IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28216

JOHN BERGGREN,

Plaintiff,

v.

JEFF SCHONEBAUM, D/B/A
SCHONEBAUM QUARTER HORSES
And LAWRENCE MENDERING,

Defendants/Appellees.

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

The Honorable John L. Brown, Presiding Judge

BRIEF OF APPELLANTS

Jake Fischer
Scott Swier
Mike Henderson
Swier Law Firm, Prof. LLC
P.O. Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
jake@swierlaw.com
scott@swierlaw.com
mike@swierlaw.com
Appellant/Former Attorney for Plaintiff

Zach Flood
Morgan Theeler, LLP
1718 N. Sanborn Blvd.
Mitchell, SD 57301
Telephone: (605) 996-5588
zflood@morgantheeler.com
Current Attorney for Plaintiff

George Johnson
Johnson, Pochop and Bartling Law Office
PO Box 149
Gregory, South Dakota 57533
Telephone: (605) 835-8391
george@rosebudlaw.com
Attorney for Defendant/Appellee
Lawrence Meendering

Sandy Steffen
Attorney at Law
318 Main Street
Gregory, South Dakota 57533
Telephone: (605) 835-9334
sjsteffen@goldenwest.net
Attorney for Defendant/Appellee
Jeff Schonebaum, d/b/a
Schonebaum Quarter Horses

Notice of Appeal filed April 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellant in this matter is Jake Fischer and Swier Law Firm, Prof. LLC ("Appellant"). Appellant seeks review of the trial court's "Order for Attorney Fees" (the "Order") signed on February 25, 2017 and filed on February 27, 2017. Appx. at 1.[1] The Order awarded Appellee Lawrence Meendering the sum of $6,416.18 in fees and costs against Jake Fischer, Plaintiff's original attorney. *Id.* Further, the Order confirmed the Court's previous award of attorney fees to Plaintiff John Berggren against Defendant Meendering concerning an earlier discovery dispute. *Id.* The Order was entered by the Honorable John L. Brown, Circuit Judge for the Sixth Judicial Circuit. *Id.* Notice of Entry of Memorandum Opinion was given on March 13, 2017. CR at 366. Appellant filed a timely Notice of Appeal on April 12, 2017. CR at 391. Jurisdiction exists pursuant to SDCL 15-26A-3(4) (any final order affecting a substantial right).

To reiterate, Appellant in this matter is attorney Jake Fischer and Swier Law Firm, Prof. LLC. This matter is captioned following the precedent of *Pearson v. O'Neal-Letcher,* 738 N.W.2d 914 (2007), where the client was captioned as Plaintiff/Appellant, even though it was client's attorney, Christensen, who appealed the Circuit Court's imposition of discovery sanctions and attorney fees.

STATEMENT OF THE ISSUE

1. Does opposition to a Motion to Disqualify constitute "other litigation which is necessitated by the act of the party sought to be charged,"

[1] For purposes of Appellant's Brief, citations to the certified record will be to "CR at ___"; similarly, citations to the attached Appellant's Appendix will be to "Appx. at ____."

which might, under *Jacobson,* allow for the award of attorney fees as a sanction?

The trial court found that Appellant's opposition to Defendant Meendering's Motion to Disqualify constituted "other litigation" necessitated by Appellant's acts. As such, attorney fees were recoverable as a sanction.

Relevant Cases and Statutes:

Rupert v. City of Rapid City, 2013 S.D. 13, 827 N.W.2d. 55.

Jacobson v. Leisinger, 2008 S.D. 19, 746 N.W.2d 739.

Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith, P.C., 1996 SD 139, 556 N.W.2d 84.

Hill v. Okay Constr. Co., 312 Minn. 324, 252 N.W.2d 107.

SDCL 15-6-11(c).

SDCL 16-19-23.

SDCL 16-19-35.

STATEMENT OF THE CASE

This case involves an allegation by John Berggren ("Berggren") against Defendant and Appellee Lawrence Meendering ("Meendering") of misrepresentation and deceit concerning the purchase of a horse. CR at 68. The Honorable Kathleen Trandahl was the original judge in this matter. The action is venued in Gregory County. CR at 3. Meendering (represented by attorney George Johnson) was added as a defendant in this lawsuit upon an Order Granting Plaintiff's Motion to Amend his Complaint on October 30, 2015. CR at 66. Due to Judge Trandahl's impending retirement, the Honorable John L. Brown was appointed as substitute judge on May 17, 2016. CR at 93.

Meendering refused to participate in discovery. As a result, Berggren filed a motion to compel, which was granted on June 29, 2016. CR at 102. This Order also granted Berggren's request for attorney's fees under SDCL 15-6-37(a). *Id.* Meendering filed a Motion to Disqualify attorney Jake Fischer and Swier Law Firm, Prof. LLC on August 18, 2016, after the Motion to Compel had been granted. CR at 112. The trial court granted Meendering's Motion to Disqualify on October 24, 2016. CR at 188. (This Court denied Plaintiff's and Appellant's Petition for Allowance of Appeal from Intermediate Order on December 9, 2016. CR at 273.) The trial court's Order to Disqualify Appellant further allowed parties to "submit a brief to the Court regarding Meendering's request for attorney fees." *Id.* Thereafter, the trial court signed its Order granting Meendering's request for attorney's fees, along with his Memorandum Opinion, on February 25, 2017. Appx. at 1., Appx. at 2-5. Notice of Entry of the trial court's Memorandum Opinion was filed on March 13, 2017. CR at 366. Appellant filed a timely Notice of Appeal on April 12, 2017. CR at 391.

STATEMENT OF THE FACTS

The trial court granted Meendering's Motion to Disqualify Jake Fischer and Swier Law Firm, Prof. LLC ("Appellant") based on the trial court's finding that Attorney Fischer was in violation of Rule 1.18 (Duties to Prospective Client, - South Dakota Rules of Professional Conduct). Appx. at 2. This finding of a violation of the South Dakota Rules of Professional Conduct was, and is, disputed by Appellant. CR at 273. As this time, the issue of whether a violation of the South Dakota Rules of Professional Conduct

occurred is pending before the State Bar of South Dakota's Disciplinary Board. A hearing on this matter is scheduled for June 20, 2017.[2]

After receiving written argument from both parties, the trial court "awarded attorney fees, as a sanction against Attorney, Jake Fischer for violation of the Rules of Professionaly Responsibility, in the total amount of $6,416.18, inclusive of fees and expenses." Appx. at 5.

The trial court's Memorandum Opinion emphasized Meendering's concession that "unlike the statutory authority for the grant of attorney fees for discovery abuses…there is no specific statutory provision for an award of attorney fees arising out of a violation of the Rules of Professional Responsibility." Appx. at 3. The trial court then properly quoted *Rupert v. City of Rapid City,* 2013 S.D. 13, 827 N.W.2d. 55, which provides, "[I]n considering whether an award of attorney fees is authorized by statute, [t]his Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." Appx. at 3., citing *Rupert.*

[2] Briefly: After Berggren brought his Complaint against Schonebaum – but before Berggren amended his Complaint to include Meendering - Berggren's attorney, Fischer, met with Meendering for a prospective client meeting. CR at 171. Meendering argued Attorney Fischer had received confidential information which might be harmful to Meendering in this action. CR at 112. Attorney Fischer argued that, pursuant to Model Rule 1.18, he had not received any information which might be significantly harmful to Meendering, and therefore, Attorney Fischer was not in violation of any duty owed to Meendering as a prospective client. CR at 171. The trial court ultimately granted Meendering's Motion to Disqualify. CR at 188. However, the trial court's Order did not refer to any specific information which Attorney Fischer allegedly received which might have been harmful to Meendering as a prospective client. CR at 188.

The trial court's Memorandum Opinion also declined to justify its award of attorney's fees on the basis of Rule 11 sanctions. Appx. at 4.

Rather, the trial court's Memorandum Opinion, citing *Jacobson v. Leisinger*, 2008 S.D. 19, ¶15, 746 N.W.2d 739, stated that since Defendant's Motion to Disqualify constituted "other litigation which is necessitated by the act of the party sought to be charged," attorney's fees as a sanction for ethics violations were warranted. Appx. at 4. This appears to be the trial court's sole justification for its award of attorney fees.

STANDARD OF REVIEW

This Court employs the following familiar standards when reviewing a trial court's findings of fact and conclusions of law:

> We review a trial court's findings of fact under the clearly erroneous standard. Under this standard, we will not disturb the court's findings unless we are firmly and definitely convinced, after review of the entire evidence, a mistake has been made. We review a trial court's conclusions of law under a de novo standard. Under a de novo review, we give no deference to the trial court's conclusion's of law.

Sabhari v. Sapari, 1998 SD 35, ¶ 12, 576 N.W.2d 886, 891 (quoting *Landstrom v. Shaver*, 1997 SD 25 ¶ 37, 561 N.W.2d 1, 7) (citations omitted). Here, the trial court's conclusion that Appellant's opposition to Defendant's Motion to Disqualify constituted "other litigation" which allowed for the award of attorney fees is a conclusion of law and is subject to de novo review. Similarly, the trial court's conclusion that it could award attorney fees as a sanction for alleged ethics violations is a conclusion of law and is subject to de novo review.[3]

[3] Alternatively, a de novo standard of review could also be implied by this Court's standard of review concerning Disciplinary Board and Referee proceedings: "We give careful consideration to [the Disciplinary Board and Referee's] findings as they have had the advantage of seeing and hearing the witnesses…However, we

ARGUMENT

A. The trial court concedes that no attorney fees are allowable under the "two exceptions" to the American Rule as set forth in *Rupert.*

Regarding attorney's fees, this Court has stated:

> For purposes of awarding attorney fees, South Dakota subscribes to the "American Rule." Under the "American Rule," each party in an action bears its own attorney fees. However, there are two exceptions to this rule. First, attorney fees may be awarded "when the parties enter into an agreement entitling the prevailing party to an award of attorney's fees." Alternatively, attorney fees may be awarded if "an award of attorney's fees is authorized by statute."

Rupert v. City of Rapid City, 2013 S.D. 13, ¶32, 827 N.W.2d. 55, (citations omitted).

The trial court properly recognized this general rule and added further clarity to this issue by citing the following language from *Rupert*: "In considering whether an award of attorney fees is authorized by statute, [t]his Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." Appx. at 3., citing *Rupert*, supra.

Both Appellant and the trial court agree that in this matter there was (1) no agreement entitling the prevailing party to an award of attorney's fees; and (2) no award of attorney's fees authorized by statute. As such, "[u]nder the American Rule, each party in an action bears its own attorney fees." *Rupert* at ¶32.

B. The trial court concedes its award of attorney fees is not a sanction under Rule 11.

SDCL 15-6-11(c) provides:

---

give no particular deference to a referee's recommended sanction." *Matter of Clagget*, 1996 SD 21 ¶9, 544 N.W.2d. 878. This Court could give deference to the trial court's decision to disqualify Appellant (which is not on appeal), but should give no deference to the trial court's recommended sanction.

> If, after notice and a reasonable opportunity to respond, the court determines that § 15-6-11(b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated § 15-6-11(b) or are responsible for the violation.

SDCL 15-6-11(c).

Neither Defendant Meendering nor the trial court ever made a request for Rule 11 sanctions. Nor were any of the procedural steps required for Rule 11 sanctions ever initiated. As such, the trial court did not base its award of attorney's fees under Rule 11. Appx. 4.

The procedural steps required to impose Rule 11 sanctions are intended to place a potentially offending party on notice of their alleged wrongful conduct, provide an opportunity to remedy the alleged wrongful conduct, and allow an opportunity to respond to the alleged wrongful conduct. Therefore, the trial court could not, and in fact did not, base its award of attorney's fees on Rule 11.

C. *Jacobson* is not applicable in this matter. Even if *Jacobson* were applicable, the trial court erred in characterizing Appellant's opposition to Meendering's Motion to Disqualify as "other litigation" which would allow for the award of attorney fees under *Jacobson*.

Attorney's fees are not generally recoverable in actions sounding in tort "except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged." *Jacobson v. Leisinger*, 2008 S.D. 19, ¶15, 746 N.W.2d 739. (citing *Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith, P.C.*, 1996 S.D. 139, ¶19, 556 N.W.2d 84, 88)).

