NO. 30558

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Lonnie Two Eagle, Sr., *Plaintiff-Appellant,* v. AVEL ECARE, LLC, MOONLIGHTING SOLUTIONS LLC, and MATTHEW C. SMITH, individually and jointly and severally, *Defendants-Appellees.*	)	On Appeal from the Circuit Court, Sixth Judicial Circuit, Todd County, South Dakota The Honorable Bobbi Rank presiding

APPELLANT LONNIE TWO EAGLE SR., BRIEF

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Notice of Appeal was filed on the 15th day of December, 2023.

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PRELIMINARY STATEMENT

Throughout Appellant's brief, Appellant will be referred to as "Two Eagle". Appellee Dr. Smith will be referred to as "Smith". Appellee Avel eCare, LLC will be referred to as "Avel". Appellee Moonlighting Solutions, LLC will be referred to as "Moonlighting". Dr. Smith's patient, Chad Sully will be referred to as "Sully". Parenthetical references prefaced by the letters "SR" refer to the settled record; those prefaced by the letters "TR" will refer to the summary judgment hearing transcript for the summary judgment hearing held on November 16, 2023. Deposition transcripts will be prefaced by the letters "SR" followed by a page number and lines.

JURISDICTIONAL STATEMENT

This is an appeal from a Summary Judgment signed by the Honorable Bobbi J. Rank dated November 30, 2023, and filed with the Sixth Judicial Circuit Court Todd County Clerk of Courts on November 30, 2023. A Notice of Entry of Summary Judgment dated December 1, 2023, was filed on December 1, 2023. The November 30, 2023, Summary Judgment granted judgment in favor of all Defendants, and therefore, the Judgment sought to be reviewed is appealable. A Notice of Appeal dated December 15, 2023, was filed on December 15, 2023.

LEGAL ISSUES

1. DID SMITH OWE A LEGAL DUTY TO TWO EAGLE?

   The trial court held that there is no issue of material fact and that after a review of the entire record that the defendants did not owe a legal duty to Two Eagle as defined by law and summary judgment should be granted.

   Kuehl v. Horner (J. W.) Lumber Co., 2004 S.D. 48
   Limpert v. Bail, 447 N.W.2d 48 (SD 1989)
   Doe v. Cochran, 210 A.3d 469 (Conn. 2019)
   Szymborski v. Spring Mt. Treatment Ctr., 403 P.3d 1280 (Nev. 2017)

2. DOES SOUTH DAKOTA PUBLIC POLICY BAR TWO EAGLE'S CLAIMS?

The trial court held that South Dakota public policy bars the claims.

Doe v. Cochran, 210 A.3d 469 (Conn. 2019)
Coombes v. Florio, 877 N.E. 2nd 567, 575 (Mass. 2007)
Rosebud Sioux Tribe v. United States, 9 F.4th 1018, 1026 (8th Cir. 2021)

STATEMENT OF THE CASE AND FACTS

This is a personal injury case including medical malpractice and ordinary negligence counts filed in the Sixth Judicial Circuit in Todd County, the Honorable Bobbi J. Rank presiding. This appears to be a case of first impression in that the South Dakota Supreme Court has not had occasion to decide whether a doctor can ever owe a legal duty to a third party, someone other than the doctor's patient. On April 14, 2022, the trial court entered an order denying the defendants' motions for judgment on the pleadings, or alternatively motions to dismiss. The trial court's April 4, 2022, memorandum opinion was incorporated within the April 14, 2022, order.

On November 30, 2023, the trial court entered summary judgment in favor of all defendants. The trial court indicated that none of the defendants owed any legal duty to the plaintiff and that South Dakota public policy precluded plaintiff's claims against the defendants.

On August 5, 2019, seventy-one-year-old Mr. Lonnie Two Eagle (Two Eagle) was operating a riding lawn mower near the roadway that circles the Rosebud Hospital. Chad Sully (Sully), a cook at the Rosebud Hospital was driving his personal vehicle on his way to work at the hospital when he suffered a seizure. As a result of suffering the seizure, Sully's vehicle left the roadway and ran over Two Eagle. (SR 646-649) Two Eagle suffered catastrophic injuries including loss of a lower leg, traumatic brain injury and fractured vertebrae. Two Eagle was hospitalized for just short of one year and now

requires dialysis three times a week. Two Eagle is no longer able to work, has an artificial limb, and gets around by wheelchair or for short distances by walker. (SR 368, 372)

Dr. Matthew C. Smith (Smith) is a neurologist from Macon, Georgia who was hired by Avel as a contract special clinic provider to perform telemedicine services for patients at the Rosebud Hospital. (SR 1418, 582, 586-587) Smith first saw patient Sully for Sully's seizure condition via telemedicine on April 16, 2019. (SR 1212-1217) Before Smith's first appointment with Sully, Avel nurse, Kristi Ponto as instructed by Avel's medical director, on April 8, 2019, prepared a chart review to assist Smith to become familiar with Sully's medical history. (SR 942, p. 16:2-10; SR 949-950, p. 23:18--p. 24:1;SR 1021-1032) Smith didn't remember if he reviewed nurse Ponto's April 8, 2019 chart review. (SR 587, p. 35:6-13) Smith was informed by Sully on April 16, 2019, that Sully's last seizures occurred on April 11, 2016. (1229-1231) Smith also had access to Sully's electronic health care records at the Rosebud Hospital that showed that Sully first had a seizure on January 13, 2019, and had a second seizure on March 12, 2019. (SR 1300-1301; 625, 627, 1591,) Smith was also informed by Sully that Sully had suffered eight seizures, meaning that Sully had suffered seven seizures between March 12, 2019, and April 11, 2019. (SR 1213) On April 16, 2019, after being informed about Sully's seizure history, Smith issued a directive to Sully, "no driving until 6 months seizure free". (SR 1216) This meant that the earliest that Sully could start driving again would have been October 11, 2019, if no further seizures occurred.

Sully was next seen by Smith via telemedicine on July 23, 2019. The medical report prepared by Smith on July 23, 2019, inaccurately reported, "no seizures since February". Sully did not tell Smith on July 23, 2019, that his last seizure was in February.

Sully does not know why Smith put in the July 23, 2019, medical report that Sully's last seizure was in February. (SR 1230) Based upon Smith's inaccurate seizure history in the July 23, 2019, medical report, Smith authorized Sully to "return to driving in August". (SR 631-632) Just five days into August, Sully suffered a seizure and the terrible accident occurred causing Two Eagle's horrendous injuries.

The Rosebud Hospital telemedicine program came about as part of Sioux Falls Avera Health's project to provide better healthcare to the Indian reservations in South Dakota. The division of Avera Health handling the telemedicine healthcare was Avera eCare, LLC (Avera), later becoming Avel eCare, LLC (Avel). (SR 1297) Avera pursuant to an agreement with Rosebud Hospital provided physicians for Rosebud Hospital's telehealth. (SR 1527-1540)

Avera provided training to specialty clinic providers such as Smith to educate the medical providers regarding access to Rosebud Hospital patient electronic healthcare records and regarding the doctors' creation of electronic medical records. (SR 1297-1298) Smith received training through Avera on March 19, 2019, and April 2, 2019. (SR 1300)

Moonlighting Solutions, LLC (Moonlighting) is a North Carolina staffing company providing physicians for telehealth. Smith became a Moonlighting contract physician in or about 2012. (SR 582) Avera contacted Moonlighting to provide physicians for the Rosebud Hospital and Avera pursuant to an agreement with Moonlighting added Dr. Smith as one of its specialty clinic providers. (SR 364-366) Part of Smith's duties under his contract with Moonlighting for client Avera for Indian Health Service medical care was to utilize Avera provided technology to access Rosebud

Hospital's electronic healthcare records and to document all facets of the interaction with the patient. In addition, Smith had a legal duty to fully and accurately complete patient medical records and notes in the electronic medical record. (SR 1011)

Sully was examined at the emergency room at the Rosebud Hospital on August 5, 2019, after the accident involving Two Eagle who also was temporarily admitted to the emergency room before being flown to the Rapid City hospital. (SR 647) Sully's August 5, 2019, electronic medical records indicate Sully was only taking one half of his seizure medicine. The August 5, 2019, Sully medical record indicates that the source of the information was from Transport Personnel. (SR 1043) Sully indicates that Sully was taking the medicine as prescribed. (SR 1230, 1557)

Urine testing from August 5, 2019, showed marijuana levels which defendants claim may have affected the efficacy of the Keppra. (SR 596, p. 72:5-18) However, Sully's health records show that Sully was a regular user of marijuana so Smith should have been aware of the marijuana usage and on notice that the marijuana and Keppra levels should have been monitored before deciding to authorize Sully to drive. (SR 627)

ARGUMENT

Standard of Review

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact[.]" SDCL 15-6-56(c). Summary judgment is usually inappropriate in a negligence case, except when no duty exists as a matter of law. *Bordeaux v. Shannon County Schools*, 2005 SD 117, ¶ 11(citation omitted). Nonetheless, "[s]ummary judgment is an extreme remedy, and is not intended as a substitute for trial."

Stern Oil Co., Inc. v. Brown, 2012 S.D. 56, ¶ 9. We review de novo a circuit court's conclusion that the defendant owed no duty to the plaintiff. *Id.* (citation omitted). *McGuire v. Curry*, 2009 S.D. 40, ¶ 7.

DR. SMITH OWED A LEGAL DUTY TO LONNIE TWO EAGLE.

Duty under medical malpractice

Two Eagle's complaint alleges a count of malpractice and a count of ordinary negligence

against Smith. Two Eagle was not Smith's patient, but Two Eagle contends that a legal duty was owed to him because his injury was foreseeable when Smith inaccurately reported when Sully's last seizure occurred and based on the negligent mistake authorized Sully to drive before Sully was 6 months seizure free, which was the time frame that Smith had previously set. The ordinary negligence claim was included because Smith's misconduct, although involving a patient, was not related to any medical science or art requiring special skills not ordinarily possessed by lay persons, rather it involved misconduct that can instead be assessed on the basis of the common, everyday experience of the trier of facts.

As pointed out by the trial court in her April 4, 2022, Memorandum Opinion (SR 303), on a negligence claim a plaintiff must prove "(1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such failure." *Shead v. Hattum,* 2021 S.D. 55 ¶ 23. For malpractice, a physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing according to a national standard, and negligence of a doctor consists of failure to

conform to the standard of care which the law establishes for members of that profession. *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 17.

It is understood and accepted by the parties, that it is most likely that the South Dakota Supreme Court has not addressed the specific issue in this case as to whether a doctor can owe a legal duty to an individual who is not the doctor's patient if the injury to the non-patient was foreseeable considering the doctor's negligent conduct. Nor has the South Dakota Supreme Court addressed whether a doctor in a medical setting can be found liable for ordinary negligence.

A duty can be created by statute or common law. *Andrushchenko v. Silchuk*, 2008 SD 8, ¶ 21 (quoting *Fisher Sand & Gravel Co. v. South Dakota Dept. of Trans.*, 1997 SD 8, ¶ 12).

SDCL § 20-9-1 provides:

> Responsibility for injury by willful act or negligence—Contributory negligence. Every person is responsible for injury to the person, property, or rights of another caused by his willful acts or caused by his want of ordinary or skill, subject in the latter cases to the defense of contributory negligence.

South Dakota recognizes the common law doctrine of gratuitous duty. *State Auto Ins. Co. v. BNC*, 2005 SD 89. The Restatement (Second) of Torts § 324A in part provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person… is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if … his failure to exercise reasonable care increases the risk of such harm… or … the harm is suffered because of reliance of the other… upon the undertaking.

Although the Appellees contend that a relationship must exist between the plaintiff and the defendant before a duty can be established, that notion was dispelled in *Thompson v. Summers,* 1997 SD 103, ¶ 13, 15. The Court wrote:

> On the contrary, it is foreseeability of injury to another, not a relationship which is a prerequisite to establishing a duty necessary to sustain a negligence cause of action.

The *Thompson* Court cited *Mark, Inc. v. Maguire Ins. Agency, Inc.,* 518 N.W.2d 227, 229-30 (SD 1994) ("Whether a duty exists depends on the foreseeability of injury.") and *Mid-Western Elec., v. DeWild Grant Reckert & Assocs. Co.,* 500 N.W.2d 250, 254 (SD1993) ("We instruct trial courts to use the legal concept of foreseeability to determine whether a duty exists.").

The trial court in the instant case noted that it could reasonably be inferred that Smith imposed a driving restriction on Sully to protect him and, inevitably, those he might encounter on the road. (SR 306) The South Dakota Supreme Court has held that the touchstone of legal duty is the foreseeability of injury. *Janis v. Nash Finch Co.,* 2010 SD 27, ¶ 15. In *Janis* the Court wrote:

> Foreseeability, rather than knowledge, however, is the touchstone of the existence of the duty of reasonable or ordinary care. (citation omitted) The risk reasonably to be perceived defines the duty to be obeyed[.] (citation omitted) "Whether a common-law duty exists depends on the foreseeability of injury." (citations omitted)

On April 16, 2019, Smith was told by patient Sully that Sully had suffered a series of seizures on April 11, 2019, and had suffered eight witnessed seizures seven of which had occurred between March 12, 2019, and April 11, 2019. (SR 1231, 634) Sully's Rosebud Hospital electronic healthcare records reflect Sully's medical history showing

these seizures and Smith had access to Sully's electronic healthcare records. (SR 626, SR 627, SR 1220, SR 964, p. 38:17-22, SR 970-971, p.44:19—p. 45:6, SR 977, p. 51:5-11) After Smith heard Sully's medical history of seizures on April 16, 2019, Smith perceived the risk of injury if Sully suffered a seizure while driving, and therefore, imposed the driving restriction. (SR 636) The issuance of the driving restriction showed that Smith foresaw the risk of injury to Sully and to the public who would encounter Sully on the road. The substantial likelihood of an accident in the event of a seizure episode while driving is bore out by the Comment in the Loyola University Chicago Law Journal authored by Katrina Lufty submitted by the defense in the instant case. (SR 1078-1079)

In addressing the defendants' contentions that the claims for ordinary negligence and malpractice claims should be dismissed as a matter of law because there was no physician-patient relationship with the plaintiff, the trial court noted that although the South Dakota Supreme Court has never addressed the specific issue, it has allowed third party professional negligence claims to proceed in certain situations.

The South Dakota Supreme Court addressed third party liability in the professional negligence setting in *Mid-Western Elec., v. DeWild Grant Reckert & Assocs. Co.,* 500 N.W.2d 250, 254 (S.D. 1993) (Recognizing professional negligence claim by electrical subcontractor providing fire suppression system against engineering firm who drafted and interpreted specifications for owner despite no privity of contract between subcontractor and engineering firm; it was foreseeable to engineering firm that subcontractor could be economically harmed by faulty specifications); *Melenkort v. Union County Land Trust,* 530 N.W.2d 658, 662 (S.D. 1995) (Court recognized tort of professional negligence beyond the strictures of privity of contract); *Friske v. Hogan,*

2005 S.D. 70 ¶ 13 (Legal malpractice claim may be brought by third party if the intent of the client to benefit third party was direct purpose of attorney-client transaction or relationship because imposition of duty to third party upon attorney would not significantly impair or compromise attorney's obligations owed to the client; the duties to both the third party and the client are the same); *Fonder v. Wells Fargo Insurance, Inc. Flood Services,* 2015 S.D. 66, ¶ 18 (Reversing dismissal of professional negligence claim by owners against flood insurance company retained by lender for analysis when it was reasonably foreseeable that the homeowners would rely on analysis when deciding whether to purchase flood insurance); and *Limpert v. Bail,* 447 N.W.2d 48 (SD 1989) (citing *Layman v. Braunschweigishe Maschinbauanstalt,* 343 N.W.2d 334, 341 (N.D. 1983) (Veterinarian who undertakes by contract to perform a certain service and is chargeable with the duty of performing the work in a reasonably proper and efficient manner, and injury occurs to a blameless person, the injured person has a right of action directly against the offending contractor which is not based on any contractual obligation but rather on the failure of such contractor to exercise due care in the performance of his assumed obligation).

The trial court was presented with the expert reports from neurologist Dr. Larry Teuber on behalf of Two Eagle who rendered opinions that Smith had a duty to get a medical history of Sully's seizure events, that Smith's conduct deviated from the standard of care and that Smith's negligence was a cause of Two Eagle's injuries. (SR 652-657)

The trial court after considering South Dakota case precedent on third party liability in the professional negligence setting concluded that the lack of a physician-

patient relationship in the instant case is not, in and of itself, fatal to Two Eagle's claims. (SR 305)

Courts from outside jurisdictions have allowed third party non-patient negligence claims against health care providers. *Tarasoff v. Regents of University of California,* 1976 551 P.2d 334 (Cal. 1976) (because a psychotherapist stands in a special relationship with a person whose conduct may need to be controlled -- the patient -- the therapist has a duty first to exercise "'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances'" in predicting whether the patient poses a serious danger to others, and second, "to exercise reasonable care to protect the foreseeable victim of that danger."); *Coombes v. Florio,* 877 N.E. 2nd 567, 575 (Mass. 2007) (doctor prescribed numerous medications with side effects including drowsiness, dizziness, lightheadedness, fainting, altered consciousness and sedation and advised patient it was safe to resume driving); *Doe v. Cochran,* 210 A.3d 469 (Conn. 2019) (doctor negligently notified patient that STD testing was negative which led to the transmission of herpes); *Arsenault v. McConarty,* 21 Mass.L.Rptr. 500 (Mass.Super. 2008) (doctor discharged patient from hospital after prescribing medications for lowering blood sugar level even though blood sugar level was still low after eating and failed to warn of the danger of driving with low blood sugar while taking medications); *Medina v. Pillmemer,* 20 Mass.L.Rptr. 352 (Mass.Super. 2005) (doctor aware of September 2000 seizure and that patient was suffering from a malignant brain tumor but authorized patient's driving in January 2001 before December 10, 2001 accident; court later granted summary judgment in favor of doctor after development of the law, see *Medina v. Pillmemer,* 29 Mass.L.Rptr. 326 (Mass.Super. 2011)); *Cheeks v. Dorsey,* 846 So.2d 1169 (Dist.Crt.App. FL 2003) (doctor administered usual dose of methadone to drug addicted

patient without first testing blood or urine failing to determine that patient was impaired causing ensuing accident); *Harden v. Allstate Insurance Company*, 883 F.Supp. 963 (Dist. Ct. Del. 1995) (doctor aware of prior accidents caused by seizures failed to report epileptic condition of patient to Division of Motor Vehicles as required by state law and failed to notify patient's husband or children that patient should not drive); *Burroughs v. Magee*, 118 S.W.3d 323, (Tenn. 2003) (doctor prescribed two medications that can affect a patient's ability to safely operate a motor vehicle when patient's medical chart showed that patient had been refused medication for abuse of medication in the past and that doctor failed to warn of risk of driving while on medications). *Tomlinson v. Metro. Pediatrics, LLC*, 362 Ore.431 (2018) (Parents who were not patients of defendant doctor, could pursue a claim for negligently failing to timely diagnose Duchenne muscular dystrophy an inheritable genetic disorder of their first son and to notify the parents who later had second son who was also inflicted with Duchenne muscular dystrophy).

As noted above, other jurisdictions have held that doctors are subject to third-party negligence liability when the risk of injury is reasonably foreseeable. Two Eagle submits that Smith should also be held legally responsible for Two Eagle's injury resulting from Smith's negligent conduct given that Smith himself acknowledged the foreseeability of injury when Smith imposed a no drive restriction on Sully until Sully went six months seizure free. The trial court in the instant case ruled that Two Eagle sufficiently pled that the Defendants undertook to render services to Sully which they should have recognized as necessary for the protection of Two Eagle, and that Smith's failure to exercise reasonable care increased the risk of harm to Two Eagle or the harm was suffered by Two Eagle because of Sully's reliance on the Defendants' undertaking. Restatement (Second) of Torts § 324A(a)(c). The trial court further noted that the harm need only be within the class of

reasonably foreseeable hazards that the duty exists to prevent. *State Auto Ins. Companies v. B.N.C.*, 2005 S.D. 89 ¶ 5. Obviously, Smith's no drive restriction was meant to prevent injuries from a motor vehicle accident occurring if Sully suffered a seizure while driving. The trial court concluded that Two Eagle raised sufficient allegations of a gratuitous undertaking under § 324A and foreseeability of injury for purposes of establishing a duty.

In ruling on the Defendants' Motions to Dismiss, the trial court noted that it was for another day to decide whether the Amended Complaint could survive the wringer of discovery. The trial court in ruling on the summary judgment motions noted, "[n]ow having benefit of the entire record, I do find that that lack of privity is a bar to existence of a duty and I don't find that the Supreme Court would not extend those lack of privity cases to this – or extend those cases that I referenced in the memorandum opinion to this situation." (TR, 39; 1-6). It is ironic and somewhat telling, that the trial court, in specifically denying the Defendants' Motions to Dismiss, subsequently decided to grant the Defendants' Motions for Summary Judgment, despite the circumstance that the "facts" concerning Defendants' and Smith's ordinary negligence only got worse for the Defendants, as developed in the discovery depositions taken by the Plaintiff, subsequent to the Trial Court's April 4, 2022 Memorandum Opinion denying the Motion to Dismiss. The material facts did not change, they only got worse for the Defendants or in effect, became more in dispute on the material facts and genuine issue of the legal duty prescribed to Smith, under ordinary negligence law standards. But the trial court did not reference any fact gained through discovery that affected her analysis that a duty existed under the Restatement (Second) of Torts § 324A(a)(c) and the common law on foreseeability of injury. (SR 307) Nothing uncovered through discovery refuted that

after Smith became aware of the extent of Sully's seizure history, he foresaw the risk of injury to those Sully may encounter on the road, and therefore, imposed the no-drive restriction. Likewise, it is undisputed that Smith on July 23, 2019, carelessly misreported the date of Sully's last seizure, and recklessly and unintentionally authorized Sully to return to driving in August contradicting Smith's previous directive to not drive until at least October 11, 2019. The trial court was correct in determining that Smith owed a common law duty to Two Eagle and the discovery process did not supply any basis to modify that conclusion.

Duty under ordinary negligence

Two Eagle's alternative count for ordinary negligence is based on Smith's negligent conduct being of a ministerial nature that had nothing to do with medical judgment or the specialized skills of a neurologist. Under this ordinary negligence theory Two Eagle contends that Smith owed a duty to exercise reasonable care in accordance with SDCL § 20-9-1 just as any non-professional person would. Smith should be subject to liability to third parties for his ordinary negligence consistent with the cases of *Kuehl v. Horner (J. W.) Lumber Co.,* 2004 S.D. 48; *McGuire v. Curry,* 2009 S.D. 40; *Harris v. Best Bus. Prods.,* 2002 SD 115; and *Thompson v. Summers,* 1997 S.D. 103. Two Eagle deserves the same protection under the law whether the ordinary negligence was committed by a professional businessperson or a lay person.

South Dakota pattern jury instruction on malpractice 20-70-30 provides:

> A physician has the duty to possess that degree of knowledge and skill ordinarily possessed by a physician of good standing engaged in the same line of practice *[in the same or a similar locality]*.
>
> A physician also has the duty to use that care and skill ordinarily exercised under similar circumstances by physicians in good standing engaged in the

same line of practice in the same or similar locality and to be diligent in an effort to accomplish the purpose for which the physician is employed.

A failure to fulfill any such duty is negligence.

The South Dakota Supreme Court has assessed what constitutes medical malpractice but not in the context of deciding whether malpractice is the exclusive cause of action for a third party injured by a doctor's ordinary negligence.

The Appellees rely heavily on *Martinmaas v. Engelmann,* 2000 SD 85 for their position that a doctor's misconduct can only constitute malpractice and can never be evaluated under an ordinary negligence standard. The Supreme Court in *Martinmaas* was deciding whether the trial court abused its discretion in denying motions for directed verdict and judgment n.o.v. The defendant in *Martinmaas* argued that the allegation of rape was not an act within the realm of patient care. Alternatively, even if there was evidence of negligence, there was no causal connection between it and a resulting injury; the injuries claimed by the Plaintiffs resulted from intentional acts. The Plaintiffs had dismissed the counts for intentional torts before trial presumably to assure coverage under Defendant's malpractice liability insurance policy in the event of a favorable jury verdict. Chief Justice Miller writing for the majority concluded that for tort liability purposes, sexual misconduct falls within the definition of malpractice. Justice Konenkamp wrote a concurring opinion strongly disagreeing with the majority decision holding that rape is an act of professional negligence. Justice Konenkamp concurred with the majority decision because the verdict could have been rendered based on plaintiffs' alternative theory of improper procedures and methods that defendant used in conducting exams. Justice Amundson in his dissenting opinion also disapproved of Chief Justice Miller's conclusion writing, "the intentional sexual assault no more constituted the rendering of

professional services than if a lawyer, angry at his client, hit her over the head with volume 24 of Corpus Juris Secondum."

Regardless of whether sexual misconduct does or does not constitute medical malpractice, *Marinmaas* does not resolve whether the negligence standard for injuries to third parties under *Kuehl, MaGuire, Harris, and Thompson* can apply to Two Eagle's claim against Smith. If so, it eliminates Appellees argument that claims against doctors can only be brought by patients, and also changes the public policy considerations.

South Dakota has ruled that an expert is not necessary for a plaintiff to prove malpractice for some claims. *Magbuhat v. Kovorik,* 382 N.W.2d 43, 46. (Opinions and conclusions of lay witnesses are admissible at trial if on subjects which are within the common knowledge and comprehension of persons possessed of ordinary education, experience and opportunity, i.e., doctor operated on the wrong knee).

The Nevada Supreme Court in *Szymborski v. Spring Mt. Treatment Ctr.,* 403 P.3d 1280 (Nev. 2017) was required to decide whether the plaintiff's Complaint sounded in ordinary negligence or medical malpractice after the trial court granted defendants' motions to dismiss the Complaint for failing to attach a medical expert affidavit. The Court started its analysis by recognizing that a health care organization's status as a medical facility cannot shield it from other forms of tort liability when it acts outside of the scope of medicine. *Id.* at 1284 (citing *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.,* 282 P.3d 727, 731-32 (Nev. 2012). The critical question is whether the plaintiff's claims involve medical diagnosis, judgment, or treatment. Designations given to the claims by the plaintiff or defendant are not determinative. *Id.* at 1284.The Court must look to the gravamen or "substantial point or essence" of each claim rather than its form to see

whether the claim sounds in ordinary negligence or medical malpractice. *Id.* at 1285. The Court concluded that discharging the patient in a taxi with only enough money to go to his father's house, without informing his father with whom the patient had a turbulent relationship, alleged negligence or a breach of duty that did not involve medical judgment, treatment, or diagnosis, and would not require medical expert testimony at trial. The claim alleged a set of duties and facts for ordinary negligence. *Id* at 1286.

In the instant case, Smith's negligence or breach of duty was reporting a date of last seizure in February despite being told that the last seizure was on April 11, 2019, and the electronic health records also showed that the last seizure was April 11, 2019, and then using the inaccurate date to prematurely authorize Sully to return to driving. Smith had been trained to gain access to the electronic health records, but he either didn't take the training serious enough to know how to access the records or simply carelessly didn't take the time to access and look at the records. Either way, the alleged negligence or breach of duty did not involve medical judgment, treatment, or diagnosis, as such the claim alleges a set of duties and facts for ordinary negligence.

In *Rabinovich v. Maimonides Med. Ctr,* 113 N.Y.S.3d 198, 202-203 the Court was asked to decide whether Plaintiff's complaint sounded in ordinary negligence or medical malpractice. If medical malpractice, then the complaint had to be accompanied by a certificate of merit. "An action sounds in ordinary negligence when jurors can utilize their common everyday experiences to determine the allegations of a lack of due care". "In contrast, an action sounds in medical malpractice where the determination involves a consideration of professional skill and judgment". In *Rabinovich* the plaintiff blood donor claimed that she had an adverse reaction after leaving the blood donation center

which caused her to lose consciousness, fall down and sustain injuries. The Complaint alleged that defendant failed to properly screen her for health problems, obtain her medical history, monitor her physical condition, measure her hemoglobin levels, and keep her at the donation site for a specific period of time to observe any signs of an adverse reaction. Whether the plaintiff needed additional screening, monitoring, or supervision, and whether she was at risk of falling due to a medical condition, involved the exercise of medical judgments beyond the common knowledge of ordinary persons. Only a medical professional would know what factors make a person ineligible to donate blood, how much blood should be drawn, what constitutes the signs and symptoms of an adverse reaction, and how to immediately treat an adverse reaction. The court concluded that the interaction between plaintiff and defendant implicated issues of medical judgment that sounded in medical malpractice.

