, *supra*), the additional/full "agency" aspect of Appellant's case before the jury should have - if not arbitrarily denied by the court - allowed her to have her case address the negligent actions/omissions regarding RCMC's employee agent medical providers Deb Brandt and Devon Graham as also caused harm and damage to Jodie during her 6-year ordeal of non-effective medical treatment by RCMC medical providers as well as ***all*** such employee agents failure to inform her of her worsening medical condition over the years. *See/cf.*, Appendix G-1 through G-14 (JT-Vol. 2, pgs. 233-246) where the trial court arbitrarily "stopped" Appellant – and her expert witness, Dr. Wright – from explaining to the jury the continuing and ongoing failed standard of care provided to Jodie by RCMC medical providers Brandt & Graham, even though he agreed that Appellant could talk about the breached standard of care by Dr. Gillen, as an agent of RCMC. *See also*, JT-Vol. 6, pgs. 1200-1202. Appellant submits that, with due respect to the trial court below: to allow some - ***but not all*** - of Appellant's important and persuasive evidence of RCMC's agent(s) failed standard of care actions or inactions to be heard and considered by the jury was an improperly arbitrary and prejudicial ruling that generally appears to be an erroneous "split of the baby." That is to say, given the trial court's ruling during trial that, in effect, Defendants opened up the proverbial barn door for consideration of RCMC's agents failed actions that harmed Jodie over the years – there was no explanation nor legal rationale for such agency evidence to be arbitrarily limited to/for the jury's hearing about and considering the failed standard of care actions pertaining to RCMC's employee agent, Dr. Gillen; but, to otherwise stop & prohibit Appellant from putting on additional evidence related to RCMC's other employee agents, medical providers Deb Brandt and Devon Graham.

> in the [facility] if it holds itself out to the public as a provider of medical services and in the absence of notice or knowledge to the contrary, the patient looks to the [facility], as opposed to [each] individual practitioner, to provide competent medical care. … *Unless the patient merely viewed the [facility] as the situs where her physician would treat her, she had a right to assume and expect that the treatment was being rendered through [medical facility] employees and that any negligence associated therewith would render the [facility] liable*." [Emphasis added.]
> citing, *Gilbert v. Sycamore Mun. Hosp.*, 156 Ill.2d 511, 190 Ill. Dec. 758, 622 NE2d 788 (1993) (many other citations from other jurisdictions omitted).

Southview, 68 Ohio St.3d 435, 444-445, 628 NE2d 46, 53 (1994). Just as in *Southview* then, Appellant argues in her case that the above analysis is a fair and correct statement of the law and her full agency instruction was warranted by the evidence and, as such, she had a right to expect that the treatment was being rendered through RCMC employee agents - such as Gillen and Brandt and Graham - and that any negligence associated with them would therefore render RCMC liable. Unfortunately, for Appellant however, the trial court's ruling in arbitrarily limiting its agency instruction as well as the (limited) aspect of what Appellant and her expert witness could testify about directly prejudiced her case before the jury. *See*, *State v. Engesser*, 2003 S.D. 47, ¶ 43, 661 NW2d 739, 753; *see also/cf., Bauman v. Auch*, 539 NW2d 320, 323-324, 325 (S.D. 1995) ("Generally, failure to give a requested instruction that correctly sets forth the law is prejudicial error. Jury instructions are reviewed as a whole and are sufficient if they correctly state the law and inform the jury. Error is not reversible unless it is prejudicial. The party asserting error has the burden of showing prejudice in failure to give a requested instruction. … *Considering all the facts adduced at trial, the court erred in ruling there was insufficient evidence to instruct the jury on this [key] issue*.")

In the case at bar, the point being, to the direct prejudice to Jodie and her (anticipated) case at trial, and considering all the facts otherwise adduced at trial, all of

the jurors in this case were *not* able to fully consider the appropriate and acceptable inferences of *all* of RCMC's employees/agents errors in falling below the required standard of care level as could/would be shown by the totality of evidence in such case, if that evidence would not have been arbitrarily "stopped" by the trial court. *See*, Appendix G-1 through G-12, pg. 244 ("*So [as to] [RCMC employee/agent Doctor] Gillen, they have talked about Gillen. If you want to go into [Doctor] Gillen, I'm going to let you go into Gillen. But I'm going to stop it there. We are not going to run amuck here.*"). No fact-related explanation or judicial finding provided. Appellant therefore submits that to be arbitrarily limited to present her evidence about some - *but not all* - of the failed and negligent care/treatment/omissions to which she was regrettably subjected to over the course of years was, by its very nature, prejudicial to her case before the jury.

As such, Appellant further argues that in her case, the instructions as a whole (Nos. 1-31) – without the inclusion of the appropriate/pattern agency instruction (again, as properly proposed by Appellant through her proposed [S.D. pattern instruction-based], and as, in large part, denied by the Court as deficiently finalized with the limited final version of Instruction No. 22) – did *not* provide a full and correct statement of the law in cases such as the case at bar. By analogy, like the trial court's prejudicial error in the *Bauman* negligence-based case, the trial court in Jodie's case was in error – to her direct prejudice before the jury – in not fully and fairly instructing such jurors as to Appellant's accepted/proposed agency instruction that was supported by the facts of this case. *Cf.*, *Southview*, 68 Ohio St.3d 435, 444-445, 628 NE2d 46 at 53. As a result, Appellant argues herein that no deference should be given to the trial court's decision related to the totality of jury instructions and, therefore Appellant respectfully urges that the trial court's decision

below should be reversed & remanded for a new trial based on this Court's overall de novo instruction-related review, with instructions for the lower court to hereafter include the full extent of the necessary agency instruction(s) at the retrial of this matter.

With all due respect, the trial court below, when presented with Jodie's timely proposed agency jury instructions (SDCL 15-6-51(a)), committed reversible error in its unexplained limitation of her proposed agency jury instruction in this case. Therefore, in sum, based on the improper and limited agency instruction(s) herein (Appendix F-4-F-5), Appellant respectfully requests this Court to reverse the trial court's erroneous and prejudicial jury instruction ruling either as part of a de novo review, or, even, arguably if this Court were to not consider the improper agency instruction as adversely affecting the entirety of the jury instructions below, as more simply an abuse of discretion in light of the facts herein and remand this matter back for the legally necessary re-trial of Jodie's medical malpractice claim(s) herein as to Defendants and all of its/their employee agents.

CONCLUSION:

Appellant submits that, by and through the arguments and authorities submitted herein, she has established, that the lower court committed reversible error in denying her the ability to pursue and seek out the truth with her two (2) rebuttal witnesses at her Pennington County jury trial. In addition, Appellant argues and respectfully asserts herein that it constituted reversible error for the lower court, under the facts as able to be presented at trial herein, to fail to properly instruct the jury with the accepted and applicable agency jury instruction in this case. Jodie, as Appellant herein, therefore respectfully requests this Honorable Court to reverse and remand this matter for a necessary re-trial with such jury to then be properly instructed as was proposed and requested during her jury trial here.

CERTIFICATE OF COMPLIANCE:

Pursuant to SDCL 15-25A-66, R. Shawn Tornow, Appellant's (eventual) trial and appellate attorney herein, submits the following:

The foregoing brief, not including the signature page as follows, is 20 pages in length. It was typed in proportionally spaced twelve (12) point Times New Roman print style. The left-hand margin is 1.5 inches, the right-hand margin is 1.0 inches. Said brief has been reviewed and referenced as containing 5,275 words and 28,423 characters.

Dated this 9th day of January, 2020.

/s/ R. Shawn Tornow

Respectfully submitted this 9th day of January, 2020, in Sioux Falls, S.D.

/s/ R. Shawn Tornow

R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: (605) 271-9006
E-mail: rst.tlo@midconetwork.com
Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify that on this 9th day of January, 2020, your undersigned's office, oversaw either by e-mailing or, if requested, by mailing via first-class USPS mail, a true and correct copy of Appellant's Brief, including the Appendix contents as listed therein, to Lonnie Braun at: lbraun@tb3law.com, one of the Attorneys for Appellee, Thomas Braun Bernard & Burke, LLP, 4200 Beach Street - Suite 1, Rapid City, South Dakota 57702, at/to such address(es).

/s/ R. Shawn Tornow

APPENDIX TABLE OF CONTENTS:

APPENDIX TABLE OF CONTENTS:

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
JODIE M. FRYE-BYINGTON Plaintiff,	)	CIVIL #16-_____
vs.	)	COMPLAINT
RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, MD; ROBERT C. BURGESS, MD; AND MICHAEL C. RAFFERTY, MD Defendants.	)	

Plaintiff, Jodie M. Frye-Byington, alleges:

COMPLAINT

1.) Plaintiff, Jodie M. Frye-Byington, is a resident of the City of Rapid City, County of Pennington, State of South Dakota.

2.) Defendant, Gary L. Welsh, M.D., is a resident of the City of Rapid City, County of Pennington, State of South Dakota, and was and is a physician and licensed to practice medicine in the State of South Dakota. Defendant is actively engaged in practice at Rapid City Medical Center, LLP, Urgent Care Department, 2820 Mt. Rushmore Road, Rapid City, Pennington County, South Dakota.

3.) Defendant, Robert C. Burgess, M.D., is a resident of the City of Rapid City, County of Pennington, State of South Dakota, and was and is a physician and licensed to practice medicine in the State of South Dakota. Defendant is actively engaged in practice at Rapid City Medical Center, LLP, Ear, Nose & Throat (ENT) Department, 101 East Minnesota St., Suite 210, Rapid City, Pennington County, South Dakota.

4.) Defendant, Michael C. Rafferty, M.D., is a resident of the City of Rapid City, County of Pennington, State of South Dakota, and was and is a physician and licensed to practice medicine in the State of South Dakota. Defendant is actively engaged in practice at Rapid City Medical Center, LLP, Urgent

Care Department, 2820 Mt. Rushmore Road, Rapid City, Pennington County, South Dakota.

5.) Defendant, Rapid City Medical Center, LLP, Registered Agent Jennifer Trucano, is now, and at all time mentioned was, a Limited Liability Partnership organized and existing under the laws of the State of South Dakota, and engaged in the business of operating a medical facility at 2820 Mt. Rushmore Road and 101 East Minnesota St., Suite 210, in the City of Rapid City, Pennington County, South Dakota, for profit.

6.) As early as the beginning of 2008, plaintiff, being ill, requested defendants to attend plaintiff and treat the illness, and defendants entered on such service for compensation.

7.) Starting in the year of 2008 and through August 2014, defendants examined plaintiff on multiple occasions at defendants' offices, but in so doing did not use the care and skill ordinarily used by physicians engaged in the practice of medicine in the City of Rapid City, State of South Dakota, or in similar localities. Although plaintiff had symptoms indicating that plaintiff had a mass growth in the mediastinum, such symptoms being swollen neck, constant cough, difficulty breathing, hoarseness, and chest pain, defendants negligently treated plaintiff and negligently and incorrectly diagnosed plaintiff's condition, including a cold, bronchitis, acid reflux and costochondritis, and gave plaintiff certain medicines suitable only for the treatment of acid reflux and pain/anti-inflammatory.

8.) If defendants had used proper methods of examination, such as reviewing Plaintiff's medical records, including medical tests, x-rays, and CT scans, defendants would have discovered that plaintiff was suffering from a mediastinal mass, which required removal to effect a cure.

9.) Defendants examined plaintiff on multiple and numerous occasions for known related symptoms from 2008 to August 2014, when, in fact, in 2008 a CT scan revealed a mass growth and the plaintiff was not informed of such diagnosis, and defendants did not properly review plaintiff's medical records when plaintiff continued to seek defendant's examinations and medical treatments for proper diagnosis and treatment.

10.) As a proximate result of defendant's negligence, plaintiff's mass growth reached an advanced stage. Plaintiff was

compelled to seek treatment at the Mayo Clinic in Rochester, Minnesota on August 11, 2014, and immediately consulted another doctor of medicine who found that plaintiff was suffering from a mediastinal mass in advanced stages, and plaintiff underwent a major surgical procedure of an upper sternal split for the removal of a mediastinal mass at Mayo Clinic in Rochester, Minnesota on September 8, 2014.

11.) By reason of the negligence and false and fraudulent representations and omissions of defendants, and each of them, and as a proximate result of them, plaintiff was unable to obtain prompt and proper medical care and treatment of the mediastinal mass in the early stages by reason of reliance on the false and fraudulent representations and omissions of defendants.

12.) As a proximate result of the carelessness, negligence, and false and fraudulent representations and omissions of defendants, and each of them, plaintiff suffered for nearly seven years of misdiagnosis and suffered greatly in body and mind, all of which would have been avoided had defendants properly diagnosed the illness and treated it as it should have been treated.

13.) By reason of the relationship between defendant Rapid City Medical Center, LLP, and defendant doctors named and alleged herein, the Rapid City Medical Center, LLP, is liable for the acts and faults and fraudulent representations and omission of the defendant doctors. Plaintiff has been damaged in the sum of $7,000,000.00.

WHEREFORE, plaintiff requests judgment against defendants, and each of them:

1.) $144,000.00 damages for medical expenses, including $127,000.00 in medical co-pay and deductible expenses, and $17,000.00 in medically-related travel and lodging;

2.) $261,000.00 damages for loss of earnings, including $240,000.00 in pre-surgical loss of earnings from 2008 to September 2014, $11,000.00 post-surgical loss of earnings, and $10,000.00 in lost earnings due to continued recovery;

3.) Plaintiff has suffered damages for physical pain and suffering and mental anguish in excess of the $500,000.00 statutory limit contained in SDCL 21-3-11 against each of the defendants, and such further damages as may be hereafter

sustained or ascertained;

4.) $150,000.00 damages for permanent partial disability;

5.) Cost of suit; and

6.) Such other further relief as may be deemed just and equitable.

Dated this 15th day of July, 2016, at Rapid City, Pennington County, South Dakota.

Lance S. Russell
Attorney for the Plaintiff
PO Box 184
Hot Springs, SD 57747
605) 745-3228

Appx. A-4

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON, Plaintiff, -VS- RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D., Defendants.	Civ. No. 16-001022 JUDGMENT

This action came on for trial before the Court and a jury, Honorable Thomas L. Trimble, Circuit Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of Defendants Rapid City Medical Center, LLP, Gary L. Welsh, M.D., Robert C. Burgess, M.D., and Michael C. Rafferty, M.D, it is hereby

ORDERED AND ADJUDGED, that the Plaintiff takes nothing on her claim against Defendants and that the action against Defendants be dismissed on its merits and with prejudice; and it is further

ORDERED AND ADJUDGED, that Defendants recover of the Plaintiffs Defendants' costs of action in the amount of $ -0-.

Dated this 7 day of March, 2019.

BY THE COURT:

Thomas L. Trimble
Circuit Court Judge

ATTEST:
Clerk of Courts
By:
Deputy Clerk

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR - 7 2019
Renae Truman, Clerk of Courts
By Deputy
1:50 PM

Appx. B

Mother alive 61-70
Arthritis

SISTERS
2 sisters alive

SONS
1 son alive

GRANDPARENTS
Colon polyp Heart disease Diabetes Asthma Stroke/TIA

IMPRESSION/REPORT/PLAN

#1 Growing anterior, indeterminate mediastinal mass

I have reviewed these images with the Pulmonary Service and am concerned regarding the enlarging nature of the lesion. The patient does appear to have symptoms attributed to this lesion, and certainly enlargement will only cause progressive problems. However, intervention at this time should be delayed until we can have a pseudocholinesterase antibody test returned and appropriate evaluation by Neurology regarding possible evaluation for myasthenia gravis. If the patient is found not to have myasthenia gravis, then we have agreed to proceed with an upper sternal split and removal of the tumor of the anterior mediastinal mass. We had a long discussion with the patient but would like to see the patient back after she has been evaluated for myasthenia gravis to properly consent her and educate her continuously about her planned surgery. The patient and her mother were actively engaged in our discussion.

PATIENT EDUCATION
I spent time with the patient on education of the pertinent clinical matters. The patient was ready to learn with no apparent learning barriers identified. We concluded that learning preferences include listening. I explained the diagnosis and treatment plan in detail, and the patient clearly expressed understanding of the content reviewed.

I spent at least 15 minutes face to face with the patient, discussed surgical options and answered questions.

DIAGNOSES

#1 Growing anterior, indeterminate mediastinal mass

Original: sb/kks revised by lbd
Electronically Signed: 09-Jan-2016 08:56 by S.. Blackmon, MD, MPH

Copy

Copy

Appx. C - SR 669

MAYO CLINIC

Dismissal Summary

Ms. Jodie M. Frye-Byington
7-142-552

Shanda Blackmon, MD
Thoracic Surgery - Blackmon

Age: 51 Y
Birthdate: [redacted]
Sex: F
Address: 3301 Country Club Drive, Rapid City, SD 57702-5291

Mayo Clinic Hospital - Rochester, Saint Marys Campus
Admission Date: 08-Sep-2014
Dismissal Date: 11-Sep-2014

FINAL PRIMARY DIAGNOSIS

#1 Anterior mediastinal mass; Thyroid colloid nodule

ADDITIONAL DIAGNOSES

#2 Hypothyroid

[redacted]

BRIEF HOSPITAL COURSE

SURGICAL PROCEDURE
Date of Surgery: 8 SEP 2014
Surgeon: S. BLACKMON, MD

PostOp Diagnosis: Colloid tumor, likely from the thyroid.
Procedure: > 1. Median sternotomy.
2. Removal of anterior mediastinal mass.
3. Tube thoracostomy.
4. Thymectomy.

SURGICAL PATHOLOGY
DIAGNOSIS:

A. Mediastinum, anterior mass, excision: Thyroid tissue with colloid change forming a mass 7 x 4.8 x 3.7 cm. Atrophic thymus is also identified.

B. Thymus gland, right superior horn, excision: Fibroadipose tissue with lymphoid tissue.

C. Thymus gland, left superior horn, excision: Fibroadipose tissue with lymphoid tissue.

POSTOPERATIVE COURSE
Uneventful post-operative course.

DISMISSAL TEST RESULTS
Chest x-ray:
09-Sep-2014 16:47:00 Exam: Chest-- PA & Lateral
Indications: R/O pneumothorax, S/P chest tube removal
ORIGINAL REPORT - 09-Sep-2014 16:50:00 SMH
Chest 2 views:
IMPRESSION: Since earlier today, the two left chest tubes have been removed. Slight decrease in the small left apical pneumothorax. Sternotomy. Lungs clear.

Appx. C-1 - SR 670

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

) FILE NO. 51CIV16-001022
JODIE M. FRYE-BYINGTON,)
)
Plaintiff,)
)
vs.) JURY TRIAL, VOLUME 5
) (Pages 872 - 1069)
RAPID CITY MEDICAL CENTER,)
LLP, GARY L. WELSH, M.D.,)
ROBERT C. BURGESS, M.D., and)
MICHAEL C. RAFFERTY, M.D.,)
)
Defendants.)

BEFORE: **THE HONORABLE JUDGE THOMAS L. TRIMBLE**
Circuit Court Judge
Rapid City, South Dakota
March 1, 2019, at 8:30 a.m.

APPEARANCES:

Representing the Plaintiff: **MR. R. SHAWN TORNOW**
Tornow Law Office, P.c.
Attorneys at Law
4309 S. Louise Avenue
Sioux Falls, SD 57108

Representing the Defendants: **MR. LONNIE R. BRAUN**
MR. GREGORY J. BERNARD
Thomas, Braun, Bernard
& Burke
Attorneys at Law
4200 Beach Drive, #1
Rapid City, SD 57702

INDEX

THE BAILIFF: Court is back in session. Please be seated.

MR. BRAUN: Dr. Burgess, you can go back up.

DR. ROB BURGESS,

called as a witness, having been previously duly sworn, testified as follows:

CONTINUED DIRECT EXAMINATION BY MR. BRAUN:

Q You ready, Doctor?

A **Yes.**

Q Okay. Yesterday we looked at some records of Dr. Gillen's. When did she leave Rapid City Medical Center?

A **I believe it was in 2013.**

Q Do you know what month it was?

A **I can't recall.**

Q Late in the year?

A **I think so.**

Q Okay. All right. We left off yesterday, Doctor, with Exhibit 1, page 47.

MR. BRAUN: Could we have that back, please, Linda.

Okay. And could you blow up the portion that's handwritten, please, again.

Q **(BY MR. BRAUN)** We missed -- we missed one entry that we intended to talk about, and that was this one. Could you tell the jury what's the significance of that records request?

A **That is a request to send her records to Dr. Khachikian.**

We call her Dr. K. They were faxed. It was regarding her labs and thyroid functions, and it was sent on February 5th of 2010.

Q Okay. And who is Dr. K?

A **An endocrinologist here in town.**

Q Why would Dr. K want records faxed to her?

MR. TORNOW: Yeah, hold it. I object. It calls for speculation.

THE COURT: I agree. It does. Sustained.

Q When -- when a patient is being referred to Dr. K, are -- does she require records to be sent?

A **Absolutely.**

MR. TORNOW: Objection. Objection; assuming facts not in evidence; calls for speculation.

THE COURT: He can answer.

A **Yes.**

Q Thank you.

Do we know who referred her?

A **I do not.**

Q Okay. I want to switch gears a little bit and pick up topics, Doctor, to try to make it a little easier to get through this material this morning. Let's first talk about hoarseness, okay?

A **Okay.**

Q Is that one of the symptoms of Ms. Byington?

932

answers you gave?
A Correct.
Q Okay. Then at line 21, were you asked the question, "As you review all of the medical records today up to the time of your deposition, do you have a determination that Jodie Frye-Byington suffered from acid reflux?"
Do you remember giving the answer at line 25, "Yes. I still believe she suffers from acid reflux."?
A Yes.
Q Was that the question and your answer?
A Yes.
Q Okay. You didn't say postnasal draining, did you?
A I did not.
Q Okay. And today you're testifying, in -- in early 2019, you've -- you've just reviewed the same records that you had reviewed at the time of your deposition, correct?
A No.
Q Oh. What new records have you --
A I received more records from the Mayo Clinic.
Q Okay. And those new records from the Mayo Clinic, what changed your opinion when you said, just last October: I still believe she suffers from acid reflux?
A Correct.
Q So now you've changed your opinion?
A Because of the records I received from Mayo Clinic, after

933

the deposition.
Q And, during that period of time, have you seen Jodie Frye-Byington?
A During these proceedings, yes.
Q Okay. Have you seen her -- my bad.
Have you seen her as a patient?
A Since -- not since 2009.
Q Okay. So my question, sir, was from the time of your deposition to the time of this trial, have you seen Jodie Frye-Byington?
A No.
Q And have you been able to discuss with her any ongoing symptoms, or anything of that nature, between -- since 2009 to -- to today?
A No. All's I had is the records to review.
Q Answer the question, please.
A No.
Q Okay. But in -- in these intervening five months, you've changed what you believe is the diagnosis or what you found to be affecting Jodie Frye-Byington without ever talking to her? Is that -- is that what you're saying?
A Correct.
Q And you've never shared that with her in the -- in the doctor/patient setting, correct?
A I haven't seen her since I got the records from --

934

Q I understand. Just answer the question, sir. You haven't shared that with her, have you?
A I haven't had any contact with her.
Q Okay. Is that sort of -- as you look at what was happening between 2008 and 2014, is that something that you saw in the medical records, that people were making diagnoses or changing diagnoses without talking to Jodie Frye-Byington?
A That they were changing diagnosis, meaning between different providers, you mean, or --
Q Correct.
A Yeah. I think the diagnosis can change, based on if their symptom changes.
Q Let's talk about in 2011, the -- the exhibit that you've looked at, I think, a couple of times, the growing growth in Jodie's chest that was ordered stat by Alexia Gillen; do you recall that?
A Yes.
Q Is that something that you were aware of?
A No.
Q Is that something that you had access to within the records or -- as to that finding of a substernal growth in Jodie Frye-Byington's chest?
A I had access to the Rapid City Medical Center's, yes --
Q Okay.
A -- notes, yes.

935

Q And did you see -- I know you testified -- by the way, are you -- are you a handwriting expert, by any chance?
A No.
Q So when you testified that you saw initials, you would agree you're not a handwriting expert?
A Correct.
Q Would you agree with me that the copies of the 1,200-some pages of these records are not great?
A I would agree with that.
Q Okay. Knowing that that -- in 2011, that that increased size of the growth was taking place and had been ordered and had been found, and, as I recall the record, explained or -- or discussed with Alexia Gillen, do you have any information if Alexia Gillen, working for Rapid City Medical Center, ever relayed that to Jodie Frye-Byington?
A I have no personal knowledge of that, no.
Q Do you remember testifying in your deposition that because the growth had grown over a centimeter, that it would be normal and you would have -- you would have wanted the patient to know about that?
A Correct.
Q Okay. But you don't know if that happened here, either by you or anybody else within Rapid City Medical Center, LLP?
A I was not aware of that scan and, no, I'm not aware.
Q Let's back up. Were you aware in 2010 of the notation of

936

-- of the thyroid tissue and also the -- I believe the radiologist making comment about this growth that's taking place in the substernal -- the substernal goiter and -- and "The possibility of some other etiology for anterior mediastinal mass may need to be considered, including thymoma, teratoma, and probably less likely, lymphoma. Biopsy may need to be considered." And "Consultation with Dr. Burgess may be of value." You're aware of that?

A I reviewed that in the -- the chart after this litigation started, yeah.

Q Right. Well, in fact, you were copied with that document, correct?

A No.

Q Okay. And you became aware of it in -- in this litigation because did I understand your testimony that in about 2011 there was some changeover in the records, and it -- they went away from paper copies to electronic copies within Rapid City Medical Center, LLP; is that right?

A That is correct.

Q And, in fact, the document you're talking about, I believe it's at pages 208 and 209, does that document actually say Rapid City Medical Center -- you can look at it if you want.

A In this?

Q Go ahead.

937

A I assume that's tab 1?

Q I think I said 208. There's been some confusion with it. Try -- try 203 and 204. I think we're off a few pages. But try 203 and 204.

Again, I'm going to approach, just to make sure we're on the same page.

A This is an ultrasound from 3-18?

Q Yep, yep. 203, 204. One second.

As you look at pages 203 and 204, is there a medical -- and -- and, by the way, first of all, if you could tell the jury, what does it say along the horizontal -- or, I'm sorry, the vertical side of those pages about medical records and being archived? What does it say?

A MR Archive November 21, 2013.

Q And, again, we're talking about a March 18, 2010 record, correct?

A Correct. March 18, 2010.

Q And is it true, sir, that these medical records have a medical record number?

A I assume they do. It looks like -- I assume that's what MRN is.

Q Right. And is the MRN on page 203 TR043985?

A Correct.

Q And is there an account number up there in that heading area, as well?

938

A There is.

Q And is the account number TR02570836?

A No. It's blank.

Q Oh. It's blank. Okay.

Oh. I know. Go to page 204. And does it indicate under Physician Notification that there is a -- a transcriptionist with initials?

A Yes.

Q And are those letters JOG?

A Correct.

Q And does it give a date of dictation of March 19, 2010?

A Yes, it does.

Q Does it give a VFID, like, a verified ID, of 1704147?

A Yes, it does.

Q And then it says, "Signed By Staff Radiologist," and does it list physician Robert Durst?

A Correct.

Q And what's the date and time listed there?

A 3-19, 2010, 9:46 a.m.

Q 9:46 a.m. All right.

Showing you what's been marked --

MR. BRAUN: Excuse me, Your Honor. I'd like to be heard.

THE COURT: I'm sorry. Go ahead.

Q (BY MR. TORNOW) I'm showing -- showing you what's been marked as Exhibit V.

939

MR. BRAUN: Can you give me a copy of it?

MR. TORNOW: You've had it.

MR. BRAUN: Can we be heard?

(Bench conference was held.)

THE COURT: We're going to take a recess, 15 minutes.

It is your duty not to converse with, or suffer yourselves to be addressed by any other person on any subject of the trial, and it is your duty not to form or express any opinion thereon until the case is submitted to you. Thank you.

THE BAILIFF: We have a plaintiff out to the restroom, so we have to wait to clear the courtroom.

THE COURT: Okay. Can't you get by them?

THE BAILIFF: Hum?

THE COURT: Can't you get by them?

THE BAILIFF: She's in the restroom back there where the jurors go.

THE COURT: Oh, okay, okay. I didn't realize that. Then the answer would be no.

(Laughter.)

(The following proceedings were held outside the presence of the jury.)

THE COURT: Okay. Plaintiff's counsel, you want to make an offer of proof, I understand.

MR. TORNOW: Judge, we've -- we're offering Exhibit V. I

REGIONAL HEALTH
TELERADIOLOGY

353 FAIRMONT
BOULEVARD
RAPID CITY, SD 57701

PATIENT NAME:	FRYE BYINGTON,JODIE M
DOB:	04/20/1963
PATIENT ADDRESS:	RAPID CITY, SD
ATTENDING:	UNKNOWN
DICTATED BY:	DURST,ROBERT MD
FAMILY PROVIDER	BURGESS,ROBERT C MD
LOCATION:	TR RCMC
MEDICAL RECORD #:	TR043985
ACCOUNT #:	TR02570836
DATE OF SERVICE:	

Thyroid Biopsy Ultrasound

IMAGING SERVICE:
ORDERING PROVIDER:

Order Procedure:	Exam Date	Accession	Ordering Physician
TR US Thyroid	03/18/2010	TM0-43764	BRANDT, DEB

* * * RAPID CITY MEDICAL CENTER * * *

EXAM
ULTRASOUND THYROID - 03/18/10

CLINICAL HISTORY
Left subclavicular swelling.

PROCEDURE/VIEWS
Sagittal and transverse real-time imaging of the neck was performed.

COMPARISON(S)
CT chest with contrast from 01/18/10 and CT maxillofacial area without contrast from 01/18/10 as well as CT soft tissue neck with contrast from 09/25/08.

FINDINGS
RIGHT LOBE: There is a small 1.2 x 1.1-cm nodule of residual thyroid tissue in the right side of the neck.
LEFT LOBE: The left lobe has been completely removed.

COMPARISON STUDY: The findings correlate with those on the CT of 09/25/08 showing a small nodule of residual thyroid tissue on the right side of he neck, but complete removal of the rest of the gland.