In *Jacobson*, Leisinger was, at trial, awarded (and actually possessed) $120,000 in punitive damages against Jacobson. *Id* at ¶2. On appeal, Leisinger's award was reduced. *Id.* Leisinger rejected the reduced award and ultimately forfeited his right to any part of

the $120,000 award. *Id.* Nonetheless, Leisinger refused to return the award. Jacobson then pursued "other litigation" (a separate action for conversion) to receive first an order, and then a judgment, against Leisinger, in order to recover the property which was hers ($120,000.00). *Id.* at 7. In granting Jacobson's request for attorney fees, this Court made specific findings that Leisinger "indefensibly and unlawfully withheld the $120,000.00 award" and had "not merely refused to pay a judgment, he ha[d] refused to obey an affirmative court order." *Id* at ¶12, ¶17. This Court also opined "[I]n conversion cases, the reasonable and necessary expenses incurred in recovering the property are a proper element of damage." *Id.* at ¶14.

A comparison between *Jacobson* and the facts in this case is entirely inappropriate. First, the award of attorney fees in *Jacobson* was an additional "element of damage" under the conversion claim - a "further pecuniary loss" incurred in Jacobson's efforts to recover her property, recoverable under the Restatement (Second) of Torts. *Id.* at ¶14. (citing *State v. Taylor,* 506 N.W.2d767,768 (Iowa 1993) (citing RESTATEMENT (SECOND) OF TORTS § 927(2)(B) (1977). The entirety of *Jacobson's* attorney fee analysis focused on the damages incurred in recovering the property. *See Id.* at ¶13, 14, 15, 16.

This case involves a wholly dissimilar claim. Meendering never made a conversion or other tort claim; Meendering never made a claim to recover property; and Meendering never made a claim for damages against Berggren (let alone Appellant). *Jacobson* allows for the recovery of attorney fees solely against a party in "recovery-of-property" type situations. This is no such case. The trial court's reliance on *Jacobson* to

base its award of attorney's fees as a sanction for an alleged ethics violation against Appellant Fischer, a non-party, is simply unfounded. Appx. at 4.

Even a strained argument that Meendering's Motion to Disqualify can be analogized to the recovery of some "right" would not allow for recovery under *Jacobson.* The trial court made no showing that Appellant's opposition to the Motion to Disqualify was an "unwarranted legal proceeding" or "other litigation" necessitated by Appellant's "indefensible and unlawful" actions.[4] *Id*. at ¶10, 12. Indeed, until Appellant was disqualified, Appellant had a professional responsibility to protect his client's own interest. If Appellant had consented to Defendant's request to disqualify himself for fear of being punished with an award of attorney fees, his responsibility to advocate for his client would have been compromised. Also, Appellant's client would have had to hire a new attorney and compensate that attorney to become acquainted with the facts of this two-year-old case. An affirmation of this award for attorney fees is likely to have a chilling effect on opposition to future disqualification attempts, whether these attempts are merited or otherwise.

Finally, in *Jacobson*, this Court cited *Grand State Property* as further support that attorney fees may be allowable where "other litigation…is necessitated by the act of the party sought to be charged." *Id.* at ¶15. However, this was not a blanket statement. Again, the cited case focused on the recovery of a property right. Also, the language adopted from *Grand State Property* is dicta; the Court did not rule upon the issue as it was not

[4] It should also be noted that in *Jacobson, Grand State,* and the additional cited cases, the "other litigation[s]" being examined were separate legal actions, not motions filed as part of an ongoing action.

raised at the trial court level. *Grand State Property* at ¶19. Further, the Minnesota case upon which *Grand State Property* bases its dicta[5] is not at all similar to this case because it involved (once again) separate legal actions with a third party to protect certain property rights.

The trial court's reliance on *Jacobson* is misplaced. *Jacobson* allows, in limited instances (namely conversion cases), an award of attorney fees as an element of damages where additional, "unwarranted," "other litigation" is required to recover property. *Id.* at ¶10, 15. It cannot be said that opposition to a Motion to Disqualify is "unwarranted" or "other litigation." There is no conversion or tort claim, no claim for damages, and no separate legal action. Appellant has not withheld any property (or rights) and Appellant has disobeyed no affirmative court orders. Appellant, and all attorneys, must have the ability to oppose a Motion to Disqualify, or they will routinely be disqualified merely as a matter of preference. Attorney's fees, in this case, should not be allowed under *Jacobson.*

D. The trial court's award of attorney fees is not allowable under the Court's inherent power to enforce the Rules of Professional Responsibility.

SDCL Chapter 16-19 ("Attorney Discipline") states:

"Nothing contained in this chapter denies any court powers necessary for that court to maintain control over proceedings conducted before it, including the power of contempt." SDCL 16-19-23.

Although this argument was not explicitly relied upon by the trial court, a searching analysis of the trial court's Memorandum Opinion may infer that it based its explanation for an award of attorney fees on the trial court's power to "maintain control over proceedings conducted before it."

[5] *Hill v. Okay Constr. Co.*, 312 Minn. 324, 252 N.W.2d 107, 121 (1977).

However, an award of attorney fees based on that justification would also be unfounded. Although SDCL 16-19-23 grants "powers necessary for th[e] court to maintain control over proceedings conducted before it, including the power of contempt," attorney fees should be excluded from this broad grant of authority, considering this Court's well-established guidance that "authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Rupert* at ¶32. Nothing in SDCL 16-19-23 can be construed as a clear legislative grant of power to assess attorney fees. In fact, no such remedy is outlined in SDCL 16-19-35 ("Kinds of Discipline Authorized.")

CONCLUSION

For the reasons set forth herein, Appellant respectfully submits that the trial court erred in awarding Defendant Meendering attorney's fees as a sanction against Appellant for allegedly violating the Rules of Professional Responsibility. Appellant submits that the trial court's Order for Attorney Fees in the sum of $6,416.18 against Attorney Fischer should be reversed.

Dated this ___ day of June, 2017.

SWIER LAW FIRM, PROF. LLC

___/s/ Jake Fischer_____
Jake Fischer
Scott Swier
Michael A. Henderson
PO Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
Facsimile: (605) 842-3375
jake@swierlaw.com
scott@swierlaw.com
mike@swierlaw.com

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 2,690 words and 14,207 characters (not including spaces).

__/s/ Jake Fischer_____
Jake Fischer

CERTIFICATE OF SERVICE

Jake Fischer, Appellant and former attorney for Plaintiff John Berggren, and pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on *June 13, 2017*, I caused the following documents:

- Appellant's Brief (word format)
- Appellant's Appendix (portable document format)

to be filed electronically with the Clerk of the South Dakota Supreme Court via email and that the original and two hardcopies of these documents were mailed by United States Mail, postage prepaid, to:

Shirley Jameson-Fergel
Clerk – South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501
SCClerkBriefs@ujs.state.sd.us

The undersigned further certifies that the above documents were also emailed to the following attorneys:

Sandy Steffen
Attorney at Law
318 Main Street
Gregory, South Dakota 57533
Telephone: (605) 835-9334
sjsteffen@goldenwest.net
Attorney for Defendant Jeff Schonebaum d/b/a Schonebaum Quarter Horses

George Johnson
Johnson, Pochop and Bartling
P.O. Box 149
Gregory, South Dakota 57533
Telephone: (605) 835-8391
george@rosebudlaw.com
Attorney for Defendant Lawrence Meendering

Zach Flood
Morgan Theeler, LLP
1718 N. Sanborn Blvd.
Mitchell, SD 57301
Telephone: (605) 996-5588
zflood@morgantheeler.com
Current Attorney for Plaintiff John Berggren

SWIER LAW FIRM, PROF. LLC

____*/s/ Jake Fischer*_____
Jake Fischer
Mike Henderson
Scott Swier
PO Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
Facsimile: (605) 842-3375
jake@swierlaw.com
mike@swierlaw.com
scott@swierlaw.com

Appellent/Former Attorney for Plaintiff John Berggren

APPENDIX

John Berggren, Plaintiff

v.

Jeff Schonebaum, d/b/a Schonebaum Quarter Horses
And Lawrence Meendering, Defendants/Appellees

No. 28216

STATE OF SOUTH DAKOTA :SS COUNTY OF GREGORY	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
JOHN BERGGREN Plaintiff, vs. JEFF SCHONEBAUM d/b/a SCHONEBAUM QUARTER HORSES and LAWRENCE MEENDERING Defendant.	)	CIV14-22 ORDER FOR ATTORNEY FEES

The Court, having before it Defendant Lawrence Meendering's request for attorney fees and having reviewed all matters on file herein, it is hereby

ORDERED that Lawrence Meendering is awarded the sum of $6416.18 in fees and costs against Jake Fischer, Plaintiff's original attorney, and

IT IS FURTHER ORDERED that the $838.69 in fees and costs previously awarded to Plaintiff, John Berggren against Defendant Lawrence Meendering will remain as ordered.

DATED: February 25, 2017

BY THE COURT:

John L. Brown
Circuit Court Judge

ATTEST:

Clerk of Courts
By: _____
Deputy
(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO
FILED
FEB 27 2017
Clerk
By _____ Deputy

MEMORANDUM OPINION

TO: **George Johnson, Jake Fischer, Sandy Steffen, Zach Flood**

FROM: **Judge John L. Brown**

RE: **Berggren v. Schonebaum and Meendering 26CIV14-22**

DATE: **February 27, 2017**

George Johnson, Attorney for Defendant, Lawrence Meendering, is seeking sanctions by way of attorney fees incurred in his successful motion to disqualify Jake Fischer as Plaintiff's attorney. This Court granted the motion to disqualify, finding that Fischer was in violation of Rule 1.18, Duties to Prospective Client, of the South Dakota Rules of Professional Conduct.

Fischer had filed a civil action on behalf of the Plaintiff against the original Defendant, Schonebaum. Meendering subsequently met with Fischer regarding potential claims he may have against Schonebaum arising out of business dealings touching on the issues in dispute in the already filed action. No representation was undertaken, however Fischer later amended the complaint to name Meendering as a Defendant in the existing action.

Johnson, representing Meendering, learned of the contact his client had with Fischer. Johnson advised Fischer of the potential ethical violation, seeking his client's dismissal from the action or Fischer's withdrawal from the case. Fischer declined, feeling that his interaction with Meendering had not created a prospective client relationship and that he did not recall obtaining information related to the present action. Fischer brought a motion to compel responses to discovery that had been submitted to Meendering which was granted and $838.69 was ordered as sanctions.

The question presented is whether monetary sanctions by way of attorney fees may be awarded against Jake Fischer for his refusal to withdraw from representation in this case. Ordinarily South Dakota follows the "American rule" where the parties bear their own

attorney fees unless specifically provided otherwise by statute or agreement of the parties.

> For purposes of awarding attorney fees, South Dakota subscribes to the "American Rule." Under the "American Rule," each party in an action bears its own attorney fees. However, there are two exceptions to this rule. First, attorney fees may be awarded "when the parties enter into an agreement entitling the prevailing party to an award of attorney's fees." Alternatively, attorney fees may be awarded if "an award of attorney's fees is authorized by statute."

Rupert v. City of Rapid City, 2013 S.D. 13, ¶32, 827 N.W.2d. 55, (citations omitted).

Johnson argues first that the $838.69 discovery sanction imposed on his client for failure to comply with discovery should be returned. Further, he seeks his attorney fees in preparing and prosecuting the Motion to Disqualify and Motion for Protective Order. He is seeking $6,416.18 in fees and expenses as to the Motion to Disqualify.

Sanctions, including an award of attorney fees, for discovery violations are specifically authorized under SDCL 15-6-37(a). Fischer's Motion to Compel was filed, considered by the court and granted in June of 2016. At that time, Defendant, Meendering, had not filed his Motion to Disqualify. The Motion to Disqualify was filed in August of 2016 and granted in October. Because there did not appear to be justification for refusal to answer Plaintiff's interrogatories at the time of the Motion to Compel, the award of $838.69 will remain.