Rabinovich is distinguishable from the instant case. In the instant case the medical history that Smith received on April 16, 2019, indicated that Sully had suffered seizures on April 11, 2019. Sully's electronic healthcare records reflected the April 11, 2019, seizures and Smith had access to the electronic medical records for the Rosebud Hospital and had been trained by Avel on how to access those records. Despite having this knowledge and having access to the medical records showing the April 11, 2019, seizures, on July 23, 2019, Smith reported, "no seizures since February". Smith then, in the same report, authorized, "return to driving in August". Five days into August Sully drives and a seizure occurs resulting in the horrible accident maiming Two Eagle. Jurors can use their common everyday experiences to determine the allegations of Smith's lack of due care. Two Eagle's Complaint about Smith's misconduct clearly constitutes and

sounds in ordinary negligence. Sounding in ordinary negligence, Two Eagle's claim should be measured by the negligence standards set forth in *Kuehl, McGuire, Harris* and *Thompson.* A legal duty has been established and Two Eagle deserves a trial on the merits for a determination of breach, proximate cause and damages. Two Eagle requests that the trial court's ruling on legal duty be reversed.

1. SOUTH DAKOTA PUBLIC POLICY DOES NOT BAR TWO EAGLE'S CLAIM.

Defendants claim that South Dakota public policy shields them from liability for the injuries suffered as a result of Smith's negligent misconduct. Defendants contend that a judicial determination that Smith can owe a legal duty to an individual other than Smith's patient will cause doctors to always refuse to authorize their seizure patients to drive, will create a conflict between the duty owed to the patient and the doctor's concern about nonpatient liability, will cause doctors to practice defensive medicine increasing the cost of medical care and will otherwise open the floodgates of litigation against physicians.

Defendants' concerns about South Dakota public policy are misplaced because (1) Two Eagle's complaint against Smith wasn't that Smith negligently decided that it was safe for Sully to drive, rather the Complaint was that Smith decided that it was unsafe for Sully to drive, but negligently reported the date of last seizure leading to the miscalculation of the date when six months from last seizure would occur; (2) there is no conflict of interest between Smith's duty to Sully and a concern of third party liability to the public with regard to Smith's negligent failure to list the correct date of last seizure;

(3) Two Eagle's claim is not for negligence based on a lack of diagnostic testing and will not lead to defensive medicine practices, (4) imposing third party liability would play an important role in spurring physicians such as Smith to take greater care in preparing reports before authorizing a seizure patient to drive; and (5) allowing third party liability under the specific facts of this case will not lead to a flood of third party litigation.

Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. *Bartron v. Codington County* 2 N.W.2d 337, 343 (SD 1942). The United States Eighth Circuit Court of Appeals in *Rosebud Sioux Tribe v. United States,* 9 F.4th 1018, 1026 (8th Cir. 2021) held that the Treaty of Fort Laramie of 1868 created a duty, reinforced by the Snyder Act and the Indian Health Care Improvement Act, for the Government to provide competent, physician-led healthcare to the Tribe and its members. Avel, sought and obtained federal funding and had hired Smith to provide specialized medical care to patients at the Rosebud Hospital to accomplish this goal, but Smith failed to provide the competent care that was agreed to under the Treaty and federal laws.

In the instant case Smith was careless by recording an incorrect date of an event in a

medical record when he was previously told the correct date and the electronic health records showed the correct date. Defendants' efforts to shield Smith under the guise of deserving protection under South Dakota public policy seems disingenuous at best considering the nature of Smith's misconduct. South Dakota public policy wasn't meant to protect doctors who make reckless errors resulting in injury to residents of the State, especially when the mistake could have easily been avoided.

The Appellees cited *Schmidt v. Mahoney*, 659 N.W.2d 552 (Iowa 2003) and *Cichos v. Dakota Eye Institute, P.C.*, 933 N.W.2d 452 (N.D. 2019) in support of their public policy arguments. In both of these cases the defendant treating doctors had made medical judgments that it was safe for their patients to drive. The *Schmidt* Court held that a consequence of recognizing liability to members of the public would be that physicians treating patients with seizure disorders will become reluctant to allow them to drive. In the instant case Smith determined it was not safe for Sully to drive which is an important distinction from *Schmidt.* The only consequence of recognizing liability against Smith in the instant case will be that doctors will be more careful to read the patient's medical history and to accurately report facts that are provided to the doctor which South Dakota public policy would fully support.

In *Cichos* the public policy concerns were how patients' treatment will be affected, physicians not expecting to be held accountable to the public for patient decisions, optimal treatment will be frustrated by extending liability to third parties and increased litigation and higher health care costs. But again, the defendant doctor in *Cichos* had made a medical judgment that it was safe for his patient to drive, which is significantly different from a doctor making a careless clerical error in reporting a date of an event. The medical field expects its members to provide competent medical care and has review boards to oversee questionable healthcare. The medical field would certainly disapprove of inaccurate reporting of a simple matter such as a date of an event, especially when confirmation of the date could be accomplished by a quick review of the electronic records. The importance of an accurate report is even greater when used to determine the safety of authorizing a seizure patient to return to driving.

Recognizing liability for the careless mistake made by Smith will only be case precedent for claims based on doctors failing to accurately report a medical history that had previously been given to the doctor and then making decisions based upon the inaccurate report. The instant case will not overturn the cases utilizing the public policy concerns raised in *Schmidt* and *Cichos* when an error in medical judgment is alleged.

The Court in *Medina v. Hochberg,* 987 N.E.2d 1206, 1211 (Mass. 2013) addressing public policy indicated that a broader duty to warn of side effects of treatment would place a physician in the untenable position of mediating between his or her loyalty to a patient, on the one hand, and avoiding liability to nonpatients on the other. The Court held that there was no duty to nonpatients to warn of risks of driving due to an underlying condition. (distinguished from *Coombes v. Florio,* 877 N.E. 2nd 567, 575 (Mass. 2007), which held public policy did not preclude a duty to the nonpatient to warn the patient of the side effects of the drug the doctor prescribed). But in the instant case, Smith had already warned Sully not to drive until seizure free six months because of the extent of seizures that had occurred in the month before Smith saw Sully. Mediating between his loyalty to Sully and avoiding liability to nonpatients was not an issue when Smith negligently failed to accurately report the date of last seizure and then authorizing a return to driving based on that negligent miscalculation of the six month seizure free time frame.

In *Doe v. Cochran,* 210 A.3d 469 (Conn. 2019) a case similar to the instant case in that the doctor failed to accurately report the medical history within the patient's file, the Court ruled that the trial court incorrectly concluded that, as a matter of law, the defendant owed no duty of care to the plaintiff. The doctor's staff member incorrectly

told the patient that his STD test results came back negative. The patient's girlfriend later contracted herpes.

In responding to the defendant's public policy arguments, the Connecticut Supreme Court rejected arguments that recognizing a duty under these specific circumstances will create a flood of litigation, increase insurance costs, or discourage physicians from offering STD testing. The defendant's position gave no reason to believe that errors of the sort alleged are commonplace or that they cannot readily be avoided by cost-effective quality assurance measures. The Court noted, "[a]rguments premised on opened floodgates and broken dams are not persuasive [when]… we suspect that only a few drips of water may spill onto a barren desert." *Id.* at 496-497. (citing *Reisner v.Regents of the University of California,* 31 Cal. App. 4th 1204.) The Court also noted, "imposing third-party liability would play an important role in spurring physicians such as the defendant to take greater care in reporting STD lab reports." *Id.* at 493.

Likewise in the instant case, the defendants' position gave no reason to believe that the errors made by Smith in misreporting when Sully had his last seizure and thereby authorizing Sully to drive prematurely was commonplace amongst neurologists treating seizure disorders. Imposing liability would also encourage Avel's specialty clinic providers to take greater care in providing high-quality telemedicine healthcare to South Dakota's Native American tribal members which was the goal of the Avera medical project in the first place. The precedential value of the instant case is limited because of its unique and rarely occurring facts.

Smith's performance at his December 20, 2022, deposition was notable with respect to his lack of recall as to the important aspects of becoming an Avera specialty clinic provider and as to the care provided to his patient, Sully. Smith didn't recall:

- if he received training before starting to perform telemedicine care (SR 584, p. 24: 6-10)
- if Moonlighting or other similar companies went over how to access patient medical records for telemedicine purposes (SR 585, p. 25:11-14)
- if he had ever accessed patient medical records or charts through telemedicine (SR 585 p. 26: 6-9)
- if before he started seeing telemedicine patients whether he had any training on how to perform patient care via telemedicine (SR 585, p. 27:16-19)
- if he kept copies of the patient medical reports he prepared while working for Moonlighting (SR 586, p. 31:9-12)
- the process of how he accessed the past telemedicine reports he prepared for a patient at the time of a follow-up visit (SR 586, p. 31:18-23)
- if he accessed past medical records while performing work for Moonlighting (SR 586, 31:24-32:3)
- whether he looked at medical records related to Sully's seizures that occurred on January 13, 2019, and March 12, 2019, before seeing Sully for the first time on April 16, 2019 (SR 587, p. 34: 14-20)
- whether he looked at Avera nurse Ponto's chart review before seeing Sully on April 16, 2019 (SR 587, p. 35:6-13, p. 36:9-13)
- if he looked at the April 8, 2019, nurse Ponto's chart review after reviewing it at the deposition (SR 588, p. 39:9-14)
- if he went through training through Avera to learn and understand the charting system at the various IHS hospitals for telemedicine purposes (SR 587, p. 35:20—p. 36:3)
- if before he saw Sully on April 16, 2019, whether he looked at Sully's medical chart records (SR 587, p. 36:14-18)
- if on April 16, 2019, he asked Sully when Sully's last seizure was (SR 588, p. 40:7-9; 598, p. 78:17-22)
- what other directives he gives to seizure patients other than no driving until seizure free six months. (SR 589, p. 44:20-23)
- the factors he considered when he issued Sully the "no driving until seizure free 6 month" directive (SR 590, p. 46:5-9)
- if he had access to Sully's medical records (SR 590, p. 46:24—p. 47:13)
- if he had ever accessed medical records for a telemedicine patient (SR 590, p. 47:22—p. 48:4)
- if he reviewed nurse Ponto's July 15, 2019, chart review before Sully's July 23, 2019, visit (SR 591, p. 49:20—p. 50:3)
- if he checked the records on July 23, 2019, to verify when Sully's last seizure was (SR 591, p. 50:12-14)
- if he talked to anyone from Avera or Moonlighting regarding access to medical records (SR 591, p. 50:15-20)

- that one of his duties under the June 4, 2018, contract with Moonlighting was to utilize client (Avera) provided technology, telemedicine platform and web- based software for access to patient's electronic health records, and to document all facets of the interaction with the patient (SR 591, p. 51:8-22)
- if when he saw Sully on July 23, 2019, whether he made any attempt to determine if Sully was being compliant with the drug dosages which was important to do (SR 592, p.55:2-8)
- whether he accessed Sully's electronic health care records on or before Sully's July 23, 2019, visit (SR 592, p. 55:9-13)
- whether he was aware before July 23, 2019, that Sully had seizures on April 11, 2019 (SR 592, p. 55:14-16)
- if he knew how to access the electronic health record of a telemedicine patient (SR 593, p. 57:19---p. 58:13)
- if before he directed Sully that he could start driving again in August he tried to verify or confirm the date of last seizure (SR 595, p. 68:10-14)
- whether the fact that Sully had seizures on April 11, 2019, was a factor for increasing the Keppra dosage from 500 mg to 750 mg on April 16, 2019 (SR 598, p. 78:23—p. 79:2)

Molly Johnson an Avera employee provided one on one training for Smith on March 19, 2019, and April 2, 2019, to teach him how to access Indian Health Service (IHS) electronic medical records and how to create an Indian Health Service medical record. Ms. Johnson with respect to the April 2019 training notified Smith, "I am sorry, you do have scheduled appointments on April 16 so we will go ahead and complete training at this time. Sorry for the confusion." (M. Johnson Dep. 19-20) Given Smith's inability to recall the one-on-one training and whether he accessed Sully's electronic health records, one could reasonably infer that Smith was more interested in receiving the supplemental income than being trained and providing focused high quality medical care to the IHS patients. South Dakota public policy would favor competent health care for South Dakota's numerous Indian Reservations and should not condone and provide civil liability protection for the ministerial easily avoidable type of errors that Smith committed. South Dakota public policy does not bar Two Eagle's ordinary negligence or malpractice claims against the defendants.

CONCLUSION

This Court on numerous occasions has held that the touchstone of legal duty is the foreseeability of injury. Without question, Smith foresaw the risk of injury and for that reason imposed a no-drive restriction for Sully who had suffered seven seizures in the month before he was first seen as a patient by Smith. Even though Smith was told, and the medical records showed that Sully suffered seizures on April 11, 2019, on July 23, 2019, Smith failed to review the medical records and resultantly authorized Sully to drive in violation of the restriction. Pursuant to the authorization, Sully drove and injured Two Eagle after Sully suffered a seizure. Based on these facts, it would be foreseeable to a reasonable person that Smith's actions in authorizing Sully to drive, in violation of the restriction, could injure a third person.

The public policy concerns raised by the defendants are not applicable to the instant case because (1) Smith did not determine that it was safe for Sully to drive, and therefore, imposing a duty would not cause doctors to overly restrict driving for their patients, (2) there was no conflict between the best interests of the patient and concerns about nonpatient third party liability, because Smith's misconduct did not involve decisions about patients treatment, (3) the defendants did not present evidence to make one believe that the type of error that Smith made is common place, and therefore, imposing a legal duty would not open the floodgates of litigation. Instead, imposing a legal duty for Smith's misconduct would spur doctors to take greater care when receiving training on how to access electronic health records and greater care in general in providing telemedicine healthcare to the Native Americans living on South Dakota Reservations.

Two Eagle requests that the Court reverse the trial court's granting of summary judgment in favor of defendants and to remand this matter to the trial court for a trial on the merits.

Dated this 1st day of February, 2024.

Respectfully submitted,

Attorney for the Plaintiff – Appellant

REQUEST IS MADE FOR ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

The Appellant's Brief complies with SDCL 15-26A-66.

The Brief was prepared using Office 365 and printed in a proportionally spaced typeface in 12-point type.

According to the word processor, this brief contains 7,841 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel.

The PDF file of this brief has been scanned by a virus-detection program and found to be virus-fee.

February 1, 2024.

By: /s/ *Jon J. LaFleur*

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a true and correct copy of the forgoing upon the person herein next designated, all on the date below shown, via Odyssey File & Serve, to-wit:

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Dated this 1st day of February, 2024.

/s/Jon J. LaFleur

APPENDIX

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF TODD) SIXTH JUDICIAL CIRCUIT

* *

LONNIE TWO EAGLE, SR., 60CIV21-000003

Plaintiff,

v. **SUMMARY JUDGMENT**

AVEL ECARE, LLC,
MOONLIGHTING SOLUTIONS LLC, and
MATTHEW C. SMITH,

Defendants.

* *

The Motions for Summary Judgment of Defendants Avel eCare, LLC, Moonlighting Solutions, and Matthew C. Smith, dated October 10, 2023, came on for hearing before the Court on November 16, 2023, at the Tripp County Courthouse in Winner, South Dakota, with Defendant Avel represented by its attorneys of record, Roger Sudbeck and Matt Murphy, Defendants Moonlighting Solutions and Dr. Smith represented by their attorney of record, Sara Frankenstein, and Plaintiff represented by his attorney of record, Jon LaFleur. The Court having fully considered all the pleadings on file herein, the written and oral arguments of counsel, and viewing the evidence in the light most favorable to Plaintiff and finding that there are no genuine issues of material fact, it is hereby

ORDERED, ADJUDGED AND DECREED that for the detailed reasons stated by the Court at the November 16, 2023, hearing which are incorporated herein, Defendants' Motions for Summary Judgment are granted in all respects in their favor and against Plaintiff and that

Filed: 12/1/2023 9:48 AM CST Todd County, South Dakota 60CIV21-000003

Plaintiff's claims and causes of action against Defendants are hereby dismissed upon the merits and with prejudice; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Avel shall recover its costs and disbursements incurred herein in the amount of $_____ and Defendants Moonlighting Solutions and Dr. Smith shall recover their costs and disbursements in the amount of $_____, said amounts to be inserted by the Clerk of Courts.

11/30/2023 3:22:56 PM

Attest:
Calhoon, Jodi
Clerk/Deputy

BY THE COURT:

Bobbi J. Rank
Circuit Court Judge

STATE OF SOUTH DAKOTA) SS		IN CIRCUIT COURT
COUNTY OF TODD)		SIXTH JUDICIAL CIRCUIT
LONNIE TWO EAGLE, SR.,	)	60CIV21-03
Plaintiff,	)	TRANSCRIPT OF HEARING RE: MOTION FOR SUMMARY JUDGMENT
vs.	)	
AVEL ECARE, LLC, MOONLIGHTING SOLUTIONS, and MATTHEW C. SMITH,	)	
Defendants.	)	

BEFORE: THE HONORABLE BOBBI J. RANK, Circuit Court Judge of the Sixth Judicial Circuit, in Winner, South Dakota, on the 16th day of November, 2023.

APPEARANCES:

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Counsel for Moonlighting Solutions and Matthew C. Smith.

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(The following was transcribed from digital recording.)

THE COURT: We'll be on the record regarding Todd County civil file 21-03, Lonnie Two Eagle, Senior, v. Avel eCare, LLC, Matthew Smith, Moonlighting Services -- Moonlighting Solutions, excuse me.

And so before the Court are two motions; motions for summary judgment on all claims filed by the Defendants and a motion to hold trial in Rosebud at the Rosebud Sioux Tribal Court building. I've read the briefing. I agree with the Plaintiffs -- excuse me -- I agree with the Defendants that the motion to hold trial is moot if the Court grants the motions for summary judgment. And so I'm not going to take -- and I also told the parties I intend to bench my decision in regard to the summary judgment motion and, if necessary, the motion to hold trial in Rosebud. So therefore, I'm not going to take argument on the motion to hold trial in Rosebud unless and until the Plaintiff survives the motions for summary judgment and so I'm going to focus argument at this point in time on the motions for summary judgment.

So I would like the attorneys to introduce themselves, please. If you have clients here with

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you, introduce them. I don't care about spectators. I don't want to know who all the spectators are but starting with the Plaintiff.

MR. LaFLEUR: Thank you, Your Honor. Jon LaFleur here on behalf of the Plaintiff, Lonnie Two Eagle. His wife, Carol, is here and two daughters, Lonna and Skyla, and also his son --

THE COURT: But the only party that's here is Lonnie Two Eagle, Senior; correct?

MR. LaFLEUR: Correct. Is it -- would you prefer to have them in the audience, Your Honor?

THE COURT: Yes, please.

MR. LaFLEUR: Okay. So just sit back in the -- all right. Thank you, Your Honor.

THE COURT: And then for the Defendants.

MS. FRANKENSTEIN: Your Honor, Sara Frankenstein on behalf of Dr. Matthew Smith and Moonlighting Solutions.

MR. MURPHY: Your Honor, Matt Murphy and Roger Sudbeck on behalf of Avel eCare.

THE COURT: And so the Court -- obviously, I'm aware of the arguments in reference to the motion for summary judgment. Similar arguments were made to me in reference to the motion to dismiss previously or the motions to dismiss and that was denied for the

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reasons stated in that memorandum opinion.

Now I have motions for summary judgment in front of me that move for summary judgment on all claims so obviously, this matter has been briefed. Obviously, the briefing on the motions for summary judgment are different because the record is more developed and I think there's also matters of judicial notice within there and so I don't want everybody to rehash their briefing. I've read the briefs. I'm fully aware of that. I just want a highlight from you regarding what you think are your most important points in reference to your respective positions.

So first for the Plaintiff, I mean, explain to me how, now that the record has been developed, this is not a malpractice action, first of all. And I mean, I know you've alleged a malpractice action. You've alleged the negligence action. Explain to me how the negligence action is not a malpractice action and explain to me how public policy does -- how public policy supports this Court imposing a duty in letting this matter go forward. Go ahead.

MR. LaFLEUR: Your Honor, I know that there's several South Dakota cases that have dealt with what does or doesn't constitute medical malpractice, most of the time in the context of whether the claim that

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was brought fit within the statute of limitations statute which is broader than medical malpractice. It includes not only malpractice but mistake, error, failure to cure. So those cases aren't dispositive of our situation. There is not a South Dakota case that I've found that specifically addressed whether something is malpractice versus ordinary negligence.

Now, the courts that have looked at the difference between ordinary negligence and medical malpractice, and I'm looking at Rabinovich v. Maimonides Medical Center, which is a New York Supp case, 113 N.Y.S.3d 198 --

THE COURT: Is that in your briefing?

MR. LaFLEUR: I do not recall. There's numerous cases cited. I think that the definition, if I can proceed, the distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons, or whether the conduct complained of can instead be assessed on the basis of the common, everyday experience of the trier of facts.

In our case, the instant facts are very easy to understand that on April 16, 2019, Dr. Smith was notified that there were seizures on April 11, 2019,

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was notified that there were eight seizures, eight witnessed seizures that had been experienced. The doctor knew the first witnessed seizure was on January 13, 2019; the second, March 12, 2019; and then seven -- there was -- Chad Sully suffered seven seizures between March 11, 2019 and April 16, 2019, when the first telemedicine visit occurred. So that's very easy for a jury to understand.

It's very easy for the jury to understand that on July 23rd of 2019, the second telemedicine visit with Mr. Sully, Dr. Smith indicated in his record that he prepared that there were no seizures since February of 2019, which was clearly a ministerial clerical error, very easy to understand for the jury without any need for a special skill or medical arts or science and that, therefore, this is ordinary negligence. No need for an expert witness to explain that, although we have identified one out of abundance of caution.

THE COURT: So you're agreeing you're not going -- I mean, so you're saying you don't need a -- are you not going forward then with your malpractice claim? Because you've raised both malpractice and ordinary negligence in your Complaint so are you dismissing the malpractice claim?

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MR. LaFLEUR: No, we intend to go forward because we want to protect our record one way or the other, Your Honor, of course. We do believe, though, under the definition of ordinary negligence versus medical malpractice that clearly a jury could understand in simple terms and common experience, everyday knowledge, that what Dr. Smith did was plainly an error that should not have been made and created a foreseeable risk of harm to Mr. Two Eagle when he released Mr. Sully to drive when he had previously directed him not to drive until seizure-free six months. That's not a complicated thing to understand.

A case that's probably the most similar to the case that we have is Doe v. Cochran, which was a case where a patient went in to the doctor, explained to the doctor I have a relationship with my girlfriend, we both have decided to be checked for STDs, we want to be tested. He was tested. The doctor reported to him that he was negative on STDs but it turned out in actuality the test showed that he was positive for herpes and that, therefore, the court found that that was ordinary negligence when the doctor told him he was free of STDs but later found out, yes, that he actually was positive. And they did allow third-party

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liability against -- on behalf of the partner that was later infected by the STD.

THE COURT: And what state was that case from again?

MR. LaFLEUR: That is a Connecticut case. You'll recall in your decision you had mentioned three cases where they had dismissed at the motion to dismiss stage, pleading stage and you cited Jarmie v. Troncale, which was a Connecticut case, so this case came after that case where they did allow third-party liability in the medical setting. As a matter of fact, in Jarmie v. Troncale, there was a footnote in that case that said we are not endorsing a per se rule that there would never be a case of third-party liability. We are exercising restraint as far as allowing third-party responsibility but we're not saying that there isn't, and then later on the court did hold that there was third-party liability.

I would suggest that every state in the United States is going to allow third-party liability given the correct case. And this case is a correct case because --

THE COURT: So there's no exercise of medical judgment under that, what your theory is it's just, well, anyone could read a medical record and he

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misread it and that's what caused the damage. Is that -- I mean, how is that within the -- how is the exercise of medical judgment not tied to your claim?

MR. LaFLEUR: The medical judgment relates to treatment and diagnosis.

THE COURT: Well, wasn't this done as part of treatment and diagnosis?

MR. LaFLEUR: It was done as part of seeing the patient but it certainly wasn't part of diagnosis or treatment. What had happened is the doctor evaluated the patient. You have epilepsy. We're putting you on 750 milligrams of Keppra twice a day and that's the recommended treatment.

The negligent conduct in this case has nothing to do with determining Keppra is the right treatment for you, take it twice a day. The negligent conduct in this case happened on July 23rd of 2019, when he puts in his record that the patient hasn't suffered seizures since February of 2019. That was the negligent conduct. It didn't have anything to do with treatment or diagnosis of the problem for patient Sully.

THE COURT: So what's the Defendants' response to this specific point?

MR. MURPHY: Sure, Your Honor. I'll go first

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and we'd kind of agreed beforehand Avel's named first so I'll take first stab at it. I'm happy to spend my time on what I think the most persuasive arguments are but it sounds like you want to hear a direct response to what Mr. LaFleur had to say so I'll focus on that.

As a starting point, I don't agree that there is a -- it's a distinction without a difference here, Your Honor, if this is a malpractice or an ordinary negligence claim. I don't think that in South Dakota calling something ordinary negligence allows for the erosion of the physician-patient privilege or the privity that needs to exist to assert a claim against a physician so I don't think that the distinction matters.

But moving forward on to the actual question that you've asked, how is this a malpractice case or an ordinary negligence case, I don't agree that this has not been addressed in South Dakota. The Bruske case, which I know is a statute of repose case, talked about the definition of malpractice, not the definition of malpractice only in the context of what a statute of repose is but the definition of malpractice and I'll quote for you from that.

And again, this isn't a New York random appellate court opinion. This is the South Dakota

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Supreme Court in Bruske saying, Misrepresentations by a physician as to treatment needed or accomplished constitutes malpractice, whether negligently, deliberately or fraudulently made.

So what do we have here? An allegation that Dr. Smith misrepresented treatment necessary, treatment being don't drive for the next six months, and that he negligently did so. That fits squarely within how our Supreme Court has defined malpractice.

You can go further forward in time and find other cases that favor this interpretation. First I would direct you to Pitt-Hart, again another statute of repose case but a case where it also added to this malpractice definition and basically said if there is a nexus between the injuries suffered by the Plaintiff and the healthcare provided, we are again talking about a malpractice case. That is exactly what we have here.

Now, to move to a non-statute of repose case in South Dakota, we've got Martinmaas, a case where a gynecologist was accused basically of raping his patients. The court there for policy grounds, because they didn't want to leave the Plaintiffs without coverage and didn't want to find that he had committed intentional torts which would have left the Plaintiffs

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with nothing, determined that malpractice also encompasses rape, essentially. And that again, that's not a statute of repose case. So we've got three cases right here in South Dakota that make very clear that the actions here fit within malpractice as compared to ordinary negligence.

And what I would also argue on this point, Your Honor, I put this in the brief, is that if we're going to create this malpractice versus ordinary negligence dichotomy that can erode the physician-patient privity relationship, that's an argument that could be made in every case. The Cichos, Colby and Schmidt cases, Cichos out of North Dakota, Colby and Schmidt out of Iowa, could have been boiled down to the same concepts.

In Cichos a doctor told a patient that he or she was safe to drive after a doctor a year before had said you're legally blind. It would be easy to stand in front of a jury and say you don't need to be a doctor. Someone's legally blind, they shouldn't be driving. This isn't a malpractice case, it's an ordinary negligence case. That argument didn't fly in North Dakota, our border state.

Next we look at the two Iowa cases. Again you've got someone who is blind looking

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straightforward in the Colby case. In the Schmidt case, like here, you've got a seizure patient whose seizures are uncontrolled and has a history of having seizures behind the wheel. In both of those cases doctors released those people to drive. Again using Mr. LaFleur's argument, it would be easy to boil that down and say, boy, ladies and gentlemen of the jury, you don't need to go to a medical school to know that if someone's legally blind looking forward, they shouldn't be allowed to drive. Or if someone has seizures and they're not controlled by medication, unlike what we had in this case when he did take his medication, that person shouldn't drive. So I think the distinction doesn't change the law and even if it did, this case under South Dakota law fits under what our Supreme Court has called a malpractice case.

So I'll stop there because that's as much as I can do to answer your question. Thank you.

THE COURT: So I mean, I just jumped into my number one question. My number two question for the Plaintiff is, I mean, even in my previous opinion I acknowledge that there were compelling public policy concerns here. And so if I deny, if I say no, public policy in this case, given the limited facts of this case does -- it's fine. Okay? So tell me under this

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case why it would not open the floodgates to some of these public policy concerns.

MR. LaFLEUR: May I respond to distinguish the Schmidt and the Cichos and the --

THE COURT: Go ahead.

MR. LaFLEUR: Okay. In each of those cases and that's the cases that this Court referred to in the motion to dismiss, those are failure to warn cases. And so in those cases the doctors determined, under the total circumstances that existed in the doctors' eyes, that the patients were safe to drive. That's the judgment call that the doctor made.

In our case, the doctor, the judgment call that the doctor made was that it is not safe for you to drive. You should not be driving and it was this ministerial clerical error that was the basis of the negligence, not some judgment call.

