IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 28967

THOMAS WRIGHT,

Plaintiff/Appellee

v.

CURTIS TEMPLE,

Defendant/Third Party
Plaintiff/Appellant

KEN MERRILL,

Third Party Defendant/
Appellee.

APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT

PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI LINNGREN

CIRCUIT COURT JUDGE

BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES

1. Whether Temple was ever personally served and the action ever properly commenced.

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2. Whether Temple ever agreed or misrepresented that he would get insurance on the airplane or only fly with a specific instructor.

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3. Whether Temple was negligent and caused the mishap which damaged the Citabrai airplane.

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5. Whether the instructions, verdict form, and judgment authorized impermissible duplicative damages.

Greenwood Ranches, Inc. v. Skye Const. Co., Inc., 629 F2d 518 (8th Cir. 1980)
Grymberg v. Citation Oil & Gas Corp., 1997 SD 121, 573 NW2d 493, 502
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Roby v. McKesson, 219 P3d 749 (Cal. 2009).

STATEMENT OF THE CASE

This is an action filed by plaintiff Thomas Wright against Curtis Temple seeking money for general and punitive damage to a 1978 Champion 7GC/KC airplane, registration No. N5530K, commonly referred to as Citabrai, owned by Wright. E.g., CR 2. The plane was involved in an accident near Caputa, South Dakota, on July 25, 2014, when it was piloted by Ken Merrill who was giving instruction to Curtis Temple. Id. The complaint alleged that Temple was negligent, breached an oral contract, and committed fraud, conversion, and deceit along with promissory estoppel in the possession and operation of the plane. Id. It was alleged that Temple failed to secure insurance and

caused the collision that damaged the plane. Id. 2.

Plaintiff's summons and complaint in this case dated November 26, 2014, attempted to commence the present action but was not personally served on defendant Temple. CR 11, 27. Defendant Temple served a motion to dismiss based on insufficiency of service and answer on or about September 21, 2015. Personal service not being completed, plaintiff filed a motion for service by publication which was granted on or about May 3, 2016. CR 11. Publication was completed. CR 50. Plaintiff filed a first amended complaint on or about October 3, 2017. CR 82. Temple moved to dismiss and submitted an answer to the amended complaint on September 27, 2017. CR 110.

On November 1, 2017, Temple moved to file a third party complaint for contribution against Ken Merrill, who was in the airplane at the time that it was damaged. CR 92. The order granting the motion was granted on November 21, 2017. CR 106. Merrill filed an answer and counterclaim on December 28, 2017, and moved to dismiss the third party complaint on January 3, 2018. CR 125. The motion to dismiss was withdrawn on October 16, 2018. CR 190.

Plaintiff Wright filed a second amended complaint on February 8, 2019. CR 655.

A pretrial and motion hearing was held on February 8, 2019. Temple's motion for summary judgment and his motions in limine regarding insurance and a second airplane mishap were orally denied. CR 194. Plaintiff Wright's motion for punitive damages was held in abeyance until trial. CR 649. A written order was entered denying the motions on February 20, 2019.

A jury trial was held on February 20, 21, and 22, 2019. On February 22, 2019, the jury awarded plaintiff Thomas Wright damages in the amount of $34,144.84 on the negligence claim, $34,144.84 on the breach of contract claim, and $34,144.84 on the deceit claim. App. 8-12; CR 667, 837. The jury found for defendant Temple on the claims for fraud and promissory estoppel. Id. The Circuit Court prior to verdict denied plaintiff's request for punitive damages. TT 383. Plaintiff voluntarily dismissed the claim for conversion. TT 436. The jury awarded judgment against Curtis Temple on his claim against Merrill and in favor of Ken Merrill on his claims against Curtis Temple but awarded no damages to Merrill. App. 8-12; CR 667-837.

On March 12, 2019, a hearing was held on the judgment that should be entered after the jury verdict. CR 837. On March 15, 2019, the Court entered a judgment in favor of plaintiff, Thomas Wright, against Curtis Temple in the amount of $102,434.52 plus prejudgment interest of $47,428.59 and costs of $2,904.99. CC 93. Ken Merrill was awarded costs in the amount of $1,242.42. Id.

Notice of entry of the judgment was served on March 19, 2019. CR 931.

A motion for judgment as a matter of law or for a new trial was made by defendant Temple and was denied by the Circuit Court on April 15, 2019. CR 936, 967.

Temple filed and served notice of appeal and docketing statement on April 17, 2019. CR 969.

Plaintiff Wright filed a notice of review on the dismissal of the punitive damage claim on May 3, 2019.

STATEMENT OF THE FACTS

Curtis Temple is a rancher on the Pine Ridge Indian Reservation. TT 22. He was in need of an airplane to learn to fly and periodically observe, monitor, and count the cattle on his ranch. TT 22. Temple had a friend, Denny Kauer, who was a friend of his family and a licensed pilot. TT 64. Kauer informed Temple that there was a 1978 Citrabria airplane advertised for sale at Black Hill Aero located on the Spearfish Airport in Spearfish, South Dakota. TT 64. Kauer knew Ted Miller, the owner of Black Hills Aero and manager of the airport.

In the last part of June, 2014, Temple and Kauer went to Spearfish to view the Citabrai and talk with Ted Miller, TT 64-65, who had been authorized by the Ted Wright, the owner to, rent and sell the plane. TT 179. Temple had a hangar and dirt runway at Caputa off of Highway 44 south of Rapid City. TT 69. Miller at Temple's request allowed Kauer to fly the airplane to Caputa to try out and see if the plane was suitable for flying from Temple's runway. TT 78, 157. Temple's intention was to see if the airplane was something that he wanted to buy and to learn to fly in because Temple was not a pilot, had no license, and had no experience in piloting an airplane. TT 156.

Miller testified that it was his practice to have everything in writing when a plane was rented or leased by him. TT 210. However, when Kauer left the Spearfish Airport with the plane to fly to Caputa there was nothing in writing, arrangements were oral, contrary to Miller's normal procedure. TT 211. Miller testified that he told Temple that in flying the plane he had to use a licensed pilot and have insurance on the plane but there was nothing in writing. TT 158. Robert McNew was one such pilot and was at the airport when Miller informed Temple of those conditions. TT 157.

Once the plane was at Caputa, Temple inquired of Ken Merrill, a licensed pilot, whether he would give flying instructions to Temple. TT 249. Merrill indicated that he would and testified that he told Temple to secure insurance and contacted some insurance companies for him. TT 254-255. Over the next few days from July 2, 2014, to July 14, 2014, Merrill flew with and instructed Temple 6 times. TT 26, 89. Merrill went on vacation and when he returned to fly with Temple again on July 25, 2014, TT 271-272, he seen from the logs that Temple had flown the plane with Robert McNew while he was gone. 273. On July 25, 2014, Merrill and Temple flew the Citabrai and on take off it failed to attain sufficient power to lift off and hit a ravine causing considerable damage to the airplane, giving rise to the present lawsuit. TT 276-281. Merrill concluded that Temple had his feet on the brakes resulting in insufficient power. TT 281. Temple denied that he had his feet on the brakes, TT 142, or that McNew had ever told him to use the brakes on take off. TT 141.

Tom Wright, plaintiff in this action, was the owner of the 1978 Citabrai. TT 323. Wright was not a licensed pilot and had no experience flying the Citabrai. TT 354. He had left the airplane at Black Hills Aero with Ted Miller beginning in 2003 to 2010 giving him complete authority to rent or lease the airplane at the rate of $50 per hour and to sell it if he could. TT 327, 354. The plane never generated much income from being rented. TT 354. All arrangements with Miller were oral; nothing was in writing. TT 326. Wright had the plane insured if it was being flown by or with a certified pilot listed with the insurance company. TT 326. McNew was listed, but Merrill was not. It would not have been a problem getting Merrill insured if Wright would have been notified. TT 327, 357. Wright had no knowledge of the arrangements between Miller and Temple though he indicated a written lease should have been required and insurance been confirmed by Miller. TT 359.

ARGUMENT

I. TEMPLE WAS NEVER PERSONALLY SERVED AND THE ACTION WAS NEVER PROPERLY COMMENCED.

An action is commenced in South Dakota by personal service of a summons and complaint. SDCL 1967 15-6-3, 15-2-30, 15-2-31. Validity of service is reviewed de novo as a matter of law. Bradley v. Deloria, 1998 SD 129 ¶ 3, 587 NW2d 591. The trial court denied Temple's motion to dismiss on grounds of invalid service because Temple filed a motion to dismiss and answer. 2/8/19 MH at 11. The motion to dismiss and answer raised the invalidity of service and so it could not have been waived as the trial court found. The record in this case reflects that Curtis Temple was never personally served with a summons and complaint but rather was served by publication. CR 46. Service by publication is only allowed when a defendant cannot after due diligence be found within South Dakota. SDCL 1967 15-9-7. Temple had lived in the same place in Oglala County all of his life and was never gone so that personal service could not be accomplished. Temple Dep. 121-122; Add. 2-3. To justify service by publication due diligence must be established which means that all reasonable means to serve a defendant have been exhausted. Ryken v. State, 305 NW2d 393 (SD 1981). It was never shown that any tribal process server was ever solicited to serve Curtis Temple, which would be required because he is a tribal member. Bradley v. Deloria, 1998 SD 129, ¶ 8, 587 NW2d 591. Due diligence and reasonable efforts were never established; defendant was never been served personally with a copy of the summons and complaint; and Temple was deprived of due process, this case was never properly commenced, and should have been dismissed. E.g., Deno v. Oveson, 307 NW2d 862, 863 (SD 1982).

II. THERE WAS NEVER ANY CONSENT OR MISREPRESENTATIONS BY TEMPLE REGARDING INSURANCE ON THE AIRPLANE OR COVERAGE THROUGH A SPECIFIC INSTRUCTOR.

Existence of a contract is question of law. LaMore Restaurant Group, LLC v. Akers, 2008 SD 32 ¶ 12, 748 NW2d 756. The interpretation of a contract is a question of law. State Farm Insurance v. Habert, 2007 SD 107 ¶ 17, 741 NW2d 228. Whether a contract is ambiguous is a question of law. Detmers v. Costner, 2012 SD 35 ¶ 20, 814 NW2d 146. The interpretation of a contract is a question of law reviewed de novo. Aggregate Const., Inc. v. Aaron Swan & Associates, 2015 SD 79 ¶ 8, 871 NW2d 508. Whether a term in a contract is ambiguous is a question of law reviewed de novo. Lillibridge v. Meade School Dist., 2008 SD 17 ¶ 9, 746 NW2d 428.

Plaintiff's second amended complaint in count II alleged a breach of contract by Temple by misrepresenting that Temple possessed adequate and proper insurance coverage typically required by standards of the industry before he flew the plane as required by Ted Miller. Plaintiff's amended complaint in count IV alleged deceit based on the same alleged misrepresentations as in count II. CR 655. Temple's motion for summary judgment, directed verdict, and motion for new trial on these counts were all denied by the trial court. 2/8/19 MH 8, 11(motion hearing); TT 430-431, 437 (motion for directed verdict); CR 936, 967 (motion and order denying judgment or new trial).

Ted Miller made all arrangements for the lease and rental of the Citabrai during the approximately 10 years that he had been leasing and renting it for Thomas Wright, the owner. TT 199. Miller rented out the plane for Wright to other persons charging them $50 per hour. TT 209. There was nothing in writing between Miller and Wright. TT 210. Temple paid the $50 per hour for his use of the plane. TT 167.

It was the practice and procedure of Miller when renting the plane out to have

everything in writing, including the persons who could fly the plane, the arrangements for rent and fuel, proof of insurance, and signed by a person responsible for piloting the plane. TT 210, 212, 239. Miller said the way he allowed the plane to be taken to Caputa and kept there for a month by Temple was not his normal procedure because he thought Temple was going to buy the plane. TT 211. Temple signed nothing and there was no writing in existence as to his use of the plane. TT 236.

Ted Miller testified at trial that the first time he met Temple and Denny Kauer concerning the Citabrai he allowed Denny Kauer to fly the airplane to Caputa. TT 157. Miller also testified that he told Temple to get hull insurance on the airplane to cover any damage to the plane, TT 158, 162, and to fly with Robert McNew because McNew was covered by insurance. TT 157. But there was nothing in writing on either. TT 213. Miller knew Temple did not know how to fly an airplane. TT 213.

According to Miller, after the plane was flown to Caputa by Kauer, he had conversations with Temple about insurance but it was obvious to Miller that Temple never had insurance. TT 165. Temple never told Miller that he had insurance and Miller was uncertain whether Temple had insurance. TT 233.

Temple testified at trial that he had no recollection of Ted Miller instructing him to secure insurance or fly with a specific instructor. TT 75-76, 78, 148. He also had no recollection of Ken Merrill telling him to have insurance. TT 84.

Oral contracts are recognized in South Dakota. SDCL 1967 53-8-1. The elements of an oral or implied contract (53-1-3 implied by conduct) are the same as a written contract. SDCL 1967 53-1-2; Setliff v. Akins, 2000 SD 224 ¶ 28, 616 NW2d

878. One element of an enforceable contract is an enforceable promise. Gul v. Center For Family Medicine, 2009 SD 12 ¶ 10, 762 NW2d 629. A contract requires the consent of both parties. SDCL 1967 53-1-2. The consent is required to be mutual and communicated to each other. Id.; SDCL 1967 53-7-4. The consent must be mutual and all parties must agree on the same thing. SDCL 1967 53-3-3. An acceptance must be absolute and unqualified or acceptance of that character which the proposer can separate from the rest. SDCL 1967 53-7-3. Silence will not of itself constitute an acceptance, McGlone v. Lacey, 288 F.Supp. 662, 665 (D.S.D. 1968), and a party cannot be bound to contracts they never agreed to accept. Masteller v. Champion Home Builder, 2006 SD 90 ¶ 13, 723 NW2d 561. The words and conduct of a party are viewed to determine mutual consent and this requires a meeting of the minds on a specific subject and does not exist unless the parties agree on the same thing in the same sense. Arrowhead Ridge I, LLC v. Cold Stone Creamery, 2011 SD 38 ¶ 11, 800 NW2 730. Compare Federal Land Bank of Omaha v. Houck, 4 NW2d 213 (SD 1942) (payment on mortgage debt does not manifest volition to assume mortgage debt); Standard Cas. Co. v. Boyd, 71 NW2d 450 (SD 1955) (no acceptance of offer to insure); Englebert v. Ryder, 91 NW2d 739 (SD 1958)(contract not conditional on furnishing performance bond); Knapp v. Breeding, 95 NW2d 535 (SD 1959) (insufficient evidence that house rented for $25 per month to be credited against balance due on note).

There was no writing and no evidence that Temple ever agreed to purchase insurance as a condition of flying the Citabrai in this case. Temple thought that the owner, Tom Wright, had insurance on the airplane. TT 91. Moreover, Robert McNew

testified that it was standard and reasonable for instructors to have insurance, TT 405, and that one would have thought that the owner would also have insurance. TT 416.

Even if it is found that Temple breached the agreement, a breaching party as a defense can show as a defense that the non-breaching parties' damages would have been lessened by the exercise of due diligence, i.e., here requiring proof of insurance in writing like his normal practice, having the plane returned when Miller knew that Temple did not have insurance, or taking the initiative to secure the insurance needed to cover any damage to the airplane. See Arrowhead Ridge I, LLC v. Cold Stone Creamery, 2011 SD 38 ¶ 20, 800 NW2d 730. And regardless of whether Temple breached any agreement, it would have to be shown that Temple was negligent or in some manner caused the mishap which damaged the plane, which was never proven at trial. Wright should have sued or claimed against Merrill at the trial which he did not do.