Unlike the statutory authority for the grant of attorney fees for discovery abuses, Johnson admits that there is no specific statutory provision for an award of attorney fees arising out of a violation of the Rules of Professional Responsibility. He instead asserts that the "courts have broad discretion with regard to sanctions imposed", citing language from *Hewitt v. Felderman*, 2013 S.D. 91, ¶23, 841 N.W.2d 258. That was however in the context of a discovery dispute which, as noted previously, has specific statutory authority. "[I]n considering whether an award of attorney fees is authorized by statute, "[t]his Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Rupert*, supra.

Essentially Johnson is apparently relying on the court's inherent powers to enforce the Rules of Professional Responsibility. The South Dakota Supreme Court has given credence to such an argument.

> Attorney fees are not generally recoverable in actions sounding in tort "except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged." *Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith, P.C.*, 1996 S.D. 139, ¶19, 556 N.W.2d 84, 88 (emphasis added) (noting that separate litigation necessitated by the misconduct of the other party may permit recovery of attorney fees);

Jacobson v. Leisinger, 2008 S.D. 19, ¶15, 746 N.W.2d 739.

I believe that the Motion to Disqualify constitutes "other litigation which is necessitated by the act of the party sought to be charged" and as such, attorney fees as a sanction for ethics violations in this litigation is warranted.

Alternatively, it is asserted that Rule 11 may provide a basis for the award of attorney fees proposed here. SDCL 15-6-11(c). Admittedly there has not been a specific request for Rule 11 sanctions and all procedural steps in applying for sanctions under Rule 11 have not been met. The court declines to rule as to whether sanctions under this rule are available, though it could be argued that there has been substantial compliance with the procedural aspects of the rule.

George Johnson has submitted an affidavit of legal fees and costs with respect to his preparation and prosecution of the Motion to Disqualify. In determining the reasonableness of an award of attorney fees, guidance has been provided by the Supreme Court.

> The factors to be considered in awarding attorney fees in a civil case are set forth in City of Sioux Falls v. Kelley, 513 N.W.2d 97, 111 (S.D. 1994):
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

Crisman v. Determan Chiropractic, Inc., 2004 S.D. 103, ¶28, 687 N.W.2d 507.

Not all of these factors have relevance here. Johnson's Affidavit indicates that he performed 40 hours of work at a rate of $150.00 per hour. Certainly the $150 hourly rate is reasonable for legal services in the locality. Johnson is a long time attorney with a reputable firm in the State of South Dakota. Johnson was successful in prosecuting the Motion to Disqualify on his client's behalf, who undoubtedly questioned the propriety of being sued by an attorney he had consulted on matters relevant to the underlying action. Although the underlying action may not involve a relatively large sum of money and the ultimate result of the litigation is yet to be determined, the issue related to the public perception of the legal profession is of great importance.

Having reviewed all the documents and evidence on file herein, the court denies Defendant's request to have Plaintiff return the fees awarded with respect to the Motion to Compel Answers to Interrogatories. Defendant is awarded attorney fees, as a sanction against Attorney, Jake Fischer for violation of the Rules of Professional Responsibility, in the total amount of $6,416.18, inclusive of fees and expenses..

John L. Brown

Circuit Court Judge

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO
FILED
FEB 27 2017
Sandy Teigen Clerk
By _____ Deputy

000005

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28216

JOHN BERGGREN,

Plaintiff,

v.

JEFF SCHONEBAUM, D/B/A
SCHONEBAUM QUARTER HORSES
and LAWRENCE MEENDERING,

Defendants/Appellees.

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

The Honorable John L. Brown, Presiding Judge

BRIEF OF APPELLEE MEENDERING

Jake Fischer
Scott Swier
Mike Henderson
Swier Law Firm, Prof. LLC
P.O. Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
jake@swierlaw.com
scott@swierlaw.com
mike@swierlaw.com
Appellant/Former Attorney for Plaintiff

Zach Flood
Morgan Theeler, LLP
1718 N. Sanborn Blvd.
Mitchell, SD 57301
Telephone: (605) 996-5588
zflood@morgantheeler.com
Current Attorney for Plaintiff

George Johnson
Johnson, Pochop and Bartling Law Office
PO Box 149
Gregory, South Dakota 57533
Telephone: (605) 835-8391
george@rosebudlaw.com
Attorney for Defendant/Appellee
Lawrence Meendering

Sandy Steffen
Attorney at Law
318 Main Street
Gregory, South Dakota 57533
Telephone: (605) 835-9334
sjsteffen@goldenwest.net
Attorney for Defendant/Appellee
Jeff Schonebaum, d/b/a
Schonebaum Quarter Horses

Notice of Appeal filed April 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Appellant in this matter is Attorney Jake Fischer from the Swier Law Firm, Prof. LLC ("Appellant"). Appellee in this matter is Lawrence Meendering, by and through his attorney, George F. Johnson. Appellant seeks review of the trial court's "Order for Attorney Fees" that was signed on February 25, 2017 and filed on February 27, 2017. Appx. at 1.[1] That Order awarded Appellee Meendering the sum of $6,416.18 in fees and costs against Attorney Jake Fischer, Plaintiff's original and former attorney. Id. The Order was entered by the Honorable John L. Brown, Circuit Judge for the Sixth Judicial Circuit. Id. Notice of Entry of Memorandum Opinion was given on March 13, 2017. CR at 366. Appellant filed a Notice of Appeal on April 12, 2017. CR at 391. Jurisdiction exists pursuant to SDCL 15-26A-3(4).

STATEMENT OF THE ISSUE

1. Did the trial court have authority to sanction Attorney Jake Fischer?

The trial court found that Appellant's actions constituted "other litigation" which necessitated the time and cost of Appellee's motion to disqualify. As such, the trial court had authority to sanction Attorney Jake Fischer for the Attorney Fees that he, himself, caused.

Relevant Cases and Statutes:

South Dakota Rules of Professional Conduct, Rule 1.18

Brown v. Hanson, 2011 SD 21 ¶ 37, 798 N.W.2d 422

Jacobson v. Leisinger, 2008 S.D. 19, 746 N.W.2d 739

Rupert v. City of Rapid City, 2013 S.D. 13, 827 N.W.2d. 55

[1] For purposes of Appellee Meendering's Brief, citations to the certified record will be to "CR at ___" and citations to the attached Appellee's Appendix will be to "Appx. at ____."

Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith, P.C., 1996 SD 139, 556 N.W.2d 84

Isaac v. State Farm Mut. Auto. Ins. Co., 522 N.W.2d 752, 763 (S.D. 1994)

Foster v. Dischner, 51 S.D. 102, 212 N.W. 506 (1927)

STATEMENT OF THE CASE

In January of 2014, John Berggren ("Berggren") sued Jeff Schonebaum ("Schonebaum") d/b/a Schonebaum Quarter Horses. The case was properly venued in Gregory County, South Dakota. CR at 3. The Honorable Kathleen Trandahl was the original Circuit Court Judge in this matter until the Honorable John L. Brown took over the case when Judge Trandahl retired from the bench. CR at 93.

The original Complaint in this case alleged that Schonebaum had made fraudulent misrepresentations about the breeding capacity of a stallion horse that Schonebaum had previously sold to Berggren. CR at 3. At some point in 2014, after Berggren had already started his lawsuit against Schonebaum, Berggren's attorney, Jake Fischer, had a "prospective client" meeting with Lawrence Meendering ("Meendering"). During that meeting, Meendering sought legal advice from Attorney Fischer about potentially suing Schonebaum to recover unpaid loans that he had made to Schonebaum. In January of 2015, Attorney Fischer deposed Schonebaum and specifically questioned him about loans he had with Meendering. In the Fall of 2016, Attorney Fischer spoke with Meendering on the phone and again talked to him about Schonebaum. Then, on or about November 2, 2015, Attorney Fischer brought his prospective client, Meendering, into this lawsuit. CR at 68.

Meendering filed a Motion to Disqualify Attorney Fischer and the Swier Law Firm, Prof. LLC on August 18, 2016. CR at 112. After considering affidavits, exhibits,

briefs and oral arguments, the trial court granted Meendering's motion to disqualify on October 24, 2016. CR at 188. The trial court then allowed the parties to "submit a brief to the Court regarding Meendering's request for attorney fees." Id. Thereafter, the trial court signed its Order granting Meendering's request for attorney's fees, along with his Memorandum Opinion, on February 25, 2017. Appx. at 1; Appx. at 2-5. The Notice of Entry of the trial court's Memorandum Opinion was filed on March 13, 2017. CR at 366. Appellant filed a Notice of Appeal on April 12, 2017. CR at 391.

STATEMENT OF THE FACTS

In January of 2014, John Berggren ("Berggren"), by and through his attorneys at the Swier Law Firm, started a South Dakota civil action against Jeff Schonebaum ("Schonebaum"). CR at 3. That lawsuit claimed that Schonebaum had made fraudulent misrepresentations about the breeding capacity of a stallion horse that Schonebaum sold to Berggren at an auction and the lawsuit sought both general and punitive damages. Id. That lawsuit was, at that time, entitled *Jeff Berggren v. Jeff Schonebaum d/b/a Schonebaum Quarter Horses.* Id. The Complaint for that lawsuit did not name or mention anything about Lawrence Meendering ("Meendering"). Id.

At some point in 2014—after the above-named lawsuit against Schonebaum was legally started—Meendering went to visit Schonebaum regarding some personal loan debts that Schonebaum owed to Meendering. Appx. at 7 ¶14. During that visit, Schonebaum informed Meendering that he was not going to be able to pay those debts. Id. Immediately after receiving that information from Schonebaum, Meendering decided to seek legal advice about potentially bringing a lawsuit against Schonebaum to collect those unpaid debts. Appx. at 7 ¶15; Appx. at 10 ¶4.

Meendering sought legal advice from two different law firms about whether he could or should sue Schonebaum. Appx. at 7 ¶17. The first lawyer was not interested in the case and referred Meendering to the Swier Law Firm in Avon, South Dakota. Meendering then drove to that firm and had an unscheduled meeting with Attorney Jake Fischer. Id. Because he was wanting to get legal advice about suing Schonebaum, Meendering disclosed to Attorney Fischer privileged information about the loans he had made to Schonebaum.[2] Appx. at 7 ¶17; Appx. at 13; Appx. at 24. Again, that "prospective client" meeting took place after Attorney Fischer had started the lawsuit against Schonebaum on behalf of Berggren, but that fact was not disclosed to Meendering during that meeting. Appx. at 27 ¶8

After meeting in 2014 with Meendering about the loans he made to Schonebaum, two important events took place. The first of those events took place on January 13, 2015 while Attorney Fischer was taking the deposition of Schonebaum. During that deposition Attorney Fischer directly asked Schonebaum questions about a person who had not been previously named, mentioned or identified to Attorney Fischer by Schonebaum and/or his attorney:

> Question: Do you know Lawrence Meendering?
>
> Answer: Yeah.
>
> Question: Who is he?
>
> Answer: He's my banker.
>
> Question: Where is – what bank does he work for?"
>
> Answer: He didn't work for no bank. He was a private lender.

[2] *See* email to Attorney Fischer on Feb. 3, 2016 stating: "You also indicated that, even though Mr. Schonebaum's name was discussed during that meeting, you didn't think Lawrence really wanted to sue Mr. Schonebaum because he never called you back after he left that meeting;" *See also*, letter from Attorney Fischer stating: "I believe we talked a year or two ago in my office in Avon regarding your business relationship with Jeff Schonebaum."

Question: And where does he live?

Answer: Sheldon, Iowa.

Question: Was he involved in the purchase of Peppy?

Answer: Yeah.

Question: How so?

Answer: He was my lender.

Question: Tell me how that deal worked.

Answer: He lended me money. He was like a banker is to a person and I paid him back.

Question: Did he lend you all $17,000?

Answer: Yep.[3]

The second important event took place on or about August 25, 2015, when Attorney Fischer sent a letter to Meendering. That letter stated and admitted the following:

> Mr. Mendering (sic),
>
> Greetings. I am an attorney over in southeast South Dakota, **I believe we talked a year or two ago in my office in Avon regarding your business relationship with Jeff Schonebaum**. (Emphasis added) I am currently engaged in a lawsuit against Mr. Schonebaum, representing a client who feels he was wronged by Mr. Schonebaum in the sale of a horse.
>
> I am wondering if you might have a few moments to speak with me on the telephone in the next couple of weeks. We are currently in the information gathering stage of our lawsuit, and I would appreciate an opportunity to talk with you about Mr. Schonebaum.
>
> Please feel free to call my office any time in the next couple of weeks. My phone number is 605.946.5096.
>
> I appreciate your consideration.