And when there is that type of judgment call that's made, then it does raise a public policy argument, the public policy argument being that if you allow third-party liability in those situations after the doctor made the judgment call to allow the person to drive, then the doctors will be very restrictive on ever allowing their patients to drive. But those aren't the facts of our case, Your Honor. That's a

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significant, substantial difference on the public policy argument.

With respect to the public policy arguments, so the first public policy argument that I just raised doesn't apply because there wasn't this decision made to allow the patient to drive. The other public policy argument that I think comes up with this type of a scenario is that the doctors will be concerned about the conflicts it may have with the third-party duty to the public versus the duty to the patient.

Again in this case what the doctor determined that was safe was that you've just had seven seizures in the last month. It's not safe for you to drive. Do not drive. We're going to give it six months while you're under medication to make sure that we have enough data to make sure it is safe for you to drive so don't drive for six months.

Well, the duty owed to the patient is to warn of the dangers of driving likewise benefited the public so there was no conflict between what the public -- the concerns for the public versus the concerns for his patient. So neither one of those public policy arguments applies to the facts of our case and I would say --

THE COURT: Well, I mean, one of the public

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policy arguments is so you're going to open up -- so under your argument, so a doctor misreads his file. Right? That's what you're saying is the issue here. You're saying he made the judgment call, he misread his file. Right? That's your argument?

MR. LaFLEUR: He didn't -- he knew or should have known that six months, the earliest was October 11th. He was told on April 16th. So I guess you could say that he didn't look at the chart and see what was there before his eyes to see and, therefore, he put in his medical record no seizures since February.

THE COURT: Okay. So he misread his chart. He made a mistake in the course of the third party consulting with him who is the patient. Right?

MR. LaFLEUR: Yes -- well, while in the course of treating the patient, yes.

THE COURT: Okay. And so because he misread his chart, now we're going to say now you could be responsible to people you don't even know about as a result of you misreading your chart. Right? I mean, that's what we're saying. Right?

MR. LaFLEUR: That's right. And as a matter of fact, the cases say that the public policy is exactly the opposite. The public policy is to hold the doctor

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responsible for making sure that he looks at his chart and acts accordingly and if you don't hold him responsible, that's a problem because now the doctors won't have the sense that they need to be diligent in the care of their patients. That's what the case says as far as the public policy concern.

THE COURT: But the ethical rules, the administrative rules, South Dakota law that's been cited by the Defendants in their briefing, that's establishing a duty to the public beyond -- I mean, isn't a doctor's duty to their patient? So if you're going to establish a duty to the public beyond, don't insurance costs raise? Don't we have some of these public policy issues come into effect?

MR. LaFLEUR: In this situation, Your Honor, where it's limited to this ministerial clerical error that the doctor made, that is not going to open up a floodgate of litigation. This is a very limited fact pattern and it's not a situation where a doctor made a medical judgment and is being held liable to a third party for that medical judgment. This is a situation where it's very clear -- and in looking at Dr. Smith's deposition, it is a reasonable inference to be made from looking at that deposition and from looking at the facts of the case that this doctor was going

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through the motions with respect to this telemedicine care that he was providing and was happy to earn the supplemental income that he was making, but he did not make the diligent efforts that a doctor will regularly take to make sure that their patient is being cared for in a proper manner.

And it's clear from day one when Dr. Smith started receiving his training from Avel, there was an e-mail or some type of a text, electronic text message from the trainer, Avel Bates 200, where Molly Johnson, the trainer, is telling Dr. Smith, you have an appointment -- and this is supposed to happen on April 2nd of 2019 -- you have an appointment on April 16th. We need to finish the training here. Sorry for the confusion but we got to get this done. So he was -- that shows he wasn't making the efforts. Then he doesn't --

THE COURT: That all goes -- I mean you, yourself, that goes to the care of his patient. Correct? I mean, all of that training went to the care of his patient. Was there anywhere in there that says, well, that goes to obligations beyond his patient? I mean, all of that was addressed going to the care of his patient. Correct?

MR. LaFLEUR: He had those duties to be

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prepared for the telemedicine patient, no doubt about it. That's what he was supposed to be doing but he was going through the motions.

Did you receive the training? I don't remember. Did you look at the electronic healthcare record that you were trained to review? I don't remember. Over and over again the doctor didn't know whether he did what he was supposed to do. And to protect this doctor the way he handled the care of Mr. Sully through public policy would just -- there's just no call for it.

Let me find the language on public policy and this is the Doe v. Cochran case where they misreported the STD results. Under these circumstances, however, imposing third liability would play an important role in spurring physicians such as the Defendant to take greater care in reporting STD lab results. The law should encourage the highest standard of care concerning communicable and infectious diseases.

So the public policy isn't in favor of not holding the doctor responsible to the injured third party but with this type of negligence and this type of problem, to hold the doctor responsible to encourage other doctors to take the appropriate care rather than going through the motions. That's our

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position with respect to the public policy, Your Honor.

THE COURT: All right. So I'm going to ask for their response in regard to whether the public policy argument is limited to that respect in this case or whether the Defendants have a different position. After we're done with that then I'll allow you to highlight -- these were two questions I wanted to get to right away and then I'll allow you to highlight your arguments. So go ahead.

MS. FRANKENSTEIN: If I could speak to one item in particular, Your Honor. While it's been tough to determine the exact conduct that the Plaintiff finds fault with because it's changed and evolved, it seems like at this point after discovery maybe the prime or the primary reason alleged for committing negligence is due to Dr. Smith changing or not adhering to his own directive. That not only seems to be the new theme now that discovery is closed but it also seems to be the most dangerous when it comes to the public policy concerns.

To back up, for medical malpractice cases it has an additional step, an additional requirement that regular negligence cases just doesn't have. While, of course, both share the requirement that a legal duty

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is required to the Plaintiff himself, in addition for professional negligence claims, medical malpractice claims, the Plaintiff has to point to a national standard in the medical industry that was breached or that was not followed. So we have to look at a national standard, something universally recognized as medically required or expected in the medical industry.

That might be one of the reasons that Plaintiff added an additional claim of regular negligence in addition to medical malpractice because there is that additional hurdle. But how we saw it play out in the life of this case was when the Plaintiff had alleged initially that there was a standard in the industry that a neurologist had to order six months no driving, as if six months was a magic measuring stick by which all doctors should or did recognize one cannot drive, it's not safe to drive before six months. As the discovery came in and the various experts weighed in on that, we found that there is no national medical standard about six months. There's nothing magical about that delineation.

In fact, states have a hodgepodge of various driving laws, nothing to do with medical science but driving laws. Some say you can continue to drive, no

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restrictions like South Dakota does. Some states say mandatory requirements for reporting, no driving for three months, six months. It's all over the place so we see there is no standard medically, there's no standard nationally at all and it has to do with driving was not a medical standard.

So because that does not benefit the Plaintiff, I think that's why the case evolved to one where the Plaintiff alleges, well, Dr. Smith created his own standard of care in just this case where he ordered or suggested to Chad Sully, no driving for six months. You can't create a standard of care just on a case-by-case basis with one patient because a standard of care by definition is a national one that's understood and expected within that area of expertise.

If the Court were to allow either kind of negligence claim to move forward under that kind of theory, that's the worst type of scenario as far as floodgates being opened for potential litigation because every time a physician makes a judgment call and says don't lift more than 20 pounds for two months and then later says no, I think you can go ahead and start lifting 40 pounds and it's only been a couple weeks because you're healing better than I thought, and then something goes wrong and that patient causes

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damages to some member of the public. Every time a doctor changes his own mind, someone could be sued for breaching the standard of care because the doctor created his own standard of care with every patient?

Opposing counsel did say that in the type of case where there's a judgment call made by the physician that it does raise public policy arguments. Boy, this is exactly what we're talking about here, Dr. Smith's judgment call saying go ahead and drive in another month.

If we allow those kinds of cases to go forward, the public policy ramifications are that will create two conflicting standards of care; one to insure that the public is safe and one that is best for the patient. And that just can't -- that just can't become the state of affairs in our state or anywhere.

Each patient has to understand when they go to the physician that that physician has a duty to them, to advise them and treat them in their best interests and not to be thinking about what the public may think. And certainly as the doctor goes along, educates himself on the issues, sees what treatment works and what prescriptions don't work and changes his mind as he goes, with every change in the plan is that medical discernment that's required. It's unique

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to the patient. And if every time the doctor gives a new order, he's created the standard of care that he himself violates when he changes it, we've got a never-ending parade of lawsuits that any member of the public could bring based upon those things.

It also allows injured members of the public to review all kinds of innocent people's medical records that aren't even involved in the case. So I think the ramifications are widespread and that's just addressing that one issue, violating a physician's own directive. There, of course, were a number of others that I think Plaintiff has alleged.

If I could just add one more thing as long as I'm talking here, Your Honor. As far as fashioning jury instructions and the jury verdict form, if you have ordinary negligence and we have to try to instruct the jury that these types of actions that Dr. Smith engaged in fall under ordinary negligence but then these types of things that the doctor did could be considered in medical negligence, I can't even fathom how we would do that, how we would determine which directives, which review of the records did or did not require medical discernment training skills and then how do we put that on a verdict form. I just think that's not a plausible or

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possible way to manage any case, particularly not this one.

Thank you, Judge.

MR. MURPHY: Your Honor, can I address the point? I'll try to be very brief.

One of the -- do you mind if I stay sitting? I didn't ask that at the outset.

THE COURT: That's fine.

MR. MURPHY: Thank you. One of the arguments that Mr. LaFleur made when you asked him about the public policy was based on his interpretation of how Dr. Smith's deposition went and he believes Dr. Smith wasn't diligent and didn't act the way he should have acted in treating Mr. Sully. And he said specifically that Dr. Smith did not make the efforts that a doctor will diligently take to review his record before seeing the patient.

Who is going to come in here and tell a jury what efforts a doctor should diligently take in reviewing his or her charting before treating a patient? That has to come from a qualified expert in the field of neurology or a like profession. That is not an ordinary negligence case.

The amount of chart review that takes place before a patient comes in and the treating physician's

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willingness to challenge his or her patient's recollection of when his or her last seizure was, those are all medical judgments, again cutting in favor of this being a malpractice case, not an ordinary negligence case.

And then one other point I would make, Your Honor, is we've talked and Mr. LaFleur has used these terms, the ministerial versus judgment calls by a doctor and it almost sounds like a sovereign immunity type of case when we're talking about those duties. But I would suggest or I would argue to this Court that finding a doctor liable to a third party for a failure of a ministerial task, which is not reviewing his chart closely enough or making that type of ministerial mistake that can be made when your brain is elsewhere or without the judgment behind it, will do nothing more than cause these healthcare professionals to put up safeguards so that those ministerial mistakes are not part of the equation.

What does that safeguard look like for a seizure patient? You have epilepsy? You never get to drive. I'm never going to think about it again. I don't need to risk making the ministerial mistake. Period. You're dangerous and I don't want to get sued by someone that you hit when you have a seizure so I'm

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going to take judgment out of it. Ministerially we're going to not worry about that. You cannot drive. Period. And then what? Then they go drive and we end up in a situation like this.

But that's the point I would make. I think the ministerial judgment distinction is actually more dangerous if you were to find a duty existed for a ministerial breach. I don't think it's -- like I said before, it's a distinction without difference though because either way this is a malpractice case as far as I'm concerned.

Thank you, Your Honor.

THE COURT: So I mean, I've addressed things that I just wanted to get to, which they might be all one and the same but, like I said, I don't need half an hour of argument on this deal. If there are specific points that you just want to highlight from your briefs, I will give you that opportunity.

And obviously, you can respond.

Go ahead.

MR. LaFLEUR: Well, I want to start where Mr. Murphy left off here trying to distinguish between the ministerial mistake and his conclusion that the review of the chart constitutes some type of special skill or art. But I will say this: It was the lack

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of effort that Dr. Smith took in preparing to see this telemedicine patient and the lack of effort he took in preparing the chart that led to the negligent conduct, which is what the Court should concentrate on, the negligent conduct.

And the negligent conduct was that he put down in his chart on July 23rd that this no seizures since February. So that negligent conduct is the ministerial clerical error made and it arose because of the lack of effort that the doctor took in preparing to see a telemedicine patient so that is a significant difference from what Mr. Murphy is trying to propose as what is important.

The discussion by Ms. Frankenstein about an evolving case or a doctor making a change of a judgment call that they'll never be able to say you can now lift 40 pounds instead of 20 pounds, that isn't what happened in our case. What happened in our case is the doctor said do not drive until seizure-free six months. He never changed from that position. He never meant to change from that position. He has admitted in his request for admissions that he never changed from that position.

His determination was and always was throughout the course of care with Mr. Sully was that you are not

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to drive until seizure-free six months. So the examples that they give where a doctor changes his position is not the case here and is not part of the public policy analysis that the Court should make either.

I would say that there was some argument in the briefing about the requirement of a special relationship in order to prevail in the medical malpractice setting or in the medical setting. And I would like to point out to you Coombes v. Florio. I think this is in the briefing, to the best of my recollection, but I'm not positive. The cite is -- and this is a Massachusetts case -- 877 N.E.2d 567. And in that case the Defendant was making the argument that there has to be this special relationship in order to succeed on a third-party claim against a medical care provider.

In the case the court specifies, Dr. Florio cites our past reliance under Restatement Second of Torts, Section 315, to argue that he has no duty to control the actions of an intermediary such as Sacca, who was the patient, in the absence of a special relationship between himself and Coombes. Coombes was the Plaintiff, the injured party.

He argues that because he had no ability to

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control Sacca's actions and because a doctor-patient relationship is not a special relationship for purposes of Section 315, he could have owed no duty to Coombes. He misunderstands the role of special relationships in establishing a duty. Section 315 is an exception to the general rule stated in Section 314 that a person has no duty to act affirmatively to protect another from harm. It describes one circumstance where an affirmative duty to control the actions of an intermediary may be imposed. There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct. We have invoked this rule when determining whether an affirmative duty existed. However, there is no need to resort to imposing an affirmative duty to conclude that Dr. Florio owed a duty to Coombes. It was Dr. Florio's own act of prescribing medication that created the foreseeable risk of accident and his duty to warn flows from that act and extends to all those foreseeable put at risk.

And they cite a case, McKenzie v. Hawaii Permanente Medical Group, and it says special

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relationship argument's inapplicable where the defendant's own act created the foreseeable risk. And in our case, it was Dr. Smith's own negligent act to indicate that no seizure happened since February, thereby authorizing Mr. Sully to drive commencing in August. I think that's one area that I wanted to highlight other than the areas that the Court raised on the duty and the public policy concerns.

I would say that summary judgment is not appropriate because of the genuine issues of material fact, Your Honor. Public policy is not applicable into the fact pattern that we have in this instant case. Plaintiff would request that the Court deny the motions for summary judgment and let this case proceed. And of course, it also applies to the independent contractor argument that Moonlighting Solutions has also raised because there are genuine issues of fact.

THE COURT: So as we said, we discussed some of these issues but anything else that the Defendants wish to highlight terms of argument?

MS. FRANKENSTEIN: Your Honor, if I could just address one thing I gave very little print in my briefs and that is with regard to Moonlighting Solutions. There were no allegations in the Complaint

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that Moonlighting Solutions did anything negligent. The sole theory against Moonlighting Solutions is that Dr. Smith was negligent and an employee of Moonlighting Solutions and through the operations of respondeat superior vicarious liability, Dr. Smith's negligence is imputed to Moonlighting.

It's undisputed that, after discovery has parsed through all of this, that Dr. Smith is not an employee of Moonlighting Solutions. He's an independent contractor. The case law that I cited in my brief from South Dakota says that while there can be negligence that's imputed to the employer, that it cannot be imputed if the doctor is an independent contractor.

I wanted to point out that there were some facts that the Plaintiff included in I think a response to our statement of material facts that included some discussions but all of those facts were Plaintiff's attempt to show that Dr. Smith was maybe an employee of Avel but that, of course, has nothing to do with Moonlighting or to help the Plaintiff keep Moonlighting in as a Defendant. There's just no facts that suggest Moonlighting did anything itself that constituted negligence or that it employed Dr. Smith so I just wanted to highlight that small issue.

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THE COURT: Anything else?

MR. MURPHY: Sure, Your Honor. I'll be brief. First of all, Dr. Smith was not an Avel employee. We didn't move on that ground but I want to make sure that's very clear.

The couple cases that Mr. LaFleur keeps coming back to, Coombes is a Florida midlevel appellate case that was splintered, had all sorts of different opinions going different directions. It was a failure to warn case; physician put a patient on medications and didn't warn them of the potential side effects. Any failure to warn case is different.

Here Mr. Sully was very well aware of the risk of him having a seizure. He had had a number of seizures before. It wasn't unknown to him and that's what comes up in a lot of these driving cases and why the burden and the public policy grounds put in favor of not placing that obligation on someone else.

As a matter of policy what do we have in place in South Dakota to protect someone like Mr. Two Eagle? Well, we have required auto insurance, which I would assume here if Mr. Sully had it, it would have probably paid out the limits by now. And then if Mr. Two Eagle happened to be driving his car, he would have had underinsured or uninsured motorist coverage.

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Mr. Two Eagle at the time he was injured was also working so he's got work comp coverage. These are all required by state statute.

We have public policy in place to protect people injured on our roadways. That public policy does not cut in favor of then placing an additional obligation on medical providers throughout our state, a state that is incredibly strapped when it comes to finding medical providers that want to come live and work here, that they should have this extensive duty that the Plaintiffs argue for here, Your Honor. So I could go on for days on the policy arguments. You understand them. I'm not going to do so.

The only other thing I would state because it hasn't really come up here, Your Honor, is I do think there is an alternative ground for summary judgment and that is the supervening cause argument that I made at the end of our briefing. I know Mr. Sully has now signed an affidavit saying he took his medication as prescribed and, theoretically, at best that could create a fact dispute in comparison to the repeated admissions that he made that he stopped taking his drug as prescribed. But for purposes of summary judgment, fact issues cannot be created based on speculation, conjecture or fantasy.

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We don't have a fact issue here. We have a blood test. The day of this accident Mr. Sully's levels of Keppra were not commensurate with having taken his drug that day. He can come up with all the reasons he wanted to try to explain it now but that is objective evidence demonstrating he did not take his Keppra. And circumstantially after that all of his treating providers said, yeah, if you take your meds, you're fine to drive. How could they have made that conclusion if it wasn't the lack of taking his med that caused this to begin with?

So for that reason I think there's an alternative ground for summary judgment. There is not a fact issue on that point because that affidavit is nothing more than speculation, conjecture or fantasy.

Thank you, Your Honor.

THE COURT: Do you want to address the last point?

MR. LaFLEUR: Yes, Your Honor. The indication that all of the treating doctors after that said it was safe to drive, that's not accurate. Dr. Prince, who was there on August 5, 2019, the date of the accident, specifically told Mr. Sully no driving while you're on your medication six months and then we'll look at it. That's what Dr. Prince said.

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As far as the testing, the blood testing, there's a lot of foundation that needs to be laid before that blood testing for serum testing, whether it's reliable or not, Your Honor. There are fact questions on all of these matters that need to be addressed and it wouldn't be appropriate to grant summary judgment with the genuine issues of material fact.

THE COURT: All right. So obviously, this Court, as I said previously, addressed some of those issues in a motion to dismiss but as part of that I think the Court was clear that it was limited by the standard that applies to a motion to dismiss and that the Court was limited to the pleadings and to inferences from the pleadings which the Court had to take in the light most favorable to the Plaintiff. And in fact when there was reference at the motion to dismiss stage to what I felt were matters outside the pleadings from both parties, I rejected that and said, no, this is strictly a motion to dismiss and that is how I limited it.

And I also pointed out when we were at the motion to dismiss phase that that was viewed with disfavor and rarely granted and that the rules of procedure favored resolution of these cases at at

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least the summary judgment stage. And particularly when we were dealing with whether a duty exists as it references these cases trying to impose liability on physicians for injuries to third parties who are not the patient and with whom they have no physician-patient relationship, which is the case here, that the vast majority of those had been determined at the summary judgment phase after development of the record.

And I indicated in my memorandum opinion that even at that point I had concerns of multiple compelling public policy arguments with imposing a duty but I also, based on which was similar to some of at least the dissenting opinions in some of those cases, felt that it was necessary to have a developed record before fully addressing those. And that record has been made at this point in time.

And there was some reference early on that the duty issue could be a mixed question of law and fact or a question of fact and although some of the facts obviously inform the Court's analysis, the case law is clear that whether a duty exists is clearly a question for this Court.

And it is -- the South Dakota Supreme Court has held that summary judgment is clearly proper in

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negligent cases if -- negligence cases if no duty exists as a matter of law and, obviously, as a general matter the existence of a duty is a question of law. And so I'm going to make that determination at this point. And if there is no duty, like I said, summary judgment is proper, not only proper but preferred.

And now that that record has been made, I think that there is no issue of material fact in this case and a review of the entire record that the Defendants owe no duty to the Plaintiff as defined by law and summary judgment should be granted.

After having the benefit of the entire record, which includes some of these matters of judicial notice and the underlying public policies and at times the relationship, the foreseeability and the public policy, even though they're somewhat separate analyses, some of the cases kind of mesh those so you kind of have to go through that. And the Court previously in regard to the privity, the idea whether there could be privity between these parties, I had said, you know, based on that record, this Court concluded that the lack of a physician-patient relationship was not in and of itself fatal to the claims based on analysis of the Complaint and I went on to the broader analysis.

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Well, now having benefit of the entire record, I do find that that lack of privity is a bar to existence of a duty and I don't find that the Supreme Court would extend those lack of privity cases to this -- or extend those cases that I referenced in the memorandum opinion to this situation. And the fact of the matter is the Plaintiffs -- or excuse me -- the Defendants are right that whether you call this -- whether it's labeled a malpractice case, whether it's labeled as a negligence case, the heart of this case is malpractice.

And clearly no matter how the Plaintiff tries to phrase it, the Plaintiff is alleging a nexus between the injury they suffered and the healthcare they received. You can't pluck out one portion of that healthcare, that being reading a record and say, well, that's a matter of common knowledge and so, therefore, it's a regular negligence claim. It's not. Making the medical records, knowing how to read the medical records, reading the medical records are all part of the medical care that was provided to the third party who is not part of this case.

And all the allegations are at their heart based on taking action below that applicable standard of care or failing to take some action that affected

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medical judgment and the exercise of the duty to the patient and it all involves specialized training of the physician in this case. And the fact of the matter is the physician-patient relationship in this case is essential to imposition of a duty.

What's been referenced to the Court now, now that the record is fully developed, the South Dakota legislature, the South Dakota Supreme Court have distinguished malpractice from traditional negligence and all of the rules governing practice of medicine in South Dakota make it clear that the responsibility to the patient is paramount. It's not a responsibility to the public. And doctors as a matter of public policy should not be worrying about potential duties to unknown third parties as they are providing medical care to the patients who, by statute, by administrative rule, by their rules of ethics is what they have to focus on is the best interests of the patient. And the Code of Ethics that's been referenced to the Court, the patient's welfare is to be placed above all obligations to others.

And so as I, again as I look at the entirety of the record, I agree with the Defendants that this particular situation is distinguishable from those cases where they have said that privity is not

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necessarily fatal to existence of a duty. And as I said, I find the South Dakota Supreme Court would not extend the existence of a duty beyond the physician-patient privilege to create a duty to third persons. And there is nothing in the record that this physician had any inkling or understanding that he would be undertaking a duty to third parties by issuing his medical advice within the physician-patient relationship here.

And in light of that entire record, I find that imposition of such a duty would run contrary to the whole limitation purpose of the physician-patient relationship and I am confident that a common law duty should not be extended to a case in which a third party attempts to sue the doctor for alleged negligent services provided to the doctor's patient.

And in light of the record and no longer limited to the standard that I was at the pleading stage, I find there is no gratuitous duty here either.

And I also, as I'm looking at this, I'm also cognizant of what's been brought forward in the briefing that it's not doctors who regulate whether a patient is fit to drive. That is -- that obligation is given by the South Dakota legislature to the Department of Public Safety and as again now that the

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record has been developed, the doctor has no requirement to mandatorily report either if they feel that a patient is not suitable to drive.

And so based upon that, I find whether you try to call it malpractice, whether you try to call it ordinary negligence, it is all essentially a malpractice claim and that requires that the duty extend only to the patient, not to an unforeseen third party such as the case in this case.

In regard to the public policy, I have already referenced that I think that there are serious public policy concerns with extending a duty to unknown third parties based upon, even under the best version of the facts, a doctor failing to exercise as much care as he should in reading his chart. If the Court as a matter of public policy were to find that there were a duty to third parties, it is going to open up physicians treating patients with seizure disorders to regard less of the best interests of the patient, which is the physician's obligation by law and obligation under the physician's rules of ethics. The physician, because of fear of third-party lawsuits from the whole extension of the public and unknown third parties, could order that anyone that comes to see them with a seizure disorder just cannot drive whether it's in

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their best interests or not.

And it also, as I look at the facts of this case and a study, multiple studies have now been cited to me that physicians do in fact have to consider potential liability issues as they are administering care and extension of liability clearly based on those studies could impact negatively patient care.

And the argument that was made to me here today in fact is compelling in that we have different levels of insurance to in fact protect drivers, protect persons that the drivers might injure and extending that to physicians who might have treated a driver puts the burden, frankly, in the wrong place of the burden and the risk.

And so -- we could also be looking at a situation where, and this is bore out by the studies that have been cited to me, where we could have an over-ordering of diagnostic tests, unnecessary referrals, again all of which increases costs to the public, increases costs of medical insurance and is against public policy.

Of particular concern to this Court and given the demographics and geographical isolation of Todd County, recognizing a duty in this case could force the doctors, because of increasing malpractice costs,

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to avoid high-risk patients and reduce their scope of practice, which would be highly detrimental to rural communities where we already have significant problems with maintaining doctors to serve the community. And it also would, as has been referenced, open the floodgates with no identifiable standard of care and a case-by-case standard of care, which is not in accordance with the best interests of patients or the community.

And so as I look at all of those significant public policy concerns along with the other things I referenced, I am confident that there is no legal duty between any of the Defendants and the Plaintiff in this case who was not the patient and I'm going to grant summary judgment to all Defendants on all claims for that reason.

The other thing that I will say in regard to the last issue that was brought up to me regarding the supervening cause for failing to take medication, I understand the argument but whether Mr. Sully, I believe, is credible in his affidavit regarding that he did in fact take his medication even though the other evidence including tests indicated that he didn't, I understand the argument but whether he's credible and whether he should be believed by the fact

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finder indicates to me that there is an issue of material fact in regard to that matter so I am not -- I would not grant summary judgment for that reason.

I am, however, granting summary judgment because I find that there is no legal duty here and, frankly, the reason that I determined that is I assume this is going up so you might as well get that issue determined as well.

So the Defendants will prepare the order granting summary judgment on all claims and because of the Court's determination of the summary judgment motions, the request to try the case in the Rosebud Sioux Tribal Court is denied as moot.

That will be all.

(Proceedings concluded.)

STATE OF SOUTH DAKOTA)
SS CERTIFICATE
COUNTY OF HUGHES)

I, Mona G. Weiger, Official Court Reporter in and for the State of South Dakota, do hereby certify that the Transcript of Hearing contained on the foregoing pages was reduced to stenographic writing by me from digital recording and thereafter transcribed to the best of my ability, and that the foregoing is a full, true and complete transcript of my shorthand notes of the recorded proceedings had at the time and place set forth above.

Dated this 18th day of December, 2023.

/s/ Mona G. Weiger
Mona G. Weiger
Official Court Reporter

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STATE OF SOUTH DAKOTA : SS COUNTY OF TODD	))	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LONNIE TWO EAGLE, Plaintiff, v. AVEL ECARE, LLC, MOONLIGHTING SOLUTIONS, and MATTHEW C. SMITH, Defendants.	))))))))))	60CIV21-3 MEMORANDUM OPINION RE: PLAINTIFF'S MOTION TO AMEND COMPLAINT AND DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR ALTERNATIVELY, MOTION TO DISMISS

This matter comes before the Court on Plaintiff's Motion to Amend Complaint to Assert Additional Count of Ordinary Negligence, and a Motion for Judgment on the Pleadings or Alternatively Motion to Dismiss by Defendants Avel ECare LLC ("Avel"), Moonlighting Solutions ("Moonlighting"), and Matthew C. Smith ("Dr. Smith") (collectively "the Defendants"). After considering all motions, briefs, and arguments at hearing, this Court **grants the Motion to Amend Complaint and denies the Motion to Dismiss** for the reasons stated below.

PARTIES AND PROCEDURAL HISTORY

Plaintiff Lonnie Two Eagle ("Two Eagle") alleges that Avel contracted with Moonlighting to provide telemedicine services to eligible patients of the United States Indian Health Services ("IHS"). Dr. Smith was one of the physicians whom Moonlighting arranged to provide these services. Chad Sully ("Sully"), who was a patient of Dr. Smith, struck Two Eagle with his vehicle on August 5, 2019.

