IN THE SUPREME COURT
STATE OF SOUTH DAKOTA
APPEAL NO. 30782

SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON AND DICKSON LAW OFFICE
Plaintiff/Appellee.

v.

BILL THOVSON,
Defendant/Appellant.

BRIEF OF APPELLANT BILL THOVSON

APPEAL FROM THE THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS E. HOFFMAN
CIRCUIT COURT JUDGE

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Notice of Appeal filed on August 6, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOUTH DAKOTA CASES

OTHER CASES

SOUTH DAKOTA STATUTES

OTHER STATUTES

OTHER RULES

PRELIMINARY STATEMENT

Citations to the record as reflected by the Court's Index are designated with "R." followed by the associated page number per the Index. Citations to the Summary Judgment Hearing are designated with "Tr." followed by the page number and line cited. (E.g. Tr. 14, 12-16). Citations to the Appendix are designated as "App." and the designated page number.

JURISDICTIONAL STATEMENT

This appeal arises from the final Order On Motions For Summary Judgment and Motion For Order S.D.C.L. § 15-6-67 and Judgment of July 8, 2024, App. 1, as amended by the District Court's Order On Motions For Summary Judgment and Motion For Order S.D.C.L. § 15-6-67 and Judgment and Order Taxing Costs. App. 2. Appellant Bill Thovson ("Thovson") timely filed his Notice of Appeal on August 6, 2024. R. 1370.

The District Court's Order and Judgment is appealable, and this Court has Jurisdiction to hear the appeal, pursuant to S.D.C.L. § 15-26A-3(1) and S.D.C.L. § 15-26A-4.

REQUEST FOR ORAL ARGUMENT

The issues presented in this appeal appear to be matters of first impression in the State of South Dakota. As such, oral argument may be valuable to the Court and Thovson respectfully requests that oral argument be heard.

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN APPLYING SOUTH DAKOTA LAW TO THIS CASE?

With no explanation, the circuit court applied South Dakota law to a contract entered into in South Dakota but which dealt solely with a North Dakota matter.

A. S.D.C.L. § 53-1-4
B. *O'Neill Farms, Inc. v. Reinert*, 2010 S.D. 25, ¶ 12, 780 N.W.2d 55
C. *Briggs v. United Services Life Ins. Co.*, 80 S.D. 26, 117 N.W.2d 804, 807 (S.D. 1962)
D. *South Dakota Wheat Growers Assoc. v. Chief Industries, Inc.*, 337 F. Supp. 3d 891, 902 (D.S.D. 2018) (non-binding persuasive authority only)

II. AS A MATTER OF LAW, DOES AN ATTORNEY'S WITHDRAWAL FROM REPRESENTATION WITHOUT "GOOD CAUSE" BECAUSE HIS CLIENT WILL NOT SETTLE THE CASE PRECLUDE THE COLLECTION OF FEES UNDER A WRITTEN REPRESENTATION AGREEMENT?

Fully apprised of the facts, and without citation to a statute or case law, the circuit court granted Appellees Turbak Law Office, P.C., Seamus Culhane, Thomas Dickson and Dickson Law Office's (hereinafter collectively referred to as "Turbak") Motion For Summary Judgment presumably deciding that an attorney's withdrawal is for good cause if done because his client will not settle a case.

A. S.D.C.L. § 16-18-A-1.2(a)

B. *Melstad v. Kovac,* 2006 S.D. 92, ¶ 12, 723 N.W.2d 699

C. *In re Petition for Distribution of Attorney's Fees Between Stowman Law Firm P.A. and Lori Peterson Law Firm*, 855 N.W. 2d 760 (Minn. App. 2014) (non-binding, persuasive authority only)

D. *Auguston v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 663 (5th Cir. 1996) (non-binding persuasive authority only)

III. DOES A CIRCUIT COURT HAVE AUTHORITY TO REVIEW THE WORK OF AN ATTORNEY PURSUANT TO A CONTINGENT FEE AGREEMENT TO MAKE A DETERMINATION AS TO WHETHER OR NOT THE COLLECTED FEES ARE INDEED REASONABLE?

The Circuit Court held Turbak's fees were not unconscionable with little to no explanation.

A. S.D.C.L. § 16-18-A-1.5(a).
B. *In re Dorothy*, 2000 S.D. 23, ¶ 32, 605 N.W.2d 493
C. *In re Kunkle*, 88 S.D. 269, 218 N.W.2d 521, 527 (S.D. 1974)
D. *Ofstad v. Beck*, 65 S.D. 387, 274 N.W. 498, 503 (S.D. 1937)

IV. DID THE CIRCUIT COURT ERR IN FINDING THAT THE ACTIONS OF THE PARTIES DID NOT RESCIND THE CONTRACT?

The circuit court ruled that Thovson's conduct did not rescind the contract at issue.

A. N.D.C.C. § 9-08-08
B. N.D.C.C. § 9-08-09
C. S.D.C.L. § 53-11-2 through § 53-11-5

V. DID THE CIRCUIT COURT ERR IN ITS DETERMINATION THAT THOVSON DID NOT PRESENT A CLAIM FOR BREACH OF FIDUCIARY DUTY?

The circuit court ruled that Thovson did not show evidence of breach of fiduciary duty.

A. *Slota v. Imhoff and Associates, P.C.*, 2020 S.D. 55, 949 N.W.2d 869

B. *Rice v. Neether*, 216 ND 247, ¶ 15, 888 N.W.2d 749.

VI. DID THE CIRCUIT COURT ERR IN ITS DETERMINATION THAT THOVSON HAD NO CLAIM FOR DECEIT?

The circuit court ruled that Thovson did not prove deceit.

A. S.D.C.L. § 16-18-26
B. *Piner v. Jensen*, 519 N.W.2d 337 (S.D. 1994)

STATEMENT OF THE CASE

Thovson's spouse, Paula, was tragically killed on July 28, 2020, when a driver under the influence of pain killers and distracted by texting his father, blew through a stop sign and caused a motor vehicle crash in LaMoure County, North Dakota. See Exhibit C of Complaint, R. 2. Seven days later, on August 4, 2020, Thovson contacted Seamus Culhane, an attorney with Turbak Law, to help secure crash-scene evidence. To that end, staff at Turbak contacted the North Dakota State Highway Patrol and other potential witnesses on August 5, 2020. On August 6, 2020, Turbak sent out four anti-spoliation letters and advised National Farmers Union Property and Casualty Company ("NFUPCC") that they had been retained. R. 542, App. 4.

On August 7, 2020, Thovson and Culhane met for the first time. At this meeting, Thovson executed a Legal Services Agreement, referred to in the litigation as LSA-1. Due to the fact that Culhane knew this was a North Dakota case, and acknowledged to Thovson that he was not licensed in North Dakota, Culhane sought to associate with Thomas Dickson of Dickson Law in Bismarck, North Dakota. Thereafter, on August 27, 2020, a second Legal Services Agreement, LSA-2, was executed between Thovson, Turbak, and Dickson. R. 34.

With very little to no legal work being performed (certainly no legal work which could possibly be thought of as novel or complex) and no evidence that NFUPCC had ever heard of Culhane, Turbak, or Dickson, prior to receiving the retention letter, let alone evidence that NFUPCC held Turbak in high esteem,

NFUPCC offered the full policy limits of the vehicle's owner, Charles Johs, 17 days after LSA 1 was executed. Two days later, 19 days after LSA 1 is signed, NFUPCC, also the insurer for the driver, Dean Johs, offered full policy limits as well. R. 542, App. 4; R. 1004, App. 7, R. 1322, App. 8. At the time policy limits were tendered, Turbak hadn't put in a claim or made a demand.

LSA 1, LSA 2, and the South Dakota's Rules of Professional Conduct clearly state that the decision to settle a case is held by the client, Thovson. Despite Thovson's insistence from the beginning that he wanted to hold the Johs' responsible and desired a trial, Turbak and Dickson immediately began pushing Thovson to settle once the insurance company offered to pay. Thovson had already indicated in his first meeting with Turbak that this case was not about the money; he wanted to hold the Johs' responsible. Thovson chose not to settle and as a result, Turbak withdrew from the case citing the contract language of LSA 1 and LSA 2. R. 542, App. 4; R. 1004, App. 7, R. 1322, App. 8. Thereafter, Turbak placed an attorney's lien on the proceeds to be received from Thovson.

Turbak contends that this is a simple breach of contract case. It is not. The material issue before the Court is whether or not the obligations of the South Dakota Rules of Professional Conduct can be contracted away between a lawyer and their client. Thovson asserts that they cannot be.

With no factual question regarding the material facts of this case, both sides moved for summary judgment. The Third Judicial Circuit, Coddington County, the Honorable Judge Douglas E. Hoffman presiding, heard argument on

July 1, 2024. At the conclusion of the hearing, Judge Hoffman adopted the argument of Turbak and stated that he was granting Turbak's Motion For Summary Judgment and denying Thovson's. On July 8, 2024, the circuit court issued its Order. R. 1357.

This appeal timely followed.

STATEMENT OF FACTS

On July 28, 2020, Bill Thovson's spouse, Paula Thovson, was tragically killed in an automobile crash on Highway 281 in Edgeley, ND, when a driver pulling a gooseneck trailer, blew through a stop sign and collided with her vehicle. See Exhibit C of Complaint. R. 2, pp. 13-21.

On August 4, 2020, Thovson contacted personal injury and wrongful death Attorney, Culhane of Turbak. See Exhibit SC 43 from the Deposition of Seamus Culhane; Turbak Response to Thovson Interr. 9 and 10. R. 542, App. 4.

On August 5, 2020, Lisa Ronke of Turbak Law had a phone call with North Dakota State Patrolman Paul Sova. See SC9. On August 5, 2020, Lisa Ronke also spoke with representatives of Ost Body and Paint. See SC10. Finally, on August 5, 2020, Lisa Ronke spoke with Paul Ostendorf of Allied Energy. See SC 11. R. 542, App. 4.

On August 6, 2020, Turbak Law Office sent four, form anti-spoliation letters to Ost Body and Paint, Allied Energy, Dean Johs, and Charles Johs. See SC 13, 14, 15, and 16. R. 542, App. 4.

The first in-person meeting between Culhane and Thovson occurred on August 7, 2020. See Turbak Response to Thovson Interr. 10. At that meeting, Culhane met with Thovson and his daughter, Ariana, for the first time. Thovson was clear with Culhane that this case was not about the money and he wanted Johs held responsible for his wife's death. R. 998 and 1002. Culhane did not indicate that in his view this was done by simply receiving a cash settlement. Furthermore, Culhane understood this involved a North Dakota fatal crash. Turbak Response to Thovson Interr. 15. R. 542, App. 4.

On August 7, 2020, Legal Services Agreement 1 is executed. See Exhibit A to Complaint. R. 2.

By August 8, 2020, Culhane advised of the need to include another personal injury and wrongful death attorney, Thomas Dickson of Dickson Law in Bismarck, ND ("Dickson"). On August 8, 2020, Culhane emailed Dickson regarding the matter. See SC 18. R. 542, App. 4.

On August 10, 2020, Lisa Ronke emailed Sean Kuklison with NFUPCC informing him of Turbak's representation in the matter. See SC 19. R. 542, App. 4.

On August 12, 2020, merely two days after Turbak's introductory email, a representative from NFUPCC emailed Culhane indicating that she did not have permission at that time to release the policy limits but that she has requested consent from Charles Johs, and that she "think[s] [they] can resolve this sooner rather than later." See SC 20. R. 542, App. 4.

On August 13, 2020, Dickson emails James Shockman, the LaMoure County State's Attorney, advising him that he, and Turbak Law, are representing Thovson in civil litigation. See DL 00051. R. 542, App. 4.

On August 24, 2020—17 days after LSA I was executed—NFUPCC offered $250,000 under Charles Johs' liability insurance policy. See SC 24. R. 542, App. 4.

On August 26, 2020—19 days after LSA I was executed—NFUPCC made a second offer of policy limits, under Dean Johs' policy, in the amount of $250,000. See SC 26. R. 542, App. 4.

On August 27, 2020, without telling Thovson that the second $250,000 tender from Dean Johs had been received, Culhane requested that Thovson execute LSA 2. See Exhibit B to Complaint. R. 2. Prior to LSA 2 being finalized, on August 20, 2020, "Bailee," a paralegal with Dickson Law, requests that additional language be placed in LSA 2 in order to comply with North Dakota. See SC 4. R. 542, App. 4.

LSA 1 and LSA 2 state that the right to settle the case is held by Thovson.

On August 28, 2020, Brad Beehler, North Dakota counsel for NFUPCC, emails Culhane with a Release of All Claims. See SC 28. The Release is not shared with Thovson. On August 31, 2020, Culhane advises Beehler they are looking for more assets. Id. R. 542, App. 4.

On August 31, 2020, five days after the tender of all available policy limits, and four days after Thovson executed LSA 2 at the request of Culhane, Thovson

is informed that all policy limits have been tendered. See Turbak Response to Thovson Interr. 37. R. 542, App. 4.

Per Dickson's hand-written notes, he makes no analysis of the case until September 2, 2020, seven days after all policy limits have been tendered. R. 542, App. 4.

On October 8, 2020, Culhane emails Dickson and tells him he doesn't want to have to go forward with a lawsuit. But, "we have a valid-as-hell suit against Charles and Dean." See SC 35. R. 1322, R. 8.

On November 20, 2020, Thovson, Culhane, and Dickson met in Watertown, South Dakota. At that time, Culhane and Dickson tried to convince Thovson to settle. At 3:18 p.m., Thovson emailed Culhane and Dickson, thanked them for that morning's meeting, and advised them that he was pressed for time and would "carefully review your narrative" over the weekend. See SC 38. R. 1322, R. 8.

On December 8, 2020, Culhane emails Thovson, informs him that Tom (Dickson) is going to tell the insurance company that Thovson will settle his claim. On December 9, 2020, Thovson responds stating, "I will not agree to sign anything, at this time." R. 542, App. 4.

On January 19, 2021, Culhane provided Thovson with written notice that he and Dickson were withdrawing as Thovson's counsel due to Thovson's refusal to accept the settlement offer. See Exhibit C to Complaint. R. 2.

Turbak and Dickson cannot produce any contemporaneously kept records of their firm's time spent on this matter.

STANDARD OF REVIEW

This Court reviews a circuit court's entry of summary judgment *de novo*. *Bohn v. Bueno*, 2024 S.D. 6, ¶ 12, 3 N.W.3d 441, 448.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN APPLYING SOUTH DAKOTA LAW TO A CONTRACT FOR SERVICES TO BE PERFORMED EXCLUSIVELY IN NORTH DAKOTA.

South Dakota law provides that, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of where it is made." S.D.C.L. § 53-1-4; *O'Neill Farms, Inc. v. Reinert*, 2010 S.D. 25, ¶ 12, 780 N.W.2d 55; *South Dakota Wheat Growers Assoc. v. Chief Industries, Inc.*, 337 F. Supp. 891 (D.S.D. 2018). Additionally, the Court may consider the intention of the parties when considering the choice of law to be applied to their contract. *Briggs v. United Services Life Ins. Co.*, 117 N.W.2d 804, 807 (S.D. 1962). Based upon these considerations, the circuit should have applied the substantive law of North Dakota to this action.

It is irrefutable that Turbak, Dickson, and Thovson all intended their agreements to be performed in North Dakota. First and foremost, if the LSAs were not to be performed in North Dakota, there was no reason whatsoever for Turbak to search for, discover, and ultimately bring Dickson, a North Dakota licensed attorney not licensed in South Dakota, onto the case. Indeed, the only reason Turbak brought Dickson onto the case was because Culhane was not licensed to practice law in North Dakota. Clearly, Turbak fully expected this to be a North Dakota case. Second, as Dickson testified, R. 1280, his only changes to LSA 2 were to include specific language regarding the split of attorney's fees which he believed to be required under North Dakota law. Third, pursuant to

Turbak's purported attorney lien, specifically the Sworn Statement of Contractual And Statutory Attorneys' Lien (SDCL 16-18-21 and SDCL 44-2-3), App. 17 and 18. Culhane swore on oath that the action for the wrongful death litigation, "will be properly venued for litigation in LaMoure County, North Dakota." Fourth, with respect to the wrongful death litigation, it is undisputed that the fatal crash occurred in LaMoure County, North Dakota; the physical evidence of the fatal crash was located in North Dakota; any and all witnesses to the deadly crash, its aftermath, and investigation were located in North Dakota; and the defendants, Charles Johs and Dean Johs, were located in North Dakota. Finally, it is undisputed that Dickson executed LSA 2 in North Dakota.

As the evidence clearly indicates that the wrongful death litigation was to be performed in North Dakota, North Dakota law should apply. Plaintiffs decision to withdraw does not change these facts.

II. AN ATTORNEY WITHDRAWING FROM REPRESENTATION BECAUSE HIS CLIENT WILL NOT SETTLE HAS NOT WITHDRAWN FOR "GOOD CAUSE" AND IS PRECLUDED FROM PAYMENT FOR SERVICES RENDERED.

Per the circuit court's Order, "[d]efendant's claim for breach of contract fails as a matter of law because Defendant did not present any evidence of a breach on the part of Plaintiffs." R. 1357, App. 1. To the contrary, it is undisputed that Plaintiffs withdrew as legal counsel to Thovson because he would not settle per their advice. Despite well settled law to the contrary, the circuit court questioned whether it was, in fact, Thovson's right to settle his case:

Attorney Gust:	And just like that it's clear in the professional rules of responsibility that settlement is always the province of the client.
The Court:	Okay. Where does it say that?
Attorney Gust:	In the rules? [sic]
The Court:	Yeah.
Attorney Gust:	I can't give you a specific cite, Your Honor.
The Court:	Okay. So you are paraphrasing.

Tr. 24, 17-25.

Despite this exchange and the circuit court's confusion, it is indeed well settled law that the determination of whether to settle a claim, or not, is that of the client. S.D.C.L. § 16-18-A-1.2(a); *Melstad v. Kovac*, 2006 S.D. 92, ¶ 12, 723 N.W. 2d 699 (holding, "[w]hile an attorney "may negotiate for and advise settlement of controversy," the decision to settle belongs to the client"); N.D.R. Prof. Resp. 1.2(a); *Hauser v. Security Credit Co.*, 266 N.W. 104, 106 (N.D. 1936). When a lawyer withdraws because his client won't settle, such withdrawal is not in good faith and the lawyer is not entitled to any contingency fee. Demanding payment when you withdraw without good cause is a violation of the contract. Although this appears to be an issue of first impression in the State of South Dakota, decisions from around the country support Thovson's argument.

The Minnesota Court of Appeals had the opportunity to analyze similar issues in *In re Petition for Distribution of Attorney's Fees Between Stowman Law Firm, P.A. and Lori Peterson Law Firm*, 855 N.W.2d 760 (Minn. App. 2014). In *Stowman*, Stowman was retained, via a contingency fee agreement, to represent

the interests of C.D. in a medical malpractice claim. Id at 760-761. Ultimately, Stowman obtained a settlement offer of $100,000. Id at 761. C.D. rejected the offer. Eventually, Stowman withdrew as legal counsel, the case was settled with new counsel, and Stowman sought an award of attorney's fees. Because the district court ruled that Stowman failed to establish "good cause" for his withdrawal, Stowman was awarded no legal fees and was reimbursed for expenses in the amount of $8,272.69. Id. Stowman appealed.

In affirming the decision of the district court, the Minnesota Court of Appeals examined Stowman's basis for withdrawing. Although Stowman articulated multiple, post-hoc reasons for his withdrawal, the Court of Appeals relied upon his withdrawal communication with C.D. which articulated the sole reason for his withdrawal as being her unwillingness to settle the case. As this was an issue of first impression in Minnesota, the Court thoroughly analyzed cases from other jurisdictions. Id at 763-764. Being persuaded by the analysis of these courts, the Minnesota Court of Appeals ruled that the refusal to settle a case "is not a justifiable ground for an attorney to withdraw from a contingency-fee case because it is generally the client's right to reject settlement." Id at 765-766.

Not only did the Court reject Stowman's claim for his contingency fee, it also rejected his claim for payment in *quantum meruit*. Id. This ruling is in accord with jurisprudence from around the country. See e.g., *Auguston v. Linea Aerea Nacional–Chile S.A.*, 76 F.3d 658, 663 (5th Cir.1996) (stating that "the

cases are in almost universal agreement, that failure of the client to accept a settlement offer does not constitute just cause for a withdrawing attorney to collect fees"); *Hardison v. Weinshel,* 450 F.Supp. 721, 722–23 (E.D.Wis.1978) (concluding that attorney's withdrawal after client refused settlement offer was unjustifiable); *In re Estate of Falco,* 188 Cal.App.3d 1004, 1018, 233 Cal.Rptr. 807 (1987) (determining that because "[a] client's right to reject settlement is absolute," his or her "exercise of [that] right cannot constitute cause for the purpose of awarding attorneys' fees"); *Ausler v. Ramsey*, 73 Wash.App. 231, 868 P.2d 877, 881 (1994) (stating that a client's refusal to settle does not justify an attorney's withdrawal from a contingency-fee case).

The facts of *Stowman* are similar to the facts in the case at bar. In his January 19, 2021, letter to Thovson, Culhane informed Thovson that Turbak and Dickson were withdrawing as counsel. See Exhibit C of Complaint. R. 2, pp. 13-14. Per Culhane, "we obtained an offer that we believe to be fair and reasonable and you have refused to accept that offer and do what is necessary to complete the settlement. The agreement provided that we would be allowed to withdraw from your representation and maintain a lien protecting our interests, which we have now done." Id. Culhane then explains to Thovson that he is complying with Rule 1.16 of the Rules of Professional Conduct. Culhane concluded the letter by again articulating the basis for withdrawing as Thovson's refusal to settle. No other basis is provided at that time. Thereafter, Thovson was left unrepresented.

The evidence is clear. Turbak and Dickson withdrew because Thovson would not settle his case. Their withdrawal, as a matter of law, was not done in good faith as it is always the client's prerogative to accept settlement or not. Turbak and Dickson's bad faith withdrawal precludes the recovery of any legal fees based upon their contingency fee agreement as well as *quantum meruit.*

Despite the litany of case law to the contrary, the circuit court ruled in Turbak's favor because "the contract said they could do that." Tr. 23, 22. In ruling in favor of Turbak, the circuit court has tacitly approved an erroneous legal position that attorneys may contract away their obligations under South Dakota's Rules of Professional Conduct. In ruling in Turbak's favor, the circuit court silently approved Turbak's contract language ("If the client refuses to accept an offer that is, in the opinion of Turbak Law Office, P.C. fair and reasonable, Turbak Law Office, P.C. has the right to withdraw from representation of the client on the matter and retain a lien against the claim for costs incurred in pursuit of the claim and for fees equal to 33.33% (1.3) of that offer . . . .", See Exhibit B of Complaint. R. 2, pp. 11-12 and actions which are a direct violation of S.D.C.L. § 16-18-A-1.2(a) because it punishes the client for exercising their sole discretion regarding settlement.

To illustrate the serious implications this decision may have, the Court should consider such a ruling in the context of the attorney-client privilege. S.D.C.L. § 16-18-A-1.6. Per the circuit court, Tr. 23-24, because Turbak's contract allowed withdrawal, that was essentially an end-all to Thovson's

argument. What if Turbak's contract allowed Turbak to breach the attorney-client privilege? Hypothetically, what if Turbak had a contract provision that stated in the event the client won't settle, Turbak is authorized to withdraw. And, not only are they authorized to withdraw, but upon withdrawal Thovson waives the attorney-client privilege and must allow Turbak to discuss the case with any third-party it deems necessary. Thovson is hard-pressed to believe any court, in any jurisdiction, would allow such a contract provision.

Turbak's withdrawal from representation was because Thovson would not agree to settle his case. Despite the contract language, courts universally hold that such a withdrawal is not for "good cause" and, if necessary, strike that provision. In this matter of first impression in South Dakota Thovson respectfully urges this Court to embrace the reasoning of the courts cited herein and rule as a matter of law Turbak's withdrawal was not for "good cause" and such withdrawal precluded the recovery on fees in this case.

III. IN THE EVENT THE COURT DECIDES THAT WITHDRAWAL WAS FOR "GOOD CAUSE" AND UPHOLDS THE CONTRACT, TURBAK'S FEES SHOULD BE REDUCED BECAUSE THEY WERE NOT REASONABLE.

The evidence in this matter is undisputed. Without performing any complex, novel, or in fact meaningful legal work whatsoever, and providing no evidence that the case was settled because of their involvement, Turbak asserts that it is entitled to over $170,000 in legal fees. These legal fees were purportedly earned simply because the Johs' insurance company tendered policy limits 17 days and 19 days after LSA 1 was signed. In other words, the circuit

court adopted Turbak's contention that it was unnecessary for Turbak to perform legal work and face any risk based upon their contingency before it was entitled to a percentage of Thovson's recovery. Respectfully, that is not the law, should not be the law, and Turbak's purported fees, as a matter of law, should be struck down as patently unreasonable.