[3] Appx. at 9

Sincerely,

Jake Fischer[4]

In response to that letter, Meendering called Attorney Fischer and they again discussed privileged information about the loans between Meendering and Schonebaum.[5]

Shortly after that phone conversation, Attorney Fischer brought Meendering into this lawsuit on or about November 2, 2015. CR at 68. That Amended Complaint named Meendering as Schonebaum's partner in this lawsuit. Id. In other words, after obtaining privileged business information from Meendering during their "prospective client" meeting in 2014; after deposing Schonebaum about his loans from Meendering in January of 2015; and after receiving more privileged information from Meendering during a phone call in the Fall of 2015, Attorney Fischer sued his own "prospective client" on or about November 2, 2015—nearly two years after the original lawsuit against Schonebaum was filed.

After bringing his "prospective client" into the lawsuit, Attorney Fischer served interrogatories on Meendering that ironically asked questions about his business relationship with Schonebaum. Not surprisingly, Meendering was reluctant to answer those interrogatories because he justifiably did not feel comfortable being sued and interrogated by an attorney with whom he had previously sought legal advice from.

Attorney George F. Johnson ("Attorney Johnson") and Attorney Fischer communicated by both phone and e-mails for months about how and why Meendering was brought into the Schonebaum lawsuit. Appx. at 10-12. Based upon those

[4] Appx. at 24

[5] At that time and to this day, Attorney Fischer has never sent any letters or documents to Meendering indicating whether or not Attorney Fischer will or will not be representing Meendering if Meendering decides to sue Schonebaum.

communications, and the discovery that had been obtained before Meendering was brought into this lawsuit, a few things became clear:

1) Schonebaum sold the stallion horse in question to Berggren for $11,000;

2) Berggren was able to naturally breed that stallion horse for profits (and did so), but, much to his chagrin, he was not able to freeze breed that horse's semen;

3) Berggren ended up suing Schonebaum for Fraudulent Misrepresentations about the horse's inability to freeze breed;

4) Berggren ended up making some money from naturally breeding that horse; and

5) Berggren ended up selling that horse that he had purchased for $11,000 to a third-party for $8,000.

STANDARD OF REVIEW

This Court employs the following familiar standards when reviewing a trial court's findings of fact and conclusions of law:

> We review a trial court's findings of fact under the clearly erroneous standard. Under this standard, we will not disturb the court's findings unless we are firmly and definitely convinced, after review of the entire evidence, a mistake has been made. We review a trial court's conclusions of law under a de novo standard. Under a de novo review, we give no deference to the trial court's conclusions of law.

Sabhari v. Sapari, 1998 SD 35, ¶ 12, 576 N.W.2d 886, 891 (quoting *Landstrom v. Shaver*, 1997 SD 25 ¶ 37, 561 N.W.2d 1, 7) (citations omitted). Here, the trial court's conclusion that Meendering's successful motion to disqualify constituted "other litigation" which authorized the sanction of attorney fees is a conclusion of law and is subject to *de novo* review.

ARGUMENT

One can wonder why this case was filed? One can even wonder why it was filed in Circuit Court and not Small Claim's Court? But no one needs to wonder why Attorney Fischer brought Meendering into this lawsuit almost two years after it was started. That's because, after having the "prospective client" meeting in 2014 with Meendering about debts that Schonebaum still owed to him; after deposing Schonebaum in January of 2015 and learning about the substantial debts that Schonebaum still owed to Commercial State Bank in Wagner; and after talking to Meendering on the phone in the Fall of 2015 about the personal loans that Schonebaum still had not been able to pay, Attorney Fischer knew, or should have known, that neither he nor his client, Berggren, were going to be able to collect much money from Schonebaum—even if they won the lawsuit against him. With that information, Attorney Fischer did NOT bring Meendering into this lawsuit alleging or claiming that Meendering had ever wronged and/or damaged Berggren in any respect. CR at 68. He brought Meendering into this lawsuit alleging that Meendering was Schonebaum's "partner." Id. A "partner" who might potentially have enough money to pay for Schonebaum's alleged mistakes even if Schonebaum, himself, didn't have enough money to pay for those alleged mistakes.

MOTION TO DISQUALIFY

When it became clear to Meendering that Attorney Fischer was not going to voluntarily withdraw from the case or drop Meendering from the case, Meendering filed his motion to disqualify Attorney Fischer from the case. CR at 112. After considering all of the briefs, affidavits and arguments connected to LAWRENCE MENDERING'S MOTION TO DISQUALIFY AND MOTION FOR PROTECTIVE ORDER, the trial court determined that Attorney Fischer had violated the conflict of interest rules set forth

in Rule 1.18 of the South Dakota Rules of Professional Conduct and Attorney Fischer was disqualified from this case. Appx. at 25. Attorney Johnson was then given ten (10) days to submit a brief in support of Meendering's request for the payment of attorney fees relating to the research, drafting and arguments of Meendering's motion to disqualify.

After considering all the briefs and affidavits connected to LAWRENCE MEENDERING'S MOTION FOR ATTORNEY FEES, COSTS AND/OR SANCTIONS, the trial court had to decide for if he had the authority to order Attorney Fischer to pay for the attorney fees that his acts triggered. In the end, the trial court sanctioned Attorney Fischer and stated, in pertinent part:

> **I believe that the Motion to Disqualify constitutes "other litigation which is necessitated by the act of the party sought to be charged" and as such, attorney fees as a sanction for ethic violations in this litigation is warranted.**

Attorney Fischer's current appeal is not directly claiming that the trial court's decision to disqualify him from the case should be reversed. Rather, it appears that Attorney Fischer is claiming that, since he believes he did not, in any way, violate the South Dakota Rules of Professional Conduct or its conflict of interest rules, the trial court had no authority to sanction him. For the reasons set forth below, the trial court had the authority to sanction Attorney Fischer because his ethical misconduct generated "other litigation," i.e., the time and costs of researching, drafting and arguing Meendering's motion to disqualify that eventually prevailed.

"AMERICAN RULE"

It does not appear that there any specific statutes in South Dakota that directly authorize courts to sanction attorneys for violating the South Dakota Rules of

Professional Conduct. However, during this entire case Attorney Fischer has been licensed to practice law in South Dakota by the State Bar of South Dakota. He was, therefore, legally and ethically obligated to understand and obey the South Dakota Rules of Professional Conduct. When Attorney Fischer violated the conflict of interest rules set forth in Rule 1.18 of the South Dakota Rules of Professional Conduct, his actions created "other litigation" in the form of Meendering's motion to disqualify.

With regard to Attorney Fees, South Dakota generally subscribes to the "American Rule." In *Rupert v. City of Rapid City*, 2013 S.D. 13 ¶ 32, 827 N.W.2d 55, this Court explained that:

> Under the "American Rule," each party in the action bears its own attorney fees. However, there are two exceptions to this rule. First, attorney fees may be awarded "when the parties enter into an agreement entitling the prevailing party to an award of attorney's fees." Alternatively, attorney fees may be awarded if "an award of attorney's fees is authorized by statute." Further, in considering whether an award of attorney fees is authorized by statute, "[t]his court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power. (citations omitted)

However, this Court has also stated:

> Attorney fees are not generally recoverable in actions sounding in tort "except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged."[6](emphasis added)

In fact, this Court specifically noted that both *Jacobson v. Leisinger,* 2008 S.D. 19, ¶ 15, 746 N.W.2d 739 and *Foster v. Dischner*, 51 S.D. 102, 212 N.W. 506 (1927):

"…illustrated previous situations where this Court has found it appropriate to award attorneys' fees, which were necessitated by a party's actions, outside of a contract or

---

[6] *Brown v. Hanson*, 2011 SD 21 ¶ 37, 798 N.W.2d 422 (citing *Jacobson v. Leisinger*, 2008 S.D. 19, ¶ 15, 746 N.W.2d 739; *Grand State Prop. Inc. v. Woods, Fuller, Shultz & Smith, P.C.*, 1996 S.D. 139, ¶ 19, 556 N.W.2d 84, 88; *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 763 (S.D. 1994)).

specific legislative grant." *Brown v. Hanson*, 2011 SD 21 ¶ 37, 798 N.W.2d 422 (emphasis added). The case at bar, likewise, represents one of those rare cases where the award of attorney fees is appropriate because those attorney fees were necessitated by Attorney Fischer's actions—outside of a contract; outside of a specific legislative grant; and outside of the "American Rule."

The trial court sanctioned Attorney Fischer because his actions created *other litigation* that stood apart from the lawsuit that was originally filed against Schonebaum. For examples:

a) but for Attorney Fischer's unethical actions, Meendering might never have been brought into this lawsuit;

b) but for Attorney Fischer's unethical actions, Meendering might never have needed to file a motion to disqualify;

c) but for Attorney Fischer's unethical actions, Meendering might never have needed to pay his attorney to research, draft and argue the motion to disqualify;

d) but for Attorney Fischer's unethical actions, Attorney Fischer might never have been disqualified from this lawsuit;

e) but for Attorney Fischer's unethical actions, the trial court might never have had to disqualify and/or sanction Attorney Fischer; and

f) but for Attorney Fischer's in violation of conflict of interest rules set forth in Rule 1.18 of the South Dakota Rules of Professional Conduct, this appeal would not even exist.

CONCLUSION

This case is not about a trial court's authority to disqualify lawyers from a lawsuit. It is not about a trial court's ability to disqualify lawyers who violate ethical rules. It is not about a trial court's ability to sanction lawyers who get disqualified from a lawsuit. This case is much more specific. The trial court in the case at bar did not sanction Attorney Fischer just because he violated conflict of interest rules set forth in Rule 1.18 of the South Dakota Rules of Professional Conduct. The trial court did not sanction Attorney Fischer just because he got disqualified from this lawsuit. Instead, the trial court sanctioned Attorney Fischer because his acts caused or generated "other litigation" inside of an aging and existing lawsuit. Under the authorities cited above, the trial court had the authority to sanction Attorney Fischer's for acts that triggered *other litigation*—in the form of Meendering's motion to disqualify—that likely would have never existed but for those acts.

It seems that Attorney Fischer did not fully understand the South Dakota Rules of Professional Conduct when he admittedly met with Meendering as a "prospective client" back in 2014. It further appears that Attorney Fischer did not fully understand how public perception of the practice of law is severely hinged upon the confidential relationships that exist between lawyers and their former, prospective and/or current clients. Finally, based upon the arguments Attorney Fischer has presented to this Court, he does not yet understand that <u>some</u> ethical rules are so fundamentally critical that, if an attorney violates those critical rules, trial courts have the authority to sanction lawyers for the legal costs and fees that those violations cause. For those reasons, this Court should affirm the trial court's decision to sanction Attorney Fischer for the Attorney Fees that he, himself, caused.

Dated this 15th day of August 2017.

JOHNSON POCHOP & BARTLING LAW OFFICE

/s/George F. Johnson
George F. Johnson
P.O. Box 149 / 405 Main Street
Gregory, SD 57533
(605) 835-8391
george@rosebudlaw.com
Attorney for Defendant/Appellee Meendering

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 3,432 words and 17,944 characters (not including spaces).

/s/George F. Johnson
George F. Johnson

CERTIFICATE OF SERVICE

George F. Johnson, Appellee and attorney for Defendant Lawrence Meendering, and pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on *August 15, 2017,* I caused the following documents:

- Appellant's Brief (word format)
- Appellant's Appendix (portable document format)

to be filed electronically with the Clerk of the South Dakota Supreme Court via email and that the original and two hardcopies of these documents were mailed by United States Mail, postage prepaid, to:

Shirley Jameson-Fergel
Clerk – South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501
SCClerkBriefs@ujs.state.sd.us

The undersigned further certifies that the above documents were also emailed to the following attorneys:

Sandy Steffen
Attorney at Law
318 Main Street
Gregory, South Dakota 57533
Telephone: (605) 835-9334
sjsteffen@goldenwest.net
Attorney for Defendant Schonebaum, d/b/a Schonebaum Quarter Horses

Zach Flood
Morgan Theeler, LLP
1718 N. Sanborn Blvd.
Mitchell, SD 57301
Telephone: (605) 996-5588
zflood@morgantheeler.com
Current Attorney for Plaintiff Berggren

Jake Fischer
Swier Law Firm, Prof. LLC
PO Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
jake@swierlaw.com
Appellent/Former Attorney for Plaintiff Berggren

JOHNSON POCHOP & BARTLING LAW OFFICE

/s/George F. Johnson
George F. Johnson
P.O. Box 149 / 405 Main Street
Gregory, SD 57533
(605) 835-8391
george@rosebudlaw.com
Attorney for Defendant/Appellee Meendering

APPENDIX

John Berggren, Plaintiff

v.