On January 6, 2021, Two Eagle filed a Complaint against the Defendants with one count, labeled Negligence. The Defendants answered shortly thereafter and subsequently filed motions to dismiss for failure to state a claim, or alternatively, for judgment on the pleadings. The Defendants

also filed motions to stay discovery pending resolution of the motions to dismiss. Two Eagle opposed both motions. Hearing on the motions was set for September 28, 2021.

On September 13, 2021, Two Eagle moved to amend his complaint and attached the amended complaint to his brief in support of the motion. The amended complaint did not change the recitation of facts but included two counts labeled "Malpractice" and "Ordinary Negligence." The Defendants opposed the motion to amend.

Hearing on all motions was held on September 28, 2021. The Court orally granted the motion to stay discovery. The Court also at hearing directed the parties to address their arguments on the motion to dismiss to the proposed amended complaint.

The Court, having considered the motions and briefs[1], the arguments at hearing, and the entire file herein, now issues this Memorandum Decision on Two Eagle's Motion to Amend Complaint and the Defendants' Motions to Dismiss or Alternative Motion for Judgment on the Pleadings.

MOTION TO AMEND COMPLAINT

Once a responsive pleading is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires."* SDCL 15-6-15(a) (emphasis added). *See also Fodness v. City of Sioux Falls*, 2020 S.D. 43, ¶ 30. The most important consideration in determining whether to grant leave to amend a pleading is whether the nonmoving party will be prejudiced by the amendment. *Hein v. Zoss*, 2016 S.D. 73, ¶ 24 (citation omitted).

[1] The Defendants' respective briefs in support of their individual Motion for Judgment on the Pleadings or, Alternatively, Motion to Dismiss, filed on May 28, 2021, and June 9, 2021, will be referenced as "Moonlighting's Brief" and "Avel's Brief." The Plaintiff's Brief in Response filed on September 13, 2021, will be referenced as "Plaintiff's Brief." The Defendants' reply briefs filed on September 24, 2021, will be referenced as "Moonlighting's Reply" and "Avel's Reply."

This matter is in the early stages of litigation, and discovery has been stayed pending the determination of the motion to dismiss. Additionally, the new claim of ordinary negligence is based on the same underlying history of Sully's medical care by Dr. Smith and simply adds an allegation that Dr. Smith's actions amounted to ordinary negligence in addition to malpractice. Defending the negligence claim will not result in significant additional time, expense, and effort by the Defendants, and there is no prejudice to Defendants in allowing Two Eagle to amend the Complaint at this early stage. Therefore, the Motion to Amend is granted, and the Court analyzes the Defendants' Motion to Dismiss in reference to the Amended Complaint.

LEGAL STANDARD

The Defendants move for judgment on the pleadings pursuant to SDCL 15-6-12(c) or alternatively move to dismiss for failure to state a claim upon which relief can be granted under SDCL 15-6-12(b)(5). The analysis for each of these motions is the same. *See Sorensen v. Sommervold*, 2005 S.D. 33, ¶ 4; *Leichtnam v. American Zurich Ins. Co.*, 2019 WL 5870367 (D.S.D. 2019) at 1 (*citing Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990)); 61A Am.Jur.2d Pleadings § 492 (Feb. 2022 Update). The Court refers to these motions collectively as the motion to dismiss.

"A motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader … all reasonable inferences of fact must be drawn in favor of the non-moving party." *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4. "The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom." *Thompson v. Summers*, 1997 SD 103, ¶ 5.

A motion to dismiss at the pleadings stage "is viewed with disfavor and is rarely granted.'" *Fodness* at ¶ 9 (*quoting Guthmiller* at ¶ 4.) "Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action … The rules of procedure favor the resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations." *North American Truck and Trailer, Inc. v. M.C.I. Communication Services, Inc.*, 2008 S.D. 45 ¶ 6 (*quoting Thompson* at ¶ 7).

"While the court must accept allegations of fact as true when considering a motion to dismiss, the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Nygaard v. Sioux Valley*, 2007 S.D. 34, ¶ 9.

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level[.] [T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]

Sisney v. Best, 2008 S.D. 70, ¶ 7 (*quoting Bell Atlantic,* 127 S.Ct. at 1964–65 (citations omitted) (Abrogating previous standard that a complaint could not be dismissed under SDCL 15-6-12(b)(5) unless it "appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief")). Ultimately, where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(5) is appropriate." *Total Auctions and Real Estate LLC v. SD DOR,* 2016 S.D. 95, ¶ 8 (citation omitted).

FACTS

Applying the standard referenced above, the Court must treat as true the following facts and reasonable inferences from the Amended Complaint, having resolved all doubts in favor of Two Eagle.[2] Avel contracted with Moonlighting to provide telemedicine physicians or medical services to eligible patients of IHS in Todd County. Moonlighting contracted with or employed Dr. Smith to provide these telemedicine services.

Pursuant to this arrangement, Dr. Smith had telemedicine appointments with Sully at or through the Rosebud IHS Hospital. Dr. Smith provided medical care, consultation, diagnosis, and treatment of a known and diagnosed seizure condition of Sully. During this time, Sully was a long-time employee of Rosebud IHS Hospital within the food service department.

Sully suffered seizures on January 13 and March 12 of 2019. Sully also suffered multiple seizures on April 11, 2019. Sully was treated at Rosebud IHS for these seizures, and there are written notations in Sully's medical records at the Rosebud IHS Hospital, dated on or about April 16 and July 15, 2019, which indicate "No driving until six months seizure free."

On July 23, 2019, Dr. Smith had a telemedicine session with Sully. During this session, Dr. Smith failed to read and understand Sully's past medical records regarding the dates of his seizures and no driving until six months seizure free. He released Sully to drive commencing in August of

[2] In response to the motion to dismiss, Two Eagle submitted documents and some facts which are neither referenced in the Amended Complaint nor formally incorporated therein. Plaintiff's Brief at 2-6; Affidavit of LaFleur (9/13/21) with exhibits. If Two Eagle wanted the Court to consider these matters outside the Amended Complaint, then it is puzzling why he did not reference them in, or incorporate them into, the proposed Amended Complaint filed on the same date. *See Nooney v. StubHub Inc.*, 2015 S.D. 102, ¶ 8 (Requiring document considered on motion to dismiss to be directly referenced in the complaint even if not explicitly incorporated by reference). The Court is excluding any facts and documents referenced by Two Eagle which are not part of or properly incorporated into the Amended Complaint or which are not reasonable inferences from the Amended Complaint. Likewise, the Court is excluding facts and inferences regarding Sully's alleged superior knowledge of his own seizure condition and unfitness to drive vis a vis Dr. Smith; those alleged facts and inferences fall in the light most favorable to *the Defendants*, which is not the standard on a motion to dismiss. Moonlighting Reply at 4,10 (citing *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998) (Summary judgment for defendants)). The Court is not converting this matter to a summary judgment motion at this early stage. SDCL 15-6-12(b) and 15-6-12(c).

2019. This was sooner than six months from the date of Sully's last seizure on April 11. Six months would have been on or about October 11, 2019.

As a result of Dr. Smith's authorization, Sully commenced driving in August of 2019. On August 5, 2019, Sully, while driving his vehicle, struck Two Eagle while he was on a riding lawn mower. Sully suffered a seizure prior to and/or about the time of the accident, and this seizure caused him to lose control of the vehicle. Two Eagle suffered serious injuries from the accident.

DECISION

In order to prevail on a negligence claim, a plaintiff must prove: "(1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure." *Sheard v. Hattum,* 2021 S.D. 55, ¶ 23 (*quoting Kirlin v. Halverson,* 2008 S.D. 107, ¶ 28). For a professional negligence claim, a physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing according to a national standard, and negligence of a doctor consists of failure to conform to the standard of care which the law establishes for members of that profession. *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 17.

The only issue raised in the motion to dismiss is whether the Defendants owed a *common law duty to Two Eagle. See Millea v. Erickson*, 2014 S.D. 34, ¶ 12 (A duty can exist in statute or common law). "The existence of a duty owed by the defendant to the plaintiff, which requires the defendant to conform to a certain standard of conduct in order to protect the plaintiff against unreasonable risks, is *elemental* to a negligence action." *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 8 (emphasis added). *See also Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶ 10; *Koenig v. London*, 2021 S.D. 69, ¶ 21.

Two Eagle implies that the existence of a duty can be a question of fact. Plaintiff's Brief at 9; Avel's Reply Brief at 1-2; Moonlighting's Reply Brief at 2. However, it is well-established that

whether a duty exists is a question of law for the Court, and whether a duty has been breached is normally a question of fact for the factfinder. *Burgi v. East Winds Court, Inc.*, 2022 S.D. 6, ¶ 16; *Sheard* at ¶ 23; *Janis* at ¶ 8 (citation omitted). "The existence, scope, and range of a duty…depend upon the foreseeability of the risk of harm." *Zerfas*, 2015 S.D. 99 at ¶ 12 (citation omitted). "Foreseeability in defining the *boundaries* of a duty is always a question of law … examined at the time the act or omission occurred." *Id.* at ¶ 14 (emphasis added). *See also Johnson v. Hayman & Assoc.*, 2015 S.D. 63, ¶ 13.

However, in defining the scope of a duty, the Court must "examine the facts as they appeared at the time, and not by a judgment from actual consequences which were not then to be apprehended by a prudent and competent man." *Zerfas* at ¶ 15. Therefore, it is impossible for the Court to ignore the facts of the individual case when defining the duty. And those facts, when brought before the Court on a motion to dismiss, are limited to only those alleged and reasonably inferred in the complaint, viewed in the light most favorable to the plaintiff. Perhaps for that reason, almost every South Dakota case cited by the parties regarding the existence or absence of a duty was decided at the summary judgment stage.

Having defined the issue before the Court for decision, the Court turns to the parties' arguments regarding the motion to dismiss. These arguments fall into two main areas, which the Court will address in turn: (1) Relationship between the parties and foreseeability; and (2) Public policy considerations.

Relationship between the parties and foreseeability

First, Avel claims that Two Eagle's negligence claim and malpractice claim are one in the same. As a result, one or both should be dismissed as a matter of law because there was no

physician-patient relationship between Dr. Smith and Two Eagle. Avel Reply at 2-5. *See also Bruske v. Hille*, 1997 S.D. 108, ¶¶ 12-13.

Although the South Dakota Supreme Court has never addressed the specific issue in this case, it has relaxed strict privity rules and allowed third party professional negligence claims to proceed in certain situations. *See Mid-Western Electric, Inc., v. DeWild Grant Reckert & Assoc. Co.*, 500 N.W.2d 250, 253 (S.D. 1993) (Recognizing professional negligence claim by electrical subcontractor providing fire suppression system against engineering firm who drafted and interpreted specifications for owner despite no privity of contract between subcontractor and engineering firm; it was foreseeable to engineering firm that subcontractor could be economically harmed by faulty specifications); *Mehlenkort v. Union County Land Trust,* 530 N.W.2d 658, 662 (S.D. 1995) (Court has recognized tort of professional negligence beyond the strictures of privity of contract); *Friske v. Hogan*, 2005 S.D. 70, ¶ 13 (Legal malpractice claim may be brought by third party if the intent of the client to benefit third party was direct purpose of attorney-client transaction or relationship because imposition of duty to third party upon attorney would not significantly impair or compromise attorney's obligations owed to the client; the duties to both the third party and the client are the same); *Fonder v. Well's Fargo Insurance, Inc, Flood Services*, 2015 S.D. 66, ¶ 18. (Reversing dismissal of professional negligence claim by owners against flood insurance company retained by lender for analysis when it was reasonably foreseeable that the homeowners would rely on analysis when deciding whether to purchase flood insurance). Therefore, this Court concludes that the lack of a physician-patient relationship is not, in and of itself, fatal to Two Eagle's claims. A broader analysis is necessary.

Turning to the Defendants' broader arguments, they allege that for a duty to exist to prevent the misconduct of a third party, Two Eagle must show both a special relationship between the

Defendants and Two Eagle and that Sully's injurious act to Two Eagle was foreseeable to the Defendants. Avel Brief at 6; Moonlighting Brief at 5. Two Eagle concedes that Dr. Smith did not "take charge" of Sully and that he therefore is not claiming a special relationship under Restatement (Second of Torts) §§ 315 and 319. Plaintiff's Brief at 14.

However, Two Eagle argues that a duty was created under the Restatement (Second) of Torts § 324A through a gratuitous undertaking by the Defendants.

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person … is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if … his failure to exercise reasonable care increases the risk of such harm … or … the harm is suffered because of reliance of the other … upon the undertaking.

Kuehl v. Horner (J.W.) Lumber Co., 2004 S.D. 48, ¶ 12. The Defendants claim that there could be no gratuitous undertaking for the protection of Two Eagle because Dr. Smith only undertook a duty to diagnose and treat Sully's seizure condition. Any suggestions Dr. Smith made about Sully's driving were merely collateral to the rendering of medical services. Avel Reply Brief at 7; Moonlighting Reply Brief at 8.

However, the Court's analysis at this stage is limited to the facts alleged in the Amended Complaint and reasonable inferences therefrom. The Defendants argue that in South Dakota, doctors have no statutory or regulatory obligation to monitor patients whose cognitive or functional impairment affects their ability to safely operate a vehicle. Avel Brief at 12. Yet, Sully's medical records indicate "no driving until six months seizure free." It is a reasonable inference, based on the very limited facts before the Court, that the Defendants, despite having no obligation to do so, imposed a driving restriction on Sully to protect him and, inevitably, those he might encounter on the road. Then Dr. Smith failed to review the medical records and authorized Sully to drive in

direct violation of this restriction. Pursuant to this authorization, Sully resumed driving, and Two Eagle was injured.

Therefore, Two Eagle has sufficiently pled that the Defendants undertook to render services to Sully which they should have recognized as necessary for the protection of Two Eagle, and that (a) Dr. Smith's failure to exercise reasonable care increased the risk of harm to Two Eagle; or (b) the harm was suffered by Two Eagle because of Sully's reliance on the Defendants' undertaking. Restatement (Second) of Torts § 324A(a)(c).

Having determined that Two Eagle has raised sufficient allegations of the Defendants having undertaken a duty to Two Eagle under § 324A, [3] the next question is whether the Defendants' actions created a foreseeable risk of injury to Two Eagle "such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff." *Zerfas*, at ¶ 15. "The risk reasonably to be perceived defines the duty to be obeyed. No one is required to guard against or take measure to avert that which a reasonable person under the circumstances would not anticipate as likely to happen." *Johnson* at ¶ 15 (citation omitted). Along those lines, "the exact harm need not be foreseeable. Rather, the harm need only be within the class of reasonably foreseeable hazards that the duty exists to prevent." *State Auto Ins. Companies v. B.N.C.*, 2005 S.D. 89, ¶ 5.

Based on the allegations and reasonable inferences of the Amended Complaint, which again, the Court must take in the light most favorable to Two Eagle, the Court determines that the injury to a third person from Dr. Smith's authorization to drive was foreseeable. The Defendants established a driving restriction for a patient with a seizure disorder, and Dr. Smith failed to review the medical

[3] Two Eagle also argues that foreseeability, under the totality of the circumstances, can create a duty even in the absence of a special relationship or gratuitous undertaking. Plaintiff's Brief at 11-14. *See Johnson* at ¶ 13; *Janis v. Nash Finch*, 2010 S.D. 27 at ¶ 15; *Thompson*, 1997 S.D. 103 at ¶ 13; *Koenig v. London*, 2021 S.D. 69, ¶ ¶ 27- 30; *Mid-Western Electric, Inc.*, 500 N.W.2d at 253; *Braun v. New Hope Twp.*, 2002 S.D. 67, ¶ 9. The Court need not determine this issue at this time in light of the Court's ruling on the gratuitous undertaking.

records and resultantly authorized Sully to drive in violation of the restriction. Pursuant to this authorization, Sully drove and injured Two Eagle. Based on these limited facts, it would be foreseeable to a reasonable person that Dr. Smith's actions in authorizing Sully to drive, in violation of the restriction, could injure a third party.

In summary, Two Eagle has raised sufficient allegations of a gratuitous undertaking under § 324A and foreseeability of injury for purposes of establishing a duty. However, that does not end the inquiry. When defining a duty, public policy is a major consideration. *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 52. Therefore, the Court turns to the parties' public policy arguments.

Public Policy

The Defendants raise multiple, compelling public policy arguments as to why there should be no duty in this case, even if there was a special relationship, gratuitous undertaking, and foreseeability. These arguments include: (1) Physicians treating patients with seizure disorders will be reluctant to allow them to drive or engage in any other activity in which a seizure could possibly harm a third party, resulting in overly restrictive conditions not in patients' best interests and inconsistent with the physician-patient relationship; (2) Physicians do not expect to be held accountable to members of the general public for decisions regarding patient treatment; (3) Increased litigation and health care costs; (4) Adverse effects on overall treatment of patients and confidence in the community of the medical profession; and (5) Inability to draw the line regarding where the duty of care ends once the floodgates of litigation are opened.

Some courts have dismissed cases at the pleading stage based in part on such arguments. *See Schmidt v. Mahoney*, 659 N.W.2d 552 (Iowa 2003); *Cichos v. Dakota Eye Inst.*, 933 N.W.2d 452 (N.D. 2019); *Jarmie v. Troncale et al.*, 50 A.3d 802 (Conn. 2012). However, at this early stage in the proceedings, on a matter of first impression in this state with potentially wide-reaching

implications, this Court has no documents, testimony, or proposed items of judicial notice from any medical professional or organization in support of these policy concerns. Moreover, the facts as developed may further inform the public policy analysis. *See Cichos* at 465-66 (Sandstrom, Surrogate Judge, dissenting). Therefore, the Court determines that the record is insufficient, at this early stage, to conclude that there is no duty on public policy grounds alone.

Conclusion

When viewing the Amended Complaint in the light most favorable to Two Eagle, which the Court must do at this early stage of the proceedings, Two Eagle has raised a sufficient common law duty to survive a motion to dismiss. Whether the Amended Complaint can survive a motion for summary judgment, after the bare allegations against the Defendants are run through the wringer of discovery, and the public policy record is further defined, however, is a question for another day.

Two Eagle shall submit a proposed order incorporating this Memorandum Decision. The Court's oral orders staying discovery and quashing subpoenas are now vacated.

Dated this 4th day of April, 2022.

BY THE COURT:

Bobbi J Rank

Bobbi J. Rank
Presiding Judge, Sixth Circuit

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30558

LONNIE TWO EAGLE, SR.
Plaintiff/Appellant,

v.

AVEL ECARE, LLC, MOONLIGHTING SOLUTIONS LLC, and MATTHEW C. SMITH,
individually, and jointly and severally,
Defendants/Appellees.

APPELLEE AVEL ECARE, LLC'S BRIEF

Appeal from the Sixth Judicial Circuit
Todd County, South Dakota
The Honorable Bobbi Rank

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NOTICE OF APPEAL FILED December 15, 2023

Filed: 3/18/2024 4:21 PM CST Supreme Court, State of South Dakota #30558

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TABLE OF AUTHORITIES

CASES:

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PRELIMINARY STATEMENT

Defendant and Appellee Avel eCare, LLC, shall be referred to herein as "Avel." Co-Defendant and Appellee Moonlighting Solutions shall be referred to as "Moonlighting." Co-Defendant and Appellee Matthew C. Smith shall be referred to as "Dr. Smith." Avel, Moonlighting, and Dr. Smith may be referred to collectively as "the Defendants." Plaintiff Lonnie Two Eagle, Sr., shall be referred to as "Two Eagle."

References to the Circuit Court Record, reflected by the Clerk's Certificate dated January 10, 2024, shall be denoted as "R." followed by the appropriate page number citation, with further specific citation provided where appropriate. Some of the items from the Circuit Court Record can also be found in the Appendix to the Brief of Appellants. For purposes of consistency throughout this Brief, the citations herein will be made only to the Circuit Court Record at "R." The pertinent summary judgment hearing transcript is part of the paginated Circuit Court Record and will also only be cited to within that record as denoted by "R."

References to the Brief of Appellants, dated February 1, 2024, shall be denoted as "Appellant's Br."

JURISDICTIONAL STATEMENT

Avel does not contest this Court's appellate jurisdiction.

STATEMENT OF THE LEGAL ISSUES

I. Did the Circuit Court err in concluding that the Defendants owed no legal duty to Two Eagle, a third party injured by Dr. Smith's patient?

The Circuit Court concluded that the Defendants owed no legal duty to Two Eagle.

SDCL 32-12-5.1
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Schmidt v. Mahoney, 659 N.W.2d 552 (Iowa 2003)
Kolbe v. State, 661 N.W.2d 142 (Iowa 2003)
Cichos v. Dakota Eye Institute, P.C., 933 N.W.2d 452 (N.D. 2019)
Jarmie v. Troncale, 50 A.3d 802 (Conn. 2012)

II. Could the Circuit Court be affirmed on the alternative ground that, regardless of the duty issue, Dr. Smith's patient's actions were a superseding cause of Two Eagle's injuries?

Although it was dicta, the Circuit Court noted that factual disputes would preclude granting summary judgment on this basis.

Howard v. Bennett, 2017 S.D. 17, 894 N.W.2d 391
Braun v. New Hope Tp., 2002 S.D. 67, 646 N.W.2d 737
Koenig v. London, 2021 S.D. 69, 968 N.W.2d 646

STATEMENT OF THE CASE

On August 5, 2019, Chad Sully ("Sully") was driving near the Rosebud Indian Health Services Hospital ("RH") when he had a seizure, lost control of his vehicle, and hit and injured Two Eagle. Along with collecting workers' compensation benefits, assumedly collecting from Sully personally and from available auto insurance, and pursuing Federal Tort Claims Act recovery, Two Eagle filed this lawsuit in January of 2021. (R. 1-11). He has asserted Dr. Smith was negligent in the medical care provided to Sully before the accident, and that this negligence caused Two Eagle's injuries. (R.7-8, ¶17, 19-20). Although neither entity employed Dr. Smith, Avel and Moonlighting were included based upon agency principles and the doctrine of respondeat superior. (R. 9, ¶21).

Once discovery concluded, the Defendants moved for summary judgment largely based upon the principle that Dr. Smith owed no legal duty to Two Eagle. The summary judgment hearing was held on November 16, 2023, at the Tripp County Courthouse in Winner, South Dakota with the Honorable Circuit Court Judge Bobbi J. Rank presiding.

(R. 1750-51).

The Circuit Court granted the Defendants' motions for summary judgment after providing an extensive oral analysis. (Id.; See also, R. 1792-94 (Hearing Transcript)). In that analysis, the Circuit Court concluded, based largely upon public policy grounds, that the physician/patient interaction between Dr. Smith and Sully did not create a duty owed by the Defendants to unidentified members of the general driving public, including Two Eagle. (Id.)

The summary judgment order was signed and filed on November 30, 2023, and noticed on December 1, 2023. (R. 1752-55). Two Eagle filed a notice of appeal on December 15, 2023. (R. 1772).

STATEMENT OF THE FACTS

I. RH, Avel, and Moonlighting Relationship

In 2019, Avel was contracted with Indian Health Services to provide telemedicine services to patients in need of certain specialty care at delineated facilities like RH. (R. 519, ¶1 – Admitted at R. 1233). To facilitate some of the more specialized areas of care, including neurology, Avel contracted with Moonlighting for Moonlighting's independently contracted physicians to provide that care. (Id. at ¶2 – Admitted at R. 1233). In 2019, Dr. Smith was an independent contractor with Moonlighting who provided medical care or consultation services at RH. (Id. at ¶3 – Generally admitted at 1233, but claiming status as an independent contractor or agent is in dispute).[1]

[1] Although not material to the current dispute because it was not a basis argued in Avel's motion for summary judgment, Avel disputes Two Eagle's assertion that Dr. Smith was an agent or employee of Avel. (R. 1791, Pg. 33).

II. Sully Failed to Take His Medication and Caused Two Eagle's Injuries

Sully experienced his first seizure on January 13, 2019, and was brought into the RH Emergency Room. (R. 520, ¶4 and 6 – Admitted at R. 1234 (with additional discussion of Sully's cocaine and marijuana use). He was transferred to Avera McKennan to investigate the cause. (Id. at ¶6 – Admitted at R. 1234). After a number of tests and additional treatment, he was discharged as stable on January 15, 2019. (Id. at ¶6 – Admitted at R. 1234 (with additional discussion)).

On February 14, 2019, after missing a follow-up mental health appointment in Sioux Falls, Sully came into the RH emergency room for anxiety and chest pain/tightness. (R. 1722). Unlike in January, he was clear of cocaine, however, cannabis was still noted. (R. 1723). Sully was told of the impact of drugs and alcohol on his conditions and he was educated on treatment options. (R. 1721). A few weeks later, he had apparently heeded this advice as he reported at a different visit that he "doesn't do alcohol or drugs." (R. 1724).

On March 12, 2019, Sully came back to RH complaining of another seizure. (R. 520, ¶9 – Admitted at R. 1234 (with additional description)). Due to the seizure recurrence, a consult was set up with Dr. Smith, a neurologist. (R. 520, ¶10 - Admitted at R. 1235). Sully's medical records also indicated concern that his sleep apnea may be playing a role in his seizures, so he was also set up for a sleep study. (R. 520, ¶11-12 - See R. 1235 disputing and admitting).

Before his visit with Dr. Smith, Sully had additional seizure activity on April 11, 2019. (R. 520, ¶13 – See R. 1235 (admitting the statement above)). He was seen at RH

and the treating physician consulted with an outside neurologist who started Sully on Keppra. (R. 520, ¶14 – Admitted at R. 1235). The Keppra worked. (Id.)

Dr. Smith's initial visit with Sully occurred on April 16, 2019. (R. 521, ¶15 – Admitted at R. 1235 (with additions)). Sully's seizures were reported as always occurring during sleep and he indicated they were followed by headaches. (R. 521, ¶16 – Admitted at R. 1236 (with substantial additions)). His anxiety and sleep problems were discussed. (R. 521, ¶17 – (Two Eagle denied this (R. 1237) but it is unclear why as it is directly from the medical record (R. 1732-33)). Dr. Smith felt that Sully may have epilepsy and sleep disturbances, and he noted Sully's anxiety. (R. 521, ¶18 – Admitted at R. 1237). Dr. Smith increased the Keppra dosage to 750mg BID, started Sully on Melatonin, suggested getting 6-7 hours of sleep per night, recommended an MRI and sleep study (aka polysomnogram), told Sully to follow up with him in two to three months, and recommended not driving until Sully was six months seizure free. (R. 521, ¶19 – Admitted R. 1237). Dr. Smith testified that if Sully only took half the amount of Keppra prescribed to him, it would not have been therapeutic. (R. 521, ¶20 – R. 1237 (admitting to this testimony and adding a denial).

On April 25, 2019, Sully had his sleep study and was diagnosed with severe obstructive sleep apnea with hypoxia and began treating with a CPAP. (R. 521, ¶21 – Admitted at R. 1237). Although Two Eagle claims the sleep apnea was not controlled, this medical record undisputedly indicated the issue was "markedly improved" with a CPAP. (R. 1738). In early June, 2019, Sully also had the MRI recommended by Dr. Smith and it was read as showing no evidence of an intracranial abnormality. (R. 521, ¶22 – Admitted at R. 1237).

On July 23, 2019, Sully had another visit with Dr. Smith. (R. 521, ¶23 – Admitted at R. 1237 (with additions)). Sully had gone about 14 weeks after the initial April 2019 consult without another seizure, however, during that visit Sully incorrectly informed Dr. Smith that he had been seizure free since February of 2019, which would have been about 22 weeks. (R. 521, ¶24; Denied at R. 1238 (claiming the source of this information is disputed and that Dr. Smith breached the standard of care in failing to identify the inconsistency). Dr. Smith noted that Sully's suspected epilepsy, and his obstructive sleep apnea, were being controlled. (R. 521, ¶25 – R. 1239 (adding that Dr. Smith did not check on Sully's Keppra compliance and denying that the sleep apnea was controlled). Dr. Smith indicated that Sully needed to continue taking his Keppra as prescribed (750mg BID) and utilizing his CPAP. (R. 522, ¶26 – Admitted at R. 1239). Based upon this visit, he informed Sully he was released to drive in August 2019.[2] (Id.)