South Dakota courts have "long ago taken the position that [courts] will not sit idly by while clients are financially abused by officers of the bar . . . ." *In re Dorothy*, 2000 S.D. 23, ¶ 32, 605 N.W.2d 493. Citing *Ofstad v. Beck*, 65 S.D. 387, 274 N.W. 498, 503 (1937), the South Dakota Supreme Court aligned itself, "with those courts which hold that when a lawyer is bargaining with a prospective client, if the provision made for his compensation is so unreasonable and excessive . . . the contract should not, and will not, be upheld." Id; *Simon v. Chicago, Milwaukee & St. P. Ry. Co.*, 177 N.W.107, 108 (1920); *Clark v. General Motors, LLC*, 161 F. Supp.3d 752, 758 (W.D. Mo. 2015) (stating that a contract prohibited by law is void). Therefore, the question on appeal is whether or not, in light of the facts and circumstances of the record in this case, the purported fee of $170,049.81 is unreasonable and excessive.

Courts have the inherent power to regulate the practice of law. See e.g. *In re Kunkle*, 88 S.D. 269, 218 N.W.2d 521, 527 (S.D. 1974); *Perius v. Nodak. Mut. Ins. Co*, 2012 ND 54, ¶ 34, 813 N.W.2d 580 (concurring opinion). This includes the inherent right to determine the reasonable amount of legal fees. Indeed, the South Dakota Supreme Court, and the trial courts, "may be considered experts

upon the value of legal services." *Stanton v. Saks*, 311 N.W.2d 584, 585 (S.D. 1981); *Wahl v. Northern Imp. Co.*, 2011 ND 146, ¶ 17, 800 N.W.2d 700 (holding that trial courts are experts in determining attorney fee issues). South Dakota, pursuant to Rule 1.5 of its Professional Rules of Conduct, S.D.C.L. § 16-18-A-1.5, requires that attorney's fees must be reasonable based upon the work performed. *In re Dorothy*, 2000 SD 23, ¶ 21; *In re Hoffman*, 2013 ND 137, ¶ 25, 834 N.W.2d 636 . While the contingent nature of a fee is one element that a court may consider in determining whether the overall fee is reasonable, contingent fee cases are not excepted from the general rule of reasonableness in South Dakota.

To the contrary, court decisions from around the country conclusively establish that fees collected in contingency fee cases must be reasonable based upon the actual work performed. See e.g. *In re Swartz*, 686 P.2d. 1236, 1243 (Ariz. 1984) (stating that, "[w]e do not believe, however, that recognition of the propriety of the initial fee arrangement gives the lawyer carte blanche to charge the agreed percentage regardless of the circumstances which eventually develop"); *Munger, Reinschmidt & Denne, LLP v. Lienhard Plante*, 940 N.W.2d 361, 367 (Iowa 2020) (identifying exceptions to general rule on contingent fees includes the collection of large fees "unearned by either effort or a significant period of risk" are unreasonable (internal citations omitted); *Clark*, 161 F. Supp. 3d at 762 (determining that reasonableness of contingent fees is determined at the conclusion of the case); *In re Hoffman*, 572 N.W.2d 904, 908 (Iowa 1997) (holding that while fee arrangement may have been reasonable when entered

into, changes in the extending circumstances, made a 1/3 contingency fee unreasonable and excessive); *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1109 (3rd Cir. 1979) (stating courts have the inherent power to examine contingency fee cases); *Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. 1976) (holding that under a court's general authority it, "may and should scrutinize contingent fee contracts and determine the reasonableness of the terms thereof").

In granting Turbak's fees, the circuit court did not undertake any scrutiny of the fees charged under the circumstances of the case. In ruling in favor of Turbak, the circuit court stated, "[w]ell, I mean, I don't think it is unconscionable." Tr. 41, 12-13. Despite the evidentiary record that NFUPCC never even challenged liability or potential damages, the circuit court further stated, "you haven't presented anything to me that suggests that it wasn't, that it was unconscionable." Id at 16-18. The circuit's court ruling in erroneous for three reasons.

First, the burden is not upon Thovson to show that the fees he was charged were unreasonable. When challenged, the attorney asserting their right to a fee, "is required to produce competent evidence to demonstrate the value of his services." *In re Dorothy*, 2000 S.D. ¶ 27. That is, it is not upon Thovson to prove to the circuit court that the fee charged was too much, it is upon Turbak to prove their fees are appropriate. The circuit court erroneously placed the burden of persuasion on Thovson.

Second, the standard of "unconscionability" used by the circuit court is the incorrect legal standard. South Dakota has never articulated a position where the determination of attorney's fees was considered in the context of conscionability. To the contrary, under South Dakota precedent, attorney's fees must be reasonable based upon the work performed. *In re Dorothy*, 2000 SD 23; *Sioux Falls v. Kelley*, 513 N.W.2d 97, 111 (S.D. 1994).

Finally, there was ample evidence presented to the circuit court that the fees were unreasonable in light of the facts and circumstances of this case, and in consideration of Rule 1.5 on fees. The fee of $170,049.81 asserted in this case was inherently unreasonable. Policy limits from Charles Johs and Dean Johs were provided to Thovson within 30 days of the tragic death of his wife Paula. R. 1367. At the time that these limits were tendered, very little legal work was done by Turbak. Work provided was purely administrative in nature. For example, staff at Turbak had sent out four anti-spoliation letters. Turbak informed the Johs's insurance companies that they had been retained. A crash investigator had been retained, and released, in short order. Dickson's hand-written notes indicate he had not even begun to analyze the case until almost one week after the policy limits were tendered. By the time that policy limits had been tendered, little administrative time and labor from Turbak or Dickson had been expended and no complex or novel services had been provided.

It is not shocking that little time had been spent on this case when policy limits were tendered. There was nothing novel or difficult about this case. The

state patrol investigation was conclusive that Dean Johs ignored traffic signs, was speeding, blew through a stop sign, and caused Paula Thovson to "t-bone" his truck and trailer. R. 542, App. 4, p. 16; all of which was caught on video from a convenience store located on the intersection of where the fatality occurred. Turbak, nor Dickson, even had to contest any factual or legal issues in this case. Indeed, the insurance company for Charles Johs and Dean Johs did not raise a single defense to payment of these claims.

Further, this was the first time that Turbak represented Thovson. Despite his prior attempts to retain Turbak for business related issues, Turbak never represented Thovson. Turbak's representation did not require Turbak to decline other cases; there were no immediate time crunches, e. g. statute of limitations, in taking on this matter; and, the results obtained, e.g. policy limit offers, had nothing to do with the work of Turbak or Dickson. In a nutshell, had Turbak and Dickson not been retained, based upon the video evidence the insurance company would have simply paid Thovson the entire amount of their policies in 29 days. Despite the fact that unconscionable fees is not the standard, it is indeed shocking that Turbak believes they should be paid over $170,000.00 for three weeks spent doing little work on a wrongful death case that contained no risk of nonpayment.

In consideration of the undisputed facts of this case, the fees charged by Turbak and Dickson were unreasonable and Turbak and Dickson failed to

provide anything to the circuit court in support of their fees. The ruling if the circuit court should be reversed.

IV. THE CIRCUIT COURT ERRED IN ITS CONCLUSION THAT THE CONTRACT FOR LEGAL SERVICES WAS VALID.

It is undisputable that the underlying action, i.e. the wrongful death of Paula Thovson, occurred in North Dakota, would be tried in North Dakota, and that North Dakota law would apply to the same. In such circumstances, North Dakota law provides special protections for contracts entered into with people suffering personal injury and wrongful death claims. Pursuant to N.D.C.C. § 9-08-09, "[a]ny person sustaining personal injuries, or in the case of the person's death, the person's personal representative, may elect at any time within six months after the date of such injury to avoid any settlement, adjustment, or contract made in connection therewith within the time mentioned in 9-08-08, by notice in writing to that effect." N.D.C.C. § 9-08-09 (emphasis added). Any contract entered into "within thirty days after the injury" is voidable. N.D.C.C. § 9-08-08; *Swenson v. Raumin*, 1998 ND 150, ¶ 13, 583 N.W.2d 102.

The reasoning for such a right, and the viability of such right, was addressed by the North Dakota Supreme Court in *Peterson v. Panovitz*, 243 N.W. 798 (N.D. 1932). Specifically:

> The object the North Dakota Legislature had in mind in enacting the statute under consideration here is quite obvious. It sought to deal with and exercise some control over the undesirable practice commonly known as "ambulance chasing." North Dakota is not the only state that has found it necessary or desirable to look for some means of control over this practice. Journal of American Judicature Society, August 1928, p. 36-40; Kelley v. Boyne, 239 Mich. 204, 214

> N. W. 316, 53 A. L. R. 273. There are two sides to the problem of ambulance chasing; on one side is *the unprofessional attorney who solicits a retainer or contract of employment to handle the claim, in personal injury cases, generally on a contingent fee basis* (Kelley v. Boyne, *supra*; In re Newell, 174 App. Div. 94, 160 N. Y. S. 275); on the other side are certain unscrupulous runners or adjusters who seek to obtain adjustments of any possible claim for damage in cases where personal injuries have been sustained in circumstances creating a basis for a claim against their employers (Gilmore v. Western Elec. Co., 42 N. D. 206, 211, 172 N. W. 111, 113). Experience has demonstrated that the two accompany and aggravate each other, each furnishing in part the reason advanced as a justification for the other. In both cases the interests of the injured party are given little or no consideration; and the agreements obtained by one class are frequently or generally as unconscionable as those obtained by the other. The records in cases which have been presented to this court bear eloquent testimony that the activities of both have resulted not only in damage to parties who have sustained personal injuries in an accident, but have resulted as well in loss and injury to the public through ill-advised, vexatious, and needless litigation. **Generally the unfortunate results could and would have been avoided if some reasonable time had elapsed after the accident before binding settlements or adjustments had been made**.

Peterson v. Panovitz, 62 N.D. 328, 243 N.W. 798, 800 (1932) (emphasis added).

Peterson is instructive in this case. Paula Thovson was tragically killed on July 28, 2020. When Thovson met with Culhane for the first time, Culhane requested that LSA 1 be executed. The same was executed on August 7, 2020, a mere nine days after Paula's death. LSA 2, which added Dickson, was signed by Thovson on August 27, 2020, day 30 after his wife's passing. By the time LSA 2 was executed, policy limits on both applicable insurance policies had already been tendered on August 24 and 26, 2020. With video evidence of the fatal crash showing Dean Johs barreling through a stop sign at a high rate of speed, there was no question as to liability in this matter.

Thovson had the statutory right to terminate his relationship with Turbak. A right neither attorney had explained to him. Turbak, within the statutory timeframe for Thovson to act, withdrew, making any further act of Thovson futile in canceling the contract. As the contract was terminated in the statutory timeframe, the contract is invalid.

V. EVIDENCE WAS PRESENTED THAT TURBAK BREACHED ITS FIDUCIARY DUTY TO THOVSON.

The attorney-client relationship is a fiduciary relationship. *Slota v. Imhoff and Associates, P.C.*, 2020 S.D. 55, ¶ 25, 949 N.W.2d 869 (stating that that "an attorney's fiduciary duty likewise grows out of the attorney-client relationship but involves a different duty than the standard of care for legal malpractice"). Fiduciary obligations owed by attorneys to clients are two-fold: 1) the duty of confidentiality; and 2) the duty of undivided loyalty. *Id.* As such, Turbak and Dickson were required to act for the benefit of Thovson and were required to give him advice upon matters within the scope of their engagement. *Rice v. Neether*, 216 ND 247, ¶ 15, 888 N.W.2d 749. Despite this fiduciary requirement, Thovson was never informed of his rights under N.D.C.C. §§ 9-08-08 and 9-08-09. In fact, Dickson, a personal liability attorney for more than 40 years in North Dakota, testified that he was unaware of these statutes until this litigation. In lieu of informing Thovson of his rights, prior to the six-month window for rescission, Turbak and Dickson withdrew as legal counsel on January 19, 2021. Thus, by their conduct, Turbak and Dickson made it impossible for Thovson to exercise his statutory rights in compliance with North Dakota public policy. The Court should

not condone attorney conduct which is at impossible odds with North Dakota public policy. Nor should the Court require Thovson to undertake a futile act, i.e. rescinding a contract, which had already been terminated by his legal counsel. The Court should deem LSA 1 and LSA 2 as void under North Dakota law.

VI. THE CIRCUIT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT AGAINST THOVSON ON HIS CLAIM FOR DECEIT.

The circuit court ruled that Thovson's claim for deceit failed as matter of law because he allegedly presented no evidence of deceit and because he presented no evidence of damages. Respectfully, the circuit court was wrong on both counts and its decision must be reversed.

As this Court is well aware, "deceit" is defined by S.D.C.L. § 20-10-2. Deceit includes, but is not limited to, the suggestion of a fact which is not true by someone who does not believe it to be true, a promise which is made without any intention of performing the same, and a fact which is not true stated by someone who has "no reasonable ground" for believing it to be true. Deceit is generally a fact question not ripe for summary judgment. *Piner v. Jensen*, 519 N.W.2d 337, 339 (S.D. 1994). With respect to summary judgment, this Court is also well aware of the off-cited standards pursuant to S.D.C.L. § 15-5-6.

With respect to the deceit issue, Thovson submitted two affidavits. R. 402 and 1002. With respect to Thovson himself, Thovson stated that he first went to Turbak to make sure the crime scene was secured. However, after listening to Culhane tell him how difficult the case was going to be with the insurance companies, he agreed to retain Turbak for the wrongful death action. Thovson,

however, informed Culhane that accountability, and not money, was the objective of any lawsuit. Culhane never informed Thovson that in his mind accountability meant the insurance company writing a check.

Additionally, Thovson's daughter, Ariana, also executed an affidavit. R. 998. Arian did not participate in the meeting but for introductions, however, she was present and listened. Araina listened to Culhane explain to her father how he hated insurance companies, how he disliked the fact they didn't make payments to people like my father, and that it would be a hard fight against the insurance company to get them to pay. Culhane told Thovson that although it wasn't easy, Turbak had a bad boy image with insurance companies, that he would beat them up, that he would hold the perpetrators responsible for killing his wife, and that despite high trial costs and the expense of litigation, this is why he does what he does. Culhane, however, never informed Thovson that once the insurance companies wrote a check, holding people responsible ended then and there.

Culhane deceived Thovson to executing the legal services agreements. Culhane talked a tough game about holding Johs responsible but never informed Thovson that simply meant getting a check from the insurance company. He also indicated that based upon his experience insurance companies don't write checks and the case would be a hard fought battle. Whether or not Culhane

believed this to be true when he made the claim is a question of fact not ripe for summary judgment.[1]

CONCLUSION

In this matter of first impression in South Dakota, Thovson respectfully requests that this Court join the majority of courts which have decided the issue and rule, as a matter of law, that an attorney who withdraws from his representation because his client will not settle a case does not withdraw for "good cause." Thovson further requests that this Court join the majority of courts which have considered the issue and hold, as a matter of law, that if an attorney does not withdraw based upon "good cause," the attorney forfeits his right to compensation for his work on the matter.

[1] Interestingly, if the facts show that Culhane in fact did believe this to be true and based his one-third contingency upon this belief, when the facts came to light and were the complete opposite of what he thought, i.e. the insurance companies offering policy limits almost immediately, this new set of facts supports Thovson's argument, *infra*, that the fees were unreasonable for the work performed by Turbak.

In the alternative, in the event the Court upholds the contract between the parties, Thovson urges this Court to rule, as a matter of law, that Turbak's fees were unreasonable in light of the facts and circumstances of the case. In this instance, the matter should be remanded solely for the purpose of conducting an evidentiary hearing to determine the actual value of Turbak's services.

Dated this 3rd day of October, 2024.

/s/ Michael L. Gust

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(Admitted Pro Hac Vice)
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Attorneys for Bill Thovson

CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 7,038 words, excluding the table of contents, table of cases, jurisdictional statement, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

/s/ Michael L. Gust
Michael L. Gust

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellant and the Appendix were served via Odyssey File and Serve upon the following:

Richard J. Thomas - *thomas@burkeandthomas.com*
Nancy J. Turbak Berry - *nancy@turbaklaw.com*

on this 8th day of October, 2024.

/s/ Mark A. Schwab
Mark A. Schwab

APPENDIX

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CODINGTON	THIRD JUDICIAL CIRCUIT
SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON, and DICKSON LAW OFFICE, Plaintiff, v. BILL THOVSON, Defendant.	14CIV23-000034 ORDER ON MOTIONS FOR SUMMARY JUDGMENT and MOTION FOR ORDER SDCL §15-6-67 and JUDGMENT

On July 1, 2024 at the Codington County Courthouse, this matter came on for hearing the following dispositive motions:

1. PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT AND ORDER UNDER SDCL §15-6-67;
2. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; and
3. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIM.

Plaintiffs were present and represented by Nancy J. Turbak Berry, Turbak Law Office, P.C., Watertown, SD and Chris Angell, Burke & Thomas, PLLP, Arden Hills, MN; Defendant was present and represented by Michael L. Gust, ABST Law, Fargo, ND. The Court, having read and considered the motions, briefs, pleadings, and filings in this matter, and having considered the arguments of counsel, IT IS HEREBY ORDERED:

1. PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT is hereby GRANTED. Judgment shall be entered against Defendant and in favor of Plaintiffs as follows: Costs advanced in the underlying claim by Turbak Law Office, P.C. in the amount of $6,516.39; Attorney's Fees in the amount of $164,494.54 (1/3 of $493,483.61 net recovery ($500,000-$6,516.39 = $493,483.61)); and Prejudgment interest from September 8, 2022 to July 3, 2024 in

the amount of $31,303.59, yielding a total Judgment of Two Hundred Two Thousand, Three Hundred and Fourteen Dollars and Fifty-Two Cents. ($202,314.52).

2. PLAINTIFFS' MOTION FOR AN ORDER UNDER SDCL §15-6-67 is hereby GRANTED and the Codington County Clerk of Courts is hereby directed to immediately release to Plaintiffs the funds previously deposited by National Farmers Union Property and Casualty Company in this action, in partial satisfaction of the above Judgment entered against Defendant.

3. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT is hereby DENIED in its entirety.

4. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIM is hereby GRANTED in its entirety on the following grounds:

a. Defendant's claim for rescission under North Dakota Century Code Sections 9-08-08 and 9-08-09 fails as a matter of law because pursuant to choice of law principles those sections are inapplicable in this matter and, even if they were applicable, Defendant failed to provide written notice of rescission within six months of Defendant's wife's death, as required;

b. Defendant's claim for rescission under North Dakota Century Code Sections 9-09-02 and 9-09-04 is deemed to be a claim for rescission under South Dakota Codified Laws Sections 53-11-2 through 53-11-5 and fails as a matter of law because Defendant did not rescind the parties' agreements promptly after discovering the facts that Defendant believes entitled him to rescind, as required;

c. Defendant's claim for actual fraud under North Dakota Century Code Section 9-03-08 is deemed to be a claim for actual fraud under South Dakota Codified Laws Section 53-4-5 and fails as a matter of law because Defendant presented no evidence of any acts committed by Plaintiffs with intent to deceive Defendant or to induce Defendant to enter into a contract and, even if he had, Defendant did not present evidence of any resulting damages;

d. Defendant's claim for deceit under South Dakota Codified Laws Section 16-18-26 also fails as a matter of law because Defendant presented no evidence of any acts of deceit or collusion committed by Plaintiffs and, even if he had, Defendant did not present evidence of any resulting damages;

e. Defendant's claim for breach of fiduciary duty fails as matter of law because Defendant did not present any legal authority or expert opinion supporting a

conclusion that Plaintiffs breached any fiduciary duty and, even if he had, Defendant did not present evidence of any resulting damages; and

f. Defendant's claim for breach of contract fails as a matter of law because Defendant did not present any evidence of a breach on the part of Plaintiffs.

Now, therefore,

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs be awarded judgment against Defendant Bill Thovson in the amount of Two Hundred Two Thousand, Three Hundred and Fourteen Dollars and Fifty-Two Cents. ($202,314.52), together with interest on that sum at the legal rate from July 3, 2024 until this judgment is paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this matter is hereby DISMISSED with prejudice.

7/8/2024 2:20:35 PM

Dated: July __, 2024

BY THE COURT:

Attest:
Beachler, Kaylee
Clerk/Deputy

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CODINGTON	THIRD JUDICIAL CIRCUIT
SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON, and DICKSON LAW OFFICE, Plaintiff, v. BILL THOVSON, Defendant.	14CIV23-000034 ORDER ON MOTIONS FOR SUMMARY JUDGMENT and MOTION FOR ORDER SDCL §15-6-67 and JUDGMENT and ORDER TAXING COSTS

NOTE: This document duplicates without amendment the Order and Judgment entered by the Court on 7/8/2024, but adds the Order Taxing Costs, previously omitted by oversight of counsel.

On July 1, 2024 at the Codington County Courthouse, this matter came on for hearing the following dispositive motions:

1. PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT AND ORDER UNDER SDCL §15-6-67;
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3. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIM.

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$6,516.39 = $493,483.61)); and Prejudgment interest from September 8, 2022 to July 3, 2024 in the amount of $31,303.59, yielding a total Judgment of Two Hundred Two Thousand, Three Hundred and Fourteen Dollars and Fifty-Two Cents. ($202,314.52).

2. PLAINTIFFS' MOTION FOR AN ORDER UNDER SDCL §15-6-67 is hereby GRANTED and the Codington County Clerk of Courts is hereby directed to immediately release to Plaintiffs the funds previously deposited by National Farmers Union Property and Casualty Company in this action, in partial satisfaction of the above Judgment entered against Defendant.

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a. Defendant's claim for rescission under North Dakota Century Code Sections 9-08-08 and 9-08-09 fails as a matter of law because pursuant to choice of law principles those sections are inapplicable in this matter and, even if they were applicable, Defendant failed to provide written notice of rescission within six months of Defendant's wife's death, as required;

b. Defendant's claim for rescission under North Dakota Century Code Sections 9-09-02 and 9-09-04 is deemed to be a claim for rescission under South Dakota Codified Laws Sections 53-11-2 through 53-11-5 and fails as a matter of law because Defendant did not rescind the parties' agreements promptly after discovering the facts that Defendant believes entitled him to rescind, as required;

c. Defendant's claim for actual fraud under North Dakota Century Code Section 9-03-08 is deemed to be a claim for actual fraud under South Dakota Codified Laws Section 53-4-5 and fails as a matter of law because Defendant presented no evidence of any acts committed by Plaintiffs with intent to deceive Defendant or to induce Defendant to enter into a contract and, even if he had, Defendant did not present evidence of any resulting damages;

d. Defendant's claim for deceit under South Dakota Codified Laws Section 16-18-26 also fails as a matter of law because Defendant presented no evidence of any acts of deceit or collusion committed by Plaintiffs and, even if he had, Defendant did not present evidence of any resulting damages;

e. Defendant's claim for breach of fiduciary duty fails as matter of law because Defendant did not present any legal authority or expert opinion supporting a conclusion that Plaintiffs breached any fiduciary duty and, even if he had, Defendant did not present evidence of any resulting damages; and

f. Defendant's claim for breach of contract fails as a matter of law because Defendant did not present any evidence of a breach on the part of Plaintiffs.

Now, therefore,

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs be awarded judgment against Defendant Bill Thovson in the amount of Two Hundred Two Thousand, Three Hundred and Fourteen Dollars and Fifty-Two Cents. ($202,314.52), together with interest on that sum at the legal rate from July 3, 2024 until this judgment is paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this matter is hereby DISMISSED with prejudice.

7/19/2024 2:29:58 PM

BY THE COURT:

Douglas E. Hoffman

ORDER TAXING COSTS

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs are awarded costs in the amount of $ 4,380.83 .

Dated: July 19TH, 2024

BY THE CLERK: **7/19/2024 12:53:21 PM**

Kaylee Beachler

Deputy Clerk of Courts

Attest:
Beachler, Kaylee
Clerk/Deputy

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF CODINGTON | THIRD JUDICIAL DISTRICT

Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office, Plaintiffs, v. Bill Thovson, Defendant.	Civil No. 14CIV23-000034 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

I. STATEMENT OF UNDISPUTED FACTS

[¶1] On July 28, 2020, Bill Thovson's ("Thovson") spouse, Paula Thovson, was tragically killed in an automobile crash on Highway 281 in Edgeley, ND, when a driver pulling a gooseneck trailer, blew through a stop sign and collided with her vehicle. See Exhibit C of Complaint.

[¶2] On August 4, 2020, Thovson contacted personal injury and wrongful death Attorney, Seamus Culhane ("Culhane") of Turbak Law in Watertown, SD. See Exhibit SC 43 from the Deposition of Seamus Culhane; Turbak Response to Thovson Interr. 9 and 10.

[¶3] The first in-person meeting between Culhane and Thovson occurred on August 7, 2020. See Turbak Response to Thovson Interr. 10.

[¶4] At that meeting, Culhane understood this involved a North Dakota fatal crash. Id at No. 15.

[¶5] On August 5, 2020, Lisa Ronke of Turbak Law had a phone call with North Dakota State Patrolman Paul Sova. See SC9.