Curtis Temple did not breach any contract with or deceitfully make any misrepresentations to Ted Miller regarding insurance.

III. CURTIS TEMPLE WAS NOT IN CONTROL OF THE CITABRAI, HAD NO DUTY IN ITS OPERATION, AND WAS NOT NEGLIGENT IN THE OPERATION OF THE PLANE ON JULY 25, 2014.

The existence of a duty, and foreseeability in defining the boundaries of that duty, are questions of law to be determined by the court de novo. Janis v. Nash Finch Co., 2010 SD 27 ¶ 8, 780 NW2d 497. The scope of a duty is a question of law to be determined de novo. Collins v. Baker, 2003 SD 100 ¶ 9, 668 NW2d 548. Questions relating to whether a duty has been breached and causation are determined by the trier of fact, Iverson v. NPC Int'l, Inc., 2011 SD 40 ¶ 7, 801 NW2d 275, provided that there is

sufficient evidence to support them. Myers v. Lennox Co-op. Ass'n., 307 NW2d 863, 864 (SD 1981). Where the case is clear that no duty or foreseeability exists, where facts are not in dispute, or reasonable persons could not differ, the issue cannot be left to the jury. Baddou v. Hall, 2008 SD 90 ¶ 11, 756 NW2d 554; Bothern v. Petersen, 155 NW2d 308, 310 (SD 1967).

Plaintiff's second amended complaint in count I alleged that on July 25, 2014, Curtis Temple was negligent in the operation of the Citabrai airplane by attempting to achieve lift off in a manner contrary to the normal operation of the plane. CR 655.

Curtis Temple moved to dismiss any allegation based on negligence in the operation of the plane because he was not licensed to fly an airplane, did not now how to operate an airplane, was taking lessons in the plane, and was with Ken Merrill, a licensed instructor, who was responsible for the control and operation of the airplane. Temple's motion for summary judgment, directed verdict, and motion for new trial moving that this claim be dismissed were denied. Temple's motion for summary judgment, CR 194 (motion); 2/8/19 MH 8, 11 (motion hearing); TT 430-431, 437 (motion for directed verdict); CR 936, 967 (motion and order denying judgment and new trial).

In order to prevail in a negligence suit, plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury. Hamilton v. Sommers, 2014 SD 76 ¶ 21, 855 NW2d 855. All facts and circumstances must be considered. Northwestern Bell v. Henry Carlson Co., 165 NW2d 346, 349 (SD 1969).

The right of an injured person to recover from a wrongdoer who fails to exercise ordinary care does not define the circumstances under which the law imposes a duty.

Millea v. Erickson, 2014 SD 34 ¶ 13, 849 NW2d 272.

Whether or not a duty exists is a question of law determined by reference to statutes, rules, principles, and precedents which make up the law. Maher v. City of Box Elder, 2019 SD 15 ¶ 9, 925 NW2d 482. Moreover, whether federal law establishes a standard of care is a matter of state law. Highmark Federal Credit Union, 2012 SD 37 ¶ 11, 814 NW2d 413.

To recover under a negligence cause of action, a plaintiff must prove not only that defendant was negligent but that defendant's negligence was the proximate cause for the ensuing damage. Zarecky v. Thompson, 2001 SD 121 ¶ 17, 634 NW2d 311. For a legal or proximate cause to exist, the harm suffered must be a forseeable consequence of the act complained of; in other words, liability cannot be based on speculative possibilities or circumstances and conditions remotely connected to events leading up to an injury, and the defendant's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as the cause of the injury. Wierzbicki v. United States, 32 F.Supp. 3d 1013, 1025 (D.S.D. 2014).

After having flown with Ken Merrill for 6 previous times, TT 253; 263; 264; 266; 267; 269, Temple had called Merrill by phone to arrange for an instruction on July 25, 2014. TT 273. At all times Temple was paying Merrill $50 per hour for instruction. TT 318. The Citabrai was at the Caputa landing strip and Merrill traveled there to meet Temple. Merrill noticed that Temple previously had received instruction 3-4 times from Robert McNew. TT 261. Temple had no experience in flying when the first lesson was given on July 2, 2014. TT 253. After that instruction by Merrill, they jointly did four

takeoff and landings. TT 269.

The Citabrai was a two seat airplane, one seat in front for the student and the back one for the pilot. TT 300. It had 2 throttles, 2 yokes or sticks, 2 rudders, and 2 brakes. TT 301. If the student moves the throttle, the instructor knows because he can see it and on take off can feel it. TT 301. What the student does with the stick, movement shows on the instructor's stick. TT 302. The instructor can feel any movement of the rudders by the student. TT 302. The instructor cannot see the brakes and can only sense and feel TT 302. There was an intercom so that the pilot could communicate with the student. TT 294.

The Caputa landing strip was dirt and grass, mowed, 1350 to 1500 feet long, ungraded, unmarked, and unlighted. TT 261, It went from the southeast to the northwest. TT 277. Merrill testified that the plane should get off the ground in 400 to 500 feet. TT 262. Merrill allowed Temple under Merrill's supervision to have joint control of the plane. TT 276, 280. Temple did the preflight, taxied the plane out, positioned it, held the brakes, and did the run up. TT 276. Temperature was 84 degrees. TT 277. Merrill had no concern about density altitude. TT 278. Halfway down the landing strip, 30-40 seconds after take off, TT 287, Merrill in 5 to 10 seconds noticed that the plane was not accelerating like it should, did not have full power, and speed was not there. TT 280, 287. Merrill took control, applied the throttle, which both he and Temple had control over, to full power, TT 280, and determined that he had enough runway to get off the ground. TT 281. However, there was not enough airspeed to fly, TT 281, and the plane went airborne for a short distance across a swale, hit a slope

on the other side, and the plane collapsed, tearing one landing gear off and bending the other one. TT 281-282. Merrill said that he should have cut the speed and could have aborted the take off and the damage to the plane would not have occurred had he done so. TT 282, 286. Merrill said that he should have aborted the take off and he made the wrong decision by failing to do so. TT 291.

Merrill concluded that Temple had his feet on the brakes after take off which prevented the plane from attaining fly speed. TT 288. If Temple had not had his feet on the brakes, the plane would have flown according to Merrill. 288. However, Merrill admitted that he could not see the brakes or whether Temple's feet were on the brakes. TT 289. There was no intercom discussions between Merrill and Temple about the brakes. TT 294. After the mishap, Merrill never asked Temple if he had his feet on the brakes nor did Temple ever say he had his feet on the brakes. TT 289. Merrill's conclusion about Temple's feet being on the brakes was because Merrill knew what the plane was capable of doing and Temple's feet being on the brakes was the only explanation. TT 289. Temple at trial denied that he had his feet on the brakes during take off. TT 142. Merrill indicated that before the flight Temple indicated that McNew had told him to use the brakes to keep the airplane in a straight line which is correct generally. TT 276. Temple at trial denied that McNew ever told him to use the brakes on take off, TT 142, and McNew at trial denied he had ever told Temple such a thing.

Merrill admitted that FAA regulations say that the instructor is in command of the aircraft. TT 293. Merrill had control of the throttle and of the airplane and Temple was

at all times under Merrill's supervision. TT 293, 295. Temple had no training, experience, or license as a pilot. TT 403. Merrill at trial indicated that Temple was a slow learner and the light had not gone on in his head. TT 305-306. If he thought Temple was doing something wrong, Merrill would have corrected it. TT 296. Robert McNew, a pilot licensed in a multitude of area with over 50 years of flying experience, TT 391-392, testified that the instructor was the pilot in command and responsible for the plane and any damage to it. TT 401, 403, 423. A fundamental proposition, referred to over and over in the reported cases involving air carrier crashes and other accidents, is the mandate in the regulations (Federal Aviation Regulations, 14 CFR § 91.3 (a)) that "the pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of an aircraft." In re Air Crash Disaster at New Orleans, 544 F2d 270, 278 (6th Cir. 1976); Ingham v. Eastern Airlines, 373 F2d 227, 231 n. 3 (2nd Cir. 1967); Baker v. United States, 417 F.Supp 471, 485 (W.D. Wash. 1975). A pilot of an airplane is charged with a duty toward a passenger commensurate with the nature of the instrument employed and with the duty imposed on him by law. Scarborough v. Aeroservice, Inc., 53 NW2d 902, 910 (Neb. 1952). "The control of a ship or airplane must, of necessity, be entrusted to a captain. Whether an engine should be feathered, whether one course as against another should be followed, whether the plane should fly over or under a storm, are all decisions within his judgment and discretion." D'Aleman v. Pan Am World Airways, 259 F2d 493, 494 (2nd Cir. 1958). Because of his training, first hand knowledge of flight conditions and sole hands on ability to maneuver the aircraft, a pilot in command is directly responsible for and has the final authority as to the operation of

the aircraft. Wojciechowicz v. United States, 576 F.Supp.2d 241, 274 (D.P.R. 2008), aff'd. 582 F3d 57 (1st Cir. 2009). See Arrow Aviation v. Moore, 266 F2d 488, 491 (8th Cir. 1959) (loss of control). Failure to exercise proper and requisite control may consist of misexecution of engine power and throttle. Riley v. Capital Airlines, 20 A.D. 682, 246 N.Y.S.2d 1022 (4th Dept. 1964) (upholding plaintiff's proposed findings of fact § 22-28 that included acts of negligence).

Curtis Temple had no duty pertaining to flying the Citabrai when the mishap occurred. He was a student without any experience or knowledge in piloting an airplane. Merrill was the licensed pilot who was in control and should have aborted the take off as he acknowledged. Temple as a matter of law could not be held responsible for the mishap.

IV. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON THE CLAIMS FOR DAMAGE AND WRIGHT'S DAMAGE REQUEST WAS NOT AUTHORIZED UNDER HIS OWN INSTRUCTIONS THAT WERE GIVEN.

Trial courts have broad discretion in instructing a jury, but their instructions must provide a full and correct statement of the law. Walter v. Fuks, 2012 SD 62 ¶ 18, 820 NW2d 761. Because of this discretion, instructions given by the court including the decision to grant or deny an instruction are reviewed under the abuse of discretion standard. Carlson v. Construction Co., 2009 SD 6 ¶ 13, 761 NW2d 595. But a trial court has no discretion to give an incorrect or misleading instruction and to do so constitutes reversible error. Kadrmas, Lee, and Jackson, Inc. v. Morris, 2010 SD 61 ¶ 10, 786 NW2d 381. Incorrect, misleading, conflicting, or confusing instructions constitute reversible error if shown to be erroneous and prejudicial. Fix v. First Bank of

Roscoe, 2011 SD 80 ¶ 10, 807 NW2d 612. A court's failure to give a requested jury instruction that properly sets forth the law constitutes error. Carlson v. Construction Co., 2009 SD 6 ¶ 13, 761 NW2d 595. Jury instructions in total are reviewed de novo to determine if they provided a full and correct statement of the law. Papke v. Harbert, 2007 SD 87 ¶ 13, 738 NW2d 510.

Wright testified that his father bought the Citabrai in 1978 and owned it until he died in 1994. TT 324. Miller said Wright's father paid $23,000 for the plane. TT 176. In 1984 or 1985, his father crashed the plane causing significant damage and sudden engine stop to the prop, landing gear, and fabric. TT 324. The plane did not pass inspection in 2009 because of a crack in the wing and damage to the fabric resulting in a repair and rebuild lasting 3 years and cost of $100,000. TT 332. Wright put the plane up for sale again at the end of 2013 or early 2014 after the repairs with the urging of his wife who was concerned that he was not learning to fly and the plane was costing money. TT 333, 339. Wright was asking $75,000 for the airplane but received no offers. TT 343, 362, 364. Temple never made any offers to Wright to buy the plane. TT 378.

After the damage sustained on July 25, 2014, Wright had the Citabrai repaired by Miller for the cost of $79,083. TT 369. Although Wright could never sell the Citabrai for $75,000 either in the nearly 10 years before or the year after the July 25 damage repairs, he maintained that the Citabrai had a fair market value of $75,000, TT 343, 362, 365-366, though it had never been appraised. TT 366. Wright sold the Citabrai to Shane Coombs for $52,500 on May 25, 2016, after the repairs had been made from the July 25, 2014, damage. TT 352. Wright testified that he was getting pressure from his

wife to sell and wanted to stop the bleeding from the expenses of the plane. TT 333, 353. As Wright indicated, Coombs got a deal, but Wright had no further expenses. TT 353. Wright indicated that exhibit 31, Add. 4, set forth his damages, TT 347, for the conversion, fraud, deceit, and promissory estoppel that he was claiming. TT 348-351.

The trial court gave Wright's instruction 34 and 35, Add. 5 and 6, to the jury on damages. Temple objected. TT 510-514. In sofar as damages are concerned, Temple submitted South Dakota Pattern Jury Instructions (PJI) 50-20-10 through 50-20-50. CR 252. These are the instructions applicable to damages for personal property regardless of whether the claims sound in contract or tort. When damages to personal property are at issue, there is not one calculation based on breach of contract as in instruction 34 and another one based on negligence as in instruction 35, both of which are different. Instruction 34 and the calculations set forth there are not supported by any case law or the PJI. There is no instruction set forth in instruction 34 other than Wright's request as set forth in exhibit 31 and that the jury could return damages "likely" resulting from Temple's conduct. No damage instruction at all was given as to deceit, fraud, or promissory estoppel. It was error to give two instructions on damages when the case was based on one incident causing alleged damage and the same alleged damage accrued regardless of whether the alleged damage claim was based on negligence or breach of contract. The instructions given in instruction 34 and 35 were confusing and not supported by law.

The general instruction on damage to personal property is set forth at PJI 50-20-10 and is determined by the lesser of two measures: (1) the difference between the fair

market value of the property immediately before occurrence and immediately after occurrence, or (2) the reasonable expense of making any necessary repairs to the damaged property, plus the difference, if any, in the fair market value of the property immediately before the occurrence and its fair market value immediately after repair. See State v. Martin, 2006 SD 104 ¶ 9, 724 NW2d 872; Joseph v. Kerkvliet, 2002 SD 39 ¶ 10, 642 NW2d 533; State v. Jacquith, 272 NW2d 90, 92 (SD 978); Thormahlen v. Foos, 83 SD 558, 564, 163 NW2d 350 (1968).

Plaintiff Wright had been trying to sell the airplane for $75,000 for years, he never received one offer of $75,000 during the time he had it for sale. The value of the plane had never been appraised. After the mishap on July 25, 2014, and after he had paid Ted Miller $79,000 to completely repair the plane, he advertised it for sale nationally and still received no offers. Applying the first measure of damages, Wright ended up selling the plane to Shane Coombs in May, 2016, for $52,500, which is the fair market value of the plane both before and after the July 25, 2014, occurrence. That was the fair market value both before and after the July 25 occurrence. No other fair market value was established at trial. Applying the second measure of damages, after the July 25 occurrence, Wright paid Miller $79,000 to repair the plane. There was no difference in the fair market value before or after July 15 occurrence. The lesser of the two measures is $52,500. None of the other parts of the PJI from 50-20-20 to 50-20-50 would change the calculation under the second measure of damages. In short, you do not get to put $79,000 into the repair of an airplane, or for that matter any item of personal property, sell it for $52,500 and claim the difference between what you sold it for and the value of the repairs as an item of

damage.