Jeff Schonebaum, d/b/a Schonebaum Quarter Horses and Lawrence Meendering, Defendants/Appellees

No. 28216

STATE OF SOUTH DAKOTA :SS COUNTY OF GREGORY	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
JOHN BERGGREN Plaintiff, vs. JEFF SCHONEBAUM d/b/a SCHONEBAUM QUARTER HORSES and LAWRENCE MEENDERING Defendant.	)	CIV14-22 ORDER FOR ATTORNEY FEES

The Court, having before it Defendant Lawrence Meendering's request for attorney fees and having reviewed all matters on file herein, it is hereby

ORDERED that Lawrence Meendering is awarded the sum of $6416.18 in fees and costs against Jake Fischer, Plaintiff's original attorney, and

IT IS FURTHER ORDERED that the $838.69 in fees and costs previously awarded to Plaintiff, John Berggren against Defendant Lawrence Meendering will remain as ordered.

DATED: February 25, 2017

BY THE COURT:

John L. Brown
Circuit Court Judge

ATTEST:

Clerk of Courts
By: _____
Deputy
(SEAL)

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO
FILED
FEB 27 2017
By _____

Appellee's Brief
Appx.
01

MEMORANDUM OPINION

TO: **George Johnson, Jake Fischer, Sandy Steffen, Zach Flood**

FROM: **Judge John L. Brown**

RE: **Berggren v. Schonebaum and Meendering 26CIV14-22**

DATE: **February 27, 2017**

George Johnson, Attorney for Defendant, Lawrence Meendering, is seeking sanctions by way of attorney fees incurred in his successful motion to disqualify Jake Fischer as Plaintiff's attorney. This Court granted the motion to disqualify, finding that Fischer was in violation of Rule 1.18, Duties to Prospective Client, of the South Dakota Rules of Professional Conduct.

Fischer had filed a civil action on behalf of the Plaintiff against the original Defendant, Schonebaum. Meendering subsequently met with Fischer regarding potential claims he may have against Schonebaum arising out of business dealings touching on the issues in dispute in the already filed action. No representation was undertaken, however Fischer later amended the complaint to name Meendering as a Defendant in the existing action.

Johnson, representing Meendering, learned of the contact his client had with Fischer. Johnson advised Fischer of the potential ethical violation, seeking his client's dismissal from the action or Fischer's withdrawal from the case. Fischer declined, feeling that his interaction with Meendering had not created a prospective client relationship and that he did not recall obtaining information related to the present action. Fischer brought a motion to compel responses to discovery that had been submitted to Meendering which was granted and $838.69 was ordered as sanctions.

The question presented is whether monetary sanctions by way of attorney fees may be awarded against Jake Fischer for his refusal to withdraw from representation in this case. Ordinarily South Dakota follows the "American rule" where the parties bear their own

attorney fees unless specifically provided otherwise by statute or agreement of the parties.

> For purposes of awarding attorney fees, South Dakota subscribes to the "American Rule." Under the "American Rule," each party in an action bears its own attorney fees. However, there are two exceptions to this rule. First, attorney fees may be awarded "when the parties enter into an agreement entitling the prevailing party to an award of attorney's fees." Alternatively, attorney fees may be awarded if "an award of attorney's fees is authorized by statute."

Rupert v. City of Rapid City, 2013 S.D. 13, ¶32, 827 N.W.2d. 55, (citations omitted).

Johnson argues first that the $838.69 discovery sanction imposed on his client for failure to comply with discovery should be returned. Further, he seeks his attorney fees in preparing and prosecuting the Motion to Disqualify and Motion for Protective Order. He is seeking $6,416.18 in fees and expenses as to the Motion to Disqualify.

Sanctions, including an award of attorney fees, for discovery violations are specifically authorized under SDCL 15-6-37(a). Fischer's Motion to Compel was filed, considered by the court and granted in June of 2016. At that time, Defendant, Meendering, had not filed his Motion to Disqualify. The Motion to Disqualify was filed in August of 2016 and granted in October. Because there did not appear to be justification for refusal to answer Plaintiff's interrogatories at the time of the Motion to Compel, the award of $838.69 will remain.

Unlike the statutory authority for the grant of attorney fees for discovery abuses, Johnson admits that there is no specific statutory provision for an award of attorney fees arising out of a violation of the Rules of Professional Responsibility. He instead asserts that the "courts have broad discretion with regard to sanctions imposed", citing language from *Hewitt v. Felderman*, 2013 S.D. 91, ¶23, 841 N.W.2d 258. That was however in the context of a discovery dispute which, as noted previously, has specific statutory authority. "[I]n considering whether an award of attorney fees is authorized by statute, "[t]his Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Rupert*, supra.

Essentially Johnson is apparently relying on the court's inherent powers to enforce the Rules of Professional Responsibility. The South Dakota Supreme Court has given credence to such an argument.

> Attorney fees are not generally recoverable in actions sounding in tort "except those fees incurred in other litigation which is necessitated by the act of the party sought to be charged." *Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith, P.C.*, 1996 S.D. 139, ¶19, 556 N.W.2d 84, 88 (emphasis added) (noting that separate litigation necessitated by the misconduct of the other party may permit recovery of attorney fees);

Jacobson v. Leisinger, 2008 S.D. 19, ¶15, 746 N.W.2d 739.

I believe that the Motion to Disqualify constitutes "other litigation which is necessitated by the act of the party sought to be charged" and as such, attorney fees as a sanction for ethics violations in this litigation is warranted.

Alternatively, it is asserted that Rule 11 may provide a basis for the award of attorney fees proposed here. SDCL 15-6-11(c). Admittedly there has not been a specific request for Rule 11 sanctions and all procedural steps in applying for sanctions under Rule 11 have not been met. The court declines to rule as to whether sanctions under this rule are available, though it could be argued that there has been substantial compliance with the procedural aspects of the rule.

George Johnson has submitted an affidavit of legal fees and costs with respect to his preparation and prosecution of the Motion to Disqualify. In determining the reasonableness of an award of attorney fees, guidance has been provided by the Supreme Court.

> The factors to be considered in awarding attorney fees in a civil case are set forth in City of Sioux Falls v. Kelley, 513 N.W.2d 97, 111 (S.D. 1994):
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

Crisman v. Determan Chiropractic, Inc., 2004 S.D. 103, ¶28, 687 N.W.2d 507.

Not all of these factors have relevance here. Johnson's Affidavit indicates that he performed 40 hours of work at a rate of $150.00 per hour. Certainly the $150 hourly rate is reasonable for legal services in the locality. Johnson is a long time attorney with a reputable firm in the State of South Dakota. Johnson was successful in prosecuting the Motion to Disqualify on his client's behalf, who undoubtedly questioned the propriety of being sued by an attorney he had consulted on matters relevant to the underlying action. Although the underlying action may not involve a relatively large sum of money and the ultimate result of the litigation is yet to be determined, the issue related to the public perception of the legal profession is of great importance.

Having reviewed all the documents and evidence on file herein, the court denies Defendant's request to have Plaintiff return the fees awarded with respect to the Motion to Compel Answers to Interrogatories. Defendant is awarded attorney fees, as a sanction against Attorney, Jake Fischer for violation of the Rules of Professional Responsibility, in the total amount of $6,416.18, inclusive of fees and expenses..

Circuit Court Judge

STATE OF SOUTH DAKOTA
CIRCUIT COURT, GREGORY CO
FILED
FEB 27 2017
Sandy Teigen Clerk
By_____Deputy

STATE OF SOUTH DAKOTA } : COUNTY OF GREGORY }	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
JOHN BERGGREN Plaintiff, vs. JEFF SCHOENBAUM d/b/a SCHONEBAUM QUARTER HORSES and LAWRENCE MENDERING Defendants.	Civ. 14-22 **AFFIDAVIT OF LAWRENCE MEENDERING**

STATE OF IOWA)
§
COUNTY OF SIOUX)

COMES NOW Defendant Lawrence Meendering, being first duly sworn, states upon his oath as follows:

1) My name is Lawrence Meendering and I'm 77 years old.

2) I am not under the influence of any drugs or alcohol that affect my ability to remember or tell the truth.

3) I live in Iowa and I am currently being sued as a Defendant in the above styled case.

4) Over the years I have made personal loans to Schonebaum and numerous other ranchers. I have done that for some of my friends, like Schonebaum, who have been through bankruptcy and/or have such a bad credit rating that they cannot get regular banks to loan them money.

5) In 2009, I loaned Schonebaum about $17,000 to buy a horse. With that loan money, Schonebaum and/or Schonebaum Quarter Horses purchased a stud horse named "Peppy for Heaven" for $17,500 in Billings, Montana. That stud horse was then registered and owned by Schonebaum and/or Schonebaum Quarter Horses, but it has never been owned by or registered to me.

6) On April 20, 2013, J Bar J Quarter Horses (a business owned by John Berggren and four of his family members) purchased "Peppy for Heaven" from Schonebaum and/or Schonebaum Quarter Horses for $11,000 in Corsica, South Dakota.

7) After the sale on April 20, 2013, the American Quarter Horse Association registered "J Bar J Quarter Horses" as the owner of "Pepper for Heaven."

8) On or about April 29, 2013, Schonebaum sent me a check for $4,900. That check referenced "for stud" and it was a payment for the money I had loaned him when he purchased "Peppy for Heaven" back in 2009.

9) On or about January 27, 2014, the Swier Law Firm started a lawsuit entitled: *John Berggren vs. Jeff Schonebaum d/b/a Schonebaum Quarter Horses.* The Complaint for that case did not name or mention me, but alleged that Schonebaum had made fraudulent representations about "Peppy for Heaven" before that horse was purchased by J Bar J Quarter Horses on April 20, 2013.

10) On or about June 1, 2014, J Bar J Quarter Horses (and not Plaintiff John Berggen) sold "Peppy for Heaven" to Lance Bullock for $8,000.

11) J Bar J Quarter Horses is not and has never been a party in this lawsuit.

12) It is my understanding that, on or about June 11, 2014, Attorney Jake Fischer from the Swier Law Firm sent the "Plaintiff's Interrogatories and Requests for Production of Documents **(First Set)**" to Schonebaum's attorney, Sandy Steffen.

13) It is my understanding that on September and November of 2014, Schonebaum's Answers to Plaintiff's Interrogatories and Requests for Production of Documents (First Set) were sent to Attorney Fischer. None of those interrogatory answers named, mentioned and/or referenced my name.

14) At some point in 2014, I drove from Iowa to Gregory County, South Dakota to visit with Schonebaum and talk about personal loans that he still owed to me. It became clear that day that he was not going to be able to pay me back for all of those loans.

15) On the way home to Iowa, I stopped in Wagner, SD and had an unscheduled meeting with Attorney Ken Cotton. I was seeking legal advice about possibly suing Schonebaum and possibly collecting money from him with a Judgment.

16) Attorney Cotton told me that he was not interested in the case and recommended the Swier Law Firm in Avon, SD. I then drove to Avon and had an unscheduled meeting with Attorney Jake Fischer.

17) During that meeting with Attorney Fischer, it is my recollection that we talked about the fact that I had loaned Schonebaum money; that I was thinking about suing him to get some of that money back; and that it might be tough to collect money from Schonebaum even if I got a Judgment against him.

18) Since that meeting at his law office, Attorney Fischer has never sent me any disengagement letters about legally representing me or not legally representing me.