On August 5, 2019, Sully had an apparent seizure while driving, causing him to lose control of his vehicle and hit Two Eagle. (R. 522, ¶27 – Admitted at R. 1239). After the incident, the investigating officer noted that Sully admitted he "did decrease his prescribed dose on his own and without being directed to do so by his doctor. He took half of what he [was] supposed to take per that prescription." (R. 522, ¶28 (citing R. 647-48)). In the emergency room later that day, and in medical visits thereafter on August 8, 2019 and August 12, 2019, Sully admitted that he had stopped taking his Keppra as prescribed. (R. 1731; 1745; 1746). In the emergency room, he also stated he misled his

[2] Two Eagle and Dr. Smith have both identified standard of care experts with opposing views on whether Dr. Smith was negligent in releasing Sully to drive in August of 2019. (R. 652-57 (Two Eagle's Disclosure); R. 661-712 (Dr. Smith's Disclosure). Avel also disclosed a causation expert who concluded that had Sully been compliant with his Keppra, he would not have had the seizure that injured Two Eagle. (R. 713-22).

neurologist about the date of his last seizure. (R. 1731). Blood testing from the day of the accident confirmed, in addition to cannabinoids, Sully had an "abnormally low" level of Keppra in his system. (R. 1712). An unrefuted expert affidavit, based upon this blood test, confirmed that the prescribed amount of Keppra was not in Sully's system on the date of the incident, and that same expert also opined that Sully's failure to take the prescribed amount of Keppra caused the August 5, 2019 seizure. (R. 1704, ¶4-5; R. 713-22). Similarly, on August 15, 2019, a treating provider concluded the accident was caused by Sully's decision to stop taking his Keppra, and he re-released Sully to drive as long as he took his seizure medication "as prescribed." (R. 1744). Sully's subsequent providers, who he said were "two Boston" doctors, similarly opined that he was safe to drive if he did, in fact, take his medication. (R. 1557).

Although the undersigned has been unable to determine the outcome, in November of 2019, Sully was charged by Criminal Complaint in the Rosebud Sioux Tribal Court with three criminal counts relating to this accident, including I. Simple Assault; II. Reckless Driving due to driving while under the influence and without having taken the full dose of his seizure medication; and III. Driving Under the Influence of marijuana. (*Rosebud Sioux Tribe v. Chad Sully,* Criminal Complaint, Rosebud Sioux Tribal Court, Den #: 2019-12509 (Nov. 18, 2019)).

Two Eagle denies that Sully was not taking his Keppra as prescribed based upon an affidavit from Sully and another written statement from Sully, which flatly deny that Sully stopped taking his Keppra and deny that he repeatedly admitted it, and also tell a confusing tale about cutting pills in half. (R. 1239 -1241, ¶28-36 and documents cited therein). These *attempts* at creating fact issues will be addressed further in Section II of

the Argument Section below. In regard to Section I, this alleged factual dispute is largely immaterial.

STANDARD OF REVIEW

This Court is well aware of the de novo standard of review for summary judgment. For that reason, Avel only submits three general points highlighted by this Court in the past. First, "'[i]f there exists any basis which supports the ruling of the trial court, affirmance of summary judgment is proper.'" *Hamilton v. Sommers,* 2014 S.D. 76, ¶17, 855 N.W.2d 855, 861 (citations omitted). Second, "summary judgment should never be viewed as 'a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Accounts Management, Inc. v. Litchfield,* 1998 S.D. 24, ¶4, 576 N.W.2d 233, 234 (citations omitted). Third, the thrust of the argument in favor of affirming the Circuit Court here is the absence of a duty as a matter of law – this Court has noted that legal duty questions are questions of law reviewed de novo, making them particularly amenable for consideration on summary judgment. *Zerfas v. AMCO,* 2015 S.D. 99, ¶8, 873 N.W.2d 65, 69.

ARGUMENT

A physician must be permitted to treat his or her patient without having to concern him or herself with a competing duty to protect unidentified members of the general public. This remains true regardless of whether a claim against the physician is labeled malpractice, ordinary negligence, error, mistake, failure to cure, or anything else. An affirmance by this Court would keep South Dakota's physicians focused on their patients as their paramount concern, thereby preserving their expectations and

understanding of their role as described by South Dakota law, directives from South Dakota rulemaking authorities, and by ethical directives provided them by the American Medical Association. An affirmance would also further the public policy of this state and would be consistent with persuasive case law from our border states and beyond. Alternatively, Sully's actions constituted a superseding cause that, as a matter of law, cut off any liability these Defendants could have in this case.

Under either theory, the Circuit Court should be affirmed.

I. Defendants Owed no Legal Duty to Two Eagle

"Generally, the law imposes no duty to prevent the misconduct of a third person." *Kirlin v. Halverson,* 2008 S.D. 107, ¶30, 758 N.W.2d 436, 448 (citations omitted). When a court is considering making an exception to this rule, public policy considerations become critically important. *Id.* at ¶52, at 453-54.

Here, the duty Two Eagle seeks to impose upon South Dakota physicians, to protect all unidentified members of the public in or around roadways from the actions of their patients, is untenable based upon current South Dakota law and in light of key public policy considerations. Sections A-B below will address these concerns and provide some case law analysis. Section C below will squarely address Two Eagle's arguments.

A. A Physician Cannot Owe a Duty Beyond the Physician/Patient Relationship

Imposing the duty Two Eagle seeks would undermine the physician/patient relationship and the physician's paramount obligation to his or her patient. In opinions that will be more fully discussed below, our border states have directly addressed this issue in cases analogous to this one. The Supreme Court of Iowa reasoned: "It is of

utmost importance that we do not compromise the physician's first loyalty and duty to his or her patient." *Kolbe v. State,* 661 N.W.2d 142, 149 (Iowa 2003). Indeed, "[i]t is not the physician's duty to protect all third parties who might come into contact with the physician's patient." *Id.* (citations omitted). Echoing Iowa's analysis and quoting from a Connecticut decision, the Supreme Court of North Dakota noted "[o]ptimal treatment of patients is frustrated by extending a physician's liability to unidentifiable third persons." *Cichos v. Dakota Eye Institute, P.C.,* 933 N.W.2d 452, 457 (N.D. 2019) (citations omitted).

South Dakota's legislature passed authority onto the State Board of Medical and Osteopathic Examiners to promulgate rules for the practice of medicine in South Dakota. SDCL 36-4-35. In response, the Board enacted, among other rules, ARSD 20:47:08:01(8). This rule, like the case law mentioned above, provides "[a] physician shall, while caring for a patient, regard responsibility to the patient as *paramount*." (emphasis added).

Moreover, South Dakota's administrative rules incorporate the American Medical Associations Code of Ethics for guidance. ARSD 20:47:08:03. AMA Code of Ethics Opinion 1.1.1 states:

> The practice of medicine, and its embodiment in the clinical encounter between a patient and a physician, is fundamentally a moral activity that arises from the imperative to care for patients and to alleviate suffering. The relationship between a patient and physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above *the physician's own self-interest or obligations to others,* to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.

AMA Code of Medical Ethics, Opinion 1.1.1 Patient-Physician Relationships, https://code-medical-ethics.ama-assn.org/ethics-opinions/patient-physician-relationships

(emphasis added) (last accessed March 18, 2024).

A reversal here would undermine these rules and guidelines, blurring the duty owed by physicians to their patients to the detriment of those patients. For example, in cases like this one involving a seizure patient, if a duty is placed upon a neurologist to protect the traveling public, what reason would that neurologist have to tell a patient that the patient is safe to drive? Certainly, a seizure patient never driving again would be safest for the general public. Instead of thinking in terms of what is medically appropriate for my patient, the medical provider will be forced to consider how he or she can abide by a duty to unknown third parties to both protect them, and minimize the provider's risk of liability, while also trying to make medically appropriate recommendations for the patient. For this reason, when similar issues have come in other jurisdictions, those jurisdictions have re-affirmed that the duty as to the safe operation of a motor vehicle must remain on an individual driver, not his or her physician:

> [W]e conclude that the benefit of warning an epileptic not to drive is incremental but that the consequences of imposing a duty are great. The responsibility for safe operation of a vehicle should remain primarily with the driver who is capable of ascertaining whether it is lawful to continue to drive once a disorder such as epilepsy has been diagnosed and seizures have occurred.

Praesel v. Johnson, 967 S.W.2d 391, 398 (Tx. 1998).

In addition to the above, the Texas Supreme Court addressed another real-world concern: "Unfortunately, many patients do not heed the admonitions of their physicians even though the consequences may be life-threatening to the patient or others." *Id.* In other words, the imposition of the duty Two Eagle seeks to impose will be wildly inconsistent because it hinges upon the patient's decision to comply with the recommendations of the physician and, after the fact, further hinges upon the confusion

that will often be created by a patient incentivized to shift blame to avoid criminal and civil liability. That begs the question, how far should Two Eagle's proposed duty go? In a seizure case like this where Keppra compliance is crucial, should Dr. Smith have been expected to have Sully report to the RH every day for an injection of Keppra to make sure he was compliant? Did he need to call Sully in to drug test him before he got behind the wheel? Such a scenario would detrimentally impact the trusting relationship necessary for the physician/patient relationship, thereby eroding what the physician is told by our state's authorities to hold as "paramount."

This would not, however, be only applicable in seizure cases. A reversal would dive head-first down a slippery slope. Would a cardiologist now be liable for the harm his cardiac patient causes if the patient had a heart attack while driving, injuring a third party? What about an endocrinologist treating a diabetic? Should they force the diabetic into the clinic every day to monitor blood sugars before driving? What happens if the diabetic ignores the advice, claims to have forgotten it, or even denies that it was given? Would an oncologist now be liable for the harm her cancer patient causes if the patient becomes weak due to chemotherapy treatment and injures a third party while driving? What about ophthalmologists and optometrists giving opinions on eyesight? Ignoring driving for the moment, what about a general practitioner who diagnosed a patient with Covid, but did not remind the patient to avoid the patient's elderly grandparents, one of whom had COPD, caught Covid, and died?

Considering some of the facts of this case (i.e. – Keppra compliance and statements made by Sully to Dr. Smith) and the Supreme Court of Texas' concerns in *Praesel*, how much should a physician be expected to disbelieve or challenge the factual

history a patient gives him at the expense of the supposedly paramount patient interest? Can a physician rely on his patient's recollection of his medical history without, in every case, second guessing that recollection and independently reviewing medical records to confirm or refute it?

The hypotheticals, which can be thought about in generalities or in specifics, are endless. In driving cases like this one, courts in other jurisdictions have refused to impose a duty based upon public policy concerns like those discussed above. As succinctly noted by the North Dakota Supreme Court, with reference to analysis from the Iowa Supreme Court:

> [A]t 'the public policy level, a physician does not have a duty to 'protect the entire public from any harm that might result from his or her patient's actions.'' [citations omitted]. 'Rather, physicians must be able to fulfill their duty to patients without fear of third party liability claims for the acts of patients over which physicians have no control.' The physician's primary obligation is to treat the patient.

Cichos, 933 N.W.2d at 456 (citing *Kolbe,* 661 N.W.2d at 148 - 50). The *Cichos* Court went on, with further reference to case law from Connecticut:

> [P]ublic policy weigh[s] in favor of the defendant physician because physicians '[1] do not expect to be held accountable to members of the general public for decisions regarding patient treatment, [2] optimal treatment of patients is frustrated by extending a physician's liability to unidentifiable third persons and [3] extending liability would lead to increased litigation and higher health care costs.'

Id. at 457 (citing *Jarmie v. Troncale,* 50 A.3d 802, 814 (Conn. 2012)). Similarly, as it relates to seizure patients specifically, the Iowa Supreme Court noted in a different case:

> [P]hysicians treating patients with seizure disorders will become reluctant to allow them to drive or engage in any other activity in which a seizure could possibly harm a third party. In order to curtail liability, physicians may become prone to make overly restrictive recommendations concerning the activities of their patients and will exercise their role as reporters to the department of transportation in an inflexible manner not in

their patient's best interests.

Schmidt v. Mahoney, 659 N.W.2d 552, 555 (Iowa 2003).

For the reasons discussed above, physicians in South Dakota should be able to focus on treating their patients and not worrying about addressing a competing duty to the general public. Accordingly, the Circuit Court should be affirmed.

1) No Duty Needs to be Created because South Dakota Law and Policy Already Address Responsibility and Set Expectations for those Injured in Motor Vehicle Accidents

The legislature addressed driving concerns for seizure patients at SDCL 32-12-5.1:

> The Department of Public Safety may deny the issuance of a motor vehicle operator's license, motorcycle operator's license, restricted minor's permit, motorcycle restricted minor's permit, instruction permit, or motorcycle instruction permit to any individual who has experienced convulsions, seizures, or blackouts, until the individual has experienced a period of twelve months without any such episode. However, upon receipt of a statement signed by the applicant that the applicant's condition is adequately controlled by medication, the applicant is continuing to take medication, and the applicant is under the care of a physician, the Department of Public Safety may issue a temporary permit to the applicant. This temporary permit is subject to the provisions of § 32-12-36 and is reviewable by the department every six months, or until the applicant has gone a period of twelve months without any episode.

This statute clearly places the regulation of licensure for seizure patients upon the Department of Public Safety ("DPS") and each driver. Notably absent from all of this is any duty placed upon a driver's physician.

Legislative mandates also give the DPS authority to promulgate additional rules for drivers with medical conditions. SDCL 32-12-4.5 and 32. The DPS has gone on to provide direction to physicians on their reporting obligations for medically unsafe drivers: "[i]n South Dakota, mandatory reporting is not required regarding those who are

believed to no longer have the ability to drive safely." S.D. DPS, FOR PHYSICIANS, available at https://dps.sd.gov/driver-licensing/south-dakota-licensing-information/physicians (last accessed March 18, 2024). Similarly, an affirmative obligation is also placed upon the driver, who has to specifically identify seizure history during the licensing application process. S.D. DPS, South Dakota Driver License Application, available at https://dps.sd.gov/application/files/8116/8815/0637/May_2023_Application_8.5x11.pdf (last accessed March 18, 2024).

The above statute, and these directives from the DPS, confirms that South Dakota's policy makers do not expect physicians to assume their treatment decisions must include protecting the general public. Indeed, how could a physician with a *permissive* obligation to report a medically unsafe driver also have a concurrent, mandatory, legal duty to protect the public from that same driver? The discretionary nature of this requirement is telling and was something the Connecticut Supreme Court discussed in the *Jarmie* case. *See Jarmie,* 50 A.3d at 817 ("[t]he statute is notable, however, for the fact that it is permissive rather than mandatory, reflecting the legislature's judgment that physicians owe no duty to the public to report even serious health problems that could affect a patient's driving ability.")

Moreover, other South Dakota laws not involving physician duties reflect who or what South Dakota policy makers expect should be responsible for motor vehicle accidents. First, a medically impaired driver, like any South Dakota driver, is statutorily required to have automobile insurance and the limits of that insurance are mandatory. SDCL 32-35-70. Second, statute requires automobile insurance policies to protect injured parties from medically impaired drivers who are uninsured. SDCL 58-11-9.

Third, a separate statute requires underinsured coverage for protection from medically impaired drivers who are underinsured. SDCL 58-11-9.4. Fourth, the common law remains intact thereby allowing the injured party to bring a claim directly against the at-fault driver regardless of the availability of insurance coverage. Fifth, the criminal process would allow for potential recovery from a medically impaired driver through restitution. SDCL Chapter 23A-28. Sixth, for employees injured while working like Two Eagle here, statutorily required workers' compensation benefits would be available through the employer. SDCL 62-3-3. Seventh, a person injured by a medically impaired driver who is acting within the scope of that driver's employment would also be able to seek compensation from the driver's employer through respondeat superior/vicarious liability or direct liability concepts.

Creation of the duty Two Eagle proposes, which would be completely unexpected to South Dakota physicians based upon current South Dakota law, is both unnecessary based upon existing avenues of recovery and improper because of the detrimental harm it would cause to the physician/patient relationship. For these reasons, the Circuit Court should be affirmed.

2) Two Eagle's Proposed Duty Would Also Increase Health Care Costs and Decrease Health Care Availability in South Dakota

This Court has previously recognized that legislative prerogatives geared toward available and affordable medical care in South Dakota must be preserved. *See Knowles v. U.S.*, 1996 S.D. 10, ¶ 66, 544 N.W.2d 183, 197 ("South Dakota's interest in preserving and promoting adequate, available and affordable medical care for its citizens was a legitimate legislative objective which should not be thwarted by judicial intrusion"). As more and more South Dakotans move to population centers like Sioux Falls and Rapid

City, the concern for the availability and affordability of health care in remote areas grows. Indeed, the areas served by RH, and much of rural South Dakota, have significant provider shortages, qualifying as medically underserved and are designated as areas of primary care medical shortage and mental healthcare shortage based upon South Dakota Department of Health data.[3] South Dakota continues to attempt to address shortages by enacting things like loan repayment programs.[4] Imposition of the duty Two Eagle seeks would exacerbate these shortages by creating yet another deterrent to attracting medical professionals to South Dakota. This is especially true considering our neighbors North Dakota and Iowa, both of whom South Dakota competes with for health care providers, have rejected the duty Two Eagle seeks to impose.

Creation of Two Eagle's duty would also exact a financial cost on South Dakotans. In hoping to avoid liability, a physician would be incentivized, consciously or subconsciously, to deviate from the treatment or testing the physician would normally recommend, turning instead to defensive medicine by overtreating and over testing so that the physician has as much cover as possible if sued by an injured member of the general public. Defensive medicine is real and it increases health care and health insurance costs. R. 1052 – 1070 and 1137 – 1152. Likewise, such a broad duty may also impact provider medical malpractice insurance premiums, resulting in even greater increase to the cost of healthcare in South Dakota.

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[3] Designated Shortage & Medically Underserved Areas, available at: https://doh.sd.gov/health-care-professionals/rural-health/shortage-areas/designated-shortage-medically-underserved-areas/ (last accessed March 18, 2024)

[4] Dep't of Health Opens Applications for Year Two of the State Loan Repayment Program, available at: https://doh.sd.gov/news/department-of-health-opens-applications-for-year-two-of-the-state-loan-repayment-program/ (last accessed March 11, 2024)

Affirming the Circuit Court would be consistent with the long history demonstrated by our legislature in taking steps to protect the availability and affordability of quality health care in this state. *E.g.*, See SDCL 15-2-14.1 (providing a broad statute of repose for claims against medical professionals); SDCL 21-3-11 (capping certain types of damages in medical cases); SDCL 36-4-25 and 26.1 (providing robust protection and immunity for peer review activities to improve the quality of medical care); *See also,* SDCL 19-19-503 (codifying the physician/patient privilege). It would also be consistent with this Court's past decisions, like *Knowles, Pitt-Hart v. Sanford, Peterson ex rel. Peterson v. Burns,* and *Novotny v. Sacred Heart Health Services,*[5] among others, in protecting these legislative prerogatives.

For these additional policy reasons, the Circuit Court should be affirmed.

B. Persuasive Case Law Support Affirmance

This Court has never decided a case directly on point. There is admittedly some authority favoring Two Eagle's interpretation, however, as noted in Section C below, it is largely distinguishable and unpersuasive in comparison to the cases mentioned here.

In *Schmidt,* an Iowa case, a plaintiff was injured when a driver had a seizure and crashed into a vehicle she occupied. 659 N.W.2d at 553. The driver suffered from a seizure disorder since infancy. *Id.* The driver's physician was aware of the disorder, was involved in treating the disorder, and was aware the treatment did not always work because the driver had prior instances of losing control of her vehicle because of seizures. *Id.* Yet, he advised the patient she was safe to drive. *Id.* The Iowa Supreme Court

[5] *Knowles,* 1996 S.D. 10, 544 N.W.2d 183; *Pitt-Hart,* 2016 S.D. 33, 878 N.W.2d 406; *Peterson,* 2001 S.D. 126, 635 N.W.2d 556; *Novotny* 2016 S.D. 75, 887 N.W.2d 83.

concluded that imposition of a duty under any theory suggested by the plaintiff was not feasible due to critical public policy concerns. *Id.* at 554-56. It reasoned: "[i]t is highly likely a consequence of recognizing liability to members of the general public on the facts of this case will be that physicians treating patients with seizure disorders will become reluctant to allow them to drive or engage in any other activity in which a seizure could possibly harm a third party." *Id.* at 555. It went on to note that imposing such a duty would disrupt and potentially damage the important physician/patient relationship. *Id.*

In *Kolbe*, another Iowa case, a driver suffered from macular degeneration and Stargardt's Disease, and was blind looking straight-on. 661 N.W.2d at 144. Yet, the driver's treating physician wrote a letter to the Iowa Department of Transportation indicating the patient was competent to drive. *Id.* at 145. A few months later, the driver hit and severely injured a bicyclist who he did not see directly in front of him. *Id.* The Iowa Supreme Court framed the issue as whether a physician "owes a duty to persons not within the physician/patient relationship." *Id.* In imposing no duty, the court first reasoned that common law tort principles did not impose a duty because there was no special relationship between the physician and injured party that would be any different than the relationship between the physician and "the entire driving public," that the physician did not have "control" over the patient, and that traditional concepts of foreseeability were not satisfied. *Id.* at 146-48. Moreover, in what it considered the "more important" aspect of its analysis, like in *Schmidt* above, the court also refused to impose a duty based upon public policy grounds. *Id.* at 148 – 150. In conclusion, it reasoned:

> Such unlimited exposure to liability could chill physicians' willingness to recommend driver's licensing for any patient who is even visually impaired. Imposition of liability would create physicians' divided loyalty between the welfare of patients, to whom they have a primary responsibility, and the welfare of the unknown public.

Id. at 150.

In *Cichos*, a North Dakota case, an eye doctor determined a patient was legally blind and instructed the patient not to drive. 933 N.W.2d at 454-55. A year later, a different eye doctor concluded the patient's vision had improved and this doctor recommended the patient renew driving with some restrictions. *Id.* at 455. In doing so, the second doctor allegedly committed malpractice as the patient's vision was still below minimum vision standards mandated by North Dakota statute. *Id.* Six weeks later, the driver hit a horse-drawn trailer, killing one passenger and injuring four others. *Id.* at 454.

The North Dakota Supreme Court followed authority consistent with the cases and analysis above to determine a physician owes no third-party duty. *Id.* at 455-59. Its analysis was largely policy based, following the Supreme Courts of Iowa and Connecticut while also mentioning cases from Pennsylvania and Massachusetts, and concluding:

> We find the public policy concerns expressed in the decisions discussed above to be determinative, and we decline to extend a physician's duty to encompass the situation presented here. We conclude a physician has no duty to third parties arising from the physician's failure to warn a patient about driving risks resulting from the patient's medical condition.

Id.

Jarmie, a 2012 Connecticut case, includes the most robust analysis of those cited in this Section. 50 A.3d 802. In *Jarmie,* a physician failed to warn his patient of the well-known driving risk of her medical condition. *Id.* at 804. After leaving the doctor's

office, she blacked out while driving and struck the plaintiff, causing severe and permanent injury. *Id.* at 804-05. The Connecticut court first concluded that no medical malpractice claim could be stated under Connecticut law because there was no physician/patient relationship between the physician and injured party. *Id.* at 807-09. It then separately addressed the concept of common law negligence, analyzing the issue based upon Connecticut precedent, traditional foreseeability concepts grounded upon common law principles, and extensive public policy analysis.[6] *Id.* at 809 – 28. It concluded, "[i]n view of all of the relevant factors, we decline to expand the duty of health care providers to unidentifiable third persons for reasons of public policy. *Id.* at 826.

Further, and although it was dicta and not binding on this Court, the Federal District Court noted in its FTCA analysis of Two Eagle's case that his claim against Dr. Smith was essentially a third-party beneficiary claim for medical negligence perpetrated upon another. *Two Eagle v. United States,* 2022 WL 1243883, n.3 (D.S.D. 2022). It concluded such a claim is not recognized in South Dakota and would not be recognized for purposes of FTCA analysis. *Id.*

While there are multiple other cases favoring an affirmance, the analysis in each does not need restating as the cases typically mimic the analysis of the four cases described above. *E.g., Tedrick v. Community Resource Center, Inc.,* 920 N.E.2d 220 (Ill.

[6] This was broken down into four factors, all of which cut in favor of finding no duty: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Id.* at 816 (citations omitted).

2009); *Estate of Witthoeft v. Kiskaddon*, 733 A.2d 623 (Penn. 1999); *Praesel*, 967 S.W.2d 391; *Young v. Wadsworth*, 916 S.W.2d 877 (Mo. Ct. App. 1996).

Based upon the persuasive analysis in the above cases, the Circuit Court should be affirmed.

C. Two Eagle's Arguments Miss the Mark

1) Labeling Two Eagle's Claim "Ordinary Negligence" is Inconsistent with South Dakota Law and Would not Change the Analysis

a. This is a Malpractice Case

In attempting to avoid the idea that a physician cannot owe a duty outside of the physician/patient relationship, Two Eagle claims this is an ordinary negligence case, determinable by a layperson. He suggests this argument expands Dr. Smith's duty beyond the physician/patient relationship.

Our jurisprudence includes a long history of plaintiffs attempting to creatively label medical claims to avoid the reach of medical malpractice law. Consequently, this Court has defined medical malpractice on a few occasions. In *Bruske v. Hille*, it defined malpractice as:

> [A]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is 'malpractice' . . . [citations omitted]. Misrepresentations by a physician as to treatment needed or accomplished or as to dangers of treatment or changes in the state of the art as to such medical treatment, whether negligently, deliberately, or fraudulently made, come within the legal purview of malpractice. [citations omitted].

1997 S.D. 108, ¶13, 567 N.W.2d 872, 876-77. Here, Two Eagle's allegation is that Dr. Smith exercised an "unreasonable lack of skill" in his treatment of Sully and "misrepresent[ed] . . . "the dangers" of Sully's condition. Per *Bruske*, this is a malpractice case.

More recently, in *Pitt-Hart*, this Court further described the "nexus" guidepost for whether or not a case should be considered a malpractice case:

> This is not a case of a nonpatient slipping on an icy sidewalk while walking past a hospital; instead, it involves a health-care technician who allegedly dropped a post-operative, knee-replacement patient contrary to standing orders that the patient required assistance to get out of bed. In other words, *there is a nexus between the injury suffered by the plaintiff and the health care he received from the hospital.*

2016 S.D. 33, ¶15, 878 N.W.2d 406, 412 (*emphasis added*). Here, Two Eagle's claims absolutely require a "nexus between the injury [he] suffered . . . and the health care" Dr. Smith provided Sully. Per *Pitt-Hart* and the nexus guidepost, this is a malpractice case.

Artful pleading to obtain more favorable legal treatment, including, like here, an attempt to focus on one aspect of the care or one action of the medical provider, and then claiming a layperson could identify it, does not change a malpractice case into something else. For example, in *Martinmaas v. Engelman*, a physician's rape of his patient during a gynecological procedure was considered. 2000 S.D. 85, ¶9-12, 612 N.W.2d 600, 604-05. A layperson, without a medical degree, knows what rape is. However, the rape, clearly an intentional tort, was considered malpractice because it occurred in the context of care and medical advice being provided to the patient. *Id.* at ¶28-31, 608. Similarly, in *Bruske*, the jurors did not need a medical license to identify concealment and fraud, yet it was a malpractice case. 1997 S.D. 108, ¶9-14, 567 N.W.2d at 875-77. In *Pitt-Hart*, the jurors did not need a medical degree to understand that a post-surgical patient was dropped in contrast to orders requiring the patient to have assistance when getting out of bed, yet it was a malpractice case. 2016 SD 33, ¶15, 878 N.W.2d at 412. *See also, Peterson*, 2001 S.D. 126, 635 N.W.2d 556 (applying malpractice law to what would have traditionally been analyzed under the wrongful death statutes).

The facts here are more clearly a malpractice case than *Martinmaas*, *Bruske*, or *Pitt-Hart*. Therefore, even if there was relevance to Two Eagle's ordinary negligence/layperson arguments, this case would not fit. There are issues outside of common knowledge requiring expert opinion, including, but not limited to: 1) What is the standard of care for what a neurologist should chart?; 2) What is the standard of care for which prior records a neurologist must review when treating a seizure patient?; 3) Does the standard of care require a neurologist to question a seizure patient's recollection of his past seizure history?; 4) To what extent does the standard of care require a neurologist to challenge the patient's recollection of past seizure activity?; 5) If a neurologist must challenge a patient's recollection of when his last seizure occurred, what other items in a patient's recollection should be challenged or investigated? 6) What factors must go into a neurologist's decision to release a patient to drive?; 7) Did the standard of care allow Dr. Smith to advise Sully he was safe to drive, under the parameters of continuing to take his Keppra as prescribed, starting in August of 2019?; 8) Did the standard of care require Dr. Smith to require Sully to return for Keppra testing to make sure he was compliant?; 9) Is the six month driving parameter for a seizure patient dictated by the medical standard of care? 10) What factors come into play when releasing a patient to drive in under six months from his last seizure?; and 11) Does the distinction of controlled versus uncontrolled seizures, as Dr. Smith described in his deposition, impact this analysis?

Analysis of all of these factors, and others, is outside the purview of a layperson. That is why Two Eagle disclosed an expert to address the medical standard of care. *See, Bruske,* 1997 S.D. 108, ¶12, 567 N.W.2d at 876 (relying upon, in part, the fact that the plaintiff disclosed an expert who repeatedly measured the defendant's actions against the

medical standard of care, to determine a case, labeled fraud and deceit, was actually a malpractice case). Likewise, Dr. Smith identified and disclosed a neurologist who has opined in contrast to Two Eagle's expert. (R. 661-712). How could two experts disagree on an issue which is supposedly so simple a layperson could decide it?