Wright's position to the jury on damages was set forth in exhibit 31, Add. 4. First, this position presupposed that the fair market value was $75,000 before the July 25 incident. The testimony at trial was that Wright wanted to get $75,000 for the plane but for years did not receive one offer in that amount. The only fair market value number in the entire trial was the $52,500 amount that Wright sold the airplane to Shane Coombs for in May, 2016, after it had been completely repaired by Ted Miller. Second, exhibit 31, which Wright argued to the jury, after improperly stating that the fair market value was $75,000, instructed the jury to reduce the proceeds by $52,500, which is found no where in his proposed instruction 35, and no where in PJI 50-20-10.

The damage instructions given in this case for all of the above reasons were inaccurate, confusing, and the instructions overall failed to properly instruct the jury as to applicable law.

V. THE INSTRUCTIONS, VERDICT FORM, AND JUDGMENT AUTHORIZED IMPERMISSIBLE DUPLICATIVE DAMAGES NOT AUTHORIZED BY LAW.

During discussions on and off the record at the conclusion of the evidence, the parties and the court worked on settling instructions. The discussions focused heavily, but not exclusively, on whether and in what form instruction 39 (instruction 34 as given) should be given and whether an instruction should be given that it was "either or" instruction 34 or 35 but not both so as to prevent what the parties and the court labeled as "double dipping." TT 486-488. The court at the close of discussions indicated that when discussions resumed the next morning it would add a proposed instruction 35

dealing with that subject. TT 488; Add. 7. The next morning the court indicated that it would not give a separate "double dipping" instruction, but said that the court had authority to make any adjustments at a hearing after verdict if the verdict rendered was contrary to law. TT 518, 520 Temple objected, his counsel stating "there (should be) something in there that tells the jury that they can only award damages on one claim. They can't award damages on numerous claims." TT 519.

After the jury returned its verdict in this case, Wright proposed a judgment in the total amount of $102,435. Temple opposed the judgment. CR 837. A hearing was held on March 12, 2019, and the lower court entered judgment in the amount returned by the jury. CR 923; Add. 13. Notice of entry was given by Wright. CR 931. Temple filed a motion for judgment as a matter of law or for a new trial based in part on the improper judgment, which was denied. CR 967.

The jury returned an identical verdict of $34,144.84 for each separate claim of breach of contract, negligence, and deceit. Add. 8. The trial court misinterpreted the verdict in this case. Instead of awarding a single verdict of $34,144.85, which was the identical damage given for each separate claim of breach of contract, negligence, and deceit, the trial court wrongly combined the separate verdicts giving Wright a total verdict of $102,434.52, Add. 13, and in the process impermissibly awarded Wright triple damages.

The evidence was undisputed at trial that Wright tried but could not sell the airplane in this case for $75,000 prior to the damage done to the airplane on July 25, 2014. As a result of the accident to the plane, Wright incurred costs of $79,083.02 in

repairing the plane. Soon after repairing the plane, Wright sold the airplane to Shane Coombs for $52,500. There was no difference in the fair market value of the airplane prior to or after the accident. Wright could only claim damages of the difference between the repairs and subsequent sale, a total of $26,583.02, not the amount of judgment authorized in this case. Wright was not entitled to claim the fair market value of the airplane at $75,000, when he could never sell it for that amount plus repairs in the amount of $79,083.02, all as set forth in Add. 5. And even if there was a difference in fair market value of the airplane before and after the accident, it could not have been more than $25,000, making the judgment given in this case nearly twice as much as the $51,583.02 Wright would have been entitled to under the law. The verdict is excessive and wrong.

In this case, Wright had one set of damages that he urged the jury to award. Add. 5. In final argument, Wright did not discuss separately negligence, breach of contract, or deceit or the amount of damage he suffered under each cause of action. Wright did not argue how he was damaged differently under each of the causes of action. The same wrong, i.e., a single airplane accident, gave rise to each cause of action. Put differently, each cause was an alternative theory seeking relief for the same single wrong. Nelson v. WEB Water Development Ass'n., 507 NW2d 691, 696 (SD 1993). Wright asked for one amount set forth on exhibit 31, Add. 4, or the amount of $106,607.10 regardless of the cause of action. The jury awarded the same amount under each cause of action, $34,144.84, which was the total damage suffered.

The verdict must be set aside because it represents double or triple damages to

Wright which is impermissible under South Dakota law, Grymberg v. Citation Oil & Gas Corp., 997 SD 121 ¶ 23 n. 4, 573 NW2d 493, 502 n. 4; Ripple v. Wold, 1996 SD 68 ¶ 7, 549 NW2d 673, 674-675; see Moysis v. DTG Dastanet, 278 F3d 819, 828 (8th Cir. 2002), as are uncertain or speculative damages or profit beyond what is necessary to put him in the same position as he occupied prior to injury. Big Rock Mountain Corp. v. Stearns Rogers Corp., 388 F2d 165, 170 (8th Cir. 1968). Duplication of damages of the same nature and purpose is to be avoided. K & E Land & Cattle v. Mayer, 330 NW2d 529, 532 (SD 1983). So, for example, in Greenwood Ranches, Inc. v. Skye Const. Co., Inc., 629 F2d 518, 521 (8th Cir. 1980), applying South Dakota law and subsequently cited by Nelson v. Web Water Dev. Ass'n., 507 NW2d 691, 696 (SD 1993), and High Plains Genetics Research v. JK Mill-Iron Ranch, 535 NW2d 839, 841 (SD 1995), a farmer which sued the installer of an allegedly defective irrigation system, designer and supplier of the pipe, and the pipe manufacturer for crop loss and money expended was not entitled to a separate compensatory damage award under each of its alternative legal theories, i.e., negligence, breach of contract, and breach of warranty, but was entitled to only one compensatory damage award if liability was found on any or all of the theories and its claim could not be multiplied by the number of theories under which the claim was asserted.

In Roby v. McKesson Corp., 219 P3d 749 (Cal. 2009), the court noted "regardless of the nature or number of legal theories advanced by plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. Double or duplicative recovery for the same items of damage amounts to

overcompensation and is therefore prohibited." 219 P3d 758. In Roby where the same identical amounts were listed for economic damages for wrongful termination, discrimination, and failure to accommodate, the court "counted the economic losses for the three termination related causes of action only once." 219 P3d 757. "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." Boeken v. Philip Morris, 230 P3d 342, 348 (Cal. 2010). "Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories." Pugh v. See's Candies, Inc., 203 Cal. App. 3d 743, 760 n. 13 (1988).

The judgment entered by the trial court is not authorized by applicable law and cannot be allowed to stand.

CONCLUSION

For all the above reasons, the judgment in this case should be reversed and this matter remanded back for a retrial.

Dated this 24th day of October, 2019.

/S/ Terry L. Pechota
Terry L. Pechota
1617 Sheridan Lake Road
Rapid City, SD 57702
605-341-4400
Tpechota@1868treaty.com

REQUEST FOR ORAL ARGUMENT

Curtis Temple requests oral argument.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word Perfect 2017 and contains 7444 words from the Statement of the Case through the Conclusion. I have relied on the work count of Microsoft Word Perfect 2017 in order to prepare this certificate.

Dated this 24th day of October, 2019.

/S/ Terry L. Pechota
Terry L. Pechota

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of October, 2019, a true and correct copy of the *Appellant's Brief* in Appeal No. 28967, was served via e-mail and U.S. Mail, Postage Pre-paid upon the persons next designated herein:

Kenneth Barker
Attorney for Thomas Wright
211 Zinnia Drive
Belle Fourche, SD 57717
Kbarker@barkerlawfirm.com

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Attorney for Ken Merrill
506 6th Street
Rapid City, SD 57701
Kcook@gpna.com

/S/ Terry L. Pechota
Terry L. Pechota

ADDENDUM
INDEX

Description **Page**

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

THOMAS WRIGHT,

Plaintiff,

vs.

CURTIS TEMPLE,

Defendant and Third-Party Plaintiff,

v.

KEN MERRILL,

Third-Party Defendant.

File Number 14-001569

Deposition of:

CURTIS TEMPLE

COPY

DATE: July 11, 2018, at 12:22 p.m.

PLACE: Gunderson, Palmer, Nelson & Ashmore
506 Sixth Street
Rapid City, SD 57701

APPEARANCES:

FOR THE PLAINTIFF: MR. KENNETH E. BARKER
Barker Wilson Law Firm
Attorneys at Law
211 Zinnia Drive
Belle Fourche, SD 57717

FOR THE DEFENDANT: (Curtis Temple) MR. TERRY L. PECHOTA
Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702

FOR THE THIRD-PARTY DEFENDANT: (Ken Merrill) MS. KATELYN A. COOK
Gunderson, Palmer, Nelson & Ashmore
Attorneys at Law
506 Sixth Street
Rapid City, SD 57701

Also Present: Thomas Wright

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them.
Q That's why I want to know.
A **Well, we've got to -- we can't tell you what I'm going to tell them, can we?**
Q Oh, yeah.
A **Oh, do I?**
Q Yes.
A **Is that what we're doing here today?**
Q That's why we're here.
A **Oh. So they -- so why do we have to do it twice then?**
Q Because I want to know in advance what you're going to testify to.
A **Oh, okay.**
Q It's quite a deal, isn't it?
A **It's a hell of a deal.**
Q Yeah. Right. So is it your testimony that you're unaware that there's a separate set of logs for the pilot versus a set of logs for the airplane? That's something that you're totally unaware of?
A **I thought it was all the same.**
Q Okay. And it is your testimony that you have not kept an individual set of logs as to your flight time at any time that you have been a student pilot?
A **No, I haven't. Maybe I should have. Yeah. No, I**

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haven't.
Q And the answer in your request for production number 1 states, I do not have any logs in my possession and do not know of their whereabouts.
That's still your testimony today, true?
A **For the Citabria.**
Q Okay. For the Citabria?
A **But for the Cessna, they should be in that plane.**
Q Yep. Okay. And we'll subpoena those and we'll get a copy of those, okay?
A **Okay.**
Q If I were to contact Mr. McNew -- do you have his phone number handy?
A **No.**
Q Do you --
A **I have --**
Q -- have his phone number in your cell phone that you have with you today?
A **It's at home.**
Q Okay. What phone is at home?
A **His phone number.**
Q His number?
A **Yes.**
Q Okay. He lives in Black Hawk?
A **Yeah.**

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Q And I'm sorry if I missed your answer to this question if it was asked.
Approximately how many times have you flown with Mr. McNew?
A **About 30. I would say 30. We've probably been up 30 times in the Cessna, yeah.**
MR. PECHOTA: In both of them?
A **In the Cessna.**
Q In the Cessna 182?
A **Yeah.**
Q That's your testimony?
A **Yeah.**
Q And as to plane that crashed, you don't have any recollection?
A **No.**
MR. BARKER: Okay. I have nothing further.
MS. COOK: Nothing further.
MR. PECHOTA: I do have some questions.
EXAMINATION BY MR. PECHOTA:
Q Curtis, where do you live? Describe where you live from Rapid City.
A **Live 60 miles from Rapid City.**
Q Okay. And off of what highway?
A **Off highway -- well, BIA 27.**
Q Okay. And that would be the road down to Scenic?

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A **Yeah. You take 44 and then you hit Scenic, then take BIA 27 south of Scenic.**
Q So you're before you get to the Visitor's Center?
A **Yes.**
Q How far on this side of the Visitor's Center do you live?
A **I would say five, five, six miles.**
Q Okay. And then how far off of that BIA highway is it from the highway to your residence?
A **Four miles.**
Q How long have you lived there?
A **All my life.**
Q Is that where you were born and raised?
A **Yeah.**
Q Okay. Were you ever aware of any attempts to serve you with a Complaint in this action?
A **No.**
Q Have you ever been served with a Complaint in this action?
A **No.**
Q Okay. Did you do anything to avoid service --
A **No.**
Q -- by any person?
A **No.**
Q Now, you're -- do you live down there with anyone

else?

A **I got kids and I got -- yeah. Yeah, there's more than just me.**

Q Are there people normally there?

A **Yeah.**

Q Most of the time?

A **Most of the time there's somebody usually there most of the time.**

Q All right. And you're an enrolled member of the Oglala Sioux Tribe?

A **Yep.**

MR. PECHOTA: Okay. Okay. I don't have any further questions. You can go home and get to work and make some money because I'm going to send you a bill here. I'm just kidding.

THE WITNESS: When is this going to stop?

THE COURT REPORTER: Do one of you guys want to advise him?

THE WITNESS: Oh.

MR. PECHOTA: Yeah. You have the right -- yeah. I'll advise him. Yeah. You have a right to read this before she types it up and submit it as a court document, okay? You can waive that, but you don't have to waive it. You don't get to really change the substance of your questions, but there might be a

misspelling or something like that.

THE WITNESS: Oh. No.

MR. PECHOTA: So whatever you want to do. I mean, she's a very good court reporter. She doesn't make any mistakes.

THE WITNESS: Really?

MR. PECHOTA: But it's up to you.

THE WITNESS: It's up to you, Terry. Whatever.

MR. PECHOTA: We'll waive it.

THE WITNESS: We'll waive it then. She can spell better than I can.

(Whereupon the deposition concluded at 2:48 p.m.)

STATE OF SOUTH DAKOTA)

) SS. CERTIFICATE

COUNTY OF PENNINGTON)

I, CAROLYN M. HARKINS, Court Reporter and Notary Public, South Dakota, duly commissioned to administer oaths, certify that I placed the witness under oath before the witness testified; that the foregoing testimony of said witness was taken by me in shorthand, and that the same has been reduced to typewritten form under my supervision; that the foregoing transcript is a true and correct transcript of the questions asked, of the testimony given, and of the proceedings had.

I further certify that I am not related to, employed by, or in any way associated with any of the parties to this action, or their counsel, and have no interest in its event.

Witness my hand and seal at Rapid City, South Dakota, this 5th day of August, 2018.

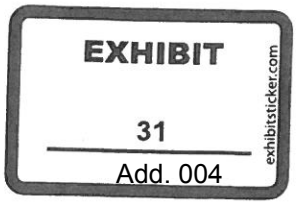
_____

Carolyn M. Harkins, RPR
Registered Professional Reporter

My Commission Expires: 11-24-2021

Damages Owed by Curtis Temple to Thomas Wright

Fair market value of airplane on 7/24/2014	$ 75,000.00
Crash repairs completed by BH Aero	+ $ 79,083.02
Hanger storage fees during repair	+ $ 4,664.08
Out-of-pocket expenses	+ $ 360.00
	$ 159,107.10
Less proceeds from sale of airplane in 6/2015	- $ 52,500.00
Total owed by Temple to Wright	**$ 106,607.10**



INSTRUCTION NO. 34

The measure of damages in this case is the amount of damages which, in the ordinary course of things, would be likely to result from Temple's conduct.

Damages which are not clearly ascertainable in both their nature and origin are unrecoverable.

If you decide for Wright on the issue of breach of contract you must award him the amount of money which will reasonably and fairly compensate Wright for the conduct of Temple. Wright claims his damages are:

1. The cost of repairing the damage done to Wright's airplane July 25, 2014 in order to prepare the airplane for sale;

2. The market value of Wright's airplane immediately prior to the damage which it sustained on July 25, 2014;

3. Expenses for lease of a hangar to store the airplane.

You should then subtract the amount that Wright recovered from the sale of his airplane from the total amount of the damages you have calculated according to this instruction.

It is up to you to decide whether Wright has proved these damages. Temple denies these claims for damages.