[¶6] On August 5, 2020, Lisa Ronke spoke with representatives of Ost Body and Paint. See SC10.

[¶7] On August 5, 2020, Lisa Ronke spoke with Paul Ostendorf of Allied Energy. See SC 11.

[¶8] On August 6, 2020, Turbak Law Office sent four, form anti-spoliation letters to Ost Body and Paint, Allied Energy, Dean Johs, and Charles Johs. See Sc 13, 14, 15, and 16.

[¶9] On August 7, 2020, Legal Services Agreement 1 is executed. See Exhibit A to Complaint.

[¶10] By August 8, 2020, Culhane advised of the need to include other personal injury and wrongful death attorney, Thomas Dickson of Dickson Law in Bismarck, ND ("Dickson"). On August 8, 2020, Culhane emailed Dickson regarding the matter. See SC 18.

[¶11] On August 10, 2020, Lisa Ronke emailed Sean Kuklison with National Farmers Union Property and Casualty Company informing him of Turbak's representation in the matter. See SC 19.

[¶12] On August 12, 2020, a representative from NFUPCI emails Culhane indicating that she does not have permission at this time to release the policy limits but that she has requested consent from Charles Johs, and that she "think[s] [they] can resolve this sooner rather than later." See SC 20.

[¶13] On August 13, 2020, Dickson emails James Shockman, the LaMoure County State's Attorney, advising him that he, and Turbak Law, are representing Thovson in civil litigation. See DL 00051.

[¶14] On August 24, 2020—17 days after LSA I was executed—NFUPCI offered $250,000 under Charles Johs' liability insurance policy. See SC 24.

[¶15] On August 26, 2020—19 days after LSA I was executed—NFUPCI made a second offer of policy limits, under Dean Johs' policy, in the amount of $250,000. See SC 26.

[¶16] On August 20, 2020, "Bailee," a paralegal with Dickson Law, requests that additional language be placed in the LSA in order to comply with North Dakota. See SC 4.

[¶17] On August 27, 2020, at the request of Culhane, Thovson executes LSA 2. See Exhibit B to Complaint.

[¶18] LSA 1 and LSA 2 state that the right to settle the case is held by Thovson.

[¶19] On August 28, 2020, Brad Beehler, North Dakota counsel for NFUPCI, emails Culhane with a Release of All Claims. See SC 28. The Release is not shared with Thovson. On August 31, 2020, Culhane advises Beehler they are looking for more assets. Id.

[¶20] On August 31, 2020, five days after the tender of all available policy limits, and four days after Thovson executed LSA 2 at the request of Culhane, Thovson is informed that all policy limits have been tendered. See Turbak Response to Thovson Interr. 37.

[¶21] On August 9, 2020, Dickson makes a hand-written note identifying Bill Thovson as the client, Paula Thovson as the deceased, and Dean Johs as the Defendant. Per Dickson's hand-written notes, he makes no further analysis of the case until September 2, 2020, seven days after all policy limits have been tendered.

[¶22] On October 8, 2020, Culhane emails Dickson and tells him he doesn't want to have to go forward with a lawsuit. But, "we have a valid-as-hell suit against Charles and Dean." See SC 35.

[¶23] On November 20, 2020, Thovson, Culhane, and Dickson met in Watertown, South Dakota. At that time, Culhane and Dickson are trying to convince Thovson to settle. At 3:18 p.m., Thovson emailed Culhane and Dickson, thanked them for that morning's meeting, and advised them that he was pressed for time and would "carefully review your narrative" over the weekend. See SC 38.

[¶24] On December 8, 2020, Culhane emails Thovson, informs him that Tom (Dickson) is going to tell the insurance company that Thovson will settle his claim. On December 9, 2020, Thovson responds stating, "I will not agree to sign anything, at this time."

[¶25] On January 19, 2021, Culhane provided Thovson with written notice that he and Dickson were withdrawing as Thovson's counsel due to Thovson's refusal to accept the settlement offer. See Exhibit C to Complaint.

[¶26] Turbak and Dickson have been unable to produce any records of their firm's time spent on this matter.

Dated this 3rd day of June, 2024.

/s/ Michael L. Gust

Michael L. Gust
(Admitted Pro Hac Vice)
ABST Law
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mgust@abstlaw.net
(701) 235-3300

Mark Schwab (SD #5422)
Schwab, Thompson & Frisk
820 34th Ave East, Suite 200
West Fargo, ND 58078
(701) 365-8088
mark@stflawfirm.com

Attorneys for Bill Thovson

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF CODINGTON | THIRD JUDICIAL DISTRICT

Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office, Plaintiffs, v. Bill Thovson, Defendant.	Civil No. 14CIV23-000034 **AFFIDAVIT OF MICHAEL L. GUST**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I, Michael L. Gust, being first duly sworn, depose and state as follows:

[¶1] I am one of the attorneys for the Defendant in the above matter, and I make this Affidavit in support of Defendant's Motion for Partial Summary Judgment.

[¶2] Attached hereto as Exhibit A is a true and correct copy of a text from the Defendant to Seamus Culhane dated August 4, 2020.

[¶3] Attached hereto as Exhibit B is a true and correct copy of a memo dated August 5, 2020 from Lisa Ronke of her interview with Paul Sova.

[¶4] Attached hereto as Exhibit C is a true and correct copy of a memo dated August 5, 2020 from Lisa Ronke of her interview with Steve Ost and Morris Ost.

[¶5] Attached hereto as Exhibit D is a true and correct copy of a memo dated August 5, 2020 from Lisa Ronke of her interview with Paul Ostendorf.

[¶6] Attached hereto as Exhibit E is a true and correct copy of a letter from Seamus Culhane to Steve Ost dated August 6, 2020.

[¶7] Attached hereto as Exhibit F is a true and correct copy of a letter from Seamus Culhane to Paul Ostendorf dated August 6, 2020.

[¶8] Attached hereto as Exhibit G is a true and correct copy of a letter from Seamus Culhane to Dean Johs dated August 6, 2020.

[¶9] Attached hereto as Exhibit H is a true and correct copy of a letter from Seamus Culhane to Charles Johs dated August 6, 2020.

[¶10] Attached hereto as Exhibit I is a true and correct copy of an email from Seamus Culhane to Tom Dickson dated August 8, 2020.

[¶11] Attached hereto as Exhibit J is a true and correct copy of an email from Lisa Ronke to Sean Kuklisin dated August 10, 2020.

[¶12] Attached hereto as Exhibit K is a true and correct copy of an email from Susan Courtney to Seamus Culhane dated August 12, 2020.

[¶13] Attached hereto as Exhibit L is a true and correct copy of Plaintiff Turbak Law Office, P.C.'s Answers to Defendant's Interrogatories (First Set).

[¶14] Attached hereto as Exhibit M is a true and correct copy of an email string between Seamus Culhane and Tom Dickson between August 19-20, 2020.

[¶15] Attached hereto as Exhibit N is a true and correct copy of an email string between Seamus Culhane and Brad Beehler between August 26-31, 2020.

[¶16] Attached hereto as Exhibit O is a true and correct copy of an email string between Tom Dickson and James Schockman dated August 13, 2020.

[¶17] Attached hereto as Exhibit P is a true and correct copy of an email string between Lisa Ronke, Seamus Culhane and Tom Dickson dated August 24, 2020.

[¶18] Attached hereto as Exhibit Q is a true and correct copy of Tom Dickson's case notes.

[¶19] Attached hereto as Exhibit R is a true and correct copy of an email string between Bill Thovson and Seamus Culhane between December 8-9, 2020.

Dated this 3rd day of June, 2024.

Michael L. Gust
(Admitted Pro Hac Vice)
ABST Law
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mgust@abstlaw.net
(701) 235-3300

Subscribed and sworn to before me this 3rd day of June, 2024.

(SEAL)
CASSIE VAN HORN
Notary Public
State of North Dakota
My Commission Expires February 03, 2027

Notary Public
My commission expires: 2-3-2027

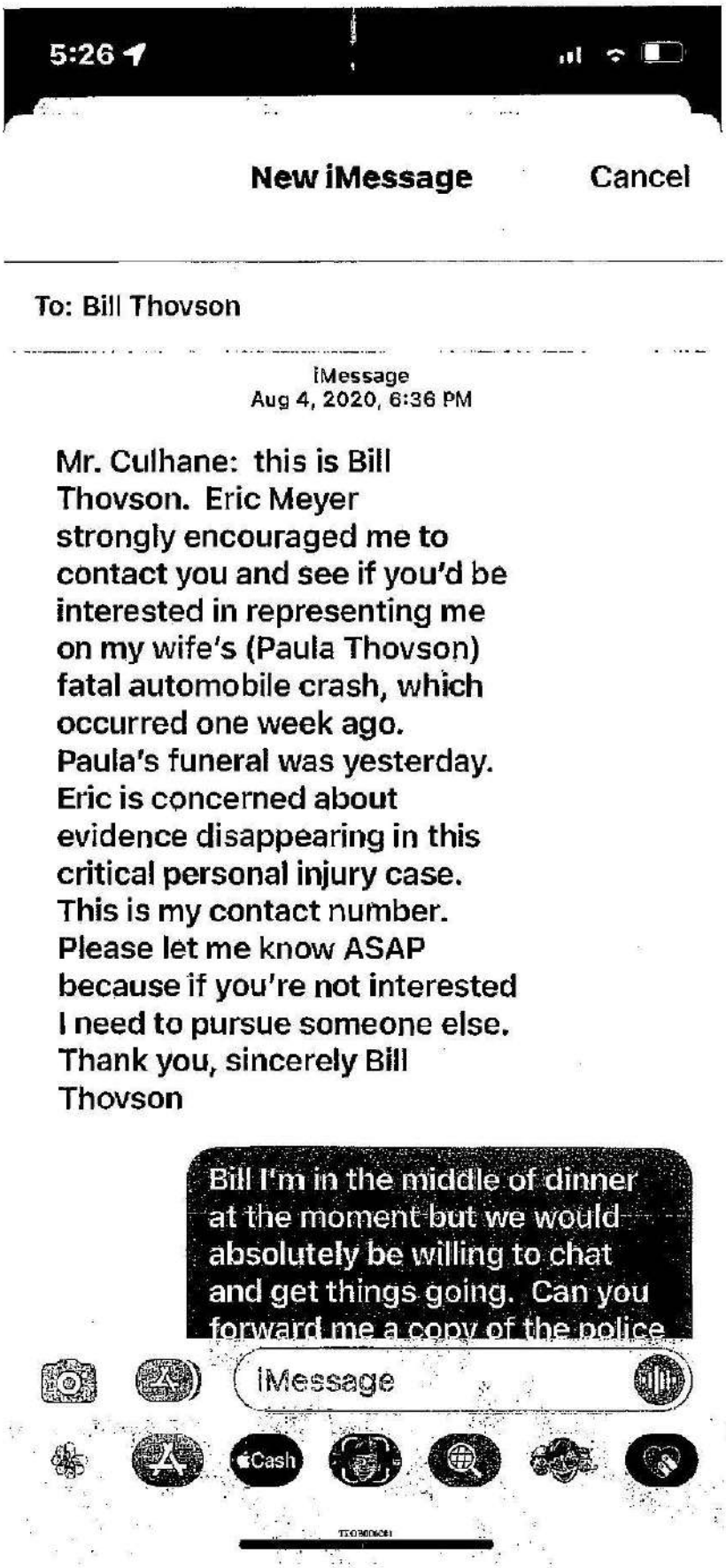


EXHIBIT
SC43
JB 4/11/24

EXHIBIT A

MEMO

TO:	Thovson, Bill – Other Interviews
FROM:	Lisa Ronke
DATE:	8.5.20
RE:	Paul Sova – ND State Patrol

Paul Sova
701.305.0572
After several attempts, I talked to Paul Sova of the ND State Patrol.

He said that he finished report last night and technically released the vehicles. He has today and tomorrow off and will not be back in office to look at report until Friday, so he could not give the insurance info. The insurance companies will have to sign for the vehicles.

He already downloaded the airbag modules, which includes the ECM and seatbelt data.

He suggested that we try to get the traffic report through the Eastern Division of the ND State Patrol.

There is a pending criminal case and they are treating this as a homicide. He has shared information with the States Attorney in LaMoure County, ND. Paul is still working on the criminal report. The official "investigative" report and reconstruction could take up to a year, which includes the data downloaded from the airbag module.

He went on to say that the "stop sign was clearly blown."

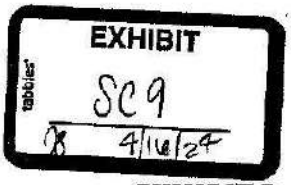


EXHIBIT B

Paula Thovson, 10.1.1956-7.28.2020
Date of loss: 7.28.20, at or about 4:30 PM
Location: Edgeley, ND, LaMoure Couty
Air-lifted to Avera St. Luke's in Aberdeen, SD – where she died

ND counsel
Thomas A. Dickson
Dickson Law Office
tdickson@dicksonlaw.com
P.O. Box 1896
Bismarck, ND 58502
701-222-4400

Assistant
Bailee Vetter <bvetter@dicksonlaw.com

ND HP
Paul Sova
ND HP doing crash scene investigation
701.305.0572

Steve -owner of Ost's Body and Paint
Owns wrecker service – contacted for all vehicles.
Business number 701.685.2660

Steve Ost
Ost Body & Paint
5819 83rd Ave SE
Adrian, ND 58472
701.685.2660

Defendant, at-fault driver
Dean Johs, age 40
Napoleon, ND
1-ton PU – pulling goose neck trailer with trusses

Atty (as of 9.10.20)
Cash Aaland
Aaland Law Firm
415 11th ST S.
Fargo, ND 58103
701.232.7944

Owner of PU –
Charles Johs

Insurance for Dean Johs – driver
250K/500K
Farmers Union – National General

Insurance for Charles Johs – PU
250K/500K
Farmers Union – National General

Ins. For flat bed trailer Charles Johs
National General
James Hanks 336.435.3692
James.hanks@ngic.com

MEMO

TO:	Thovson, Bill – Other Interviews
FROM:	Lisa Ronke
DATE:	8.5.20
RE:	Steve Ost - Tow truck driver, storage location of both vehicles Morris Ost – father of Steve Ost

Steve Ost
Ost Body & Paint
5819 83rd Ave SE
Adrian, ND 58472
701.685.2660 – office
701.269.2660 – cell
This is the location of the Thovson vehicle and the Johs PU & trailer.

11 AM – per call to 701.685.2660, I talked to Morris Ost, Steve's dad. He said the Steve was not there at the time.
He stated that both of the vehicles and the trailer are still located at Ost Body & Paint. He said that he wasn't sure about the name of the driver of the PU, but that he was there the other day and picked up his personal belongings.

Morris also said that there is not much left of the car. The PU is a mess, too.
I asked if he knew the name of the insurance company for the PU driver or if he had access to that information. He said he didn't know how to find it or if Steve had paperwork about that. I asked if he could go out to the PU and check for a registration for the PU and the trailer. He said he had to be somewhere but to call him back around 2 or 3 this afternoon.

(in between these two calls, I figured out the name of the at-fault driver)

2:05 PM – I called Morris at 701.685.2660. He said that he looked in the PU and said that all registration/insurance papers are gone from truck. I asked about registration / insurance info for the trailer. He said that there were a lot of registration papers for several different trailers in the pickup, but he didn't know which trailer they had on the lot for sure. Morris said that Steve had to go to Minneapolis to help his daughter with something. I asked if there were a different number where I could reach Steve. Morris gave me Steve's cell number.

2:15 PM - I talked to Steve (is in Mnpls now), 701.269.2660, cell, he knows he has the insurance info at the shop and will call with that info tomorrow (Thursday). He said that nobody has paid for any of his services, yet.

Steve said that he got the call from a deputy to come and get the vehicles. Steve's shop is about 15 minutes from the collision site. When he arrived at scene the EMTs had already left with the people from the vehicles. He had heard that they were taken away by ambulance. Steve said that he has since learned that there was a fatality. Steve said that there is **dash cam in his tow truck**

EXHIBIT
tabbies
SC10
4/16/24

EXHIBIT C

and that the video might still be available. I advised him that we would be sending him an "anti-spoilation" letter so that he preserves that video and any other evidence that he might have that would be related to this claim.

He said that when he arrived, the trailer was in the ditch and the contents were spread out. The car was on the road and the PU was in the ditch.

Steve helped the HPs at the scene. He also said that the HP came to Steve's business and downloaded the info on the airbag modules. It was Paul Sova and another HP, who specializes in that. Then, the HP went back to the scene and measured everything.

I asked Steve what he thinks happened. He said it was pretty obvious what happened. He said that the crash happened in town. There is a "stop ahead" sign and "stop" sign and rubble strips on road.

Steve said that he didn't know either driver. He said that the driver of the PU works for a construction company that he thinks is owned by the PU driver's father.

Steve then said that technically the vehicles are released. Normally, when they are released, the insurance company has to sign for them. He has been towing for 30 years, and this was a bad one (collision).

Then he mentioned that the C-Store on the corner has a video camera and Steve has heard that they have video of the collision. He said it was Allied Energy in Edgeley, ND. He didn't know the name of who I should talk to there.

MEMO

TO:	Thovson, Bill – Other Interviews
FROM:	Lisa Ronke
DATE:	8.5.20
RE:	Paul Ostendorf – Allied Energy

Paul Ostendorf
General Manager
Allied Energy
109 Industrial Park
Edgeley, ND 5843

I heard from the tow truck driver, Steve Ost that there was a security camera at the C-Store in Edgeley that has footage of the collision. Per google, I found this place and was transferred to the manager.

I told Paul I was calling in reference to the collision on July 28, 2020 between a vehicle and a PU pulling a trailer and that I was informed that there was video footage. I told him that we were helping the family of the woman who was in the collision.
He was quite cautious in his choice of words. He only answered what I asked, but I felt he was truthful in his responses.

He said that he gave a copy of the video to the State Patrol. I asked how we could get a copy. He said he didn't know who he was allowed to give it to, so he said we should just get it from the State Patrol if they want us to have it. I asked him if HE still had a copy and he said yes. I told him we would be sending him a letter to preserve the video, to make sure that it doesn't accidentally get erased or recorded over. He understood.

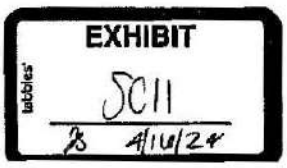
He was real quiet.

I asked if he was working that day and if he saw the collision. After a pause, he said that he HEARD it. He did not witness it. It was about 100 yards from his office. He ran out the door and told one of his other employees, Bryson, from the NAPA store, to call 911.

Paul was the first one on the scene. He immediately ran over to the car. He said that the woman was unresponsive. He said that it was "beyond anything I could do to help." Then he got a little choked up as he was reliving this recent memory. He said that the PU airbags went off and that driver, a man, was up and responsive.

He went on to say that the car was "ripped open" and he could tell she was in rough shape. The front of the car was impacted heavily from the crash. He could tell that she had been driving on 281, which runs North/South and does not have a stop sign. The PU was going West and the East/West traffic has a stop sign. He missed the stop sign.

EXHIBIT D



The ambulances and EMTs arrived on the scene and assisted the woman. Both drivers were taken away by ambulance.

Paul said that he was there (at the scene) with his employees until about 8 PM that night because parts from the wreck were on their lawn of the C-Store.

After they got clearance from the State Patrol, his employees used a forklift to help clean up. They helped remove the trailer from the ditch with skid loader and put the items back on the trailer. I asked him what kind of items were on the trailer. He said that it was trusses and a load of steel for a pole barn.

Paul said that he did not know either driver.

Paul estimated that the road was blocked for about 2 hours after the collision.

LAW OFFICE, P.C.

August 6, 2020

Steve Ost
Ost Body & Paint
5819 83rd Ave SE
Adrian, ND 58472

Re: Our Client: Bill Thovson for Paula Thovson, deceased
Date of Loss: 7.28.2020

Dear Mr. Ost:

Turbak Law Office, PC has been retained to represent Bill Thovson with regard to claims arising from a motor vehicle collision on July 28, 2020 near Edgeley, ND.

Mr. Thovson's wife was fatally injured in the collision between her vehicle and a pickup that was pulling a trailer loaded with construction materials.

It is our understanding that there is video footage from the dash camera in the tow truck that was used by you to secure and transport the damaged vehicles from the collision scene to your business. This letter is to request the preservation of that video footage from July 28, 2020. Please also preserve any photographs that you have in your possession. I am writing to make certain that all parties preserve any and all physical evidence related to this incident.

Please contact our office with any additional information you may have about the collision. I expect to have someone come in the very near future to your lot to do an inspection of the vehicles involved in the crash. If you have any questions, please call me at 605-880-1580.

Best regards,
TURBAK LAW OFFICE, P.C.

Seamus W. Culhane
SWC/llr

EXHIBIT
tabbies
SC 13
8 4/16/24

26 S. Broadway, Suite 100 • Watertown, SD 57201-3670
(605) 886-8361 • FAX (605) 886-8363 • www.turbaklaw.com
nancy@turbaklaw.com • seamus@turbaklaw.com • liam@turbaklaw.com

DL 00001

EXHIBIT E

TURBAK

LAW OFFICE, P.C.

August 6, 2020

Paul Ostendorf
General Manager
Allied Energy
109 Industrial Park
Edgeley, ND 58433

Re: Our Client: Bill Thovson for Paula Thovson, deceased
Date of Loss: 7.28.2020

Mr. Ostendorf:

We represent Bill Thovson, spouse of Paula Thovson, deceased, in the above referenced collision.

It is our understanding that there is video footage from security camera(s) on your building(s) that show the collision between a vehicle and a pickup and trailer. This letter is to request the preservation of that video footage from July 28, 2020. Please also preserve any photographs that you have in your possession. I am writing to make certain that all parties preserve any and all physical evidence related to this incident.

I am happy to provide a storage device to you to transfer the information, or otherwise have someone come up and get a copy.

Please contact our office with any additional information you may have about the collision at 605-886-8361 and ask to speak with Lisa.

Best regards,
TURBAK LAW OFFICE, P.C.

Seamus W. Culhane
SWC/lr

EXHIBIT
tabbies
SC14
4/16/24

26 S. Broadway, Suite 100 • Watertown, SD 57201-3670
(605)886-8361 • FAX (605)886-8383 • www.turbaklaw.com
nancy@turbaklaw.com • seamus@turbaklaw.com • liam@turbaklaw.com

TURBAK

LAW OFFICE, P.C.

August 6, 2020

Dean Johs
724 3rd St. West
Napoleon, ND 58561-7419

Re: Our Client: Bill Thovson for Paula Thovson, deceased
Date of Loss: 7.28.2020

Mr. Johs:

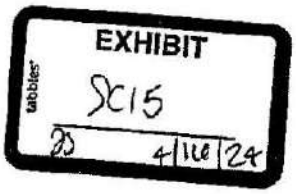
We represent Bill Thovson, spouse of Paula Thovson, deceased, in the above referenced collision. This letter is to request the preservation of the cellular phone you were carrying during the collision, as well as the preservation of the vehicle you were driving as well as the trailer that was being towed on July 28, 2020 at the time of the collision until it can be inspected by our collision reconstructionist. I am writing to make certain that all parties preserve any and all physical evidence related to this incident. I have someone immediately available to inspect the vehicle and trailer as soon as we obtain your written consent, the form I attach herein. Please sign and return it.

Failure to preserve the material will result in a request for a spoliation instruction at any trial in this matter and may ultimately be considered by a court as an attempt to destroy evidence. Because this is of critical importance, and destruction of evidence will lead to the inference that you were doing something wrong, or worse than what the evidence its self demonstrates, I do believe that this preservation is in your best interest. If you have legal counsel, please provide this to them and I ask that they, and your auto insurance company get in contact with me.

Additionally, please contact our office with information about any and all insurance coverage in effect at the time of the collision so I may begin dealing with them.

Best regards,
TURBAK LAW OFFICE, P.C.

Seamus W. Culhane
SWC/llr



26 S. Broadway, Suite 100 · Watertown, SD 57201-3570
(605)886-8361 · FAX (605)886-8383 · www.turbaklaw.com
nancy@turbaklaw.com · seamus@turbaklaw.com · ilam@turbaklaw.com

DL 00003

EXHIBIT G

TURBAK

LAW OFFICE, P.C.

August 6, 2020

Charles Johs
CD&R Construction LLP.
2821 72nd Street, SE
Napoleon, ND 58561

Re: Our Client: Bill Thovson for Paula Thovson, deceased
Date of Loss: 7.28.2020

Dear Mr. Johs:

We represent Bill Thovson, spouse of Paula Thovson, deceased, in the above referenced collision. This letter is to request the preservation of the cellular phone you were carrying during the collision, as well as the preservation of the vehicle being driven as well as the trailer that was being towed on July 28, 2020 at the time of the collision until it can be inspected by our collision reconstructionist. I am writing to make certain that all parties preserve any and all physical evidence related to this incident. I have someone immediately available to inspect the vehicle and trailer as soon as we obtain your written consent, the form I attach herein. Please sign and return it.