IMPRESSION
1. 1.2-cm greatest dimension thyroid remnant in the right side of the neck. Clinical correlation is recommended.

2. No suspicious abnormalities or masses in the left side of the neck. Any decision to biopsy should be based on clinical assessment.

REPORT NOTE
It should be noted that the patient has had a rounded soft tissue

Appx. E-1

EXHIBIT V

REGIONAL HEALTH
TELERADIOLOGY

353 FAIRMONT
BOULEVARD
RAPID CITY, SD 57701

PATIENT NAME:	FRYE BYINGTON,JODIE M
DOB:	04/20/1963
PATIENT ADDRESS:	RAPID CITY, SD
ATTENDING:	UNKNOWN
DICTATED BY:	DURST,ROBERT MD
FAMILY PROVIDER:	BURGESS,ROBERT C MD
LOCATION:	TR RCMC
MEDICAL RECORD #:	TR043985
ACCOUNT #:	TR02570836
DATE OF SERVICE:	

Thyroid Biopsy Ultrasound

mass in the substernal area of the neck seen on CTs going back through 09/28/08 which has been felt to represent substernal extension of thyroid. The possibility of some other etiology for anterior mediastinal mass may need to be considered including thymoma, teratoma, and probably less likely, lymphoma. Biopsy may need to be considered. Consultation with Dr. Burgess may be of value.

PHYSICIAN NOTIFICATION:
The case was discussed with Devon Graham who was covering for Deb Brandt on the morning of 3/19/10 at 0940 hrs. She said she would followup with PA Brandt.

Transcriptionist: JOG Date of Dictation: 03/19/10
VFID: 1704147

Report status: SIGNED BY STAFF RADIOLOGIST / Physician DURST,ROBERT
Date/Time: 3/19/2010 9:46:00 AM

DRAFT COPY UNTIL ELECTRONICALLY SIGNED BY AUTHOR(S) OF DOCUMENT.

_____ Date: _____ Time: _____
ROBERT DURST MD/JG
D: T: 03/18/10 1711

cc:
BURGESS,ROBERT C MD
UNKNOWN
(C: ; BURGRC ; ~ UNK)

Rapid City Regional Hospital
PATIENT COPY

1613 60

Rapid City Medical Center

Name: FRYE BYINGTON,JODIE	MRN: TR043985	DOB: 04/20/1963	Sex: F
Ordering Phys: BRANDT DEB	Account #: TR02570836	Location: TR RCMC - -	Patient Type: AO
Copy To:		Pt. Phone #: (605)341-3599	

Exam: TR US Thyroid

Exam Date: 03/18/2010

Accession #: TM0-43764

* * * RAPID CITY MEDICAL CENTER * * *

EXAM
ULTRASOUND THYROID – 03/18/10

CLINICAL HISTORY
Left subclavicular swelling.

PROCEDURE/VIEWS
Sagittal and transverse real-time imaging of the neck was performed.

COMPARISON(S)
CT chest with contrast from 01/18/10 and CT maxillofacial area without contrast from 01/18/10 as well as CT soft tissue neck with contrast from 09/25/08.

FINDINGS
RIGHT LOBE: There is a small 1.2 x 1.1-cm nodule of residual thyroid tissue in the right side of the neck.
LEFT LOBE: The left lobe has been completely removed.

COMPARISON STUDY: The findings correlate with those on the CT of 09/25/08 showing a small nodule of residual thyroid tissue on the right side of he neck, but complete removal of the rest of the gland.

IMPRESSION
1. 1.2-cm greatest dimension thyroid remnant in the right side of the neck. Clinical correlation is recommended.

2. No suspicious abnormalities or masses in the left side of the neck. Any decision to biopsy should be based on clinical assessment.

REPORT NOTE
It should be noted that the patient has had a rounded soft tissue mass in the substernal area of the neck seen on CTs going back through 09/28/08 which has been felt to represent substernal extension of thyroid.

Name: FRYE BYINGTON,JODIE	MRN: TR043985	DOB: 04/20/1963	Sex: F

Exam:	Exam Date/Time:	Accession #:
TR US Thyroid	3/18/2010 4:59 PM	TM0-43764

The possibility of some other etiology for anterior mediastinal mass may need to be considered including thymoma, teratoma, and probably less likely, lymphoma. Biopsy may need to be considered. Consultation with Dr. Burgess may be of value.

PHYSICIAN NOTIFICATION:
The case was discussed with Devon Graham who was covering for Deb Brandt on the morning of 3/19/10 at 0940 hrs. She said she would followup with PA Brandt.

Transcriptionist: JOG Date of Dictation: 03/19/10 VFID: 1704147

Report status: SIGNED BY STAFF RADIOLOGIST / Physician DURST,ROBERT
Date/Time: 3/19/2010 9:46:00 AM

REGIONAL HEALTH
TELERADIOLOGY

353 FAIRMONT
BOULEVARD
RAPID CITY, SD 57701

PATIENT NAME:	FRYE SYINGTON,JODIE M
DOB:	04/20/1963
PATIENT ADDRESS:	RAPID CITY, SD
ATTENDING:	GILLEN,ALEXIA G DO
DICTATED BY:	BAXTER,BRIAN MD
FAMILY PROVIDER	BURGESS,ROBERT C MD
ORDERING PROVIDER:	
LOCATION:	TR RCMC
MEDICAL RECORD #:	TR043985
ACCOUNT #:	TR02769990
DATE OF SERVICE:	

Chest CT

Order Procedure: Exam Date 03/21/2011 Accession TM1-57640 Ordering Physician GILLEN, ALEXIA G

TR CT Chest

* * * RAPID CITY MEDICAL CENTER * * *

EXAM
CT CHEST

CLINICAL HISTORY
Cough. Shortness of breath. Supraclavicular fullness on exam.

PROCEDURE/VIEWS
Routine chest using 5 mm axial images was performed from the lung apices to the adrenal glands following the administration of some oral dilute barium and the injection of 125 cc Isovue-370 which was injected intravenously without complication.

COMPARISON(S)
CT - 01/18/10, 09/25/08.

FINDINGS
The lungs are clear. No mediastinal or axillary lymph node enlargement. There is an enhancing somewhat heterogeneous 4.6-cm substernal mass corresponding to that seen on the 2010 and 2008 examination. There has been mild growth measuring maximum transverse dimension of 4.6 today compared to 3.38 cm previously. The appearance is most consistent with a substernal thyroid. The patient's native thyroid appears absent. Lungs are clear without effusion or nodule. The upper liver and abdominal viscera are unremarkable.

No axillary or mediastinal lymph node enlargement.

IMPRESSION
1. Substernal thyroid.

2. Findings were communicated to the Alexia Gillen.

Transcribed by: PB Date of Dictation: 03/21/11 VFID: 1866260

Report status: SIGNED BY STAFF RADIOLOGIST / Physician BAXTER,BRIAN
Date/Time: 3/23/2011 4:40:00 PM

DRAFT COPY UNLESS ELECTRONICALLY SIGNED BY AUTHOR(S) OF DOCUMENT.

Appx. E-5

EXHIBIT
V-1

REGIONAL HEALTH
TELERADIOLOGY

353 FAIRMONT
BOULEVARD
RAPID CITY, SD 57701

PATIENT NAME:	FRYE BYINGTON,JODIE M
DOB:	04/20/1963
PATIENT ADDRESS:	RAPID CITY, SD
ATTENDING:	GILLEN,ALEXIA G DO
DICTATED BY:	BAXTER,BRIAN MD
FAMILY PROVIDER:	BURGESS,ROBERT C MD
ORDERING PROVIDER:	
LOCATION:	TR RCMC
MEDICAL RECORD #:	TR043985
ACCOUNT #:	TR02769990
DATE OF SERVICE:	

Chest CT

_____ Date: _____ Time: _____

BAXTER, BRIAN MD/PB1
D: T: 03/21/11 1223

cc:
BURGESS,ROBERT C MD

GILLEN,ALEXIA G DO
(C: ; BURGRO ; ~ GILLAL) 0321-0280

Appx. E-6

Rapid City Medical Center

Name: FRYE BYINGTON,JODIE	MRN: TR043985	DOB: 04/20/1963	Sex: F
Ordering Phys: GILLEN ALEXIA G	Account #: TR027109990	Location: TR RCMC - -	Patient Type: AO
Copy To:		Pt. Phone #: (605)341-3599	

Exam:	Exam Date:	Accession #:
TR CT Chest	03/21/2011	TMI-57640

* * * RAPID CITY MEDICAL CENTER * * *

EXAM
CT CHEST

CLINICAL HISTORY
Cough. Shortness of breath. Supraclavicular fullness on exam.

PROCEDURE/VIEWS
Routine chest using 5 mm axial images was performed from the lung apices to the adrenal glands following the administration of some oral dilute barium and the injection of 125 cc Isovue-370 which was injected intravenously without complication.

COMPARISON(S)
CT – 01/18/10, 09/25/08.

FINDINGS
The lungs are clear. No mediastinal or axillary lymph node enlargement. There is an enhancing somewhat heterogeneous 4.6-cm substernal mass corresponding to that seen on the 2010 and 2008 examination. There has been mild growth measuring maximum transverse dimension of 4.6 today compared to 3.38 cm previously. The appearance is most consistent with a substernal thyroid. The patient's native thyroid appears absent. Lungs are clear without effusion or nodule. The upper liver and abdominal viscera are unremarkable.

No axillary or mediastinal lymph node enlargement.

IMPRESSION
1. Substernal thyroid.

2. Findings were communicated to the Alexia Gillen.

Transcribed by: PB Date of Dictation: 03/21/11 VFID: 1866260

Report status: SIGNED BY STAFF RADIOLOGIST / Physician BAXTER,BRIAN

Appx. E-7 RCMC 000208

Name: FRYE BYINGTON,JODIE	MRN: TR0439SS	DOB: 04/20/1963	Sex: F

Exam:	Exam Date/Time:	Accession #:
TR CT Chest	3/21/2011 12:15 PM	TM1-57640

Date/Time: 3/23/2011 4:41:00 PM

Appx. E-8 RCMC 000209

AGENCY – PRINCIPAL'S LIABILITY FOR AGENT'S NEGLIGENT ACTS

Instruction No. _____

Rapid Medical Center, LLP, is liable to third persons, like Plaintiff, for the negligence of its employee(s) in carrying out medical services to and for Plaintiff's medical diagnosis, treatment(s) and failure to inform, including wrongful acts committed by such employee(s) in and as part of the conduct of such medical services; and for the employee(s) willful omission(s) to fulfill the obligation(s) of Defendant Rapid Medical Center, LLP.

SOURCES: S.D. Civil Pattern Jury Instruction: 30-50-110 (Modified); SDCL 59-6-9; *see also, McKinney v. Pioneer Life Ins. Co.*, 465 NW2d 192 (S.D. 1991); *Drew v. Stanton*, 1999 S.D. 151, 603 NW2d 79; *Rumpza v. Larsen*, 1996 S.D. 87, 551 NW2d 810; *Leafgreen v. American Family Mutual Ins. Co.*, 393 NW2d 275 (S.D. 1986).

SR 89. 444

Appx. F-1

30-50-110

AGENCY — PRINCIPAL'S LIABILITY FOR AGENT'S NEGLIGENT ACTS

Instruction No. _____

A [principal][employer] is liable to third persons for the negligence of his [agent][employee] in conducting the [business of the agency][purpose of the employment], including wrongful acts committed by such [agent][employee] in and as part of the conduct of such [business][employment]; and for the [agent] [employee]'s willful omission to fulfill the obligation of the [principal] [employer].

References:

SDCL 59-6-9

McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192 (1991)

Drew v. Stanton, 1999 S.D. 151, 603 N.W.2d 79

Rumpza v. Larsen, 1996 S.D. 87, 551 N.W.2d 810

Leafgreen v. American Family Mutual Ins. Co., 393 N.W.2d 275 (S.D. 1986)

Comment:

The full text of SDCL 59-6-9 at the time of the 2014 revision reads:

Unless required by or under authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as part of the transaction of such business; and for his willful omission to fulfill the obligation of the principal.

The jury instruction merely recites the statute without the preliminary language at its beginning, which addresses a matter of law assumed to be addressed by the court. Should a factual issue require determination by a jury in regard to the authority of law or its requirement, a modification specific to the circumstances of the case will be necessary.

(Revised 2014)

30-50-110

AGENCY — PRINCIPAL'S LIABILITY FOR AGENT'S NEGLIGENT ACTS

Instruction No. _____

A [principal][employer] is liable to third persons for the negligence of his [agent][employee] in conducting the [business of the agency][purpose of the employment], ~~including wrongful acts committed by such [agent][employee] in and as part of the conduct of such [business][employment]; and for the [agent] [employee]'s willful omission to fulfill the obligation of the [principal] [employer].~~

As modified by trial court at settlement of instructions. JT-Vol. 6, pgs. 1200-1202.

INSTRUCTION NO. 22

Rapid City Medical Center, LLP, is liable to third persons, like the Plaintiff, for the negligence of its agent(s) in carrying out medical services to and for the Plaintiff's medical diagnosis and treatment(s).

INSTRUCTION NO. 23

There are three physician defendants in this lawsuit and one corporation defendant. The rights of the physician defendants are separate and distinct. You should decide the case of each of the physician defendants separately as if it were a separate lawsuit. Unless a specific instruction states that it applies to a specific defendant, these instructions apple to each defendant.

The parties stipulate and agree that the physician defendants [only] - by implication were agents of defendant Rapid City Medical Center, LLP, at all times relevant to this case. Therefore, if you find Dr. Welsh, Dr. Rafferty and/or Dr. Burgess liable for any of plaintiff's claims against them, you must also find defendant Rapid City Medical Center, LLP, liable on the same claim.

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON

Plaintiff,

vs.

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.

Defendants.

JURY TRIAL

FILE NO. 51-CIV-16-1022

VOLUME 2

PAGES 128 - 386

DATE: February 26, 2019 at approximately 8:30 AM

PLACE: Pennington County Courthouse
Pennington County Circuit Court
Rapid City, South Dakota

BEFORE: THE HONORABLE THOMAS L. TRIMBLE
Circuit Court Judge
Seventh Judicial Circuit

George R. Cameron
Official Court Reporter
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota 57709
605.394.2571

App. G

MR. TORNOW: Judge, could we make a record very briefly?

THE COURT: Sure. Go ahead. I think everybody is here.

MR. TORNOW: I wanted to do this to try to save us some time.

THE COURT: Okay.

MR. TORNOW: One of the things -- and I do have re-direct. One of the things we are going to do is now ask Molly Wright, our expert, about the failure of standard of care by Alexia Gillen and by other medical providers within Rapid City Medical Center. Because, Judge, they have just opened the door, when Mr. Braun asked her, through her deposition that wasn't in the record, but now he has asked her and put it in front of these jurors.

Their motion in limine was that we can't talk about any unnamed providers to the failure of standard of care. They have just opened the door and asked her that. And it would be unfair and prejudicial to my client if I can't now talk about the Rapid City Medical Center providers, the other providers that deviated from the standard of care.

We've tight-roped that with our expert beforehand because of the ruling. But when he just --

when he just had her testify about the Mayo Clinic providers --

THE COURT: What was her testimony? What did she say? I don't recall it. What did she say?

MR. TORNOW: On pages 71 and 72 of her deposition, where he asked her, so are you saying 2010, he said the pulmonologist and the EMT failed and deviated from the standard of care.

MR. BRAUN: Mayo Clinic records.

MR. TORNOW: And she said yes, and they have put that in the record.

THE COURT: Okay. Well, I have got her deposition here, if that's in her deposition.

MR. TORNOW: Pages 71 and 72. And they have now opened the door, Judge, for their own motion in limine, and it's open now. And that's why I wanted to do this off the record. I didn't want to do it while the jury was back --

THE COURT: Okay.

MR. TORNOW: (Continuing) -- and have to go outside to your chambers. If you want to look at it over the lunch hour, we can talk about it right before, you certainly can.

THE COURT: That is fine. Let's do that. I guess that my question is, I remember -- there was a

reference to Exhibit 1, Page 44, 208 of Doctor Gillen's record. I don't recall that she was asked whether it had anything to do with the standard of care.

MR. TORNOW: I don't know why they put that in if they are saying, gee, she followed up because of these initials that they want everybody to presume are her initials. It still doesn't, of course, say that she communicated that. But they are saying -- and then they put on the next exhibit to saying, gee, look, two days later there was a follow-up, so she must have communicated.

THE COURT: Yeah, you are right.

MR. BERNARD: Judge, the argument before today was always standard of care of unnamed persons. This -- the Court also said that you can talk about their care all you want. And that is specifically in the transcript.

THE COURT: They can show that she went to those doctors at those times.

MR. BERNARD: And that's what happened. This discussion about a pulmonologist and an ENT breaching the standard of care was with regard to the Mayo Clinic ones which she had an opinion on in the deposition.

MR. TORNOW: But they asked about that, and they said it was a breach of the standard of care. They didn't just say did she provide treatment. If they would have stopped there -- they talked about, as to those other unnamed providers, did they breach the standard of care.

MR. BERNARD: Wrong.

MR. TORNOW: That is exactly what the deposition says. And that's what he put into the record. The door is wide open.

THE COURT: I tell you what. George, can you see if you can find that? So when was -- that was during the Gillen part?

MR. TORNOW: It was just very recently here towards the end.

THE COURT: Okay. I recall talking about Doctor Gillen, and I saw the initial and all of that. But I don't remember -- that standard of care is what I don't recall.

MR. TORNOW: No. No. No. He knew it -- and, Judge, I'm sorry. My bad. I'm talking about when he -- it was about the time he was talking about that, but he referred back to her deposition, Pages 71 to 72, and did those Mayo Clinic doctors in 2010, unnamed in this suit, did they breach the standard of care. My client

says yes. And we know why. He wanted it out there that the Mayo Clinic breached the standard of care. But they are unnamed providers. And that is now in the record, and it would be unfair and prejudicial that they can bring that up, but I can't have my expert talk about the remainder of those other providers that are a part of her expert opinion coming up to this point.

THE COURT: All right. I will have to see what you are talking about here. Her testimony was that they did deviate from the standard of care in the deposition. And I assume that's why he brought up the motions in limine.

MR. TORNOW: And that is now on the record. Right. And that's now in the record. It wasn't. That was a discovery deposition. But now that he has put it in front of the jury, the barn door is open, and the horses or out, and now --

THE COURT: I want to see exactly what the testimony was.

MR. BERNARD: I will remind you, Judge, the motion in limine was the unnamed treaters that -- at the Rapid City Medical Center. And Doctor Rosario, as we now know is not there anymore, and Doctor Gillen and two PAs. That was the motion in limine. There is no

Appx. G-5

discussion in the record at all about the Mayo Clinic doctors.

MR. TORNOW: The motion in limine was any unnamed providers. They can't limit it now. It was any unnamed providers.

THE COURT: We'll take a look at it.

*** *** ***

[REPORTER'S NOTE: At this point the lunch recess was held; whereupon the following proceedings were conducted in open court outside of the presence of the jury.]

*** *** ***

THE COURT: We are back on the record. Mr. Tornow, do you have my order?

MR. TORNOW: No. It was on your bench, and it was laying there, and you said I could look at it, and I had --

THE COURT: Oh, okay. All right. Have we got everybody situated? Let's get this done so we can get the jury in here. Ready? Mr. Tornow, you had a matter to bring up before the Court on the record? Two things.

MR. TORNOW: Two things, Judge. First, the -- we will get the easy one out of the way. I wanted to let the Court and counsel know that as I stood down on the

first floor -- and I think maybe it was because my sun glasses had kicked in -- I'm standing by the elevator, and one of the jurors is talking to me. And he says, *Wow, it's really cold here. It's some 33 degrees colder here than it is Anchorage.* And I literally just looked down. But other people were around, and I wanted to report to the Court that I did not respond. But I wanted to let the Court know.

THE COURT: All right.

MR. TORNOW: I believe it was Mr. Peterson, the older gentleman.

THE COURT: Yes. I know Mr. Peterson.

MR. TORNOW: That's the extent of it. He looked at me for a response, and that was what I just told you, where I put my head down.

THE COURT: Okay. We have got the matter of negligence on non-named parties. Do you want to make your record on that?

MR. TORNOW: Thank you, Judge. And since I addressed this before lunch, at least I have looked at that proposed order, I think it is as I said, but the little different twist is, I think so far the Court struck that -- based on my objection, struck that. But, as I understand it, that is still their -- the defendant's objection that to try to preclude us --

it's not in the order, but I think it was going to be addressed at the time, and I wanted to address it outside of the presence of the jury that -- and it does not say any Rapid City Medical Center providers. It says any other providers.

And I believe by them now, as I said, and I don't need to restate it all, but them going into the Mayo Clinic providers and asking our expert about whether that deviated from the standard of care, that that opened the door that we can now talk about Alexia Gillen, who they have now raised, and go down that road.

THE COURT: Okay.

MR. BERNARD: Your Honor, that motion -- I mean, I understand what the order says, but you have to take that in the light of what the motion was. And the motion was -- and I'm reading from the defendant's brief regarding claims against providers who are not named parties.

And as you will recall, the trial transcript -- or the hearing transcript is replete with this discussion. And the Court asked for more briefing on the issue.

The issue was the plaintiff is trying to try the un-pled negligence of four persons at RCRH and make

some claim of liability against RCRH without actually naming these people who have been sued or haven't been sued, and it's too late because of the statutes of repose. And specifically in that brief -- and I'm reading from the brief. Specifically in proposed instruction number 18, plaintiff expects to try the alleged negligence of Rosario, Brandt, Graham and Gillen. We know now that there was a mistake about Rosario being actually an agent of Rapid City Medical Center. And all of the alleged negligence of care by these unnamed providers, and it's clear that our motion was we can't try the negligence of someone who has not been sued, and somebody who can't be sued, and somehow assign liability to Rapid City Medical Center.

There was -- the discussion of the Mayo Clinic treaters never came up in the brief, and it never came up in the transcripts. And the alleged negligence, or her alleged opinions of negligence never came up on her cross-examination.

The discussion was, Doctor Wright, you think these people at -- the pulmonologist and the ENT at Mayo Clinic are negligent. And, of course, that came out of her deposition. It wasn't even in her report. She had an expert report that said these four people,

unnamed persons, and as well as the three here. And that's what the impetus of that motion was.

And she went on to say, And I think that the people at Mayo Clinic were, too. And that was in her deposition.

MR. TORNOW: Thank you. And it's interesting how he puts that. But it did come up in cross-examination by them quoting that portion of the deposition. There is no distinction of, well, it was just talked about in her deposition. In the cross-examination, they have now entered that into the record. And what I'm going by, Judge, is their proposed order to this Court said any unnamed providers. And as I understood it, the Court was sort of holding that in abeyance. You didn't enter it for now, but that's the issue.

THE COURT: Yeah.

MR. TORNOW: And, of course, we have maintained all along the agency issue is in play because Rapid City Medical Center, LLP continues to be in play. But now there is no question about it since they have done what they did in cross-examination.

MR. BERNARD: Can I say one more thing? The transcript was not put into evidence. It wasn't flashed on the screen. It was -- it was a description of you saying -- or you believe the Mayo Clinic

treaters are negligent, and nothing more.

There wasn't -- there was nothing on the screen, and there is nothing in evidence regarding her transcript, other than a question and answer about Mayo Clinic doctors.

MR. TORNOW: And, of course, that is part of cross-examination. It doesn't matter if it's an exhibit. It's now part of cross-examination that they took that part, that portion from her deposition. I think that is distinction without a difference.

THE COURT: Well, I read the order. And at the last hearing, my recollection isn't that good. I remember my first reaction was to just go ahead and strike that paragraph. And then I'm thinking that Mr. Bernard talked me into keeping it.

MR. BERNARD: No.

THE COURT: That's not correct?

MR. BERNARD: Two hearings ago --

THE COURT: It was last Friday.

MR. BERNARD: Okay. Last Friday I said, *Judge, are you going to sign this order?* You said, *I'm going to think about it over the weekend.* You looked at Aaron and said, *Aren't we, Aaron?* And we got to the in-chambers, I guess, it was Monday, yesterday, and you said, *I'm going to leave it out.*

THE COURT: Okay. If I said I'm going to leave it out, I left it out. But that don't change the problem.

MR. BERNARD: But it certainly does -- well, okay, go ahead.

THE COURT: The questions were asked with regard to a non-claimed party, whether or not the non-claimed party breached their duty of care. And that was Mayo Clinic. And my notes rather indicate -- they are not like the record -- but basically Doctor Wright was asked whether or not they violated, and she kind of sidestepped it. Not a standard of care. She basically said that it wasn't their place to have to tell somebody that somebody else didn't notify them about a particular CT or whatever it was you were talking about. But it definitely was gone into. There is no question about that.

MR. BRAUN: The Mayo Clinic.

THE COURT: So Gillen, they have talked about Gillen. If you want to go into Gillen, I'm going to let you go into Gillen. But I'm going to stop it there. We are not going to run amuck here.

MR. BRAUN: You are going to run amuck if you let them talk about Gillen, because then you're letting him assign liability to the Medical Center for Doctor

Gillen.
THE COURT: I understand that.
MR. BERNARD: And then the issue becomes, Judge --
THE COURT: But no matter whether the order was in or the order was out, it's happened. You got into it, so it's there.
MR. BERNARD: We haven't gotten into where these named persons -- these four people who -- against whom he wants to assign liability were negligent. We haven't gotten into that. And the Court did say, you can talk about their treatment all you want.
THE COURT: Yeah. But not about whether or not they were negligent.
MR. BERNARD: And that's --
THE COURT: And that --
MR. BERNARD: That did not come up. It absolutely did not come up out --
THE COURT: She was asked whether they violated the standard of care.
MR. BERNARD: Not these persons against whom he is trying to establish --
THE COURT: Well, I understand that part. But still what's -- yeah. You're just protecting -- trying to protect the LLP. But you still got into it. And it's going to -- and as far as I'm concerned, he can go

into Gillen.
MR. BERNARD: And he gets to go into -- okay. So he -- so we know what the parameters are, he gets to talk about alleged negligence of Doctor Gillen?
THE COURT: Yes.
MR. BERNARD: And when we get to the verdict form --
THE COURT: We will take that up when we get there.
MR. BERNARD: Okay.
THE COURT: But right now we have got this problem, and that's how we are going to solve it.
MR. TORNOW: Can I -- and just to add to the record. I think that the time to address would be -- would have to do with the verdict form. But that she is an agent, I don't think they are going to deny. And not in front of the jury, but she is an agent, Gillen is, of Rapid City Medical Center, LLP.
THE COURT: I guess you can ask one of the doctors whether or not she is. Nobody has made that decision at this point.
MR. TORNOW: Yeah. I'm just making the point that that's the agency argument that we were talking about, Judge.
THE COURT: Yeah.
MR. TORNOW: We addressed it and so there we were.
THE COURT: I know.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

JODIE M. FRYE-BYINGTON,

Appellant,

v.

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,

Appellees.

Appeal No. 28952

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

THE HONORABLE THOMAS L. TRIMBLE,
(RETIRED) CIRCUIT COURT JUDGE

APPELLEES' BRIEF

Mr. R. Shawn Tornow
Tornow Law Office, P.C.
P.O. Box 90748
Sioux Falls, SD 57109-0748
(605) 271-9006
Attorney for Appellant

Mr. Lonnie R. Braun
Mr. Gregory J. Bernard
Ms. Kimberly Pehrson
Thomas Braun Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
(605) 348-7516
Attorneys for Appellees

NOTICE OF APPEAL FILED
April 5, 2019
APPELLEE'S NOTICE OF REVIEW FILED
April 23, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiff/Appellant Jodie Frye-Byington will be referred to as "Appellant" or "Ms. Frye-Byington." Rapid City Medical Center, LLP will be referred to as "RCMC." Defendants/Appellees Dr. Burgess, Dr. Rafferty, Dr. Welsh, and RCMC collectively will be referred to as "Appellees." An otolaryngologist, also known as an "ear, nose, and throat" doctor, will be referred to as an "ENT." References to the Certified Record on Appeal will be "CR" with the applicable page number. References to the transcript of the Pretrial Conference held February 11, 2019 will be "PTC" followed by the page and line numbers. The trial transcript will be "TT" followed by the page and line numbers. Trial exhibits will be "Ex. ___, p. ___." for the exhibit number and page number. Citations to the Appendix of this brief will be "App." followed by the page number. Exhibits 1-4 (medical records) are confidential trial exhibits and are not included in the Appendix.

JURISDICTIONAL STATEMENT

This is an appeal from a Judgment for Defendants on Jury Verdict. The Honorable Thomas L. Trimble, Retired Circuit Court Judge, Seventh Judicial Circuit, Pennington County, South Dakota, entered Judgment on March 7, 2019. (CR 1847.) Ms. Frye-Byington filed a Notice of Appeal on April 5, 2019. (CR 1864.) The Judgment is appealable as of right pursuant to SDCL 15-26A-3(1).

Defendants filed a Notice of Review on April 23, 2019. The Orders under which Appellees seek review are *Order Denying Partial Summary Judgment* dated January 25, 2019, and orders on the record denying judgment as a matter of law on February 28, 2019 (TT 629_{21}-641_{1}) and March 5, 2019 (TT 1187_{19}-1195_{1}). These matters are appealable pursuant to SDCL 15-26A-22 and as a matter of right. SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES

I. DID THE TRIAL COURT ERR BY DENYING DR. BURGESS'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE STATUTE OF REPOSE?

The trial court denied the motion for summary judgment. (CR 330; TT 630_{14}-631_{22}; TT 1188_{24}-1189_{19}.)

Apposite Authority:
Pitt-Hart v. Sanford USD Medical Center, 2016 S.D. 33, 878 N.W.2d 406
SDCL 15-2-14.1

II. DID THE TRIAL COURT ERR BY DENYING DR. BURGESS'S MOTION FOR JUDGMENT AS A MATTER OF LAW FOR APPELLANT'S FAILURE TO PRODUCE COMPETENT EXPERT TESTIMONY THAT DR. BURGESS EITHER DEVIATED FROM THE STANDARD OF CARE OF AN ENT OR LEGALLY CAUSED HARM TO APPELLANT?