INSTRUCTION NO. 35

If you decide for Wright on the on the question of negligence, you then fix the amount of money which will reasonably and fairly compensate Wright for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by Temple's conduct, whether such loss or harm could have been anticipated or not, namely:

Reasonable compensation for damage to Wright's property, determined by the lesser of two measurers:

(1) The difference between the fair market value of the property immediately before the occurrence and immediately after the occurrence and immediately after the occurrence; or

(2) The reasonable expense of making any necessary repairs to the damaged property, plus the difference, if any, in in the fair market value of the property immediately before the occurrence and its fair market value of the property and its fair market value immediately after the repair.

Whether any of these elements of damages have been proved by the evidence is for you to determine. Your verdict must be based on the evidence and not upon speculation, guesswork or conjecture.

INSTRUCTION NO. 35

Plaintiffs cannot double dip. [insert]

STATE OF SOUTH DAKOTA,))SS. COUNTY OF PENNINGTON.)		IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
THOMAS R. WRIGHT, Plaintiff, v. CURTIS TEMPLE, Defendant and Third-Party Plaintiff, v. KEN MERRILL, Third-Party Defendant	)	FILE NO. 51CIV 14-1569 **SPECIAL VERDICT FORM**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find as follows:

DAMAGES (IF ANY) TO BE AWARDED TO PLAINTIFF, THOMAS WRIGHT

A. Negligence

1. Was the Defendant Curtis Temple negligent?

   YES X

   NO ____

2. Was the negligence a legal cause of any injury to the Plaintiff Wright?

   YES X

   NO ____

3. What is the amount of damages to be awarded to Plaintiff Wright, if any, associated with his negligence claim?

   $ 34,144.84

4. Are Defendant Temple and Third-Party Defendant Merrill joint tortfeasors with regard to the Plaintiff Wright's negligence claim and associated damages?

YES ____

NO X

If your answer is "No," do not fill out Question 5 and move to Section B, "Breach of Contract" below. If your answer is "yes," move on to question number 5.

5. Only if you have answered "Yes" to Question 4: With regard to the Plaintiff Wright's negligence claim and associated damages, we find that the relative degrees of fault are as follows:

Curtis Temple _____%

Ken Merrill _____%

(These percentages MUST add up to 100%)

B. Breach of Contract

6. Did Defendant Temple breach his contract with the Plaintiff Wright?

YES X

NO ____

7. If your answer to question number 6 is yes, what is amount of damages to be awarded to Plaintiff Wright from Defendant Temple, if any, associated with Plaintiff's contract claim?

$ 24,144.84

C. Promissory Estoppel

8. Is Defendant Temple liable for promissory estoppel with regard to Plaintiff Wright?

YES ____

NO X

9. If your answer to question number 8 is yes, what is amount of damages to be awarded to Plaintiff Wright from Defendant Temple, if any, associated with Plaintiff Wright's promissory estoppel claim?

$ _____

D. Deceit

10. Is Defendant Temple liable to the Plaintiff for deceit?

YES X

NO ____

11. If your answer to question number 10 is yes, what is the amount of damage to be awarded to Plaintiff from Defendant Temple, if any, associated with Plaintiff's deceit claim?

$ 34,144.84

E. Fraud

12. Is Defendant Temple liable to the Plaintiff for fraud?

YES ____

NO X

13. If your answer to question number 12 is yes, what is the amount of damages to be awarded to Plaintiff from Defendant Temple, if any, associated with Plaintiff's fraud claim?

$ _____

DAMAGES (IF ANY) TO BE AWARDED TO THIRD-PARTY DEFENDANT, KEN MERRILL

A. Breach of Contract

14. Did Defendant Temple breach his contract with Third-Party Defendant Merrill?

YES X

NO ____

15. If your answer to question number 14 is yes, what is the amount of damages to be awarded to Third-Party Defendant Merrill from Defendant Temple, if any, associated with Third-Party Defendant Merrill's Breach of Contract claim?

$ 0

C. Promissory Estoppel

16. Is Defendant Temple liable for promissory estoppel with regard to Third-Party Defendant Merrill?

YES ____

NO X

17. If your answer to question number 16 is yes, what is amount of damages to be awarded to Third-Party Defendant Merrill from Defendant Temple, if any, associated with Third-Party Defendant Merrill's promissory estoppel claim?

$ _____

D. Deceit

18. Is Defendant Temple liable to the Third-Party Defendant Merrill for deceit?

YES X

NO ____

19. If your answer to question number 18 is yes, what is the amount of damages to be awarded to Third-Party Defendant Merrill from Defendant Temple, if any, associated with Third-Party Defendant Merrill's deceit claim?

$ 0

E. Fraud

20. Is Defendant Temple liable to the Third-Party Defendant Merrill for fraud?

YES X

NO ____

21. If your answer to question number 20 is yes, what is the amount of damages to be awarded to Third-Party Defendant Merrill from Defendant Temple, if any, associated with Third-Party Defendant Merrill's fraud claim?

$ 0

F. Interest

22. As to any damages that you should approve, on what date should damage accrue?

Date of damage: 07/26/2014

Dated this 22nd day of February, 2019.

Foreperson

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

THOMAS R. WRIGHT, Plaintiff, vs. **CURTIS TEMPLE,** Defendant and Third-Party Plaintiff, v. **KEN MERRILL,** Third-Party Defendant.	51CIV14-001569 **JUDGMENT ON JURY VERDICT**

This action was tried before the Court, the Honorable Heidi L. Linngren, Circuit Judge, February 20 – 22, 2019. The issues having been tried, and the jury having returned its Verdict, it is therefore:

ORDERED, ADJUDGED AND DECREED, that Judgment is entered under the authority of SDCL § 15-6-58, in favor of Plaintiff, Thomas R. Wright, and against Defendant and Third-Party Plaintiff, Curtis Temple, for each of the following claims:

Negligence – Thirty-Four Thousand One Hundred Forty-Four and 84/100 Dollars (**$34,144.84**).

Breach of Contract – Thirty-Four Thousand One Hundred Forty-Four and 84/100 Dollars (**$34,144.84**).

Deceit – Thirty-Four Thousand One Hundred Forty-Four and 84/100 Dollars (**$34,144.84**).

Total Judgment as of 2/22/2019 – One Hundred Two Thousand Four Hundred Thirty-Four and 52/100 Dollars (**$102,434.52**).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Judgment is entered in favor of Third-Party Defendant, Ken Merrill, and against Defendant and Third-Party Plaintiff, Curtis Temple on all claims asserted by Temple against Merrill.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Judgment is also entered in favor of Third-Party Defendant, Ken Merrill, and against Defendant and Third-Party Plaintiff, Curtis Temple, on Merrill's Counterclaim against Temple on the claims of breach of contract, deceit and fraud, however, Merrill shall recover zero damages in these claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant and Third-Party Plaintiff Curtis Temple shall pay Plaintiff, Thomas Wright, the sum of **$47,428.59** for prejudgment interest as assessed by the Court in post-trial proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant and Third-Party Plaintiff Curtis Temple shall pay Plaintiff, Thomas Wright, the sum of **$2,904.99** for costs and disbursements as assessed by the Court in post-trial proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Defendant and Third-Party Plaintiff Curtis Temple shall pay Defendant and Third-Party Defendant, Ken Merrill, the sum of **$1,242.42** for costs and disbursements as assessed by the Court in post-trial proceedings.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, this Judgment shall accrue post-judgment interest at the statutory rate of ten percent (10%) per year, under the authority of SDCL § 54-3-5.1 and SDCL § 54-3-16(2), until the Judgment is paid in full.

3/13/19

BY THE COURT

Heidi L. Linngren
Judge of the Circuit Court

51CIV14-001509
Judgment on Jury Verdict

12:05 PM
Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 15 2019
Ranae Truman, Clerk of Courts
By _____ Deputy

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 28967

THOMAS WRIGHT,
Plaintiff/Appellee,

v.

CURTIS TEMPLE,
Defendant/Third Party
Plaintiff/Appellant,

v.

KEN MERRILL,
Third Party Defendant/Appellee.

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

The Honorable Heidi Linngren, Circuit Court Judge

Notice of Appeal filed April 17, 2019

APPELLEE KEN MERRILL'S BRIEF

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PRELIMINARY STATEMENT

Citations to the record will appear as "(CR. ___)" with the appropriate page number in the Clerk's Appeal Index. Citations to the trial transcript will appear as "(TT ___)" with the appropriate page and line number. In lieu of filing his own appendix, Merrill will utilize Temple's addendum, and in doing so will cite to the appropriate page therein.

Plaintiff and Appellee Thomas Wright will be referred to as "Wright," Defendant and Appellant Curtis Temple will be referred to as "Temple," and Third-Party Defendant and Appellee Ken Merrill will be referred to as "Merrill."

JURISDICTIONAL STATEMENT

Temple appeals from the denial of his motion for judgment as a matter of law or for a new trial, entered on April 15, 2019. CR 936, 967. Temple filed and served his notice of appeal and docketing statement on April 17, 2019. CR 969. On May 3, 2019, Wright filed a notice of review on the circuit court's dismissal of his punitive damage claim against Temple. The order denying Temple's motion for new trial is not appealable under SDCL § 15-26A-3, but this Court may review the propriety of that order in an appeal from the judgment per SDCL § 15-26A-7. *See Kasselder v. Kapperman,* 316 N.W.2d 628, 630 (S.D. 1982).

STATEMENT OF THE ISSUES

I. WHETHER TEMPLE WAS PERSONALLY SERVED?

The trial court found Temple waived his right to contest the propriety of service by filing his answer and third-party complaint and not bringing it before the trial court until the pre-trial conference.

Merrill takes no position as to the propriety of service on Temple, and to the extent necessary, joins in the arguments set forth in Wright's responsive brief.

II. WHETHER TEMPLE EVER AGREED OR MISREPRESENTED THAT HE WOULD GET INSURANCE ON THE AIRPLANE OR ONLY FLY WITH A SPECIFIC INSTRUCTOR?

The trial court denied Temple's Motion for Judgment as a Matter of Law or For New Trial, finding adequate evidence was presented to support the jury's finding that Temple breached an oral contract to obtain insurance on the plane.

Merrill takes no position as to whether adequate evidence was presented at trial to support to jury's finding that Temple breached an oral contract, and to the extent necessary, joins in the arguments set forth in Wright's responsive brief.

III. WHETHER TEMPLE WAS NEGLIGENT AND CAUSED THE MISHAP WHICH DAMAGED THE AIRPLANE?

The trial court denied Temple's Motion for Judgment as a Matter of Law or For New Trial with regard to the negligence claim, finding adequate evidence was presented to support the jury's finding that Temple was negligent.

Howlett v. Stellingwerf, 2018 S.D. 19, ¶ 18, 908 N.W.2d 775, 781

LDL Cattle Co. v. Guetter, 1996 S.D. 22, ¶ 22, 544 N.W.2d 523, 528

IV. WHETHER THE JURY WAS PROPERLY INSTRUCTED ON DAMAGE TO PERSONAL PROPERTY AND PLAINTIFF'S CLAIM WAS EVEN AUTHORIZED UNDER HIS OWN PROPOSED INSTRUCTION?

The trial court denied Temple's Motion for Judgment as a Matter of Law or For New Trial, finding that the jury was properly instructed on the measure of damages in this case.

Merrill takes no position as to whether the jury was adequately instructed on damages but to the extent necessary, joins in the arguments set forth in Wright's responsive brief, and alternatively, asks this Court to simply reduce the judgment in lieu of ordering a new trial.

Biegler v. Am. Family Mut. Ins. Co., 2001 S.D. 13, ¶ 1, 621 N.W.2d 592, 595

V. WHETHER THE INSTRUCTIONS, VERDICT FORM, AND JUDGMENT AUTHORIZED IMPERMISSIBLE DUPLICATIVE DAMAGES?

The trial court denied Temple's Motion for Judgment as a Matter of Law or For New Trial, finding that the jury verdict did not authorize duplicative damages.

> Merrill takes no position as to whether the jury was adequately instructed on damages but to the extent necessary, joins in the arguments set forth in Wright's responsive brief, and alternatively, asks this Court to simply reduce the judgment in lieu of ordering a new trial.
>
> *Biegler v. Am. Family Mut. Ins. Co*., 2001 S.D. 13, ¶ 1, 621 N.W.2d 592, 595

STATEMENT OF THE CASE

Temple's statement of the case adequately represents the basic procedural background of the case. However, in lieu of restating that which was already included by Temple, Merrill will provide further information pertaining specifically to the claims between Merrill and Temple and the outcome at trial.

Temple's third-party claim against Merrill sought contribution only if Temple was found liable for Wright's negligence claim, not for Wright's claims of breach of contract, promissory estoppel, fraud, or deceit claims. CR 92. Thus, Merrill would only be responsible for damages should the jury find him to be a joint tortfeasor with Temple with regard to Wright's negligence claim.

In response to Temple's third-party complaint, Merrill answered and asserted counterclaims against Temple for fraud and deceit, breach of contract, promissory estoppel, and punitive damages. CR 110. There were no claims made by Wright against Merrill, and no claims by Merrill against Wright.

Following a three-day jury trial, the jury returned a verdict specifically finding that Merrill and Wright were not joint tortfeasors and that Merrill was not liable or responsible for any portion of the $34,144.84 awarded to Wright against Temple on the negligence claim. Temple Add. 008-0012. The jury found in favor of Merrill on all of his claims against Temple with the exception of the promissory estoppel claim. *Id.*

None of Temple's assignments of error in this appeal impact the jury's findings that (1): Merrill shared no responsibility to pay any percentage of the damages awarded against Temple on Wright's negligence claim; and (2) the fact that the jury found in favor of Merrill on all of his claims against Temple (with the exception of the promissory estoppel claim).

STATEMENT OF THE FACTS

Merrill will reiterate those facts pertinent to Temple's claims against him, and to the extent necessary, joins in Wright's statement of facts as to any additional facts which may pertain to Wright's claims against Temple.

In or around late June or early July of 2014, Temple contacted Merrill and inquired whether Merrill would be willing to meet with Temple to discuss flight instruction. TT 249:16-22. Merrill agreed to do so, and after meeting Temple out at his hangar near Caputa, South Dakota, on July 2, 2014, agreed to provide flight instruction for Temple in the airplane at issue in this case, a 1978 Citabria. TT 256:17-23. During this first meeting, Merrill told Temple that Merrill would not fly with him unless Temple carried insurance on the airplane. TT 254:16-19. Merrill contacted an insurance company for Temple and asked that a representative send the information to Temple. TT 254:22-255:4.

After taking Temple for the first introductory flight on July 2, 2014, he flew with Temple one more time on July 3, 2014. TT 263:23-25. On their next flight on July 8, 2014, Merrill asked Temple if he had obtained the required insurance on the plane as

Merrill had instructed and Temple stated that he had. TT 264:13-265:13.[1] Despite this representation, Temple never obtained insurance on the plane. TT 128:25-129:1.

Over the next few days, from July 2, 2014 to July 14, 2014, Temple flew with Merrill six times. TT: 89:18-24. As with all of his students, as the lessons went on, Merrill gradually turned control of the plane over to Temple. TT 427: 22-25. Shortly thereafter, Merrill went on vacation. TT 92:19-1. Unbeknownst to Merrill, during Merrill's vacation, Temple flew with a different instructor, Bob McNew. TT 273:14-21. During his time flying with McNew, Temple accidentally hit the windsock on the air field, damaging the plane. TT 274: 12-24.