Failure to preserve the material will result in a request for a spoliation instruction at any trial in this matter and may ultimately be considered by a court as an attempt to destroy evidence. Because this is of critical importance, and destruction of evidence will lead to the inference that you were doing something wrong, or worse than what the evidence itself demonstrates, I do believe that this preservation is in your best interest. If you have legal counsel, please provide this to them and I ask that they, and your auto insurance company get in contact with me.

Additionally, please contact our office with information about any and all insurance coverage in effect at the time of the collision so I may begin dealing with them.
Best regards,

TURBAK LAW OFFICE, P.C.

Seamus W. Culhane

SWC/dm

EXHIBIT
tabbies
SCIU
4/16/24

28 S. Broadway, Suite 100 · Watertown, SD 57201-3670
(605)886-8361 · FAX (605)886-8383 · www.turbaklaw.com
nancy@turbaklaw.com · seamus@turbaklaw.com · liam@turbaklaw.com

DL 00005

EXHIBIT H

Tom Dickson

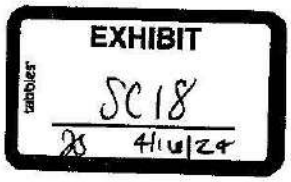
From: Seamus Culhane <seamus@turbaklaw.com>
Sent: Saturday, August 08, 2020 1:47 PM
To: Tom Dickson
Subject: Fwd: Thovson v. Dean JOHS

Tom thanks for agreeing to take my call And preliminarily agreeing to work with me on this. At this point I've done anti-spoliation letters. I've done some preliminary research on the assets of the potential defendants. I've retained the services of Matt Brown. I have requested from both the at fault insurance Company and the defendant driver permission to do downloads of the pick up. I requested a copy of the North Dakota crash report. Once I get a few more details, I anticipate digging into service records for the defendants vehicle and trailer, load records from the truss manufacturer. We're already aware that there's video from the wrecker and video on a C store camera that has all been requested as well. I have been retained formally to handle this on behalf of the deceased woman's husband and minor daughter. There is one adult child that I do not currently represent. I believe that we will want to do a fee agreement with your office once we get going on this as well as having the fee split arrangement in writing and approved by the client. They are already aware that I intend to work with you on this matter. My current fee is 33% and due to the fact that the client is a banker he requested that costs come off the top rather than after fees. Everything else is rather routine.

Sent from my iPhone

Begin forwarded message:

> **From:** Lisa Ronke <Lisa@turbaklaw.com>
> **Date:** August 5, 2020 at 11:59:22 AM CDT
> **To:** Deb Wiedman <Deb@turbaklaw.com>, Erika Fox <Erika@turbaklaw.com>
> **Cc:** Seamus Culhane <Seamus@turbaklaw.com>
> **Subject: Thovson v. Dean JOHS**
>
> Correct spelling of name:
> Dean JOHS
>
> Lisa Ronke
> Turbak Law Office, P.C.
> 26 S. Broadway, Suite 100
> Watertown, SD 57201
> Phone: 605.886.8361
> Fax: 605.886.8383
>
>
>
> -----Original Message-----
> From: Seamus Culhane <seamus@turbaklaw.com>
> Sent: Wednesday, August 5, 2020 10:26 AM



From: Lisa Ronke
To: sean.kuklisin@ngic.com
Cc: susan.courtney@ngic.com; Seamus Culhane; Dilon Martinez; Erika Fox; WilliamThovson7550422@projects.filevine.com
Subject: Thovson - Johs - collision, 7.26.20, CLAIM# 200 293 750
Date: Monday, August 10, 2020 3:18:00 PM
Attachments: 08.06.20 TLO-Farmers Union; LOR Anti spoliation.pdf
Importance: High

Mr. Kuklisin:
Per our phone call, (216.266.0648) I understand that you are the Property Damage Claims Representative and that Susan Courtney is the Bodily Injury Claims Representative. I am attaching a copy of the Letter of Representation and notice of Antispoilation that was mailed to Farmers Union on August 6, 2020. Please add this to the Claims file and please forward the requested information as soon as possible via mail or email.

As we discussed, we ask that you leave the Johs pick up and trailer at Ost Body & Paint in Adrian, ND until it can be properly inspected and information downloaded.

We look forward to working with Farmers Union on this claim.

Thank you.

Lisa Ronke
Turbak Law Office, P.C.
26 S. Broadway, Suite 100
Watertown, SD 57201
Phone: 605.886.8361
Fax: 605.886.8383

EXHIBIT
SC19
25 4/16/24

From: Seamus Culhane
To: Erika Fox
Subject: Fw: Claim 200293750 Your Client Thovson
Date: Friday, February 24, 2023 9:58:02 AM
Attachments: image001.png
C_200293750_GEN - GENERIC LETTER_157927037_1-5UYSHAF_90875 (1).pdf

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From: Courtney, Susan <Susan.Courtney@NGIC.COM>
Sent: Wednesday, August 12, 2020 3:52 PM
To: Seamus Culhane <seamus@turbaklaw.com>
Subject: Claim 200293750 Your Client Thovson

Hi Seamus.

As outlined in the attached letter, we do not have permission to release the policy limits. I have requested consent from my named insured, Charles Johs. As soon as I hear back from him, I will let you know.

We have very little information on your client. If there were any medical bills that may have been incurred or you have information for me to review, I think we can resolve this sooner rather than later.

Please let me know.

Susan K. Courtney
Large Loss Adjuster
(314) 813-5685 Phone
(800) 924-0273 Fax
P .O. Box 1623
Winston-Salem, NC 27102
claims@ngic.com

EXHIBIT K

EXHIBIT
tabbies
SC20
28 4/4/24

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CODINGTON	THIRD JUDICIAL CIRCUIT
SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON, and DICKSON LAW OFFICE, Plaintiff, v. BILL THOVSON, Defendant.	14CIV23-000034 PLAINTIFF TURBAK LAW OFFICE, P.C.'S ANSWERS TO DEFENDANT'S INTERROGATORIES (FIRST SET)

TURBAK LAW OFFICE, P.C.'S ANSWERS TO INTERROGATORIES

1. Identify each person who contributed to answering these Interrogatories.

ANSWER: **Seamus Culhane with assistance of Counsel, Nancy Turbak Berry and staff legal assistant, Erika Fox.**

2. Please identify each and every person known to you to have knowledge or information relevant to the claims, defenses and issues involved in this lawsuit.

ANSWER: **Seamus Culhane**

Lisa Ronke

Deb Wiedman

Erika Fox

Tom Dickson

Matthew Brown

Brad Beehler

Cash Aaland

Paul Sova

Bill Thovson

Dean Johs

Charles Johs

Steve Ost

Paul Ostendorf

Dillon Martinez

3. As to each such person listed in your response to Interrogatory No. 2, please provide a summary of that person's knowledge.

ANSWER: **Objection: Mental Impressions and other Work Product prepared in preparation for litigation.**

4. If any of the persons identified in your response to Interrogatory No. 2 have made any statements, written or oral, while being interviewed by you, your attorneys, agents or any other person acting on your behalf in connection with this lawsuit, for each such person, state:
a. The name and address of each person making such statement;
b. The date of such statement;
c. The place of such statement;
d. Whether the statement was in writing or oral;
e. If in writing, was the statement signed or unsigned;
f. The name and address of the person taking the statement down if in writing;
g. The identity of the person presently in custody of each and every statement;
h. Please attach to these interrogatories a copy of each and every statement; and
i. If the statement is oral, state, in detail and not in summary fashion, the substance of each oral statement.

ANSWER: **See Responses to RFPD of Turbak Law Office, P.C. and RFPD to Seamus Culhane.**

5. Please identify each and every witness you intend to call at trial and describe, in detail and not in summary fashion, the substance of each and every person's expected testimony.

ANSWER: **Objection: Mental Impressions and other Work Product prepared in preparation for litigation.**

6. Please identify each expert witness that you propose to use at trial for this lawsuit. For each such expert witness, state:
a. His or her qualifications to testify in this lawsuit;
b. Substance of the expected testimony;
c. Please attach a copy of the experts curriculum vitae to response to this Interrogatory; and
d. Attach to your response to these Interrogatories a copy of any expert witness report.

ANSWER: **Objection: Mental Impressions and other Work Product prepared in preparation for litigation.**

7. Please identify all individuals of Turbak Law Office which billed any time to Bill Thovson's file.

ANSWER: **None.**

8. Please identify any staff or other personnel of Turbak Law Office which did work for Turbak Law Office regarding Bill Thovson but for which no time was billed.

ANSWER: **Objection: Vague. Without waiving, Seamus Culhane, Lisa Ronke, Deb Wiedman, Erika Fox, and Dillon Martinez all contributed to the contractually obtained contingent fee efforts for Bill Thovson's benefit.**

9. Please identify the individual, date, and time of the first person employed By Turbak Law Office who was contacted by Bill Thovson regarding legal services for the wrongful death of his wife Paula Thovson.

ANSWER: **Seamus Culhane, August 4th, 2020, at 6:36 PM.**

10. Please identify the date which Turbak Law Office alleges an attorney\client relationship with Bill Thovson was established.

ANSWER: **By at least 8:37 PM on August 4, 2020, Bill Thovson sought attorneys' services regarding his wife's fatal automobile crash, which were within the purview of services normally provided by Turbak Law Office, P.C., and had been agreed to be provided by Seamus Culhane in saying, "[W]e would absolutely be willing to chat and get things going." By August 7th, 2020, at or about 2:15 PM, there was a meeting, in person between Seamus Culhane and Bill Thovson wherein a written contingent legal services agreement was finalized, memorialized, and signed by both Bill Thovson.**

11. Please identify the first date which Seamus Culhane met with Bill Thovson.

ANSWER: **The first identifiable record of a meeting between Bill Thovson and Seamus Culhane was on 3/30/2016.**

12. During Culhane's first meeting with Bill Thovson, did Culhane ask Thovson if he and his wife Paula Thovson carried underinsured or uninsured motorist coverage as part of their insurance coverage.

ANSWER: **No. The first meeting between Thovson and Culhane appears to be regarding bank collection type work.**

13. If the answer to the preceding Interrogatory is in the affirmative, why did Seamus Culhane ask Bill Thovson about underinsured or uninsured motorist coverage?

ANSWER: **Not Applicable.**

14. Please explain any research and investigation conducted by Turbak Law Office regarding the type of insurance required to be carried by Charles Johs or Dean Johs as a result of their commercial use of a truck and trailer which crossed state lines.

ANSWER: **Objection, Vague, Overbroad. Without waiving, neither underlying potential Johs defendant appeared to be an interstate motor carrier and likewise, there was no evidence that either defendant crossed state lines or acted in a "for hire" capacity.**

15. During the first meeting between Seamus Culhane and Bill Thovson, did Mr. Culhane understand that the vehicle accident which killed Paula Thovson occurred in North Dakota?

ANSWER: **During the first meeting regarding this matter, on or about August 7, 2020, Yes Seamus Culhane understood this was a North Dakota crash.**

16. Please provide an explanation of all work done by any individual of Turbak Law Office, or an individual hired by Turbak Law Office involving Bill Thovson's case from August 4, 2020 until January 31, 2021. In your response, please, in addition to an explanation of the work performed, provide the date the work was performed, the individual who performed the work, the amount of time spent on the work, and why the work was relevant to Bill Thovson's case.

ANSWER: **Objection, Overbroad, Vague. Without waiving, See Responses to RFPD which detail various work performed to further the benefits conferred by Turbak Law Office, P.C. and Seamus Culhane onto Bill Thovson.**

17. Please identify the date which Turbak Law Office alleges the Dickson Law Office was retained by Thovson to assist in the prosecution of the wrongful death action of Paula Thovson.

ANSWER: **Thovson was made aware of Turbak Law Office, P.C.'s decision to engage the services of a North Dakota attorney pursuant to the legal services and fee agreement signed by Thovson and Culhane on August 7th, 2020, named Thomas Dickson on August 8th, 2020.**

18. Provide each and every reason why Turbak Law Office advised Bill Thovson that he needed to retain the Dickson Law Office to assist in the wrongful death action involving his wife Paula Thovson.

ANSWER: **Objection, Overbroad, Vague. Without waiving: Thovson was notified on August 8th, 2020, that Dickson was a great guy, a great lawyer, that ND attorneys do not charge sales tax on legal services, and that the involvement of Dickson would not cost Thovson any more than he agreed to pay to Turbak Law Office, P.C. a day earlier.**

Over time, Thovson was generally made aware of Dickson's extraordinary civil trial skills and reputation, his awareness and knowledge of North Dakota law, in particular wrongful death, personal injury, and insurance claims related to litigation and background.

Likewise, there was uncertainty regarding various factual and legal matters surrounding the claim/case that Turbak Law Office, P.C. was hired to prosecute, and that if formal legal action was ever necessary in North Dakota, a North Dakota licensed attorney would be necessary to begin the action, assist with proceedings, and aid in the admission of Turbak Law Office, P.C. attorneys pro hac vice.

19. Please explain any and all issues of facts which Turbak Law Office believed was disputed with respect to Bill Thovson's wrongful death claims against Dean Johs and Charles Johs.

ANSWER: **Objection, Overbroad, Vague as to the word, "disputed." Without waiving: Experienced Plaintiff's attorneys do not wait for an actual "disputed" fact nor circumstance to act. At the time that Thovson first contacted Seamus Culhane, no facts had been supported nor established other than Paula Thovson had died in a car crash. The police report and any resulting investigation and information were not available during the initial days following the consultation and independent investigation.**

Turbak Law Office, P.C. started its own investigation from the ground up contacting witnesses and otherwise preserving information to be processed.

As a fundamental matter, all wrongful death claims suffer from the reality that no amount of money returns the loved one to their family and that attempts to recover money for the death and loss of a loved one are inherently suspect to some portion of potential jurors. Some potential jurors remain focused on "hard" losses, or "blackboarded"

damages, like lost wages, medical bills, and financial losses that are easily attributable to the loss of a loved one, like burial expenses, and lost financial support to children. It was discovered that Paula did not work outside the home and was not a breadwinner for Bill and Ariana. Simply because a person dies in an automobile crash that is not their fault or is not entirely their fault does not equate to automatic payment of potential liability or under/uninsured motorist benefits. Losses have to be established with reasonable certainty in court.

The fact that Bill Thovson was on the phone with Paula Thovson at the time of impact, and apparently for some duration prior to impact, presented at least two problems. First, juries are inherently suspect of anyone who files a lawsuit to recover money; they want to know who is really to blame for the crash and compare fault. In this instance, Paula was on the phone, and whether or not she could have avoided the collision had she not been on the phone presented a practical, factual problem related to compensatory damages reduced by comparative fault. Likewise, not only was she on the phone, but she was on the telephone with the person who stood to personally benefit the most from an insurance claim and case, her husband, Bill Thovson. Cell phone usage is a difficult matter to specifically assign a percentage of blame to in any given set of factual circumstances but would without question give rise to a defense and argument about comparative fault on behalf of both the decedent and an eventual Plaintiff.

With time, it also became obvious that Bill Thovson's strange demeanor and flat affect when describing the loss of his wife presented credibility problems. Likewise, Bill Thovson refused attempts by Seamus Culhane to seek therapy for his emotional issues which would likely have assisted Thovson in being more credible and likable. Instead, Bill Thovson appeared insistent on remaining maliceful, angry, and punitive rather than moving through the process of grieving and mourning the loss of his wife.

And, while an underlying punitive type of wrongful death claim can be effective, in this instance, Dean Johs was being prosecuted criminally. This fact tended to detract from the likelihood that an eventual jury would want to further punish him and was more likely to focus on the compensatory damages which, for reasons described above, were going to be difficult to demonstrate. The chances of obtaining a punitive damages instruction was small, and the chances of discovering any assets, tax returns, or personal financial statements from either defendant prior to a verdict was also very small.

Ultimately, during the representation, factual issues extended beyond pure fault for the collision and damages resulting from the crash to also include the existence of and amount of available insurance coverage which has a significant practical impact on any claim/case. Factual issues existed about the existence of, and recoverability of, assets beyond the insurance coverage. Factual issues existed about who Dean and Charles were working for at the time of the crash, and whether either would have qualified as agents or independent contractors under North Dakota law. Meanwhile, the collectability of PIP coverage and repayment thereof was also contingent.

By the time Thovson met with Seamus Culhane on August 7th, 2020, it is unclear whether it was known how limited Thovson's own insurance coverage was, but by August 12th, 2020, it was known that Thovson's own coverage was limited to $100,000 UM/UIM.

20. Please explain any and all legal issues which Turbak Law Office believed was disputed with respect to Bill Thovson's wrongful death claims against Dean Johs and Charles Johs.

ANSWER: **Objection, Overbroad, Vague as to the word, "disputed." See Answer to No. 19, above, for a detailed recitation of the various blended factual, legal, and practical issues.**

21. Explain each and every contingency which Turbak Law Office believed existed which would have prevented the insurance company of Dean Johs or Charles Johs from offering policy limits for the wrongful death of Paula Thovson.

ANSWER: **Objection, Overbroad, Vague as to the word, "disputed." See Answer to No. 19, above, for a detailed recitation of the various blended factual, legal, and practical issues. Furthermore, the fact that the potential defendants also were operating quasi-commercially, without commercial auto coverage meant that there *could* have been a commercial use type exclusion, that is because farm and/or residential type policies are what cover a vehicle used for business purposes at the type of the collision *may have meant* that there was *no coverage,* or only minimum coverage available.**

22. Why did Turbak Law Office refuse Bill Thovson's request to pay for legal services by the hour?

ANSWER: **I do not believe that Thovson ever specifically requested to pay Turbak Law Office, P.C. by the hour.**

However, as a general matter, Turbak Law Office, P.C. does not work nor offer to work by the hour. Hourly arrangements are disfavored by Seamus Culhane and Turbak Law Office, P.C. for a litany of reasons including timekeeping issues associated with working on multiple files in a single day and interruptions during work on various files; the fact that most clients who have suffered injury, loss, and even death in a family cannot afford to pay by the hour.

Turbak Law Office, P.C., and Seamus Culhane generally do not go into hourly arrangements with clients because of the fact that most clients are more comfortable knowing that they will not go backward in the event of a smaller overall recovery and prefer that Turbak Law Office, P.C. shares the risk of a claim/case that could take significantly more work than it would eventually yield in gross recovery; that most clients appear comfortable knowing that Turbak Law Office, P.C. has the incentive to work quickly, efficiently, and for the most money possible when it stands to recover a portion of a lump sum settlement; that most clients do not want an attorney who has the incentive to delay cases to increase the quantity of charges and otherwise simply churn paperwork and other matters to increase overall profitability for an attorney.

Likewise, as civil claims progress and hourly arrangements progress, clients can become unhappy and impatient, and those arrangements can pit clients against their lawyers as they approach the most stressful part of civil litigation (trial), rather than keeping them unified in their efforts to collect from a third party.

23. How many wrongful death cases has Turbak Law Office been retained as legal counsel for from January 1, 2015 until December 31, 2020?

ANSWER: **Objection, Overbroad, Vague, not likely to lead to the discovery of admissible evidence.**

24. With respect to any wrongful death case enumerated in the preceding Interrogatory, please identify by caption, county, and state all wrongful death lawsuits commenced by Turbak Law Office on behalf of their clients.

ANSWER: **Objection, Overbroad, Vague, not likely to lead to the discovery of admissible evidence.**

25. With respect to any wrongful death case enumerated in the preceding Interrogatory, please identify by caption, county, and state all wrongful death lawsuits filed with the court by Turbak Law Office on behalf of their clients.

ANSWER: **Objection, Overbroad, Vague, not likely to lead to the discovery of admissible evidence.**

26. Please identify all legal research conducted as to whether Bill Thovson should commence an action in federal court against Charles Johs or Dean Johs.

ANSWER: **Objection, Overbroad, Vague. Without waiving, see Answer to No. 19, above. The legal research performed pertaining specifically to this file included research into personal assets and collectability of any potential excess verdict against either potential defendant, research into other similar cases/verdict(s), research into whether Charles Johs and Dean Johs were independent contractors or agents on behalf of any other principal, and whether a general commercial liability policy would likely offer additional limits of coverage to the tendered policies.**

27. Did Turbak Law Office conduct any research or investigation into the material which Dean Johs was hauling on the date of the fatal crash which killed Paula Thovson?

ANSWER: **Objection, Overbroad, Vague. Without waiving, Yes.**

28. Did Turbak Law Office conduct any research for investigation into the permitting, licensure, or insurance limits which Dean Johs or Charles Johs was required to have due to type of material which Dean Johs was hauling on the day of the fatal crash that killed Paula Thovson.

ANSWER: **Objection, Overbroad, Vague. Without waiving, Yes.**

29. If your answer to either of the preceding two Interrogatories is in the affirmative, please identify all research and investigation which Turbak Law Office did regarding the preceding two Interrogatories.

ANSWER: **On August 5, 2020, during an interview, Lisa Ronke identified that Dean Johs was hauling trusses. (See 6:08 PM email to SWC) Seamus also directed Lisa to figure out where the trusses came from and otherwise indicated that Lisa should direct Jodi Hoffman, a private investigator go to the scene and otherwise figure out what existed for video footage, weight slips, payment information, receipts, etc. (See August 5, 2020, email from SWC to L.R. and E.F. By August 12, 2020, Lisa Ronke had researched CD & R Construction on Facebook which indicated that it is a local construction company that specializes in general construction including Pole barns, houses,**

remodeling, roofing, siding, windows and doors, overhead doors, sheds, and hoop buildings. (See August 12, 2020, email 1:55 PM) By August 13th, 2020, SWC and T.D. were corresponding about the potential that these trusses may have been owned by some individual and the construction company, i.e. Johs (CD&R) would be an agent of some other potential individual. (See August 12, 202 email from 11:58 AM.) That conversation and thread continued through at least September 14th, at 9:51 AM through a series of emails between Thomas Dickson. and Seamus Culhane. Lisa Ronke also contacted the Hutterite Colony where we believed the trusses originated. (See September 14th, 2020, email) This included email correspondence between Paul Semeraro and Brad Beehler on August 28th, 2020, that was forwarded to Lisa Ronke on September 11th, 2020, in response to an email a day earlier from Lisa Ronke inquiring about the same. By August 27, 2020, Defense attorney Brad Beehler indicated: "Well, this is becoming interesting. I think both Charlie and Dean need to be contacted to confirm a number of things. They each should be asked:

1. Where was Dean coming from;
2. Where was Dean going to;
3. What was Dean hauling;
4. Who was he hauling something for;
5. Was Dean working for Charlies' business at the time; and
6. Was Dean acting within the scope of his employment at the time of the crash.

It will be interesting to see if their answers are the same. No matter what the circumstances Charlie needs to be asked what the name of his business is and what type of insurance coverage that particular business has. We may need to put the other insurer on notice of the loss."

That conversation continued on September 18th, 2020: Ms. Courtney, Our concerns are beyond the collision itself and involve things that Dean apparently didn't know. Who owned the trusses and steel at the time of the crash? Were they paid for? Had they been billed? What project were they to be used for? Where exactly were they headed? Where are the invoices, receipts, etc. related to the transaction of purchasing/sale of the trusses and steel in the first instance and what occurred later on when they were put in/on a building? Where? For whom? SWC" (11:18 AM Email)

Likewise, Tom Dickson went to the La Moure County State's Attorney's office on September 17th and reported the same on the 18th, 2020, via email at 9:41 AM.

Susan Courtney continued to pursue these questions via email on September 21st, 2020, at 4:38 PM at the request of SWC.

By September 30th, 2020, Cash Aaland continued attempts to get what SWC and TD and staff had requested several times. (11:45 AM email)

Finally, on October 2, 2020, attorney Cash Aaland provided the requested documentation that effectively disallowed any potential agency claim. (1:06 PM email).

As to the affirmative response to No. 28, all of the above-cited information indicated that the load was being operated INTRA-state, not INTER-state, and was being hauled for their own construction use, not "for hire."

30. Please identify the date which Turbak Law Office received any video of the car crash which killed Paula Thovson.

ANSWER: **Turbak Law Office, P.C. did not receive a copy of the video of the crash. While the LaMoure County State's Attorney did allow attorney Tom Dickson to view the video on September 17th, 2020, because of the pending criminal action, it was not released. And, by the time the criminal prosecution was completed, the video was no longer of any consequence as the full limits of coverage had been tendered, and no other assets were available. Filing a civil claim was neither practical nor prudent by that point in time.**

31. Please identify the date which you informed Bill Thovson that Turbak Law Office had received video evidence of the crash.

ANSWER: **The day BEFORE, (August 6, 2020) Bill Thovson signed the first Legal Services Agreement, he was notified by Seamus Culhane that, "[M]y paralegal discovered that there is likely video at the c-store near the collision, and likely a dash camera in the tow truck." (10:50 AM)**

32. Please identify the date that Turbak Law Office received the final report from the North Dakota State Highway Patrol regarding the car crash which killed Paula Thovson.

ANSWER: **Objection, Vague. It is not clear what you mean by the "final report." The collision report was provided to Turbak Law Office on or about August 17th, 2020. Additional information related to the criminal charges and additional report including Trooper Sova's**

declaration of Probable Cause was produced on or about August 31st, 2020.