The trial court denied the motion for judgment as a matter of law. (TT 637_{19}-639_{12}; TT 1192_{1}-1193_{19}.)

Apposite Authority:
Mousseau v. Schwartz, 2008 S.D. 86, 756 N.W.2d 345
Maroney v. Aman, 1997 S.D. 73, 565 N.W.2d 70

III. DID THE TRIAL COURT ERR BY DENYING APPELLEES' MOTION FOR JUDGMENT AS A MATTER OF LAW FOR APPELLANT'S FAILURE TO PRODUCE COMPETENT TESTIMONY THAT APPELLEES LEGALLY CAUSED HARM TO APPELLANT?

The trial court denied the motion for judgment as a matter of law. (TT 639_{13}-641_{1}; TT 1193_{20}-1195_{1}.)

Apposite Authority:
Bertness v. Hanson, 292 N.W.2d 316 (S.D. 1980)
Lohr v. Watson, 2 N.W.2d 6 (S.D. 1942)

IV. DID THE TRIAL COURT ERR BY PERMITTING APPELLANT'S EXPERT TO TESTIFY TO PREVIOUSLY UNDISCLOSED EXPERT OPINIONS?

Appellees objected to the testimony and moved to strike the opinions; the court overruled the objections and denied the motion to strike. (TT 629_{21}-630_{13}; TT 1187_{19}-1188_{23}.)

Apposite Authority:
Thompson v. Avera Queen of Peace Hospital, 2013 S.D. 8, 827 N.W.2d 570
Supreme Pork, Inc. v. Master Blaster, Inc., 2009 S.D. 20, 764 N.W.2d 474
SDCL 15-6-37(c)(1)

V. DID THE TRIAL COURT ERR BY PERMITTING APPELLANT TO ARGUE THAT ALLEGED NEGLIGENCE OF DR. GILLEN, WHO WAS NOT SUED, COULD BE ATTRIBUTED TO RAPID CITY MEDICAL CENTER, LLP?

Appellees objected to the testimony and the court overruled the objection. (TT $256_{12\text{-}15}$; TT 631_{23}-637_{18}; TT 1189_{20}-1191_{25}.)

Apposite Authority:
Rehm v. Lenz, 1996 S.D. 51, 547 N.W.2d 560
SDCL 48-7A-201(a)

VI. DID THE TRIAL COURT PROPERLY EXCLUDE APPELLANT'S TWO ALLEGED REBUTTAL WITNESSES?

The trial court did not allow the testimony. (TT 1183_{17}-1184_{8}.)

Apposite Authority:
O'Day v. Nanton, 2017 S.D. 90, 905 N.W.2d 568
Schrader v. Tjarks, 522 N.W.2d 205 (S.D. 1994)
SDCL 15-14-1(6)

VII. WERE THE TRIAL COURT'S JURY INSTRUCTIONS NOT ERRONEOUS?

The trial court modified the language of Appellant's proposed jury instruction and overruled Appellant's objection to the modification. (TT 1200_{5}-1201_{24}.)

Apposite Authority:
Heuther v. Mihm Transp. Co., 2014 S.D. 93, 857 N.W.2d 854
Vetter v. Cam Wal Elec. Co-op, Inc., 2006 S.D. 21, 711 N.W.2d 612
Bauman v. Auch, 539 N.W.2d 320 (S.D. 1995)

STATEMENT OF THE CASE

Plaintiff/Appellant served her Summons and Complaint, commencing this lawsuit on July 22, 2016.[1] She names Dr. Gary Welsh (Complaint ¶ 2), Dr. Robert Burgess (Complaint ¶ 3), Dr. Michael Rafferty (Complaint ¶ 4), and Rapid City Medical Center, LLP (RCMC) (Complaint ¶¶ 5 and 13). The defendant doctors are agents of RCMC. "By reason of the relationship between defendant Rapid City Medical Center, LLP and defendant doctors named and alleged herein, the Rapid City Medical Center, LLP, is liable for the acts…of the defendant doctors." (Complaint ¶ 13.)

Appellees moved for summary judgment based on the statute of repose on June 19, 2018. (CR 80.) The Court denied the motion on January 25, 2019. (CR 330.)

This case was tried to a jury, the Honorable Thomas L. Trimble presiding, beginning February 25, 2019 and ending with a unanimous jury verdict on March 5, 2019. (CR 587.) Judge Trimble entered Judgment on March 7, 2019 and Notice of Entry of Judgment was issued March 7, 2019. (CR 1847 and 1848.)

STATEMENT OF THE FACTS[2]

Plaintiff/Appellant Jodie Frye-Byington sought treatment from Dr. Burgess in 2008 for pain in her neck.[3] (Ex. 1 p. 177.) Dr. Burgess ordered a CT scan of Ms. Frye-Byington's neck. (Ex. 1 p. 198.) The scan revealed nothing abnormal in Dr. Burgess's

[1] The Complaint of Ms. Frye-Byington was filed by attorney Lance Russell. Mr. Russell never withdrew from the case but did not participate in the depositions or trial.
[2] Appellees cannot adopt the Statement of the Facts from Appellant's brief. Appellees request this Court disregard Appellant's Statement of the Facts for failure to state the facts fairly, with complete candor, and as concisely as possible as required by SDCL 15-26A-60(5).
[3] Dr. Burgess had previously performed a right-sided thyroidectomy on Appellant in 2005. (TT $816_{10\text{-}11,\ 22\text{-}24}$.) She had a left-sided thyroidectomy performed in 1996. (TT $817_{2\text{-}6}$.)

judgment. (TT 830$_{1-7}$.) Dr. Burgess is an ENT. (TT 802$_{25}$; Ex. 22.) Dr. Burgess treated Appellant again in 2009, but not following October 27, 2009.[4] (Ex. 1 p. 176 et. seq.)

Appellant treated with other medical providers at RCMC, Regional Health, and the Mayo Clinic between 2008 and 2014. (Ex. 1, 2, 3, 4.) Appellant was diagnosed with acid reflux (GERD) and post-nasal drip. (TT 972$_{21-24}$; 204$_{23-25}$; 905$_{14-19}$.) Appellant treated at Mayo Clinic in 2010 for chronic coughing and throat clearing. Mayo Clinic did not find any abnormalities in her chest and throat scans. (Ex. 2 p. 1)

Appellant sought treatment from Dr. Rafferty at Urgent Care on July 24, 2014, for chest pain, abdominal pain, and back pain. (Ex. 1 p. 104-107.) Dr. Rafferty ordered a chest X-ray, which appeared normal, placed Appellant on a steroid for her acid reflux, and told her to follow up in two weeks. (Ex. 1 p. 107-109.)

Appellant sought treatment from Dr. Welsh at Urgent Care on August 6, 2014, for chest pain. (Ex. 1 p. 112-114.) He diagnosed costochondritis. (*Id*.) Dr. Welsh referred Appellant to a cardiologist for a cardiac work up and exercise stress test. (*Id*.)

Dr. Burgess, Dr. Rafferty, and Dr. Welsh were agents of Rapid City Medical Center, LLP when they treated Appellant. (TT 34$_{14-16}$.)

Appellant sought treatment at the Mayo Clinic on August 11, 2014, and thereafter had surgery at the Mayo Clinic. (Ex. 2 p. 7, 26-30.) There was conflicting evidence as to whether Appellant's symptoms of coughing and throat clearing subsided after this surgery. (TT 98$_{1-4}$; 99$_{8}$; 110$_{2}$-3; 123$_{20-22}$; 472$_{2-3}$; 534$_{13;24}$; 592$_{15-16}$; 601$_{9}$; 624$_{11}$; Ex. 2 p.

[4] There were some thyroid medication (Synthroid) refills after that date, prescribed by Dr. Burgess, but he never met Appellant again as a patient after October 2009. (Ex. 1 p. 176 et. seq.; TT 933$_{7}$.)

55, 70.) The jury was able to observe Ms. Frye-Byington throughout the trial. (*See* TT $905_{14\text{-}19}$.)

Appellant claims Defendants/Appellees negligently treated her. (Complaint ¶¶ 7-12.) Dr. Molly Wright, a family practice doctor, and Appellant's only expert witness, argued the doctors were negligent for failing to notify Appellant of a substernal mass in her chest. (Ex. T; TT 167_{20}-168_{1}.) Dr. Wright was unable to testify when the surgery to remove the mass should have been performed prior to September 2014 in order to conform with the standard of care. (TT $230_{23\text{-}24}$; $259_{21\text{-}25}$; $260_{1\text{-}6}$.)

Dr. Wright additionally attributed negligence to providers who are nonparties. The alleged negligence Dr. Wright attributed each unnamed provider was:

> 1/18/2010 (CT Chest) Elmo Rosario[5] failed to notify patient of mass. Copy of CT report to Devon Graham, PA-C was not acknowledged.
>
> 5/18/2010 (Thyroid U/S) Ordered by Deb Brandt, results called to Devon Graham, and copy to Dr. Burgess, all of whom failed to discuss with patient and plan further evaluation.
>
> 3/21/2011 (CT Chest) Ordered STAT with patient to wait for result which was called to Dr. Gillen. Patient was not notified of the mass.
>
> 4/1/2011 Dr. Gillen again saw patient for persistent symptoms and failed to discuss the CT that had been done 11 days prior and pertained to the reason for her visit.

See App. 039. Dr. Wright additionally was impeached with the claims in her deposition testimony that the Mayo Clinic was negligent in 2010 for failing to inform Appellant regarding the mass. (TT $218_{15\text{-}21}$.) Dr. Wright testified to new, undisclosed opinions during trial which included: 1) Appellant was harmed by going through unnecessary

[5] It should be noted that at all times relevant to Ms. Frye-Byington's case, Dr. Rosario was not a physician or agent of RCMC. (TT $890_{18\text{-}25}$; TT $241_{8\text{-}10}$.)

treatments, 2) Dr. Burgess violated the standard of care by not completing yearly TSH tests, 3) Dr. Burgess may have been prescribing too much Synthroid because he did not complete TSH tests, and 4) that based upon a July 2014 article, a substernal goiter has a risk of malignancy 20% of the time and symptoms include shortness of breath, difficulty swallowing, compression of the vasculature, and even sudden death. (TT $161_{2\text{-}16}$, $170_{1\text{-}20}$, $174_{1\text{-}10}$, $175_{3\text{-}11}$.)

All other relevant facts will be discussed in the body of the brief.

NOTICE OF REVIEW ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING DR. BURGESS'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE STATUTE OF REPOSE.

A. Standard of Review

In reviewing a denial of summary judgment, this Court is to determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406.

B. The Statute of Repose prohibits this action against Dr. Burgess

Appellant commenced this lawsuit on July 22, 2016. SDCL 15-2-14.1 provides the statute of repose for medical malpractice actions can only be brought within two years after the alleged malpractice occurred. In *Pitt-Hart v. Sanford USD Medical Center,* 2016 S.D. 33, 878 N.W.2d 406, this Court held that SDCL 15-2-14.1 is a "statute of repose" and not a statute of limitations. The court examined what might toll a statute of repose: "For the present action, the critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling. Likewise fraudulent concealment does not toll a period of repose." *Id.* at ¶ 20. Here, any allegations of wrongful conduct prior to July 22, 2014, are barred.

Defendants' Statement of Undisputed Material Fact in support of the motion for summary judgment stated:

1. This action was commenced by service on Defendants on July 22, 2016.
2. Plaintiff alleges professional negligence of Defendants.
3. Plaintiff's expert opines seven deviations from the standard of care. Only two fall within the two years preceding the commencement of this action.

(CR 78.) It was undisputed that no alleged negligence of Dr. Burgess occurred within two years of commencement of the action. Defendants submitted Plaintiff's complaint, the expert report of Dr. Wright, a copy of the *Pitt-Hart* case, and a copy of SDCL 15-2-14.1 to support the motion. The facts were not disputed and must be taken as true. SDCL 15-6-56(c)(3). Appellant submitted argument in response to those facts. *See* App. 052-53. Appellant submitted an affidavit of Ms. Frye-Byington, to support her argument that a continuing tort occurred in this case. (CR 119.) Ms. Frye-Byington's Affidavit did not dispute the *Defendants' Statement of Undisputed Material Fact*, relevant to Dr. Burgess's treatment.

More than seven months after Defendants' motion for summary judgment was filed, the trial court denied the motion stating, "the Court is unable to discern from the facts presented thus far whether the alleged negligent treatment Plaintiff received prior to July 22, 2014, would fall within the continuing tort doctrine thereby causing the statute of repose to start running on the last date of negligent treatment." (CR 330; App. 001.)

Rather than providing a genuine issue of material fact, Appellant argued that the continuing tort doctrine applied because the practitioners should be considered collectively, and therefore, because Doctors Rafferty and Welsh as agents of RCMC treated Ms. Frye-Byington after July 22, 2014, Dr. Burgess could be held liable for negligence allegedly occurring more than five years earlier. (*See* App. 052-53.) By accepting this argument, ignoring the undisputed facts, and erroneously applying the continuing tort doctrine,[6] the trial court erred as a matter of law.

[6] It appears Appellant's argument that the continuing tort doctrine applies is due to a "collective knowledge" of all treatment providers within RCMC. The continuing tort

Doctor Rafferty and Welsh's treatments were not related to Ms. Frye-Byington's thyroid. (Ex. 1 p. 107-114.) She sought treatment for chest, abdominal, and back pain from them in 2014. *Id.* She was convinced she was dying of a heart condition. (Ex. 1 p. 112) She was referred to a cardiologist. (Ex. 1 p. 113-114.) This treatment, which was the only alleged negligence within the statute of repose, was separate and distinct from the neck pain for which Appellant saw Dr. Burgess in 2008 and led to the CT scan.

Pitt-Hart noted that the continuing treatment doctrine does not apply to a statute of repose. 2016 S.D. 33, ¶ 26. However, *Pitt-Hart* did hold that the continuing tort doctrine could apply when the "harm is the cumulative effect of several treatments rather than the result of a single act." *Id.* at ¶ 25. The doctrine does not apply when a patient is able to identify the specific negligent treatment that caused her injury. *Id.* Here, the alleged negligence of Dr. Burgess was pinpointed to his failure to disclose to Ms. Frye-Byington the results of a CT scan in September 2008. (App. 039.) Later treatment by other providers is irrelevant to Dr. Burgess's alleged negligence. Prior to seeing Doctors Rafferty and Welsh, Ms. Frye-Byington was informed of the mediastinal mass by Dr. Gillen in 2011 and sought treatment at another facility (Rapid City Regional Hospital) where she informed the intake nurse of the growth. (Ex.1 p. 44; Ex. 3 p. 8.) Additionally, Appellant took her CT scans to the Mayo Clinic in 2010 and sought treatment for her chronic cough. The Mayo Clinic did not find a thyroid mass, but instead diagnosed her with post-nasal drip. (Ex. 2 p. 1-6; TT $196_{8\text{-}20}$; $201_{1\text{-}6}$; $203_{18\text{-}25}$.) There was not a "continuous and unbroken course" of negligent treatment by Dr. Burgess

---

doctrine has never applied a collective knowledge doctrine to a medical entity. The continuing tort doctrine applies to repeated treatment by a single doctor. *See Pitt-Hart*, 2016 S.D. 33, ¶ 25.

or the RCMC doctors, nor was the treatment by these doctors "so related as to constitute one continuing wrong." *See Pitt-Hart*, at ¶ 26. Appellant's treatment was for various ailments, not one particular issue. (*See* Ex. 1.)

As this Court noted in *Holland v. City of Geddes*, 2000 S.D. 71, ¶ 9, 610 N.W.2d 816, "To constitute a continuing tort…all elements of the tort must be continuing, including breach of duty and damages." When the breach ceases, but the alleged damage continues, there is no continuing tort. *Id.* (citing *Hall's Park Motel v. Rover Constr., Inc.*, 194 W.Va. 309, 460 S.E. 444 (1995)).

Viewing the evidence most favorably to Appellant, it is clear that prior to trial Appellant provided no factual dispute showing Dr. Burgess treated Ms. Frye-Byington after July 22, 2014. Dr. Burgess's failure to inform Ms. Frye-Byington of the CT scan results in 2008 did not result in damages to Ms. Frye-Byington. Ms. Frye-Byington sought treatment for a multitude of issues at RCMC unrelated to this CT scan and sought treatment from providers outside of RCMC who also did not inform Appellant of the mass and came to similar conclusions that her coughing and throat clearing were related to acid reflux or post-nasal drip. (*See* Ex. 1, 2, 3, 4.) Dr. Burgess's actions are unrelated to the alleged negligence of Doctors Rafferty and Welsh. The trial court erred by denying Dr. Burgess's motion for partial summary judgment because the statute of repose prohibited the lawsuit against Dr. Burgess. The circuit court's denial prejudiced Dr. Burgess because he had to stand trial for allegedly negligent conduct which occurred eight years prior to Appellant's Complaint. The court erred by denying the motion based upon the facts before it. This Court should reverse the decision of the trial court.

At trial, for the first time, Appellant asserted that Dr. Burgess continued prescribing Appellant thyroid medication (Synthroid) through 2014. (Ex. S.) This information was not argued prior to trial or ever considered part of Appellant's continuing tort argument. For the first time, at trial, Dr. Wright alleged Dr. Burgess was negligent for prescribing the Synthroid without conducting TSH tests. (TT $174_{1\text{-}13}$.) Dr. Wright did not, however, allege prescribing this medication caused the coughing and throat clearing by Appellant or caused the mass to grow. This information was not relevant to the alleged harm. The Court erred by denying Appellees' renewed motion for summary judgment for Dr. Burgess on the statute of repose.

II. THE TRIAL COURT ERRED BY DENYING DR. BURGESS'S MOTION FOR JUDGMENT AS A MATTER OF LAW FOR APPELLANT'S FAILURE TO PRODUCE COMPETENT EXPERT TESTIMONY THAT DR. BURGESS EITHER DEVIATED FROM THE STANDARD OF CARE OF AN ENT OR LEGALLY CAUSED HARM TO APPELLANT.

A. Standard of Review

This Court reviews the denial of a motion for judgment as a matter of law under the abuse of discretion standard. *Stensland v. Harding Cty.*, 2015 S.D. 91, ¶ 9, 872 N.W.2d 92, 95.

B. Appellant failed to produce competent expert testimony regarding the standard of care for an otolaryngologist (ENT)

Expert testimony is required to establish the standard of care for a professional unless the issue is within the common knowledge of the jury. *Mid–Western Elec. Inc., v. DeWild Grant Reckert & Associates Co.*, 500 N.W.2d 250, 255 (S.D.1993). Whether a witness is qualified as an expert can only be determined by comparing the area where the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony. *Maroney v. Aman*, 1997 S.D. 73, ¶ 39, 565 N.W.2d 70, 79.

In *Maroney*, the court agreed that exclusion of Dr. Loomstein was appropriate. *Id.* at ¶ 40. Although Dr. Loomstein had experience with soft-tissue/chronic pain cases, including head injuries, he did not have previous experience determining the cause of a stroke, only a determination of the activity of a person who suffered from a stroke. *Id.* at ¶ 37-38. Therefore, he was not qualified as an expert on the matter before the court.

Maroney noted that in *State v. Hill*, this Court stated the criteria applicable to determine the admissibility of expert testimony was 1) the use of a qualified expert, 2) conformity to a generally accepted explanatory theory, 3) the proper subject matter, and 4) probative value compared to prejudicial effect of the testimony. *Maroney*, 1997 S.D. 73, ¶ 34 (citing *State v. Hill*, 463 N.W.2d 674, 676-77 (S.D. 1990)).

A specialist in a particular field of medicine has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same field of specialization in the United States. SDPJI (civil) 20-70-50 (emphasis added). A physician has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same line of practice. SDPJI (civil) 20-70-30 (emphasis added). Other states apply the rule that an expert must be qualified (competent) to testify regarding a specialist's standard of care. *See DiFilippo v. Preston*, 173 A.2d 333 (Del. 1961) (general practitioner unfamiliar with the standard of care of surgeon excluded from testifying regarding alleged breach of standard of care of surgeon in performing thyroidectomy); *Peterson v. Carter*, 182 F.Supp. 393 (D.C.W.D. Wis., 1960) (board certified internal medicine doctor not competent to testify regarding alleged breach of standard of care of surgeon during thyroid surgery).

The duty owed by an ENT surgeon, like Dr. Burgess, is to possess and use that degree of knowledge and skill ordinarily possessed and used under the circumstances by an ENT of good standing engaged in ENT surgery practice. *Mousseau v. Schwartz*, 2008 S.D. 86, 756 N.W. 2d 345. Because the standard of care of an ENT surgeon and whether it was breached in a given circumstance is not within the common knowledge of a jury, such issues must be determined based on the testimony and evidence of other members of the profession who testified as experts. *Id.; see also* SDPJI (civil) 20-70-20.

In *Greene v. Thomas,* 662 P.2d 491 (Colo.App. 1982), the plaintiff sued a plastic surgeon following the surgical removal of a growth from plaintiff's scalp. *Id*. at 493. At trial, plaintiff called a dermatologist to testify to an alleged breach of the standard of care by the plastic surgeon. The trial court directed verdict for the defendant at the close of plaintiff's evidence because plaintiff failed to present competent evidence on defendants' standard of care. *Id*. In its analysis, the appellate court noted that, as in South Dakota:

> the plaintiff in a medical malpractice case must prove that the defendant specialist failed to meet the standard of care required of physicians in the same specialty practiced by the defendant. And, to qualify a witness as an expert on that standard of care, the party offering the witness must establish the witness' knowledge and familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty.

Id. at 493. The court held that the proffered expert "must have acquired through experience or study, more than just a casual familiarity with the standards of care of the defendants specialty." *Id.* When measured against this standard, the expert dermatologist was not competent to testify to the plastic surgeon's standard of care. For example:

> the dermatologist testified that he had never performed surgery of the kind performed on the plaintiff, nor was there any evidence that he had witnessed its performance. He further testified he habitually refers such cases to plastic surgeons because the treatment of the condition in question

> is outside his area of expertise. His sole exposure to the work of plastic surgeons was through attending occasional lectures. Moreover, he admitted he had only limited knowledge of the standard of care for plastic surgeons.

Id. at 494. Based on the dermatologist's testimony, the court found the witness did not have more than a casual familiarity with the surgeon's area of expertise and was unqualified to testify to plastic surgery standard of care. *Id.*

Similarly in *Paige v. Mississippi Baptist Medical Center*, 31 So.3d 637 (Miss.Ct.App. 2009) the court affirmed a summary judgment for the defendant thoracic surgeon because the plaintiff's expert internal medicine primary care physician was not competent to offer standard of care opinions against the defendant surgeon. In analyzing the propriety of the trial court's exclusion of the proffered expert's testimony regarding the surgeon's standard of care, the court reiterated, "it is required that the expert show 'satisfactory familiarity with the specialty of the defendant doctor.'" *Id.* at 642 *(citation omitted).* The evidence showed that, although board certified in internal medicine, the expert had no training in any type of surgery and had not even participated in the type of thoracic surgery the defendant performed. *Id.* at 641-642. Based on the proffered experts' lack of knowledge and experience in the specialty in which he intended to offer opinions, the court properly excluded his testimony. *Id.* at 642.

Here, Dr. Wright's own testimony reveals that she is neither a surgeon nor ENT. (TT $159_{21\text{-}25}$; 180_{24}.) Dr. Wright is a family practice physician. (Ex. T.) Until about mid-way through her deposition, she believed her opinions against Dr. Burgess were against another family practice doctor. (TT 192_{24}-193_{2}.) She is not a specialist in treating thyroids, and there is nothing in her past research or professional experience related to thyroids. (TT $182_{6\text{-}20}$; 228_{20}.) She admits she does not have enough knowledge

and experience to know whether, after a complete thyroidectomy, thyroid tissue commonly grows back without causing symptoms. (TT 227_{22}-228_{5}.) Further, Dr. Wright refers thyroid patients to specialists such as Dr. Burgess. (TT $181_{9\text{-}11}$.)

While Dr. Wright, as a family practice physician, has some casual familiarity with thyroids, she does not have the specialized knowledge that Dr. Burgess possesses as an ENT surgeon. Dr. Wright testified that doctors are entitled to exercise their professional judgment. (TT $187_{13\text{-}22}$.) Because Dr. Wright has no knowledge whether tissue can re-grow after a thyroidectomy and not cause the patient problems, Dr. Wright was incompetent to testify whether a mass is medically relevant to an ENT's medical decision making and treatment under the circumstances presented in this case. (TT 227_{22}-228_{18}.) Dr. Wright does not feel she is competent to read and interpret a chest X-ray; she leaves that to radiologists. (TT $211_{12\text{-}13}$: "I don't trust my own knowledge of whether or not a mediastinum is enlarged.") If Dr. Wright cannot even read and interpret an X-ray, she is not competent to testify that Dr. Burgess's determination that thyroid tissue in the neck was normal and not a cause of concern in the patient, breached the standard of care.

When Appellant presented to Dr. Burgess and the CT was taken in 2008, Appellant was complaining of pain in her neck. (Ex. 1 p. 178.) Dr. Burgess utilized his specialized knowledge as an ENT to determine the small mass was not the cause of Appellant's neck pain and was not an abnormal finding on the CT. (TT 828_{16}-830_{7}.)

Dr. Burgess moved for judgment as a matter of law at the close of Appellant's case and at the close of the all evidence. (TT 630_{14}-631_{6}; 1188_{24}-1189_{18}.) The Court denied both motions. (TT 631_{22}; 1189_{19}.) Using the abuse of discretion standard of review, it is apparent that Dr. Wright did not possess more than a casual familiarity, and

certainly not superior knowledge of the standard of care of an ENT or thyroids (the subject matter) to demonstrate more likely than not that Dr. Burgess deviated from the standard of care of an ENT. The court should have granted the motion. Dr. Burgess was prejudiced by having to stand trial and leave his fate in the hands of a jury. This Court should reverse the trial court's decision.

III. THE TRIAL COURT ERRED BY DENYING APPELLEES' MOTION FOR JUDGMENT AS A MATTER OF LAW FOR APPELLANT'S FAILURE TO PRODUCE COMPETENT TESTIMONY THAT APPELLEES LEGALLY CAUSED HARM TO APPELLANT.

A. Standard of Review

This Court reviews the denial of a motion for judgment as a matter of law under the abuse of discretion standard. *Stensland v. Harding Cty*., 2015 S.D. 91, ¶ 9, 872 N.W.2d 92, 95.

B. Legal Causation

In *Lohr v. Watson*, 68 S.D. 298, 302, 2 N.W.2d 6, 7 (1942), this Court discussed the quality of proof necessary to submit a malpractice case to a jury:

> Because the central issues of this case, viz., (a) negligence, and (b) its causal connection with the injury suffered by plaintiff, turn upon scientific questions laymen are not qualified by learning or experience to answer, plaintiff was required to establish those elements by the testimony of experts.

(citing Wigmore on Evidence, 3rd Ed., § 2090). The *Lohr* Court affirmed a directed verdict for Plaintiff's failure to provide expert proof that Plaintiff's alleged damages "resulted from some negligence for which Defendant was responsible [rather] than in consequence of something for which he was not responsible." *Id.* at 8.

This Court requires that issues outside common knowledge be proved by expert testimony, particularly in malpractice cases. "The opinions and testimony of such experts

are indispensable in determining questions which are unfamiliar to ordinary witnesses and, within that field the opinions of lay witnesses are not admissible." *Lenius v. King*, 294 N.W.2d 912, 914 (S.D. 1980). A verdict in a malpractice case, lacking the required expert testimony is "based on inferences and conjecture [and] cannot stand." *Id.* (citing *Lohr v. Watson*, 2 N.W.2d 6).

A plaintiff in a medical malpractice case under the traditional proximate cause standard must prove by a preponderance of the evidence that the physician's negligence caused an injury. *Smith v. Bubak*, 643 F.3d 1137, 1141 (8th Cir. 2011). If the plaintiff would have likely sustained the injury in the absence of negligence, recovery is precluded. *Id.* In other words, if Ms. Frye-Byington would have likely sustained the same injuries absent negligence, she cannot meet the burden of proof.

Appellant's expert was asked in her deposition what date she believed that the Appellant's mass should have been removed. Dr. Wright said she could not give an opinion because she is not a surgeon. (Wright Depo. 76_{16-22}.) At trial, Dr. Wright again testified she had no opinion when the optimal time for surgical treatment occurred. (TT 230_{23-24}; 259_{21}-260_{6}.) Dr. Wright testified, "I can't state when in the course of her care she would have needed surgery." (TT 230_{11-12}.) Moreover, there was insufficient evidence that Appellant's symptoms of coughing and throat clearing were due to the mass. The symptom which led to the mass removal was chest pain, not coughing or throat clearing. (Ex. 1 p. 107-109, 112-114; Ex. 2 p. 7.) Appellant continued to cough after the mass removal. (Ex. 2 p. 55, 70.) Further, the Mayo Clinic did not attribute her cough to the thyroid tissue in her chest. (TT 905_{9-12}.)

An expert must do more than simply state an action may have caused an injury. *Bertness v. Hanson*, 292 N.W.2d 316, 319 (S.D. 1980). "Without stating that the causal connection exists in the case at issue, such evidence does not raise an issue for the trier of fact." *Id*. A doctor is only entitled to state his or her medical opinion if it is "based upon medical certainty or medical probability." *Armstrong v. Minor*, 323 N.W.2d 127, 128 (S.D. 1982). Opinions based upon anything less are insufficient and inadmissible. *Id*. In other words, he or she must testify that more likely than not a defendant's alleged negligence caused the injury complained of. *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 28, 756 N.W. 2d 345, 357.

Dr. Wright could not identify how Dr. Rafferty's alleged negligence approximately two weeks prior to her appointment at Mayo and a few weeks before surgery caused any harm to Appellant. (TT 230$_{24}$.) She could not identify how Dr. Welsh's alleged negligence a few days prior to Appellant's appointment at Mayo and a few weeks before surgery caused harm to Appellant. (TT 230$_{24}$.) If the harm was "not knowing" about the mass, Mayo told Appellant about it on August 12, 2014, though Appellees contend Appellant knew about the mass in 2011 through Dr. Gillen. (See Ex. 1 p. 44; Ex. 3 p. 8.) In fact, Dr. Wright testified that the intervening time between appointments with Dr. Rafferty and Dr. Welsh to the Mayo Clinic "didn't impact the eventual outcome." (TT 230$_{24}$.) Therefore, any breach of the standard of care by Doctors Rafferty and Welsh did not cause Appellant harm, and the court erred by not granting Appellees' motion for judgment as a matter of law. Additionally, Appellant concedes that the failed standard of care began and ended with Dr. Burgess's "oversight" in 2008. (*Appellant's Brief* at 13.)