By its very nature and through Two Eagle's painstaking attempts to turn this case into anything other than a malpractice case, he recognizes that if Dr. Smith was acting in his role as a physician in relation to Sully, the public policy considerations cut heavily in favor of not imposing the duty he requires. However, this is a malpractice case. No duty can be extended outside of the duty owed to Sully. The Circuit Court should be affirmed.

b. Alternatively, Regardless of the Claim's Label, a Duty Did not Exist

Assuming, *arguendo,* that this was a case that could be decided by a layperson without expert testimony, and that the ordinary negligence/layperson distinction had some relevant role to play in this analysis, the public policy concerns noted throughout the briefing and case law above should not be relaxed and, in fact, would become even more important. This is largely true for two reasons.

First, Two Eagle's negligence assertion focuses heavily on Dr. Smith's alleged failure to determine Sully was not six months seizure free before releasing him to drive. Two Eagle paints this as a ministerial task that could have been completed by simply reviewing a few records and correctly counting to six. However, if, in fact, a provider's ministerial failure expands the provider's duty beyond that of what is owed to the patient, the public policy issues described above become even more grave. This is true because the best protection from failing to complete a ministerial task is to create hard and fast guidelines undermining the actual exercise of judgment. An example demonstrates the

point. If a neurologist can be exposed to liability for his or her seizure patient's decision to drive if the neurologist is not precise on prior seizure dates, the neurologist will be incentivized to take the risk of ministerial mistake out of the equation and simply, always, recommend the patient not drive. This hard and fast rule provides the physician the most protection regardless of what the physician's medical opinion would be, and regardless of what the patient does or does not do. And the policy could not be second guessed. In effect, Two Eagle's layperson rule would strip the physician of the exercise of medical judgment and detrimentally impact the patient for no sound medical reason.

Second, as a practical matter, it takes little effort to simplify a cause of action and then argue for Two Eagle's layperson distinction. In the *Kolbe* case from Iowa, the defendant told the patient he was safe to drive even though he was "blind looking head-on." In the *Cichos* case from North Dakota, a patient was told he could safely drive even though a prior doctor determined the patient was legally blind, and the patient's testing indicated his eyesight fell below what state statute said was necessary to have a license. In the *Schmidt* case, a patient was told she was safe to drive even though the treating physician knew that her seizures were not always controlled by her medication *and* knew the patient had prior experience in losing control of her vehicle due to seizures. Every one of these cases would be subject to Two Eagle's concocted layperson rule - even a layperson would know releasing a legally blind person, a person blind when looking straight on, or a person subject to random seizures, to drive would be a mistake. Yet, even as obvious as these scenarios can be made to seem, each reflects a case where an appellate court, largely on policy grounds, rejected the injured parties' arguments that a legal duty should be extended from the doctor to those in the general public.

In sum, Two Eagle's attempts to ignore critical policy considerations by simplifying this case and then suggesting it would have no precedential value fall short. South Dakota physicians, like those in our border states, North Dakota and Iowa, and like those elsewhere, should not be forced to treat their patients with an eye toward all of the complicated considerations that can arise if the general public's health and well-being must also be considered. The Circuit Court should be affirmed.

2) Common Law Negligence Principles Cannot Cover up the Policy Concerns

"[T]here is no well-established common-law rule that a physician owes a duty to warn or advise a patient for the benefit of another person." *Jarmie,* 50 A.3d at 811 (citations omitted). Similarly, albeit not in the context of a physician specifically, South Dakota case law notes "[g]enerally, the law imposes no duty to prevent the misconduct of a third person." *Kirlin,* 2008 S.D. 107, ¶30, 758 N.W.2d at 448 (citations omitted).

To avoid these concepts, Two Eagle's arguments focus on the gratuitous duty rule from Restatement (Second) of Torts §324A, with a mix of foreseeability discussion and citation to South Dakota cases where privity requirements between the tortfeasor and injured party have been relaxed. Appellant's Br., Pg. 7 – 10.

Here, 324A, and any other provision of the Restatement of Torts recognized in South Dakota, should not be used as a sword to pierce the privity shield protecting the physician/patient relationship. The language directly from 324A confirms this - no aspect of the physician/patient relationship lends itself to forcing a physician to provide his or her patient care that "should [be] recognize[d] *as necessary* to the protection of a third person." Restatement (Second) of Torts, §324A (emphasis added). Requiring the physician to do so asks the physician to place the interests of non-patients alongside the

interests of the patient, thereby undermining the entire relationship. Unlike in *Kuehl v. Horner*, or any other South Dakota case where 324A has been applied, imposition of such a duty runs contrary to the entire role and thought process that a physician is expected to utilize. *See Kuehl*, 2004 S.D. 48, 678 N.W.2d 809 (imposing a duty upon a lumber yard to a third-party motorist when the lumber yard's employees, who assisted in loading a trailer they knew was going to be taken out onto the roadway, failed to use reasonable care in doing so). Indeed, numerous cases similar to this one, including the *Schmidt*, *Kolbe*, and *Tedrick* cases cited above, rejected 324A and similar provisions of the Restatement in their analysis.

Likewise, traditional foreseeability analysis should not result in imposition of a duty here for a few reasons. First, even if providing negligent care to a seizure patient could foreseeably create a risk of harm for purposes of traditional duty analysis, the public policy concerns far outweigh imposition of such a duty. *See Zerfas*, 2015 S.D. 99, 873 N.W.2d 65 (holding, in a case where a driver left a dead deer in the middle of the roadway that caused a foreseeable hazard, that no duty existed largely to avoid creating precedent that would require South Dakota drivers to drag dead animals from the roadway); *See also, Kirlin*, 2008 S.D. 107, ¶52, 758 N.W.2d at 453-54 (refusing to impose a duty on an employer to a third party, in relation to hiring an employee with a violent past, based largely upon policy grounds).

Second, when a physician provides care to a patient, it is not foreseeable that the physician must account for the interests of those in the general public who may sue the physician based upon that care. This lack of foreseeability exists because of the fact that physicians are trained to treat their patient's interests as paramount and is bolstered by the

South Dakota Administrative Rules and AMA Ethical Guidelines, cited above, all providing similar directives. This concept is furthered by South Dakota statues which place regulation for drivers squarely upon the DPS, which in turn advises physicians that they *are not* mandatory reporters relating to patients with medical conditions that could impact their ability to drive. The lack of expectation for physician exposure to liability from the general public in cases like this one has been noted as yet another reason for not imposing the duty Two Eagle seeks here. *Jarmie,* 50 A.3d at 817-18*; Cichos,* 933 N.W.2d at 457-58.

As to privity, Two Eagle suggested the privity concept has been relaxed in South Dakota in relation to other professionals. The cases he cited are all distinguishable. Each case involved a scenario where there was a broad expectation and understanding that identifiable third parties would be relying upon advice given by the alleged tortfeasor and all but one case *did not* involve a fiduciary relationship like that of the physician/patient relationship. *See Wells Fargo Bank v. Fonder,* 2015 S.D. 66, 868 N.W.2d 409 (A flood services entity, hired by a lender, had a duty to the buyers when it mistakenly concluded the pertinent home was not in a flood hazard area, and in reliance upon that opinion, buyers obtained financing and *did not* obtain flood insurance, and home subsequently flooded); *Mid-Western Electric v. DeWild,* 500 N.W.2d 250, 253-54 (S.D. 1993) (engineer was amenable to suit by owner, without existence of privity of contract between the two, when the engineer provided incorrect specs for installation of a fire detection/suppression system that were relied upon by the subcontractor to the economic detriment of the owner who had to pay to fix the issue); *Limpert v. Bail,* 447 N.W.2d 48 (S.D. 1989) (negligent veterinarian, contacted by cattle buyer to test cattle,

owed duty to cattle buyer even if the veterinarian only contracted with the cattle seller); *See also, Mehlenkort v. Union County,* 530 N.W.2d 658 (S.D. 1995) (abstracter who failed to note existence of a lien in title policy *did not*[7] owe a duty to a third party injured by the mistake because the third party did not rely upon the abstracter and the third party's actions were not foreseeable).

The outlier case, *Friske v. Hogan,* did involve a fiduciary relationship, however, it is also easily distinguished. 2005 S.D. 70, 698 N.W.2d 526. *Friske* involved a recognized exception in legal malpractice jurisprudence wherein the privity rules are relaxed when the "direct purpose" of the transaction between the client and attorney is for the benefit of the non-client. *Id.* at ¶13, at 530. Specifically, in *Friske,* a duty was found to non-clients because they were intended beneficiaries of estate planning services provided by the attorney. That exception to privity, even if transposed into a medical case like this one, would have no relevance here. Sully did not, under any version of the facts, seek treatment for the "direct purpose" of benefiting Two Eagle, nor was Two Eagle an intended beneficiary of Sully's treatment. In sum, none of the general South Dakota privity cases cited by Two Eagle should apply here in relation to imposing a duty upon the Defendants to protect the general public.

Similarly, all of the medical cases Two Eagle cited are also unpersuasive and largely distinguishable. As a starting point, the *Friske* concept does show up in a few of the cases found at Pg. 11-12 and 21-22 of Appellant's Br. Specifically, the *Tarasoff* (California), *Doe* (Connecticut), and *Tomlinson* (Oregon) cases all involved factual

[7] This case did not impose a duty to a third party – it is unclear why Two Eagle believes it is helpful.

scenarios where the medical providers' duty was extended to known and identifiable third parties. In fact, the Connecticut Supreme Court, in *Doe,* distinguished *Jarmie* on this precise point, among others. 210 A.3d 469, 483-84 (Conn. 2019). The Iowa Supreme Court also made a similar distinction in a wrongful birth claim. *See Plowman v. Fort Madison Comm. Hosp.*, 896 N.W.2d 393, 410-13 (Iowa 2017) (recognizing the identifiable party exception for a father's wrongful birth claim, and distinguishing cases like *Schmidt* because the public policy concerns are different in such cases). This grouping of cases, like *Friske,* is of little use because Two Eagle was not an identified victim or intended beneficiary of care Dr. Smith provided to Sully.

The remainder of the medical cases cited by Two Eagle on the duty issue are also distinguishable. A few involved a failure to give a patient any warning at all about the impact of a drug or condition on a patient's ability to drive[8] - here, Sully was well aware that his seizures were a driving risk. Similarly, Two Eagle affirmatively stated long ago in the very first line of a Brief: "This is not a doctor's failure to warn case[.]" (R. 212).

Another case he cited involved a physician acting outside his scope of practice and giving a patient medication that caused the patient's inability to drive.[9] That did not occur here as the Keppra was actually helping Sully when he took it correctly. Another was overturned in favor of the position Avel argues for here.[10] The last case cited arose

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[8] Appellant's Br at Pg. 11-12 - *Coombes* (Mass. 2007); *Arsenault* (Mass. Super. Ct. (trial court)); *See Burroughs* (Tennessee) (finding a duty owed to the public to warn patient of impact of medications on driving, but *no duty* to consider the general public in making treatment decision);

[9] Appellant's Br. at Pg. 11 – *Cheeks* (Florida appellate court).

[10] Appellant's Br. at Pg. 11; *Medina* (Mass. trial court) (a decision later changed to find no duty, by the same court, on summary judgment (2011 WL 7118864) and, subsequently, the finding of no duty was affirmed by the Massachusetts Supreme Court (*Medina v. Hochberg,* 987 N.E.2d 1206, 1212-1213 (Mass. 2013))

in Delaware which, in complete contrast to South Dakota, has a statute requiring mandatory reporting by physicians treating patients for the pertinent condition that caused the accident.[11]

In sum, no law or case, whether from South Dakota or from another state, and whether cited by Two Eagle or not, persuasively undermines the law and policy considerations discussed in Sections A-B above. Therefore, the Circuit Court should be affirmed.

II. Alternatively, Sully's Actions were a Superseding Cause

Even if a duty existed, the Circuit Court could still be affirmed because Sully's actions were the superseding cause of Two Eagle's injuries. "'[W]hen the natural and continuous sequence of causal connection between the negligent conduct and the injury is interrupted by a new and independent cause, which itself produces the injury, that intervening cause operates to relieve the original wrongdoer of liability.' . . . An intervening cause that cuts off liability is a superseding cause if it 'so entirely supersede[s] the operation of the defendant's negligence that it alone, without his negligence contributing thereto, produces the injury.'" *Howard v. Bennett,* 2017 S.D. 17, ¶7, 894 N.W.2d 391, 395 (citations omitted). The touchmark as to whether or not an intervening cause rises to the level of a superseding cause in the context of a tortfeasor's potential liability for actions of another, is whether or not the intervening cause was foreseeable. *Braun v. New Hope Tp.*, 2002 S.D. 67, ¶15-16, 646 N.W.2d 737, 741.

Sully went 14 weeks without a seizure because he was taking his Keppra as prescribed. Unfortunately, he stopped taking it in the days before the August 5, 2019

[11] Appellant's Br. at Pg. 12 - *Harden* (Delaware).

incident. Sully repeatedly admitted this to police officers and medical providers that day and in subsequent medical visits days later. (R. 647-48; 1731; 1745; 1746). Blood testing from the day of the accident objectively documented that he had an "abnormally low" level of Keppra in his system. (R. 1712). An unrefuted expert affidavit, based upon this blood work, confirmed that the prescribed amount of Keppra was not in Sully's system on the date of the incident. (R. 1704, ¶4-5). Avel's expert also opined that Sully's Keppra non-compliance caused the August 5, 2019 seizure. (R. 714-18). More than one of Sully's treating providers came to the same conclusion either directly, or impliedly when they released him to drive *as long as* he took his Keppra. (R. 1744; See also, R. 1557 (Sully claimed in a written statement in January of 2020 that after the event, he saw "two Boston doctors and they said I was able to drive as long as I was taking my medication as prescribed."))

At the Circuit Court level, Two Eagle was unable to dispute the conclusions of Avel's expert, the treating physicians, and the blood work. Two Eagle's only argument was his assertion that Sully's Keppra compliance was factually in dispute because Sully denied it and speculated about why multiple third parties were confused by his admissions. However, a party resisting summary judgment cannot create a fact issue based upon "inferences that require 'speculation, conjecture, or fantasy.'" *Godbe v. City of Rapid City,* 2022 S.D. 1, ¶28, 969 N.W.2d 208, 215. And, although this Court must resolve factual disputes in favor of the nonmoving party, the inferences the nonmoving party seeks to rely upon must be reasonable. *Koenig v. London,* 2021 S.D. 69, ¶40-42, 968 N.W.2d 646, 657-58.

Even if Dr. Smith owed Two Eagle a duty and breached that duty by violating the

medical standard of care in releasing Sully to drive in August 2019, Sully's unforeseeable and unexpected decision to stop taking his Keppra, which had worked for 14 weeks, and then recklessly get behind the wheel after smoking marijuana was the superseding cause of Two Eagle's injuries. The Circuit Court could be affirmed on this alternative basis.

CONCLUSION

A physician's duty to his or her patient is paramount. That duty cannot be divided and undermined by creating a competing duty to protect unidentified members of the general driving public. Dr. Smith, and the Defendants, had no duty to protect Two Eagle. Alternatively, even if a duty was imposed, Sully's actions were a superseding cause of Two Eagle's injuries.

Wherefore, Avel respectfully requests that this Honorable Court affirm the Circuit Court's decision granting summary judgment in favor of the Defendants.

Dated this 18th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said Brief totaling 9418 words, which count excludes the Preliminary Statement, Jurisdictional Statement, Statement of the Legal Issue Sections, and the Certificates, and Signature blocks as permitted by SDCL 15-26A-66(b)(3). I have relied on the word and character count of the word-processing system used to draft this Brief in preparing this certificate as permitted under SDCL 15-26A-66(b)(4).

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CERTIFICATE OF SERVICE

I, Matthew D. Murphy, do hereby certify that I am a member of Boyce Law Firm, L.L.P. attorneys for Appellee/Defendant Avel eCare, LLC and that on the 18th day of March, 2024, I served a true and correct copy of the within and foregoing Appellee Avel eCare, LLC's Brief via email upon:

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Appeal No. 30558

In the
Supreme Court of the State of South Dakota

LONNIE TWO EAGLE, SR.,.
Appellant

vs.

AVEL ECARE, LLC, MOONLIGHTING SOLUTIONS LLC and MATTHEW C. SMITH, individually and jointly and severally,

Appellees.

Appeal from the Circuit Court
Sixth Judicial Circuit
Todd County, South Dakota

The Honorable Bobbi Rank

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JURISDICTIONAL STATEMENT

This is an appeal from a circuit court's order granting Appellee's motion for summary judgment dated November 30, 2023. R. 17778–79. Notice of Entry of the Judgment was served on December 1, 2023 and the Notice of Appeal was timely filed on December 15, 2023. R. 1772–73. The Court has jurisdiction of this appeal pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

I. DID SMITH OWE A LEGAL DUTY TO TWO EAGLE?

The circuit court correctly determined that Smith did not owe a legal duty to Two Eagle.

- *Cichos v. Dakota Eye Inst., P.C.*, 2019 N.D. 234, 933 N.W.2d 452
- *Hanson v. Big Stone Therapies, Inc*, 2018 S.D. 60, 916 N.W.2d 151
- *Schmidt v. Mahoney*, 659 N.W.2d 552 (Iowa 2003)
- *Praesel v. Johnson*, 967 S.W.2d 391 (Texas 1998)

II. DOES SOUTH DAKOTA PUBLIC POLICY BAR TWO EAGLE'S CLAIMS?

The circuit court correctly determined that South Dakota public policy bars Two Eagle's claims.

- *Jarmie v. Troncale*, 50 A.3d 802 (Conn. 2012)
- *Schmidt v. Mahoney*, 659 N.W.2d 552 (Iowa 2003)
- *Cichos v. Dakota Eye Inst., P.C.*, 2019 N.D. 234, 933 N.W.2d 452

STATEMENT OF THE CASE

This is an appeal from the circuit court's determination regarding a motion for summary judgment in the Sixth Judicial Court, Todd County, before the Honorable Bobbi Rank. Appellant Lonnie Two Eagle, Sr. brought negligence and malpractice claims against Appellees – Avel Ecare LLC, Moonlighting Solutions, and Matthew C. Smith. Two Eagle alleges Dr. Smith was negligent when he incorrectly calculated the date Chad Sully was authorized to drive again, prior to an accident where Two Eagle injured Sully. After written briefing and oral argument, the circuit court determined that the Appellees did not owe a legal duty to Two Eagle and that public policy barred Two Eagle's claims.

Appellant appeals the circuit court's granting Appellees' motion for summary judgment.

STATEMENT OF THE FACTS

Defendant Moonlighting Solutions, LLC ("Moonlighting Solutions") contracted with Defendant Avel eCare, LLC to provide telemedicine physicians or medical services for eligible patients of the United States Indian Health Services (IHS). R. 1153 (Defendant Moonlighting Solutions and Matthew C. Smith's Statement of Undisputed Material Facts), ¶ 1. Moonlighting arranged for Dr. Matthew C. Smith ("Dr. Smith") to provide telemedicine services to United States Indian Health Services patients at the IHS facility in Rosebud, South Dakota. *Id.* at 1153–54, ¶¶ 2-4. Dr. Smith had two telemedicine appointments with Chad Sully at or through the Rosebud Indian Health Services Hospital. *Id.* at 1155, ¶ 13.

Chad Sully suffered his first seizure on January 13, 2019, and experienced a second one on March 12, 2019. *Id.*, ¶¶ 11-12. After those seizures, Sully had two telemedicine appointments with Dr. Smith in April and July of 2019. *Id.*, ¶ 13.

Prior to Sully's first telemedicine appointment with Dr. Smith on April 16, 2019, Avel nurse Kristi Ponto ("Nurse Ponto") compiled a chart review for Dr. Smith's use on April 8, 2019. *Id.* at 1156, ¶ 14. Nurse Ponto's chart review noted Sully's January 13, 2019 and March 12, 2019 seizures. *Id.* at 1156, ¶ 15.

After Nurse Ponto completed her April 8 chart review, Sully seemingly experienced another seizure on April 11, 2019, but the chart summary was not updated prior to Sully's telemedicine appointment with Dr. Smith on April 16, 2019. *Id.*, ¶¶15-16. Additionally, Sully did not mention his most recent seizure to Dr. Smith at his appointment. *Id.*, ¶ 18.

At Sully's first telemedicine appointment on April 16, 2019, Dr. Smith increased Sully's anti-seizure medication, Keppra, to 750 mg twice per day and noted in Sully's file that Sully should not drive a vehicle until he has been six months seizure free. *Id.*, ¶ 19. Dr. Smith suggested the six-month break from driving for a variety of reasons, including to ensure that Sully would tolerate the medication without any side-effects. *Id.*, ¶ 20. Even if Dr. Smith had known about Sully's April 11, 2019 seizure, it would not have changed his directive regarding driving because Dr. Smith believed Sully's seizures were provoked. *Id.*, ¶ 21.

Sully had a second telemedicine session with Dr. Smith on July 23, 2019. *Id.* at 1156–57, ¶¶24-26. Nurse Ponto compiled a chart review for the July 23 appointment on July 15, 2019. *Id.*, ¶ 24.

Clinical notes from the July 23 appointment indicate that Sully suffered no seizures since February. *Id.*, ¶ 25. It is unknown if Sully volunteered that false information, or if Dr. Smith asked Sully about his last seizure and Sully lied, saying his last seizure was in February rather than April 11. *Id.*, ¶25.

As the information provided at the July 2019 appointment indicated that Sully had not had a seizure since February 2019, the recommendations and plans section of Sully's medical records note that Sully should "continue Keppra 750 mg BID" and that Sully could "return to driving in August." *Id.*, ¶¶ 25-26. The recommendation that Sully could return to driving in August was based on the report that Sully's last seizure was in February of that year. *Id.*, ¶ 27. Dr. Smith only intended to authorize Sully to drive after he was seizure free for six months and if his seizure condition was controlled based on the doctor's recommendations such as the taking of his anti-seizure medication, Keppra, as prescribed. *Id.*, ¶ 28.

When determining whether driving restrictions are necessary for seizure patients, Dr. Smith considers a number of relevant factors. Specifically, he looks to whether the seizure or seizures the patient had experienced were provoked or unprovoked and what has been learned from eliminating potential provocations and from the effects of the medications that patient had been taking. *Id.*, at 1160, ¶48. Although a state's recommendations for driving restrictions may be an additional consideration, those recommendations are made by the individual

states, and they are not necessarily based on a medical decision or any standard of care for medical professionals. *Id.*, ¶8.

On August 5, 2019, Sully operated a motor vehicle and struck Plaintiff Lonnie Two Eagle while he was on a riding lawnmower on a piece of grass adjacent to a road near the Rosebud Indian Health Services Hospital (Rosebud IHS). *Id.* at 1158–59, ¶¶36-37. Sully seemingly experienced a seizure while he was driving which caused the accident. *Id.*, ¶38.

Following the accident involving Two Eagle, Sully was seen in the emergency department of the Rosebud IHS. *Id.*, ¶40. Medical tests administered that day showed that Sully's was positive for cannabinoids and that he had a low glucose level on August 5, 2019. *Id.*, ¶39.

STANDARD OF REVIEW

This court reviews circuit court's decisions regarding a motion for summary judgment *de novo*. *McGuire v. Curry*, 2009 S.D. 40, ¶ 7. Circuit court's findings of fact are reviewed under the clearly erroneous standard. *Fin-Ag, Inc. v. Feldman Bros.*, 2007 S.D. 105, ¶ 19, 740 N.W.2d 857, 862-63 (citation omitted). Conclusions of law are reviewed under the *de novo* standard without deference to the circuit court. *Id.*

ARGUMENT

I. DR. SMITH DOES NOT OWE A LEGAL DUTY TO APPELLANT

A. Duty under Medical Malpractice

In order to sustain a claim for negligence, a plaintiff has the burden of demonstrating facts establishing each of the following: "[1] a duty on the part of the defendant to protect the plaintiff from injury, [2] a failure to perform that duty,

and [3] an injury to the plaintiff resulting from such failure." *Cuppy v. Bunch*, 88 S.D. 22, 25, 214 N.W.2d 786, 788 (1974) (citation omitted). Claims against a medical practitioner sounding in negligence are considered in the context of medical malpractice. *See Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, ¶ 15, 878 N.W.2d 406, 412; *Bruske v. Hille*, 1997 S.D. 108, ¶¶ 12-14, 567 N.W.2d 872, 876-77. In addition to the three elements of negligence, "[i]n a suit for professional negligence, the plaintiff must prove that the professional deviated from the required standard of care." *Hanson v. Big Stone Therapies, Inc*, 2018 S.D. 60, ¶ 25, 916 N.W.2d 151, 158 (citing *Magbuhat v. Kovarik*, 382 N.W.2d 43, 46 (S.D. 1986)). This Court has recognized that "a physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing" and "negligence of a doctor consists of his failure to conform to the standard of care which the law establishes for members of his profession." *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 17, 756 N.W.2d 345, 352 (internal citation and quotation omitted); R. 303 (Memorandum Opinion).

"[T]he existence of a duty of care on the part of a defendant to a plaintiff is an essential element of a negligence action." *Barger for Wares v. Cox*, 372 N.W.2d 161, 167 (1985) (citations omitted). "A duty can be created by common-law or statute" or public policy. *Millea v. Erickson*, 2014 S.D. 34, ¶ 12, 849 N.W.2d 272, 276; *Johnson v. Hayman & Assocs., Inc.*, 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702. Dr. Smith did not owe a duty to Two Eagle under any theory and therefore he is not liable for Two Eagle's injuries.

a. Statutory Duty

There is no statutory duty Dr. Smith owes to Appellee in relation to Sully's driving privileges. South Dakota statutes clearly state that it is the responsibility of the Department of Public Safety, not medical professionals, to determine an individual's ability to drive after seizure-like events. SDCL §§ 32-12-4.5[1] and -32[2]. South Dakota Codified Law § 32-12-32 provides, DPS "may not issue any license under this chapter to any person who is physically or mentally incapable to drive." South Dakota Codified Law § 32-12-5.1 explicitly provides that it is the Department of Public Safety, not medical providers, who determine South Dakota residents' ability to drive:

> The Department of Public Safety may deny the issuance of a motor vehicle operator's license . . . to any individual who has experienced convulsions, seizures, or blackouts, until the individual has experienced a period of twelve months without any such episode. However, upon receipt of a statement signed by the applicant that the applicant's condition is adequately controlled by medication, the applicant is continuing to take medication, and the applicant is under the care of a physician, the Department of Public Safety may issue a temporary permit to the applicant. This temporary permit is subject to the provisions of § 32-12-36 and is reviewable by the department every six months, or until the applicant has gone a period of twelve months without any episode.

SDCL § 32-12-5.1. The South Dakota Department of Public Safety affirmatively notes on its website that "[i]n South Dakota, mandatory reporting is not required

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[1] SDCL § 32-12-4.5. Rules authorized for medical and vision standards of drivers.
The secretary of the Department of Public Safety may promulgate rules on medical criteria and vision standards relating to the licensing of drivers under the provisions of this chapter.

[2] SDCL § 32-12-32. Licensable persons--Physical or mental capability--Promulgation of rules.
The Department of Public Safety may not issue any license under this chapter to any person who is physically or mentally incapable to drive. The Department of Public Safety may promulgate rules, pursuant to chapter 1-26, to establish criteria for determining an individual's physical or mental capability to drive.

regarding those who are believed to no longer have the ability to drive safely." South Dakota Department of Public Safety, FOR PHYSICIANS, available at https://dps.sd.gov/driver-licensing/south-dakota-licensing-information/physicians (last accessed February 29, 2024).

b. Duty Under Common Law

Whether the common law creates a "duty [ ] depends on the relationship of the parties, public policy considerations," and foreseeability. *Johnson v. Hayman & Associates, Inc.*, 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702 (2015) (citations omitted); *see also Cichos v. Dakota Eye Inst., P.C.*, 2019 ND 234, ¶ 8, 933 N.W.2d 452, 456 (citing the same three factors). Dr. Smith and Two Eagle are strangers – there is no relationship between the parties. Foreseeability does not create a duty of Dr. Smith to Two Eagle. Neither do public policy considerations justify extending a duty. *See infra* Section II.

c. Role of foreseeability

Appellant wrongly claims Sully's driving restriction was not just for Sully but also for the public. Appellant Brief, p. 8 ("The trial court in the instant case noted that it could reasonably be inferred that Smith imposed a driving restriction on Sully to protect him and, inevitably, those he might encounter on the road. (SR 306)"). In support, Appellant cites to the circuit court's memorandum opinion to defendant's motion to dismiss. In its opinion, the court stated, "the Court's analysis at this stage is limited to the facts alleged in the Amended Complaint and reasonable inferences therefrom. . . . It is a reasonable inference, based on the very limited facts before the Court, that the Defendants, despite having no obligation to do so, imposed a driving restriction on Sully to protect him and,

inevitably, those he might encounter on the road." After discovery, in her order from the bench, the court found,

> The South Dakota legislature, the South Dakota Supreme Court have distinguished malpractice from traditional negligence and all of the rules governing practice of medicine in South Dakota make it clear that the responsibility to the patient is paramount. It's not a responsibility to the public. And doctors as a matter of public policy should not be worrying about potential duties to unknown third parties as they are providing medical care to the patients who, by statute, by administrative rule, by their rules of ethics is what they have to focus on is the best interests of the patient. And the Code of Ethics that's been referenced to the court, the patient's welfare is to be placed above all obligations to others.