33. Please identify the date which Turbak Law Office received any criminal proceedings from LaMoure County, North Dakota against Dean Johs.

ANSWER: **Turbak Law Office, P.C. did not receive any criminal proceedings from LaMoure County, North Dakota against Dean Johs.**

34. Please identify the date which Turbak Law Office informed Bill Thovson of any criminal proceedings from LaMoure County, North Dakota against Dean Johs.

ANSWER: **Turbak Law Office, P.C. did not inform Bill Thovson of any criminal proceedings from LaMoure County, North Dakota against Dean Johs. However, Bill Thovson was made aware of the criminal proceedings in August 2020 via email by Thomas Dickson.**

35. Please identify the date in which the insurance company for Charles Johs offered the policy limits of coverage for the death of Paula Thovson.

ANSWER: **Objection, Vague. August 24, 2020, is the date the initial offer was made regarding what was alleged to be Charles Johs' commercial auto insurance policy limits.**

36. Please identify the date in which Turbak Law Office informed Bill Thovson of the policy limits of coverage for the death of Paula Thovson.

ANSWER: **Objection, Vague. On August 24, 2020, Bill Thovson was notified of the existence of and tender of Charles Johs' alleged commercial auto policy limits.**

37. Please identify the date which Turbak Law Office informed Bill Thovson of the policy limit offer from the insurance company of Dean Johs.

ANSWER: **Objection, Vague. August 31st, 2020, was the date that Bill Thovson was notified of the offer of the alleged limits of Dean Johs' auto insurance policy.**

38. Please identify the date which Turbak Law Office received a policy limit offer from the insurance company of Dean Johs.

ANSWER: **Objection, Vague. August 26th, 2020, is the date of the initial offer was made regarding what was alleged to be Dean Johs' auto insurance policy limits.**

39. In the event that more than 12 hours passed from when Turbak Law Office received the policy limit offer from the insurance company for Charles Johs or Dean Johs before Turbak Law Office informed Bill Thovson of the same, please explain the reason for the delay.

ANSWER: **As an initial matter, time was not of the essence. Seamus Culhane had already told Bill Thovson that he believed an offer of $250,000 would be forthcoming from Dean Johs, and without more information and context, all Culhane, Thovson, and Dickson were in agreement that the amount would not be accepted until other details had been investigated.**

August 26, 2020, was a Wednesday, and there was an intervening weekend. Meanwhile, Bill Thovson was a sophisticated client with many questions who required extensive explanation at every stage. At that point in time there were several areas of uncertainty about what the potential final numbers would be for Mr. Thovson's benefit.

There was a variety of ongoing and outstanding issues related to Mr. Thovson's case/claim. This includes the fact that neither adjuster would provide certified copies of the tendered policies nor declarations pages as Bill Thovson requested on August 25th, "[T]rust but verify." Meanwhile, Turbak Law Office, P.C. was running independent, Red Book searches to attempt to identify other potential insurance coverages. Also, there was some potential that there would be a General Commercial Liability coverage on the trailer that might offer additional coverage for the crash. There were also outstanding questions that Paul Semeraro and Brad Beehler were attempting to answer about the items loaded on the trailer at the time of the crash that may have provided additional insurance coverage. Further, Turbak Law Office, P.C. was attempting to obtain a waiver of the potential subrogation amounts to further benefit Mr. Thovson. That amount impacted the gross recovery by as much as $70,000. Finally, Seamus Culhane attempted to contact Thomas Dickson to discuss the offer and likely strategy moving forward.

All of these issues provided significant financial and strategic context that would impact the advice that Seamus Culhane and Thomas Dickson would offer Thovson in response to the offer of Dean Johs' auto policy limits in the overall context of the case/claim.

40. Please explain all research and investigation conducted by the Turbak Law Office regarding the employment relationship between Dean Johs and Charles Johs.

ANSWER: **Objection: Vague, Overbroad. Without waiving: Turbak Law Office, P.C. requested and reviewed interviews, police reports, and materials lists. Once Dean admitted to being in the scope of employment on August 31st, 2020, via email from Paul Semeraro that Dean considered himself to be within the scope of his employment, that particular issue did not remain of significant consequence.**

41. Please explain all research or investigation conducted by the Turbak Law Office, or anyone acting on its behalf, with respect to the assets of Charles Johs.

ANSWER: **Objection: Vague, Overbroad. Without waiving: Turbak Law Office, P.C. ordered Transunion Searches on both Charles and Dean Johs which were provided to Bill Thovson on August 25, 2020. Meanwhile, on October 24th, 2020, Thomas Dickson drove to Charles Johs' farm to see if there was anything remarkable. His corresponding email to Seamus Culhane included the following:**
"Seamus:
Today, I drove to the Johs farm south of Napoleon. That area is mainly pasture and small grains. Not great farming land. The Google pictures are pretty telling.
On the Johs place, there are no big grain bins nor a grain delivery system that one would expect on a big farming operation.
Some big hay bales just south of the farm-yard but not a lot. I did not see any cattle.
There were 8 or more horses northwest of the farmstead that probably belong to him.
There is a big Morton building that is shown on the photographs that could be used for storage,calving, or storing building supplies. Typical big storage building.
There is a nice ranch house with a camper parked in front.
It is a pretty typical small farm in that area. Very scrubby shelterbelt on the north and east sides.
I did not drive into the yard for fear someone was there. Since I am hoping to meet him, I did not want talk to him without his lawyers.

42. Please explain all research or investigation conducted by the Turbak Law Office, or anyone acting on its behalf, with respect to the assets of Dean Johs.

ANSWER: **Objection: Vague, Overbroad. Without waiving: Turbak Law Office, P.C. ordered Transunion Searches on both Charles and Dean Johs which were provided to Bill Thovson on August 25, 2020. Bill Thovson, an expert in identifying other assets indicated that he did not believe, based upon the creditors identified in the asset checks that there were likely any other assets combined with other facts associated with Dean Johs' incarceration and other substance abuse factors.**

43. Please identify all issues of fact, issues of law, or contingencies which Turbak Law Office believes existed as to the recovery of North Dakota personal injury protection (a/k/a PIP coverage/no-fault insurance)?

ANSWER: **Bill and Paula Thovson's insurance policy was one from South Dakota, where there is *no* statutory nor other PIP coverage beyond the declared medical payments, coverage provided in the insurance policy(s). At the time of the consultation, Bill Thovson *had not* made claims for those amounts, however, Lisa Ronke made those claims for Bill Thovson along with the accidental death benefit. Likewise, that same Thovson auto policy likely provided for potential reimbursement. Thus, not only was the recovery/payment of PIP benefits TO Bill Thovson contingent upon the coverage being identified and prosecuted, so too was reimbursement following the recovery thereof.**

44. Please identify all healthcare subrogation work conducted by Turbak Office Law on behalf of Bill Thovson.

ANSWER: **See Documents provided in Responses to RFPD.**

45. Did Bill Thovson disclose to you at any time prior to August 28, 2020, that it was his intention to file a wrongful death action against Charles Johs or Dean Johs?

ANSWER: **Objection: Vague. Turbak Law Office, P.C. does not believe that Bill Thovson ever independently intended to file a wrongful death action.**

46. Did Seamus Culhane advise Bill Thovson that he should seek mental counseling to deal with the grief from the loss of his wife Paula Thovson?

ANSWER: **Yes.**

47. If the answer to the preceding Interrogatory is in the affirmative, why did Seamus Culhane advise Bill Thovson to seek professional help in dealing with his grief over the loss of Paula Thovson?

ANSWER: **Because Seamus Culhane has dealt with many people who have suffered injury, loss, and death of family members. And therapy has often proven to be beneficial to individuals' mental well-being, long-term health, and recovery. It also assists individuals in communicating about difficult topics, including guilt and grief. Meanwhile, Mr. Thovson was openly maliceful and angry and had a history of being physically violent in the context of litigation, something that would not be tolerated by him nor any Counsel,**

Courts, or any eventual jury. Neither anger nor malice appeared to be healthy emotions for him to live with, and neither would aid him in being likeable to a judge or jury should he ever have to testify in court.

48. At the time that you requested Bill Thovson to execute the second legal services agreement, had Turbak Law Office already received policy limits offers from the insurance companies for both Charles Johs and Dean Johs?

ANSWER: **No.**

49. At the time that Turbak Law Office requested Bill Thovson execute legal services agreement no. 2, had Turbak Law Office disclosed to Bill Thovson all offers which it had received from the insurance company of Charles Johs and Dean Johs?

ANSWER: **No as it had not yet been received.**

Dated this 3rd day of OCT 2023.

TURBAK LAW OFFICE, P.C.

Subscribed and sworn to before me this 3rd day of October, 2023.

(SEAL) ERIKA L. FOX NOTARY PUBLIC SOUTH DAKOTA

Notary Public, State of South Dakota
My Commission Expires: Aug 15 2028

Objections to any interrogatories and requests stated above are made on Plaintiff's behalf by his counsel, Nancy J Turbak Berry.

TURBAK LAW OFFICE, P.C.
Attorneys for Plaintiff

Nancy J Turbak Berry
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From: Seamus Culhane
To: Erika Fox
Subject: FW: Thovson Report
Date: Saturday, August 22, 2020 10:29:50 AM

Please update the LSA with this language and we will have Bill sign the new one.

From: Bailee Vetter <bvetter@dicksonlaw.com>
Sent: Thursday, August 20, 2020 9:53 AM
To: Seamus Culhane <seamus@turbaklaw.com>
Cc: Tom Dickson <tdickson@dicksonlaw.com>
Subject: Thovson Report

Good Morning Seamus:
Tom asked me to send to you the below language that will need to be included in the fee agreement to comply with ND Law. He said that you can just place this language in your fee agreement. He thought this maybe easier.

Dickson Law Office has agreed to share the fee payable hereunder with the law firm Turbak Law Office, P.C. The fee will be paid 50% to Turbak Law Office, P.C. and 50% to Dickson Law Office.

If you have any questions, please do not hesitate to call our office.
Thank you.

Bailee
Paralegal
Dickson Law Office

From: Seamus Culhane [mailto:seamus@turbaklaw.com]
Sent: Wednesday, August 19, 2020 10:26 AM
To: Tom Dickson <tdickson@dicksonlaw.com>
Cc: Bailee Vetter <bvetter@dicksonlaw.com>
Subject: RE: Thovson Report

So we might be capped at the $10,000 in med pay?

From: Tom Dickson <tdickson@dicksonlaw.com>
Sent: Wednesday, August 19, 2020 9:33 AM
To: Seamus Culhane <seamus@turbaklaw.com>
Cc: Bailee Vetter <bvetter@dicksonlaw.com>
Subject: Re: Thovson Report

Seamus:
North Dakota's No-Fault coverage is either $30,000 or $10,000. The Auto Insurance companies got a Coordination of Benefits statute passed which allows them to only pay $10,000 if there is medical insurance. The lobbyist for Blue Cross was such a moron that he testified in favor of it.
Blue Cross has spent the last 20 years trying to repeal that statute but have been unable.
Tom

From: Seamus Culhane <seamus@turbaklaw.com>
Date: Tuesday, August 18, 2020 at 11:00 PM

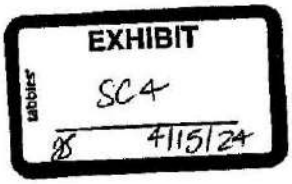


EXHIBIT M

4. Who was he hauling something for someone?
Answer: He was hauling for his father (Charles Johs). Dean states he does not know if the sheets of tin and the trusses were going to be used for CD&R Construction business or if his dad was going to use them for his farm.
5. Was he working for Charles Johs' business at the time?
Answer: Yes, he was working as an employee of CD&R Construction when the accident occurred
6. Was Dean acting within the scope of his employment at the time of the crash?
Answer: Yes - back in June 2020 he fell off a ladder and had a serious injury to his left shoulder that required significant surgery. Thus he was relegated to driving around for CD&R Construction - mainly picking up materials. He considers himself on the job and in the course & scope of his employment.

Paul Semeraro
Large Loss Adjuster
Cell: 813-390-6282
Office: 314-813-5933
Email: paul.semeraro@ngic.com

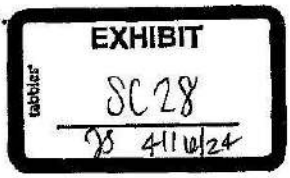
From: Seamus Culhane <seamus@turbaklaw.com>
Sent: Monday, August 31, 2020 10:35 AM
To: Brad Beehler <bbeehler@MorleyLawFirm.com>; Semeraro, Paul <Paul.Semeraro@NGIC.COM>
Cc: Lisa Ronke <lisa@turbaklaw.com>; Courtney, Susan <Susan.Courtney@NGIC.COM>; Kellie Burgess <kburgess@MorleyLawFirm.com>; Seamus Culhane <seamus@turbaklaw.com>
Subject: RE: Claim 200310521

Mr. Beehler,
Thank you for the note. Once we are able to decipher whether there are additional assets and claims or not, I will be back in touch.
SWC

From: Brad Beehler <bbeehler@MorleyLawFirm.com>
Sent: Wednesday, August 26, 2020 1:38 PM
To: Semeraro, Paul <Paul.Semeraro@NGIC.COM>; Seamus Culhane <seamus@turbaklaw.com>
Cc: Lisa Ronke <lisa@turbaklaw.com>; Courtney, Susan <Susan.Courtney@NGIC.COM>; Kellie Burgess <kburgess@MorleyLawFirm.com>
Subject: Claim 200310521

Mr. Culhane
I have been asked to prepare a release to facilitate resolving this matter. I am attaching my standard RELEASE OF ALL CLAIMS – WRONGFUL DEATH AND SURVIVORSHIP. **I understand there are still some things you want to look into before a final settlement is reached but was asked to get the attached to you to hopefully move the process along for both sides.**

EXHIBIT N



From: Tom Dickson [mailto:tdickson@dicksonlaw.com]
Sent: Thursday, August 13, 2020 11:35 AM
To: jshockman@nd.gov
Subject: FW: In Re: Paula Thovson

CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe.

Sorry about the misspelling.

Tom
Thomas A. Dickson
Dickson Law Office
tdickson@dicksonlaw.com
P.O. Box 1896
Bismarck, ND 58502
701-222-4400

From: Tom Dickson
Sent: Thursday, August 13, 2020 11:34 AM
To: jschockman@nd.gov; Seamus Culhane <seamus@turbaklaw.com>
Cc: Bailee Vetter <bvetter@dicksonlaw.com>
Subject: In Re: Paula Thovson

James:

Attorney Seamus Culhame of Watertown, SD and I will be representing the family of Paula Thovson in the civil claim arising from this incident.

I just wanted to touch base with you to let you know the family has retained civil representation.

Please let us know if there is anything you need from the family.

Thank you.

Tom

Thomas A. Dickson
Dickson Law Office
tdickson@dicksonlaw.com
P.O. Box 1896
Bismarck, ND 58502
701-222-4400

From: Seamus Culhane
To: Erika Fox
Subject: Fw: Thovson -$250K limits offer from Susan - BI for Charles Johs
Date: Friday, February 24, 2023 3:06:23 PM

From: Tom Dickson <tdickson@dicksonlaw.com>
Sent: Monday, August 24, 2020 2:39 PM
To: Seamus Culhane <seamus@turbaklaw.com>
Subject: Re: Thovson -$250K limits offer from Susan - BI for Charles Johs

Seamus:

I think we need to see all the policies.

Tom

From: Seamus Culhane <seamus@turbaklaw.com>
Date: Monday, August 24, 2020 at 2:32 PM
To: Tom <tdickson@dicksonlaw.com>
Cc: Seamus Culhane <seamus@turbaklaw.com>
Subject: FW: Thovson -$250K limits offer from Susan - BI for Charles Johs

Tom,

I normally try to settle claims without suit, however, it seems like they always give me an excuse. Do you think we should just wait to file suit and trust they are going to come to their senses? This non-cooperation irritates me.

SWC

From: Lisa Ronke <lisa@turbaklaw.com>
Sent: Monday, August 24, 2020 2:09 PM
To: Seamus Culhane <seamus@turbaklaw.com>
Cc: WilliamThovsonZ7550422@projects.filevine.com
Subject: Thovson -$250K limits offer from Susan - BI for Charles Johs

Susan from National General called in from 314.813.5685
She stated that Charles Johs, owner of PU, had a commercial policy of only $250/500
She is authorized to offer limits of $250K and will be sending the DEC page and the offer via email

She state that Dean Johs (at-fault driver) is also insured by National General and his BI Claims rep is

EXHIBIT P

TLOA000460

EXHIBIT
tabbies
SC 24
25 4/16/24

Paul Semeraro, who is still investigating and is not yet authorized to release coverage info, but this should be in the next day or two.
Paul's #: 314.813.5933

She state that there is NOT an umbrella policy and no other policies for this collision.
PU is personal use, but is covered by the commercial policy state above ($250/500)

Brad Beehler of Morley Law Firm has already been assigned to this case and will help with drafting releases or represent the Johs family in case of suit.

She stated that we would like to get this over with and that I am more pleasant to talk to than Seamus.

Lisa Ronke
Turbak Law Office, P.C.
26 S. Broadway, Suite 100
Watertown, SD 57201
Phone: 605.886.8361
Fax: 605.886.8383

New Case

August 9, 2000

Bill Thorsen

Deceased: Paula Thorsen
Age: 63
DOI: July 28, 2000
Time: 4:30 pm
County: LaMoure County

Defendant: Dean Johns
Napoleon, N.D.

Sept. 2, 2020

Mem. Review & File

-Dean Johns.

C D & R Construction
2821 7th St NE
Napoleon, ND 58561-9648
Trade name;

V Coose made Trailer:

1/ 2017 FORD F350

Sept. 14, 2012

9am Review of File.

I. Dean-Johns:

- Taped statement of Dean Johns & Johns
- Napoleon, ND.
- DOB: 2-11-80
- His injuries:
  - Concussion;
  - Very little memory;
  - Took him to the hospital;
  - Scrape on abdomen;
  - Scrape on left wrist & right wrist;
  - Ambulance took him to Minot Hospital;
- Has had several previous concussions;
- Pretty coherent @ the hospital.
- Anticipate no further treatment.
- Did work day <u>after</u> the accident.
- * - Another accident in <u>June</u> - Right shoulder; June 12*
- Had major surgery -
- Being PT
- Had seat belt on.
- "I was getting materials for my <u>dad</u> from the Butterfield Colony;
- I was being paid; Dad is Chuck
- Business is General Construction;
- Have not filed a WSI claim;

DL 01021

II. Witness: Todd Kent Hof - August 16, 2000
- Expert Student
DOI: July 28, 2000 Tuesday 4:30-5 pm.
DOB: July 4, 1995
(507) 227-8437
Home: Moses, Minnesota
- Wears prescription glasses;
- West from the area;
- Following Ms Thorson; 100 yards behind her;
- "On-coming truck distracted by something"
- "Pick-up w/ 5th wheel blew through.
- Didn't hit the brakes"
- "45-50 mph"

- "I was traveling about 45 mph"
"Same speed @ Ms Thorson"
- Saw brakes flash "
- "Truck came to fast."
- "There was a stop sign for Pick-up"
- I was alone;
- No passengers in the two vehicles;
- I went to the pick-up.
- All the air bags were deployed;
- "John was dazed"
- Did not approach Ms. Thorson;

DL 01022

- "I was traveling south"
- "Tin something for roofing" & "some ladders"
- Impact of sedan - Front driver side;
- I noticed John same time she did.
- I saw that he was not going to stop @ all,
- "It was fast."

III Bryson Schiele - Taped Statement Sept. 5, 2020
Jodie & Bryson - Jodie
DOI: July 28, 2020
- Jodie is the Mom;
- Bryson is her son
- From Edgeley, N.D
- DOB: 10-08-2002
- He has to wear prescription glasses.
- He was wearing Contacts
- It was a Tuesday - July 28, 2020
- Around 4:30 pm.
- Intersection Hwy 13 & 281
** - Across the street in NAPA
- Pick-up on #13
- Pick-up did not stop
- He blew right through the intersection;
** - He did not brake @ all;
- Not sure if she braked
- The Car hit the trailer;

- Heard no horns or screeching
- Brown pick-up w/ Trailer
- 4 door sedan;
- No passengers in the two vehicles
- Ms Thorson was wearing her seat belt
- Airbags in both vehicles

- Trailer had building trusses;
- Did not observe skid marks
- Car hit when Trailer was attached to Pick-up
- "Assumed car was going 45 mph - speed lim. 7-"
- "Pick up going @ least 65"
- Trailer detached
- She was just coming to the intersection;

- He took photos;

Sept 16, 2020

Noon: LaMoure County State's Attorney - LaMoure, ND
- He took a pain pill earlier; Jane Huckman
- 3 sets of Rumble strips; Katie
- Pick up trusses @ both Colonies.
- Video from Cenex
- Shows the accident;
- Paula & lives;
- John does not slow down
"Paula Thorson!"

7-29-20 - Miranda the next day 12:34 pm.
- At John house/farm;
- H.P. Interview
- Picked up steel at trusses - another east & south;
- On Medication - Wellal, effexor, ciprexin;
- Ladder fell on him. - New injury;
- Was adjusting his sling;
- Looking over @ gas station;
- "I usually stop."
- "Did I run the stop sign"
- Went through about road speed;
- Impounded the cell-phone;
- H.P. got both phones;
- Accident @ 4:30 p.m.
- Going to get s/t to eat & drink @ gas station;
- Warrant to search the phone;

DL 01025

* Out-going call @ 16:29 & 47 seconds.
- 1 second.
Crash @ 16:29:

Crash Report
- W.P. Paul Fire

Tom Wakel (701) 730-7013
- Witness
- Edgeley, ND

- They downloaded ACM's of both vehicles.
- Both of the drivers have from "traveling into the space b/w the pick-up & the trailer and the Avalon then being struck by the trailer after impact by the Ford 350.

July 29, 2020
11:36 Charles was allowed to come to OSD Body & Paint to obtain property in trailer
- This is where Interview of Dean took place.

2011 Toyota Avalon
- Bill was on the phone w/ Paula.
- Not a crime.
- Call ended @ 16:30.02
- Jake called out going @ 16:29.45

DL 01026

2017 Ford 350

En-route from Willow Bank Hatteras to Colony:

-The drivers side front quarter panel was embedded in the main cross frame of the trailer

-Right arm in the sling

-

3 calls by Chuck

From Chuck: 4:26:14 22 seconds

From Chuck: 4:27:30 34 seconds

To Chuck: 4:29:45 1 second

Paula

From B.H

5:24:35 1:05:37 Answered

4.52:15 Not answered

DL 01027

Trusses & Steel siding.

Fairview & Wilno bank

Sept. 20, 2020

12:15 pm. E-mail to Brad Beckler

10-6-20

2:30pm Review of File.

Receipt: 9-23-2020

Trusses & Materials - West Jobs

Magnolia Jobs

7-27-20
Pick-up Tuesday on July 28, 2020

Northland Steel & Tim LLC
Fullerton
Bill 7-27-20
Pickup on Tuesday
- Located near Maple Lucas Colony
- Steel roofs & siding panels
Sam & Jerry Williams

WB Components, LLC
Edgeley, ND

Pick-up on July 28, 2020
- Trusses
-
8826 ~~Hwy~~ Street SE
Near Williams Co.
$1,913.82

DL-01029

10-7-20
Stanley, ND

8am. Review of File:

Fleck v. MNC
- Summary judgment
- Employer is not vicariously liable to independent K'ors employees.

FeHig v. Whitman

11-13-20

10:10am

Fargo ND
Ballard Law Office
Jean Marlin
H Baker
Charles Johns
Tom Dickson

Trusses for Pole Building
10 mile NW of Charles

Steel Siding
- Repair his barns.
- McKenzie Farm.
- John Marquart.

Nov. 19, 2020

Gen. Review of File:

Wife: Paula
Daughter: Briana

DOI: July 28, 2020
Time: 4:30 pm.
Day: Tuesday
2011
Vehicle: ~~2020~~ Toyota Avalon

Posted speed: 45 mph.
Age: 63

Idaho Vehicle: ~~2017~~ Ford F350

Intersection: #281 & #13.

-3 eyewitnesses
-Video tape from Chevron
-Outgoing call:

Dam Jobs

(1) Negligent Homicide - Class C felony;
- Prior DUI
- No defense;
- Outgoing call;
- Medication hit - Juno related accident
- Did not drive, no skid marks;

(2) 2nd charge Logan County
- Reduced to Misdemeanor;
- Went in for treatment - Hazelden
- Nov 8, 2020 - Charles drove him;
- Served 10 days - released 10-6;
- Treatment five days later
- Closed

(3) Negligent Homicide:
- Jail time; ?
-

Pluses:
(1) Local, Treatment, no aggravating facts;

Minuses:
(1) No reading, no skid marks, no drug call, 2nd charge

DL 01033

I. Civil Case:

(1) Dean-John was negligent

(2) Two insurance policies - $30,000 -

(3) Dean is a laborer - judgment proof.

(4) Charles - Chuck is a small contractor

(5) Invoices:

A: ~~A~~ John Invoice

~~B: Brian Wirth File~~ Baker

~~C:~~ ?