If the Court finds for Dr. Burgess on Appellees' Issues I or II *supra*, there is no need to examine this issue as related to him. But, for Dr. Burgess, Dr. Wright's sole criticism was that the chart she was given failed to reflect that he told Appellant the results of her September 25, 2008 CT.[7] (App. 039.) Dr. Wright is not a thyroid specialist. (TT 170_{25}.) Most significantly, Dr. Wright opined that it is impossible to answer when Ms. Frye-Byington needed either surgery or some other treatment. (TT $230_{11\text{-}12}$; $260_{4\text{-}6}$.)

Pursuant to the above, Appellant had the burden of presenting expert testimony establishing that each doctor's alleged violation of the standard of care more likely than not was the cause of injury to Appellant. Appellant presented no expert testimony on how the three visits that she claims were malpractice by the three doctors she sued proximately caused harm to Appellant. Dr. Wright specifically acknowledged there was no harm caused by Doctors Rafferty and Welsh. (TT 230_{24}.) Reviewing the evidence in the light most favorable to Appellant, Appellant provided no expert opinion on causation. Appellees were prejudiced by having to stand trial in a case that was sorely lacking in evidence. Appellant's failure to present expert testimony on this critical issue entitled Appellees to judgment as a matter of law. The trial court's denial of Appellees' motion was an abuse of discretion requiring reversed.

IV. THE TRIAL COURT ERRED BY PERMITTING APPELLANT'S EXPERT TO TESTIFY TO PREVIOUSLY UNDISCLOSED EXPERT OPINIONS.

[7] This was Dr. Wright's sole criticism until trial when she created more criticisms about TSH tests and prescribing/refilling Synthroid. Once again, however, Dr. Wright established no causal connection between this new alleged breach and the alleged harm. In fact, when Appellant presented to the Mayo Clinic on August 12, 2014, her thyroid function tests were normal. (Ex. 2 p. 10.) This new opinion was a red herring and based solely on conjecture.

A. Standard of Review

The trial court's evidentiary rulings are presumed correct and will not be reversed absent a clear abuse of discretion. *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994). An abuse of discretion occurs when "no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Rogen v. Monson*, 2000 S.D. 51, ¶ 17, 609 N.W.2d 456, 460.

B. Undisclosed Expert Opinions

SDCL 15-6-37(c)(1) provides when a party attempts to offer a previously undisclosed expert opinion, she may not "use as evidence at trial" the "information not so disclosed." *Thompson v. Avera Queen of Peace Hospital*, 2013 S.D. 8, 827 N.W.2d 570. In *Thompson*, no opinion was previously offered on duty to inform or failure to inform, but at Dr. Clark's trial deposition, for the first time, he opined the defendant breached the standard of care by failing to inform the patient about a screw. *Id.* at ¶ 11. That opinion was "new and previously undisclosed." *Id.* The Supreme Court affirmed the decision to redact those parts of Dr. Clark's opinion before presentation to the jury. *Id.* at ¶ 7.

An expert may only testify to matters disclosed. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, 764 N.W.2d 474. This Court held several times that it is appropriate to exclude undisclosed expert testimony. In *Kaiser v. University Physicians Clinic*, 2006 SD 95, 724 N.W.2d 186 and *Papke v Harbert*, 2007 SD 87, 738 N.W.2d 510, this Court examined undisclosed expert testimony. *Supreme Pork*, 2009 S.D. 20, ¶ 14. The Court recognized that the purpose of pretrial discovery is to allow "the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Id.* (quoting *Papke*, 2007 S.D. 87 at ¶ 55). To fulfill this purpose, the parties are "under a duty

seasonably to supplement [their] response[s] with respect to any question directly addressed to…the subject matter on which [the expert witness] is expected to testify, and the substance of [the expert's] testimony." *Id.* (quoting *Kaiser*, 2006 S.D. 95 at ¶ 32). This is to promote the truth finding process and avoid trial by ambush. *Id.* Seasonable disclosure allows opposing counsel the ability to effectively cross-examine an expert witness at trial. *Id.*

This Court identified three areas of concern regarding allegations of undisclosed expert testimony: 1) the time element and whether there was bad faith by the party required to supplement; 2) whether the expert testimony or evidence pertained to a crucial issue; and 3) whether the expert testimony differed substantially from what was disclosed in discovery. *Supreme Pork*, at ¶ 15 (citing *Papke*, at ¶ 56 and *Kaiser* at ¶ 35).

Here, Appellant never disclosed Dr. Wright's additional opinions nor the article prior to trial. Dr. Wright's expert report never indicated a review of an article from a medical journal. (App. 036-39.) Her testimony at her deposition did not disclose the article. (Wright Depo. 33_{22}-$34_{8, 19-23}$.) Disclosure occurred while Dr. Wright was on the witness stand.[8] Appellants counsel obviously knew about the article because he had a line of questions about it at trial. (TT 160_{1}-161_{16}.) This evidences bad faith by Appellant's counsel. This testimony was substantially different from Dr. Wright's deposition testimony. (Wright Depo. 33_{20-21}: "There are no particular texts that I felt were required for review.")

[8] Dr. Wright's original opinions were disclosed via report on April 3, 2018, and through her deposition on June 6, 2018. No additional disclosure regarding her opinions was made by Appellant.

Yet, at trial, Dr. Wright suddenly now relied on an article from a July 2014 International Surgery Journal. (TT 160_{5-21}.) Despite that she is admittedly not a surgeon or ENT, she used the article for her new opinion that "a substernal goiter has a risk of malignancy 20% of the time and that symptoms include shortness of breath, difficulty swallowing, compression of the vasculature, and even sudden death." (TT 161_{2-6}.) Appellees objected to these undisclosed opinions but were overruled. (TT 160_{12-14}.) This testimony was new and previously undisclosed. Dr. Wright's deposition testimony was that she had not reviewed articles and had no research on thyroids. (Wright Depo. 28_{7-9}.) This new testimony should have been excluded. This is trial by ambush. The trial court abused its discretion by allowing this testimony.

Additionally, Dr. Wright opined, at trial, that Ms. Frye-Byington was harmed by going through unnecessary treatments. (TT 170_{1-19}.) She opined Dr. Burgess was also negligent by not conducting TSH tests yearly. (TT 174_{1-13}.) And she opined that Dr. Burgess was negligent in potentially giving Ms. Frye-Byington too much thyroid hormone. (TT 175_{8-11}.) None of these opinions were disclosed prior to trial. Despite Appellees' objections to the new expert opinions, the Court overruled all the objections and allowed Dr. Wright to testify to multiple new opinions. (*See* TT 160-175.) Appellant had the opportunity to disclose these opinions. The newly admitted opinions pertained to Dr. Burgess's negligence and although Appellant did not clearly tie this alleged negligence to Appellant's alleged harm, the jury should not have heard about these new theories of negligence. Given that these new opinions were heard by the defendants and counsel during Dr. Wright's trial testimony, Appellees did not have time to prepare to adequately cross-examine Dr. Wright on these new theories and opinions.

The prejudice to Appellees was compounded when, despite allowing the new opinions by Dr. Wright, the Court specifically precluded Appellees from asking their expert (Dr. Reiner) about Dr. Wright's new opinions. (TT $702_{6\text{-}22}$; 703_{25}-704_{10}.) By allowing Dr. Wright to testify to undisclosed opinions but not allowing Appellees' expert to rebut them, Appellees were prejudiced, and the court abused its discretion.

Before the trial, Ms. Frye-Byington moved the court to preclude Appellees' expert from testifying to matters not previously disclosed and Appellees' asked for a reciprocal order. The court Ordered "that Plaintiff's Motion in Limine (2) precluding Defendants' expert from testifying to matters not previously disclosed is granted and reciprocal." (App. 057; CR 397.) Clearly, since Appellant made the motion, Appellant's counsel understood that an expert cannot testify to previously undisclosed opinions. Curiously, Appellant argued that Appellees' expert couldn't refute these new opinions because it would be a violation of the pretrial order. (TT $695_{3\text{-}6,\ 23}$-$696_{4,\ 8\text{-}10}$, $698_{13\text{-}17}$.)

The trial court erred by admitting the testimony over the objection of Appellees.

V. THE TRIAL COURT ERRED BY PERMITTING APPELLANT TO ARGUE THAT ALLEGED NEGLIGENCE OF DR. GILLEN, WHO WAS NOT SUED, COULD BE ATTRIBUTED TO RAPID CITY MEDICAL CENTER, LLP.

A. Standard of Review

The trial court's evidentiary rulings are presumed correct and will not be reversed absent a clear abuse of discretion. *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994). An abuse of discretion occurs when "no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Rogen v. Monson*, 2000 S.D. 51, ¶ 17, 609 N.W.2d 456, 460.

B. The law of Agency precludes claims against non-party medical providers

It is axiomatic that for vicarious liability to apply, an agent must be liable for a tort committed in the scope of the agency. *See Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436. Applied here, in order for RCMC to be vicariously liable for the alleged negligence of Dr. Gillen, Dr. Gillen must first be liable for negligence. As noted, Appellant's expert opined that the last event of negligent care by Dr. Gillen occurred on April 1, 2011. (*See* App. 039.) In July 2016, when Appellant filed her lawsuit, she had no viable claims against Dr. Gillen because such claims were extinguished by the statute of repose. SDCL 15-2-14.1. (*See Argument I, supra*.)

Dr. Gillen is not a named party and was not served. (Complaint.) She treated Ms. Frye-Byington in 2011. (Ex. 1 p. 44.) Dr. Gillen left RCMC in 2013. (TT $874_{9\text{-}11}$.) Any alleged negligence of Dr. Gillen cannot be used to find any of the other doctors negligent because she is not an agent of those doctors. Dr. Gillen's treatment of Ms. Frye-Byington as an agent of RCMC ended nearly five years before the commencement of the suit. A claim against Dr. Gillen barred by the statute of repose cannot be revived against RCMC on a theory of vicarious liability.

In the factually similar case of *Comer v. Risko*, 833 N.E.2d 712 (Ohio 2005)[9] the plaintiff alleged that she underwent two chest x-rays at defendant hospital, and the reports interpreting the x-rays did not mention an enlarged mass. *Id*. at 718. Plaintiff was

[9] In Appellant's argument to her Issue II, Appellant discusses the 1994 Ohio case of *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994). Aside from being an older case than *Comer*, *Southview* is distinguishable from the case at bar. It involved an independent contractor of a hospital and the patient specifically chose that hospital for emergency treatment. That case included an independent claim against the hospital. There is no independent claim of negligence against RCMC here. Additionally, in *Southview*, the plaintiff alleged negligence by the providers she came into contact with during a single stay at Southview Hospital, rather than multiple visits with multiple providers.

subsequently diagnosed with cancer. *Id*. She sued the hospital claiming the hospital was vicariously liable for negligence of its two agent physicians who misinterpreted the x-rays. *Id.* The plaintiff did not sue the two agent physicians because the statute of limitations applicable to them had expired. *Id*. The hospital moved for summary judgment arguing no viable claim existed against the hospital because the statute of limitations against the agent physicians had expired. *Id*. at 714. The trial court granted the motion and the Ohio Supreme Court agreed with the trial court's ruling. *Id.*

In its analysis, the Ohio Supreme Court noted that the plaintiff's sole theory of liability against the hospital was based on the agency relationship between the hospital and the two unnamed physicians who allegedly misinterpreted the x-rays. *Id.* The court noted the statute of limitations had expired, so any liability of the unnamed physicians was extinguished. *Id*. Because the hospital's liability for the actions of the unnamed physicians was based on vicarious liability, when the underlying liability extinguished, so did the claims against the hospital. *Id*. at 715.

A partnership is an entity distinct from its partners. SDCL 48-7A-201(a). In South Dakota, an entity like RCMC cannot engage in the practice of medicine. *See Kelly v. Duling Enterprises, Inc.*, 172 N.W.2d 727, 746 (S.D. 1969) ("a corporation cannot engage in the practice of a learned profession in South Dakota"). Therefore, only vicarious liability can apply to RCMC.

Here, Appellant used the alleged negligence of Dr. Gillen, a non-party, to attempt to support her theory of a continuing tort and create an additional doctor's negligence as a way for the jury to find RCMC negligent. Appellant argued as much in her closing argument to the jury. (TT 1224_{5-8}, 1273_{3-18}, 1282_{6-16}.)

C. Continuing tort doctrine does not salvage the extinguished claims against Dr. Gillen

The continuing tort doctrine does not revive or toll the statute of repose against Dr. Gillen. Here, Appellant attempts to bootstrap alleged negligent conduct of several different providers over a period of six years into one continuous tort, thus tolling the statute of repose. (TT 1224_{5-8}.) Appellant argues that if the statute of repose is tolled as against these unnamed providers (notably, Dr. Gillen), RCMC can be held vicariously liable for their alleged negligence. (TT 1273_{3-18}, 1282_{6-16}.) This is a fundamental misapplication of the continuing tort doctrine. (*See Appellees' Argument I, supra.)*

This Court rejected the argument that treatment by a co-employee can toll the statute of limitations. *Rehm v. Lenz,* 1996 S.D. 51, 547 N.W.2d 560. Although analyzed in the context of the continuing treatment doctrine, the Court's analysis is equally applicable to the continuous tort doctrine.

The *Rehm* plaintiffs filed suit against a mental health center, arguing that the center was liable for a psychologist's improper counseling based on *respondeat superior*. *Rehm*, 1996 SD 51, ¶ 25, 547 N.W.2d at 567. The plaintiff argued that, although the psychologist left the center and no longer treated the plaintiff, the statute of limitations should be tolled because the plaintiff continued to receive counseling from a different psychologist at the center. *Id*. This Court held the position "untenable. Under that logic, if [the plaintiff] had never stopped counseling with [the center], it could be liable for [the psychologist]'s actions into the next millennium." *Id*. *See also Zielinski v. Kotsoris,* 901 A.2d 1207, 1217 (Conn. 2006) ("separate and isolated contacts with different physicians who have the same employer…will not, without more, give rise to a continuing course of conduct or treatment relationship for purposes of tolling the statute of limitations").

Rehm held that it is the relationship between the patient and the allegedly negligent provider that matters, not the relationship between the patient and the institution. *Id.* This is a logical result. If treatment of the alleged consequences of malpractice by healthcare providers with the same employer as the tortfeasor is sufficient to toll the statute of repose, then there will effectively be no statute of repose when a plaintiff alleges ongoing malpractice through several sequential treaters. *Id.* at 567. Dr. Gillen left RCMC in 2013, more than two years prior to Appellant's Complaint. Her alleged negligence cannot be used against Doctors Burgess, Welsh, Rafferty, or RCMC.

D. Appellees did not "open the door" to Dr. Gillen's alleged negligence

The trial court ordered that Plaintiff was precluded from making claims at trial for the alleged negligent treatment of Plaintiff delivered by treaters who were not named or served as defendants in this action. (*See* CR 588; PTC $35_{17\text{-}21}$; $36_{4\text{-}11}$.) The Court then rescinded this order as to Dr. Gillen, claiming Appellees "opened the door" by mentioning her name and discussing alleged negligence of Mayo Clinic providers in 2010. (TT 244_{19}-246_{5}.)

At the Pretrial Conference, after a lengthy discussion regarding the principles of agency and what testimony was allowable concerning unnamed, non-party doctors employed by RCMC, the court stated, "I assume you can only try the named parties. And that's what the jury will get." (PTC $32_{22\text{-}23}$.) "Nor can they be found liable when they are not named in the lawsuit. But they were still part of what happened in this whole bit of treatment." (PTC $33_{9\text{-}11}$.) The court clearly indicated it would be permissible to discuss Dr. Gillen's treatment without breaching the topic of alleged negligence by Dr. Gillen. The Mayo Clinic's negligence was not discussed.

Defense counsel questioned Dr. Wright regarding her opinions of the Mayo Clinic on cross-examination. Because RCMC could not be held liable for the alleged negligence of Mayo Clinic doctors this testimony did not "open the door." Mayo Clinic treated Appellant in 2010 and failed to diagnose or disclose any thyroid mass. (Ex. 2 p. 1-6.) This is not the same as Appellant presenting in her case-in-chief an opinion by Dr. Wright that Dr. Gillen, acting as an agent of RCMC, was negligent and therefore RCMC could also be found liable for Dr. Gillen's alleged negligence in 2011.

Defense counsel questioned Dr. Wright about Appellant establishing care with Dr. Gillen. (TT 190_{23}-191_{1}.) Defense counsel asked Dr. Wright if anyone not associated with RCMC deviated from the standard of care related to Appellant. (TT 192_{15-22}.) Dr. Wright admitted that two specialists at the Mayo Clinic found Appellant's CT normal in 2010. (TT 204_{20-22}.) Dr. Wright then opined the Mayo Clinic pulmonologist and ENT deviated from the standard of care in their treatment of Appellant. (TT 217_{7}-218_{21}.) Defense counsel asked Dr. Wright about Dr. Gillen ordering the CT scan "stat" in 2011. (TT 219_{1}-222_{20}.) Dr. Wright admitted that Appellant's record from Rapid City Regional two days later indicated Appellant's thyroid was "regrowing." (TT 226_{17-22}.)[10]

The court determined this testimony "opened the door" for Appellant to re-direct Dr. Wright about alleged negligence of Dr. Gillen. On re-direct, Dr. Wright testified that Dr. Gillen failed to meet the standard of care by not communicating CT results to Ms. Frye-Byington in 2011. (TT 255_{19}-256_{2}.) Dr. Wright speculated Dr. Gillen never communicated the results then, nor eleven days later when Appellant returned to see her.

[10] Appellant disputes that she completed the Regional Health form or told the nurse her thyroid was "regrowing." (TT 284_{4}-288_{24}.) The jury was able to view the form and determine the credibility of Appellant.

(TT 257$_{6-8}$.) Defense counsel objected to these questions but was overruled. (TT 256$_{12-14}$.)

This testimony improperly put before the jury the idea that RCMC could be found negligent without a finding that Doctors Burgess, Rafferty, or Welsh were negligent. Appellant argued this point in closing. (TT 1224$_{5-8}$, 1226$_{4-9}$, 1273$_{3-18}$, 1282$_{8-16}$.) The court abused its discretion by permitting testimony and argument about Dr. Gillen's alleged negligence. Allowing this evidence was against reason and evidence.

RESPONSIVE ARGUMENT

For the reasons articulated above, this case never should have been presented to a jury; therefore, this Court need not address Appellant's arguments. However, if this Court reaches Appellant's arguments, Appellees provide the following Response.

VI. THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S TWO ALLEGED REBUTTAL WITNESSES.

A. Standard of Review

The trial court's evidentiary rulings are presumed correct and will not be reversed absent a clear abuse of discretion. *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994). An abuse of discretion occurs when "no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion." *Rogen v. Monson*, 2000 S.D. 51, ¶ 17, 609 N.W.2d 456, 460. What is proper rebuttal evidence rests almost wholly in the discretion of the court. *Farmers Union Grain Terminal Ass'n v. Industrial Elec. Co.*, 365 N.W.2d 275, 277 (S.D. 1985). Not only must this Court find that the trial court abused its discretion in excluding rebuttal witnesses, but it must find that a different result might and probably would have occurred by the jury in order to warrant a reversal of the trial court. *Schrader*, 522 N.W.2d at 209-210.

B. The witnesses were properly excluded

SDCL 15-14-1(6) requires rebuttal evidence to be clearly rebuttal and not evidence upon the original case, unless good cause is shown for the trial court to allow it. "Rebuttal evidence is that which explains, contradicts, or refutes the defendant's evidence. Its purpose is to cut down defendant's case and not merely to confirm that of the plaintiff's." *Schrader*, 522 N.W.2d at 209. "Rebuttal is appropriate only when the defense injects a new matter or new facts." *Id.*

Appellant attempted introduce documents marked as Exhibits V and V-1 through cross-examination of Dr. Burgess. (TT 957_{13-16}; TT 1053_{17-19}.) Dr. Burgess denied seeing or receiving the documents during his care of Appellant. (TT 958_{9-10}.) Appellant failed to authenticate the documents or lay foundation for them prior to trying to introduce them through Dr. Burgess. Appellant attempted to impeach Dr. Burgess through extrinsic evidence. The defense did not inject a new set of facts, but rather Appellant attempted to inject new facts after having the opportunity to present evidence during her case-in-chief. Dr. Burgess's trial testimony about Exhibits V and V-1 was not new or unexpected, as Appellant claims. (*See Appellant's Brief* at 12, "distinctively new trial testimony.") Dr. Burgess was asked about Exhibit V-1 during his deposition and denied knowledge of it. (Burgess Depo. 17-19.)[11] Dr. Burgess was deposed on October 5, 2018, more than four months before trial. Appellant was fully aware how Dr. Burgess would testify about this proposed exhibit. Further, Appellant knew Appellees would not stipulate to the foundation for these exhibits. (TT 1183_{3-8}.) This was also discussed at the Pretrial Conference, approximately two weeks before the trial. (PTC 81_{8-11}.) When Appellant

[11] Dr. Burgess was not previously asked about Exhibit V.

brought up Exhibit V at trial, Appellees objected, and a discussion ensued about laying foundation. The court allowed Appellant to question Dr. Burgess about the medical record, but foundation could not be established. (*See* TT 940_2-949_{25}.)

Appellant relies heavily on *Schrader.* In *Schrader*, the plaintiff submitted affidavits to support the motion for rebuttal witnesses. *Schrader v. Tjarks*, 522 N.W.2d 205 (S.D. 1994). Schrader failed to identify the rebuttal witnesses because the Hospital didn't supplement interrogatory answers with expert witnesses until shortly before trial. *Id.* Schrader was not motivated by procrastination, bad planning, dilatory tactics, or bad faith. *Id.* at 210. The excluded rebuttal witnesses in Schrader were expert witnesses. *Id.* The trial court effectively eliminated Schrader's counterattack. *Id.* The defense witness's trial testimony changed from his deposition. *Id.* at 211 ("at trial he deviated from his deposition testimony that it was mild inflammation to stating that this was the 'most extensive damage' from myocarditis that he had ever seen").

In *Sorenson*, the rebuttal witness was an undisclosed expert who was allowed to briefly testify as an offer of proof. *Sorenson v. Harbor Bar, LLC*, 2015 S.D. 88, 871 N.W.2d 851. The Department allowed the testimony. *Id.* The Doctor did not testify in support of Plaintiff's theory, but in response to Defendant's theory. *Id.*

Here, Appellant argues that Dr. Burgess continued treating Ms. Frye-Byington as a primary care doctor and was aware of later testing, and therefore owed some kind of duty to her related to that later testing which was ordered by different providers. (Notably, this later testing occurred on March 18, 2010 and March 21, 2011, outside the statute of repose in this case. *See* Ex. 1 p. 203-204, 208-209.) The foundation for

documents to demonstrate Dr. Burgess's knowledge was part of Appellant's theory of the case and case-in-chief; it was not rebuttal evidence.

In *O'Day v. Nanton*, 2017 S.D. 90, 905 N.W.2d 568, an expert witness was excluded on rebuttal because the opinion was new and undisclosed, plaintiff knew the topic discussed by defendant's experts would be included in the trial, and the potential for prejudice against defendant favored exclusion. The issue here is two "rebuttal" witnesses to testify to two unauthenticated reports goes only to the credibility of Dr. Burgess, not an element of the claim of malpractice.

An offer of proof is preferable to allow a court to review excluded evidence. The least favored offer of proof method is one of testimony by counsel because it lacks specificity and detail. *O'Day* at FN 3 ("certainty and detail are needed in narrative offers of proof by counsel because there is a great risk that the court will find it insufficient").

Here, there is little for the court to review regarding what the two witnesses would say if called. The "offer of proof" presented by Ms. Frye-Byington is

> that Doctors Brian Baxter and, I believe it is, Robert Durst, Exhibits V and V-1, would indicate that those are their records, and that they prepared the information, and that they signed off on them and that they are finalized, and that those documents are what was copied and put into Rapid City Medical Center records. And, as part of that, they have in their records listed Doctor Robert Burgess as the family – the family practice provider in both 2010 and 2011, as the mass was enlarging….And that through their regular and ordinary practice it would be CC'd to Doctor Robert Burgess, as is indicated.

(TT 1184$_{12}$-1185$_{3}$.) This argument is speculative.[12]

[12] The witnesses could not have been critical to Appellant's case if counsel was not even sure of their names. Exhibits V and V-1 both note they may be "Draft" copies, making it difficult to believe they are "finalized" especially in light of the verified documents in RCMC's chart at Ex. 1 p. 203-204 and 208-209. It is speculation that these doctors would be able to testify what happens to the records once they've been signed.

Appellant's offer of proof was lacking. She did not present affidavits from the two witnesses about what they would be testifying, the witnesses were not present for the court to hear from them about their proposed testimony, the witnesses were not previously deposed, and the record lacks any indication that counsel for Appellant had even spoken to them to determine what they would say. Appellant presented only speculation and hope about the testimony of these witnesses. (*See* TT 1184-1185.) The witnesses could not rebut Dr. Burgess's testimony that he had not seen the reports. Rather, the witnesses were an attempt to lay foundation for the two suspicious and unauthenticated exhibits.

The Court's reasoning was:

> A party cannot, as a matter of right, offer in rebuttal evidence which was proper, or should have been introduced in the case in chief, even though it tends to contradict the adverse party's evidence. And while the Court may, in its discretion, admit such evidence, it may and generally should decline to admit the evidence.

(TT 1183_{24}-1184_{5}.) The court went on to say, "You had all this time to get that – to get the foundation put in, and you didn't do it. So I'm not going to admit it." (TT 1184_{6-8}.) The trial court's ruling was not an abuse of discretion.

Since Appellant was aware prior to trial that Dr. Burgess would deny seeing the documents and that Appellees' counsel would not stipulate to the foundation, Appellant should have identified and subpoenaed the witnesses to testify during her case in chief.

C. If an error occurred, it was harmless

As noted above, if this court determines that the trial court erred, then it must determine whether such error was harmless or whether the "erroneously excluded

evidence might and probably would have resulted in a different finding by the jury." *Schrader*, 522 N.W.2d at 209-210.

In a cumbersome attempt to lay foundation, Dr. Burgess was cross-examined, over objection, about these documents for several minutes, so the jury learned about the documents without their admission. (TT 935_{24}-938_{25}; 950_{6}-957_{16}; 1046_{12}-1053_{19}.) Visually observing the "cc" on these documents from 2010 and 2011 would not likely have changed the jury verdict to find Dr. Burgess negligent.

Appellant failed to demonstrate harm by these two witnesses being excluded. Even if the court had allowed the testimony, there is no evidence that the witnesses would have appeared to testify. Jeffrey Hurd, attorney for the two witnesses, informed the court via motion on March 5, 2019, that Appellant did not properly serve the witnesses and they would not be appearing to testify. (CR 523-526; App. 084-86.) The witnesses were not personally served and the attempted service on an administrative assistant at Dakota Radiology was less than 24 hours before the time set for testifying. (App. 084-85.) Attorney Hurd informed the court, "Because Plaintiff did not serve them, the witnesses are not subject [sic] the subpoenas, and will not be appearing." (App. 086.) There was no prejudice to Appellant by the court's denial of the two alleged "rebuttal" witnesses. The court's ruling should be affirmed.

VII. THE TRIAL COURT'S JURY INSTRUCTIONS WERE NOT ERRONEOUS.

A. Standard of Review

A trial court has discretion in the wording and arrangement of its jury instructions, and therefore, this Court reviews a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. *Vetter v. Cam Wal Elec. Co-op, Inc.*,

2006 S.D. 21, 711 N.W.2d 612. A court cannot, however, give incorrect, misleading, conflicting, or confusing instructions. *Id.* Erroneous instructions are prejudicial under SDCL 15-6-61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. *Id.* Accordingly, when the question is whether a jury was properly instructed overall, that issue becomes a question of law, subject to *de novo* review, to determine if the instructions provided a full and correct statement of the law. *Id.*

The party alleging error on appeal must show that the error was prejudicial. *City of Sioux Falls v. Kelley*, 513 N.W.2d 97 (S.D. 1994). Prejudicial error is error without which the jury probably would have returned a different verdict. *Id.* An "abuse of discretion" refers to a discretion exercised to an end or purpose not justified by and clearly against reason and evidence. *Id.*

B. The Jury Instructions were not erroneous

SDCL 15-6-51(c) requires Appellant to cite grounds on the record at the time she objected to the jury instruction. The issue presented by Appellant is framed as a failure to provide complete jury instructions based on the evidence received at trial, not wrongful exclusion of the evidence. (*Appellant's Brief* at 6.)[13] It appears the jury instruction at issue here is Instruction No. 22 (*Id.* at 18).

[13] In Appellant's second issue and argument Appellant meandered into a separate issue of whether the court erred in prohibiting testimony about alleged negligence of other providers who were not parties to this lawsuit. Such issue is separate and distinct from the issue of jury instructions and is subject to the abuse of discretion standard for evidentiary issues. Further, when the issue of Dr. Gillen came up, Appellant's counsel indicated no intention of discussing other providers, evidencing that counsel, at trial, did not object to the court's ruling on agency of unnamed physicians. (TT $247_{8\text{-}10}$.)

Instruction 22 relates to agency. Appellant cites a number of out-of-state cases not helpful on whether a jury instruction should be given and if it was a correct statement of South Dakota law. The agency instruction which became Instruction 22, was proposed by Appellant as follows:

> Rapid City Medical Center, LLP, is liable to third persons, like Plaintiff, for the negligence of its employee(s) in carrying out medical services to and for Plaintiff's medical diagnosis, treatment(s) and failure to inform, including wrongful acts committed by such employee(s) in and as part of the conduct of such medical services; and for the employee(s) willful omission(s) to fulfill the obligation(s) of Defendant Rapid City Medical Center, LLP.