19) At some point in 2015, Attorney Fischer sent me a letter that asked me to call him about *John Berggren vs. Jeff Schonebaum d/b/a Schonebaum Quarter Horses.*

20) Pursuant to that letter, I called Attorney Fischer and it is my recollection that we spoke for a good while about the loans I had made to Schonebaum; his inability to pay his debts; his sale

of "Peppy for Heaven"; the breeding history of that horse; and the lawsuit pending against Schonebaum.

21) On or about November 2, 2015, after I had the meeting with Attorney Fischer in his office and after I had the conversation with Attorney Fischer on the phone, Attorney Fischer filed and served an Amended Complaint that changed the name of the lawsuit from *John Berggren vs. Jeff Schonebaum d/b/a Schonebaum Quarter Horses* to *John Berggren vs. Jeff Schonebaum d/b/a Schonebaum Quarter Horses, and Lawrence Meendering.* (Emphasis added)

22) That Amended Complaint does not allege that I am being sued for defrauding, buying, advertising, marketing, breeding and/or selling "Peppy for Heaven." It alleges that I was a "partner" with Schonebaum and his "unincorporated sole proprietorship."

23) The Amended Complaint alleges that I was Schonebaum's "partner" and that I should be held jointly liable for both general damages and punitive damages that Schonebaum might have caused to Plaintiff John Berggren.

24) Shortly after I was sued by Attorney Fischer, my attorney, George F. Johnson, received interrogatories from Attorney Fischer.

25) Attorney Johnson and I had several discussions about those interrogatories. It was during one of those discussions that I informed Attorney Johnson that, **prior to being sued by Attorney Fischer,** I had personally met with and sought legal advice from Attorney Fischer.

26) I also informed Attorney Johnson that at some point in 2015, **prior to being sued by Attorney Fischer,** I had talked to Attorney Fischer on the phone about the money I had loaned to Schonebaum.

27) I believe that Mr. Fischer used the information I provided to him when I was his prospective client against me to bring me into the lawsuit and claim that I was somehow a partner of Mr. Schonebaum. I am highly offended that Mr. Fischer is now seeking damages against me, including punitive damages.

Dated this 27 day of July, 2016.

Lawrence Meendering

Subscribed and sworn on this 27 day of July, 2016.

Notary Public

[SEAL]
My Commission Expires: 5-30-19

ERIC HAVEMAN
Commission Number 710333
My Commission Expires
5-30-19

however he wants.
MS. STEFFEN: He's answered the question.
Q (By Mr. Fischer) You understood that John was angry with you, didn't you?
A Yeah.
Q Didn't you suppose that John was going to express his frustration to other folks in the horse community?
A Yeah. He could do what he wants to.
Q And from a business perspective, were you worried at all about that?
A No.
Q So you don't really care to make your customers happy after you make a sale?
A Yeah, I make my customers happy that - my sales are all private.
Q This one wasn't, was it?
A No.
Q Did you tell Dallas Talkington there were seven mare breeding contracts to go with the sale of Peppy?
A No.
Q You've never been on probation with the American Quarter Horse Association?
A No.
Q Has Jolene?
A No.

A He lended me money. He was like a banker is to a person, and I paid him back.
Q Did he lend you all $17,000?
A Yep.
Q And what were the terms of that loan?
A I - our terms was I just paid him back as it went. There was no loans set up.
Q No written contract?
A No.
Q Was there interest on the money?
A Yep.
Q What was the interest rate?
A He usually ran me around like 3 percent.
Q And how soon were you supposed to pay him back?
A I just paid him back when I could.
Q How soon did you pay back this particular loan?
A I paid him all off when I sold the horse on this stud.
Q So about 4 years later you paid him back?
A Yeah.
Q Did he make any decisions in your operation?
A No.
Q Did he weigh in on your - on your decision-making process?
A No.
Q So he wouldn't say "maybe we should sell this horse or that horse."

Q She's not currently on probation?
A No.
Q Has Jolene ever failed to DNA a horse that the Quarter Horse Association requested?
A No.
Q Has she refused to DNA a horse that they requested?
A No.
Q So if we looked that up at the association, we wouldn't find anything like that?
A Right.
MS. STEFFEN: I'm going to object. What Jo has to do with any of this I've missed, Mr. Fischer.
Q (By Mr. Fischer) Do you know Lawrence Mendring?
A Yeah.
Q Who is he?
A He's my banker.
Q Where is - what bank does he work for?
A He didn't work for no bank. He was a private lender.
Q And where does he live?
A Sheldon, Iowa.
Q Was he involved in the purchase of Peppy?
A Yeah.
Q How so?
A He was my lender.
Q Tell me how that deal worked.

A No. Never did.
Q How did you come to be associated with Mr. Mendring?
A I ran a lot of cattle for Mendring, Lawrence.
Q When did you do that?
A Oh, probably - I'm going to say from 2000, maybe even before 2000. We ran from 150 to 180 cows for him.
Q When did you stop running cattle for him?
A Drought 2012.
Q Did you run cattle through that season?
A No. Just until July when we were out of grass.
Q You sent them home?
A Sold them all.
Q If you would have wanted to work a deal out with John regarding Peppy, would have you had to consult with Lawrence?
A No.
Q So he was just the guy who gave you money.
A Yep.
Q Are you still working with Lawrence?
A No.
Q When did you stop banking with Lawrence?
A Would have been probably like December 2013.
Q Anything in particular that made you stop --
A No.
Q -- working with him?

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	§	
COUNTY OF GREGORY	)	SIXTH JUDICIAL CIRCUIT

JOHN BERGGREN Plaintiff, vs. JEFF SCHOENBAUM d/b/a SCHONEBAUM QUARTER HORSES and LAWRENCE MENDERING Defendants.	Civ. 14-22 **AFFIDAVIT OF GEORGE F. JOHNSON**

STATE OF SOUTH DAKOTA)
§
COUNTY OF GREGORY)

COMES NOW George F. Johnson, being first duly sworn, states upon his oath as follows:

1) I am the attorney for Lawrence Meendering in the above styled case.

2) I have had phone conversations with Attorney Jake Fischer about this lawsuit.

3) Since being hired to represent Mr. Meendering in the above styled case, I have sent emails to Attorney Jake Fischer and I have received emails from Attorney Jake Fischer. I am attaching all of the emails I received from and/or sent to Attorney Jake Fischer regarding the ethical issues that are related to **LAWRENCE MEENDERING'S MOTION TO DISQUALIFY AND MOTION FOR PROTECTIVE ORDER.**

4) Some of the attached emails are directly cited and discussed in the **BRIEF IN SUPPORT OF LAWRENCE MEENDERING'S MOTION TO DISQUALIFY AND MOTION FOR PROTECTIVE ORDER.** Some of the attached emails are NOT directly cited and discussed in that brief, but I am providing the Court with all of the emails that I received from or sent to Attorney Fischer regarding his communications with Mr. Meendering:

   A) Attached as "**Exhibit A**" to this affidavit is a true and accurate copy of the email I sent to Attorney Fischer on January 27, 2016 regarding this lawsuit.
   B) Attached as "**Exhibit B**" to this affidavit is a true and accurate copy of the email I sent to Attorney Fischer on February 3, 2016 regarding this lawsuit.
   C) Attached as "**Exhibit C**" to this affidavit is a true and accurate copy of the email I received from Attorney Fischer on February 8, 2016 regarding this lawsuit.
   D) Attached as "**Exhibit D**" to this affidavit is a true and accurate copy of the email I sent to Attorney Fischer on February 9, 2016 regarding this lawsuit.
   E) Attached as "**Exhibit E**" to this affidavit is a true and accurate copy of the email I received from Attorney Fischer on February 22, 2016 regarding this lawsuit.

F) Attached as "**Exhibit F**" to this affidavit is a true and accurate copy of the email I received from Attorney Fischer on March 10, 2016 regarding this lawsuit.
G) Attached as "**Exhibit G**" to this affidavit is a true and accurate copy of the email I sent to Attorney Fischer on March 10, 2016 regarding this lawsuit.
H) Attached as "**Exhibit H**" to this affidavit is a true and accurate copy of the email I received from Attorney Fischer on March 10, 2016 regarding this lawsuit.
I) Attached as "**Exhibit I**" to this affidavit is a true and accurate copy of the email I sent to Attorney Fischer on May 10, 2016 regarding this lawsuit.
J) Attached as "**Exhibit J**" to this affidavit is a true and accurate copy of the email I received from Attorney Fischer on May 13, 2016 regarding this lawsuit.

5) I have personally spoken with Attorney Ken Cotton on the phone about his unscheduled meeting with Meendering; about how he was not interested in suing Schonebaum for Meendering; and about how he referred Meendering to the Swier Law Firm in Avon.

6) I sent an email to Attorney Fischer requesting a letter that he had mailed to Meendering. I received a copy of that letter from Attorney Fischer via email. That letter is attached to this affidavit as "**Exhibit K**" and is dated August 24, 2015.

George F. Johnson

Subscribed and sworn on this 18th day of August, 2016.

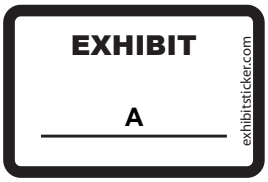
NICOLE O. JOHNSON NOTARY SEAL PUBLIC STATE OF SOUTH DAKOTA

Nicole O. Johnson
Notary Public

(SEAL) My Commission Expires: 12/12/20

Subject: John Berggen v. Jeff Schonebaum & Lawrence Mendering
Date: Wednesday, January 27, 2016 at 2:06 PM
From: George Johnson <george@rosebudlaw.com>
To: "jake@swierlaw.com" <jake@swierlaw.com>

Jake: I have been consulting with my new client, Lawrence Mendering, about the interrogatories you sent over for the above referenced case. As we were discussing his "alleged" partnership with Jeff Schonebaum, he told me something very unusual. Could you please give me a brief call so that we can talk about what he told me? Thanks, George



Subject: Berggren v. Schonebaum & Mendering
Date: Wednesday, February 3, 2016 at 11:22 AM
From: George Johnson <george@rosebudlaw.com>
To: "jake@swierlaw.com" <jake@swierlaw.com>

Jake: As we discussed on the phone the other day, my client, Lawrence Mendering, recently told me that he once had a meeting with you at the Swier Law Firm In Avon. He tells me that he (and a friend of his) met with you to discuss a potentially lawsuit against Jeff Schonebaum. You admitted to me that you had a meeting with Lawrence, but you felt like he was just hunting around to see what was going on regarding the claims against Mr. Schonebaum. You also indicated that, even though Mr. Schonebaum's name was discussed during that meeting, you didn't think Lawrence really wanted to sue Mr. Schonebaum because he never called you back after he left that meeting.

To be clear, I respect you as a lawyer and I consider you to be a friend. I am writing to you because I think you to reconsider your claims against Mr. Mendering before that situation goes downhill. In my opinion, when you met with Mr. Mendering at your office to discuss a potential lawsuit against Mr. Schonebaum, at some level he became a "prospective client" under Rule 1.18 of Model Rules of Professional Conduct. I believe you guys discussed some confidential information about loans that he made to Mr. Schonebaum and about the possibility of using litigation to get some of that loan money back. It is my understanding that Lawrence probably would have hired you to conduct that lawsuit if there was any money that could have been collected, but it was apparently clear at that time, to both of you and Lawrence, that Mr. Schonebaum probably did not have enough money to pay even if a Judgment was rendered against him. It is pretty obvious, at least in my eyes, that you brought Lawrence into this lawsuit because: 1) you knew, or should have known, that it will be extremely difficult, if not impossible, to collect much judgment money from Mr. Schonebaum — even if you win Mr. Berggren's lawsuit against him; and 2) you have alleged that Lawrence is somehow a partner with Mr. Schonebaum because you learned some things about their loaning relationship during the meeting you had with Lawrence.

Here are some basic facts as I understand them:
1) Lawrence has never owned or been the registered owner of Peppy from Heaven;
2) Lawrence has never legally owned or legally registered as an owner or partner of Schonebaum Quarter Horses;
3) Peppy from Heaven was once registered under Jeff Schonebaum and/or Schonebaum Quarter Horses;
4) the depositions taken in this case indicate that your client was never personally or individually registered as an owner of Peppy of Heaven; and
5) the depositions taken in this case indicate that J Bar J Quarter Horses was once a registered owner of Peppy of Heaven.