B steel siding - repair person - John Hoagwelt

C. Trucker - Brian Wirth

(6) No Agency.

II. Comparative Fault.

- Jury Instructions

- Talking on the phone;

Jury determines reasonableness;

III State v. Federal Court

- Federal Court

Diversity

IV. Settle:

1 - Accident scene - Tr... - Edgeley
2 - LaMoure County State's Attorney - LaMoure
3/ Charles Johnson Farm; - Napoleon
4/ Interview Charles - Fargo
5/ Trip to Watertown to meet client

~~Leadership is~~
Our job is not to tell what you ~~need~~ want to hear;
Our job is to tell you what you need to hear,

11-20-20
Turbak Law Office
Watertown, SD

10am. Meeting w/ client:

- Request $100,000 from Charles;
- If no money, settle the case for policy limits;

Jerome Cathane
Bill Thorsen
Tim Dickson

-$
500,000 -

55692

494,340
x 30%
$ 148,392.00

11-19-20

2pm T/C w/ 1 Bidder
- Demanded $100,000 personally
- Al will get back to us next week.

Al said NO

Bailee Vetter

From:	bthovson@midco.net
Sent:	Wednesday, December 09, 2020 6:36 AM
To:	Seamus Culhane
Cc:	Lisa Ronke; Bailee Vetter; Tom Dickson; Deb Wiedman
Subject:	Re[2]: Thovson v. Johs

All:

I'm currently in the process of preparing to travel all day today, so a detailed response can not be provided, at this time. I will not agree to sign anything, at this time. Thanks.

Bill

On Tue, Dec 8, 2020 at 09:35 AM, Seamus Culhane <seamus@turbaklaw.com> wrote:

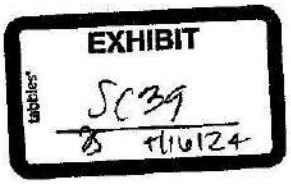
Bill,

Charles' attorney has indicated that Charles is unwilling to pay personally. This is what I would do if I were Charles and is what I would advise him to do if I were his attorney. There was simply no leverage and they know it. If you have questions about what transpired during those recent conversations, you can call Tom at 701-222-4400.

I've been in contact with the Optum people, and while they've agreed to a 25% reduction of their interest, I've told them they will need to agree to a full 1/3 reduction to pay their proportionate share of attorney's fees and costs. Once they've confirmed that, the settlement breakdown should look as it does in the attached spreadsheet per our discussion on November 20th.

Per our discussion and agreement, I expect Tom to now tell the insurance company that we will be accepting the offer(s) on your behalf and provide instructions for the settlement check to be deposited into his trust account. You'll need to sign a release of any civil claims and then Tom can disburse according to the attached spreadsheet.

1



DL 00533

EXHIBIT R

While no amount of money can ever replace Paula, in the scheme of wrongful death claims in the Midwest, this is a good outcome. Many, many claims are settled for much less than we recovered in this case. And, while I expect there would have been a different outcome if there was more coverage, so too would there have been a different outcome if there was less coverage. It is time to put this to rest.

Best,

SWC

From: Tom Dickson <tdickson@dicksonlaw.com>
Sent: Monday, December 07, 2020 5:23 PM
To: Seamus Culhane <seamus@turbaklaw.com>
Cc: Lisa Ronke <lisa@turbaklaw.com>; Bailee Vetter <bvetter@dicksonlaw.com>
Subject: FW: Thovson v. Johs

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF CODINGTON | THIRD JUDICIAL DISTRICT

Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office, Plaintiffs, v. Bill Thovson, Defendant.	Civil No. 14CIV23-000034 **COUNTERSTATEMENT OF FACTS IN RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS (Turbak)[1]**

I. COUNTERSTATEMENT OF FACTS

[¶1] Thovson does not dispute that LSA 1 was executed on August 7, 2020. Prior to the execution of LSA 1, however, Seamus Culhane informed Thovson, who had no prior knowledge of how wrongful death actions work (See Ex. 58 to the Declaration of Richard Thomas, p. 17, ll. 14-18), that there would be a wrongful death lawsuit to hold Dean Johs responsible (Id at p. 38, ll. 19-23), that the insurance company would be a challenge to work with and it would be a fight (Id at p. 39, ll. 1-4), and that the wrongful death lawsuit would be a challenge (Id at p. 39, ll. 6-11).

[¶2] Because Culhane was not admitted to practice law in North Dakota, he found Thomas Dickson, a Bismarck, North Dakota lawyer, to assist with the case. LSA 2 was drafted to add Dickson Law. Also, language in LSA 2 regarding the split of legal fees was changed as was language with respect to Thovson having the final say on subrogation payments being made.

[¶2] With respect to Paragraphs 5, 6 and 7, while the essence of the statements are factual, the sequence they are stated in is ultimately misleading. Indeed, the policy limits offer of $500,000 was received by Turbak Law prior to the execution of LSA 2. Specifically,

[1] Nancy J. Turbak Berry and Richard J. Thomas, both representing Plaintiffs in this matter, submitted separate Statements of Material Fact. As S.D.C.L. § 15-6-56(c)(2) requires a separate response, Thovson addresses each Statement of Material Fact separately.

- LSA 1 is executed on August 7, 2020;

- On August 12, 2020, NFUPCC emailed Culhane indicating that they do not have authority to make an offer yet, however, they are discussing the same with their insured;

- On August 24, 2020, policy limits for Charles Johs are offered with little to no professional services being performed by Turbak Law;

- On August 26, 2020, policy limits are offered by insurance for Dean Johs with little to no professional services being performed by Turbak Law. However, this offered is suppressed by Turbak Law until August 31, 2020;

- August 27, 2020, Thovson executed LSA 2; and

- August 28, 2020, Turbak Law and Dickson Law execute LSA 2.

[¶3] As for Exhibit C attached to the "NJTB Affidavit," there is no reference to other collectible assets.

[¶4] Thovson's agreement to take the offer of NFUPCC was based upon North Dakota's statute of limitations for wrongful death cases and Mr. Dickson's warnings regarding the same (see Exhibit A to Second Aff. of Gust).

[¶5] NFUPCC deposited the check with the court pursuant to Court Order dated April 24, 2023.

Dated this 17th day of June, 2024.

/s/ Michael L. Gust

Michael L. Gust
(Admitted Pro Hac Vice)
ABST Law
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mgust@abstlaw.net
(701) 235-3300

Mark Schwab (SD #5422)
Schwab, Thompson & Frisk
820 34th Ave East, Suite 200
West Fargo, ND 58078
(701) 365-8088
mark@stflawfirm.com

Attorneys for Bill Thovson

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF CODINGTON | THIRD JUDICIAL DISTRICT

Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office, Plaintiffs, v. Bill Thovson, Defendant.	Civil No. 14CIV23-000034 **COUNTERSTATEMENT OF FACTS IN RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIMS (Dickson)**

I. COUNTERSTATEMENT OF FACTS

[¶1] Paragraph 19 of the Statement of Facts is an incomplete and disingenuous claim that Thovson had "no idea" of the facts of his wife's vehicular homicide. To the contrary, this text is simply a follow up to Thovson's text from the day prior, August 3, 2020, wherein Thovson explaining questions he had, answers he was in fact discovering, and conclusions he was making of the perpetrator, Dean Johs. See Exhibit B to Second Aff. of Gust. Additionally, on August 5, 2020, Thovson sent Culhane an email giving him information to begin the investigation. It is not as if, out of thin air, Turbak Law began discovering information. See Exhibit C to Second Aff. of Gust. Indeed, Thovson gave a significant amount of information about the accident to Culhane.

[¶2] With respect to Paragraph 20, the August 4, 2020 text message indicates that Thovson's friend, Eric Meyer, was concerned about critical evidence disappearing in this case and that Thovson should contact an attorney. Exhibit 4 to Thomas Declaration; Exhibit 58 to Thomas Declaration, p.10, ll. 8-16.

[¶3] With respect to Paragraph 22, the citation to "Exhibit 1 at ¶ 13" does not appear to support this contention.

[¶4] With respect to Paragraph 23, collection of information began on August 4, 2020. At that time, Thovson exchanged several text messages with Culhane and had a call of about 45 minutes with him to discuss the vehicular homicide of his wife, Paula.

[¶5] With respect to Paragraph 25, Culhane did not advise to the actual existence of video evidence. The email states "there is likely video" of the accident. Which was false because based upon the conversations had, Turbak Law knew there was video of the accident and misled Thovson regarding its existence.

[¶6] As to Paragraph 28, Thovson does not dispute that LSA 1 was executed on August 7, 2020. Prior to the execution of LSA 1, however, Seamus Culhane informed Thovson, who had no prior knowledge of how wrongful death actions work (See Ex. 58 to the Declaration of Richard Thomas, p. 17, ll. 14-18), that there would be a wrongful death lawsuit to hold Dean Johs responsible (Id at p. 38, ll. 19-23), that the insurance company would be a challenge to work with and it would be a fight (Id at p. 39, ll. 1-4), and that the wrongful death lawsuit would be a challenge (Id at p. 39, ll. 6-11).

[¶7] As to Paragraph 29, LSA 1 was replaced with LSA 2.

[¶8] As to Paragraph 40, the same is an incomplete recitation. Ms. Courtney, with NFUCC, notified Turbak that she did not have permission to release policy limits but that she has "requested consent from my named insured, Charles Johs." Exhibit 18 to Thomas Declaration. This email shows there was in fact no contingency in the recovery of insurance proceeds.

[¶9] As to Paragraph 58, Thovson denies that all of those notes were taken on August 25, 2020. That is simply a date of a phone call. For example, in the August 3, 2020 text exchange (see Exhibit B to Second Aff. of Gust), Thovson already knew that the Ford truck driven by Dean Johs had ran the stop sign. Why would he now be asking that on August 25?

[¶10] As to Paragraph 63, it is important to note that the e-mail attachment does not discuss other available assets.

[¶11] As to Paragraph 64, while the factual assertion may be correct, there is no evidence this was presented to Thovson.

[¶12] As to Paragraph 66 and 67, there are other changes between LSA 1 and LSA 2 but the documents speak for themselves. The language inserted and quoted in Paragraph 67 is required under North Dakota law.

[¶13] As to Paragraphs 75-79, there are many issues raised. First, the email incorrectly starts off with, "the primary purpose of filing suit was going to be to discover information that would indicate that Charles was working as someone else's agent/employee." That was never the primary purpose. The primary purpose of filing suit was to hold Dean Johs responsible for the death of Paula Thovson. See Exhibit 58, p. 38; Declaration of Ariana Thovson. Next, when Culhane was contracting with Thovson about this case, there is no evidence that Culhane would not file suit because of its costs or risk. Next, filing suit was not about leveraging personal assets to obtain more than policy limits. It was about making Dean Johns take personal responsibility for killing Paula Thovson. Finally, the referenced case which was attached to the email is not attached to the Thomas Declaration and Thovson disputes that the facts of his case bear much resemblance to the case referenced.

[¶14] While Paragraph 80 may be an accurate statement, it fails to state that prior to the meeting Dickson emailed counsel, stated he was just trying to get the case wrapped up, and that he had done this before. See Exhibit D to Second Aff. of Gust.

[¶15] As to Paragraph 84, Thovson did not agree to settle his case and denies this assertion. Thovson acknowledges there was discussion under what terms he would settle, but in Thovson's November 20, 2020, email to Culhane, he clearly stated he was not making any decisions regarding Culhane's email of the 20th.

[¶16] As to Paragraph 85-87, Thovson disagrees that the email memorialized the terms of an agreement. The email is Culhane's recitation of Culhane's understanding. Thovson emailed on November 20, 2020, and specifically said he was thinking about the terms. On December 9, 2020, he refused to sign any settlements.

[¶17] With respect to Paragraphs 88-90, this recitation of facts fails to disclose that prior to the request for funds, Attorney Dickson had already emailed Charles Johs' attorney indicating that he just need to talk with Charles to put this matter to bed. A communication never authorized by Thovson.

[¶18] As to Paragraph 91, it is disputed that any agreement had been reached on November 20, 2020, i.e. three weeks earlier.

[¶19] As to Paragraph 94, per LSA 2, Thovson had sole authority to determine the payment on insurance claims.

[¶20] As to Paragraph 98, Thovson, per prior recitations contained herein, rejects the idea that there was any agreement which he "reneged on."

[¶21] As to Paragraph 106, the letters identified speak for themselves and Thovson rejects Plaintiff's conclusion.

[¶22] As to Paragraph 113, there is no negotiation to change the terms of settlement.

Dated this 17th day of June, 2024.

/s/ Michael L. Gust

Michael L. Gust
(Admitted Pro Hac Vice)
ABST Law
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(701) 365-8088
mark@stflawfirm.com

Attorneys for Bill Thovson

STATE OF SOUTH DAKOTA

COUNTY OF CODINGTON

IN CIRCUIT COURT

THIRD JUDICIAL DISTRICT

Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office,

Plaintiffs,

v.

Bill Thovson,

Defendant.

Civil No. 14CIV23-000034

SECOND AFFIDAVIT OF MICHAEL L. GUST

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I, Michael L. Gust, being first duly sworn, depose and state as follows:

[¶1] I am one of the attorneys for the Defendant in the above matter, and I make this Affidavit in support of Defendant's Motion for Partial Summary Judgment.

[¶2] Attached hereto as Exhibit A is a true and correct copy of letters from Dickson to Thovson dated June 25, 2021 and June 23, 2022.

[¶3] Attached hereto as Exhibit B is a true and correct copy of a text Thovson had with Paul Sova.

[¶4] Attached hereto as Exhibit C is a true and correct copy of an email from Thovson to Culhane dated August 5, 2020.

[¶5] Attached hereto as Exhibit D is a true and correct copy of emails between Dickson and Cash Aaland dated October 8-9, 2020 and Dickson and Culhane dated October 7, 2020.

Dated this 17th day of June, 2024.

Michael L. Gust
(Admitted Pro Hac Vice)
ABST Law
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mgust@abstlaw.net
(701) 235-3300

Subscribed and sworn to before me this 17th day of June, 2024.

(SEAL)

JENNIFER A. ERNST
Notary Public
State of North Dakota
My Commission Expires Aug. 19, 2025

Notary Public
My commission expires:

Filed: 10/8/2024 3:36 PM CST Supreme Court, State of South Dakota #30782

DICKSON LAW OFFICE

Thomas A. Dickson
Licensed in North Dakota and Montana

Attorney at Law
P.O. Box 1896
Bismarck, ND 58502-1896
www.dicksonlaw.com

Telephone: (701) 222-4400
Fax: (701) 258-4684
Email: tdickson@dicksonlaw.com

June 25, 2021

Bill Thovson
1328 South Lake Drive
Watertown, SD 57201

Re: Paula Thovson

Dear Bill:

I have tried to reach you by telephone and email; but have been unsuccessful. I wanted to take this opportunity to formally inform you of the Statute of Limitations in a Wrongful Death case in North Dakota so that you may act appropriately in advance of these absolute deadlines.

Your wife tragically passed away on July 28, 2020. Under North Dakota law, a wrongful death action must be commenced or otherwise resolved within two years of that date. Failure to do so will bar your right to sue or recover anything from either potential defendant, or any insurer for the wrongful death of your wife no matter how meritorious your claim is. Any lawsuit for the wrongful death of your wife must be commenced or otherwise resolved by July 27, 2022. A lawsuit in State Court in North Dakota is commenced with the Defendant is served. A lawsuit in federal court in North Dakota is commenced when the lawsuit is filed.

In addition, under North Dakota law, your wife's Estate would have the right to bring a Survival Action for lost income, medical bills, and non-economic damages for pain and suffering. The recoverable damages are different from those recoverable in a wrongful death claim. The Statute of Limitations for the Survival Claim is six years. However, I am unaware that an Estate has ever been opened in this matter. In addition, your wife is a resident of South Dakota. Presumably, that is where an Estate would be opened.

Regardless, the available insurance coverage for all of these claims is $500,000. Bringing two separate claims does not increase the insurance coverage. The insurance company has tendered that policy limit so that is the extent of their financial coverage in this matter. Seamus Culhane and I have both recommended that you accept this offer. However, you

have chosen not too. If you fail to accept this offer and resolve this matter prior to the expiration of the statute of limitations, your claim will be forever barred and even the $500,000 in available insurance coverage will not be paid out. However, this is your choice.

If you have any questions, please do not hesitate to call me.

Thank you.

Very truly yours,

Thomas A. Dickson

TAD:bbv

Cc: Seamus Culhane

DICKSON LAW OFFICE

Thomas A. Dickson
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Fax: (701) 258-4684
Email: tdickson@dicksonlaw.com

June 23, 2022

Bill Thovson
1328 South Lake Drive
Watertown, SD 57201

Re: Paula Thovson

Dear Bill:

I have received the recent emails between Seamus and you. The two statue of limitations is quickly approaching, and I wanted to take this opportunity to re-iterate what was contained in my June 25, 2021 letter to you.

Your wife tragically passed away on July 28, 2020. Under North Dakota law, a wrongful death action must be commenced within two years of that date. Failure to do so will bar your right to sue Dean Johs and/or Charles Johs for the wrongful death of your wife. Any lawsuit for the wrongful death of your wife must be commenced by July 27, 2022. A lawsuit in State Court in North Dakota is commenced when the Defendant is served. A lawsuit in federal court in North Dakota is commenced when the lawsuit is filed.

In addition, under North Dakota law, your wife's Estate would have the right to bring a Survival Action for lost income, medical bills, and non-economic damages for pain and suffering. The recoverable damages are different from those recoverable in a wrongful death claim. The Statute of Limitations for the Survival Claim is six years. However, I am unaware that an Estate has ever been opened in this matter.

Regardless, the policy limits for all of these claims is $500,000. Bringing two separate claims does not increase the insurance coverage. The insurance company has tendered that policy limit so that is the extent of their financial coverage in this matter. Seamus Culhane and I have both recommended that you accept this offer. However, you have chosen not too.

If you fail to accept this offer and resolve this matter prior to the expiration of the statute of limitations, your claim will be forever barred and even the $500,000 in available insurance coverage will not be paid out. This is your choice.

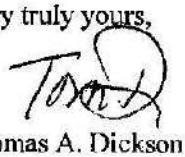
I also wish to reiterate that neither Seamus Culhane nor I will be commencing any civil action on your behalf.

DL 00017

If you have any questions, please do not hesitate to call me.

Thank you.

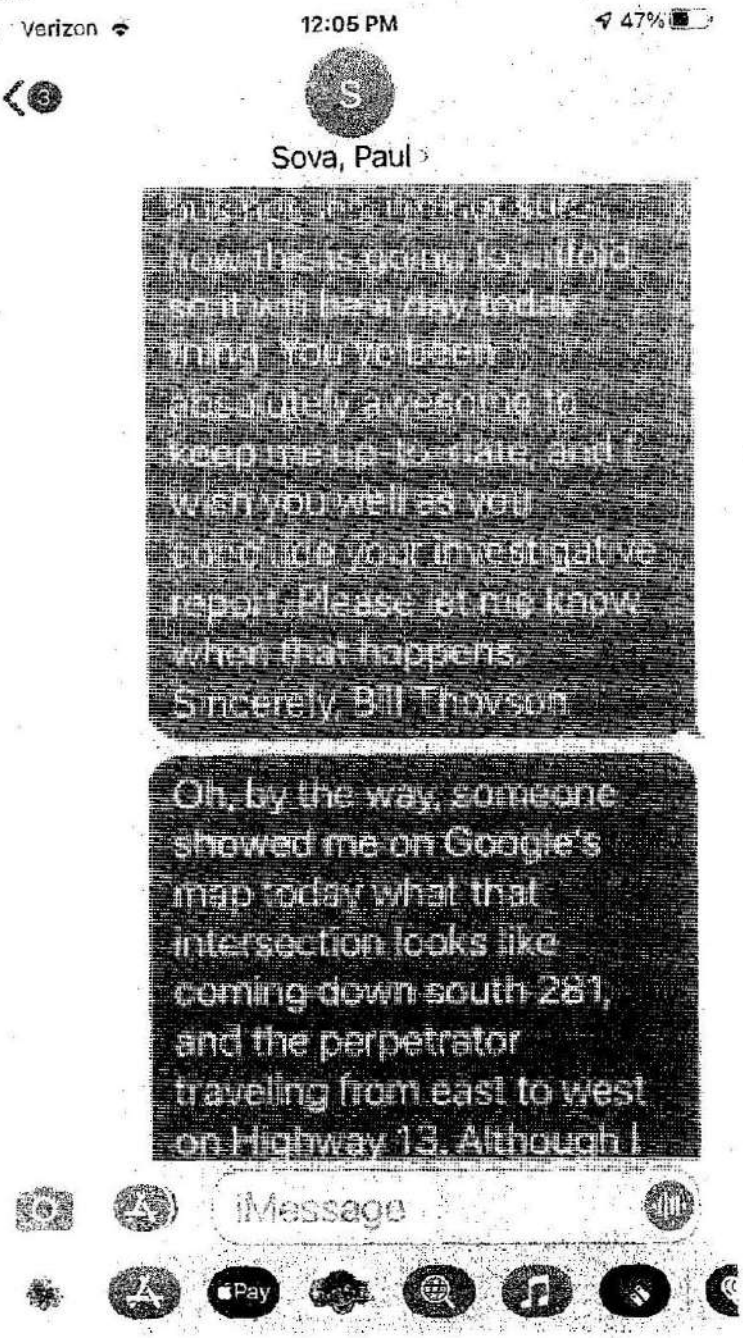
Very truly yours,



Thomas A. Dickson

alm
cc: Seamus Cullhane

2/9/2021 mail.midco.net (1242×2208)



8-3-20

BT

BT

16

EXHIBIT B

Verizon 12:05 PM 47%

S

Sova, Paul >

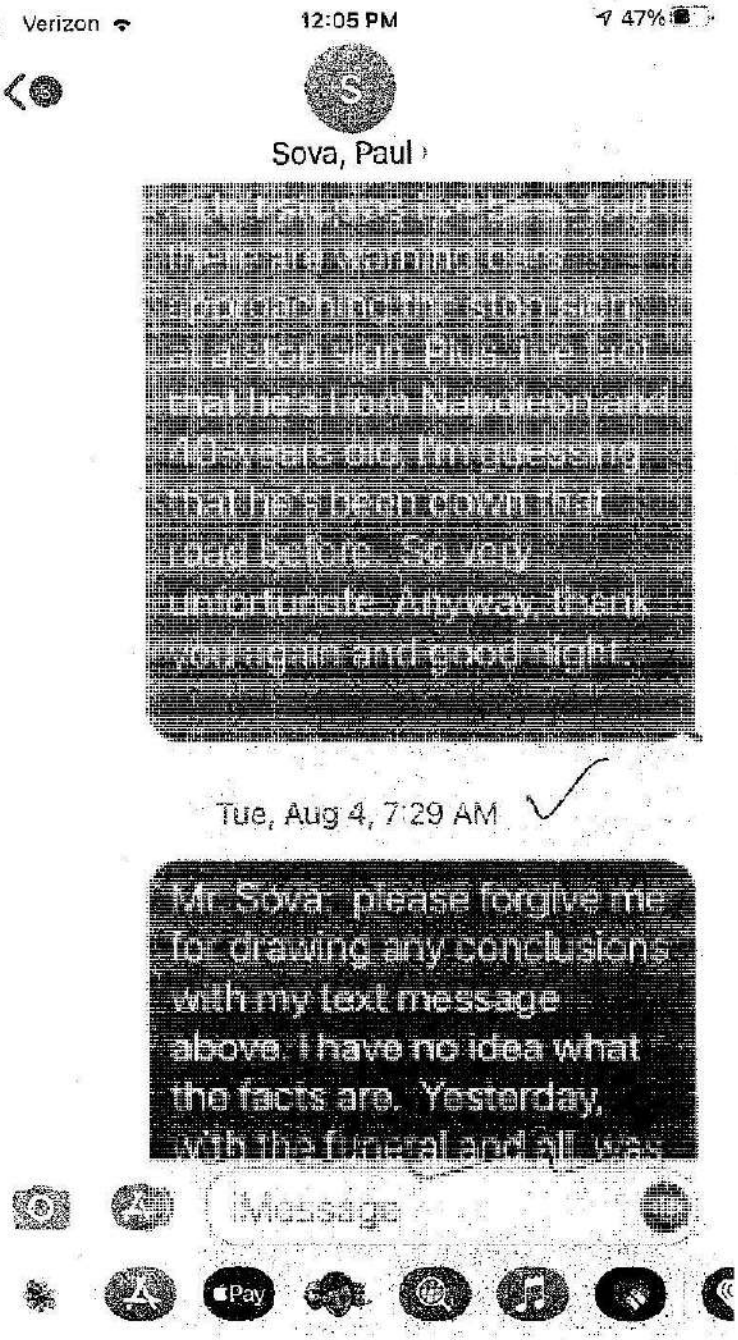
[illegible] 13. [illegible] have been wondering why Paula wasn't more observant and looking back-and-forth on that intersection despite the fact that she had a pass-through on 281. I now see why. It was basically a blind intersection for Paula coming from the north and going south on 281, and any traffic coming from the east on Highway 13. There appears to be a big building and trees in the north east corner of that intersection. So sad... That he simply didn't stop as I've been told there are warning bars [illegible]

Message

8-3-20

BT

17



8-3-20

BT

8-4-20

BT

8/5/2020

From:	bthovson@midco.net
To:	"Culhane, Seamus" <seamus@turbaklaw.com>
Date:	Wed, Aug 5, 2020 05:29 AM
Subject:	text messages and equipment status

I'm so sorry about the multiple text messages last evening, but figured it was "time to move" when the ND Highway Patrol informed that he "had released" both vehicles and the gooseneck trailer yesterday. Once Steve Ost, the owner of Ost's Body and Paint, returns my call I'll get back to you. Ost's Body and Paint is located in the country with an address of 5918 - 83rd Avenue SE, Adrain, ND 58472. Phone #605-685-2660. His body shop is located south of Jamestown, ND, and is only about two-miles off-of highway 281 which, again, runs from Jamestown to Aberdeen. I'm guessing that you'll want to chase your investigator over there before the insurance companies literally remove the equipment, unless they have already done that . . . just don't know. I doubt that it's been removed, since it was "just released" yesterday, but it depends on how anxious the insurance company(s) are, I suppose.