On July 25, 2014, the first lesson with Temple after Merrill's vacation, they began take off in the Citabria. Temple told Merrill that while flying with McNew, McNew had instructed him to use the brakes to keep the plane straight during takeoffs. TT 275: 19-21. However, despite the fact Merrill had always instructed Temple to give the plane full throttle during take-off, Temple failed to do so. TT 280:16-23.[2]

To try to overcome the lack of speed, Merrill attempted to give the plane full throttle, which should have been sufficient to achieve the necessary air speed. TT 288:3-8. However, the plane did not achieve the necessary air speed and instead hit a ravine near the end of the runway, causing damage to the plane. TT 281:21-25. In Merrill's professional experience, the only reason that they would not have been able to obtain proper airspeed was that Temple had his foot on the brakes in an attempt to keep the plane straight during take off. TT 281:6-18. Temple denies having his foot on the brakes. TT 142. When it became clear that there was no insurance to pay for the damage

[1] At trial, Temple denied this conversation ever occurred. TT 149:8-16.
[2] Temple denied that he ever had control of any part of the plane during any part of his takeoff or lessons with Merrill. TT 116:117-10.

to the plane, Wright brought suit against Temple. Temple then brought a third-party claim against Merrill for contribution.

STANDARD OF REVIEW

The question of whether a jury was properly instructed overall is a question of law which this Court reviews de novo. *Papke v. Harbert*, 2007 S.D. 87, ¶ 13, 738 N.W.2d 510, 514-15. 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." Id. at ¶ 40 (quoting *State v. Frazier*, 2001 S.D. 19, ¶ 35, 622 N.W.2d 246, 259 (citations omitted)).

ARGUMENT

I. THERE IS NO ASSIGNMENT OF ERROR WITH REGARD TO THE JURY'S FINDINGS AS TO MERRILL.

None of the issues raised in Temple's appellate brief identify any error which impacts the jury's clear and unambiguous findings that (1): Merrill was not a joint tortfeasor with Temple; (2) that Merrill was not responsible for any portion of the negligence damages assessed against Temple; or (3) that Temple was liable to Merrill for breach of contract, fraud, and deceit. *See* Temple Add. 008-012. The jury was abundantly clear as to its findings of Merrill's lack of liability to Temple, as well as Temple's clear liability to Merrill. Merrill is not responsible to pay any damages to Temple, and none of Temple's assignments of error as to the alleged "duplicative damages" have any bearing on Merrill or any power to change the outcome as it pertains to Merrill.

Because there is no assignment of error as to the outcome of the trial as it pertains to Merrill, there is a final, binding judgment in favor of Merrill, and as such, Merrill

respectfully requests that this Court affirm the jury's verdict as to the claims against him, dismissing him from any further proceedings which may result in this matter.

II. ISSUES ONE AND TWO RAISED BY TEMPLE: MERRILL'S JOINDER.

In the interest of judicial economy, and pursuant to SDCL § 15-26A-67, Merrill joins in the arguments and authorities advanced by Wright in response to issues one (lack of personal service) and two (whether the evidence is sufficient to support a finding that Temple breached an oral agreement to obtain insurance on the plane and fly only with certain instructors) as set forth more fully in Temple's appellate brief. Neither issue has any impact on the jury's finding that Merrill was not negligent and as such, not liable for contribution.

III. TEMPLE WAS NEGLIGENT AND WAIVED HIS ARGUMENT AS TO WHETHER HE OWED A DUTY BY FAILING TO RAISE IT BEFORE THE TRIAL COURT.

Temple argues that he was "not in control of the Citabria, had no duty in its operation, and was not negligent in the operation of the plane on July 25, 2014." *See* Appellee's Br. pg. 11. This argument fails for multiple reasons.

First, Temple has waived his ability to make the argument regarding a lack of duty. Precedent is clear in that failure to bring legal or factual arguments to the circuit court's attention waives them on appeal. *See Howlett v. Stellingwerf,* 2018 S.D. 19, ¶ 18, 908 N.W.2d 775, 781 (citing *In re M.D.D.*, 2009 S.D. 94, ¶ 11, 774 N.W.2d 793, 796-97; *State v. Janis*, 2016 S.D. 43, ¶ 19, 880 N.W.2d 76, 81 (citing *In re M.S.*, 2014 S.D. 17, ¶ 17 n.4, 845 N.W.2d 366, 371 n.4 ("It is the Court's standard policy that failure to argue a point waives it on appeal")) (internal quotations omitted).

While Temple may have argued that Ken Merrill was in charge of the plane and responsible for the plane and the student in both his motion for directed verdict and his

Motion for Judgment as a Matter of Law or for a New Trial, at no point did he ever raise the issue that Temple did not owe a duty. CR 936; TT 431:1-11. Likewise, he never provided any analysis or case law in support of this argument until doing so in his appellate brief. This failure to raise the argument in front of the trial court deprived the trial court of meaningfully reviewing it or rendering any ruling. Thus, because Temple failed to raise this issue before the trial court, it is waived on appeal.

Second, Temple argues that the jury's negligence verdict against him is unsupported by the evidence because contradictory testimony was presented at trial. "The credibility of witnesses and the evidentiary value of their testimony falls solely within the province of the jury." *LDL Cattle Co. v. Guetter*, 1996 S.D. 22, ¶ 22, 544 N.W.2d 523, 528 (quoting *Bridge v. Karl's, Inc*., 538 N.W.2d 521, 525 (S.D. 1995) (citing *Miller v. Hernandez*, 520 N.W.2d 266, 272 (S.D. 1994)).

Merrill testified that Temple failed to follow his explicit instructions and negligently applied the brakes during takeoff. TT 281:4-18. Temple failed to provide any expert testimony to controvert Merrill's opinions. Just because Temple's trial testimony was contrary to Merrill's does not mean that the negligence verdict is unsupported by evidence, it simply means that the jury found Merrill's testimony to be more credible—which is exactly what a jury is supposed to do in weighing the evidence and coming to a decision. The jury's verdict unequivocally indicates that they found Temple liable for negligence, and this finding is supported by the record in this case.

Finally, to the extent that Temple is correct that the negligence verdict against Temple is unsupported by the evidence and that Temple cannot be found negligent, then Merrill should be dismissed from any further proceedings in this matter because the only claim Temple brought against Merrill was contribution for negligence. Thus, if the

negligence claim against Temple is eliminated, it would likewise eliminate any claims brought by Temple against Merrill, thus releasing him from this lawsuit.

IV. ISSUES FOUR AND FIVE: MERRILL'S JOINDER IN WRIGHT'S RESPONSIVE BRIEF.

In issues four and five raised by Temple, he argues the jury was not properly instructed on damages to personal property and that the jury instructions, verdict form, and judgment authorized impermissible duplicative damages. Again, the issues as to duplicative damages and improper property damage instructions do not pertain to Merrill and do not impact the jury's findings as to the claims against, and brought by, Merrill. To the extent necessary, Merrill joins Wright's arguments with regard to these issues and incorporates them herein by this reference.

However, in the alternative, should this Court find there to be prejudicial error with regard to the instructions, Merrill would ask that in lieu of remanding the case for a new trial, the Court use its power to modify the judgment to comply with the measure of damages supported by the instructions. This would not be the first time this Court has modified a judgment to fit the evidence provided in a case. In *Biegler v. Am. Family Mut. Ins. Co.*, this Court lessened an award of compensatory damages to fit the appropriate evidence and measure of damages presented at the trial court level. 2001 S.D. 13, ¶ 38, 621 N.W.2d 592, 6045. In doing so, this Court stated:

> An appellate court generally will not exercise its discretionary power to grant a new trial unless it is satisfied that the second trial will produce different results; if it appears that no purpose may be served by ordering a new trial, the entry of judgment by the appellate court, rather than the ordering of a new trial, may be appropriate. Where it is obvious that the grounds for prejudgment relief exist, remand is unnecessary and the appellate court may use facts found by the trial court to support its disposition.

Biegler, 2001 S.D. 13 at ¶ 38 (quoting AmJur2d Appellate Review § 809 (1995)). The *Biegler* court further stated that in modifying the compensatory damages in that case, the "modification of a judgment, especially a money judgment, is to be used sparingly and only 'when the record and evidence is such that such judgment may be rendered with confidence in the reasonableness, fairness, and accuracy of the decision.'" *Id.* (quoting 5 AmJur2d Appellate Review § 836).

In this case, the record strongly supports the findings of liability against Temple, both on Wright's and Merrill's claims against him. The verdict also evidences the jury's clear intent to award Wright the full measure of damages necessary to make him whole after Temple's transgressions. Even the trial court noted the clarity of the jury's decision, stating "it is very apparent by the jury verdict form that the jury contemplated each and every section of the form. They followed the instructions to a 'T.'" Status Hearing Transcript, 10:2-5. A new trial would not change the jury's findings of liability.

Thus, should this Court find that the damages awarded to Wright are in excess of what would be supported by the evidence or allowed by the law, then Merrill would respectfully request this Court modify the judgment in lieu of granting a new trial.

CONCLUSION

Ultimately, the jury's decision with regard to the claims pertaining to Merrill is clear and Temple has not identified any error which would impact those findings. As such, for the above-stated reasons, Merrill respectfully requests this Court affirm the ruling of the trial court.

REQUEST FOR ORAL ARGUMENT

Ken Merrill respectfully requests oral argument in this case.

Dated this 9th day of December, 2019.

GUNDERSON, PALMER, NELSON
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By: */s/ Katelyn A. Cook*

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellant's Brief, including footnotes, contains 3,039 words. I have relied upon the word count of our word processing system as used to prepare this Appellee's Brief. The original Appellant's Brief and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Katelyn A. Cook*
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CERTIFICATE OF SERVICE

I hereby certify on December 9, 2019, I emailed a true and correct copy of the foregoing **APPELLEE KEN MERRILL'S BRIEF** to the following at their last known e-mail addresses and served two copies of the same via U.S. Mail first class postage prepaid as follows:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28967
Notice of Review Appeal No. 28989

Thomas Wright,

Plaintiff and Appellee,

vs.

Curtis Temple,

Defendant and Appellant.

vs.

Ken Merrill,

Third-Party Defendant/Appellee

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Heidi Linngren, Presiding

APPELLEE THOMAS WRIGHT'S BRIEF AND BRIEF ON NOTICE OF REVIEW

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Notice of Appeal filed April 17, 2019
Notice of Review filed May 3, 2019

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INTRODUCTION

Appellee Thomas Wright ("Wright") will use the same citations to the record and abbreviations used by Defendant/Appellant Curtis Temple ("Temple"). Accordingly, citations to the Clerk's Record will be indicated by CR, transcript of the trial by TT, transcript of the Pretrial Motion Hearing by MH, and transcript of the post-trial Status Hearing by SH, followed by the page number. Plaintiff/Appellee Thomas Wright will be referred to as Wright. Defendant/Appellant Curtis Temple will be referred to as Temple, and Third Party Defendant Ken Merrill as Merrill.

JURISDICTIONAL STATEMENT

Temple's Notice of Appeal was timely filed on April 17, 2019 (CR 969) from a final Judgment on Jury Verdict entered March 15, 2019 (CR 923). Notice of Entry was served March 19, 2019. (CR 931).This Court has jurisdiction of Temple's appeal under authority of SDCL § 15-26A-3(1).

Wright's Notice of Review was timely filed on May 3, 2019. The Notice of Review is from the Court's denial of Wright's Motion to submit the claim of punitive damages against Temple to the jury. No written judgment or order was entered. At the close of Plaintiff's case during the trial, on February 21, 2019, the Circuit Court orally denied Plaintiff's Motion to Submit the Claim of Punitive Damages to the jury. Plaintiff renewed the Motion to Submit the Claim of Punitive Damages at the close of all of the evidence on February 22, 2019, and the Circuit Judge orally denied the renewed Motion again at that time. (The Court's ruling is at TT 384-387, and at 437). This Court has jurisdiction of the issue raised in the Notice of Review under authority of SDCL § 15-26A-22.

STATEMENT OF LEGAL ISSUES

1. Was the trial Court correct in exercising its discretion in ruling that Wright had shown due diligence in attempting to locate Temple within the State of South Dakota, permitting service of process by publication under SDCL § 15-9-7?

Comment: Trial Court entered an order allowing service by publication.

Most Relevant Statutes:

SDCL § 15-6-4(c)
SDCL § 15-9-7

Most Relevant Cases:

Bradley v. Deloria, 1998 SD 129, 587 N.W.2d 591
Ryken v. State, 305 N.W.2d 393 (S.D. 1981)
In re D.F., 2007 S.D. 14, 727 N.W.2d 481

2. Was the jury's verdict concluding Temple breached the contract in which he agreed to fly Wright's airplane only with the certified flight instructor who had insurance on Wright's airplane, and agreed to obtain insurance for Wright's airplane, supported by sufficient evidence?

Comment: Trial court submitted the issue of whether Temple had breached his contract, and the jury found that Temple had breached an oral contract to use only an insured instructor and to obtain insurance.

Most relevant cases:

Moe v. John Deere Co., 516 N.W.2d 332 (S.D. 1994)
Weitzel v. Sioux Valley Heart Partners, 2006 S.D. 45, 714 N.W.2d 884

3. Was the jury's verdict concluding Temple was negligent in the operation of Wright's airplane when it crashed during an attempted takeoff, supported by sufficient evidence?

Comment: Trial Court submitted the issue of Temple's negligence to the jury, and the jury found that Temple was negligent.

Most relevant cases:

Treib v. Kern, 513 N.W.2d 908 (S.D. 1994)
Johnson v. Matthew J. Batchelder Co., Inc., 2010 S.D. 23, 779 N.W.2d 690
*Morrison v. Mineral Palace Ltd. Partnershi*p, 1999 S.D. 145, 603 N.W.2d 193

4. Was the jury was properly instructed on the measure of damages?

Comment: Trial Court submitted the issue of damages to the jury using South Dakota Pattern Jury Instructions.

Most relevant statutes:
SDCL § 21-2-1

Most relevant cases:
Stern Oil Company, Inc. v. Brown, 2018 S.D. 15, 908 N.W.2d 144
Behrens v. Wedmore, 2005 S.D. 79, 698 N.W.2d 555

5. Did the jury, using a Special Verdict Form finding Temple liable for breach of contract, negligence, and deceit, and awarded damages for each separate cause of action, cause duplicative damages when the total damages awarded are well within Wright's total damage claim?

Comment: Trial Court overruled Temple's objection to the Judgment, and entered Judgment which properly implemented the jury verdict.

Most relevant cases:
Fjerstad v. Sioux Valley Hospital, 291 N.W.2d 786 (S.D. 1980)
Miller v. Hernandaz, 520 N.W.2d 266 (S.D. 1994)
Harriman v. United Dominion Industries, Inc., 2005 S.D. 18, 693 N.W.2d 44

ISSUE ON NOTICE OF REVIEW

1. **Did the trial court err in refusing to submit Wright's claim for punitive damages against Temple to the jury?**

Comment: Trial Court denied Wright's Motion to Submit Punitive Damages to the jury, but the jury found that Temple was liable on the claim of deceit.

Most relevant statutes:
SDCL § 21-1-4.1
SDCL § 21-3-2

Most relevant cases:
Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419 (S.D. 1994)
Selle v. Tozser, 2010 S.D. 64, 786 N.W.2d 748
Biegler v. American Family Mutual Insurance Co., 2001 S.D. 13, 621 N.W.2d 592

STATEMENT OF THE CASE

This case was filed on December 1, 2014. (CR 1, 2). Wright owned a 1978 Citabria airplane which he had hangered at Black Hills Aero in Spearfish, South Dakota. Temple rented the airplane while deciding whether he wanted to buy it. Temple wrecked the airplane. Wright sued Temple for negligence. (CR 2). Several months went by while Wright used numerous process servers and other methods (including contacting Temple's counsel) to attempt to serve Temple, who lives within the Pine Ridge Indian Reservation. During those months, on September 21, 2015, Temple filed an Answer which included a Motion to Dismiss for Insufficient service of process. (CR 74, 78). Temple had not yet been served with the Summons and Complaint at that time, although at least five attempts at his residence had been made by process servers. (CR 15). Ultimately, service was effected by publication, which was completed on June 23, 2016. (CR 50).