Instruction 22 as given to the jury stated:

> Rapid City Medical Center, LLP, is liable to third persons, like the Plaintiff, for the negligence of its agent(s) in carrying out medical services to and for the Plaintiff's medical diagnosis and treatment(s).

At the time jury instructions were being settled between the parties and the Court, counsel for Appellees objected to Appellant's proposed instruction.

> Everything beyond that [after the word treatment] is merely a recitation of plaintiff's claims or various allegations of negligence. For example, failure to inform. That's negligence. Wrongful acts committed by employees. That's negligence. The willful omission to fulfill obligations. That is nothing more than negligence. So it is unfair and prejudicial to the defendants to identify and highlight what his theory is, when all the jury is going to determine is were they negligent, for whatever reason the evidence supports.

(TT 1200_{21}-1201_{5}.)

Counsel for Appellant responded that "it's not fair to the plaintiff to simply say diagnosis and treatment, because we – you know, the evidence has borne out that the failure to meet the standard of care is through the failure to inform. It's not a diagnosis or treatment." (TT $1201_{12\text{-}16}$.) The court decided, after hearing arguments from both plaintiff and defendants, to "put a period after treatment." (TT 1201_{23}.)

The jury was instructed on negligence and specifically in Instruction 19:

> A physician has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same line of practice in the United States.
>
> A physician also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians in good standing engaged in the same line of practice in the United States and to be diligent in an effort to accomplish the purpose for which the physician is employed.
>
> A failure to perform any such duty is negligence.

The instructions as a whole were a correct statement of the law. Appellant has not demonstrated that had her proposed jury instruction been given in its entirety, a different jury verdict would have resulted.

"Error is not reversible unless it is prejudicial." *Bauman v. Auch*, 539 N.W.2d 320 (S.D. 1995). The party asserting error has the burden of showing prejudice in failure to give a requested instruction. *Id.* The party asserting error must also show the jury might, and probably would have, returned a different verdict if the proposed instruction had been given. *Id.* Here, the jury was instructed that RCMC could be held liable for the negligence of its employees. The jury was instructed on the law of negligence and the standard of care of doctors. This is what Appellant was seeking, so there is no prejudice. The instruction was consistent with the evidence and South Dakota law. Additionally, Appellant argued to the jury to consider Instruction 22 and find RCMC liable for Dr. Gillen's negligence. (TT $1273_{7\text{-}13}$; $1274_{3\text{-}6}$.)

Appellant argues error in Instruction 23. (*See Appellant's Brief* at p. 15.)[14] However, Appellant did not object to it. The transcript indicates the Court stated, "Instruction 23 is the one we have gone over before, that if you find any of the three named physicians liable, the LLP is liable." (TT $1202_{9\text{-}11}$.)[15] Counsel for Appellant replied, "Yeah, that's fine." (TT 1202_{12}.) By failing to object to this instruction, Appellant has waived this issue. *Heuther v. Mihm Transp. Co.*, 2014 S.D. 93, ¶ 21, 857 N.W.2d 854, 862.

Appellant failed to demonstrate prejudice by the instructions. The jury found for defendants because plaintiff's case was insufficient, not because of the wording of a single jury instruction. The instructions as a whole were a correct statement of the law. The trial court's ruling should be affirmed.

CONCLUSION

Appellees respectfully request this Court reverse the decisions of the Circuit Court as described above in their Notice of Review Arguments. This case never should have been presented to a jury. Appellees respectfully request this Court affirm the jury verdict and Circuit Court's rulings on Appellant's issues.

REQUEST FOR ORAL ARGUMENT

Oral Argument is hereby requested by Appellees.

Dated: February 24, 2020 Respectfully submitted,

[14] The instructions in *Appellant's Appendix* improperly contain handwritten notes not part of the court record nor included in the instructions to the jury. (Appx. F-3 and F-5.)
[15] This instruction was discussed at the Pretrial Conference and Appellant did not object to the instruction at that time either. (PTC $46_{13\text{-}17}$; $49_{11\text{-}13}$.)

THOMAS BRAUN
BERNARD & BURKE, LLP

By: ***/s/ Kimberly Pehrson***
Kimberly Pehrson
Lonnie R. Braun
Gregory J. Bernard
Attorneys for Appellee
4200 Beach Drive, Suite 1
Rapid City, SD 57702
(605) 348-7516

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66(4). The font is Times New Roman size 12, which includes serifs. The brief is 32 pages long and the word count is 9,658, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: February 24, 2020

Respectfully submitted,

THOMAS BRAUN
BERNARD & BURKE, LLP

By: ***/s/ Kimberly Pehrson***
Kimberly Pehrson
Lonnie R. Braun
Gregory J. Bernard
Attorneys for Appellee
4200 Beach Drive, Suite 1
Rapid City, SD 57702
(605) 348-7516

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below, true and correct copies of APPELLEES' BRIEF and APPENDIX were served through electronic mail and first-class U.S. mail on:

Mr. R. Shawn Tornow
Tornow Law Office, P.C.
P.O. Box 90748
Sioux Falls, SD 57109-0748
(605) 271-9006
rst.tlo@midconetwork.com
Attorney for Appellant

Dated: February 24, 2020

Respectfully submitted,

THOMAS BRAUN
BERNARD & BURKE, LLP

By: ***/s/ Kimberly Pehrson***
Kimberly Pehrson
Lonnie R. Braun
Gregory J. Bernard
Attorneys for Appellee
4200 Beach Drive, Suite 1
Rapid City, SD 57702
(605) 348-7516
kpehrson@tb3law.com
lbraun@tb3law.com
gbernard@tb3law.com

APPENDIX

STATE OF SOUTH DAKOTA,	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON.	)	SEVENTH JUDICIAL CIRCUIT
JODIE M. FRYE-BYINGTON,	)	FILE NO. CIV16-1022
Plaintiff,	)	**ORDER DENYING PARTIAL SUMMARY JUDGMENT**
v.	)	
RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFERTY, M.D.,	)	
Defendants.	)	

This matter having come before the Court on Defendants' Motion for Partial Summary Judgment, and the Court having considered the briefs supplied by Counsel, Defendants' Statement of Undisputed Material Facts, arguments of Counsel, and being fully advised as to all matters pertinent hereto; it is hereby **ORDERED** that:

Defendants' Motion for Partial Summary Judgement is hereby **DENIED** as there are genuine issues of material fact as to whether SDCL § 15-2-14.1 bars any and all claims and allegations of alleged malpractice prior to July 22, 2014. Based on the current record, the Court is unable to discern from the facts presented thus far whether the alleged negligent treatment Plaintiff received prior to July 22, 2014, would fall within the continuing tort doctrine thereby causing the statute of repose to start running on the last date of negligent treatment. Therefore, because there are current genuine issues of material fact, Plaintiff's claims based on acts prior to July 22, 2014 are currently not barred by SDCL § 15-2-14.1.

Dated this 25 day of January, 2019.

BY THE COURT:

THE HONORABLE THOMAS L. TRIMBLE
CIRCUIT COURT JUDGE

ATTEST:

RANAE TRUMAN,
CLERK OF COURTS

By: _____
Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT
JAN 25 2019
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON,

Plaintiff,

vs.

RAPID CITY MEDICAL CENTER, LLP, GARY L. WELSH, M.D., ROBERT C. BURGESS, M.D., and MICHAEL C. RAFFERTY, M.D.,

Defendants.

FILE NO. 51CIV16-001022

JURY TRIAL, VOLUME 4

(PAGES 616 - 871)

BEFORE: **THE HONORABLE JUDGE THOMAS L. TRIMBLE**
Circuit Court Judge
Rapid City, South Dakota
February 28, 2019, at 8:30 a.m.

A P P E A R A N C E S:

Representing the Plaintiff: **MR. R. SHAWN TORNOW**
Tornow Law Office, P.C.
Attorney at Law
4309 S. Louise Avenue
Sioux Falls, SD 57108

Representing the Defendants: **MR. LONNIE R. BRAUN**
MR. GREGORY J. BERNARD
Thomas, Braun, Bernard & Burke
Attorneys at Law
4200 Beach Drive, #1
Rapid City, SD 57702

law at this time to do some housekeeping. So we're going to take you back out for a little while, take care of this, and then we're going to come in and start the defense case. We'll be in recess for whatever time it takes.

It is your duty not to converse with, or suffer yourselves to be addressed by any other person on any subject of the trial, and it is your duty not to form or express any opinion thereon until the case is finally submitted to you.

We'll be in recess for a little bit.

THE BAILIFF: Please rise. The court will be in recess until called back.

(The jury was excused from the proceedings, after which the following record was had.)

THE COURT: All right. The record should reflect we're outside the presence of the jury. The plaintiff has rested its case.

Does the defendant have any motions it wishes to bring before the Court at this time?

MR. BERNARD: We do, Your Honor. Thank you.

Defendants' -- I think I'm getting feedback here. Defendants' first judgment -- or first motion, Your Honor, is to strike the undisclosed opinions of Dr. Wright, which were allowed over the objection of defense counsel, relative to a -- an alleged breach of the Standard of Care

by Dr. Burgess in refilling the prescriptions for Synthroid for Ms. Byington, as well as some TH -- TSH study relative to that. That was an entirely new, entirely undisclosed opinion. In fact, it -- it's not in her written disclosure, and -- and those words don't even appear in her deposition. It really was an entirely new -- new to us. Defendants are prejudiced in that they have not been allowed to cross-examine or to -- to explore with Dr. Wright pretrial what her opinions and the basis for those opinions are at trial or to nominate an expert to meet those allegations, and, for that reason, we believe that opinion should be stricken.

THE COURT: All right. That's denied.

MR. BERNARD: Defendants' next motion, Your Honor, is renewed motion for summary judgment on the statute of repose against Dr. Burgess. The last clinic visit now, we know, is in 2009. And even if one assumes that filling the Synthroid is a -- is a negligent act, and that somehow caused damage to the plaintiff, the evidence presented through Dr. Wright is the last prescription refill before Ms. Byington went to the Mayo Clinic. That's important, Judge, because when she went to Mayo Clinic, all negligence -- all liability for negligence would have to terminate because that's the point where she knew and did something about what she's claiming she didn't know or have an

opportunity to do anything about. The point is the last prescription refill for Synthroid was more than two years before Dr. -- or before Ms. Byington sued the defendants. And so the last culpable act falls outside of the statute of repose, and for that reason summary judgment should be granted.

THE COURT: You want to respond?

MR. TORNOW: Yes, Judge.

And we object and -- and oppose that for the same reasons and on the same grounds that we earlier did on the partial summary judgment, that while the defendants cling to the statute of repose, what the Court found, in essence, through its initial decision is this was a continuing tort. And -- and, as that, that -- I guess my terminology is that it trumps the statute of repose. It doesn't extend it. But the case is clear, in the very case that they cite, the *Pitt-Hart* case, that as a continuing tort, and it meets the criteria, that -- that, in fact, the statute of repose does not prohibit this action, and that's why earlier, as I understood it, the Judge, Your Honor, denied the motion for partial summary judgment. That's why we're here.

THE COURT: That's correct. That's denied.

MR. BERNARD: The defendants' next motion then, Your Honor, is for judgment as a matter of law on any claims arising -- arising out of Dr. Gillen's conduct -- conduct. Sorry.

That is, during the middle of the trial plaintiffs were allowed to bring out that Dr. Gillen was negligent. They did that through Dr. Wright. The evidence shows that Dr. -- and this came through Ms. Byington -- that Dr. Gillen left the clinic in 2013. So -- and so there can be no agency relationship and there can be no relationship between the defendants and Dr. Gillen's conduct, so the -- the last act of culpable conduct for purposes of repose would have had to have happened in 2013. He never did sue -- the plaintiff never did sue Dr. Gillen, and for that reason she can't be held liable.

THE COURT: Okay. Go ahead, counsel.

MR. TORNOW: Thank you.

And, Judge, I think we dealt with this in sort of the middle of the case. The -- the problem the defendants have here, of course, is they opened the door when they asked about these other unnamed providers at the Mayo Clinic. They like to say, "Well, it was in a deposition." It doesn't matter. The deposition didn't come into evidence. The testimony came in when they asked Molly Wright about what she found about the unnamed Mayo Clinic providers. They said -- they -- they took the step and stepped in it. But also, Judge, when they said that she did those, Mayo Clinic providers breached the standard of care. So once they did that, that's when Your Honor said, "We can now

talk about Gillen." We -- the plaintiff first believes that's a correct ruling. And you -- you limited us at that point from any of the other, what I would call, agent providers. But what Mr. Bernard doesn't say is that Ms. Gillen may have left the clinic, but in all the times that we're talking about, she was still an agent within Rapid City Medical Center, LLP, and as part of the continuing tort, of that entity, she provided treatment right along the continuing trail.

(An off-the-record discussion was had.)

MR. TORNOW: And I think through their cross-examination, if I'm recalling correctly, Judge, beginning in 2011 through 2012, while defendants want to complain that Jodie didn't have a primary care provider and was unnecessarily going to Urgent Care, she did in fact have a primary care provider, and that was an agent of Rapid City Medical Center. And that's why we raised the issues we did before the trial through instructions. We think they now come into play, that those agents are there, and -- and, again, as part of the continuing tort. She was, as I just said, along the continuing trail of defendant Rapid City Medical -- Medical Center, and, therefore, there would be no reason to strike the -- the concerns that Dr. Wright expressed about Dr. Gillen's care, irrespective of whether she was individually sued when this was initially sued out, Judge.

THE COURT: Okay. Well, we had a motions hearing Friday before the Monday that we started this trial, an order had come into my office from defense counsel to sign regarding what we had taken care of on February 11th. One of the orders there was the third order down, which ordered that the plaintiff would be precluded from making claims at trial for the alleged negligent treatment of plaintiff delivered by treaters who were not named or served as defendants in this action. There's a note that goes with this from Mr. Tornow that came back to me. So I did not sign it at that time. That plaintiffs object based on the Court's discussion analysis through February 11 hearing transcript, at page 33, lines 9 through 21, along with plaintiff's arguments and authority discussed.

So, basically, this was to keep this thing from opening up beyond the three named defendants. I took it under advisement. The order had not been signed. And then plaintiff's counsel got into negligence of Mayo Clinic with Dr. Wright and had her express her opinion that they were negligent.

MR. TORNOW: Judge, if I could, you said plaintiffs got into that.

THE COURT: I'm sorry. Defense counsel did.

And so she gave her opinion that they were negligent. Well, that totally violates that order. So, as far as I'm

concerned, the door was opened.

MR. BERNARD: Your Honor, can I just --

THE COURT: No, I'm not done.

MR. BERNARD: Oh. Sorry.

THE COURT: Once that door was opened, I allowed plaintiff's counsel to go back to Gillen and have the same opinion expressed as to her duty of care. And that's where we're at right now. And the question being, in my mind, as to whether or not that opens up liability to Rapid City Medical Center based on her acts. She has no independent or -- liability here. But Rapid City Medical Center does, if she acted negligently. And that's where I see where we're at.

Before, we had agreed that if one of the three named doctors was negligent, Rapid City Medical Center was negligent. Now we've added this to the -- to the package because of getting into that area.

So go ahead and make your record. I'm sorry for cutting you off, but...

MR. BERNARD: I'm sorry for interrupting you, Your Honor.

It's clear from the motion we made and from the discussions on the record that that motion was limited to three agents of the Rapid City Medical Center. The -- the -- that order was never signed, so that -- I mean, that's a proposed order, as imprecise as it is. But there isn't any

question in the context of that order, was these -- anybody who could have an agency relationship with Rapid City Medical Center. And so I don't believe there's even any discussion about persons who couldn't be agents of Rapid City Medical Center. So it's -- that's imprecise, yes, and that's -- that's on me for submitting an imprecise order. But that was never signed. So we're back to the motion. And the motion clearly is persons who can be established as agents against Rapid City Medical Center.

THE COURT: Correct.

MR. BERNARD: And one other point, Judge?

THE COURT: Yep.

MR. BERNARD: Obviously, we object to this throughout, and we don't want to get to a point where we've deemed to have agreed to it because the evidence conforms to --

THE COURT: I believe I've limited this to Gillen, as I recall, when I ruled on it earlier.

MR. BERNARD: Understood.

THE COURT: I haven't changed my mind about that. But I've got to -- you know, this just makes me go back and go back to the instructions again. I'm not -- I'm not pleased, okay? 'Cause it kind of rocks the boat, and I thought we had things kind of straightened out, and then this comes up.

MR. BERNARD: Okay.

THE COURT: And so I think it opens up the possibility -- we can argue about this at instructions, but I believe it opens up the possibility that if one of the jurors would find that Dr. Gillen was negligent, it would appear -- through the agency, it would go back to Rapid City Medical Center.

MR. BERNARD: Okay. And -- and I want to finish my point for the record.

THE COURT: Okay.

MR. BERNARD: And that is we have -- just so we don't have to do this in front of the jury -- we object to, obviously, including Dr. Gillen's liability, but -- and so we don't want to be deemed to have consented to it by addressing it through trial, so that there's some amendment that we've agreed to on the original --

THE COURT: She is not a named party. She cannot be found liable personally. But I think it reflects back to the Rapid City Medical Center.

MR. BERNARD: Okay. Finally, Your Honor -- well, not finally, the defendants move for judgment as a matter of law on the claims against Dr. Burgess, because they don't have a competent expert to testify that an ENT should have done something different in light of the radiographs, that Dr. Wright was testifying he should have done something about. She admits that an ENT exercises judgment when

faced with radiographs, and that she exercises judgment in determining what's significant in what he or she is seeing, and exercises judgment then on what to do with that. But also agreed, *I'm not an ENT, don't know what is significant to an ENT,* and, therefore, is incompetent to establish the standard of care of Dr. Burgess and his review and interpretation of the radiographs.

THE COURT: Go ahead.

MR. TORNOW: Thank you, Judge.

And I think what's important -- and, of course, we -- we oppose their position, think they're wrong, and -- and here's why. They're sort of leaving out what her opinion was. It wasn't about -- and I think I covered this with her on direct. I think it even came up on cross. It wasn't about his ability or what he does as an ENT surgeon and it wasn't about what an ENT does. The question asked was, As a physician, is the standard of care with this type of finding, is the standard of care that there is communication and you provide information and inform the patient of the situation? And she said, Absolutely, I believe, if my recollection is right. And -- and the reason that's important is that it -- and I'm not going to rehash all her testimony, but that -- that the patient has a right to know and -- and have that information to give informed consent as part of their treatment. That's where

he failed in the standard of care. And -- and he is a physician. You know, they can call him ENT all he wants. He is an ENT specialist. But he's a physician in South Dakota. And she testified about the standard of care for physicians to inform their patients. And -- and for that her testimony is clear and it's not incompetent. She was qualified as an expert. You know, we've gone through the -- in different stages, sort of the Daubert analysis. It's up to the jury what weight they want to give it. But she's qualified, she's not incompetent to testify in that regard, and we oppose the motion.

THE COURT: All right. That motion is denied.

MR. BERNARD: Finally, Your Honor, defendants move for judgment as a matter of law on liability for the reason that plaintiffs have tendered no expert to establish that anything that these named doctors did caused damages to Ms. Byington. Dr. Wright's not competent to testify that -- that had -- if plaintiff had known what it is she says she should have been told, that anything different would have been done to treat this condition, and certainly not in a position to say something should have been done at a specific time and we would have -- it would have made a difference in the outcome. And that's particularly true for Drs. Rafferty and Welsh, who saw the plaintiff within days of going to Mayo Clinic, and she could not establish

that anything they did made any difference whatsoever.

THE COURT: Okay. Go ahead.

MR. TORNOW: And, of course, we oppose, Judge. And Dr. Molly Wright did testify that plaintiff was damaged in the -- what I call the unknowing of -- of what happened, and she was damaged specifically. Judge, she testified -- and this is what they didn't tell you -- and I know you sat through it -- but she said she was damaged by unnecessary medical visits that wouldn't have been necessary medical expenses and -- and -- and going through the -- what I would call sort of chasing your tail to -- to seek medical answers. And, also, just even the -- the damage insofar as the -- as the mental health part of this, that everybody is telling her there's nothing wrong, essentially, and -- and then you find out, of course, there was, that that harmed her. And you heard through, of course, the -- the plaintiff that that is, in fact, true. So Molly Wright's testimony was appropriate and -- and did provide -- lay that groundwork, that foundation, if you will, for those damages.

THE COURT: My recollection of Dr. Wright's testimony was basically that without notifying the patient of the problem, that there was really nothing she could converse with her doctor as to when the -- when the problem should be addressed. She was -- it was unknown to her. And she

had to be part of that equation. So it's denied.

MR. BERNARD: All right. Thank you, Your Honor.

THE COURT: You guys ready with your expert?

MR. BRAUN: Yes, Your Honor.

THE COURT: Okay. We'll bring the jury back in. We'll get Gene --

MR. TORNOW: Judge --

THE COURT: Yep.

MR. TORNOW: -- she's going to run to the bathroom.

THE COURT: Okay.

MR. BRAUN: Me too.

THE COURT: Okay. We'll take five minutes, and then we'll bring the jury back in. How's that?

(Recess was taken from 9:15 to 9:20 a.m.)

THE COURT: We ready? Go ahead, counsel.

MR. BRAUN: All right. Your Honor, the defense calls Dr. Seth Reiner.

Step over there.

DR. SETH ALLEN REINER,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BRAUN:

Q Dr. Reiner, I need you to state your name for the record, please.

A Seth Allen Reiner.

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON

Plaintiff,

vs.

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.

Defendants.

JURY TRIAL

FILE NO. 51-CIV-16-1022

VOLUME 6

PAGES 1,070 - 1,288

DATE: March 5, 2019 at approximately 8:15 AM

PLACE: Pennington County Courthouse
Pennington County Circuit Court
Rapid City, South Dakota

BEFORE: THE HONORABLE THOMAS L. TRIMBLE
Circuit Court Judge
Seventh Judicial Circuit

George R. Cameron
Official Court Reporter
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota 57709
605.394.2571

THE COURT: Yeah.
MR. TORNOW: For the record, the plaintiff would move for a directed verdict.
THE COURT: Okay. That's denied. Defense?
MR. BRAUN: Did you rest first?
MR. TORNOW: No. Given that we can't call any rebuttal witnesses, Judge, and given your ruling on our offer of proof, yes, the plaintiff rests. And then I would make our -- the plaintiff's motion for a directed verdict.
THE COURT: All right.
MR. TORNOW: Is that denied?
THE COURT: That's denied.
MR. BERNARD: Your Honor, we have motions too.
THE COURT: Pardon?
MR. BERNARD: We have --
THE COURT: Yeah. That's what I'm asking, what your motion is.
MR. BERNARD: Thank you. The first motion for the defense is that the Court strike the undisclosed opinions of Doctor Molly Wright as against Doctor Burgess. The Court can probably recall that there was some medical literature that came up during the trial that had never been disclosed.
In fact, she admitted on cross that she had --

she did not do any research and was not relying on any medical literature for her opinions.

And I think more importantly, Judge, that Doctor Wright's opinions regarding the prescription of Synthroid and the -- and what followed from that as a breach of the standard of care by Doctor Burgess was an absolutely brand-new opinion, never heard until she said it from the stand. It's not in her deposition. The word Synthroid doesn't even appear in her disclosure. It's not in her disclosure. And for that reason, the defendants are prejudiced by not having a fair and full opportunity to meet that opinion with their own experts to discover, number one, what it was and what the basis was for it and, number two, to meet that with expert testimony.

THE COURT: Okay. Denied.

MR. BERNARD: Because that's denied, Your Honor, the defense moves for a mistrial for the undisclosed -- the admission of undisclosed opinion of Doctor Wright and the prejudice to the defendants for not being able to -- a fair and full opportunity to meet that opinion.

THE COURT: Okay. That's also denied.

MR. BERNARD: Next, Your Honor, the defense moves for summary judgment on the Statute of Repose as applied

to Doctor Burgess. We have now heard all of the evidence, and it clearly establishes, if one is to take Doctor Wright at her word, that it was improper for Doctor Burgess to have prescribed Synthroid.

It's clear that the last culpable act of Doctor Burgess in this regard had to have been November 14, 2013, because the evidence establishes that was the last time before the Mayo Clinic surgery that he had done anything -- had prescribed anything.

And, of course, the Statute of Repose runs from the last culpable conduct. And when she gets to the Mayo Clinic that has to end, because the claim is she didn't know about this mass. Well, it's all unmasked when she gets to Mayo Clinic.

Doctor Burgess was not sued for approximately three years after that last culpable act, and for that reason, he cannot be held liable because he was not served within the Statute of Repose.

THE COURT: Okay. Denied.

MR. BERNARD: Next, Your Honor, the defense asks for -- moves for a judgment as a matter of law on any claims again Doctor Gillen, because the evidence clearly established that she left the medical clinic in 2013. And the argument is the same. The last culpable act, if you assume she committed negligence

while she was there, the last opportunity to do that would have been in 2013.

The plaintiffs never sued her. But, clearly, she can't be sued and, therefore, her liability can't be determined for purposes of vicarious liability to the Rapid City Medical Center. The medical center itself, based on the law we have already submitted in argument, cannot have a direct claim against it for the negligence of an agent who cannot be found liable. And, for that reason, the Statute of Repose requires that there be no claims against Doctor Gillen, or any claims against Rapid City Medical Center arising out of the alleged negligence of Doctor Gillen.

THE COURT: Do you want to respond to that?

MR. TORNOW: Well, I think that we have addressed this previously, Judge, and we have agreed with the Court's rulings to date. But, of course, Rapid City Medical Center, LLP is a defendant. This is a continuing tort. That's what they don't indicate in their argument when they talk about the Statute of Repose, and that continuing tort, that's been the finding up until now, again, for lack of a better term, sort of trumps that Statute of Repose argument.

We have heard plenty of testimony regarding her dealings throughout the continuing course here and,

therefore, that argument should be denied.

And, again, what happened during the trial is when they brought up other unnamed providers, that being Mayo Clinic, did they meet the standard of care, they certainly opened the door. That was the Court's ruling. I don't need to revisit all of that. But we are certainly in agreement with that as the plaintiff. They have opened the door in that regard, and it would be improper to somehow strike, you know, her name as a part of this action when the jury has heard so much about her care. Specifically, Judge, the 2011 CT scan was ordered stat. It was hot -- they put on the evidence that she signed for it, but yet not communicated to the plaintiff. And that's all, Judge, while she was at Rapid City Medical Center.

So the fact that she left later doesn't somehow interrupt the continuing tort. It still stays within Rapid City Medical Center because these actions, for lack of a better term, overlap and are part of that continuing train of misdiagnosis or failure to explain or inform Jodie Frye-Byington over the course of six years as a part of this action.

THE COURT: All right. I'm going to deny the defense's motion regarding Gillen as a matter of law. I'm going to give an agency instruction on that.

MR. BERNARD: Thank you, Your Honor. Next the defense moves for judgment as a matter of law on the claims against Doctor Burgess because no competent expert offered testimony against an ENT surgeon.

She did admit and did testify that an ENT surgeon has discretion to understand and know what is significant in a radiograph that he or she has seen, and has discretion then and exercises judgment on what to do.

She also admits she's not an ENT and cannot be in that position, however, is going to criticize Doctor Wright -- or, I'm sorry, Doctor Burgess for exercising that very discretion.

She also admitted that she didn't know that thyroid tissue grows back or that it can or cannot cause harm. Again, something that is the piece of the puzzle for an ENT surgeon under the same or similar circumstances, a circumstance which she cannot put herself in, because she does not have the training, the acknowledge, the education or experience as an ENT surgeon treating thyroids. And, for that reason, there should be a judgment as a of matter of law entered in favor of Doctor Burgess on liability.

THE COURT: All right. I thought we took care of that in the first round, but evidently we didn't. So

regarding whether or not a family practitioner can testify as to the standard of care on an ENT, I have heard nothing in the testimony that says that an ENT doesn't have to give a patient knowledge of a mass growing in them, whether they are an ENT or a thoracic surgeon, or what they are.

This ENT/family practitioner thing, I don't think it works in this case. I think the duty to disclose, if there is one, if the jury finds there is one, is not peculiar to a specialty. And, if you want to get something out of that reason of a specialty, I think you need to have that specialist come in and testify that, *Well, no, that's not peculiar,* or, *That is peculiar to the specialty that you not do that.*

We have got a whole different thing here. This is simply a matter communication. It's not thyroid tissue; it's a mass. Nobody knew what kind of tissue it was. They were guessing most of the time.

So, basically, it's denied. Okay?

MR. BERNARD: Next, Your Honor, the defense moves for a judgment as a matter of law on the claims against all defendants, because there is no competent expert testimony that any negligence by them caused the injuries complained of.

And, by that, here is what I mean. Doctor Wright

couldn't offer any opinions regarding that some earlier intervention would have somehow changed the outcome of Ms. Byington. The experts all agreed that the intervention that was necessary was a sternotomy because of the two prior surgeries, not because of the size of the mass that was in her chest.

Doctor Wright didn't know what different treatment would be indicated if the mass had been told to Ms. Byington earlier. And both Doctor Burgess and Doctor Reiner testified that she would have undergone the same course. And so, for that reason, there is not the required expert testimony to draw the causal link between the alleged negligence and the alleged harm.

THE COURT: I do remember Wright testifying about that, as to when you don't tell the patient what's going on, that they can't be part of the decision, which they need to be part of the decision in making that determination. So, if the patient doesn't know, there is no time when you come to a point where this is the time for intervention, or this is not the time for intervention.

So without the plaintiff's participation, you will never -- you don't ever have time. So I think the jury -- it's a jury question, and they will make

that determination. Anything else?
MR. BERNARD: That's it, Your Honor.
THE COURT: All right. Well, we are going to be adjourned. Do you want to stay over the noon hour and do jury instructions, or do you want to come back after lunch and do jury instructions?
MR. BERNARD: I would just as soon slug it out right now.
THE COURT: Do you want to stay?
MR. BRAUN: Yeah. Because, if we are going to stay, I need to let the jury go, and tell them when to be back.
MR. TORNOW: Are you going to take -- are you saying no lunch break at all?
THE COURT: That's what I'm saying.
MR. TORNOW: I'm just concerned about the jury. I don't mind working, but --
THE COURT: I'm going to send them out to lunch.
MR. TORNOW: Oh. No lunch for us is what you are saying?
THE COURT: Yeah. We'll stay here and work, and they can go get some lunch. We'll bring them back at 1:15, and we should be done by then. Any problem?
MR. BERNARD: I'm good.
THE COURT: Mr. Tornow, it's up to you. If you are

STATE OF SOUTH DAKOTA)SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON, Plaintiff, -vs- **RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,** Defendants.	Civ. No. 16-001022 **DEFENDANTS'MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Defendants, through undersigned counsel; for the reasons stated in their Brief in Support, move the Court to find there is no genuine issue of material fact and any and all allegations of negligence occurring before July 22, 2014 are barred by the statute of repose and the Complaint against Dr. Burgess is dismissed on its merits and with prejudice.