Those things being said, I'm not real sure that your client, as an individual, is the appropriate Plaintiff for this lawsuit. More importantly, I'm relatively certain that you and/or your law firm violated some ethically rules by suing Lawrence AFTER he sought legal advice from you and/or your law firm about possibly suing Mr. Schonebaum for loan-related damages.

If you want to keep this lawsuit going against Lawrence, he has told me that he will be sending a claim about this situation to the Disciplinary Board of the State Bar Association to have it reviewed. Furthermore, it is likely that, when you had the meeting with Lawrence regarding his loans to Mr. Schonebaum, you obtained relevant evidence that moved you from an attorney in this case to being a potential witness in this case — you cannot be both. With that in mind, if you will terminate your claims against Lawrence now, he will agree to forever and permanently forget that this entire mess occurred and you can continue with your case against Mr. Schonebaum.

I think my client has been working on his interrogatory answers that you sent, and that there is a deadline for those answers approaching. Please let me know what you want to do before we get too far into this situation to turn back. Cordially, George

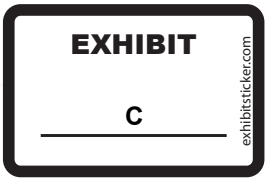
Subject: RE: Berggren v. Schonebaum & Mendering
Date: Monday, February 8, 2016 at 2:04 PM
From: jake@swierlaw.com <jake@swierlaw.com>
To: George Johnson <george@rosebudlaw.com>

George,

I am in receipt of your email. I need to think about your message. I will get back to you soon.

Thanks,

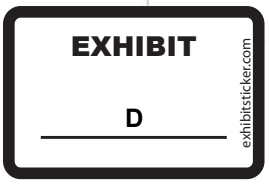
Jake Fischer



Subject: Re: Berggren v. Schonebaum & Mendering
Date: Tuesday, February 9, 2016 at 11:45 AM
From: George Johnson <george@rosebudlaw.com>
To: "jake@swierlaw.com" <jake@swierlaw.com>

Jake: Thank you for the response. Just so you can better understand my previous email, I did not base that email upon guess, luck or chance. Not only did I research that ethics issue, but I had two distinguished attorneys — who have both frequently defended lawyers being reviewed by the SD disciplinary board — consider the information I have obtained so far. To be clear, I did NOT mention your name, your partners' names and/or your firm's name during that process. Both of those lawyers told me independently that, in their opinions, if this situation continues on, my client would be well within his rights to ask the disciplinary board to review this situation AND/OR he might be able to sue you and/or your firm for legal malpractice.

This is a very unusual case that does not involve a ton of money, but it certainly involves a ton of risk. Please let me know what you decide to do. Thanks, George



Subject: Re: Your client Lawrence Mendering
Date: Monday, February 22, 2016 at 11:53 AM
From: jake@swierlaw.com <jake@swierlaw.com>
To: George Johnson <george@rosebudlaw.com>
Cc: Scott Swier <scott@swierlaw.com>

George,

Thank you again for reaching out to me regarding your concerns of a potential conflict of interests I may have with your client and my former "prospective client." I appreciate you taking the time to write me first, before proceeding. I've had a chance to review South Dakota Rule of Professional Conduct 1.18. I agree with your assessment that this rule is the most applicable to the current situation.

According to the definition of a "prospective client" laid out in Rule 1.18(a), I believe it is arguable, and perhaps likely, that Mr. Mendering was a "prospective client" after meeting with me in my office some time ago.

In my opinion, Rule 1.18(c) is the determining factor as to whether a conflict of interest exists in the present situation. That Rule states, in part:

"A lawyer shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter *if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.*" (emphasis mine)

George, I do not have any notes from this prospective client meeting. I do not have any entries on my billing statements. All in all, I have very little recollection of this meeting whatsoever. After discussing Mr. Mendering's situation, in nonspecific terms, Mr. Mendering left my office, and never followed up on anything we discussed.

From my perspective, I've racked my brain and cannot think of any information I gleaned from our meeting which would be significantly harmful to Mr. Mendering in the current litigation. At this point, because he is an adverse party, I hesitate to ask you what information Mr. Mendering believes I have, but I would like some indication as to what he might base his complaint on.

In further consideration of the "significant harm" factor, I note that Comments 1 and 6 to Rule 1.18 state, respectively:

"(1) A lawyer's consultations with a prospective client usually are limited in time and depth and

leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients."

And:

"(6) Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter."

As to Comment 1: My consultation with Mr. Mendering was certainly limited in time and depth. Further, it was clear to me by the meeting, and Mr. Mendering's lack of interest in following up with me, that neither party intended to proceed any further. I also note that "prospective clients" receive "some but not all" of that protection afforded actual clients.

As to Comment 6: It is stressed here, again, that a lawyer is not prohibited from representing a client with adverse interests unless he's received information that could be "significantly harmful" to the prospective client. In this instance, I simply fail to identify any information I would have gleaned which would be harmful to Mr. Mendering.

I remain open to discussing this issue further with you, and if there is something that I am missing which might present "significant harm" to Mr. Mendering, I will certainly consider it. However, at this point in time, I believe my duty to my current client requires that I maintain my action against Mr. Mendering.

Please don't hesitate to contact me further.

Sincerely,

Jake Fischer

Subject: Berggren v. Schonebaum/Mendering
Date: Thursday, March 10, 2016 at 12:44 PM
From: jake@swierlaw.com <jake@swierlaw.com>
To: George Johnson <george@rosebudlaw.com>

George,

Can you please advise if your client plans to Answer the Interrogatories we've sent out?

Thanks,

Jake Fischer

Subject: Re: Berggren v. Schonebaum/Mendering
Date: Thursday, March 10, 2016 at 3:45 PM
From: George Johnson <george@rosebudlaw.com>
To: "jake@swierlaw.com" <jake@swierlaw.com>

Jake: Last I heard he was not going to answer those interrogatories until after his ethics question was reviewed and considered by the State Bar Disciplinary Board. I will give him a call and see if he has changed his mind on that issue, but it is my understanding that the ethical issue that is in question can be privately submitted to Disciplinary Board to ask them to offer an opinion about it BEFORE we get any further into this potential ethical maze.

In the mean time, I find myself wondering about the allegations set forth in your Amended Complaint. Specifically, I am wondering if Lawrence and/or Mr. Schonebaum told you that they were partners? If so, or not, can you tell me exactly what they are partners of? Are they business partners, company partners, LLC partners, corporation partners or what kind of partners are they? Let me know, George

Subject: RE: Re: Berggren v. Schonebaum/Mendering
Date: Thursday, March 10, 2016 at 5:00 PM
From: jake@swierlaw.com <jake@swierlaw.com>
To: George Johnson <george@rosebudlaw.com>

George,

In our view, they are members of an informal partnership which is defined under South Dakota law as, essentially, any group of people working together toward a common business venture.

Please let me know if this matter will proceed through discovery or if we will need a judicial determination.

Thanks George.

Sincerely,

Jake Fischer

Subject: Berggren v. Schonebaum & Mendering
Date: Tuesday, May 10, 2016 at 2:52 PM
From: George Johnson <george@rosebudlaw.com>
To: "jake@swierlaw.com" <jake@swierlaw.com>

Jake: I see that we have a scheduling hearing for the above referenced case set for next week. During that hearing I anticipate that you will be asking the Judge to force my client to answer your interrogatories and requests for production. As you know, I have previously asked you to consider dismissing my client from that case because I sincerely believe that you violated the Rules of Professional Conduct (including, but not limited to, Rule 1.18) when you sued my client. I also previously warned you what MIGHT happen if you didn't dismiss my client from that case. With that in mind, when you gave notice last month of the up-coming scheduling hearing, I started researching and helping my client draft his Disciplinary Complaint for the SD Disciplinary Board. That detailed Disciplinary Complaint has recently been completed and it sets forth a full and complete timeline of events that explain how you violated at least three (3) of the SD Rules of Professional Conduct. That Disciplinary Complaint has not yet been sent to the Disciplinary Board because I'm still hoping that you will consider dismissing my client from the case before next week's scheduling hearing.

As you now know, Mr. Schonebaum has serious problems paying his debts and it will be extremely difficult to collect any Judgment money from him. That knowledge is the sole reason why you brought my client into the lawsuit AFTER you met with my client in your law office and AFTER you took Mr. Schonebaum's deposition. Both of those events proved that he can't pay his debts or Judgments.

Anyway, if you decide not to dismiss my client before the hearing next week: 1) my client will be sending his Disciplinary Complaint to the SD Disciplinary Board; 2) I will be providing you and the Judge with a copy of that Disciplinary Complaint at the scheduling hearing; and 3) I will use that detailed information to explain why my client will not be answering your interrogatories and why you (and your law firm) should be dismissed from the case because of conflicts of interest.

I honestly don't want to go that route, but why don't you let me know what you want to do?
Cordially, George

Subject: RE: Berggren v. Schonebaum & Mendering
Date: Friday, May 13, 2016 at 10:22 AM
From: jake@swierlaw.com <jake@swierlaw.com>
To: George Johnson <george@rosebudlaw.com>

George,

Thank you for your recent email. As I've previously relayed to you, I've reviewed the Rules of Professional Conduct applicable to the present circumstances and cannot conclude there is a conflict of interest at play here.

I have sought a second opinion from outside counsel and they have not identified a problem in this matter, either. Further, outside counsel has directed my attention to the following case: In re Discipline of Eicher, 2003 SD 40. You may or may not find said case helpful in your analysis.

At this point, I feel I have a duty to proceed and protect the interest of my client. I will plan on moving forward with the scheduling hearing on Tuesday.

Thanks George,

Jake Fischer

August 24, 2015

Lawrence Mendering
3342 Lily Avenue
Sheldon, Iowa 51201

Mr. Mendering,

Greetings. I am an attorney over in southeast South Dakota, I believe we talked a year or two ago in my office in Avon regarding your business relationship with Jeff Schonebaum. I am currently engaged in a lawsuit against Mr. Schonebaum, representing a client who feels he was wronged by Mr. Schonebaum in the sale of a horse.

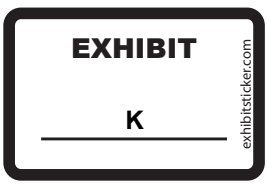
I am wondering if you might have a few moments to speak with me on the telephone in the next couple of weeks. We are currently in the information gathering stage of our lawsuit, and I would appreciate an opportunity to talk with you about Mr. Schonebaum.

Please feel free to call my office any time in the next couple of weeks. My phone number is 605.946.5096.

I appreciate your consideration.

Sincerly,

Jake Fischer



Rule 1.18. Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as in Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

STATE OF SOUTH DAKOTA § COUNTY OF GREGORY	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
JOHN BERGGREN Plaintiff, vs. JEFF SCHOENBAUM d/b/a SCHONEBAUM QUARTER HORSES and LAWRENCE MENDERING Defendants.		Civ. 14-22 **SECOND AFFIDAVIT OF LAWRENCE MEENDERING**

STATE OF IOWA)
§
COUNTY OF O'Brien)

COMES NOW Lawrence Meendering, being first duly sworn, states upon his oath as follows:

1) My name is Lawrence Meendering and I am named as a co-defendant in the above styled lawsuit.

2) I am not under the influence of any drugs or alcohol that affect my ability to remember or tell the truth.

3) I have personal knowledge of the facts stated in this affidavit.

4) I cannot and will not be able to attend the up-coming hearing in this case because I am currently dealing with severe medical problems that will not allow me to safely travel to and from the hearing.

5) I have reviewed the information set forth in the "Affidavit of Jake Fischer in Opposition to Defendant Lawrence Mendering's Motion to Disqualify and Motion for Protective Order."

6) With regard to Jake Fischer's affidavit, I agree that I had an unscheduled meeting with Mr. Fischer at his law office in Avon, South Dakota at some point in 2014. As indicated in my previous affidavit, I went there to seek legal advice about possibly suing Jeff Schonebaum regarding unpaid personal loans that I had made to him.