Wright's First Amended Complaint (CR 82) added claims for breach of contract, promissory estoppel, deceit, fraud, conversion, and punitive damages. The Second Amended Complaint retained those causes of action. (CR 655).

Temple filed a Third Party Complaint against Merrill (CR 92), which alleged that Merrill was negligent and sought indemnity and contribution from Merrill. (Id.).

The case went to jury trial in February of 2019 on Wright's claims of negligence, breach of contract, fraud, and deceit, along with Temple's Third Party claim against Merrill for negligence. The trial court, at the close of Wright's case-in-chief, denied Wright's motion to submit punitive damages. (TT 384-387). It denied the motion again when it was renewed at the close of all of the evidence. (CR 437).

The jury returned a Special Verdict Form (CR 667) which found Temple liable on Wright's claims of negligence, breach of contract, and deceit. (Id.) The Special Verdict Form also found that Merrill was not a joint tortfeasor, and that Temple was liable to Merrill for breach of contract, deceit, and fraud. The jury did not, however, award damages to Merrill. (Id.).

At trial, Wright claimed damages in the amount of $106,607.10 (Appellant's Addendum 004), which included repair costs, loss of value, and hangar rental costs (TT 573). The jury awarded Wright $34,144.84 on each of the three claims (negligence, breach of contract, and deceit) upon which the jury had found Temple liable. (CR 667). The jury's award of damages totaled $102,434.53. (Id.) This amount is a little over $4,000.00 less than amount which Wright had requested. (TT 533). The $4,000.00 difference is accounted for by the obvious fact that the jury did not award Wright hangar rental fees because the airplane had to be stored in the hangar regardless of whether it was damaged or not. (Id.).

The jury also found that the damage occurred on July 26, 2014. (Id.). After allowing all parties opportunity to be heard at a Post-Trial status hearing, the trial court awarded Judgment which conformed to the jury verdict, plus prejudgment interest in the amount of $47,428.59, costs in favor of Wright in the amount of $2,904.99, and costs in favor of Merrill in the amount of $1,242.42. (CR 923).

Temple has appealed from the Judgment in favor of Wright. He has not appealed from the Verdict and Judgment in favor of Merrill.

Temple's Brief on appeal addresses service of process, breach of contract, negligence, the measure of damages, and whether the Judgment accurately conforms to

the Special Verdict Form. Temple's Brief does not dispute the jury's finding that he is liable to Wright for deceit.

STATEMENT OF FACTS

Wright was raised from infancy on the family ranch near Newcastle, Wyoming, and he still lives there. (TT 322). In 1978, Wright's father bought a 1978 Citabria airplane directly from the Minnesota factory, and flew it back home to Newcastle. (TT 324). Wright's father owned the airplane until his death in 1994. (Id.). The Citabria is a unique airplane, being certified as a beginning aerobatic plane. (TT 335).

Although Wright never obtained a pilot's license, he retained ownership of the plane and kept it hangered at Black Hills Aero in Spearfish, South Dakota, which is a business owned and operated by Ted Miller ("Miller"). (TT 152). Miller has been a licensed pilot since 1968, and, following service in the Army, has been involved in the airplane business in Spearfish since 1971. (TT 153).

From 2009 through 2013, Wright had Miller completely rebuild the airplane. (TT 339). The fabric shell or cover of the airplane was replaced and upgraded, a wing was replaced, the inside tubing of the airplane's frame was upgraded with zinc chromate, and the wiring was replaced, among other things. (TT 331-332). The rebuild was completed at a cost of approximately $100,000. (TT 332). According to Miller, when the rebuild was complete, the airplane was "better than new" (TT 175-176), or "better than factory." (TT 178). Merrill described the airplane as a "beautiful airplane." (TT 257). He said that when he flew it, it performed "better than original." (Id). A new Citabria costs approximately $260,000. (TT 194).

As the years went on, Wright's wife convinced him that he was probably not going to use the Citabria and learn to fly, and was incurring storage expenses. (TT 332-333). So he decided to put the airplane up for sale. (Id.) He kept it at Black Hills Aero in Spearfish, and used Miller as his agent for interested buyers and for individuals renting the airplane. (TT 333). Wright is a long-time subscriber to a trade publication called "Trade-A-Plane," which shows listing of airplanes offered for sale. (Id.). Based upon his study of that publication, and conferring with Miller, Wright offered the airplane for sale at a price of $75,000. (Id.).

In June of 2014, Temple contacted Miller about the Citabria. (TT 154). Temple and an acquaintance, Denny Kauer ("Kauer"), came to Black Hills Aero to ask about trying the airplane out to see if it was suitable for use on a runway on Temple's ranch at Caputa, South Dakota. (TT 78, 157). If so, Temple was interested in buying it. (TT 65). Temple was not a licensed pilot, and was not experienced in flying. (TT 156). Kauer was a licensed pilot, and Miller knew him as one of Black Hills Aero's customers. (TT 155). Miller told Temple that, if he was to fly the airplane, he had to use licensed pilot and have insurance on the airplane. (TT 158). Specifically, Miller told Temple that he had to use Bob McNew as his only instructor, because McNew was covered by insurance. (TT 158). Miller also told Temple that he needed to obtain his own "hull coverage" insurance for the airplane. (Id.). Hull coverage insurance provides coverage for damage to the airplane itself. (TT 163).

Temple testified that he did not recall that Miller told him that he had to fly only with Bob McNew. (TT 75-76, 78, 148). He also did not recall that anyone told him to obtain insurance. (TT 84).

Although Temple flew with Bob McNew a few times, he contacted Merrill to ask if he would be his instructor. (TT 83). Miller did not know that Temple did not always use Bob McNew. (TT 165). Had Miller known that Temple was using Merrill, Miller would have gone to Caputa and taken the plane back to Black Hills Aero. (Id.).

At Temple's request, Merrill went to Caputa to talk with Temple and look at the airplane. Merrill told Temple that he "would not fly with him if he didn't have insurance on that airplane." (TT 254). Temple does not recall this. (TT 84). Merrill also testified that, while he was with Temple at the Caputa landing strip, Merrill used his cell phone to call an insurance agent at Fargo, North Dakota, provided her with the airplane identification number, and obtained a rough estimate of about $800.00 for hull insurance. (TT 254-255). Although Temple actually told Merrill that "he'd paid for the insurance," he did not do so. (TT 319).

Temple used Merrill as his instructor, instead of Bob McNew, on at least six occasions in July of 2014, without Miller's knowledge. (TT 26, 89). In mid-July, Merrill left for approximately a week's vacation. (TT 271). On July 25, 2014, Merrill returned and went to Temple's airstrip at Caputa. (TT 279). He learned that Temple had used Bob McNew as an instructor in Merrill's absence. (TT 275). During one of the McNew's flights, they had struck the windsock at Temple's landing strip which did some damage to the airplane. (TT 274).[1]

On July 25, 2014, Temple and Merrill attempted to take off in the airplane. (TT 278). The Citabria has two in-line, as opposed to side-by-side, seats. (TT 330). Each of

[1] Miller had repaired the damage at Black Hills Aero, in a single day. (TT 166). Because Bob McNew, who was insured, as Miller had told Temple, the repair was covered by insurance. (Id.)

the two seats has throttle, rudder, and brake controls. (TT 301). The student sits in the front seat, and the instructor sits behind. (Id.). During taxiing prior to take-off, the rudder and the brakes are used to keep the airplane going straight. (TT 276). But, for take-off, the brakes are released and full power applied. (TT 280). The brakes are not used after that point. (Id.)

During the attempted take-off, the airplane did not accelerate to a speed that allowed for take-off, resulting the crash that gave rise to this lawsuit. (TT 281). Merrill testified that the only way to explain the airplane's lack of acceleration is that Temple "rode the brakes to keep it straight and you don't keep it straight with brakes on takeoff contrary to anything I had ever taught him." (TT 281). If Temple had not been applying the brakes, the airplane had sufficient distance and would have attained sufficient speed to take off. (TT 288).[2] Temple denied having his foot on the brakes. (TT 142).

When Miller went to Temple's landing strip area to pick up Wright's airplane, he had an interesting and ironic conversation with Temple. (TT 183). Temple asked Miller "[w]hat do you think I should do?" (Id.) Miller told Temple "[w]ell you should buy the airplane." (Id.). Temple replied "[w]ell it's wrecked. I don't want to buy it now." (Id.).

Wright did not learn about his airplane's crash until his daughter called him and told him that there was a picture on Facebook of his airplane "off 'sconchwise'." (TT 344). He tried several times to call Temple. (TT 345-346). Each time he identified himself as the owner of the plane and asked to talk about what happened and how to deal with the situation. (Id). Each time, after his introduction, there would be a click indicating

[2] As noted in the Statement of the Case, Temple brought a Third Party Complaint against Merrill. The jury found in Merrill's favor (CR 667). Temple has not appealed that result.

a hang-up. (Id.). Wright used different phones for the several calls and got the same result at the Temple phone number each time. (Id.).

This lawsuit resulted after Temple failed to respond to Wright's inquiries.

ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING SERVICE BY PUBLICATION IN THIS CASE.

Wright filed the Summons and Complaint against Temple on December 1, 2014. (CR 1, 2). Temple was served by publication after the trial Court entered an Order Allowing Service by Publication on May 24, 2016. (CR 46). In the intervening months, exhaustive efforts to have Temple served with the Summons and Complaint were undertaken. These efforts are set out in the Affidavit of Counsel in Support of Motion for Process of Service by Publication which was filed on May 4, 2016. (CR 27). Shannon County Sheriff Rex Conroy was contacted to attempt service, but Conroy did not return calls from Wright's counsel as to his service efforts. (Id.)

Wright's counsel then contacted or attempted to contact other potential process servers, including an individual named Ryan White Feather whom Wright's counsel was informed was a tribal process server, but Mr. White Feather did not return calls either. (Id.). Wright's counsel then retained Stan Zakinski, an individual who lives in Rapid City, Pennington County. (Id.) Mr. Zakinski made several attempts in June, July, and August of 2016 to serve Temple. (Affidavit of Stan Zakinski attached to Brief in Support of Motion to Serve by Publication, CR 15). Zakinski's efforts included personal telephonic contacts with Temple, and two visits to Temple's home. (Id.) On those two

visits, there were significant indications that Temple was in fact at his home along with several other individuals. (Id.)

Zakinski's attempts to obtain personal service on Temple, as outlined in Zakinski's Affidavit strongly indicate that Temple was evading process. (Id.) Wright's counsel then arranged for Oglala Lakota resident Bud Merrill (no relation to Third Party Defendant Ken Merrill) to attempt service on Temple. Bud Merrill also attempted three times to serve Temple, but was unsuccessful. (Affidavit of Bud Merrill attached to Brief in Support of Motion to Serve by Publication, CR 15).

In the meantime, counsel for Temple served an Answer and Motion to Dismiss for lack of service of process on September 21, 2017. (CR 110).

After more than half a dozen attempts to have Temple served at his home, Wright set a hearing on a Motion to Serve Temple by Publication, and served Temple's counsel with a Notice of Hearing on the Motion. (CR 13).

After the hearing, the Court entered an Order allowing service by publication. (CR 46). Service was completed by publication four times in four successive weeks in the Lakota Country Times. (CR 50).

Service by publication is called for when "the person on whom the summons . . . is to be made cannot, after due diligence, be found within the state and that fact appears by affidavit to the satisfaction of the court." SDCL § 15-9-7. Whether service by publication should be allowed is a matter committed to the discretion of the trial court. *See*, *In re D.F.*, 2007 S.D. 14, ¶12, 727 N.W.2d 481, 485.

In defining the phrase "due diligence," this Court has stated:

> The test of the sufficiency of the showing of due diligence is not whether all possible or conceivable means of discovery are used, but rather it must

> be shown that all reasonable means have been exhausted in an effort to locate interested parties.

Ryken v. State, 305 N.W.2d 393, 395 (S.D. 1981). Although Temple claims in his Brief that "Temple had lived in the same place in Oglala County all of his life and was never gone," (Appellant's Br., 7), the undisputed fact is that there were a half dozen unsuccessful attempts to serve him at his home, as well as several telephone conversations in which he was asked to accept service. (Affidavits of Stan Zakinski and Bud Merrill, CR 15). But Temple does not seriously dispute that efforts to serve him were substantial. Instead, Temple's argument is that "it was never shown that any tribal process server was ever solicited to serve Curtis Temple, which would be required because he is a tribal member." (Appellant's Br., 7).

In support of his argument that a tribal process server is required to establish due diligence, Temple cites *Bradley v. Deloria*, 1998 SD 129, 587 N.W.2d 591. *Bradley* has been effectively overruled, however, by the 1999 amendment to SDCL § 15-6-4(c), which provides:

> The summons may be served by the sheriff or a constable of the county or other comparable political subdivision where the defendant may be found, or in the District of Columbia by the United States marshal or a deputy, or by any other person not a party to the action who at the time of making such service is an elector of any state. *If the defendant to be served is an Indian residing in Indian country, the summons may be served by a person not a party to the action who at the time of making such service is an elector of any state.* The service shall be made and the summons returned with proof of the service, with all reasonable diligence, to the plaintiff's attorney, if any, otherwise to the plaintiff. The plaintiff or the plaintiff's attorney may by endorsement on the summons fix a time for the service thereof, and the service shall be made accordingly. (Emphasis added).

The italicized sentence in SDCL § 15-6-4(c) was added by SB 246 of the South Dakota Session Laws, which was signed on March 9, 1999.[3]

Since the 1999 enactment, SDCL § 15-6-4(c) has contained the wording quoted above. It was in effect when numerous attempts to serve Temple were made in June, July, and August of 2016 by Stan Zakinski and Bud Merrill, neither of whom is a party to this action and both of whom qualify as electors of "any state." Use of a tribal process server to attempt to serve Temple, therefore, was not required. Temple does not seriously argue that the extensive efforts to serve him do not constitute due diligence. The trial court did not then, abuse its discretion when it allowed service by publication.

2. THE JURY VERDICT THAT TEMPLE BREACHED A CONTRACT IN WHICH HE AGREED TO FLY WRIGHT'S AIRPLANE ONLY WITH THE CERTIFIED FLIGHT INSTRUCTOR WHO HAD INSURANCE ON WRIGHT'S AIRPLANE, AND AGREED TO OBTAIN INSURANCE FOR WRIGHT'S AIRPLANE IS SUPPORTED BY SUFFICIENT EVIDENCE.

Temple's Brief contains a litany of basic principles of contract law, without relating those principles to this case. He relies solely on Temple's testimony, but the obvious result of the trial is that the jury believed Miller and Merrill, and did not believe Temple.

Beyond the summary of basic principles of contract law, Temple's argument in this section of his Brief (Appellant's Br., 8-11) is nothing more than a summary of the version of the facts to which Temple testified at trial. Ted Miller testified in contradiction to Temple's version of the facts, however, and the jury obviously accepted Miller's version. This issue is governed by the following summary of contract law stated by this Court in *Weitzel v. Sioux Valley Heart Partners,* 2006 S.D. 45, 714 N.W.2d 884:

[3] https://sdlegislature.gov.sessions/1999/sesslaws/ch 102.htm (Accessed December 5, 2019).