Dated this 19th day of June, 2018.

THOMAS BRAUN BERNARD & BURKE, LLP
By: /s/ Lonnie R. Braun
LONNIE R. BRAUN
Attorneys for Defendants
4200 Beach Drive – Suite 1
Rapid City, SD 57702
605-348-7516

CERTIFICATE OF SERVICE

I, Lonnie R. Braun, attorney for Defendants, do hereby certify that on the 19th day of June, 2018, a true and correct copy of the foregoing ***Defendants' Motion for Partial Summary Judgment*** relative to the above-entitled matter, was filed via Odyssey File and Serve, which will effect service on the following individual:

Lance S. Russell
PO Box 184
Hot Springs, SD 57747
lance_russell@yahoo.com

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
rst.tlo@midconetwork.com

/s/ Lonnie R. Braun
LONNIE R. BRAUN

STATE OF SOUTH DAKOTA)SS. COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON, Plaintiff, -vs- **RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,** Defendants.	Civ. No. 16-001022 **DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACT**

Defendants submit this statement of Undisputed Material Facts in support of their Motion for Partial Summary Judgment.

1. This action was commenced by service on Defendants on July 22, 2016.
2. Plaintiff alleges professional negligence of Defendants.
3. Plaintiff's expert opines seven deviations from the standard of care. Only two fall within the two years preceding the commencement of this action.

Dated this 19th day of June, 2018.

THOMAS BRAUN BERNARD & BURKE, LLP
By: /s/ Lonnie R. Braun
LONNIE R. BRAUN
Attorneys for Defendants
4200 Beach Drive – Suite 1
Rapid City, SD 57702
605-348-7516

CERTIFICATE OF SERVICE

I, Lonnie R. Braun, attorney for Defendants, do hereby certify that on the 19th day of June, 2018, a true and correct copy of the foregoing ***Defendants' Statement of Undisputed Material Facts*** relative to the above-entitled matter, was filed via Odyssey File and Serve, which will effect service on the following individual:

Lance S. Russell
PO Box 184
Hot Springs, SD 57747
lance_russell@yahoo.com

R. Shawn Tornow
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
rst.tlo@midconetwork.com

/s/ Lonnie R. Braun
LONNIE R. BRAUN

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON, Plaintiff, -vs- **RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,** Defendants.	Civ. No. 16-001022 **AFFIDAVIT OF LONNIE R. BRAUN**

Lonnie R. Braun, being duly first sworn upon his oath, states as follows:

Attached are true and correct copies of the following:

1. Plaintiff's Complaint;
2. Expert report of Dr. Wright;
3. Pitt-Hart v. Sanford USD Medical Center, 2016 S.D. 33, 878 N.W. 2d 406 (2016);
4. SDCL 15-2-14.1

Dated this 19th day of June, 2018.

Lonnie R. Braun

Subscribed and sworn to before me this 19th day of June, 2018.

STATE OF SOUTH DAKOTA SEAL LORI A. BENSON NOTARY PUBLIC SEAL

Notary Public, South Dakota

My Commission Expires: March 25, 2020

(SEAL)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
JODIE M. FRYE-BYINGTON Plaintiff,	)	CIVIL #16-_____
vs.	)	COMPLAINT
RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, MD; ROBERT C. BURGESS, MD; AND MICHAEL C. RAFFERTY, MD Defendants.	)	

Plaintiff, Jodie M. Frye-Byington, alleges:

COMPLAINT

1.) Plaintiff, Jodie M. Frye-Byington, is a resident of the City of Rapid City, County of Pennington, State of South Dakota.

2.) Defendant, Gary L. Welsh, M.D., is a resident of the City of Rapid City, County of Pennington, State of South Dakota, and was and is a physician and licensed to practice medicine in the State of South Dakota. Defendant is actively engaged in practice at Rapid City Medical Center, LLP, Urgent Care Department, 2820 Mt. Rushmore Road, Rapid City, Pennington County, South Dakota.

3.) Defendant, Robert C. Burgess, M.D., is a resident of the City of Rapid City, County of Pennington, State of South Dakota, and was and is a physician and licensed to practice medicine in the State of South Dakota. Defendant is actively engaged in practice at Rapid City Medical Center, LLP, Ear, Nose & Throat (ENT) Department, 101 East Minnesota St., Suite 210, Rapid City, Pennington County, South Dakota.

4.) Defendant, Michael C. Rafferty, M.D., is a resident of the City of Rapid City, County of Pennington, State of South Dakota, and was and is a physician and licensed to practice medicine in the State of South Dakota. Defendant is actively engaged in practice at Rapid City Medical Center, LLP, Urgent

Care Department, 2820 Mt. Rushmore Road, Rapid City, Pennington County, South Dakota.

5.) Defendant, Rapid City Medical Center, LLP, Registered Agent Jennifer Trucano, is now, and at all time mentioned was, a Limited Liability Partnership organized and existing under the laws of the State of South Dakota, and engaged in the business of operating a medical facility at 2820 Mt. Rushmore Road and 101 East Minnesota St., Suite 210, in the City of Rapid City, Pennington County, South Dakota, for profit.

6.) As early as the beginning of 2008, plaintiff, being ill, requested defendants to attend plaintiff and treat the illness, and defendants entered on such service for compensation.

7.) Starting in the year of 2008 and through August 2014, defendants examined plaintiff on multiple occasions at defendants' offices, but in so doing did not use the care and skill ordinarily used by physicians engaged in the practice of medicine in the City of Rapid City, State of South Dakota, or in similar localities. Although plaintiff had symptoms indicating that plaintiff had a mass growth in the mediastinum, such symptoms being swollen neck, constant cough, difficulty breathing, hoarseness, and chest pain, defendants negligently treated plaintiff and negligently and incorrectly diagnosed plaintiff's condition, including a cold, bronchitis, acid reflux and costochondritis, and gave plaintiff certain medicines suitable only for the treatment of acid reflux and pain/anti-inflammatory.

8.) If defendants had used proper methods of examination, such as reviewing Plaintiff's medical records, including medical tests, x-rays, and CT scans, defendants would have discovered that plaintiff was suffering from a mediastinal mass, which required removal to effect a cure.

9.) Defendants examined plaintiff on multiple and numerous occasions for known related symptoms from 2008 to August 2014, when, in fact, in 2008 a CT scan revealed a mass growth and the plaintiff was not informed of such diagnosis, and defendants did not properly review plaintiff's medical records when plaintiff continued to seek defendant's examinations and medical treatments for proper diagnosis and treatment.

10.) As a proximate result of defendant's negligence, plaintiff's mass growth reached an advanced stage. Plaintiff was

compelled to seek treatment at the Mayo Clinic in Rochester, Minnesota on August 11, 2014, and immediately consulted another doctor of medicine who found that plaintiff was suffering from a mediastinal mass in advanced stages, and plaintiff underwent a major surgical procedure of an upper sternal split for the removal of a mediastinal mass at Mayo Clinic in Rochester, Minnesota on September 8, 2014.

11.) By reason of the negligence and false and fraudulent representations and omissions of defendants, and each of them, and as a proximate result of them, plaintiff was unable to obtain prompt and proper medical care and treatment of the mediastinal mass in the early stages by reason of reliance on the false and fraudulent representations and omissions of defendants.

12.) As a proximate result of the carelessness, negligence, and false and fraudulent representations and omissions of defendants, and each of them, plaintiff suffered for nearly seven years of misdiagnosis and suffered greatly in body and mind, all of which would have been avoided had defendants properly diagnosed the illness and treated it as it should have been treated.

13.) By reason of the relationship between defendant Rapid City Medical Center, LLP, and defendant doctors named and alleged herein, the Rapid City Medical Center, LLP, is liable for the acts and faults and fraudulent representations and omission of the defendant doctors. Plaintiff has been damaged in the sum of $7,000,000.00.

WHEREFORE, plaintiff requests judgment against defendants, and each of them:

1.) $144,000.00 damages for medical expenses, including $127,000.00 in medical co-pay and deductible expenses, and $17,000.00 in medically-related travel and lodging;

2.) $261,000.00 damages for loss of earnings, including $240,000.00 in pre-surgical loss of earnings from 2008 to September 2014, $11,000.00 post-surgical loss of earnings, and $10,000.00 in lost earnings due to continued recovery;

3.) Plaintiff has suffered damages for physical pain and suffering and mental anguish in excess of the $500,000.00 statutory limit contained in SDCL 21-3-11 against each of the defendants, and such further damages as may be hereafter

sustained or ascertained;

4.) $150,000.00 damages for permanent partial disability;

5.) Cost of suit; and

6.) Such other further relief as may be deemed just and equitable.

Dated this 15th day of July, 2016, at Rapid City, Pennington County, South Dakota.

Lance S. Russell
Attorney for the Plaintiff
PO Box 184
Hot Springs, SD 57747
605) 745-3228

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

JUL 20 2016

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

Confidential Case Overview Report based on documents available for review as of 04/02/2018

Jodie M. Frye-Byington, Plaintiff

-vs-

Rapid City Medical Center, LLP; Gary L. Welsh, M.D.; Robert C. Burgess, M.D.; and Michael C. Rafferty, M.D.

1. Jodie M. Frye-Byington (JF-B) has past medical history of enlarged thyroid requiring thyroidectomy in 1996 and 2005.

2. **9/25/2008** JF-B had CT of the neck with contrast ordered by **Dr. Robert Burgess** due to Carotidynia. Visit note pertaining to that CT is not available for review. **Neck CT** was significant for **"3.3 x 2.7 cm soft tissue density at the level of the upper manubrium, extending just anterior and somewhat lateral to the trachea on the left...suggestive of thyroid tissue."** Per the opinion of the reading radiologist, Dr. Timothy Frost, "correlation with any history would be of help." There is no record of communication of this report to JF-B.

3. **11/6/2009** JF-B had 2 view chest X-ray (CXR) and soft tissue neck X-ray done in ER ordered by Bobbie Schauer, read by Dr. Nesbit, with Dr. Burgess listed as Family Provider on the reports. CXR was read as normal and neck X-rays were read as normal glottis, subglottic area, and epiglottis. Visit note, if any, pertaining to these imaging studies was not available for review.

4. **1/18/2010 Chest CT** with contrast and Sinus CT were ordered by **Elmo Rosario,** indication: cough, with copy to **Devon Graham, PA-C.** Visit note pertaining to these imaging studies was not available. Chest CT showed a **superior mediastinal mass 3.9 cm similar in size to study done 9/25/2008**. Sinus CT read as normal. No record of communication of this to JF-B. Visit note by Elmo Rosario, if any, was not available for review.

5. **3/18/2010** Thyroid Ultrasound is ordered by **Deb Brandt.** Indication is left subclavicular swelling. U/S was read by Dr. Robert Durst. **Dr. Robert Burgess is listed as the Family Provider** on the U/S report, and CC of the report was sent to him. U/S was correlated with CT Chest done 9/25/2008. This showed thyroid remnant on the right measuring 1.2 cm, complete removal of the rest of the gland. Report also noted, "...patient has had a rounded soft tissue mass in the substernal area of the neck seen on CT going back through 9/28/2008 which has been felt to represent substernal extension of thyroid. The possibility of some other etiology for anterior mediastinal mass may need to be considered including thymoma, teratoma, and probably less likely lymphoma. Biopsy may need to be considered. **Consultation with Dr. Burgess may be of value. PHYSICIAN NOTIFICATION: The case was discussed with Devon Graham who was covering for Deb Brandt on the morning of 3/19/10 at 0940 hrs. She said she would followup with PA Brandt."** There is no record of follow up regarding this or notification of the findings to JF-B. Office visit note by Deb Brandt, if any, was not available for review.

6. **2/14/2011** JF-B established care with **Dr. Alexia Gillen.** At that visit she complained of progressive chronic throat clearing and occasional hoarseness. She was referred to GI for EGD for possible reflux cause for this.

7. **3/15/2011** JF-B saw **Dr. Gillen** with complaint of persistent cough. She was given Z-pack, prednisone, ProAir inhaler, and tessalon perles.

8. **3/21/2011** JF-B was again seen by **Dr. Gillen** with complaint of constant throat clearing and the sensation that there was something stuck in her throat with difficulty swallowing and unable to take a deep breath. Dr. Gillen ordered a **STAT CT chest and CT of the soft tissue of the neck** with clinical history "cough, shortness of breath, supraclavicular fullness on exam, left greater than right." Imaging center was told to hold the patient until results were called to Dr. Gillen. These were read by Dr. Brian Baxter and findings included "enhancing mass substernal which has the appearance of thyroid, was present dating back to 2008 and is slightly larger in size than on that exam but is most consistent with substernal thyroid," and "enhancing somewhat heterogeneous 4.6 cm substernal mass...mild growth...compared to 3.38 cm previously." **It was noted in the report that the findings were communicated to Dr. Gillen.** However, I have not been provided a copy of any record of findings being communicated to JF-B.

9. **3/23/2011** EGD was done by Dr. Bochna. Gastric polyps were seen and biopsied. Bravo pH capsule was placed. There was no evidence of GERD and biopsies were "essentially normal."

10. **4/1/2011** JF-B was seen by **Dr. Gillen** for persistent dry hacking cough. **There is no mention in the visit note about the CT neck or chest findings from one week prior and no mention of pursuing further evaluation of the substernal mass.** Instead, she was asked to stop carbonated beverages.

11. **5/19/2012** JF-B was seen at the ER and had Carotid U/S and Head CT, both ordered by John Hill and both read as normal. ER visit note was not available.

12. **8/21/2012** JF-B was seen at Urgent Care with complaint of neck and upper back pain. C-Spine X-ray and T-spine X-rays were done, read by Dr. Rafferty, normal except surgical clips. This was not over-read by radiology. Visit note was not available.

13. **12/7/2012** JF-B was seen at Urgent Care by Devon Graham, PA-C. Testing included swab for influenza, WBC, and 2 view chest X-ray. This was apparently read by Dr. Rafferty as normal. This was not over-read by radiology. She was diagnosed with bronchitis and given Z-pack and ventolin.

14. **1/8/2014** JF-B was seen in Urgent Care for chest cold by **Devon Graham, PA-C.** She complained of chest feeling tight, can't get a deep breath, and pain in her back. Work up included **CXR, read by Dr. Gary Welsh** as "no infiltrate or mass." **This was not over-read by radiology. She tested positive for Influenza A, but was given Z-pack in spite of the fact that JF-B had called into the clinic and had already been given a Z-pack prior to being seen in Urgent Care. She was not given Tamiflu to treat Influenza A.**

15. **2/11/2014** JF-B was seen at Urgent Care by **Devon Graham, PA-C** for persistent cough. She was again prescribed Z-pack in spite of the fact that she had taken two Z-packs prior without benefit.

16. **7/24/2014** JF-B was seen in Urgent Care by **Dr. Michael Rafferty**. She had complaint of chest pain. Work up included CBC, CMP, CRP, lipid panel, cardiac panel, EKG and CXR. **CXR was read by Rafferty as "no infiltrates or effusions, normal cardiac silhouette." This was not over-read by radiology.**

17. **8/6/2014** JF-B was again seen in Urgent Care, this time by **Dr. Gary Welsh**, for persistent chest pain that had now been going on for 2-3 weeks. She reported to Dr. Welsh that she has seen a homeopathic doctor who told her she had a problem with her heart. He described her as "nearly frantic" and diagnosed her with costochondritis, prescribing Ketoprofen. **He stated in his note that he thought the opinion of the homeopathic doctor was "BS in no uncertain terms" advising that she "let the experts determine what she has and not this person [the homeopathic doctor] who obviously is giving her information she can not handle."** She was referred to cardiology.

18. **8/11/2014** JF-B was seen at **Mayo Clinic** for cardiology evaluation. Her complaint at that time was constant substernal chest pain and dyspnea on exertion. Her neck felt swollen, she had constant cough, difficulty breathing, and hoarseness. Exam included description of left upper chest and neck palpable soft mass. **Initial work-up included CXR read as having soft tissue prominence in the upper left mediastinum with slight tracheal deviation. CXR** done as noted on 7/24/2014, just three weeks prior, had been read as normal. If this had been sent for radiology to over-read, the widened mediastinum may have been picked up sooner. She had nuclear stress test that was normal.

19. **8/12/2014** Due to the widened mediastinum seen on CXR, **CT of the chest** was done showing a mass in the superior mediastinum measuring 5.1 x 4.9 cm. JF-B brought copies of her previous CT scans for evaluation and this CT was compared to the previous studies with comment of enlarging previously noted substernal mass.

20. **8/14/2014** PET/CT was done to further evaluate the mediastinal mass. This was reported as favoring residual benign adenomatous thyroid in the superior mediastinum with thymus neoplasm far less likely.

21. **9/8/2014** Surgical excision of mass took place. Operative report described the mass was "densely adherent to innominate vein." Thyroid mass that was removed included adhesions at its borders. Pathology report included 7 x 4.8 x 3.7 cm thyroid mass and 15 x 3 x 1.2 cm Thymus. Operative report further described the dissection borders of the mass as from the diaphragm inferiorly, the innominate vein superiorly, the pericardium posteriorly, the sternum anteriorly, and the thymus/phrenic nerves laterally. Given this description, JF-B's concern that something was pressing against her heart, which was belittled by Dr. Welsh, was quite correct.

Based upon a reasonable degree of medical certainty, it is my opinion that there were several key times when diagnosis and further work-up related to J-FB's substernal mass fell below and failed to meet the accepted standard of care when it was missed or inexplicably overlooked by her treating medical providers, specifically:

9/25/2008 (CT Neck) Dr. Burgess failed to notify patient of result and order work up.

1/18/2010 (CT Chest) Elmo Rosario failed to notify patient of mass. Copy of CT report to Devon Graham, PA-C was not acknowledged.

5/18/2010 (Thyroid U/S) Ordered by Deb Brandt, results called to Devon Graham, and copy to Dr. Burgess, all of whom failed to discuss with patient and plan further evaluation.

3/21/2011 (CT Chest) Ordered STAT with patient to wait for result which was called to Dr. Gillen. Patient was not notified of the mass.

4/1/2011 Dr. Gillen again saw patient for persistent symptoms and failed to discuss the CT that had been done 11 days prior and pertained to the reason for her visit.

7/24/2014 (CXR) Done by Dr. Rafferty, read as normal, not over-read by radiology, but likely had widened mediastinum as was mentioned on the CXR done at Mayo Clinic 18 days later.

8/6/2014 Visit with Dr. Welsh for chest pain, but his apparent bias against the homeopathic doctor she saw prior caused him to disregard her claim of something pressing against her heart.

As a result of at least the above mentioned failure(s) to follow accepted standards of care to or for JF-B, it is my opinion, based upon a reasonable degree of certainty, that if the substernal mass had been properly diagnosed and treated earlier, she would have been spared 6 years of symptoms related to the mass including cough, hoarseness, throat clearing, chest pain, and shortness of breath. She also would have been spared numerous visits to the ER, Urgent Care, and her family physician, as well as the unnecessary expense and troubling uncertainty related to the numerous tests that were not needed in her case.

15-2-14.1 Time for bringing medical malpractice actions--Counterclaims--Prospective application.

15-2-14.1. Time for bringing medical malpractice actions--Counterclaims--Prospective application. An action against a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts for malpractice, error, mistake, or failure to cure, whether based upon contract or tort, can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred, provided, a counterclaim may be pleaded as a defense to any action for services brought by a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts after the limitation herein prescribed, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim was sued or originated, but no judgment thereon except for costs can be rendered in favor of the party so pleading it.

This section shall be prospective in application only.

Source:(1)

Endnotes

1 (Popup - Source)

Source:

SDC 1939, § 33.0232 (6); SL 1945, ch 144; SL 1947, ch 153, § 3; SL 1963, ch 224; SDCL, § 15-2-15 (3); SL 1976, ch 145, §§ 1, 2; SL 1977, ch 168.

Pitt-Hart v. Sanford USD Med. Ctr., 2016 S.D. 33

BARRY THOMAS PITT-HART,
MD, Plaintiff and Appellant,
v.
SANFORD USD MEDICAL CENTER,
Defendant and Appellee.
[2016 S.D. 33]

South Dakota Supreme Court
Appeal from the Scond Judicial Circuit, Minnehaha County, SD
HON. DOUGLAS E. HOFFMAN, Judge
#27568-a-DG

N. DEAN NASSER, JR.
JAMES M. NASSER of
Nasser Law Offices, PC
Sioux Falls, SD
Attorneys for plaintiff and
appellant.

MELISSA C. HINTON of
Evans, Haigh & Hinton, LLP
Sioux Falls, SD
Attorneys for defendant and
appellee.

Considered on Briefs on March 21, 2016; Opinion Filed April 13, 2016

GILBERTSON, Chief Justice

[¶1] Barry Thomas Pitt-Hart appeals the circuit court's order granting summary judgment to defendant Sanford USD Medical Center. Pitt-Hart argues that he commenced his action within the three-year statute of limitations applicable to general-negligence actions and that the court erred by determining his action was time barred. He also argues that even if a shorter statute of

limitations applies, it should have been tolled. We affirm.

Facts and Procedural History

[¶2] On November 10, 2009, Pitt-Hart underwent a knee-replacement surgery at Sanford. The day after surgery, while Pitt-Hart was still hospitalized at Sanford, he asked for assistance to get out of bed and travel to and from the restroom adjoining his hospital room. Mark Nygard, a patient-care technician employed by Sanford, assisted Pitt-Hart. While Nygard attempted to help Pitt-Hart return to his bed, Pitt-Hart fell. Pitt-Hart was discharged on November 13, 2009.

[¶3] After being discharged, Pitt-Hart began inpatient rehabilitation at Avera Prince of Peace in Sioux Falls. Following that, Pitt-Hart underwent outpatient physical therapy at Prairie Rehabilitation until February 1, 2010. Neither Avera Prince of Peace nor Prairie Rehabilitation is affiliated with Sanford. In June 2010, Sanford agreed to provide outpatient physical therapy to Pitt-Hart at no charge because Medicare would not cover additional treatments at Prairie Rehabilitation. Pitt-Hart's outpatient therapy with Sanford concluded on September 14, 2010.

[¶4] Two years later, in September 2012, Pitt-Hart sought additional physical therapy for what he asserts were the continuing effects of the injury resulting from his fall. Sanford declined to pay for additional treatment, and Pitt-Hart commenced this action on September 14, 2012, by delivering a summons and complaint to the Minnehaha County Sheriff for service on Sanford. Sanford answered the complaint on October 5, 2012. Sanford later filed a motion for summary judgment, asserting that Pitt-Hart's action was time barred under SDCL 15-2-14.1{fn1}(1) as a medical-malpractice claim. The circuit court agreed and granted Sanford's motion for summary judgment.

[¶5] Pitt-Hart appeals, raising the following issue: Whether Pitt-Hart's action was time barred by SDCL 15-2-14.1.

Standard of Review

[¶6] "In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Gades v. Meyer Modernizing Co.*, 2015 S.D. 42, ¶ 7, 865 N.W.2d 155, 157-58 (quoting *Peters v. Great W. Bank, Inc.*, 2015 S.D. 4, ¶ 5, 859 N.W.2d 618, 621). "We view the evidence 'most favorably to the nonmoving party and resolve reasonable doubts against the moving party.'" *Id.* ¶ 7, 865 N.W.2d at 158 (quoting *Peters*, 2015 S.D. 4, ¶ 5, 859 N.W.2d at 621).

[¶7] "Statutory interpretation is a question of law reviewed de novo." *Wheeler v. Cinna Bakers LLC*, 2015 S.D. 25, ¶ 4, 864 N.W.2d 17, 19.

Analysis and Decision

[¶8] Pitt-Hart argues that summary judgment was inappropriate for a number of reasons. First, he contends that the circuit court erred by treating his case as a direct-liability case instead of a vicarious-liability case. According to Pitt-Hart, the circuit court should have treated his action as if it were brought against Nygard for purposes of determining whether the action was time barred by SDCL 15-2-14.1. Pitt-Hart also contends that even if SDCL 15-2-14.1 applies, the running of its two-year period was tolled because of Sanford's alleged, inequitable conduct. Finally, Pitt-Hart contends that the two-year period was tolled under the continuous-treatment rule because he continued to receive treatment until September 14, 2010.

[¶9] Pitt-Hart first argues that SDCL 15-2-14.1 does not apply to this action. Pitt-Hart contends that "[s]uing only the master does not turn a *respondent superior* claim into a direct liability claim for statute of limitations purposes." Because Pitt-Hart concludes that SDCL 15-2-14.1 does not apply to Nygard, Pitt-Hart also concludes that it does not apply to Sanford in this case. According to Pitt-Hart, "[a]lthough a hospital is vicariously liable for the torts of its ministerial employees committed within the scope of employment, the ministerial tortious acts of the employees do not become the torts of the hospital." Therefore, Pitt-Hart concludes that SDCL 15-2-14.1 bars claims only for malpractice directly performed by those persons listed in that statute. In essence, Pitt-Hart asks us to replace the word *against* in SDCL 15-2-14.1 and to read that statute to address only "an action [based on an injury caused by (rather than *against*)] a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts."

[¶10] Pitt-Hart's argument that SDCL 15-2-14.1 applies to "direct" claims but not vicarious claims is untenable, and we decline his invitation to insert language into SDCL 15-2-14.1. "When interpreting a statute, we 'begin with the plain language and structure of the statute.'" *Magellan Pipeline Co., LP v. S.D. Dep't of Revenue & Reg.*, 2013 S.D. 68, ¶ 9, 837 N.W.2d 402, 404 (quoting *In re Pooled Advocate Tr.*, 2012 S.D. 24, ¶ 32, 813 N.W.2d 130, 141). "Words used [in the South Dakota Codified Laws] are to be understood in their ordinary sense . . . ." SDCL 2-14-1. SDCL 15-2-14.1 applies simply to *an action*. An action is "[a] civil or criminal judicial proceeding." *Black's Law Dictionary* 35 (10th ed. 2014). The only qualifiers on the type of action contemplated by SDCL 15-2-14.1 are the type of defendant sued (i.e., "a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts") and the type of conduct alleged (i.e., "malpractice, error, mistake, or failure to cure"). SDCL 15-2-14.1. Thus, according to its plain language, SDCL 15-2-14.1 broadly applies to any action meeting *these* criteria.{fn2}(2) While direct and vicarious theories of liability are distinct legal concepts, SDCL 15-2-14.1 makes no distinction between the two, nor does it appear that this Court has ever recognized such a distinction.

[¶11] The question then becomes simply whether SDCL 15-2-14.1 applies to Pitt-Hart's action against Sanford. First, we must determine whether the type of defendant in this case is among those enumerated in SDCL 15-2-14.1. Although Pitt-Hart contends that the statute is inapplicable because Nygard is not a practitioner of the healing arts, our past cases establish that in vicarious-liability cases, the employee's negligence is treated as the employer's negligence. *See Lewis v. Sanford Med. Ctr.*, 2013 S.D. 80, ¶ 1, 840 N.W.2d 662, 663; *Burgard v. Benedictine Living Cmtys.*, 2004 S.D. 58, ¶¶ 1-3, 680 N.W.2d 296, 297-98. More importantly, Sanford—not Nygard—is the named defendant in this case. There is no dispute that Sanford is a hospital. Therefore, under the plain language of SDCL 15-2-14.1, the defendant in this action is of a type enumerated by that statute.

[¶12] Next, we must also determine whether the conduct alleged is of a type contemplated by SDCL 15-2-14.1. Pitt-Hart cites several cases holding that certain conduct of hospital employees does not fall within the ambit of medical malpractice. *See Moore v. Louis Smith Mem'l Hosp., Inc.*, 454 S.E.2d 190, 191 (Ga. Ct. App. 1995) (nursing-home resident fell while nursing assistant attempted to help the resident move from her wheelchair to her bed); *Brown v. Durden*, 393 S.E.2d 450, 451 (Ga. Ct. App. 1990) (patient suffering from seizures fell off examination table at doctor's office); *Candler Gen. Hosp., Inc. v. McNorrill*, 354 S.E.2d 872, 873 (Ga. Ct. App. 1987) (hospital patient fell while orderly attempted to remove patient from a stretcher); *Landes v. Women's Christian Ass'n*, 504 N.W.2d 139, 140 (Iowa Ct. App. 1993) (hospital patient fell in restroom after staff failed to accompany him); *Papa v. Brunswick Gen. Hosp.*, 517 N.Y.S.2d 762, 763 (N.Y. App. Div. 1987) (hospital patient fell out of bed); *Coursen v. N.Y. Hosp.-Cornell Med. Ctr.*, 499 N.Y.S.2d 52, 53 (N.Y. App. Div. 1986) (hospital patient fainted in restroom, unattended by nurse's aide); *Toledo v. Mercy Hosp. of Buffalo*, 994 N.Y.S.2d 298, 299 (N.Y. Sup. Ct. 2014) (hospital patient slipped on urine while walking to restroom); *Dawkins v. Union Hosp. Dist.*, 758 S.E.2d 501, 502 (S.C. 2014) (emergency-room patient fell in hospital restroom after staff failed to accompany her); *Peete v. Shelby Cty. Health Care Corp.*, 938 S.W.2d 693, 694 (Tenn. Ct. App. 1996) (hospital patient injured after hospital technician caused an orthopedic suspension bar to fall on her); *Franklin v. Collins Chapel Connectional Hosp.*, 696 S.W.2d 16, 17 (Tenn. Ct. App. 1985) (nursing-home resident suffered burns after orderly placed him in a hot bath).