7) Paragraph #13 of Jake Fischer's affidavit states, in pertinent part, that during our meeting in 2014: "...Defendant Mendering (sic) and I *discussed 'some debts'* that Defendant Schonebaum owed to Defendant Mendering (sic)." That information is supported by the letter that Jake Fischer sent to me on or about August 24, 2015. That letter stated, in pertinent part: "Greetings. I am an attorney over in southeast South Dakota. I believe we talked a year or two ago in my office in Avon regarding

your ***business relationship*** with Jeff Schonebaum. I am currently engaged in a lawsuit against Mr. Schonebaum, representing a client who feels he was wronged by Mr. Schonebaum in the sale of a horse." (Emphasis added)

8) Paragraph # 19 of Jake Fischer's affidavit states: "To the best of my recollection, Defendant Mendering (sic) and I did not specifically discuss this lawsuit." I agree that, during the prospective client meeting with Jake Fischer at his office in 2014, I told him about my business dealings that I had with Jeff Schonebaum. However, during that meeting Mr. Fischer did not tell me that he was, at that time, already suing Jeff Schoenbaum. I was not informed that Mr. Fischer was suing Jeff Schonebaum until I received a letter from Mr. Fischer in August of 2015. That letter, dated August 24, 2015, indicated that Mr. Fischer was "...currently engaged in a lawsuit against Mr. Schonebaum," and that he was wondering if I would call him regarding that lawsuit and Mr. Schonebaum. Again, that was the very first I had heard that Mr. Fischer was suing Mr. Schonebaum.

9) The information set forth in Paragraphs #24 and #25 of Jake Fischer's affidavit is blatantly FALSE. Those paragraphs suggest that Jake Fischer deposed Jeff Schonebaum armed with questions about me and my business relationship with Jeff Schonebaum because Mr. Fischer somehow got information about me and my business dealings with Jeff Schonebaum from his own client, Plaintiff Berggren. The fact is, Mr. Fischer got information about me and my business dealings with Jeff Schonebaum directly from me during our prospective client meeting in 2014 **before** Mr. Fischer deposed Mr. Schonebaum on January 13, 2015.

10) Paragraph 31 of Jake Fischer's affidavit states: "I told Defendant Mendering (sic) we had received information that he was involved in past business relationships with Defendant Schonebaum." He received that information directly from me during our perspective client meeting in 2014.

11) Paragraph 34 of Jake Fischer's affidavit states: "At that time, I informed Defendant Mendering that if we were unable to reach an agreement, I would likely be joining Defendant Mendering into the lawsuit as a partner of Defendant Schonebaum." That is completely FALSE. I had absolutely no idea that I could potentially be sued for Schonebaum's alleged misconduct until I was served with the Amended Complaint for this case.

Signed this the 7 day of October, 2015.

Lawrence Meendering

Subscribed and sworn on this 7th day of October, 2016.

Notary Public

[SEAL]
My Commission Expires: 1/23/17

DEEANN JANSMA
Commission Number 782306
My Commission Expires
1/23/17

28216

SANDY J. STEFFEN

Attorney at Law
PO Box 165
Gregory, South Dakota 57533

TELEPHONE: (605) 835-9334 FAX: (605) 835-9938

August 14, 2017

Shirley Jameson-Fergel
Supreme Court Clerk
500 E. Capitol
Pierre, SD 57501

RE: Berggren v. Schonebaum, #28216

Dear Ms. Jameson-Fergel:

This is to inform you that Appellee Jeff Schonebaum does not intent to file a brief in this matter.

Thank you.

Sincerely,

Sandy Steffen
cc: George Johnson attorney for Lawrence Mendering
Jake Fischer
Zach Flood attorney for John Berggren

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28216

JOHN BERGGREN,

Plaintiff,

v.

JEFF SCHONEBAUM, D/B/A
SCHONEBAUM QUARTER HORSES
And LAWRENCE MENDERING,

Defendants/Appellees.

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

The Honorable John L. Brown, Presiding Judge

REPLY BRIEF OF APPELLANTS

Jake Fischer
Scott Swier
Mike Henderson
Swier Law Firm, Prof. LLC
P.O. Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
jake@swierlaw.com
scott@swierlaw.com
mike@swierlaw.com
Appellant/Former Attorney for Plaintiff

Zach Flood
Morgan Theeler, LLP
1718 N. Sanborn Blvd.
Mitchell, SD 57301
Telephone: (605) 996-5588
zflood@morgantheeler.com
Current Attorney for Plaintiff

George Johnson
Johnson, Pochop and Bartling Law Office
PO Box 149
Gregory, South Dakota 57533
Telephone: (605) 835-8391
george@rosebudlaw.com
Attorney for Defendant/Appellee
Lawrence Meendering

Sandy Steffen
Attorney at Law
318 Main Street
Gregory, South Dakota 57533
Telephone: (605) 835-9334
sjsteffen@goldenwest.net
Attorney for Defendant/Appellee
Jeff Schonebaum, d/b/a
Schonebaum Quarter Horses

Notice of Appeal filed April 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Appellee Lawrence Meendering ("Appellee") focuses the majority of his brief on the actions that led to Appellant attorney Fischer's ("Appellant") ultimate disqualification from the underlying action. The facts provided by Appellee are, of course, one-sided. Appellee has distorted and misrepresented the narrative of the underlying litigation in order to misconstrue the issue on appeal. The trial court's Memorandum Opinion adopted virtually none of the allegations offered in Appellee's brief; indeed, the trial court's analysis of the issue did not require the facts now proffered by Appellee. Since the issue on appeal does not require a correction or recitation of all of those misrepresented facts, Appellant will not lengthen its reply to provide one. Suffice to say that Appellant agrees that Apellee Meendering was likely a "prospective client" under South Dakota Rule of Professional Conduct 1.18, but Appellant disputes the allegation that Appellant received any information which could have been significantly harmful to Appellee Meendering in the litigation, per that same rule.

Regardless, the fact is the trial court disqualified Appellant Attorney Fischer from this litigation using its best judgment and in consideration of the South Dakota Rules of Professional Conduct. However, that issue is not on appeal. The issue on appeal is the trial court's award of attorney fees as a sanction for an ethics violation and, in Appellant's view, its lack of authority to make such an award.

Appellee has failed to address any of Appellant's arguments based in law while attempting to create a new grant of authority under which South Dakota courts might award attorney fees. Appellants contend that South Dakota law and precedent does not support such a claim and that the trial court's award of attorney fees should be reversed.

ARGUMENT

A. The "Other Litigation" authority.

Appellant addressed the trial court's *Jacobson* "other litigation" reasoning in its initial brief. *Jacobson v. Leisinger*, 2008 S.D. 19, 746 N.W.2d 739. Appellee has made no legal argument counter to the analysis offered in Appellant's initial brief. Appellee has cited no statutory authority or precedent which would support extending the "other litigation" language found in *Brown, Jacobson, Grand State,* or *Foster* (all "recovery of property" type cases) to anything other than "recovery of property" type cases. Again, the award of attorney fees in *Jacobson* was an additional "element of damage" under a conversion claim - a "further pecuniary loss" incurred in Jacobson's efforts to recover her property, contemplated under the Restatement (Second) of Torts's discussion of conversion of property. *Id.* at ¶14. (citing *State v. Taylor,* 506 N.W.2d767,768 (Iowa 1993) (citing RESTATEMENT (SECOND) OF TORTS § 927(2)(B) (1977).

To reiterate, in this case once the Court had made a decision to disqualify Appellant, neither Appellant nor his client made any action to obstruct any further

proceedings. Appellant simply followed the ordinary procedural steps to litigate the issue of whether he should be disqualified from the case. In *Jacobson*, the wrongful party refused to return property to the complaining party, even after a formal court order. Attorneys fees were justified in that conversion litigation because the wrongful party caused the complaining party "further pecuniary loss" by requiring a continued legal pursuit of the property by its "indefensible," "unlawful" actions.

B. Attorney fees as a sanction is not the appropriate redress for a perceived violation of the South Dakota Rules of Professional Conduct.

At the outset of his attorney fee analysis, Appellee states there is no statutory authority which authorizes courts to sanction attorneys for violating the South Dakota Rules of Professional Conduct. Having stated this premise, Appellee then concludes that in this instance the trial court has the authority to sanction Appellant for violating the South Dakota Rules of Professional Conduct.

Flatly stated, Appellee argues for a brand new grant of authority for the award of attorney fees. Appellee argues that if the trial court determines a violation of the Rules of Professional Conduct has occurred, then the trial court may award attorney fees as it sees fit. Aside from the "other litigation" argument addressed above, Appellee provides no authority for this argument, either in statute or case law. Indeed, it does not appear that even the trial court's opinion put forth such an argument.

Appellant analyzed SDCL 16-19, "Attorney Discipline," in its initial brief and found no authority for the award of attorney fees as a disciplinary measure. SDCL 16-19. Appellee has provided no response to this analysis. From a policy perspective, if attorney fees were awarded for every violation of the Rules of Professional Conduct, attorneys would surely begin to wield the threat of disciplinary complaints to coerce opposing counsel into a certain course of conduct on issues – such as the one at hand – that are admittedly close, difficult judgment issues.

Appellee's argument for a new grant of authority to award attorney fees to the trial courts should be rejected. A grant of authority of this magnitude, using authority from a narrow and defined area of law (conversion/recovery of property) would completely reshape the Court's precedent concerning the award of attorney fees. Further, such a grant of authority would remove the role of attorney discipline from the Disciplinary Board of the State of South Dakota. The Disciplinary Board has investigated the allegations in this matter, has allowed a formal space for due process, and has made its decision. This authority to discipline has, of course, been statutorily granted to the Board under SDCL 16-18. SDCL 16-18.

CONCLUSION

Appellee has contributed no law or precedent on which he bases his argument for the award of attorney fees as a sanction. Appellee misconstrues the facts in this matter to paint his most sympathetic picture. From there, Appellee relies on these misconstrued facts – not on any legal authority – in asking the court to consider an entirely new grant of authority to the trial court concerning the award of attorney fees.

For the reasons set forth herein, Appellant respectfully submits that the trial court erred in awarding Defendant Meendering attorney's fees as a sanction against Appellant for allegedly violating the Rules of Professional Responsibility. Appellant submits that the trial court's Order for Attorney Fees in the sum of $6,416.18 against Attorney Fischer should be reversed.

Dated this 28th day of August, 2017.

SWIER LAW FIRM, PROF. LLC

/s/ Jake Fischer

Jake Fischer

Scott R. Swier

Michael A. Henderson
PO Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
Facsimile: (605) 286-3219
jake@swierlaw.com
scott@swierlaw.com
mike@swierlaw.com

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 1024 words and 5578 characters (not including spaces).

/s/ Jake Fischer
Jake Fischer

CERTIFICATE OF SERVICE

Jake Fischer, Appellant and former attorney for Plaintiff John Berggren, and pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on September 6, 2017, I caused the following documents:

- **Appellant's Reply Brief (word format)**

to be filed electronically with the Clerk of the South Dakota Supreme Court via email and that the original and two hardcopies of these documents were mailed by United States Mail, postage prepaid, to:

Shirley Jameson-Fergel
Clerk – South Dakota Supreme Court
500 East Capitol
Pierre, South Dakota 57501
SCClerkBriefs@ujs.state.sd.us

The undersigned further certifies that the above documents were also emailed to the following attorneys:

Sandy Steffen
Attorney at Law
318 Main Street
Gregory, South Dakota 57533
Telephone: (605) 835-9334
sjsteffen@goldenwest.net
Attorney for Defendant Jeff Schonebaum d/b/a Schonebaum Quarter Horses

George Johnson
Johnson, Pochop and Bartling
P.O. Box 149
Gregory, South Dakota 57533
Telephone: (605) 835-8391
george@rosebudlaw.com
Attorney for Defendant Lawrence Meendering

Zach Flood
Morgan Theeler, LLP
1718 N. Sanborn Blvd.
Mitchell, SD 57301
Telephone: (605) 996-5588
zflood@morgantheeler.com
Current Attorney for Plaintiff John Berggren

SWIER LAW FIRM, PROF. LLC

____/s/ *Jake Fischer*_____
Jake Fischer
Mike Henderson
Scott Swier
PO Box 72
Corsica, SD 57328
Telephone: (605) 946-5096
Facsimile: (605) 842-3375
jake@swierlaw.com
mike@swierlaw.com
scott@swierlaw.com

Appellent/Former Attorney for Plaintiff John Berggren