> The elements of breach of contract are: 1. An enforceable promise; 2. A breach of the promise; 3. Resulting damages." *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶ 14, 699 N.W.2d 493, 498 (citing *McKie v. Huntley*, 2000 SD 160, ¶ 17, 620 N.W.2d 599, 603; *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 496 N.W.2d 916, 923 (1993)). *Whether a contract has been breached is a pure question of fact for the trier of fact to resolve. Rindal v. Sohler*, 2003 SD 24, ¶ 13, 658 N.W.2d 769, 772 (citing *Moe v. John Deere Co*., 516 N.W.2d 332, 335 (S.D. 1994); *C & W Enterprises v. City of Sioux Falls*, 2001 SD 132, ¶ 19, 635 N.W.2d 752, 758; *Harms v. Northland Ford Dealers*, 1999 SD 143, ¶ 21, 602 N.W.2d 58, 63; *Swiden Appliance v. Nat'l. Bank of S.D*., 357 N.W.2d 271, 277 (S.D. 1984)). A breach of contract is defined as "[a] violation of a contractual obligation, either by failing to perform one's own promise or by interfering with another party's performance." *Black's Law Dictionary* 182 (7th ed 1999). (Emphasis added)

Weitzel, 2006 S.D. 45, ¶ 31, 714 N.W.2d 884, 894. Miller testified that he told Temple, who is not a licensed pilot, to use only Bob McNew, because McNew had insurance. (TT 157). He told Temple to make sure that Temple himself had insurance. (Id.) Temple testified that he did not recall these admonitions. (TT 75-76, 78, 84). But the jury believed Miller, and did not believe Temple. All of the basic black letter principles of contract law do not change the more fundamental principle of law that whether a contract is breached or not is a question of fact for the jury. *Weitzel,* TT 157.

This Court summarized this principle in *Moe v. John Deere Co.*, 516 N.W.2d 332 (S.D. 1994):

> It is equally well-settled that whether the parties' conduct constitutes a breach 'presents a pure question of fact that the trier of fact alone may decide.' " *Concise Oil & Gas v. La. Interstate Gas Corp.*, 986 F.2d 1463, 1496 (5th Cir. 1993) (quoting *Turrill v. Life Ins. Co. of North America*, 753 F.2d. 1322, 1326 (5th Cir. 1985)); *Town of Breckenridge v. Golforce, Inc*., 851 P.2d 214 (Colo. Ct. App. 1993). In *Breckenridge*, the Colorado Court of Appeals stated, "Whether there has been a breach of a contract is an issue for the fact finder." *Breckenridge*, 851 P.2d at 216. In *Bator v. Mines Development, Inc*., 513 P.2d 220 (Colo. Ct. App. 1973), the court stated that a "[d]etermination of whether a party has performed under a contract is ultimately a question of fact." Id. at 225 (citation omitted).

Moe 516 N.W.2d 332, 335. Temple's argument is an attack on the sufficiency of the evidence. In such cases, all reasonable inferences are to be drawn in favor of the verdict, and it is the function of the jury in resolving factual conflicts, to weigh the credibility of contradictory testimony. *State v. Moran*, 2003 S.D. 14, ¶ 36, 657 N.W.2d 319, 328. Temple has shown no basis for overturning the jury's determination that he made an oral contract to obtain insurance and fly only with Bob McNew, and that he breached that contract.

3. THE JURY VERDICT THAT TEMPLE WAS NEGLIGENT IN THE OPERATION OF WRIGHT'S AIRPLANE IS SUPPORTED BY THE EVIDENCE AND SHOULD BE UPHELD.

Temple's argument on this issue, like his argument as to issue 2 (Breach of Contract) is based solely upon his version of the facts. But his version of the facts was rejected by the jury. There is a little different twist to this portion of Temple's Brief, as he argues that the plane crash was actually Merrill's fault because Merrill should have cut the speed of the airplane and aborted the attempted take-off. (Appellant's Br., 14-15). Temple's claim that Merrill was negligent and at fault, however, was submitted to the jury, which found in Merrill's favor. (CR 434, 667). Temple has not appealed from that determination.

The factual question as to this issue is whether Temple caused the crash by keeping his foot on the brake pedal for his front seat during attempted take-off. Temple denied having his foot on the brake (TT 142). In contrast, Merrill testified that the only way to explain the airplane's lack of acceleration sufficient to allow take-off is that Temple "rode the brakes to keep it straight and you don't keep it straight with brakes on takeoff contrary to anything I had ever taught him." (TT 281). Student pilot or not, if

Temple was riding the brake instead of allowing Merrill to control the take-off, Temple caused the accident as a factual matter. If Temple had not been applying the brakes, the airplane had sufficient distance and would have attained sufficient speed to take off. (TT 288). In short, there was contradictory testimony as to the cause of the crash, and the jury resolved the contradictory testimony against Temple.

Temple must, therefore, shoulder the burden in this appeal of showing that the jury could only rationally have drawn the conclusion that he was not negligent. As this Court stated in *Johnson v. Matthew J. Batchelder Co*., 2010 S.D. 23, 779 N.W.2d 690:

> [w]hat constitutes due care and other questions relating to negligence and contributory negligence are generally questions of fact for the jury. It is only when reasonable [people] can draw but one conclusion from facts and inferences that they become a matter of law and this rarely occurs.

Johnson, 2010 S.D. 23, ¶ 10, 779 N.W.2d at 693–694. Temple made his argument to the jury, and is simply repeating them now. The jury reached its result.

Temple attempts to couch his argument to this Court by saying that he had no duty because he was only taking lessons, and the responsibility for operation of the airplane lay with Merrill (Appellant's Br., 12). As noted in the Statement of Facts, the Citabria airplane's seating configuration gave him full access to the throttle, rudder, and braking operation of the plane. (TT 301, 330). The jury found that, whether he was a beginner or not, he caused the crash by braking, which Merrill testified was "contrary to anything I had ever taught [Temple]." (TT 281). It is ridiculous to blame the instructor when the student has disregarded the instructor's teaching.

This Court has repeatedly stated that:

> [t]he decision of the jury is likely to be upheld as questions of negligence ... are for the determination by the jury in all except the rarest of instances." (Citing *Bridge v. Karl's, Inc.*, 538 N.W.2d 521, 523 (S.D.

1995); *Westover v. East River Elec. Power Coop., I*nc., 488 N.W.2d 892, 896 (S.D. 1992)

Morrison v. Mineral Palace Ltd. Partnership, 1999 S.D. 145, ¶ 14, 603 N.W.2d 193, 197. The jury found that Temple was negligent. Temple has failed to show that this is one of the "rarest of cases" when the verdict should be overturned.

4. THE DAMAGES INSTRUCTION WAS A PROPER STATEMENT OF THE LAW.

Wright's Citabria, after being completely rebuilt in 2013, was a "beautiful airplane," "better than new," and performed "better than factory." (TT 175-176, 178, 257). A new Citabria is priced at about $260,000.00. (TT 194). Wright, who had inherited the plane from his father, testified as an owner that it had a value of $75,000.00. (TT 333). As an owner, he is clearly qualified to offer his opinion as to the value of the Citabria. *Behrens v. Wedmore*, 2005 S.D. 79, ¶65, 698 N.W.2d 555, 580.

Wright invested $79,083.02 in repairing the damage to the airplane caused by Temple. (TT 193). As Miller testified, this expense was justified because "you can't go out and buy one like that." (TT 193). Citabrias like Wright's are vintage, rare, and hard to find. (Id.).

Fair compensation to Wright for Temple's breach of his promises as to insurance and flight instructors begins with SDCL § 21-2-1, which provides:

> For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved *for all the detriment proximately caused thereby*, or which, in the ordinary course of things, would be likely to result therefrom. (Emphasis added).

As to tort damages, SDCL § 21-3-1 provides:

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise provided by this code, is the amount

> which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

The Trial Court's basic damage instructions (Appellant's Addendum 005-005) set out Wright's claim for cost of repair, difference in value caused by the collision, and instructed the jury to deduct the damages by the amount Wright received from the sale of the airplane. (Appellant's Appendix Add. 005).

The Citabria is a unique airplane. It is certified as an aerobatics airplane. (TT 335). After it was rebuilt in 2013, it was considered by both Miller and Merrill to be better than a new Citabria. (TT 175-176, 178, 257, 194). The Citabria had been in Wright's family since 1978, when his father purchased it new and flew it home. (TT 324). Temple did not want to buy it after he wrecked it (TT 183). In order to market the airplane, and save it from the landfill, Wright had no choice but to repair it. (TT 365). After its repair, he had no choice but to sell it for the best price he could get.

The Court's Jury instruction as to damages was appropriately based upon South Dakota Pattern Jury Instruction 50-20-20, which provides that the measure of damages is:

> The reasonable expense of the necessary repairs to the damaged property plus the difference, if any, between the fair market value of the property immediately before the occurrence and its fair market value immediately after repair.

This instruction was actually included in Temple's own proposed instructions. (TT 473). The trial court carefully considered Temple's arguments during the settlement of instructions, and arrived at an appropriate set of instructions which, when read as a whole, properly state the law. *See, Harriman v. United Dominion Indus., Inc*., 2005 S.D. 18, ¶ 13, 693 N.W.2d 44, 48 (instructions must be read as a whole).

Wright is entitled to compensation for all of the harm that Temple caused him, and all of the detriment that Temple caused him. SDCL §§ 21-2-1, 21-3-1. The Court's instructions correctly guided the jury to provide that justice.

5. THE JURY DID NOT AWARD DUPLICATIVE DAMAGES, AND THE SPECIAL VERDICT FORM APPROPRIATELY INSTRUCTED THE JURY.

Wright requested damages in the amount of $106,607.10 (Appellant's Addendum 004), which included repair costs, loss of value, and hangar rental costs (TT 573). The jury awarded Wright $34,144.84 on each of the three claims (negligence, breach of contract, and deceit) upon which the jury had found Temple liable. (CR 667). The jury's award of damages totaled $102,434.53. (Id.). In the Special Verdict Form, the Jury was asked to decide as to each of the claims Wright pled against Temple. In doing so, the Jury was clearly and unambiguously directed to assess damages associated with that claim. Specifically, the Jury was instructed, and gave the following answers:

> Special Verdict Question 3: What is the amount of damages to be awarded to Plaintiff Wright, if any, associated with his negligence claim? $34,144.84.
>
> * * *
>
> Special Verdict Question 7: What is the amount of damages to be awarded to Plaintiff Wright, if any, associated with his contract claim? $34,144.84.
>
> * * *
>
> Special Verdict Question 11: What is the amount of damages to be awarded to Plaintiff Wright, if any, associated with his deceit claim? $34,144.84.

(CR 434). Applying the plain language of the Special Verdict Form, it is clear that the Jury awarded $34,144.84 as to each of the three claims in which the Jury found in favor of Wright. The language "associated with each claim" belies any suggestion by Temple that $34,144.84 is the total damage figure for all claims.

It is the long-held principle that the jury's verdict should be upheld in all but the most extreme circumstances. In *Fjerstad v. Sioux Valley Hospital*, 291 N.W.2d 786 (S.D. 1980), this Court said it this way:

> A verdict should be sustained and should not be set aside unless it is irreconcilably inconsistent or is so vague that its meaning is uncertain. The verdict of a jury may be construed in light of the pleadings, the issues made by the evidence, and the jury instructions. It is presumed that a jury understands and alludes by the court's instructions. Even if the verdict is susceptible of two constructions, the construction that sustains the verdict must be applied. (Citations omitted).

291 N.W.2d at 788. Temple's analysis fails to explain how the verdict is "irreconcilably inconsistent" with the Jury's answers to the Special Verdict questions. The jury's answers are not "so vague that its meaning is uncertain," and it stretches credibility to argue that the verdict which awarded separate damages as to each of three causes of action is "irreconcilably inconsistent" or "vague."

Assuming solely for the sake of argument that the verdict is susceptible to two constructions, the Supreme Court in *Fjerstad* teaches that the construction that upholds the verdict must be applied. In all cases, where the jury's verdict can be explained with reference to the evidence, rather than by juror passion, prejudice or mistake of law, the verdict should be implemented and affirmed. *Miller v. Hernandez*, 520 N.W.2d 266, 272 (S.D. 1994). When the attorneys for the parties settled the instructions, Temple's counsel agreed to the Special Verdict Form, while preserving his record as to whether the claims presented a jury question. (TT 521). There was no objection raised even though clearly, it was contemplated that the Jury could return a decision that favored Wright on more than one count. Even more specifically, there was no objection from Temple to the express direction to the Jury that it assess the damages which were associated with each

individual claim. The Jury's decision to approve damages totaling $102,434.52 is totally consistent with the evidence and arguments presented by Wright as to his damages, and more importantly, consistent with the directions given the jury in the instructions and Special Verdict Form.

Jury instructions are to be read as a whole. *Harriman v. United Dominion Industries, Inc.*, 2005 S.D. 18, ¶ 13, 693 N.W.2d 44, 48. The trial court instructed the jury as to the elements of each cause of action. Then the trial court asked the jury whether they found liability against Temple as to each individual cause of action. If the jury found liability as to a cause of action, then the jury was asked to assess the damages associated with the particular cause of action. Read as a whole, the instructions and Special Verdict Form could not be more clear: the jury made a separate award as to each of the three causes of action as to which they found liability.

There was no "double recovery" in the verdict as claimed by Temple. Obviously, the verdict demonstrates that the jury intended to compensate Wright for all of the harm that Temple caused him, but no more.

NOTICE OF REVIEW

1. THE COURT ERRED IN REFUSING TO ALLOW THE JURY TO CONSIDER WRIGHT'S CLAIM OF PUNITIVE DAMAGES AGAINST TEMPLE.

Wright filed a Motion to allow his claim for punitive damages to be submitted to the jury (CR 242). The trial court considered the motion, and denied it at the close of Wright's case. (TT 384-387). It adhered to its initial ruling when the motion was renewed at the close of all of the evidence. (CR 437). Significantly, the jury then found that Temple had committed deceit in his dealings with Wright. (CR 434, 667).

SDCL § 21-1-4.1 provides:

> In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.

The statute requires a determination by the trial court that, based upon clear and convincing evidence, there is a reasonable basis that a defendant's conduct warrants a submission of a punitive damages claim to the jury. It does not require that there be clear and convincing evidence of conduct for punitive damages. Although the language of SDCL § 21-1-4.1 can be confusing, it simply requires that there be clear and convincing evidence of a "reasonable basis to believe" that a tortfeasor's conduct creates an entitlement to submission of a punitive damages claim. The quantum of proof in the statute is "based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party complained against." This Court interprets this language to mean that:

> [t]he proponent bears a burden of demonstrating a "reasonable basis" to believe punitive damages are warranted. (Citing *Vreugdenhil v. First Bank of South Dakota*, N.A., 467 N.W.2d 756, 760 (S.D. 1991)). In other words, the proponent must prove a "prima facie case" for punitive damages. (Citing *Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991)).

Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 425 (S.D. 1994). It "is a preliminary, lower-order quantum of proof than must be established at trial. *Selle v. Tozser*, 2010 S.D. 64, ¶29, 786 N.W.2d 748 (Quoting *Isaac v. State Farm Auto Ins. Co*., 522 N.W.2d 752, 761 (S.D. 1994)).