[¶13] The majority of the foregoing authorities do not discuss the distinction between malpractice and negligence in the context of timing requirements for filing an action; instead, they address the question whether expert testimony is required in cases where a medical professional is negligent in some ordinary way. More importantly, each of the foregoing cases discusses only what constitutes malpractice. In contrast, SDCL 15-2-14.1 applies to "[a]n action . . . for malpractice, error, mistake, *or* failure to cure[.]" SDCL 15-2-14.1 (emphasis added). This is true regardless of "whether [the action is] based upon contract *or* tort[.]" *Id.* (emphasis added).

"[W]e assume that the Legislature intended that no part of its statutory scheme be rendered mere surplusage . . . ." *Peters*, 2015 S.D. 4, ¶ 8, 859 N.W.2d at 622 (quoting *Faircloth v. Raven Indus., Inc.*, 2000 S.D. 158, ¶ 6, 620 N.W.2d 198, 201). Therefore, the phrase *malpractice, error, mistake, or failure to cure* necessarily has a broader meaning than the term *malpractice* alone. Even if we accept Pitt-Hart's authorities, then, they offer little guidance on the application of SDCL 15-2-14.1 to the facts of this case.

[¶14] In determining the meaning of the terms *error* and *mistake*, we first examine their plain, ordinary meanings. SDCL 2-14-1; *Magellan Pipeline Co.* 2013 S.D. 68, ¶ 9, 837 N.W.2d at 404. The term *error* means: "1. An act, an assertion, or a belief that unintentionally deviates from what is correct, right or true. 2. The condition of having incorrect or false knowledge. 3. *The act or an instance of deviating from an accepted code of behavior*. 4. A mistake." *The Am. Heritage Coll. Dictionary* 467 (3d ed. 1997) (emphasis added). The term *mistake* means: "1. An error or *a fault resulting from* defective judgment, deficient knowledge, or *carelessness*. 2. A misconception or misunderstanding." *Id.* at 873 (emphasis added). Thus, while SDCL 15-2-14.1 applies to a personal injury resulting from medical care (i.e., "[a]n action against a physician . . . for malpractice . . . based upon . . . tort"), it also seems to apply to a variety of other conduct involving unlicensed hospital personnel, such as a dispute regarding a bill for hospital services (i.e., "[a]n action against a . . . hospital . . . for . . . error . . . based upon contract").

[¶15] In light of the broad range of conduct contemplated by SDCL 15-2-14.1, we conclude it applies to the action in the present case. Assuming for the purpose of summary judgment that Nygard dropped Pitt-Hart, such could easily be described as either a deviation from an accepted code of behavior (i.e., an error) or as a fault resulting from carelessness (i.e., a mistake). This decision does not require us to conclude that SDCL 15-2-14.1 applies to all negligence actions against a hospital. This is not a case of a nonpatient slipping on an icy sidewalk while walking past a hospital; instead, it involves a health-care technician who allegedly dropped a post-operative, knee-replacement patient contrary to standing orders that the patient required assistance to get out of bed. In other words, there is a nexus between the injury suffered by the plaintiff and the health care he received from the hospital. Therefore, Pitt-Hart's action is one against a hospital for error or mistake based upon tort, and SDCL 15-2-14.1 applies.

[¶16] Next, Pitt-Hart argues that even if SDCL 15-2-14.1 applies in this case, his action is not time barred by the statute's two-year period. He argues:

> The Doctrine of Estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations. The issue is whether the Plaintiff, by inequitable conduct on the part of the Defendant (usually fraud or misrepresentation), has been induced to alter his position to do that which he would not otherwise have done (i.e., refrained from commencing an action within the statutory period).

Pitt-Hart further contends that if his argument is successful, the effect is that SDCL 15-2-14.1's two-year period is tolled. This argument conflates principles of fraud, estoppel, and tolling. Additionally, both Pitt-Hart's and Sanford's references to SDCL 15-2-14.1 as a "statute of limitation" require us to first address the nature of the two-year period defined in that statute.

[¶17] In *Peterson ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 43, 635 N.W.2d 556, 571, we explicitly held that SDCL 15-2-14.1 is a statute of repose and not a statute of limitation. Only two paragraphs later in the same decision, however, we reverted to referring to SDCL 15-2-14.1 as a statute of limitation. *Peterson*, 2001 S.D. 126, ¶ 45, 635 N.W.2d at 571. This inconsistency has persisted in almost all of our decisions involving SDCL 15-2-14.1. *See, e.g., Lewis*, 2013 S.D. 80, ¶ 25, 840 N.W.2d at 668 (referring to SDCL 15-2-14.1's two-year period as a "limitations period"). Yet, we have previously recognized that "the differences between statutes of limitations and statutes of repose are substantive, not merely semantic." *Clark Cty. v. Sioux Equip. Corp.*, 2008 S.D. 60, ¶ 24, 753 N.W.2d 406, 415 (quoting *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005)). Thus, we take this opportunity to reexamine and clarify the operation of SDCL 15-2-14.1.

[¶18] There can be little doubt that *Peterson* correctly held that SDCL 15-2-14.1 is properly considered a statute of repose and not one of limitation. "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp. v. Waldburger*, ___ U.S. ___, ___, 134 S. Ct. 2175, 2182, 189 L. Ed. 2d 62 (2014) (quoting *Black's Law Dictionary* 1546 (9th ed. 2009)); *Peterson*, 2001 S.D. 126, ¶ 41, 635 N.W.2d at 570. "A statute of repose, on the other hand, . . . is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2182. The two-year period expressed in SDCL 15-2-14.1 does not begin when a cause of action accrues; it begins when the "alleged malpractice, error, mistake, or failure to cure shall have occurred[.]" SDCL 15-2-14.1. Therefore, as we held in *Peterson*, the two-year period expressed in SDCL 15-2-14.1 is a period of repose. *Compare* SDCL 15-2-14.1 ("An action . . . can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred . . . ."), *with* SDCL 15-2-14(3) ("[An action for personal injury] can be commenced only within three years after the cause of action shall have accrued . . . .").

[¶19] This conclusion is reinforced by our treatment of SDCL 15-2-14.1. Even while incorrectly referring to SDCL 15-2-14.1 as a statute of limitation, we have preserved its function as a statute of repose in one important way. "We have consistently held that [SDCL 15-2-14.1] is an occurrence rule, which begins to run when the alleged negligent act occurs, not when it is discovered." *Beckel v. Gerber*, 1998 S.D. 48, ¶ 9, 578 N.W.2d 574, 576. The reason SDCL 15-2-14.1 is an occurrence rule, however, is simply because it is a statute of repose, which by

definition begins running upon the occurrence of a specified event rather than the discovery of a cause of action.

[¶20] While concluding that SDCL 15-2-14.1 is a statute of repose rather than a statute of limitation does not change the basic question of determining when the two-year period has expired in any given action, there are important differences in the subsequent analysis. For the present action, the "critical distinction is that a repose period is fixed and its expiration *will not be delayed by estoppel or tolling*[.]" *CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2183 (emphasis added). Likewise, fraudulent concealment does not toll a period of repose. *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989), *cert. denied*, 493 U.S. 1070, 110 S. Ct. 1113, 107 L. Ed. 2d 1020 (1990). "[A]fter the legislatively determined period of time, . . . liability will no longer exist and will not be tolled *for any reason*." 54 C.J.S. *Limitations of Actions* § 7 (2015) (emphasis added).

[¶21] The reason for this critical distinction lies in the different policy objectives underlying both types of statutes. "Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" *CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2183 (quoting *Black's Law Dictionary* 1546 (9th ed. 2009)). "[W]hen an 'extraordinary circumstance prevents [a plaintiff] from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." *Id.* (quoting *Lozano v. Montoya Alvarez*, ___ U.S. ___, ___, 134 S. Ct. 1224, 1231-32, 188 L. Ed. 2d 200 (2014)). In contrast, "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Id.* (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010)). "[They] are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." *First United Methodist Church*, 882 F.2d at 866. Thus, while tolling a *period of limitation* or estopping a party from asserting it as a defense may be proper, tolling a *period of repose* or estopping a party from raising it as a defense subverts this legislative objective. Therefore, principles of estoppel and tolling are inapplicable to a period of repose.

[¶22] In *Anson v. Star Brite Inn Motel*, 2010 S.D. 73, 788 N.W.2d 822, although we stopped short of recognizing that SDCL 15-2-14.1 has been incorrectly treated as a statute of limitation, we touched on the problem of applying tolling principles to it. We recognized that "a very compelling argument can be made that equitable tolling cannot be recognized as a legal doctrine in South Dakota." *Id.* ¶ 15 n.2, 788 N.W.2d at 825 n.2. This recognition was based on the absolute language of the statute, which identifies it as a statute of repose. SDCL 15-2-14.1 ("An action . . . can be commenced *only* within two years after the alleged [actionable conduct] shall have occurred . . . ." (emphasis added)); *CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2183; *Peterson*, 2001 S.D. 126, ¶ 41, 635 N.W.2d at 570. Our hesitancy to apply equitable tolling in

Anson is easily explained as an unrealized recognition that SDCL 15-2-14.1 is a statute of repose and that, therefore, it is not subject to tolling. *CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2183; *First United Methodist Church*, 882 F.2d at 866.

[¶23] Finally, Pitt-Hart argues that even if the two-year period of repose applies, his action is timely under the continuous-treatment rule. This Court, as well as other jurisdictions, has recognized two different versions of the continuous-treatment rule. Under one version, the limitation period on an accrued cause of action may be tolled when a "medical practitioner . . . continue[s] 'to treat the patient *for the particular disease or condition created by the original act of alleged negligence*.'" *Lewis*, 2013 S.D. 80, ¶ 23, 840 N.W.2d at 667 (emphasis added) (quoting *Liffengren v. Bendt*, 2000 S.D. 91, ¶ 17, 612 N.W.2d 629, 633). This rule applies only when the plaintiff receives "continuous treatment . . . by the *same* physician or clinic." *Liffengren*, 2000 S.D. 91, ¶ 17, 612 N.W.2d at 633. The rationale behind this rule is "to prevent the refusal to seek or administer health care due to pending litigation when treatment may be desperately needed." *Bosse v. Quam*, 537 N.W.2d 8, 10 (S.D. 1995); *see also Wells v. Billars*, 391 N.W.2d 668, 672 n.1 (S.D. 1986). It also affords a medical provider "the opportunity to correct the error before harm ensues." *Wells*, 391 N.W.2d at 672 n.1 (quoting 1 David W. Louisell & Harold Williams, *Medical Malpractice* § 13.08 (1981)).

[¶24] Pitt-Hart's action is not saved by the foregoing rule. The arguments against applying equitable tolling, estoppel, and fraudulent concealment to a period of repose apply with equal force to the tolling that would result from application of the continuous-treatment rule. *See CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2183; *First United Methodist Church*, 882 F.2d at 866; 54 C.J.S. *Limitations of Actions* § 7 (2015). Thus, while the rule applies to a period of limitation, it does not apply to a period of repose like SDCL 15-2-14.1. Even if the rule did apply, it is undisputed that Pitt-Hart received treatment from two providers unaffiliated with Sanford—let alone the same physician or clinic—after his discharge from Sanford on November 13, 2009. Therefore, the continuous-treatment rule *cannot* toll SDCL 15-2-14.1's two-year period of repose, nor should it under the facts of this case.

[¶25] The second version of the continuous-treatment rule is simply a mislabeled application of the continuing-tort doctrine. "Generally, when a tort involves a continuing injury, the cause of action accrues and the statute of limitations commences when the wrong terminates." *Alberts v. Giebink*, 299 N.W.2d 454, 456 (S.D. 1980). In the context of medical malpractice, this doctrine applies when harm is the cumulative effect of several treatments rather than the result of a single act. *Wells*, 391 N.W.2d at 672 n.1. However, the doctrine does not apply when "a patient is able to identify the specific negligent treatment that caused [his or her] injury[.]" *Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997); *Wells*, 391 N.W.2d at 672 n.1; 70 C.J.S. *Physicians & Surgeons* § 141 (2015).

[¶26] While the continuous-treatment rule does not apply to a statute of repose, the continuing-tort doctrine does. "When the cumulative result[] of continued negligence is the cause of the injury, the statute of repose cannot start to run until the last date of negligent treatment." *Cunningham v. Huffman*, 609 N.E.2d 321, 325 (Ill. 1993); *Wells*, 391 N.W.2d at 672 n.1. This is true because the repose period "is measured . . . from the date of the last culpable act or omission of the defendant." *CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2182. Thus, although a period of repose will not be tolled for any reason *once commenced*, *id.* at ___, 134 S. Ct. at 2183, such a period may be *delayed from commencing* if a plaintiff "demonstrate[s]: (1) that there was a continuous and unbroken course of negligent treatment, and (2) that the treatment was so related as to constitute one continuing wrong." *Cunningham*, 609 N.E.2d at 325. Pitt-Hart does not allege his injury resulted from a continuous and unbroken course of negligent conduct; rather, Pitt-Hart's complaint alleges his injury was caused solely by being dropped. Because Pitt-Hart's injury resulted from a single, identifiable act and not from a continuing course of negligent treatment, the tort alleged was complete on November 11, 2009. Therefore, Pitt-Hart's action became time barred by SDCL 15-2-14.1 nearly one year before he commenced this action.

Conclusion

[¶27] Pitt-Hart's action against Sanford is one for error or mistake. Therefore, SDCL 15-2-14.1's two-year period of repose applies. Today we correct the past practice of referring to SDCL 15-2-14.1 as a statute of limitation in contravention of its status as a statute of repose. *See CTS Corp.*, ___ U.S. at ___, 134 S. Ct. at 2182; *Peterson*, 2001 S.D. 126, ¶ 41, 635 N.W.2d at 570. However, the analysis of our previous malpractice cases remains largely undisturbed. Legal concepts such as fraudulent concealment, estoppel, and equitable tolling are still applicable to *statutes of limitation*, and the continuing-tort doctrine is applicable to both statutes of limitation and repose.{fn3}(3) Even so, the Legislature's creation of a two-year period of repose in SDCL 15-2-14.1 essentially renders such tolling moot for any limitation period of two years or longer. As we said in *Peterson:* "The policy of the Legislature is clearly to make SDCL 15-2-14.1 a statute of repose. . . . If the policy is to be changed, the Legislature, not this Court, should make the change." 2001 S.D. 126, ¶ 43, 635 N.W.2d at 571.

[¶28] We affirm.

[¶29] ZINTER, SEVERSON, WILBUR, and KERN, Justices, concur.

Endnotes

1 (Popup - Footnote)

1. **SDCL 15-2-14.1** states, in part:

An action against a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts for malpractice, error, mistake, or failure to cure, whether based upon contract or tort, can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred . . . .

2 (Popup - Footnote)

2. Pitt-Hart contends that "[i]f the Legislature intended **SDCL 15-2-14.1** to include vicarious liability, it could have easily said so[.]" **SDCL 15-2-14.1** is worded inclusively—it broadly applies to *an action*. This inclusive statement is explicitly limited in only two ways. When the Legislature uses inclusive language indicating a broad range of conduct, it is not required to anticipate and individually address each subdivision of that conduct a party might imagine. Thus, the better view is that if the Legislature intended **SDCL 15-2-14.1** to *exclude* vicarious liability, it could have easily said so.

3 (Popup - Footnote)

3. In this case, it appears that the applicable statute of limitation is **SDCL 15-2-14**(3), which states that an action for a personal injury "can be commenced only within three years after the cause of action shall have accrued[.]" Because we reaffirm that **SDCL 15-2-14.1** is a statute of repose, there is no conflict between it and **SDCL 15-2-14**(3). However, **SDCL 15-2-14.1** would control even if it was a statute of limitation. "A rule of statutory construction is that the more specific statute governs the more general statute." ***Peterson***, 2001 S.D. 126, ¶ 28, 635 N.W.2d at 567. "Another rule of statutory construction is that the more recent statute [supersedes] the older statute." *Id.* ¶ 29, 635 N.W.2d at 567. Because **SDCL 15-2-14.1** is both more specific and more recently modified than **SDCL 15-2-14**(3), **SDCL 15-2-14.1**'s two-year period would apply to Pitt-Hart's action even if **SDCL 15-2-14.1** was a statute of limitation.

STATE OF SOUTH DAKOTA) :SS		IN CIRCUIT COURT
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT
JODIE M. FRYE-BYINGTON, Plaintiff,		51CIV16-001022
vs.		*PLAINTIFF'S OPPOSITION TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS*
RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFTERTY, M.D., Defendants.		

Pursuant to SDCL §15-6-56(c), Plaintiff hereby submits her timely opposition to Defendant's statutorily deficient statement of undisputed material facts as well as her responsive statements of material facts setting forth, in part, the genuine issue(s) that must hereafter be tried to a jury in this matter as provided below and as cited to the record herein.

1.) Defendant's Statement of Undisputed Material Facts No. 1 is statutorily deficient and hereby controverted by Plaintiff insofar as its lack of specificity and/or citation to the record which is contrary to the statutory requirements of SDCL §15-6-56(c)(1)("...Each material fact in this required statement must be presented in a separate numbered statement *and* with appropriate citation to the record in the case."). Plaintiff additionally submits that there is no statutory procedure to permit Defendants, as movants, to subsequently amend their filed statement of undisputed material facts herein;

2.) Defendant's Statement of Undisputed Material Facts No. 2 is statutorily deficient and hereby controverted by Plaintiff insofar as its lack of specificity and/or citation to the record which is contrary to the statutory requirements of SDCL §15-6-56(c)(1)("...Each material fact in this required statement must be presented in a separate numbered statement *and* with appropriate citation to the record in the case."). Plaintiff additionally submits that there is no statutory procedure to permit Defendants, as movants, to subsequently amend their filed statement of undisputed material facts herein;

3.) Defendant's Statement of Undisputed Material Facts No. 3 is statutorily deficient and hereby controverted by Plaintiff insofar as its lack of specificity and/or citation to the record which is contrary to the statutory requirements of SDCL §15-6-56(c)(1)("...Each material fact in this required statement must be presented in a separate numbered statement *and* with appropriate citation to the record in the case."). Plaintiff additionally submits that there is no statutory procedure to permit Defendants, as movants, to subsequently amend their filed statement of undisputed material facts herein;

4.) In addition, within Defendant's Statement of Undisputed Material Facts No. 3, Plaintiff submits that there is, contrary to Defendants unsupported statement, a genuine issue of material fact in this matter which is outlined as follows: Plaintiff submits as a fact herein that she was, unfortunately and to her ongoing detriment, subjected to what was a continuing tort by and through a continuous and unbroken course of negligent and failed treatment(s) by Defendants and/or at Defendants direction(s), and that such continuous negligent treatment and/or related treatments were so related as to constitute one continuing wrong to her. *See, Plaintiff's Affidavit in Opposition to Defendants' Motion for Partial Summary Judgment* at ¶¶ 2-7; and, *see also*, Dr. Molly K. Wright's entire deposition testimony transcript, including, in part, page 77.

Dated this 8th day of August, 2018.

/s/ R. Shawn Tornow
-Filed electronically-
R. Shawn Tornow, for
Tornow Law Office, P.C.
PO Box 90748
Sioux Falls, SD 57109-0748
Telephone: 605-271-9006
Facsimile: 605-271-9249
E-mail: rst.tlo@midconetwork.com
One of the attorneys for Plaintiff

CERTIFICATE OF SERVICE:

I, R. Shawn Tornow, an attorney for Plaintiff herein, do hereby certify that on the 9th day of August, 2018, a true and correct copy of *Plaintiff's Opposition to Defendant's Motion for Partial Summary Judgment* and accompanying Affidavits as well as *Plaintiff's Opposition to Defendant's Statement of Undisputed Material Facts* and corresponding *Brief in Opposition* herein were timely served by uploading the same through Odyssey's File and Serve program or, if necessary, by regular e-mail by and through submitting scanned copies of the above-referenced documents to the attention of the following named person(s) at the address(es) so indicated:

NAME:	ADDRESS:
Lonnie R. Braun One of the Attorneys for Defendant	Thomas Braun Bernard & Burke, LLP 4200 Beach Drive – Suite 1 PO Box 1030 Rapid City, SD 57702 E-mail: lbraun@tb3law.com

/s/ R. Shawn Tornow

STATE OF SOUTH DAKOTA) :SS COUNTY OF PENNINGTON)		IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
JODIE M. FRYE-BYINGTON, Plaintiff, vs. RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFTERTY, M.D., Defendants.		51CIV16-001022 *PLAINTIFF'S AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT*

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF PENNINGTON)

Jodie Frye-Byington, being first duly sworn upon her oath, deposes and states as follows:

1.

Your Affiant submits that she is over the age of eighteen and is the named Plaintiff in this medical malpractice action and, as such, she is informed and competent to testify to the matters as set forth herein;

2.

Your Affiant can and does attest that beginning on September 25, 2008, at the direction of Defendant Burgess, she underwent a CT of the neck with contrast and the corresponding CT report was found to be significant for "3.3 x 2.7 cm soft tissue density at the level of the upper manubrium, extending just anterior and somewhat lateral to [Plaintiff's] trachea on the left ... suggestive of thyroid tissue." Despite the significance of the reported mass (i.e., the mediastinal mass condition that your Affiant suffered from), Defendant Burgess failed to communicate, explain or, to the best of Affiant's knowledge and understanding from reviewing related medical records, consider the corresponding adverse health impacts of such a mass on your Affiant's ongoing health and well-being. *See*, Expert report of Dr. Molly Wright as attached to Defendants' Affidavit of Lonnie Braun and as fully incorporated herewith; *see also*, Deposition testimony of Dr. Molly Wright as also attached hereto as part of the supporting Affidavit of R. Shawn Tornow - "Exhibit 1" and as fully incorporated herewith;

3.

Your Affiant can and does attest that from and after September 25, 2008 through August 2014, just prior to surgery, the named Defendants herein continued over the years with a continuing and ongoing course of their individual and/or collective misdiagnosis and/or missed diagnoses as well as Defendants failure to communicate to Affiant the negative health and overall adverse health and well-being medical consequences resulting - either directly or indirectly - from the significant mediastinal mass from which she suffered. *See*, Expert report of Dr. Molly Wright, page 4 ("As a result of at least the [Defendants] failure(s) to follow accepted standards of care to or for [Plaintiff], it is my opinion, based upon a reasonable degree of certainty, that if the substernal mass had been properly diagnosed and treated earlier, [Plaintiff] would have been spared 6 years of symptoms related to the mass including cough, hoarseness, throat clearing, chest pain and shortness of breath. [Plaintiff] also would have been spared numerous visits to the ER, Urgent Care, and her family physician, as well as the unnecessary expense and troubling uncertainty related to the numerous tests that were not needed in her case."); *see also/cf.*, Deposition testimony of Dr. Molly Wright at pgs. 37-92, as attached for consideration herewith;

4.

After September 25, 2008, your Affiant was regularly directed over the following years by Defendant Burgess clinic staff (primarily by "Mercy") to continue to be seen and with continuing attempt(s) to be treated as part of Affiant's same related medical conditions and symptoms by Defendants Urgent Care clinic by and through Defendant Welsh and Defendant Rafferty, amongst others within or as part of Defendant Rapid City Medical Center's Urgent Care clinic staff;

5.

As part of the failed continued and continuing diagnoses and attempted treatments, in approximately late August 2014 your Affiant specifically recalls that Defendant Rafferty admitted *and* apologized to your Affiant, with a witness present, that he - Defendant Rafferty - had failed over the previous years to, as your Affiant understood, correctly, appropriately or sufficiently "read her (medical) files" in conjunction with all of Defendants collective prior failed diagnoses and related failed tests and/or attempted treatments to/for Affiant;

6.

Ultimately, your Affiant was found (only by Mayo Clinic medical staff in August 2014) to have been suffering - from 2008 through 2014 - from a mediastinal mass in advanced stages and, as a result, your Affiant had to endure going through a major surgical procedure of an upper sternal split (of Affiant's chest cavity) on September 8, 2014;

7.

Based in part on the foregoing, Affiant submits that the cumulative results of the continued negligence, including continuing and ongoing failure(s) to follow accepted standards of medical care toward Affiant, of all of the Defendants herein from September 2008 through the last date of negligent treatment on August 6, 2014 (as seen by Defendant Welsh for chest pain) was and is, in fact, the cause of her injuries, not only physically as to her body and voice, but also the continuing and ongoing adverse mental health injuries suffered over the years as well as the continuing financial injuries she has suffered over the number of years referenced in this matter. *See*, Expert report of Dr. Molly Wright, page 4; *see also*, Deposition testimony of Dr. Molly Wright at page 77 ("My opinion is that in 2008 the cause for her chronic cough should have at least been considered to be due to this [large] mass. ... And when it failed to be considered [by the Defendants], it set the stage for what then was *not* considered important *from then on*." Emphasis added.].

Dated this 8th day of August, 2018.

Jodie Frye-Byington

Jodie Frye-Byington, Affiant

Subscribed and sworn to before me
this 8th day of August, 2018.

Renee Catron

Notary Public—South Dakota

My Commission Expires: 10/11/2018.

SEAL RENEE CATRON NOTARY PUBLIC State of South Dakota SEAL

STATE OF SOUTH DAKOTA)SS. COUNTY OF PENNINGTON	))	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON, Plaintiff, -vs- **RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,** Defendants.	Civ. No. 16-001022 **ORDER ON PENDING MOTIONS**

Pending before the Court are several motions in limine made by the parties in their pretrial pleadings. Having reviewed the submissions and having heard the arguments of counsel at the pretrial hearing, it is hereby

ORDERED that Plaintiff's Motion in Limine (1) to preclude evidence of the Defendants' character is denied to the extent of relevant background information. The parties may make objections at trial should the testimony venture into irrelevant information. It is further

ORDERED that Plaintiff's Motion in Limine (2) precluding Defendants' expert from testifying to matters not previously disclosed is granted and reciprocal; it is further

ORDERED that Plaintiff's Motion in Limine (3) to exclude reference of settlement negotiations, communications, discussions or offers prior to the trial is granted; it is further

Ordered that Plaintiff's Motion in Limine (4) to sequester fact witnesses until such time as they are brought into the courtroom is granted; it is further

ORDERED that Defendants' Motion in Limine (1) to preclude evidence of malpractice insurance coverage is granted and is reciprocal as to any health insurance covering Plaintiff's medical expenses; it is further

ORDERED that Defendants' Motion in Limine (2) to exclude reference of settlement negotiations, communications, discussions or offers prior to the trial is granted; it is further

ORDERED that Defendant's Motion in Limine (3) to sequester fact witnesses until such time as they are brought into the courtroom is granted; it is further

ORDERED that ruling on Defendants' Motion in Limine (4) regarding personal practices or techniques is reserved pending further briefing and hearing on February 11, 2019; it is further

ORDERED that ruling on Defendants' Motion in Limine (5) regarding failure to call equally available and/or unavailable witnesses is reserved pending further hearing on February 11, 2019; it is further

ORDERED that Defendants' Motion in Limine (6) to preclude Plaintiff from making a golden rule or conscience of the community argument is granted and reciprocal; it is further

ORDERED that Defendants' Motion in Limine (7) to preclude evidence of past lawsuits against the Defendant is granted; it is further

ORDERED that Defendants' Motion in Limine (8) to preclude evidence of past lawsuits against an expert is granted and is reciprocal; it is further

ORDERED that Defendants' Motion in Limine (9) to preclude Plaintiff's counsel from suggesting that a verdict against the Defendant won't affect his license is granted; it is further

ORDERED that Defendants' Motion in Limine (10) to preclude Plaintiff's counsel from making an improper damages argument is granted; it is further

ORDERED that Defendants' Motion in Limine (11) precluding hearsay statements of Plaintiff's non party treaters is granted to the extent such statements are outside of the medical records admitted into evidence; it is further

ORDERED that ruling on Defendants' Motion in Limine (12) precluding the Plaintiff claiming damages arising from her divorce is reserved pending further briefing and hearing on February 11, 2019; it is further

ORDERED that the Court shall hold a hearing on Monday, February 11, 2018 at 10:00 a.m. Mountain time in Courtroom 6 of the Pennington County Courthouse at which time the matters unresolved by this order will be heard along with a discussion concerning the substance of the proposed jury instructions; it is further

ORDERED that any further motions and briefing by the parties related to any outstanding matters must be filed and served no later than 5:00 p.m. Mountain time on February 5, 2019; it is further

ORDERED that the parties will exchange exhibit lists and exhibits no later than 5:00 p.m. Mountain time on January 30, 2019.

Dated this 30 day of Jan., 2019.

BY THE COURT:

Honorable Thomas Trimble, Ret.
Circuit Court Judge

ATTEST:

Renae Truman
Clerk of Courts

By: Deputy

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

JAN 30 2019

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT

JAN 30 2019

Ranae Truman, Clerk of Courts

By Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON

Plaintiff,

vs.

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.

Defendants.

PRE-TRIAL CONFERENCE

FILE NO. 51-CIV-16-1022

DATE: February 11, 2019 at approximately 11:30 AM

PLACE: Pennington County Courthouse
Pennington County Circuit Court
Rapid City, South Dakota

BEFORE: THE HONORABLE THOMAS L. TRIMBLE
Circuit Court Judge
Seventh Judicial Circuit

George R. Cameron
Official Court Reporter
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota 57709
605.394.2571

assistants or whoever, names are in those documents. Those documents were also CCd to, for instance, Doctor Burgess, as her primary care provider, or sent off to Welsh or Rafferty, because they are all part of the defendant, Rapid City Medical Center.

And, by the way, I didn't concede anything about why this was sued out, or not, or whether persons were named, or not, based on the years after a certain incident. I didn't concede that. Again, I was just saying I wasn't a part of a decision to do that. That was done by another law office.

MR. BERNARD: Two points, Your Honor.

THE COURT: Go ahead, Mr. Bernard.

MR. BERNARD: Doctor Burgess was a partner. He said in his deposition, I'm an independent contractor. He is a partner of the LLP. So independent contractor status has nothing to do with this case.

The second point I want to make -- or really it's a question -- is whose of these four unnamed, unserved treaters, whose continued negligence are they -- are we trying?

THE COURT: I assume you can only try the named parties. And that's what the jury will get. Here's the -- Mr. Bernard, maybe I heard you wrong. But it sounded to me like you were telling me that Rapid City

Medical Center being the principal here was not responsible for its agent's acts?