Thank you.

Bill

Bailee Vetter

From: Cash Aaland <cash@aalandlaw.com>
Sent: Friday, October 09, 2020 1:46 PM
To: Tom Dickson; Brad Beehler
Cc: Bailee Vetter
Subject: RE: Charles Johs

Hi Tom:

Talked to Charles and explained the situation. I think he will sit down with you and Brad, but I don't feel confident representing both Charles and his son. I talked to Al Baker, explained the situation and referred Charles to him. Al is officing in Aaland Law's building. Charles indicated he was going to call Al. I'll check back early next week to assist this to happen.

Cash

From: Tom Dickson <tdickson@dicksonlaw.com>
Sent: Thursday, October 8, 2020 5:53 PM
To: Brad Beehler <bbeehler@morleylawfirm.com>; Cash Aaland <cash@aalandlaw.com>
Cc: Bailee Vetter <bvetter@dicksonlaw.com>
Subject: Charles Johs

Cash and Brad:

Thank you for the information. I think I have a pretty good handle on what happened here.

However, we have a young lawyer from a South Dakota and a strong personality in the surviving husband.

I would like to sit down with Charles Johs and just have him explain these invoices to me.

We could do it in your offices in Fargo or Grand Forks or Napoleon where he lives or at my office in Bismarck. Anywhere is fine with me.

It would just be me, Mr. Johs and you guys. It would not be taped. I am trying to put this case to bed and I think I can if I can talk to Mr. Johs.

I have done this before and been able to avoid a lawsuit.

Let me know. Hope all goes well.

Tom

Bailee Vetter

From: Tom Dickson
Sent: Wednesday, October 07, 2020 1:49 PM
To: Seamus Culhane
Cc: Lisa Ronke; Bailee Vetter
Subject: RE: Seamus:

Seamus:

I am very aware of these cases. "Control" is generally the only issue in oil field litigation. The employer is immune and the oil company insulates itself by legally not giving a shit what happens on their well-sites.

We are sending you a brief in the Grady case. The defendants scheduled a mediation after they got the brief. Case settled at mediation and one of the defense lawyers faxed a letter to judge from the Hotel telling him that the case had been settled and that he did not need decide the summary judgment motion. They knew they would lose the Motion and did not have a "bad" decision out there.

The Kronberg case went to the 8th Circuit and we lost on that issue. I was not involved in the briefing nor the discovery but I knew the case was close. The young lawyer who handled the motions did a good job. It is hard issue to prove.

Let me know if you want me ask the lawyers if I can meet with Charles. It might help fill in some blanks..... but it will not change outcome.

However, me might need this to persuade the client that the end of this case is now here.

Tom

Thomas A. Dickson
Dickson Law Office
tdickson@dicksonlaw.com
P.O. Box 1896
Bismarck, ND 58502
701-222-4400

From: Seamus Culhane <seamus@turbaklaw.com>
Sent: Wednesday, October 07, 2020 11:41 AM
To: Tom Dickson <tdickson@dicksonlaw.com>
Cc: Lisa Ronke <lisa@turbaklaw.com>; Bailee Vetter <bvetter@dicksonlaw.com>
Subject: RE: Seamus:

Tom,

What I think we need is some explanation to confirm that whoever Charles Johs' company was hired by did not maintain any control over the work that was being done. ND recognizes this potential exception, but it looks like one of those deals that has never actually been used. It is there, but serves no purpose.

STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF CODINGTON | THIRD JUDICIAL DISTRICT

Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office, Plaintiffs, v. Bill Thovson, Defendant.	Civil No. 14CIV23-000034 **THIRD AFFIDAVIT OF MICHAEL L. GUST**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I, Michael L. Gust, being first duly sworn, depose and state as follows:

[¶1] Attached as Exhibit A is a true and correct copy of the October 8, 2020, Culhane email to Dickson referenced as "SC35" in Paragraph 22 of Defendant's Statement of Undisputed Material Facts.

[¶2] Attached as Exhibit B is a true and correct copy of the November 20, 2020, 3:18 p.m., email from Thovson to Culhane and Dickson following Thovson, Culhane, and Dickson meeting in Watertown, South Dakota referenced as "SC38" in Paragraph 23 of Defendant's Statement of Undisputed Material Facts.

Dated this 24th day of June, 2024.

Michael L. Gust
(Admitted Pro Hac Vice)
ABST Law
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
mgust@abstlaw.net
(701) 235-3300

Subscribed and sworn to before me this 24th day of June, 2024.

(SEAL) JENNIFER A. ERNST
Notary Public
State of North Dakota
My Commission Expires Aug. 19, 2025

Notary Public
My commission expires:

Bailee Vetter

From: Seamus Culhane <seamus@turbaklaw.com>
Sent: Thursday, October 08, 2020 11:00 AM
To: Tom Dickson
Cc: Bailee Vetter; Lisa Ronke
Subject: RE: Seamus:

Well, I don't want to go through that if we don't have to, either and we wouldn't have to sue the currently unknown named party.

But, if we do, we have a valid-as-hell suit against Charles and Dean; I am unaware of any case law indicating that we are not allowed to proceed to a judgment against Charles and Dean even if insurance limits have been tendered.

From: Tom Dickson <tdickson@dicksonlaw.com>
Sent: Thursday, October 08, 2020 10:58 AM
To: Seamus Culhane <seamus@turbaklaw.com>
Cc: Bailee Vetter <bvetter@dicksonlaw.com>; Lisa Ronke <lisa@turbaklaw.com>
Subject: Re: Seamus:

I will see if the lawyers let me talk to Charles in their presence. If not, it will take a lawsuit to take his deposition. It will be close to a frivolous lawsuit.

Sent from my iPhone

> On Oct 8, 2020, at 10:35 AM, Seamus Culhane <seamus@turbaklaw.com> wrote:
>
> Sounds good. Tom, I am on the same page with you. My only concern is that Bill is thorough enough that if we don't have a fact specific answer of why whoever the potential employer of C D & R on whatever building project was occurring was NOT factually in control of C D & R, he will not be satisfied.
>
> **From:** Bailee Vetter <bvetter@dicksonlaw.com>
> **Sent:** Wednesday, October 07, 2020 7:28 PM
> **To:** Seamus Culhane <seamus@turbaklaw.com>; Lisa Ronke <lisa@turbaklaw.com>
> **Cc:** Tom Dickson <tdickson@dicksonlaw.com>
> **Subject:** Fw: Seamus:
>
> Seamus:
>
> Tom asked me to send to you the attached Order and Response.
>
> Please let me know if you have any questions.
>
> Thanks.

DL 00399

EXHIBIT A

Bill:

I spoke with Mr. Baker by telephone so I did not stop in Fargo. I conveyed the demand for $100,000 personally from Charles Johs. He will discuss the demand with Mr Johs and get back to me next week.

Tom

Sent from my iPhone

> On Nov 20, 2020, at 3:18 PM, Bill Thovson <bthovson@midco.net> wrote:
>
> Gentlemen, thank you for meeting this morning and reviewing this matter. I am pressed for time this afternoon and I plan to carefully review your narrative and the spreadsheet this weekend, Seamus.
>
> Perhaps, Tom, you will be able to provide a limited update as to how your meeting goes this afternoon with the Grand Forks attorney, and whether or not he thought my request was plausible.
>
> Thank you, again. Bill T.
>
> Sent from my iPhone
>
> > On Nov 20, 2020, at 2:00 PM, Seamus Culhane <seamus@turbaklaw.com> wrote:
> >
> > Bill,

EXHIBIT B

I am writing to memorialize our meeting today. We've agreed to attempt to obtain additional proceeds beyond the $500,000 in combined liability limits from Mr. Charles Johs. However, we all recognize the unlikely event that we will recover anything from him and we also all recognize the fact that there is basically nothing to be gained from litigation. As such, you've preliminarily agreed to accept whatever the answer/response may be from Mr. Johs and release your claims after Mr. Dickson exercises what efforts he feels are appropriate and practical to obtain additional proceeds. In exchange for this agreement among us, Mr. Dickson and I have agreed to reduce our fees on the first $500,000 to 30% (rather than 33.33%), and otherwise eat the

costs you've incurred to date (not Optum's -- just yours) -- all as reflected in the attached spreadsheet. Meanwhile, if there are additional proceeds beyond the $500,000 in liability limits, we will only charge you 17% on that amount of additional money recovered beyond the $500,000 that has already been offered (we've waived fees on PIP/Med Pay). We've emailed Optum to confirm that there will be a proportionate reduction in attorney's fees for their subrogation claim. So, this number could change slightly.

Please let me know if we've misunderstood anything. I do not believe that we need an additional fee agreement, and given the limited time frame between our meeting and when I expect Mr. Dickson to

meet/speak with Mr. Johs' attorney, this should suffice as a written agreement. As we previously discussed, the services have been deemed to have been provided in ND, and Mr. Dickson's office and my office are splitting all attorneys' fees 50/50 and you are okay with that.

Best,

SWC

<11.20.20 Disbursement of Settlement Funds - Thovson, Bill.pdf>

15-6-67(a). Deposit in an action.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under § 15-6-67 shall be deposited and withdrawn as ordered by the court.

Source: SD RCP, Rule 67 (a), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

15-26A-3. Judgments and orders of circuit courts from which appeal may be taken.

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

(1) A judgment;

(2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

(3) An order granting a new trial;

(4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;

(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;

(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or

(7) An order entered on a motion pursuant to § 15-6-11.

Source: SDC 1939 & Supp 1960, § 33.0701; SDCL, § 15-26-1; SL 1971, ch 151, § 2; SL 1986, ch 160, § 2.

15-26A-4. Appeals of right--How taken.

An appeal permitted by § 15-26A-3 as of right shall be taken as follows:

(1) Notice of appeal. The notice shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall be signed by the appellant or his or her attorney. A notice of appeal filed under chapter 26-8A shall be signed by the appellant and his or her attorney. A notice of appeal filed under chapters 26-7A, 26-8A, 26-8B and 26-8C shall comply with § 15-26A-63.1.

(2) Docketing statement. A docketing statement shall be completed for each civil appeal, other than appeals in habeas corpus actions brought under chapter 21-27, on the form prescribed by the Supreme Court. Appellant shall attach to the docketing statement the findings of fact and conclusions of law, and memorandum decision, if any.

(3) Service of the notice of appeal and docketing statement. The appellant, or his or her counsel, shall serve the notice of appeal and docketing statement on counsel of record of each party other than appellant, or, if a party is not represented by counsel, on the party at his or her last known address.

(4) Filing notice of appeal and docketing statement. Before the expiration of the time to appeal, appellant shall file the notice of appeal and docketing statement with the clerk of the trial court in which the judgment or order was entered. The clerk of the trial court shall not accept for filing a notice of appeal unless accompanied by a docketing statement and proof of service of copies thereof on each party other than the appellant, together with the required statutory filing fees unless exempt by law. The clerk of the trial court shall not accept for filing a notice of appeal under chapter 26-8A that is not signed by the appellant and his or her attorney.

(5) Transmittal to Supreme Court. Upon compliance with subdivision (4) of this section, the clerk of the trial court shall immediately transmit to the clerk of the Supreme Court certified copies of the notice of appeal, docketing statement, proof of service, the judgment or order appealed from, notice of entry thereof, and the required statutory filing fees unless exempt by law. The clerk of the trial court shall redact the signature of the appellant from any certified copy of a notice of appeal filed under chapter 26-8A that is transmitted pursuant to this subdivision.

(6) Joint appeals. If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may serve and file a joint notice of appeal, or may join in appeal after serving and filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant.

Failure of an appellant to take any step other than timely service and filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. The failure of the appellant and his or her attorney to sign a notice of appeal under chapter 26-8A deprives the Supreme Court of jurisdiction to decide the appeal.

Appeals may be consolidated by order of the Chief Justice of the Supreme Court upon motion of a party.

Source: Supreme Court Rule 79-1, Rule 3; SDCL Supp, § 15-26A-3; SL 1986, ch 445 (Supreme Court Rule 86-10); SL 1991, ch 435 (Supreme Court Rule 91-1); SL 1993, ch 390 (Supreme Court Rule 93-7); SL 2007, ch 305 (Supreme Court Rule 06-73), eff. Jan. 1, 2007.

15-26A-4.1. Amended notice of appeal.

An amended notice of appeal shall be limited to the correction of clerical errors or omissions in the original notice of appeal. It may not be used for the purpose of appealing an order or judgment entered subsequent to the filing of the original notice of appeal, except when a subsequent order or judgment amends the order or judgment from which the appeal was initially taken. The amended notice shall be served and filed pursuant to the provisions of § 15-26A-4, provided, however, that no filing fees need be paid and no docketing statement need be filed.

The service and filing of an amended notice of appeal shall not serve to extend the time within which to accomplish the applicable appellate procedure, the time therefor to be computed as hereafter provided from the dates of service or filing of the original notice of appeal.

Source: SL 1988, ch 420 (Supreme Court Rule 87-1); SL 1990, ch 423 (Supreme Court Rule 89-5).

53-1-4. Law and usage of place of performance, application to contracts.

A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

Source: CivC 1877, § 937; CL 1887, § 3561; RCivC 1903, § 1255; RC 1919, § 876; SDC 1939, § 10.0106.

CHAPTER 9-08
UNLAWFUL AND VOIDABLE CONTRACTS

9-08-01. Provisions that are unlawful.

Any provision of a contract is unlawful if it is:

1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or
3. Otherwise contrary to good morals.

9-08-02. Contracts against the policy of the law.

All contracts which have for their object, directly or indirectly, the exempting of anyone from responsibility for that person's own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

9-08-02.1. Contracts against liability for errors or omissions - Void.

Any provision in a construction contract which would make the contractor liable for the errors or omissions of the owner or the owner's agents in the plans and specifications of such contract is against public policy and void.

9-08-03. Penalties and penal clauses void.

Penalties imposed by contract for any nonperformance thereof are void.

9-08-04. Fixing damages for breach void - Exception.

Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof is to that extent void, except that the parties may agree therein upon an amount presumed to be the damage sustained by a breach in cases in which it would be impracticable or extremely difficult to fix the actual damage.

9-08-05. Restricting enforcement of rights void.

Every stipulation or condition in a contract by which any party thereto is restricted from enforcing that party's rights under the contract by the usual legal proceedings in the ordinary tribunals or which limits the time within which that party thus may enforce that party's rights is void, except as otherwise specifically permitted by the laws of this state.

9-08-06. In restraint of business void - Exceptions.

A contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except:

1. A person that sells the goodwill of a business and the person's partners, members, or shareholders may agree with the buyer to refrain from carrying on a similar business within a reasonable geographic area and for a reasonable length of time, if the buyer or any person deriving title to the goodwill from the buyer carries on a like business in that area.
2. Partners, members, or shareholders, upon or in anticipation of a dissolution of a partnership, limited liability company, or corporation; upon or in anticipation of a dissociation of a partner or member; or as part of an agreement addressing the dissociation or sale of a partner, member, or shareholder's ownership interest, may agree that all or any number of them will not carry on a similar business within a reasonable geographic area where the partnership, limited liability company, or corporation business has been transacted, or within a specified part of the area.

9-08-07. In restraint of marriage void.

Every contract in restraint of the marriage of any person, other than a minor, is void.

9-08-08. Settlement of damages for personal injuries voidable.

Every settlement or adjustment of any claim for relief for damages on account of any personal injuries received, whether death ensues or not to the person injured, and every contract of retainer or employment to prosecute such an action, is voidable if made within thirty days after the injury or if made while the person so injured is under disability from the effect of the injury so received and within six months after the date of the injury.

9-08-09. Rescission of contract for damages for personal injuries.

Any person sustaining personal injuries, or in case of the person's death, the person's personal representative, may elect at any time within six months after the date of such injury to avoid any settlement, adjustment, or contract made in connection therewith within the time mentioned in section 9-08-08, by a notice in writing to that effect. The bringing of an action to recover damages for such injuries avoids any such settlement or adjustment. Whenever an action is commenced within the period of time herein limited to recover such damages, the amount received by the injured person, or the injured person's representative, in case of the injured person's death, in any such settlement or adjustment is not a bar to the prosecution of the action but may be set up as an offset or counterclaim to the amount of damages recoverable, if any, or applied toward payment of any judgment recovered in any such action if such amount so received by the injured person or the injured person's representative has not been pleaded specifically as an offset or counterclaim.

CHAPTER 53-11

EXTINCTION AND ALTERATION OF CONTRACTS

53-11-1. Extinguishment of contracts--Methods.

A contract may be extinguished in like manner as any other obligation and also by rescission, alteration, and cancellation, as provided by statute.

Source: CivC 1877, §§ 963, 964; CL 1887, §§ 3587, 3588; RCivC 1903, §§ 1281, 1282; RC 1919, §§ 902, 903; SDC 1939, § 10.0801.

53-11-2. Rescission by party to contract--Grounds.

A party to a contract may rescind the same in the following cases only:

(1) If consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;
(2) If through fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;
(3) If the consideration becomes entirely void from any cause;
(4) If such consideration before it is rendered to him fails in a material respect from any cause; or
(5) By consent of all the other parties.

Source: CivC 1877, § 965; CL 1887, § 3589; RCivC 1903, § 1283; RC 1919, § 904; SDC 1939, § 10.0802.

53-11-3. Rescission not effected by consent--Accomplishment by use of diligence to comply with rules governing rescission.

Rescission, when not effected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with §§ 53-11-4 and 53-11-5.

Source: CivC 1877, § 967; CL 1887, § 3591; RCivC 1903, § 1285; RC 1919, § 906; SDC 1939, § 10.0804.

53-11-4. Prompt action by party rescinding on discovery of duress, undue influence, or disability.

The party rescinding a contract must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, undue influence, or disability, and is aware of his right to rescind.

Source: CivC 1877, § 967, subdiv 1; CL 1887, § 3591, subdiv 1; RCivC 1903, § 1285, subdiv 1; RC 1919, § 906 (1); SDC 1939, § 10.0804 (1).

53-11-5. Restoration of everything of value by party rescinding.

The party rescinding a contract must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

Source: CivC 1877, § 967, subdiv 2; CL 1887, § 3591, subdiv 2; RCivC 1903, § 1285, subdiv 2; RC 1919, § 906 (2); SDC 1939, § 10.0804 (2).

53-11-6. Extinction by destruction or cancellation of contract or signatures by consent.

The destruction or cancellation of a written contract or of the signatures of the parties liable thereon with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act.

Source: CivC 1877, § 970; CL 1887, § 3594; RCivC 1903, § 1288; RC 1919, § 909; SDC 1939, § 10.0807.

53-11-7. Extinction by intentional destruction, cancellation or alteration of contract--Alteration or destruction of duplicate, not to prejudice.

The intentional destruction, cancellation, or material alteration of a written contract by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act. Where a contract is executed in duplicate, an alteration or destruction of one copy while the other exists is not within the provisions of this section.

Source: CivC 1877, §§ 971, 972; CL 1887, §§ 3595, 3596; RCivC 1903, §§ 1289, 1290; RC 1919, §§ 910, 911; SDC 1939, § 10.0808.

Codified Laws

APPENDIX TO CHAPTER 16-18
SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT

3.7. Lawyer as Witness.
3.8. Special Responsibilities of a Prosecutor.
3.9. Advocate in Nonadjudicative Proceedings.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS.

4.1. Truthfulness in Statements to Others.
4.2. Communication with Person Represented by Counsel.
4.3. Dealing with Unrepresented Person.
4.4. Respect for Rights of Third Persons.

LAW FIRMS AND ASSOCIATIONS.

5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.
5.2. Responsibilities of a Subordinate Lawyer.
5.3. Responsibilities Regarding Nonlawyer Assistance.
5.4. Professional Independence of a Lawyer.
5.5. Unauthorized Practice of Law; Multi-jurisdictional Practice of Law.
5.6. Restrictions on Right to Practice.
5.7. Responsibilities Regarding Law-Related Services.

PUBLIC SERVICE.

6.1. Voluntary Pro Bono Publico Service.
6.2. Accepting Appointments.
6.3. Membership in Legal Services Organization.
6.4. Law Reform Activities Affecting Client Interests.
6.5. Nonprofit and Court-Annexed Limited Legal Services Programs.

INFORMATION ABOUT LEGAL SERVICES.

7.1. Communications Concerning a Lawyer's Services.
7.2. Advertising.
7.3. Solicitation of Clients.
7.4. Communication of Fields of Practice and Specialization.
7.5. Firm Names and Letterheads.

MAINTAINING THE INTEGRITY OF THE PROFESSION.

8.1. Bar Admission and Disciplinary Matters.
8.2. Judicial and Legal Officials.
8.3. Reporting Professional Misconduct.
8.4. Misconduct.
8.5. Disciplinary Authority; Choice of Law.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of

honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's

legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Source: SL 2022, ch 249 (Supreme Court Rule 21-08), eff. Sept. 1, 2021.

CLIENT-LAWYER RELATIONSHIP

Rule 1.0.Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly" "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Source: SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004; SL 2018, ch 297 (Supreme Court Rule 18-06), eff. July 1, 2018.

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) Notwithstanding subsection (d), a lawyer may counsel or assist a client regarding conduct expressly permitted by South Dakota Cannabis laws, even if the same conduct violates federal law, but the lawyer must inform the client that the conduct violates federal law and advise the client about the legal consequences under federal law of the client's proposed course of conduct.

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:

(1) "This lawyer is not covered by professional liability insurance;" or

(2) "This firm is not covered by professional liability insurance."

(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

(e) This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable amount for fees or expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(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.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of potential expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

(2) To secure legal advice about the lawyer's compliance with these Rules;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(4) To the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used;

(5) To comply with other law or a court order; or

(6) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Source: SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004; SL 2018, ch 297 (Supreme Court Rule 18-06), eff. July 1, 2018; SL 2022, ch 250 (Supreme Court Rule 21-09), eff. Sep. 1, 2021.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided by paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or same matter before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8. Conflict of Interest: Current Clients, Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

16-18-26. Misconduct by attorney as misdemeanor.

Every attorney at law who:

(1) Practices any deceit or collusion, or consents to the same with intent to deceive the court or any party;
(2) Intentionally delays his client's suit with a view to his own gain;
(3) Intentionally receives any money or allowance for or on account of any money which he has not paid or become answerable for;
(4) Makes a subsequent application to a different judge to stay the same trial of any criminal prosecution with knowledge that application for such stay has been made and denied without leave reserved to renew it, before a judge authorized to grant it; or
(5) Knowingly permits any person not his general law partner or a clerk in his office to sue out any process or to prosecute or defend any action in his name;

is guilty of a Class 2 misdemeanor.

Source: PenC 1877, §§ 203, 210, 211; CL 1887, §§ 6403, 6410, 6411; RPenC 1903, §§ 206, 213, 214; RC 1919, §§ 3794, 3800, 3801; SDC 1939, § 13.1249; SL 1979, ch 150, § 19.

16-18-21. Attorney's lien on proceeds of action.

An attorney and counselor at law has a lien for a general balance of compensation in and for each case upon:

(1) Any paper belonging to his client which has come into his hands in the course of his professional employment in the case for which the lien is claimed;

(2) Money in his hands belonging to his client in the case;

(3) Money due his client in the hands of the adverse party or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed and in general terms for what services; after judgment in any court of record such notice may be given and the lien made effective against the judgment debtor by entering it in the judgment docket.

Source: PolC 1877, ch 18, § 9; CL 1887, § 470; RPolC 1903, § 702; RC 1919, § 5266; SDC 1939 & Supp 1960, § 32.1205; SL 1983, ch 157, § 3.

44-2-3. Public record notice of claim of lien on personal property--No other method provided--Lien statement--Contents.