Indisputably, punitive damages are recoverable in cases of fraud. SDCL § 21-3-2 provides:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or in any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, in disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

Fraud is a violation of a legal duty arising independent of contract, so that where fraud is shown to exist, punitive damages may be awarded notwithstanding the existence of a contract. *Grynberg v. Citation Oil & Gas Corp*., 1997 S.D. 121, ¶ 22, 573 N.W.2d 493; *Biegler v. Am. Family Mutual Ins. Co*. 2001 S.D. 13, ¶42, 621 N.W.2d 592. The jury in this case actually found that Temple committed deceit when he promised Miller that he would use only Robert McNew as an instructor and would obtain insurance. (TT 434). Temple has not appealed that finding.

Malice to support an award of punitive damages may, under SDCL § 21-3-2, be either actual or presumed. While actual malice is characterized by a desire to cause harm, "presumed malice implies that the act complained of was conceived in the spirit of mischief or criminal indifference to civil obligations." *Biegler*, 2001 S.D. 13, ¶46 (Quoting *Case v. Murdock*, 488 N.W.2d 885, 891 (S.D. 1992)). A claim for presumed malice, therefore, can be shown by demonstrating a disregard for the rights of others. *Id.* (Quoting *Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991)).

The jury in this case found that Temple committed deceit when he promised to use only Robert McNew, and promised that he would obtain insurance coverage in order to obtain possession of Wright's airplane. This is tantamount to a finding that Temple disregarded his civil obligations, and the rights of Wright. That finding entitles Wright to a jury consideration of his claim for punitive damages.

Because Temple has not appealed the jury finding that he is liable for deceit, the only issue to be determined is the amount, if any, of punitive damages.

CONCLUSION

Wright respectfully requests that this Court affirm the jury verdict and judgment as to Temple's liability for compensatory damages.

As to the Notice of Review, Wright respectfully requests that this Court remand for a jury assessment of the amount of punitive damages that Temple should pay Wright. Temple's liability for punitive damages is established as a matter of law, so on remand only the amount of punitive damages is in question.

Dated this 9th day of December, 2019.

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IN THE EVENT THAT THE COURT GRANTS APPELLANT'S REQUEST FOR ORAL ARGUMENT, APPELLEE THOMAS WRIGHT RESPECTFULLY REQUESTS THE OPPORTUNITY TO PARTICIPATE UNDER THE RULES OF THE COURT

_____

Kenneth E. Barker
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CERTIFICATE OF SERVICE

The undersigned certifies that he served a true and correct copy of APPELLEE THOMAS WRIGHT'S BRIEF AND BRIEF ON NOTICE OF REVIEW on the 9th day of December, 2019, by electronic mail and a copy by U.S. Mail on:

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CERTIFICATE OF FILING

I, Kenneth E. Barker, attorney for Appellee Thomas Wright, certify the original and two copies of APPELLEE THOMAS WRIGHT'S BRIEF AND BRIEF ON NOTICE OF REVIEW was mailed by first class mail, postage prepaid to:

Shirley Jameson-Fergel
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An electronic version of APPELLEE THOMAS WRIGHT'S BRIEF AND BRIEF ON NOTICE OF REVIEW was also electronically transmitted in Word format to the Clerk of the Supreme Court at scclerkbriefs@ujs.state.sd.us on the 9th day of December, 2019.

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APPELLEE'S CERTIFICATE OF COMPLIANCE

In compliance with SDCL § 15-26A-66(4), I certify that the font size used in Appellee Thomas Wright's Brief and Brief on Notice of Review is Times New Roman 12. The total word count for Appellee Thomas Wright's Brief and Brief on Notice of Review is 6370.

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IN THE SUPREME COURT

OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 28967

THOMAS WRIGHT,

Plaintiff/Appellee

v.

CURTIS TEMPLE,

Defendant/Third Party
Plaintiff/Appellant

KEN MERRILL,

Third Party Defendant/
Appellee.

APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT

PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI LINNGREN

CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Curtis Temple, appellant, submits the following reply to the responsive briefs submitted by appellees, Thomas Wright and Ken Merrill, in this action. The arguments and points of appellees will be addressed, where necessary, in the order set forth in their main combined brief submitted by Wright. Any points raised by Merrill in his separate brief requiring a reply will be addressed at the end of this reply. If no reply is made in this brief to any sections of appellees' briefs, the issues will be deemed submitted on the arguments set forth in appellant's main brief and appellees' responsive brief.

STATEMENT OF THE CASE

Wright argues that the jury in this case reached a determination of total damages in the amount of $102,435.53 and then apportioned that amount equally between the three different causes of actions the jury returned identical verdicts of $34,144.84 upon, namely negligence, breach of contract, and deceit, which he claims was the total amount of damages claimed less hangar fees. There is no factual or legal basis for such an argument and amounts to nothing more than unfounded speculation and conjecture. It is also not accurate that Temple does not dispute the jury's finding in favor of Wright based on the claim of deceit.

I. TEMPLE WAS NEVER PERSONALLY SERVED AND THE ACTION WAS NEVER PROPERLY COMMENCED.

There is no dispute in this case that Curtis Temple was an enrolled member of the Oglala Sioux Tribe and at all times was a resident of Oglala Lakota County. His residence is in a remote area of the Pine Ridge Indian Reservation. He was never gone

from his home during the times that service was attempted in this case. It is not the position of Temple here that he could only be served by a tribal process server, contrary to SDCL 1967 15-6-4 (c), but that if a tribal process server was utilized from the Reservation, familiar with the area where Temple lived and the Reservation in general, was utilized personal service could have been secured on Temple as required. None of the persons utilized by Wright to effect service was either a tribal member or resided in the area where Temple lived. If the persons who are attempting service reside outside the Reservation, it will always be an easy explanation that they could not locate the Indian defendant even though the defendant, as here, resided on the Pine Ridge Indian Reservation all of his life. Temple could and should have been personally served. All reasonable means to effect service were not utilized in this case and consequently service was insufficient.

II. THERE WAS NEVER ANY CONSENT OR MISREPRESENTATIONS BY TEMPLE REGARDING INSURANCE ON THE AIRPLANE OR COVERAGE THROUGH A SPECIFIC INSTRUCTOR.

As set forth in appellant's opening brief, Ted Miller's practice in allowing rental of the plane was to have everything in writing including provisions relating to rent and fuel, proof of insurance requirements, and signed by the person responsible for the plane. That protocol was not observed when the plane left Miller's possession to be flown to Caputa. Nothing in writing was set forth as to the instructor that could be utilized. Miller knew that Temple was not a pilot. Even after the plane was in Caputa and Miller realized that Temple had no insurance, Miller took no action to require the plane to be returned or to reassume possession of the plane. Miller's testimony itself shows the

profound lack of due diligence in all aspects of the dealings with Temple. Miller's testimony was that he told Temple to have insurance, but there was no evidence that Temple agreed to or consented. Consent must be mutual and an agreement must be on the same thing. Silence does not constitute acceptance. There is a lack of any evidence of consent or any misrepresentation by Temple upon which liability could be based, even if it could be shown that Temple was negligent in the operation of the plane at the time that the damage was done.

III. CURTIS TEMPLE WAS NOT IN CONTROL OF THE CITABRAI, HAD NO DUTY IN ITS OPERATION, AND WAS NOT NEGLIGENT IN THE OPERATION OF THE AIRPLANE ON JULY 25, 2014.

Curtis Temple had no experience nor license to fly an airplane; he was at most a student. Temple was flying with Merrill a certified pilot, licensed to instruct students, with complete control over the airplane, and Merrill had final authority as to the operation of the plane. Temple at all times was under Merrill's supervision. Merrill was the captain of the ship and responsible both for the plane and the student. Merrill admitted that he could have cut speed and have aborted the take off therefore avoiding the damage caused to the airplane and that he made the wrong decision in failing to do so. There is not one ounce of evidence that Curtis Temple had his feet on the brake other than the self serving statement of Merrill without any substantiation by any objective facts. Temple had no liability for the operation of the airplane. Responsibility for the damage to the plane rests with Merrill.

IV. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON THE CLAIMS FOR DAMAGE AND WRIGHT'S DAMAGE REQUEST WAS NOT AUTHORIZED UNDER HIS OWN INSTRUCTIONS THAT WERE GIVEN.

Appellant Temple adequately covered this assignment in his main brief. In short, first, South Dakota Pattern Jury Instruction (PJI) 50-20-10, submitted by Temple, states the applicable law on damages to personal property regardless of the theory set forth in the causes of action. Indeed, Wright's request for damages at Add. 004 or in his final argument to the jury made no distinction as to theories of liability. Second, there is no case law supporting giving two different instructions as set forth in Add. 005 and 006 on damage to personal property based on a single incident underlying various causes of actions. Third, the instruction set forth in Add. 005 not only is inaccurate and is not really an instruction providing any guidance to the jury but rather Wright's request for damages. The instructions given were inaccurate, confusing, and failed to properly instruct the jury.

Wright maintains that the fair market value of the plane was $75,000. His own testimony at trial was that he had the plane for sale before and after the July 25, 2014, incident resulting in the damage to the plane and he received no offers of $75,000. The only offer he received was subsequent to the July 25, 2014, incident after the plane had been completely repaired when Shane Combs offered him $52,500 which Wright accepted. Wright's testimony cannot belie the market place price he received.

V. THE INSTRUCTIONS, VERDICT FORM, AND JUDGMENT AUTHORIZED IMPERMISSIBLE DUPLICATIVE DAMAGES NOT AUTHORIZED BY LAW.

This assignment likewise has been thoroughly covered in Appellant Temple's main brief at 21-25.

Wright's response consists of the argument that the jury meant to award

$34,144.84 for each cause of action based on negligence, breach of contract, and deceit and that the jury must have meant that total award is the sum of the three or $102,434.53. The counter argument, of course, is that the jury meant that the total damage was $34,144.84 regardless of the cause of action which is more consistent with South Dakota law that each cause of action was an alternative theory seeking relief for the same single wrong, namely damage to the airplane.

The trial court initially indicated that it would give an instruction on "double dipping" but then changed its mind, over objection of Temple, reasoning that it had authority to make adjustments if the verdict was contrary to law. Temple opposed the proposed judgment that was signed by the judge in this case because it awarded duplicative damages.

Wright argues that the answer to the special verdict form shows that the jury meant to award a total of $102,435.53. A review of the special verdict form shows that the jury could have meant that the $34,144.84 was the total damage regardless of the cause of action.

Understandably, Wright in his brief did not respond to the body of law in South Dakota and elsewhere at 23-25 of Temple's main brief which prohibits duplicative damages where the same wrong, here the July 25, 2014, damage to the plane, gave rise to each cause of action. Each cause of action was an alternative theory seeking relief for the same wrong.

NOTICE OF REVIEW

I. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION

IN REFUSING TO ALLOW CONSIDERATION OF PUNITIVE DAMAGES.

A trial court's determination on whether or not to submit a punitive damage claim to the jury is reviewed under the clearly erroneous standard. Hoaas v. Griffiths, 2006 SD 27 ¶ 16, 714 NW2d 61; Kieser v. Southeast Props., 1997 SD 87 ¶ 27, 566 NW2d 833, 839-40. In order for punitive damages to be submitted to a jury, the proponent must establish by clear and convincing evidence that there is a reasonable basis to believe that a party's conduct was willful. SDCL 1967 21-1-4.1.

There was no reasonable or prima facie basis for the court to allow the punitive damage claim to be submitted to the jury. Temple had literally no contact with Wright throughout these proceedings until after the July 25, 2014, incident. Temple was allowed to have the airplane flown from Miller's airport without any of the written protocol in place that Miller usually required. Without the normally required writing, the case came down to a disagreement between Temple, Miller, and Merrill as to what was said and agreed upon. This action is a straight- forward contract action, whether denominated as negligence, contract, or deceit. Punitive damages are not allowed for breach of contract actions, Longwell v. Custom Benefits Programs Midwest, 2001 SD 60, 627 NW2d 397, and mere negligence is not equivalent to willful and wanton misconduct. Brown v. Youth Services, 89 F.Supp.2d 1095 (D.S.D. 2000). There were no facts established or argued to the jury that separated or distinguished the claim of deceit from the breach of contract action. Grynberg v. Citation Oil & Gas Corp., 1997 SD 121, 573 NW2d 493.

Indeed, there was not even a separate instruction given on deceit. The jury clearly

merged deceit with breach of contract. Coverage actions have been determined as not meeting the conditions necessary to support submission for punitive damages. See O'Daniel v. Stroud, 607 F.Supp.2d 1065 (D.S.D. 2009). There was no evidence that Temple had a positive state of mind to injure Wright evidenced by the positive desire to injure actuated by hatred or ill will nor that any representation as to insurance was conceived in the spirit of mischief or criminal indifference to any civil obligation. To reach that conclusion means that Temple must have had the intent to cause the damage to the airplane, which not even Wright is maintaining in this action. Axness v. Aqreva LLC, 118 F.Supp.3d 1144 (D.S.D. 2015). To reach that conclusion, it must be presumed that Temple wanted to injure the airplane and in the process risk injury or death to himself.

The jury found that there was no fraud and no damages were awarded on that cause of action. There was no violation of any statute. Maryott v. First National Bank of Eden, 2001 SD 43, 624 NW2d 96.

Wright in his brief claims that Temple has not appealed the finding of the jury on deceit, which is inaccurate. See Temple's main brief at 8 through 11 ("Curtis Temple did not breach any contract with or deceitfully make any misrepresentations to Ted Miller regarding insurance)."

The trial court was not clearly erroneous in determining that there was no basis for submitting the punitive damage claim to the jury in this case. There was no clear and convincing evidence that there was a reasonable basis for finding that action of Temple was willful.

MERRILL'S BRIEF

Merrill has joined in the brief of Wright and Temple's main brief responds to both the claims of Wright and Merrill in this matter except as set out hereafter.

Merrill in his arguments under I and III claims there is no assignment of error with regard to the jury's findings as to Merrill. This is inaccurate. In Temple's main brief under III at 11 through 17 it sets forth his argument that Temple was not in control of the Citabrai, had no duty in its operation, and was not negligent in the operation of the plane on July 25, 2014. This assignment clearly makes the argument that the total responsibility for the damage to the plane was through the negligence of Merrill because Merrill was the licensed pilot, was in total control of the plane, and he admitted that he should have aborted the take off which would have avoided any damage to the plane and resulting judgment against Temple. There was no need for expert testimony in view of Merrill's admissions at trial. There was no waiver by Temple of his claim that Merrill was responsible for the damage to the plane.

Under IV of Merrill's brief at 9 and 10, he argues that this reviewing court, under Biegler v. Am. Family Mut. Ins. Co., 2001 SD 13, 621 NW2d 592, has the authority to modify the judgment entered in this case to comport with the law. If the court finds that the judgment against Temple should not be reversed in its entirety, Temple concurs in Merrill's position that the judgment can be modified by this court to provide for judgment in the amount of $34,144.84 because otherwise Wright is awarded prohibited duplicative damages as set forth in Temple's main brief under V at 21 through 25.

CONCLUSION

For the above reasons, the judgment in this case should be reversed in its entirety or at the very lease the judgment in this case modified to prohibit the award of duplicative damages not allowed under South Dakota law.

Dated January 6th, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word Perfect 2017 and contains 2342 words. I have relied on the work count of Microsoft Word Perfect 2017 in order to prepare this certificate. Dated this 6th day of January, 2020.

/S/ Terry L. Pechota
Terry L. Pechota

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of January, 2020, a true and correct copy of the *Appellant's Reply Brief* in Appeal No. 28967, was served via e-mail and U.S. Mail, Postage Pre-paid upon the persons next designated herein:

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