MR. BERNARD: It is, if those agents can be found liable.

THE COURT: Okay.

MR. BERNARD: Those agents, those four persons, can never be found liable, because the statute of repose ran on them.

THE COURT: Nor can they be found liable when they are not named in the lawsuit. But they still were part of what happened in this whole bit of treatment. I mean, I guess, as a lawyer standing up there defending three doctors, you could say these three doctors didn't have anything to do with the negligence here. It was those three people over there. Nobody can sue them. Nobody can do anything to them. You can blame it on them.

And maybe they are responsible. I don't know. But they are still agents of the principal. So the principal still has liability. Right? Isn't that what you are -- that is what you are telling me.

MR. BERNARD: No. I'm telling you that's not the case.

THE COURT: Okay.

MR. BERNARD: It's not the case, because the principal

cannot practice medicine. It has to be -- it has to be vicarious liability from persons who are liable. Because they didn't serve them --

THE COURT: Well, a truck transport company can't drive a truck either, but the drivers can.

MR. BERNARD: But there's no -- on straight up agency law, vicarious liability in it's -- respondeat superior. Agreed, a truck company can't drive a truck. It can only act through its agents. It still applies though that, if the agent can't be held liable, neither can the trucking company.

But there is a different -- there is a special treatment to the -- for the practice of professions in South Dakota and other states. Attorneys and doctors can't practice medicine, can't practice law, so there is not a direct claim against those entities for something their agents did, if you can't -- if you don't also and can't also find the liability on the agents.

And in our brief we cite the official comments to the Uniform Partnership Act 305. The specific reference to that unique treatment of professionals. South Dakota has adopted the same law. And the Comer case will then tell you this. There is not a direct cause of action against the Rapid City Medical Center

for negligently treating the plaintiff, if you don't -- if you can't and don't find the agents liable first. It is strictly vicarious liability.

THE COURT: Well, let's stop right there. Let's just stop right there. So here is the way I'm looking at this under the agency law. If any of the three doctors are found negligent --

MR. BERNARD: The named doctors?

THE COURT: The named doctors.

MR. BERNARD: Yes.

THE COURT: (Continuing) -- it can go back to the principal?

MR. BERNARD: Yes.

MR. BRAUN: Correct.

THE COURT: Well, we agree on that.

MR. BERNARD: Yes.

THE COURT: Okay. I don't disagree that they can't find the principal negligent if these other four people who participated in this cannot be found or are not -- well, they can't be found negligent because they are not named as a negligent party.

MR. BERNARD: Correct.

THE COURT: But they are still part of the whole treatment area. They still are involved in this whole thing.

MR. BERNARD: I got that. I mean, is the question, Your Honor -- we are not suggesting they can't even talk about them.

THE COURT: Here is what I'm saying. The jury can't come in and say, all right, Rapid City Medical Center, you're negligent. We are going to find you negligent. You owe a million dollars. Nobody else is negligent.

MR. BERNARD: Can't do it.

THE COURT: Can't do it. I agree. But, if they find any one of those three doctors were negligent, Rapid City Medical Center is negligent.

MR. BERNARD: And we've got an instruction that says that.

THE COURT: Okay. Do you have any problem with that, Mr. Tornow?

MR. TORNOW: Yeah, I agree with the -- to the extent of what you just said. I still do disagree with defendants insofar as they continue to go back to the statute of repose is in effect here, and you can't look at the PA, the Rapid City Medical Center, PA Brant, who was -- who was doing work at the Rapid City Medical Care Urgent Care Clinic as a part of this continuing tort.

I mean, I'm not trying to beat a dead horse here, but the Court has already ruled that their statute of

just -- this is where we have been messing around here. I have got it in front of me, and let's get it taken care of. It's not numbered. Have you received it?

MR. BERNARD: Is that what's on his brief? Yeah, I think so.

MR. TORNOW: We filed one on February 5th.

THE COURT: Yeah. It's agency. It's principal liability for agents negligent acts. It's our pattern instruction 30-50-110. Are we all on the same page?

MR. TORNOW: Yes.

THE COURT: Okay. Basically, it says Rapid City Medical Center, LLP is liable to third persons like plaintiff or the negligence of its employees or employee in carrying out medical services to and for plaintiff's medical diagnosis, treatments, failure to inform, including wrongful acts committed by such employee or employees in and as part of the conduct of such medical services; and for the employed employees willful omissions to fulfill the obligations of defendant, Rapid City Medical Center.

MR. BERNARD: I don't think that's necessary in light of the instruction that both of us have proposed, although it should be tweaked. That says, if you find

MR. BERNARD: We are conceding agency.
THE COURT: Yeah.
MR. BERNARD: If one of them is liable, so is the medical center.
THE COURT: That's what I'm seeing here in that instruction you are proposing. So I don't --
MR. BERNARD: This is given lots of times. This is a very common instruction.
THE COURT: Okay.
MR. BERNARD: It is given lots of times.
MR. TORNOW: Yeah. And, again, to be clear. I'm okay with 21, if you also have our agency once behind that or maybe behind that --
THE COURT: I will consider it. I'm not sure we need it, but I will consider it. And that was 21 and 27.
MR. TORNOW: I guess I would say, Judge, if you want to clear up one. I would say that given where we are at, I wouldn't have a problem if you did defendant's proposed number 21. Well, let's just -- I'm looking your way. You do what you want to do.
THE COURT: Yeah. All right. I have never -- and you are going to have to bear with me when I read these, done preliminary jury instructions.
MR. BERNARD: Really?
THE COURT: No. When they came down and said you had

MR. TORNOW: Yeah. Your 35 was like my 31 that you were going to give. I will send it to you anyway, but I'm sure I'm fine with this.

THE COURT: Is there anything else?

MR. BERNARD: We have an issue related to the party of the plaintiffs -- or the defendants certainly have offered to stipulate as to the foundation of the medical records exchanged in discovery, except for one record. And I can't cite what that is, but it's a two-page record that came out of the depositions of Doctor Burgess, and perhaps others.

But beyond that, as we typically do, we will stipulate to the foundation, but not necessarily admissibility, but foundation of the medical records exchanged in discovery. So we don't have to call people in here to --

THE COURT: I understand.

MR. TORNOW: Yes. And as to the foundation, we agree to that.

THE COURT: All right. How about you, Mr. Tornow? Do you have anything more you want to take up at this time?

MR. TORNOW: By the way, just so we are clear, I assume that foundation is reciprocal both ways?

THE COURT: Yes.

STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
COUNTY OF PENNINGTON)	SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON

Plaintiff,

vs.

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.

Defendants.

JURY TRIAL

FILE NO. 51-CIV-16-1022

VOLUME 2

PAGES 128 - 386

DATE: February 26, 2019 at approximately 8:30 AM

PLACE: Pennington County Courthouse
Pennington County Circuit Court
Rapid City, South Dakota

BEFORE: THE HONORABLE THOMAS L. TRIMBLE
Circuit Court Judge
Seventh Judicial Circuit

George R. Cameron
Official Court Reporter
Seventh Judicial Circuit
Pennington County Courthouse
Rapid City, South Dakota 57709
605.394.2571

Q But are you familiar -- or have you familiarized yourself with thyroid conditions that can be this anterior intermediate mediastinal mass, that they can cause problems?

A Yes, absolutely, after reading the defendant's expert witness testimony, the deposition, stating that these extra thyroid tumors are never problematic, I did do some delving and came across an article in the -- a peer reviewed article in the Surgery Journal that said that all substernal masses should be removed. And that --

MR. BRAUN: Excuse me, Your Honor. This is an improper answer with no citation to authority, an undisclosed opinion.

THE WITNESS: Would you like the journal article?

MR. TORNOW: Let him rule.

THE COURT: Go ahead. Lay some foundation.

Q Go ahead, Doctor Wright.

A Okay. So it's from the International Surgery Journal, July, 2014, regarding substernal goiter. And in the article it states that a substernal goiter can --

MR. BRAUN: Excuse me. That's not enough foundation to put anything in out of a journal.

THE COURT: Go ahead. Finish answering the question. I'm sorry you were cut off.

MR. TORNOW: Go ahead.
A (Continuing) So it says that a substernal goiter can be -- there is a risk of malignancy in up to 20 percent of them. And that they can cause symptoms such as shortness of breath, difficulty swallowing, compression of the vasculature, and even sudden death. And then when you look at the record from Mayo Clinic, the CT scan that they had, it said that the tumor that was growing in her chest was compressing her blood vessels that go to the heart.
Q From your reading of the medical periodicals, did it talk about those substernal masses can cause coughing and that type of thing as well?
A Oh, absolutely. That the most common symptoms are shortness of breath, coughing, inability to sleep, hoarseness.
Q Are those -- are those -- in your review of the records from 2008 to 2014, up to the time of her going to Mayo Clinic, is that a consistent -- are those consistent issues that Jodie presented with when she appeared before Rapid City Medical Center, LLP providers?
A Yes.
Q Did you in your review of the records, up until the Mayo Clinic time period, see any Rapid City Medical

from -- strike that. Did you find that Jodie ended up unnecessarily going for treatments numerous times over the years that, if she had known would not have been necessary?

MR. BRAUN: Objection, undisclosed opinion.

THE COURT: Go ahead. You can answer.

MR. TORNOW: Go ahead.

A She spent a lot of time and effort going to different physicians to have different tests done to rule out all that other stuff even though the point existed that she had something that was causing her symptom in the first place. So, yes, she had numerous appointments.

Q And to be clear, I think you referred earlier that you did a report here. Did you actually make that finding in your report that Jodie suffered from unnecessarily having to go to be treated many, many, many, many times over the years for treatments and things that weren't necessary?

A Absolutely.

Q Just a couple more questions, Doctor. Did you see in these records that -- as to any -- well, let me back up. What is a thyroid specialist in the medical world?

A A thyroid specialist would be an endocrinologist, and

Q In your role as a primary care provider just dealing with thyroids, would you have an issue and a concern, I guess, as related to the standard of care to not follow through with that TSH test over the years?

MR. BRAUN: Object. Undisclosed. Again, no -- lack of foundation.

THE COURT: You can answer.

A It's standard of care that you would check a TSH, as I just described, any time you are going to prescribe this medication.

Q And, again, just to be clear, did you see that that happened here by Doctor Burgess?

A No.

Q Did you see -- to be clear, did you see that Doctor Rafferty ever ordered such a test?

A No. But he didn't prescribe the Levothyroxine.

Q Fair enough. And the only -- strike that. As a primary care provider dealing with that thyroid issue, and knowing about the TSH test not being done, but knowing that she was growing that substernal goiter, does that cause you any concerns or anything that you -- that should have been looked at and communicated to Jodie?

MR. BRAUN: Objection, foundation and undisclosed opinion.

THE COURT: Overruled. Go ahead and answer the question.

A So, if she had what we -- again, what we are presuming is thyroid issue until you have actually biopsied it to know, if we think it's thyroid tissue, there's no reason to believe that that thyroid tissue isn't going to be making hormone.

So, if she had -- if this thyroid was making hormone, but we are also giving her replacement hormone, we could be giving her too much. And that is also detrimental.

MR. TORNOW: Thank you, Doctor Wright. I don't believe I have anything further.

*** *** ***

CROSS-EXAMINATION

BY MR. BRAUN:

Q Good morning, Doctor Wright.

A Good morning.

Q You have done a lot of work since you and I met in June of 2018.

A Excuse me?

Q I say you have done a lot of work on this case since you and I met on June 6th of 2018?

A I have done some work on it.

Q Earlier in your testimony you indicated that you were

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF PENNINGTON SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON,

Plaintiff,

vs. File No. 51civ.16-001022

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,

Defendants.

DEPOSITION OF DR. MOLLY WRIGHT

DATE: June 6, 2018

TIME: 3:03 PM

PLACE: Paradigm Reporting & Captioning Inc.
1400 Rand Tower
527 Marquette Avenue South
Minneapolis, Minnesota55402

REPORTED BY:
Elizabeth J. Gangl
Registered Professional Reporter
Notary Public, State of Minnesota

all times.

Q. For labor and delivery?

A. No, that was actually for pediatrics.

Q. Oh, okay.

A. Hm-hmm. And so that was during the last part of my residency we would do moonlighting shifts.

Q. Okay, all right. Your research and professional experience, I see nothing in there related to thyroid.

A. Correct.

Q. You said you had been involved in ten other cases since 2016; do I recall right?

A. Yes. Well, I think this is number ten.

Q. Okay. In any of those cases have you given a deposition?

A. No.

Q. Are they all in Minnesota?

A. Yes.

Q. In any of those cases have you testified at trial?

A. Not yet.

Q. Are you set to testify at trial?

A. Yes.

Q. When?

A. October.

Q. What's the name of that case?

(Wright Exhibit 14 marked.)

BY MR. BRAUN:

Q. I want to go back and finish my housekeeping before we get any deeper here. Okay.

This is a notice of your deposition, ma'am. Have you seen this before?

A. Just prior to you walking in Mr. Tornow handed me what I believe to be that.

Q. Yes. And with my apologies; he didn't get it until yesterday so he couldn't show it to you any sooner than that.

A. Hm-hmm.

Q. But now having seen this, did you bring all of the materials that would fit these descriptions with you?

A. Primarily. I mean I didn't bring my own curriculum vitae but you had it.

Q. Right.

A. You also got a copy of my fee charges so far.

Q. Hm-hmm.

A. There are no particular texts that I felt were required for review.

Q. How about codes, standards, rules, regulations, manuals, treatises or videos?

A. Huh-uh.

MR. TORNOW: You need to answer yes or no.

THE WITNESS: So under Section F?
BY MR. BRAUN:
Q. Yes, ma'am.
A. None of those.
Q. Okay. So you reviewed none of those materials or considered any of them to be supportive of your opinions in this case?
A. I did not.
Q. Okay. And then G., "Any and all reference materials which aided, assisted or supported" you in forming the opinions that are contained in your report; are there any of those types of materials?
MR. TORNOW: Hold it. I'm going to object to the form of the question insofar as it calls for speculation. I guess, maybe to clarify, I would ask, Lonnie, are you saying did she review those or did she bring those?
BY MR. BRAUN:
Q. "Which aided, assisted or supported her in forming her opinions." Did you consider any of that type of material in forming the opinions that went into your report, ma'am?
A. No.
Q. And then correspondence you've given me, and we've looked at the billing materials.

Q. So as far as looking at a document that has a brief summary of all of your opinions in this case that you would testify to at the trial of this action, Exhibit 15 is still complete?

A. I would amend it with information based on that, but, yes.

Q. And how would you amend it, ma'am?

A. I would -- I would state that when evaluating for chronic cough and a patient -- and a person has a mass in their chest that's not commented on one way or another, that it's not a complete evaluation of the patient.

Q. All right. And you feel that that was a deviation of standard of care?

A. Yes.

Q. Okay. And what I want to know, ma'am, is what date do you believe that, if what you're claiming is standard of care was followed, when Ms. Frye-Byington would have had a operation?

A. Well, I can't state that.

Q. Why?

A. Because I'm not a surgeon.

Q. Okay. So you have no opinion, as far as whether in 2008 or 2014, whether the treatment, once the treatment was chosen, would have been any different,

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON) Case No. 51CIV.16-001022
)
Plaintiff,) Deposition of:
)
vs.) ROBERT C. BURGESS, M.D.
)
RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D.,)
)
Defendants.)

DATE: October 5, 2018, at 12:00 p.m.

PLACE: Thomas, Braun, Bernard & Burke
4200 Beach Drive, Suite #1
Rapid City, SD 57702

APPEARANCES:

FOR THE PLAINTIFF: MR. R. SHAWN TORNOW
Attorney at Law
4309 South Louise Avenue
Suite 101
Sioux Falls, SD 57106

FOR THE DEFENDANTS: MR. LONNIE R. BRAUN
Thomas, Braun, Bernard & Burke
Attorneys at Law
4200 Beach Drive, Suite #1
Rapid City, SD 57702

Also Present: Michael Rafferty, M.D. & Jodie Frye-Byington

dimension of 4.6 today compared to 3.38 previously?

MR. BRAUN: Hold on.

MR. TORNOW: Let's go off the record a second. I'll mark this one. You can have it.

(Exhibit Number 1 marked for identification.)

Q So what was the question again?

MR. BRAUN: Just for my purposes, it's the report beginning at RCMC 000208. Thank you.

A No. I was not aware of that.

Q Showing you what's been marked as Burgess 1, the second page of that document -- well, first of all, the top of the first page, you see that you're listed as the family provider, Exhibit 1?

A That's what the sheet says.

Q And if you look at page 2, it also, again, indicates that you're the family provider. Do you see that it indicates that there's a cc to Robert Burgess?

A I do.

Q Did you receive that?

A I don't recall ever seeing this report.

Q You don't recall ever seeing Exhibit 1, although you said you read the records and it's in the record --

A I do not recall ever --

Q Can you let me finish, please?

MR. BRAUN: Can you let him finish before you

start asking --

MR. TORNOW: No. He answered before I finished the question.

Q So let me ask the question and you can give an answer.

Did I understand your testimony correctly that you've never seen Exhibit 1 before when you just testified that you looked through all of the records that your counsel had where this record is included?

A I have never seen this. This is different than this one (indicating).

Q I don't know what you're looking at within your counsel's records.

A This is the medical record from the Rapid City Medical Center. That is from the hospital.

Q Okay. So Burgess Exhibit 1, you have not seen before and it's not part of the medical records in this case?

MR. BRAUN: Well, excuse me. I'm going to object as calling for a legal conclusion as to whether it's a part of the medical records in this case. But go ahead and tell him what your understanding is.

A What was the question?

Q I'll rephrase.

Is it your testimony that Exhibit 1 is a medical

record that you have not seen before today?
A Correct.
Q And just so I'm understanding your testimony, that on page 2 of Exhibit 1 where it says it was cc'd to you, your testimony is that you didn't receive it?
A I did not see that medical record.
Q Having reviewed the -- and if you need to take a minute to look at the record, reviewing the record today, does it indicate any concerns or any information that you see there that you believe should have been shared with Jodie Frye-Byington?
MR. BRAUN: Object, overly broad and vague. Go ahead.
A At the time this was performed, yes, her mass increased in size.
Q Okay. My question was, is there anything within Exhibit 1 that you believe should have been shared with Jodie Frye-Byington?
MR. BRAUN: Object, overly broad and vague.
A Yes. That the thyroid tissue had enlarged.
Q But you didn't inform her of that?
A No.
Q And you don't know if anybody else, any named defendant ever indicated that to Jodie prior to her surgery, do you?

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
PENNINGTON COUNTY	)	SEVENTH JUDICIAL CIRCUIT

JODIE M. FRYE-BYINGTON,

Plaintiff,

vs.

RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; And MICHAEL C. RAFFERTY, M.D.,

Defendants.

51 CIV 16-001022

Dr. Robert Durst and Dr. Brian Baxter's Objection to, and Motion to Quash Trial Subpoenas

To: **Plaintiff**, and her attorney R. Shawn Tornow.

Summary

Plaintiff tried to subpoena two witnesses, Dr. Robert Durst and Dr. Brian Baxter, by serving a secretary at the office where the two of them work. That is not proper service of the subpoenas, so they are ineffective.

We're not seeking to quash a validly served subpoena. Rather, the subpoenas are ineffective, and we are giving notice that the witnesses will not be attending.

Background

Plaintiff prepared subpoenas for Dr. Baxter and Dr. Durst. (Copies attached as Ex. A and Ex. B to the Ortmeier Affidavit filed with this Objection.) Plaintiff served the subpoenas by leaving them at the offices

of Dakota Radiology, with Jessica Ortmeier. Ortmeier is the assistant to the administrator. (See Affidavit of Jessica Ortmeier.)

Plaintiff attempted to serve the subpoenas less than 24 hours before the time set for testifying.

Argument

- A subpoena must be served in the same manner as a summons is served. SDCL § 15-6-45(c).
    - A summons upon an individual must be personally served. SDCL § 15-6-4(d)(8).
    - Plaintiff did not personally serve the subpoena upon either witness.
- "If the defendant cannot be found conveniently, service may be made by leaving a copy at the defendant's dwelling with someone over the age of fourteen years who resides there." SDCL § 15-6-4(e). First, Plaintiff has not shown that either witness could not "be found conveniently." Second, Plaintiff left the subpoenas at the witnesses' office, not their dwellings. Third, Ortmeier does not reside at the office.

Plaintiff has the burden of showing she properly served the subpoenas. *See, R.B.O. v. Priests of Sacred Heart*, 2011 S.D. 86, ¶ 7, 807 N.W.2d 808, 810 (referring to service of a summons). She has not, and the subpoenas are ineffective.

Conclusion

Because Plaintiff did not serve them, the witnesses are not subject the subpoenas, and will not be appearing.

Respectfully submitted the 5th day of March 2019.

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

By: */s/ Jeffrey G. Hurd*

Jeffrey G. Hurd
(jhurd@bangsmccullen.com)
333 West Boulevard, Ste. 400
P.O. Box 2670
Rapid City, SD 57709
Telephone: (605) 343-1040
Facsimile: (605) 343-1503

ATTORNEYS FOR DRS. DURST AND BAXTER

Certificate of Service

I certify that, on March 5, 2019, I served copies of this document upon each of the listed people by the following means:

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

R. Shawn Tornow
Tornow Law Office, P.C.
P.O. Box 90748
Sioux Falls, SD 57109-0748
605-271-9006
rst.tlo@midconetwork.com

Attorneys for Plaintiff

Greg Bernard
Thomas, Braun, Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702
605-348-7516
gbernard@tb3law.com

Attorneys for Defendants

/s/ Jeffrey G. Hurd
Jeffrey G. Hurd

20-70-50

MALPRACTICE — DUTY OF SPECIALIST

Instruction No. ____

A specialist in a particular field of medicine has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same field of specialization in the United States.

A specialist also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians in good standing engaged in the same field of specialization in the United States and to be diligent in an effort to accomplish the purpose for which the physician is employed.

A failure to perform any such duty is negligence.

References:

Mousseau v. Schwartz, 2008 S.D. 86, 756 N.W.2d 345
Kostel v. Schwartz, 2008 S.D. 85, 756 N.W.2d 363
Papke v. Harbert, 2007 S.D. 87, 738 N.W.2d 510
Matter of Yemmanur, 447 N.W.2d 525 (S.D. 1989)
Shamburger v. Behrens, 418 N.W.2d 299 (S.D. 1988) (Overruled on other grounds by Russo v. Takata Corp., 2009 S.D. 83, 774 N.W.2d 441)
See Instruction 20-70-30 references

Comment:

Papke v. Harbert, supra, found: "[t]he court's remaining instructions [including 20-70-50] properly informed the jury about the applicable standard of care." ¶¶14 and 52.

Although the South Dakota Courts recognize this standard of care for specialists, the locality rule may still apply to a general practitioner. The cases noted and the Comments to Instructions 20-70-30 and 20-70-40 should be reviewed in that event.

This instruction was previously numbered 105-03.

(Revised Mar 2017)

MALPRACTICE — DUTY OF PHYSICIAN

Instruction No. ____

A physician has the duty to possess that degree of knowledge and skill ordinarily possessed by physicians of good standing engaged in the same line of practice [in the same or a similar locality]*.

A physician also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians in good standing engaged in the same line of practice in the same or similar locality and to be diligent in an effort to accomplish the purpose for which the physician is employed.

A failure to perform any such duty is negligence.

References:

Mousseau v. Schwartz, 2008 S.D. 86, 756 N.W.2d 345
Martinmaas v. Engelmann, 2000 S.D. 85, 612 N.W.2d 600
Matter of Yemmanur, 447 N.W.2d 525 (S.D. 1989)
Shamburger v. Behrens, 418 N.W.2d 299 (S.D. 1988) (Overruled on other grounds by
Russo v. Takata Corp., 2009 S.D. 83, 774 N.W.2d 441
Fjerstad v. Knutson, 271 N.W.2d 8 (S.D. 1978) (Overruled on other grounds by
Shamburger v. Behrens, 380 N.W.2d 659 (S.D. 1986))
Block v. McVay, 80 S.D. 469, 126 N.W.2d 808 (1964) (Overruled on other grounds by
Shamburger v. Behrens, 418 N.W.2d 299 (S.D. 1988)
Restatement (Second) of Torts § 299A

Comment:

For duty of specialist, see Instruction 20-70-50.

For other professions and healing arts, see Instruction 20-70-10.

This instruction was previously numbered 105-01.

*Board certified physicians/specialists are subject to national standard.

(Revised Mar 2017)

20-70-20

MALPRACTICE — EXPERT WITNESS AS TO PROFESSIONAL'S KNOWLEDGE, SKILL, AND CARE

Instruction No. ____

You must decide whether the defendant possessed and used the knowledge, skill, and care which the law demands of a[n] _____ (insert profession) based on the testimony and evidence of members of the profession who testified as expert witnesses.

[However, you are permitted to consider the opinions and conclusions of lay witnesses on those subjects which are within the common knowledge and comprehension of people who have ordinary education, experience, and opportunity for observation.]

References:

Kostel v. Schwartz, 2008 S.D. 85, 756 N.W.2d 363
Mousseau v. Schwartz, 2008 S.D. 86, 756 N.W.2d 345
Luther v. City of Winner, 2004 S.D. 1, 674 N.W.2d 339
Mid-Western Elec. v. DeWild Grant Reckert & Assoc. Co., 500 N.W.2d 250 (S.D. 1993)
Savold v. Johnson, 443 N.W.2d 656 (S.D. 1989)
Matter of Yemmanur, 447 N.W.2d 525 (S.D. 1989)
Magbuhat v. Kovarik, 382 N.W.2d 43 (S.D. 1986)
Lenius v. King, 294 N.W.2d 912, 14 ALR4th 62 (S.D. 1980)
Key: Health, 821

Comment:

This instruction should be used when expert testimony is required.

This instruction may need to be tailored to fit the facts of any particular case.

This instruction was previously numbered 105-01-(B)

(Revised Mar 2017)

15-6-37(c) Failure to disclose--False or misleading disclosure--Refusal to admit.

15-6-37(c). Failure to disclose--False or misleading disclosure--Refusal to admit.

(1) A party that without substantial justification fails to disclose information required by subdivision 15-6-26(e)(1), or to amend a prior response to discovery as required by subdivision 15-6-26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorneys' fees, caused by the failure, these sanctions may include any of the actions authorized under subdivisions 15-6-37(b)(2)(A), (2)(B), and (2)(C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under § 15-6-36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. The court shall make the order unless it finds that:

(A) The request was held objectionable pursuant to § 15-6-36(a); or

(B) The admission sought was of no substantial importance; or

(C) The party failing to admit had reasonable ground to believe that the party might prevail on the matter; or

(D) There was other good reason for the failure to admit.

Source:(1)

Endnotes

1 (Popup - Source)

Source:

SDC 1939 & Supp 1960, § 36.0606; SD RCP, Rule 37 (c), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; Supreme Court Rule 76-3, § 11; SL 2006, ch 309 (Supreme Court Rule 06-35), eff. July 1, 2006.

15-14-1 Order of proceedings at trial.

15-14-1. Order of proceedings at trial. In civil jury cases, prior to the jury having been selected and sworn, the court may read a written statement of the case agreed upon by the parties to the prospective jurors. The statement may include a summary of the uncontested facts of the case, the claims of the parties and the issues presented. Any such statement of the case shall be submitted to the parties and agreed to by them before being read to the jury panel. The statement of the case read to the prospective jurors shall become a part of the instructions and charge to the jury except to the extent that justice may require any modification thereof after the evidence has been concluded. The jury shall then be selected and sworn, and the trial shall then proceed in the following order, subject to the right of the court, for good cause shown, otherwise to direct the order of statements, proof, and argument:

(1) The court may give such general and preliminary instructions pursuant to § 15-6-51, as the court, in its discretion, deems advisable;

(2) The plaintiff or party having the burden of proof shall state the issues and the general nature of the evidence he expects to produce in substantiation of the issues by stating what he claims the issuable facts to be, without argument, and without naming or identifying any particular witness or exhibit by which he expects to prove any of such issuable facts unless permitted by the court;

(3) The defendant or party not having the burden of proof shall then state the issues and the general nature of the evidence he expects to produce in substantiation of the issues by stating what he claims the issuable facts to be, without argument, and without naming or identifying any particular witness or exhibit by which he expects to prove any of such issuable facts unless permitted by the court;

(4) The party having the burden of proof shall then produce and offer before the court and jury the evidence on his part;

(5) The opposing party shall then produce and offer before the court and jury his evidence in support of his defense;

(6) The party having the burden of proof may then offer rebutting evidence only, and the opposing party may also offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

(7) When the evidence is concluded the court shall then settle the instructions and charge the jury;

(8) After the court shall have charged the jury, the plaintiff or party having burden of proof may commence and may conclude the argument, the opposing party making his argument between the opening and concluding argument of plaintiff.

Source:(1)

Endnotes

1 (Popup - Source)

Source:

SDC 1939 & Supp 1960, § 33.1307; SL 1993, ch 389 (Supreme Court Rule 93-6); SL 1999, ch 269; SL 2000, ch 257 (Supreme Court Rule 00-3).

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUN - 5 2020

Clerk

JODIE M. FRYE-BYINGTON, Plaintiff and Appellant,	**ORDER DENYING SECOND MOTION TO EXTEND TIME TO SERVE AND FILE APPELLANT'S REPLY BRIEF**
vs.	**#28952**
RAPID CITY MEDICAL CENTER, LLP; GARY L. WELSH, M.D.; ROBERT C. BURGESS, M.D.; and MICHAEL C. RAFFERTY, M.D., Defendants and Appellees.	**#28969 (NOR)**

Appellant having served and filed a second motion for an extension of time for service and filing of appellant's reply brief in the above-entitled matter, and appellee having served and filed a response thereto and the Court having considered the motion, response and response to opposition and being fully advised in the premises, now, therefore, it is

ORDERED that the motion be and it is hereby denied.

DATED at Pierre, South Dakota, this 5th day of June, 2020.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

(Justice Janine M. Kern disqualified.)

PARTICIPATING: Chief Justice David Gilbertson and Justices Steven R. Jensen, Mark E. Salter and Patricia J. DeVaney.