HT, p. 40. As such, the court found "the duty extend[s] only to the patient, not to an unforeseen third party such as the case in this case." *Id.* at 42. Appellant is misleading when he tries to shoehorn the trial court's motion to dismiss ruling as binding for the subsequent motion for summary judgment decision.

"[F]oreseeability in defining the boundaries of a duty is always a question of law." *Johnson v. Hayman & Associates, Inc.*, 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702 (2015) (citations omitted). "Foreseeability in the 'duty' sense is different from foreseeability in fact issues bearing on negligence (breach of duty) and causation." *Id.* "Foreseeability is examined at the time the alleged negligent act occurred, not when the damage was done." *McGuire v. Curry*, 2009 S.D. 40, ¶ 9, 766 N.W.2d 501, 506. "While physicians can readily appreciate that their epileptic patients will risk harm to themselves by noncompliance with recommended treatments or other self-defeating behaviors, it is less easy to envision the risks of these behaviors to third parties." Beresford, H. Richard, "Legal Implications of Epilepsy" (1988). *Cornell Law Faculty Publications.* 1641. https://scholarship.law.cornell.edu/facpub/1641.

This Court assessed the foreseeability element necessary to establish duty in a third-party negligence claim when it decided *Johnson v. Hayman & Associates*, 2015 S.D. 63, 867 N.W.2d 698. In *Johnson*, Fannie Mae hired a residential engineering service to conduct a visual inspection of a home it had foreclosed on and to prepare a corresponding report. *Id.* ¶ 2, 867 N.W.2d at 699. The services were rendered for the sole benefit of Fannie Mae. *Id.* ¶ 4, 867 N.W.2d at 700. After Fannie Mae made some of the repairs suggested in the engineering service's report, it sold the home which was subsequently resold. *Id.* ¶¶ 4-5. Over time, problems with the home became more evident, and the current owners brought a professional negligence suit against the engineering service. *Id.* ¶¶ 7-9. The Court found that because it was not foreseeable that when the engineering service conducted a home inspection for the sole benefit of a previous owner that a subsequent owner would be harmed by its report. *Id.* ¶¶ 15, 19, 867 N.W.2d at 702-04.[3] "The risk reasonably to be perceived defines the duty to be obeyed. No one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen." *Id.*, ¶ 15.

Appellant also incorrectly states "The issuance of the driving restriction showed that Smith foresaw the risk of injury to Sully and to the public who would encounter Sully on the road." Appellant Brief, p. 9. At Smith's deposition, when asked, "The reason for [a six month driving restriction] is that driving with a seizure condition was a danger to himself and to the public, correct?", Smith

[3] The Court in *Johnson* also noted that the subsequent owners did not know of or see the engineering services report prior to its decision to purchase the home.

responded "it depends." R. 591 (Smith Deposition). Then when asked, "isn't the reason that you give a directive to not drive until seizure free for six months was because it's foreseeable that he could have an accident while driving that would – could harm he [sic] or the public, correct?" Dr. Smith responded, "I wouldn't say that's necessarily true." *Id.* at 591–92. Part of the reason Dr. Smith recommended restricting Sully's driving was "to make sure that he was tolerating medication, so there wasn't any kind of medication side effect." *Id.* Dr. Smith also testified that the ultimate decision regarding an adult's ability to drive is made by the state, not the doctor. *Id.* at 597.

A duty can be created through foreseeability, but there is no evidence here that Dr. Smith foresaw any harm to Two Eagle or the general public based upon his medical advice to Sully.

d. Third-Party Liability

Appellant tries to analogize other third-party liability cases to the instant case via a string citation, but none support extending third party liability to a patient's doctor.

Mid-Western Elec., v. DeWild Grant Reckert & Assocs. Co., 500 N.W.2d 250, 254 (S.D. 1993) establishes the importance of foreseeability and reliance generally ("We instruct trial courts to use the legal concept of foreseeability to determine whether a duty exists."); *Wells Fargo Insurance, Inc. Flood Services v. Fonder,* 2015 S.D. 66, ¶ 18, 868 N.W.2d 409, 416; *Muhlenkort v. Union County Land Trust*, 530 N.W.2d 658, 662–63 (S.D. 1995) ("to hold an abstractor liable in

tort to a third party there must be some reliance on the part of the third party"). Without reliance, there was no foreseeability and therefore no liability.[4]

> This Court, in the context of attorneys and clients has noted,
>
> > To establish a duty owed by an attorney to a nonclient, the nonclient must allege and prove that the *intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship*. Therefore, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party.

Friske v. Hogan, 2005 S.D. 70 ¶ 13, 698 N.W.2d 526, 530 (internal quotations and citations omitted) (emphasis added). Unlike in *Frisk* where the plaintiffs were "identifiable beneficiaries" under the client's will, Two Eagle was not an identifiable beneficiary of Sully's medical advice received from his doctor. Two Eagle has offered no evidence that he relied upon Smith's guidance to Sully when he was mowing the lawn at his job that he would not be injured by Sully's driving. Neither has Dr. Smith offered evidence that he considered the impact of his driving guidance upon anyone but Sully.

Appellant also includes a one page string citation of cases from other jurisdictions where non-patient negligence claims were permitted against health care providers. There is no analysis. Only one of the cases cited has the similar

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[4] "We think that analysis equally applies to a title insurance policy issued by an Abstractor. Here the trial court found that Muhlenkort had not relied on the title policies and we agree. Muhlenkort has not established that she relied on or was a beneficiary of the abstract of title or title insurance policies. The parties stipulated that the title policies were not supplied to Muhlenkort, that she did not communicate with representatives of the Abstractor or Insurer prior to the issuance of the policies and that she was not a named insured on the policies. Even more important is that the omission of Muhlenkort's judgment lien from the title insurance policy did not extinguish her lien on the property. Muhlenkort knew on July 22, 1986 of the omission of her lien on the title policy but did not seek to foreclose on it." *Muhlenkort v. Union Cnty. Land Tr.*, 530 N.W.2d 658, 663 (S.D. 1995).

facts as our instant case. The remainder of the cases are distinguishable fact patterns that do not support Appellant's theory.

In *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334, 340 (Cal. 1976) the court noted a therapist "incurs an obligation to use reasonable care to protect the intended victim" if the therapist determines "his patient presents a serious danger of violence to another." There was no determination that Sully might endanger another person due to violence. In *Doe v. Cochran*, the court's finding of liability was "quite limited" and "extends only to *identifiable* third parties who are engaged in an exclusive romantic relationship with a patient at the time of testing and, therefore, may foreseeably be exposed to any STD that a physician fails to diagnose or properly report." *Doe v. Cochran*, 210 A.3d 469, 496 (Conn. 2019) (emphasis added). Two Eagle was a member of the general public – he was not an identifiable third party.

Several courts found liability for doctors when they failed to warn patients about side effects of a prescribed medication. *Coombes v. Florio*, 877 N.E.2d 567, 573 (Mass. 2007); *Arsenault v. McConarty*[5], 2006 WL 2846962, at *4 (Mass. Super. Oct. 3, 2006); *Burroughs v. Magee,* 118 S.W.3d 323 (Tenn. 2003). In *Coombes v.*

[5] *Arsenault v. McConarty*, 2006 WL 2846962, at *2 (Mass. Super. Oct. 3, 2006) cannot be used as a foreseeability case as Massachusetts had not adopted section 321 of the Restatement (Second) of Torts at the time of the case, so "the foreseeability of physical harm is not the linchpin for determining the existence of a common law duty . . . the question of duty is determined by a consideration of 'existing social values, customs, and considerations of policy." *Arsenault v. McConarty*, 2006 WL 2846962, at *2 (Mass. Super. Oct. 3, 2006).

Florio,[6] the court found the doctor to be liable for failure to warn a patient about potential side effects of a medication. The Massachusetts Court explained, "When a doctor prescribes medication it is both a foreseeable and intended result that a patient will take the medication. The occurrence of known side effects, and the impact of such side effects on the patient's ability to drive, are foreseeable results of that prescription." *Coombes v. Florio*, 877 N.E.2d 567, 573 (Mass. 2007). Unlike in the instant case, "the duty described [ ] does not impose a heavy burden because it requires nothing from a doctor that is not already required by his duty to his patient." *Coombes v. Florio*, 877 N.E.2d 567, 573 (Mass. 2007).

The foreseeability of dangerous side effects of medication the doctor prescribes is distinct from a doctor who prescribed a medication to make it safer for Sully to drive. Here, the danger came from Sully's base condition, which Dr. Smith was working to control through medication, versus the danger coming from the medication prescribed by the doctor. The side effect of medications could arguably be related to the practice of medicine, that is, prescribing medication to one's patient. Here, guidance on driving is an activity exclusively determined by the State of South Dakota.

The court in *Cheeks v. Dorsey* found a doctor liable for administering a drug "which, when combined with other drugs or alcohol, may severely impair the patient, the doctor's failure to take the proper precautions (i.e., verify whether

[6] Notably, the Massachusetts Court found malpractice claims are limited to cases between a patient and her doctor. A third party cannot bring a medical malpractice claim. *Coombes v. Florio*, 877 N.E.2d 567, 569 (Mass. 2007) ("It is not a malpractice claim because it lacks a physician-patient relationship between plaintiff and defendant, an essential element of any malpractice claim.").

the patient is already under the influence of another drug) is an affirmative act which creates the risk that unidentifiable third parties might be injured." *Cheeks v. Dorsey*, 846 So. 2d 1169, 1173 (Fla. Dist. Ct. App. 2003). However, as relevant here, the court also stated,

> This case is unlike a mere failure to warn case where the doctor prescribes a medication which might have certain effects under certain circumstances at some future time. In those situations, whether the patient takes the medication and then drives is beyond the doctor's control. In fact, whether the patient consumes the medication at all is beyond the doctor's control. Thus, imposition of a duty to unidentifiable third parties under those circumstances would create a zone of risk which would be impossible to define.

Cheeks v. Dorsey, 846 So. 2d 1169, 1173 (Fla. Dist. Ct. App. 2003). The court in *Cheeks v. Dorsey* would not have even found liability in a failure to warn case, let alone a case where a patient's medication actually assisted his driving capabilities.

Harden v. Allstate Ins. Co., 883 F. Supp. 963, 967 (D. Del. 1995) (citing 24 Del. C. 1763) is distinct because Delaware law requires physicians who treat patients with epilepsy to inform the Division of Motor Vehicles of all patients treated for epilepsy. This reporting requirement cannot be used as a standard of care, but was relevant to the public policy arguments in Delaware regarding doctor liability. *Id. Tomlinson v. Metro. Pediatrics, LLC*, 412 P.3d 133, 143 (Or. 2018) is also not applicable because "the [plaintiff] parents' relationship with [doctor] defendants arose within the context of defendants' undertaking and the parents' status as M's biological parents and primary caregivers." The court held that because the doctors failed "to reasonably diagnose M's genetic disorder and communicate that diagnosis to the parents, defendants failed to reasonably protect M's interests in receiving medical care and failed to reasonably protect the

parents' separate interests in avoiding the reproductive risks associated with their own genetic composition." *Id.* This logic does not extend to the instant case.

The one case cited by Appellant supporting his position is *Medina v. Pillember*, but even that case was reversed on appeal due to a change of the law. 20 Mass. L.Rptr. 352. The three cases cited in *Medina* that purportedly support Appellant's position are factually distinct or were decided on narrow grounds. The other five cases cited in *Medina* support Appellee's position.

Medina cites three cases where courts have found a duty on behalf of a physician who permitted a patient to drive, but none support Appellant's case. *Harden v. Allstate Ins. Co.*, 883 F. Supp. 963, 967 (D. Del. 1995) (citing 24 Del. C. 1763), a Delaware case, is inapplicable because the legislature passed a statute requiring doctors to notify the DMV of patients with epilepsy. The cited California case, *Myers v. Queensberry* was an order on a motion to dismiss and focused on a doctor who knew a patient's diabetic condition was not controlled and encouraged them to drive to a nearby hospital for treatment. *Myers v. Quesenberry*, 144 Cal. App. 3d 888, 894, 193 Cal. Rptr. 733, 736 (Ct. App. 1983). These are too dissimilar to the current case to provide useful guidance. That leaves *Duvall v. Goldin.* The Michigan appellate court found a physician owed a duty to a third party who was injured by their epileptic patient driving. 139 Mich.App. 342, 362 N.W.2d 275 (1984). However, the court clearly noted, the decision "is limited to the narrow facts set forth in this case" and "decline[d] to find a duty in every instance involving a physician, his patient and an unidentifiable third party." *Id.* at 279.

By contrast, the Missouri Court of Appeals held "[t]here is no duty or need to warn of dangers which are open and obvious or which are commonly known." *Young v. Wadsworth*, 916 S.W.2d 877, 878 (Mo. Ct. App. 1996). The Kansas Supreme Court arrived at the same conclusion finding a doctor not liable when his patient knew about the dangers of driving while drowsy. *Calwell v. Hassan*, 260 Kan. 769, 783, 925 P.2d 422, 431 (1996). The Texas Supreme Court explained epilepsy patients know that they are subject to seizures and the risk that they may suffer a seizure while driving "should be obvious" to them. *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Texas 1998). Also, a patient's treating physician does not have the right nor ability to control the conduct of their patient. *Id.*

The Iowa Supreme Court found a physician did not owe a duty to a third-party motorist injured by his patient's medical condition, noting "it is highly likely that a consequence of recognizing liability to members of the general public on the facts of this case will be that physicians treating patients with seizure disorders will become reluctant to allow them to drive or engage in any other activity in which a seizure could possibly harm a third party." *Schmidt v. Mahoney*, 659 N.W.2d 552 ,555 (Iowa 2003). Finally a Florida trial court noted when an injured party was unknown to the physician and "there is no allegation that [physician's] failure to warn [injured party] not to drive while medicated proximately caused the accident," the doctor was not liable. *Werner v. Varner, Stafford & Seaman, P.A.*, 659 So. 2d 1308, 1311 (Fla. Dist. Ct. App. 1995). Appellant has failed to offer a single case that supports his theory.

Appellant argues, "Nothing uncovered through discovery refuted that after Smith became aware of the extent of Sully's seizure history, he foresaw the risk

of injury to those Sully may encounter on the road, and therefore, imposed the no-drive restriction." Appellant Brief, 13-14. Appellant has the wrong starting point. Nothing in discovery demonstrated this is why Dr. Smith recommended Sully not drive. In fact, the record demonstrates Dr. Smith was concerned simply for his patient when he made the driving recommendation. *See* R. 591–92 (Smith Deposition). Further, the record is clear that Dr. Smith did not have the ultimate authority in addressing Sully's legal ability to drive – that was the South Dakota DMV. *See supra* Section I.A.a.

As for his argument "it is undisputed that Smith on July 23, 2019, carelessly misreported the date of Sully's last seizure, and recklessly and unintentionally authorized Sully to return to drive in August contradicting Smith's previous directive to not drive until at least October 11, 2019," Dr. Smith's directive never changed. Appellant's Brief, p. 13-14. The directive was no driving for six months after his last seizure. This never changed. The incorrect date of Sully's last seizure was placed in Sully's file, which changed the six month calculation. However, the date is less important than the six month calculation. If Sully had a seizure after his July appointment, the date provided by his doctor would no longer apply and the six month clock would have restarted. Sully was well aware of when his seizures occurred. Even if the date was incorrect, the advice was still six months after last seizure.

B. Duty Under Ordinary Negligence

Appellant contends,

> The ordinary negligence claim was included because Smith's misconduct, although involving a patient, was not related to any medical science or art requiring special skills not ordinarily

> possessed by law persons, rather it involved misconduct that can instead be assessed on the basis of the common, everyday experience of the trier of facts.

Appellant's Brief, p. 6. He claims the ordinary negligence committed by Dr. Smith was his,

> [1] reporting a date of last seizure in February despite being told that the last seizure was on April 11, 2019, and the electronic health records also showed that the last seizure was April 11, 2019, and then [2] using the inaccurate date to prematurely authorize Sully to return to driving. . . . [T]he alleged negligence or breach of duty did not involve medical judgment, treatment, or diagnosis, as such the claim alleges a set of duties and facts for ordinary negligence.

Appellant Brief, p. 17. Despite Appellant's contention otherwise, an ordinary lay person does not have the training and experience to review all records in an electronic health record, does not know how far back a doctor must review medical health records prior to an appointment, and does not know if the doctor relies upon what was told to him during the appointment or the medical records when determining dates. These are decisions a trained medical professional understands, not an ordinary lay person. Therefore, the alleged ordinary negligence behavior, if anything, is allegations of medical malpractice, not ordinary negligence.

Szymborski v. Spring Mountain Treatment Center, 403 P.3d 1280 (Nev. 2017) does not support Appellant's argument. In that case, the court found discharging a patient in a taxi to a relative's home without informing said relative was general negligence, not medical malpractice. Here, the alleged offense was negligently determining the date of Sully's last seizure and then providing improper medical advice as a result. The incorrect date of the last seizure is

directly related to the medical advice provided to Sully. Plaintiff's claims inherently involve medical diagnosis (Sully still suffered from epileptic seizures), judgment (when could Suly drive again from a medical perspective), and treatment (was Sully's current medication sufficient to address his seizures so that he could drive). Under the *Szymborski* test, Appellant's claims sound in medical malpractice, not general negligence.

Appellant argues *Martinmaas v. Engelmann* is inapplicable because it "does not resolve whether the negligence standard for injuries to third parties . . . can apply to Two Eagle's claim against Smith." Appellant Brief, p. 16. He improperly focuses on Justice Konenkamp's concurrence and Justice Amundson's dissent. He provides no evidence or caselaw as to why the concurrence or dissent's arguments should prevail over the majority opinion. When one focuses on the majority's opinion, this Court noted, "the negligence standard for doctors is no different than for other professionals," indicating that the definition of malpractice includes negligent conduct. *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 30, 612 N.W.2d 600, 608. In support this Court explained the definition of medical malpractice insurance covered both negligent and intentional acts in the practice of medicine. *Id.* at ¶ 28. When this Court has previously tried to separate out medical malpractice claims from other claims, it noted "[m]isrepresentations by a physician as to treatment needed or accomplished or as to dangers of treatment or changes in the state of the art as to such medical treatment, whether negligently, deliberately, or fraudulently made, come within the legal purview of malpractice." *Bruske v. Hille*, 1997 S.D. 108, ¶ 13, 567 N.W.2d 872, 877 (internal quotation and citation omitted). Appellant's concerns here focus on the treatment

Sully required (what dosage of medication was appropriate) and any restrictions upon Sully's behavior during treatment.

The intermediate appellate court in New York has similarly found, "When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence." *Papa v. Brunswick General Hospital*, 132 A.D.2d 601, 603, 517 N.Y.S.2d 762, 763 (N.Y. 1987) (citation omitted). Similarly, in *Doe v. Cochran*, the Supreme Court of Connecticut considered the distinction between medical malpractice and ordinary negligence actions and determined,

> a claim sounds in medical malpractice when (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

Doe v. Cochran, 210 A.3d 469, 476, 332 Conn. 325, 335 (2019) (internal quotation omitted).

Reading a patient's medical chart is directly related to rendering medical services to the patient. Physicians and medical professionals have special training and experience in reading, interpreting, and preparing medical charts. No person off the street has a duty (or ability) to read anyone else's full medical record. Only health care providers ever would or could do so. Further, only medical professionals know what questions to ask regarding a patient's medical history as to how that impacts the medical advice given by the doctor or other medical professional. This Court has previously explained, "laypersons would not

generally know what type or manner of care medical staff should provide a patient in response to a report of increased pain following a physical therapy session" and therefore "laypersons would have to indulge in speculation and conjecture to determine whether the care provided to [individual] by Hospital staff was appropriate." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 26, 916 N.W.2d 151, 158.[7] Here, a lay person would have to "indulge in speculation and conjecture" when determining when it is appropriate to review which parts of Sully's medical record prior to the appointment, what to review during the appointment, and what to rely upon in asking Sully about his last seizure.

As Dr. Smith testified, he reviewed and considered Sully's medical history and the type of seizures when discussing his recommendations regarding Sully's return to driving. R. at 591–92 (Smith Deposition). The date for Sully to return to driving is not a simple plug and chug equation where one enters the date of his last seizure and decides that X many months later, Sully can drive. More importantly, the ultimate determination of whether Sully can drive is not determined by Dr. Smith, but by the State of South Dakota. Dr. Smith's recommendations are limited to the medications taken by Sully and whether those medications are working to control Sully's seizures. It is up to the State of South Dakota as to whether Sully is legally authorized to drive. *See supra* Section I.A.a. Despite Appellant's desire to bring a general negligence claim, these allegedly negligent acts may only sound in medical malpractice.

[7] This case discusses when a layperson or expert must testify regarding a professional deviating from the standard of care, but the concept of what information a layperson versus an expert knows is equally applicable to determining if a concept falls under general negligence or is something requiring a medical professional's knowledge.

Additionally, finding a duty of this nature would improperly and imprudently open up every driver's medical records to inspection and scrutiny by third parties harmed in an auto accident with that driver. Creating a third-party duty whereby any individual could sue a medical professional for any alleged error occurring during a patient's doctor appointment or in a patient's chart would allow countless plaintiffs 1) access to extreme amounts of confidential patient-physician information of non-parties; and 2) would create an endless inquiry into each and every doctor's appointment to determine what was related by whom and what was recorded. Such an extreme and far-reaching definition of "duty" should be determined by our Legislature, and not by the courts.

II. SOUTH DAKOTA PUBLIC POLICY BARS APPELLANT'S CLAIMS

Appellee believes there are six public policy reasons to not impose third party liability upon doctors in South Dakota – 1) doctors with seizure patients may overly restrict patients' activities to reduce exposure to third party liability,[8] 2) doctors expect to be accountable to patients, not the general public,[9] 3) creating a third party duty could increase litigation and health care costs,[10] 4) third party claim exposure would adversely affect patient treatment and the public's

[8] "the physician, because of fear of third-party lawsuits from the whole extension of the public and unknown third parties, could order that anyone that comes to see them with a seizure disorder just cannot drive whether it's in their best interests or not." HT, 42:21-43:1.

[9] Concerns about "over-ordering of diagnostic tests, unnecessary referrals, again all of which increases costs to the public, increase costs of medical insurance and is against public policy." HT, 43:15-21.

[10] "we could have an over-ordering of diagnostic tests, unnecessary referrals, again all of which increases costs to the public, increases costs of medical insurance and is against public policy" HT, 43:17-21; "It also would, as has been referenced, open the floodgates with no identifiable standard of care and a case-by-case standard of care, which is not in accordance with the best interests of patients or the community." HT 44:5-9.

confidence in the medical profession,[11] 5) the floodgates of litigation without an identifiable standard of care would open,[12] 6) foreseeability considerations do not support existence of a third-party duty[13]. The court agreed on all six points (see footnotes above). In his brief, Appellant argues five reasons why Appellee's public policy concerns are misplaced. None are persuasive.

A. Negligence was Recording Incorrect Date

Appellant's first contention is,

> Two Eagle's complaint against Smith wasn't that Smith negligently decided that it was safe for Sully to drive, rather the Complaint was that Smith decided that it was unsafe for Sully to drive, but negligently reported the date of last seizure leading to the miscalculation of the date when six months from last seizure would occur

Appellant Brief, p. 19. As discussed *supra*, the calculation of when Sully was authorized to drive again was not a simple plug and chug calculation but rather a combination of Dr. Smith's experience as a neurologist, his understating of Sully's seizures, his review of the medical record and his discussion with Sully of his date of his last seizure. This is not a simple calculation that anyone could execute. Further, Dr. Smith was not the ultimate determiner of Sully's driving. The State of South Dakota is.

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[11] "Of particular concern to this Court and given the demographics and geographical isolation of Todd County, recognizing a duty in this case could force the doctors, because of increasing malpractice costs, to avoid high-risk patients and reduce their scope of practice, which would be highly detrimental to rural communities where we already have significant problems with maintain doctors to serve the community." HT, 43:22-44:4.
[12] "And it also would, as has been referenced open the floodgates with no identifiable standard of care and a case-by-case standard of care, which is not in accordance with the best interests of patients or the community." HT, 44:4–9.
[13] Encompassed more generally by the Court's discussion.

B. No Conflict of Interest in Duties

Appellant's second argument is,

> There is no conflict of interest between Smith's duty to Sully and a concern of third party liability to the public with regard to Smith's negligent failure to list the correct date of last seizure.

Appellant Brief, p. 19. The conflict of interest focuses on the discord between the patient and the general public – not the recording of the date of the last seizure. The date of Sully's last seizure is of no relevance to Two Eagle. The date of Sully's last seizure is highly relevant to Dr. Smith's medical advice to Sully, but is not the only piece of relevant information. It is also relevant, *inter alia*, whether the seizures were provoked or unprovoked and whether Sully took his medications as prescribed. Smith's duty to Sully is to provide the best advice regarding his medical conditions, his seizures, the best risk tolerance for potential side effects of his advice. This is different from a duty, if it existed, to third parties on the road who could be impacted by a patient's driving. All third parties would benefit from as restrictive rules as possible for seizure or other medical patients because all restrictions would provide additional safety to the others on the road.

In its analysis of a similar factual scenario, the Supreme Court of Connecticut found that imposing the kind of duty that Appellant suggests would "undeniably interfere with a physician's duty of loyalty to the patient because, in deciding when and how to advise the patient, the physician would be required to consider a second, possibly conflicting duty to persons who are not their patients." *Jarmie v. Troncale*, 50 A.3d 802, 819 (Conn. 2012). That court noted:

> when the accepted standard of care requires a health care provider to advise or warn a patient of the risks of driving due to the patient's underlying medical condition, imposing an additional duty on the health care provider to the victim of the patient's unsafe driving would be problematic at best, because it would be inconsistent with the physician's duty of loyalty to the patient, would threaten the inherent confidentiality of the physician-patient relationship and would impermissibly intrude on the physician's professional judgment regarding treatment and care of the patient.

Id. at 818.

Any potential liability of Dr. Smith to the public focuses on Dr. Smith's liability exposure based upon any errors during the course of his medical practice. If Dr. Smith is liable to a third party based upon a simple negligent act of noting the incorrect date in a patient's chart, as alleged by Appellant, there is no answer as to where this liability ends. Are doctors liable to a third party who is diagnosed with Covid because third party interacted with a doctor's patient and the doctor incorrectly calculated patient's days of isolation? What about if the doctor misread the CDC guidelines or the doctor has a fundamental disagreement with the CDC guidelines? At what point is the doctor required to inquire as to the information provided by the client when said information differs from the information in a patient's medical file? There is a clear conflict of interest of Dr. Smith's duty to provide competent medical care to his patients with the correct risk assessment for said patient as compared to a more conservative risk analysis when the doctor may be liable to the third party.

Appellant argues "South Dakota public policy wasn't meant to protect doctors who make reckless errors resulting in injury to residents of the State, especially when the mistake could have easily been avoided." Appellant Brief, p.

20. But, Appellant misstates the issue. Dr. Smith is not escaping liability due to public policy considerations. Dr. Smith is still liable to his patient. He is still liable to those with whom he is in a special relationship. But he is not, nor should be, liable to every person in this state whom his patient encounters. No one is disputing the seriousness of Two Eagle's injuries nor that Sully was driving and had a seizure. But, these facts do not require that Dr. Smith be found liable.

C. Defensive Medicine Practice

Third, Appellant argues extending liability will not lead to defensive medicine practice, "Two Eagle's claim is not for negligence based on a lack of diagnostic testing and will not lead to defensive medicine practice." Appellant Brief, p. 19.

A lack of diagnostic testing in Appellant's claim is not the only potential means of defensive medicine. As multiple courts have found, making a doctor liable to an unknown third party will change the scope of a doctor's medical practice. By definition, the doctor will not only be required to consider the needs of his or her patient, but also any and all third parties who may be impacted by every decision – including every date he writes down in a patient's medical chart. According to the study conducted by Studdert, et al., "[m]any specialist physicians reported doing more for (or to) patients because of malpractice risk." R. 1137 et al (Studdert DM, Mello MM, Sage WM, et al., Defensive Medicine Among High-Risk Specialist Physicians in a volatile Malpractice Environment, JAMA. As some doctors already modify their practices to protect themselves from malpractice litigation, if the floodgates to third-party medical malpractice litigation are opened, it reasons that additional, unnecessary defensive medical

practices will increase. Such additional defensive medicine practices could particularly impact seizure patients as doctors would likely be hesitant to recommend that a patient may resume driving, even if the physician believes the patient's seizures are appropriately controlled with medication.

The Supreme Court of Iowa considered one such circumstance when it decided *Schmidt v. Mahoney*, 659 N.W.2d 552 (Iowa 2003). In *Schmidt*, a physician had been treating the patient for a seizure disorder since early infancy and knew she had on occasion lost control of her vehicle due to oncoming seizures. *Id.* at 553. The doctor did not warn the patient of the dangers of driving, affirmatively advised her that she could safely drive, and provided documentation to the Iowa Department of Transportation so that the patient could obtain a permit. *Id.* That patient experienced a seizure while driving, lost control of her vehicle, and struck a vehicle occupied by the plaintiff. *Id.* In affirming the lower court's motion to dismiss, the Iowa high court held that the physician did not owe a duty to a third-party motorist injured by its patient's medical condition. *Id.* at 555–56. The court specifically noted that policy considerations weigh against finding such a duty, and stated

> it is highly likely that a consequence of recognizing liability to members of the general public on the facts of this case will be that physicians treating patients with seizure disorders will become reluctant to allow them to drive or engage in any other activity in which a seizure could possibly harm a third party. In order to curtail liability, physicians may become prone to make overly restrictive recommendations concerning the activities of their patients and… not in their patient's best interests.

Id. at 555.

Finding a duty upon the facts and circumstances in the current case would create unreasonable liability risks for physicians which would likely cause them to be overly restrictive in their treatment of their patients. In the case at hand, Dr. Smith prescribed anti-seizure medication for his patient Sully, and, based on his examination of Sully and Sully's representations to him, Dr. Smith believed the seizures were adequately controlled by the medication as prescribed. If Sully's seizures were properly controlled with medication, it was appropriate for Dr. Smith to no longer recommend that Sully refrain from driving. "[A]s a matter of public policy… the law should encourage medical care providers… to devote their efforts to their patients… and not be obligated to divert their attention to the possible consequences to [third parties] of medical treatment of the patient." *Jarmie v. Troncale*, 50 A.3d 802, 818 (Conn. 2012) (quotation omitted).

Our sister state's high court has explained, "[P]hysicians must be able to fulfill their duty to patients without fear of third party liability claims for the acts of patients over which physicians have no control." *Cichos v. Dakota Eye Inst., P.C.*, 2019 N.D. 234, ¶ 9, 933 N.W.2d 452, 456. In its decision, the North Dakota Supreme Court highlighted the difference between courts that have recognized a third-party duty based on a physician's failure to warn patients about driving-related side effects of prescribed medications or administered treatments, versus imposing a duty on physicians to warn patients about their own medical conditions which create the driving risk. *Cichos v. Dakota Eye Institute, P.C.*, 2019 ND 234, ¶¶ 15-16, 933 N.W.2d 452 458-59. The Supreme Judicial Court of Massachusetts, Suffolk, explained the reasons for such a distinction well in *Medina v. Hochberg*, 987 N.E.2d 1206 (Mass. 2013). In *Medina*, the court

determined that only an affirmative act on the part of the physician, as in the prescribing of medication which has known side effects, imposed a nonpatient duty of the physician to warn the patient against driving. The court noted,

> [i]n prescribing the medication, a physician has created the possibility that the patient might decide to operate a motor vehicle while taking it, experience a known side effect, and cause bodily injury to a nonpatient. Thus, a physician's decision to prescribe medication to his patient creates or increases the risk of harm to the general public.

Id. at 1212. On the other hand, the court reasoned, a physician should not be exposed to nonpatient liability for accepting a patient with a preexisting medical condition which may affect the patient's driving ability. *Id.* at 1212.

When a physician's professional judgment and duty to their patients is impacted by the fear of third-party litigation arising from a patient's failure to properly self-administer prescribed medications, their fidelity to their patients erodes and they engage in defensive medical practices. As the public becomes aware that physicians are placing their self-interest in avoiding litigation ahead of the patients' individual efficacy and well-being, the public's confidence in the medical profession will likewise erode.

D. Third Party Liability Results in Improved Medical Care

Fourth, Appellant argues, "imposing third party liability would play an important role in spurring physicians such as Smith to take greater care in preparing reports before authorizing a seizure patient to drive" Appellant Brief, p. 19.

First, a doctor in South Dakota cannot authorize a patient to drive. Decisions regarding a patient's ability to drive are made exclusively by the state

of South Dakota. *See supra* Section I.A.a. Second, Dr. Smith's advice was for Sully to wait six months after his last seizure. Sully knows better than Dr. Smith when his last seizure was. In fact, if the seizure had occurred after his appointment with Dr. Smith, then according to Dr. Smith's analysis, Sully would have needed to wait another six months prior to driving. Therefore, the date Dr. Smith provided Sully is less important than the advice given – six months since Sully's last seizure. This advice did not change. It was consistent and only Sully could determine when this time had elapsed. Dr. Smith is already liable to Sully for negligence and intentional torts. Expanding liability to third parties will not improve Dr. Smith's relationship with his patient.

E. No Expanded Third-Party Litigation

Fifth, without any analysis or citation, Appellant concludes "allowing third-party liability under the specific facts of this case will not lead to a flood of third-party litigation." Appellant Brief, p. 19. In fact, this case, if decided alone, would result in any future third party liability cases to be determined on a case by case basis without any standard to be applied. Even if this court were to set forth a standard, there would be an increase in litigation as the contours of said rule were established. By definition, if this Court were to permit liability in this case, more third party plaintiffs would test the waters in an effort to determine if their case would also fall under the guidance of the new rule.

The limited study conducted by Studdert et al., found that "large numbers of [the physician] respondents reported engaging in avoidance behavior, many reporting across-the-board reductions in their scope of practice to qualify for less expensive malpractice insurance." R. 1137 et al. (Studdert DM, Mello MM, Sage

WM, et al., Defensive Medicine Among High-Risk Specialist Physicians in a volatile Malpractice Environment, JAMA). In other words, physicians will quit accepting seizure patients to avoid being sued. Conversely, for those physicians who take the risk of accepting seizure patients, they must pay the more expensive insurance premiums, which likely raises the overall cost of healthcare.

CONCLUSION

Appellees do not owe a statutory duty to Appellant because the State of South Dakota determines who is fit to drive a motor vehicle. As a member of the general public, Dr. Smith could not have foreseen any injury to Appellant based upon his advice to Sully. Public policy considerations in South Dakota and other states clearly demonstrate the harm to the medical profession and medical patients if Dr. Smith were found to owe a duty to Appellant. Appellees Moonlighting Solutions LLC and Matthew C. Smith request the Court to affirm the Circuit Court's decision granting summary judgment.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellees' Brief complies with the type volume limitation. This Appellee's Brief including footnotes, excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, and Certificates, contains 9,882 words. I have relied upon the word count of our word processing system as used to prepare this Appellees' Brief. The original Appellees' Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I hereby certify on March 18, 2024, I served a true and correct copy of the foregoing BRIEF OF APPELLEES MOONLIGHTING SOLUTIONS LLC and MATTHEW C. SMITH through South Dakota's Odyssey File and Serve Portal upon the following:

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NO. 30558

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Lonnie Two Eagle, Sr., *Plaintiff-Appellant,* v. AVEL ECARE, LLC, MOONLIGHTING SOLUTIONS LLC, and MATTHEW C. SMITH, individually and jointly and severally, *Defendants-Appellees.*	On Appeal from the Circuit Court, Sixth Judicial Circuit, Todd County, South Dakota The Honorable Bobbi Rank presiding

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Notice of Appeal was filed on the 15th day of December, 2023.

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PRELIMINARY STATEMENT

Throughout Appellant's reply brief, Appellant will be referred to as "Two Eagle". Appellee Dr. Smith will be referred to as "Smith". Appellee Avel eCare, LLC will be referred to as "Avel". Appellee Moonlighting Solutions, LLC will be referred to as "Moonlighting". Dr. Smith's patient, Chad Sully will be referred to as "Sully". Parenthetical references prefaced by the letters "SR" refer to the settled record; those prefaced by the letters "TR" will refer to the summary judgment hearing transcript for the summary judgment hearing held on November 16, 2023. Deposition transcripts will be prefaced by the letters "SR" followed by a page number and lines.

ARGUMENT

Initially, Two Eagle responds by pointing out two major flaws in the briefing submitted by the Appellees.

First, Smith, Moonlighting and Avel's arguments center on the theme that a doctor can never owe a duty to a non-patient for negligent decision making, because if held accountable for injuries to non-patients, it would interfere with doctors' medical decision making. Defendants argue that medical decision making would be influenced by concerns of public liability rather than being able to focus solely on the best interest of the patient.

However, Two Eagle's claim of negligence doesn't involve Smith's decision making about Sully's diagnosis or treatment plan. Smith's decisions about Sully's medical diagnosis and treatment were made on April 16, 2019. Smith's negligence occurred on July 23, 2019, and did not involve any decision making. On April 16, 2019,

Sully told Smith that Sully had seven seizures between March 12, 2019, and April 11, 2019. Concerned with the level of seizure activity, Smith directed Sully to not drive until seizure free for six months. Sully stopped driving after the April 16, 2019, medical appointment. On July 23, 2019, just 98 days later, Smith told Sully that Sully could commence driving again in August based on Smith's false indication in the report that Smith prepared on July 23, 2019, that there hadn't been a seizure since February even though Smith had been told by Sully, that the last seizure had occurred on April 11, 2019, and Sully's electronic health records showed that the last seizure had occurred on April 11, 2019. Sully denied that Sully told Smith that Sully's last seizure was in February. Smith for whatever reason, just negligently didn't determine or recognize the correct date of the last seizure and didn't determine or recognize that the soonest that Sully could start driving was October 11, 2019, six months after April 11, 2019.

Second, Smith, Moonlighting and Avel ignore the summary judgment standard for determining the facts to be used in gauging whether summary judgment is appropriate under the law. Although Smith and Moonlighting reference a review of the circuit court's findings of fact under a clearly erroneous standard (Smith and Moonlighting brief p. 5), the trial court does not make findings of fact when evaluating whether summary judgment is appropriate. The Court must view the evidence most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. *Groseth Int'l v. Tenneco, Inc.*, 410 N.W.2d 159, 164 (S.D. 1987). In addition, the court makes all reasonable inferences drawn from the facts in a light most favorable to the non-moving party. *Mckie Ford Lincoln, Inc., v. Hanna,* 2018 S.D. 14, ¶ 8.

The Defendants repeatedly state disputed facts in a light most favorable to the Defendants, the moving party, rather than in the light most favorable to Two Eagle, the nonmoving party. That is an upside-down application of the legal standard, and should not be condoned in any respect. Sully's affidavit denies that he was failing to take his anti-seizure medicine as prescribed. Defendants cite blood testing results without taking into consideration any foundational evidence qualifying the admissibility of the evidence. Defendants did not conduct any discovery other than the deposition of the Plaintiff Two Eagle and written discovery requests to Two Eagle. Defendants refer to the contents of questionable hearsay medical records that indicate that the source of information for the record is from an emergency transport crew from August 5, 2019, at a time when Sully was still dazed and confused about what had happened having just suffered a seizure. Defendants didn't take the depositions of the doctors whom the Defendants claim have personal knowledge assuming that those doctors are not relying on the same information from the initial records which records are unreliable hearsay from a confused seizure patient. Regardless, Sully's affidavit directly disputes the facts upon which the Defendants wish to rely, creating a genuine issue of material fact making summary judgment inappropriate.

Avel at page 2 of the its brief refers to collateral source damages and speculates about other damages, knowing that such matters are not relevant or proper admissible evidence.

> Appendix to Chapter 16-18
> South Dakota Rules of Professional Conduct
> Rule 3.4 Fairness to Opposing Party and Counsel
> A lawyer shall not:

> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Inadmissible considerations of potential collateral sources in the case, cannot and shall not be used as a legal basis to skirt the appropriate application of the proper summary judgment legal standard as it pertains to the disputed facts and the genuine issues to be resolved as to Smith's ordinary negligence.

It would be just as improper for Two Eagle to refer to the 2 million dollar liability insurance held by Smith and Moonlighting and the 6 million dollar liability insurance coverage held by Avel that still falls far short of the total damages suffered by Mr. Two Eagle. Two Eagle felt it necessary to respond to the Appellee's improper reference to collateral sources and speculation on outside damage recovery.

1. **Legal Duty**

Defendants contend that whether the common law creates a duty depends on the relationship of the parties, public policy and foreseeability, citing *Johnson v. Hayman & Associates, Inc.,* 2015 S.D. 63, ¶ 13. The Court in *Johnson* wrote, "[h]owever, the lack of a relationship of the parties is not necessarily fatal to the duty determination." *Mid-W. Elec., Inc. v. DeWild Grant Reckert & Assocs. Co.*, 500 N.W.2d 250, 254 (S.D. 1993) (abolishing the privity of contract requirement). This is because "[f]oreseeability may also create a duty." *Braun*, 2002 S.D. 67, ¶ 9, *see also Thompson v. Summers*, 1997 S.D. 103, ¶ 13, 567 N.W.2d 387, 392.

In the instant case, Smith on April 16, 2019, directed Sully to not drive after finding out that Sully had suffered seven seizures between March 12, 2019, and April 11, 2019. Smith's directive served to protect Sully from the foreseeable risk of an automobile accident caused by suffering a seizure while driving, and it is clear that the foreseeable risk of injury was not limited to Sully. When the foreseeable risk in question is the risk of a driver suffering a seizure causing an automobile accident, it extends a duty of reasonable care to all those involved in such foreseeable accident, including other motorists, bicyclists, and pedestrians. s*ee Coombes v. Florio,* 877 N.E.2d 567, 571 (Mass. 2007).

Avel cites *Kolbe v. State,* 661 N.W.2d 142, 149, (Iowa 2003), *Cichos v. Dakota Eye Institute, P.C.,* 933 N.W.2d 452, 457 (N.D. 2019), *Praesel v. Johnson,* 967 S.W.2d 391, 398 (Tx. 1998) and *Schmidt v. Mahoney,* 659 N.W.2d 552, 555 (Iowa 2003) in support of its contention that a physician cannot owe a duty beyond the physician/patient relationship. *Kolbe and Cichos* involved doctors who failed to warn vision impaired patients about the risks of driving, and *Praesel and Schmidt* involved doctors who failed to warn seizure patients about the risks of driving.

First, these cases are materially distinguishable from the instant case in that the instant case is not a failure to warn of the risk of driving case. Smith specifically did determine that it was not safe for Sully to drive and directed him to not drive until Sully would be six months seizure free, October 11, 2019, being the earliest date that Sully could start driving after being six months seizure free. Smith's negligence did not involve medical decision making or any medical judgment or science. On July 23, 2019, Smith somehow carelessly and mistakenly determined that Sully had been six months

seizure free as of August 1, 2019, and allowed Sully to commence driving. This horrible accident happened on August 5, 2019, resulting in a hospitalization for almost a year, the loss of Mr. Two Eagle's lower leg, a head injury, fractured vertebrae and over five million dollars in medical expense.

Second, none of these cases cited by the Defendants suggest that just because failure to warn cases may not warrant finding a duty owed by the doctors to nonpatients, the decisions exclude the possibility of finding that a duty exists under different circumstances. In fact, the *Praesel* Court cited *Gooden v. Tips,* 651 S.W.2d 364 (Tx.App. 1983) in which the appellate court reversed the trial court's order granting summary judgment to the defendant. The Texas appellate court determined that the physician could owe a duty to use reasonable care to protect the driving public where the physician's negligence in diagnosis or treatment of his patient contributed to the plaintiff's injuries. The court reasoned that the physician knew, or in the exercise of ordinary care should have known, that his patient's condition could seriously impair the patient's ability to drive a motor vehicle. Thus, the harm which resulted to plaintiff was in the general field of danger which should reasonably have been foreseen by defendant when he administered the drug, and defendant was under a duty to take whatever steps were reasonable under the circumstances to reduce the likelihood of injury to the potential innocent motorists who may be killed or crippled by said foreseen danger.

The trial court in the instant case, in ruling on the motions to dismiss noted, "[a] lack of a physician-patient relationship is not, in and of itself, fatal to Two Eagle's claims." The trial court further wrote, "[i]t is a reasonable inference, based on the very limited facts before the Court, that the Defendants, despite having no obligation to do so, imposed a driving restriction on Sully to protect him and, inevitably, those he might

encounter on the road. Then Dr. Smith failed to review the medical records and authorized Sully to drive in direct violation of this restriction. Pursuant to this authorization, Sully resumed driving, and Two Eagle was injured."

Although the trial court reflected that the court had limited facts in making the ruling, those facts to which the court referred were not only not refuted, but were solidified through Sully's medical records, Smith's deposition, and Sully's affidavit. The trial court relied in part on Restatement (Second) of Torts § 324(A)(a)(c) and *Kuehl v. Horner (J.W.) Lumber Co.*, 2004 S.D. 48, ¶ 12.

As noted in Two Eagle's original brief, foreseeability of injury is the touchstone of legal duty. *Janis v. Nash Finch Co.*, 2010 SD 27, ¶ 15. The existence, scope, and range of a duty, depend upon the foreseeability of the risk of harm. *Zerfas v. Amco Ins. Co.*, 2015 S.D. 99, ¶ 12. (citing *Johnson*, 2015 S.D. 63, ¶ 13; *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 22; *Poelstra v. Basin Elec. Coop*, 1996 S.D. 36, ¶ 16). This record contains substantial evidence establishing that Sully's frequent seizures created a serious risk of injury in the event of a seizure occurring while driving an automobile. Without question, Smith perceived this risk and ordered Sully to refrain from driving. Smith's duty under the circumstances extended to Two Eagle who at the time of the catastrophic incident was working for the Rosebud Sioux Tribe's Water Resources facility adjacent to the Rosebud Hospital where Sully worked as a cook.

2. **Public Policy**

Defendants contend that even if the risk of injury was foreseeable forming the basis for legal duty, South Dakota public policy overrides the foreseeability of injury factor and thwarts Two Eagle's cause of action against the Defendants. Defendants offer case law, the State Board of Medical and Osteopathic Examiners' rules and regulations

and the American Medical Association's Code of Ethics in support of the proposition that responsibility to the patient is paramount above the physician's own self-interest or obligations to others.

Defendants suggest that allowing Two Eagle to recover for his horrendous injuries due to Smith's negligence would lead to a breakdown of the physician-patient relationship, causing the physician to lose focus of the patient's best interest due to concerns of third-party liability.

The problem with Defendants' public policy argument is that Two Eagle would have greatly appreciated if Smith had focused better on Sully's medical care, and had Smith done so, Two Eagle would not have been left maimed and unable to care for himself independently. A review of Smith's deposition shows that Smith didn't focus on the one-on-one training that Avel supposedly provided, didn't focus on accessing electronic health records, didn't focus on the nurse chart reviews prepared for Smith's benefit, didn't focus on whether Sully was being compliant with medication directives, didn't focus on whether Sully continued with other drug use, and most importantly, didn't focus on whether the six month seizure free no drive restriction was met.

It seems ironic that Defendants suggest that barring Two Eagle's claim against Smith for failing to properly focus on patient Sully's medical care, will lead to physicians being better able to focus on their patients.

Protecting Smith from liability on South Dakota public policy grounds under these circumstances is inconsistent with the duty recognized by the United States Eighth Circuit Court of Appeals in the case of *Rosebud Sioux Tribe v. United States,* 9 F.4th 1018, 1026 (8th Cir. 2021) requiring the government to provide competent physician led healthcare to the Tribe and its members.

The trial court raised the concern that recognizing a duty to Two Eagle would force doctors because of increasing malpractice costs to avoid high risk patients and reduce their scope of practice which would be detrimental especially in rural communities. Sound public policy favors a duty in the instant circumstances. The costs of imposing a duty owed to individuals other than a patient are limited because existing tort law already imposes on a doctor a duty to take a reasonably detailed medical history from a patient and to accurately enter it into a report. Therefore, the duty here does not impose a heavy burden because it requires nothing more from a doctor that is not already required by his duty to his patient. *See Coombes* at 573.

The Court in *Coombes* when presented with Defendant's argument about the concern with medical malpractice rates after considering other statutory tort reform limits on claims against medical care providers, indicated that it should be left to the Legislature whether to impose further limits on doctors' liability. In addition, it is unlikely that the type of errors made by Smith in the instant case are both so prevalent or so unavoidable that imposing third party liability will meaningfully impact insurance rates or overall health care costs. *See Doe v. Cochran,* 210 A.3d 469, 495 (Conn. 2019).

Defendants also contend that SDCL § 32-12-5.1 that gives the Department of Public Safety the power to deny the issuance of a motor vehicle operator's license to an individual who has experienced a seizure, precludes Two Eagle's cause of action against the Defendants. However, nowhere within Chapter 32-12 does the Legislature exclude causes of actions for injury claims or even limit the same. Besides, after April 16, 2019, there was no reason for the Department of Public safety to become involved because Sully was not operating a motor vehicle in accordance with Smith's directive. The only reason Sully started driving in August was as a result of Smith's negligence.

Avel questions, "[h]ow could a physician with a permissive obligation to report a medically unsafe driver also have a concurrent, mandatory, legal duty to protect the public from the same driver?" It isn't a mandatory duty that exists, it is a legal duty that arises when an individual foresees a risk of injury, requiring the individual to exercise reasonable care to avoid the injury. SDCL § 32-12-5.1 does not relieve Smith from his legal duty to exercise reasonable care after Smith recognized the danger associated with Sully's operation of a motor vehicle. Smith determined that it was reasonable to monitor Sully for six months and then determine if it was safe to allow Sully to drive. Smith just negligently failed to execute the safe plan. Knowing of the serious danger associated with having a seizure while driving, Smith as a reasonable person, should have made certain on the timing of Sully's driving restrictions before authorizing him to start driving again.

3. **Ordinary Negligence**

Smith should be subject to liability in accordance with *Kuehl v. Horner (J. W.) Lumber Co.*, 2004 S.D. 48; *McGuire v. Curry*, 2009 S.D. 40; *Harris v. Best Bus. Prods.*, 2002 SD 115; and *Thompson v. Summers*, 1997 S.D. 103 for an act of ordinary negligence. There is no logical reason to limit an injured party's remedy when a professional commits an act of ordinary negligence simply because the professional has a specialized college degree.

Typically, the issue of whether a cause of action constitutes ordinary negligence or malpractice comes up in the context of a statute of limitation defense or whether a doctor's affidavit is necessary as a condition precedent to filing a malpractice lawsuit. The legal test for what constitutes medical malpractice in those contexts was identified in the parties' original briefs.

Under that legal test Smith's disregard of being told that Sully had a series of seizures on April 11, 2019, and disregard of Sully's electronic health records showing that Sully had a series of seizures on April 11, 2019, when determining whether six months had elapsed from last seizure, constitutes ordinary negligence since that negligent failure didn't involve medical diagnosis, judgment, or treatment.

Defendants rely on *Bruske v. Hille,* 1997 S.D. 108, *Pitt-Hart v. Sanford,* 2016 S.D. 33, and *Martinmaas v. Engelman,* 2000 S.D. 85 in support of their argument that under South Dakota law Smith's negligent conduct is exclusively medical malpractice.

Bruske was solely a statute of limitations issue involving a failed prosthetic jaw implant that clearly fell within the language of SDCL § 15-2-14.1. Again, this statute is broader than just malpractice.

Pitt-Hart was also solely a statute of limitations issue involving a patient care technician for Sanford Health Hospital dropping a patient while assisting the patient with a bathroom break after a knee surgery. That scenario also clearly fell within the language of SDCL § 15-2-14.1.

The issue in the *Matinmass* case was whether the trial court erred by failing to grant Defendant's motion for judgment as a matter of law because the evidence if accepted established an intentional tort and the Plaintiffs had dropped the intentional tort counts from their complaint prior to trial. Plaintiffs claimed that they had been raped during gynecological exams. The South Dakota Supreme Court concluded that a deviation from the standard of care even if it involved sexual misconduct could support a jury determination of malpractice for tort liability and therefore, the trial court did not abuse his discretion in denying the Defendant's motion for judgment as a matter of law.

Again, there were two strong opinions, one concurring in result and one dissent from Justice Konenkamp and Justice Amundson, respectively, disagreeing that rape could ever be classified as malpractice.

The important distinction from the instant case in analyzing the ordinary negligence count of the complaint, was that Engelman's improper conduct occurred during treatment of the patients, whereas Smith's conduct didn't involve diagnosis, medical judgment, or treatment. Smith just concluded in his own mind, without any factual basis, that an event occurred in February, when he knew or should have known that the event occurred on April 11, 2019.

A Plaintiff can include numerous causes of action in a single complaint and Defendants have not submitted any legal authority holding that a medical malpractice cause of action must be brought to the exclusion of any other cause of action. In other words, just because the facts establish one cause of action doesn't mean it can't establish another cause of action.

Two Eagle is entitled to pursue an ordinary negligence claim against the Defendants in a like manner as the plaintiffs did in *Kuehl, McGuire, Harris* and *Thompson,* and the trial court erred when she granted summary judgment in favor of the Defendants.

4. **Superseding Cause**

Avel argues that Sully's actions were the superseding cause of Two Eagle's injuries. Avel contends that Sully wasn't taking his medication as prescribed just days before the subject accident and that was the cause of the seizure and accident. Sully signed a statement on January 31, 2020, and a sworn affidavit dated October 23, 2023,

indicating that he was taking his medication as prescribed. The trial court specifically indicated from the bench during the summary judgment hearing that there is an issue of material fact on the superseding cause issue, and she would not grant summary judgment in favor of the Defendants on the basis of superseding cause. TR 44:17-25, 45:1-3.

"Whether or not certain conduct constitutes a superseding cause and questions of proximate cause are normally for the jury. (citations omitted). It is a question of law for the court only when the facts are not in dispute and reasonable minds cannot differ." *Holmes v. Wegman Oil Co.*, 492 N.W.2d 107, 114. "The intervening cause must be a superseding cause. It must so entirely supersede the operation of the defendant's negligence that it alone, without his negligence contributing thereto, produces the injury. *Johnson v. Straight's Inc.*, 288 N.W.2d 325, 328.

Avel's argument on superseding cause is misplaced for two reasons. First, there is a dispute of material facts on whether Sully was taking his medicine as prescribed. Second, the cause of the subject accident and Two Eagle's injuries was Smith's negligence in authorizing Sully to drive before the six-month restriction was met. The reason Smith set six months for monitoring Sully was to give a full opportunity to observe whether the medication was effective, whether Sully was being compliant with the medication dosages, whether Sully was ingesting other medications or illicit drugs that would affect the efficacy of the Keppra medication, whether Sully was getting the necessary hours of sleep and other such factors. Obviously, if Sully was not driving on August 5, 2019, Sully would not have caused the catastrophic injuries to Two Eagle. Smith's negligence caused Sully to be driving, and therefore, the resulting injuries to Two Eagle.

Defendants are not entitled to summary judgment based on a superseding cause.

CONCLUSION

Smith for good reason foresaw a dangerous situation and directed Sully to refrain from driving until such time as it was determined that Sully's seizure activity was controlled. Observing Sully for six months to assure he was following his medication directives and was not suffering from side effects or otherwise partaking in outside activities that could affect the seizure events, was an adequate amount of time in Smith's opinion to evaluate if Sully was safe to drive. Of course, if Sully were to have another seizure within the six-month period, then the driving restriction would be pushed back to six months from that seizure date.

Smith owed a legal duty to Two Eagle under these circumstances and there is no public policy reason for protecting Smith for the type of negligent conduct Smith committed by disregarding the information that Sully provided and the information within Sully's electronic health records.

Mr. Two Eagle should be entitled to pursue his claim against all of the Defendants seeking compensation for his catastrophic injuries and the trial court's order granting summary judgment should be reversed and this matter should be remanded to the trial court for a trial on the merits.

Dated this 15th day of April, 2024.

Respectfully submitted,

/s/ Jon J. LaFleur
Attorney for the Plaintiff – Appellant

CERTIFICATE OF COMPLIANCE

The Appellant's Brief complies with SDCL 15-26A-66.

The Reply Brief was prepared using Office 365 and printed in a proportionally spaced typeface in 12-point type.

According to the word processor, this brief contains 4,030 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificates of counsel.

The PDF file of this brief has been scanned by a virus-detection program and found to be virus-fee.

April 15, 2024.

By: /s/ *Jon J. LaFleur*

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a true and correct copy of the forgoing upon the person herein next designated, all on the date below shown, via Odyssey File & Serve, to-wit:

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