In all cases where no other provision is made by statute for giving public record notice of any claim of lien on personal property any person claiming such lien may give public record notice thereof by sworn statement executed in writing stating:

(1) The names and addresses of the owner of the property and of the lien claimant;
(2) A description of the property sufficient to identify it;
(3) The approximate location of the property;
(4) The date on which the lien is claimed to have arisen;
(5) The amount claimed as a lien, and if the lien is one, which may increase by future keep, care, or other transactions related to the property, the probable amounts by which it will increase;
(6) The circumstances out of which the lien is claimed to have arisen and the circumstances, if any, under which its future accumulations may arise, sufficient to show the legal or contract right to such lien and its accumulations.

Source: SDC 1939, § 39.0124.

20-10-2. Acts constituting deceit.

A deceit within the meaning of § 20-10-1 is either:

(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
(4) A promise made without any intention of performing.

Source: CivC 1877, § 975; CL 1887, § 3599; RCivC 1903, § 1293; RC 1919, § 797; SDC 1939, § 47.0402.

15-5-6. Venue based on residence of defendant--Nonresident defendants--Payment of jurors' fees and mileage--Stipulation to venue.

In all other cases, except as provided in § 15-5-7, 15-5-8, or 15-5-8.1, the action shall be tried in the county in which the defendant or defendants, or any of them, shall reside at the commencement of the action. However, if none of the defendants reside in the state, the action may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial in the cases provided by statute. In the second event, the jurors' fees and mileage payments shall be paid by the parties in such proportions as the court may order. If the parties stipulate to a venue which is not specified in §§ 15-5-1 to 15-5-5, inclusive, the first sentence of this section, § 15-5-7, 15-5-8, or 15-5-8.1, the stipulation must be approved by a court order which also provides for the payment of jurors' fees and mileage payments by the parties.

Source: SDC 1939 & Supp 1960, § 33.0304; SL 1976, ch 146; SL 1985, ch 158; SL 2016, ch 110, § 2.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

NO. 30782

SEAMUS CULHANE, TURBAK LAW OFFICE, P.C.,
THOMAS DICKSON, and DICKSON LAW OFFICE,
Plaintiffs and Appellees,
v.
BILL THOVSON,
Defendant and Appellant.

Appeal from the Third Judicial Circuit
Codington County, South Dakota

The Honorable Douglas E. Hoffman, Circuit Court Judge

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Notice of Appeal filed August 6, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Caselaw

Other Caselaw

South Dakota Statutes and Rules

North Dakota Statutes

JURISDICTIONAL STATEMENT

Thovson appeals from judgment entered July 8, 2024, by which the Circuit Court granted Culhane, Turbak Law Office, PC, Dickson, and Dickson Law Office (collectively, "Plaintiffs") summary judgment on their claims against Thovson, granted Plaintiffs summary judgment on Thovson's counterclaims against Plaintiffs, and denied Thovson partial summary judgment on his counterclaim against Plaintiffs. Thovson filed a Notice of Appeal August 6, 2024.

STATEMENT OF LEGAL ISSUES

I. Were Plaintiffs entitled to summary judgment on their breach of contract claim?

The trial court decided Plaintiffs were entitled to judgment against Thovson for breach of contract.

A. Did Thovson make an enforceable promise?

The trial court decided the promise Thovson made was enforceable.

Tidball v. Hetrick, 363 N.W.2d 414 (S.D. 1985)
Ofstad v. Beck, 65 S.D. 387, 274 N.W. 498 (1937)
Whitman v. Hanson, 69 S.D. 610, 13 N.W.2d 495 (1944)
Chambers v. Dakota Charter, Inc., 488 N.W.2d 63, (S.D. 1992)

SDCL §15-17-38
SDCL §16-16-Appendix, Rules 1.2(c), 1.5(a), 3.1, 4.4(a)

B. Did Thovson breach his promise?

The trial court found Thovson breached his promise.

C. Did Thovson's breach cause damages?

The trial court found Plaintiffs were damaged by Thovson's breach.

II. Were Plaintiffs entitled to summary judgment on Thovson's counterclaim?

A. Did Thovson's claim for breach of fiduciary duty fail as a matter of law?

The trial court found Thovson's breach of fiduciary claim fails as a matter of law for lack of evidence of a breach and resulting damages.

Chem-Age Industries, Inc. v. Glover, 2002 S.D. 122, 652 N.W.2d 756
Hauck v. Clay County Commission, 2023 SD 43, 994 N.W.2d 707

B. Did Thovson's claim for deceit fail as a matter of law?

The trial court found Thovson's breach of fiduciary claim fails as a matter of law for lack of evidence of deceit and resulting damages.

Western Townsite Co. v. Novotny, 32 S.D. 565, 143 N.W. 895 (1913)

STATEMENT OF THE CASE

Plaintiffs sued Thovson in Codington County, Third Circuit, alleging breach of contract for legal services. Following the death of Thovson's wife, the parties had entered into a Legal Services Agreement ("LSA"). Plaintiffs agreed to provide certain legal services regarding Thovson's claim for wrongful death and Thovson agreed to pay for those services. Plaintiffs performed their contractual obligations, but Thovson refused to pay.

Responding to Plaintiffs' Complaint, Thovson denied he was required to pay. Thovson claimed the fees to which he had agreed were unreasonable and claimed he had rescinded the contract. He also counterclaimed, alleging breach of fiduciary duty, deceit, and breach of contract (abandoning the breach of contract claim on appeal).

Judge Douglas E. Hoffman heard cross-motions for summary judgment. Plaintiffs had submitted separate statements of undisputed facts – one supporting a motion for summary judgment on the Complaint (SR 478-80) and the other supporting a motion for summary judgment on Thovson's Counterclaim (SR 930-952); all those facts were admitted by Thovson failing to submit a response as required by SDCL § 15-6-56(c)(2)(3). Judge Hoffman granted Plaintiffs' motion for summary judgment on the Complaint and entered a corresponding money judgment, granted Plaintiffs' motion for summary judgment on Thovson's Counterclaim, and denied Thovson's motion for partial summary judgment on his Counterclaim. (Appendix p.1-3)

STATEMENT OF THE FACTS

Seamus Culhane, an attorney at Turbak Law Office, was having dinner with his family the evening of August 4, 2020 when Bill Thovson texted Culhane to ask if Culhane would represent Thovson regarding his wife's fatal automobile crash. (SR 545) After Culhane finished dinner, they exchanged text messages and phone calls over the next few hours and had a lengthy conversation. (SR 1042, dep. 65:25-67:11) As Thovson had told a highway patrol trooper earlier that day, Thovson had little information about the facts of the collision. (SR 658-659) However, he wanted Culhane to represent him on a wrongful death claim. (SR 1046, dep. 84:1-7) Culhane agreed, and went to work immediately. (SR 1056, dep. 124:8-125:11)

By the next morning Culhane and Turbak Law staff were busy investigating. (*E.g.*, SR 668-676) Among other things, they requested records from the North Dakota Department of Transportation and the North Dakota Highway Patrol and began interviewing possible witnesses. (SR 668-676.) They spoke with a trooper who reported a pending criminal case against Dean Johs. (SR 668-676.) They spoke with a convenience store manager, who said a video of the collision captured by surveillance near the intersection had been provided to the patrol. (SR 668-676.)

On the afternoon of July 28, 2020, Thovson's wife had been driving a Toyota Avalon south on Highway 281 in North Dakota toward its intersection with Highway 13, as Dean Johs was driving a pickup truck and trailer west on Highway 13 toward the same intersection. (SR 649-656.) The pickup was owned by Charles Johs and reportedly was insured by Farmers Union. (SR 649-656.) A stop sign faces traffic on

Highway 13, but Johs' pickup entered the intersection without stopping. (SR 649-656.)

Thovson had been talking to Mrs. Thovson on her cell telephone as she approached the intersection. (SR.649-656; SR 634 ¶11) Still on the phone with Thovson, Mrs. Thovson then entered the intersection and crashed into the passenger side of Johs' pickup. (SR 649-656) She was airlifted from the scene with fatal injuries. (SR 281) The North Dakota Highway Patrol later would report that Mrs. Thovson had been "DISTRACTED BY TALKING ON HAND-HELD ELECTRONIC DEVICE." (SR 281)

On August 6, 2020, Culhane informed Thovson that video evidence likely existed and that Turbak Law would have the convenience store preserve it. (SR 678) They did so. (SR 680) That same day, Culhane sent a letter of representation to Farmers Union, asking Farmers Union to disclose their insured's liability policy limits and preserve Johs' pickup for inspection. (SR 682)

Thovson and Culhane had immediately begun discussing terms under which Culhane would represent Thovson. (SR 1022, ¶10-11) Culhane knew Thovson was litigious.[1] (SR 1092, dep. 268:7-13) Culhane had met Thovson several times before

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[1] Thovson was a *pro se* plaintiff twice before this Court. *Thovson v. Codington County Dir. of Equalization,* 2013 S.D. Lexis 177, 842 N.W.2d 239, 2013 WL 6857349; *Thovson v Codington County,* 2013 S.D. Lexis 43, 828 N.W.2d 547, 2013 WL 1296393. Thovson had brought multiple actions against individuals, a national insurance company, and the Codington County Board of Equalization, and had defended state court actions brought by individuals, the City of Watertown, and a collection agency. In the prior 12 years, Thovson had been a party to at least 20 different legal matters in northeastern South Dakota: 14 in Codington County, one each in Day County, Grant County, and Hamlin County, and three in Marshall

when Thovson was seeking representation but had always declined to represent Thovson. (SR 1038-39, dep. 50:21–51:1; 55:5-11)

As they discussed their legal services agreement, it was unknown whether any liability insurance existed that exceeded Thovson's $100,000 UM/UIM coverage. (SR 1022 ¶10; SR 1045-46, dep. 80:20–81:2) Thovson was concerned that because recovery might be limited to $100,000, he would net little or nothing after paying attorney's fees, medical bills, and advanced legal costs. (SR 1022, ¶10; SR 1047, dep. 86:4-25; SR 1085; dep. 237:18-24) To guarantee a net recovery for Thovson, they agreed to a one-third contingency fee with a special provision Thovson negotiated: costs would be paid from the gross recovery before calculating attorney's fees, instead of from Thovson's share of the recovery. (SR 1022 ¶9-11; SR 1028, dep. 11:21-1311) Thovson also negotiated other changes to Turbak Law's usual contingency fee agreement. (SR 1050-51, dep. 104:21-105:15) Culhane agreed to all changes Thovson requested and had staff prepare the resulting Legal Services Agreement ("LSA"), which Thovson signed August 7, 2020. (SR 664, 686-87)

The parties never discussed a requirement that the case be taken to trial. (SR 1047, dep. 87:25-88:4) Culhane would not have been willing to represent Thovson, had Thovson insisted on such a term. (SR 1047, dep. 88:1-16) Thovson never said he wanted to be able to insist on a trial (SR 1048, dep.

County. 14CIV11-0000713; 14CIV12-000240; 14CIV13-000298; 14CIV14-000383; 14CIV15-000269; 14CIV15-000293; 14CIV16-000248; 14CIV22-000212; 14MAG12-000885; 14POA15-000296; 14POA18-000393;14SMC20-000070; 14TPO18-000056; 14TPO13-00064; 18CIV21-000042; 25CIV19-000072; 28PRO19-000072; 43SMC16-000008; 42SMC16-000009; and 42SMC16-000010. (SR 180-81).

89:5-9; SR 1068, dep. 169:21-170:19), and the word "trial" never appeared in the LSA. (SR 1132, dep. 42:20-44:9)

On the contrary, the parties' LSA states in Paragraph 8:

> .... If the client refuses to accept an offer that is, in the opinion of Turbak Law Office, P.C., fair and reasonable, Turbak Law Office, P.C. has the right to withdraw from the representation of the client on the matter and retain a lien against the claim for costs incurred in pursuit of the claim and for fees equal to 33.33% (1/3) of that offer, less costs ... (SR 687)

It also refers to attorney's fees being due "upon either settlement of the claim or entry of judgment...." (SR 686 ¶3)

On August 8, 2020, Culhane informed Thovson that he intended to involve Tom Dickson, a North Dakota lawyer. (SR 291-92) Culhane told Thovson it would not increase Thovson's legal fees, as Turbak Law would just split its fee with Dickson Law. (SR 291-92) Culhane thought that because North Dakota does not charge sales tax on legal services, it could save Thovson money if the contingent fee were processed through Dickson Law. (SR 291-92) Thovson responded, "Sounds good and I trust your judgment." (SR 291-92)

On August 10, 2020, the North Dakota Highway Patrol acknowledged receipt of Turbak Law's request for information, but said the investigation was still ongoing and resulting materials would be released later. (SR 694-695) It instructed Turbak Law to request the collision report from the Driver's License Division. (SR 694-695) On August 13, 2020, Dickson emailed the LaMoure County State's Attorney to advise that Plaintiffs represented Thovson in the civil claim from the collision. (SR701-702) The State's Attorney responded that it had not yet received the Highway

Patrol's collision report and did not have much information to offer because the investigation was ongoing. (SR 701-702)

Meanwhile, on August 12, 2020, Farmers Union emailed Culhane saying it did not have permission to disclose its insured's policy limits. (SR 697-699) By August 18, 2020, Plaintiffs learned that Dean Johs and Charles Johs were separately insured by Farmers Union. (SR 707) Although Farmers Union still wouldn't disclose coverage amounts, Culhane suspected each insured had a $250,000 policy, yielding a total of $500,000 in liability coverage. (SR 707) Culhane was concerned that even those policies might not provide coverage, though, given commercial exclusions common in personal auto policies. (SR 1065, dep. 157:10-158:18.)

Because Thovson's auto policy had only $100,000 in UIM coverage, Thovson likely was not entitled to UIM benefits. (SR 707) However, Plaintiffs deduced that Thovson's insurer should honor North Dakota's minimum requirement of $30,000 in medical payments benefits, rather than the lower amount stated in Thovson's policy, and informed Thovson of that on August 19, 2020. (SR 1197, entry 262; SR 709) Thovson responded:

> ... Thank you for catching this as, you know full-well, that is a solid financial windfall for [my daughter] and me in the time of facing all sorts of needs, financial and otherwise. Thank you, again, for taking on this case. (SR 709)

Early on, Plaintiffs engaged Matt Brown of Brown Crash Reconstruction, LLC (SR 1182, entry 25), and by August 21, 2020 Brown had mapped the collision scene and inspected the Toyota. (SR 927-929)

On August 24, 2020, Farmers Union called Turbak Law and offered the $250,000 limit of Charles Johs' policy in settlement of any claim against Charles. (SR 711; SR 713) Farmers Union emailed Culhane confirming the offer. (SR 713) The Farmers Union representative said Charles had no other coverage, and that Dean Johs' policy would be handled separately. (SR 711) Culhane emailed Thovson to notify him of the offer on Charles' policy and the report that Charles had no other coverage. (SR 715-716) Culhane predicted that Farmers Union would offer to pay the limit of Dean's policy at some point, too, though it still had not disclosed the amount of Dean's coverage. (SR 715-716)

Culhane told Thovson they needed to sign a new LSA reflecting that Turbak Law would split attorneys' fees with Dickson Law, reiterating that it would not increase Thovson's fees. (SR 715-716) Thovson responded in relevant part:

> Yes, please … send over the document that you reference … and I'll do my best to get it signed and sent right back to you. (SR 715-716)

On August 25, 2020, Turbak Law emailed Thovson the draft of an LSA revised to reflect the fee split with Dickson Law. (SR 722-727) The following morning, Thovson responded by suggesting various revisions, none of which altered Paragraph 8. (SR 722-727) Later on the morning of August 26, 2020, Turbak Law sent Thovson the revised LSA ("LSA 2") reflecting Thovson's requested revisions. (SR 729-730) Paragraph 8 was unchanged from the original LSA. (SR 735)

Farmers Union emailed Culhane on August 26, 2020, finally disclosing the $250,000 limit of Dean Johs' policy and offering that amount in settlement of any claim against Dean. (SR 713) The email attached a signed affidavit in which Dean

Johs swore he had no other insurance providing coverage for the collision. (SR 713) Later that same day, attorney Brad Beehler emailed Culhane a release Farmers Union had asked Beehler to prepare. (SR 732)

On August 27, 2020, Thovson signed and returned LSA 2. (SR 729-730) The only material differences from the first LSA were the deletion of language regarding Thovson's responsibility to pay sales tax on fees and stating that all services would be deemed performed in South Dakota, and addition of the following language:

> Dickson Law Office has agreed to share the fee payable hereunder with the law firm Turbak Law Office, P.C. The fee will be paid 50% to Turbak Law Office, P.C. and 50% to Dickson Law Office. (SR 734-735)

Culhane informed Thovson on August 31 that, as expected, Farmers Union had offered the $250,000 limit of Dean's policy. (SR 737) Culhane further advised Thovson that Plaintiffs were trying to determine if any other insurance coverage was available and were trying to convince Thovson's auto insurer to waive its right to reimbursement for the $30,000 in med pay benefits it had paid at Culhane's request. (SR 737) Later, that insurer agreed to entirely waive its right to any reimbursement for the $30,000 paid. (SR 744)

With Farmers Union's offer on the table, Plaintiffs and Thovson agreed they would continue investigating additional sources of recovery – including additional insurance coverage, other defendants, and Dean Johs and Charles Johs' personal assets – before Thovson decided whether to accept the $500,000. (SR 739-742) They worked at length to track down details about the load Dean had been hauling and who owned it, in case Dean might have been acting as someone's agent at the time of the

crash. (*See, e.g.*, SR 1184, 1194, 1210, 1217, 1219-20, 1224-2) They explored whether a General Commercial Liability policy of Charles' could apply. (SR 1065, dep. 158:24-159:10) Dickson visited the Johs' properties to informally assess their apparent wealth or poverty. (SR 165, dep. 157:3-9) Turbak Law ran TransUnion credit reports to try to locate possible assets. (SR 1151, dep. 117:12-118:14) Thovson, a private lender and debt collector by profession, tried to locate assets (SR 1151, dep. 15-25), but learned Charles Johs had a federal tax lien against him. (SR 864-65, dep. 120:10-121:10) Eventually, Plaintiffs and Thovson concluded that Dean and Charles Johs had no other resources from which to collect any verdict over $500,000, even if one could be obtained. (SR 1083-84, dep. 232:9-233:2; SR 1087, dep. 248:14-17) Meanwhile, the court system was still shut down by Covid-19, making it unclear whether and when a trial could occur. (SR 1074; dep. 193:2-21)

On September 18, 2020, Dickson met with the State's Attorney prosecuting Dean Johs and reviewed the prosecutor's file, including the surveillance video. (SR 746-747)

On October 19, 2020, Culhane emailed Thovson to provide an update on the status of Plaintiffs' investigation into the possibility of other sources of recovery. (SR 749-752) Among other things, the email advised that Dickson was trying to get Charles Johs' attorney to let Dickson speak directly with Charles. (SR 749-752) Thovson responded by expressing his appreciation for the update, suggesting filing suit, and inquiring about renegotiating Plaintiffs' attorneys' fees if the only available

source of recovery turned out to be Charles Johs and Dean Johs' liability insurance. (SR 749-752)

Culhane emailed Thovson on October 23, 2020 and reported that Dickson had set up a meeting with Charles Johs and Charles' attorney, and would meet with Culhane and Thovson afterwards. (SR 749-752) (Dickson eventually met with Charles Johs and Charles' attorney on November 13, 2020. (SR 754)) Culhane's email also reported that Culhane and Dickson had discussed the possibility of commencing suit but knew that would come with a lot of litigation costs as well as the risk of a verdict no greater than the $500,000 already offered. (SR 749-752) The email concluded by advising that Culhane and Dickson both agreed commencing suit was "not a practical alternative." (SR749-752) The email attached a recent verdict from a wrongful death suit in which a North Dakota plaintiff had turned down a settlement offer of $1,650,000 and ended up with less than $500,000, after incurring substantial costs to try the case. (SR 749-752)

On November 19, 2020, Culhane emailed accident reconstructionist Matt Brown, who was awaiting further directions from Culhane. Culhane informed Brown that "due to limited coverage," they "may have to wrap this one up," and asked Brown to provide a bill for services performed to date. (SR 927-929) Later that day, Brown provided Culhane with an invoice. (SR 927-929)

On November 20, 2020, Plaintiffs met with Thovson. (SR 756) At that meeting, Thovson agreed to accept Farmers Union's offer on three conditions: (1) Plaintiffs first seek an additional, voluntary payment from Charles Johs; (2) Plaintiffs

reduce the contingency fee from 33.33% to 30%; and (3) Plaintiffs "eat" the out-of-pocket legal costs incurred to date. (SR 756) Plaintiffs agreed, and following the meeting Culhane sent Thovson an email memorializing that agreement. (SR 756) The email asked Thovson to let Culhane know if Plaintiffs had misunderstood anything. (SR 756) Thovson never responded with any claim that Culhane had misstated the parties' agreement. (SR 1081-82, dep. 224:7-225:1; SR 1086, dep. 241:15-24; SR 1158-59, dep. 145:13-146:2,152:12-18)

Following the November 20, 2020 meeting, Plaintiffs asked that Charles Johs personally contribute $100,000 toward a settlement. (SR 758) Charles' attorney informed Dickson on December 7, 2020 that Charles refused (SR 758), and on December 8, 2020 Plaintiffs informed Thovson that Charles was not willing to contribute to settlement. (SR 760-761) Accordingly, per Thovson's agreement on November 20, 2020, Plaintiffs advised Thovson that he needed to accept Farmers Union's offer and release the claims against Dean and Charles Johs. (SR 760-761) Thovson, however, refused to do so. (SR.760-761)

Meanwhile, Thovson's health insurer had paid $51,463.06 in medical expenses for Mrs. Thovson's emergency care. (SR 763-765) Turbak Law assisted Thovson in getting those bills paid and negotiated a compromise of the resulting subrogation claim. (SR 1137, dep. 64:15-23; SR 1140, dep. 73:24-74:4; SR506) On December 15, 2020, the health insurer agreed to reduce its subrogation claim to $34,238.93. (SR 767) The next day when Culhane emailed Thovson to share that good news, Culhane also attached a release prepared by Beehler, asking Thovson to sign and return the

release. (SR 769-772) The following day, the Highway Patrol finally issued its Crash Reconstruction Report. (SR 774-791)

By early January 2021, Plaintiffs advised Thovson that if Thovson did not cooperate with finalizing the settlement under the terms agreed to on November 20, 2020, Plaintiffs would withdraw and file an attorney's lien (*See, e.g.,* SR 793-794) Nevertheless, Thovson reneged on his promise to sign the release in exchange for the reduced contingency fee of 30%, and instead tried to pressure Plaintiffs to reduce their fees still further. (SR 796-797) Thovson emailed Culhane on January 15, 2021, threatening to rescind LSA 2 on the grounds of "fraudulent inducement" if Plaintiffs withdrew and filed an attorney's lien. (SR 799)

On January 19, 2021, Plaintiffs sent Thovson a letter notifying him of their withdrawal as counsel as authorized by Paragraph 8 of LSA and LSA 2. (SR 801-802) The letter enclosed an attorney's lien statement in the amount of $170,049.81. (SR 801-802; SR 804-805) Plaintiffs sent copies to Farmers Union. (SR 807-808) While Thovson now claims Plaintiffs had done virtually no work on his case, a reconstructed log of file activity at Turbak Law alone confirms that is false. (SR 1181-1253)

On February 17, 2021, Thovson sought restitution in Dean Johs' criminal case by submitting an exaggerated statement of expenses he claimed to have incurred. (SR 810-813) Thovson knew his health insurer had agreed to reduce its subrogation claim to $34,238.93, but claimed restitution for $51,463.06 of medical expenses originally billed. (SR 810-813; SR 769-772) He also claimed restitution for the $4,250 charge

from Brown Crash Reconstruction, though Turbak Law, not Thovson, had paid that bill. (SR 813; SR 1069, dep. 173:11-21)

On February 18, 2021, Thovson sent Plaintiffs a letter reiterating his belief that he had grounds to rescind LSA 2 and stating that he was preserving that right pending retention of counsel. (SR 815.)

Over the next year and a half, neither Thovson nor any counsel he consulted identified additional resources to satisfy Thovson's claim. (SR 1162, dep. 161:18-162:5) Finally, in direct communications with Farmers Union, Thovson agreed to the $500,000 settlement and executed a release on July 18, 2022. (SR 830) Farmers Union planned to issue three checks: (1) a $250,000 check payable to Thovson; (2) a $79,950.19 check payable to Thovson; and (3) a $170.049.81 check payable to Thovson and Turbak Law. (SR 822; SR 824-828) Thovson tried to persuade Farmers Union to ignore Plaintiffs' lien and pay Thovson the full $500,000. (*See, e.g.*, SR 817-818; SR.820)

In a last-ditch effort to evade payment of fees, Thovson filed a lien against the settlement proceeds on behalf of "Legendary Loan Link" – a company he alone owns. (SR 824-828; SR 876, dep. 167:25-169:1) The lien purportedly related to $500,000 Thovson recently had loaned himself through Legendary Loan Link to purchase cattle. (SR 885-886) In an August 2, 2022 letter to Farmers Union and Beehler, Thovson claimed Plaintiffs' attorneys' lien was not valid but Legendary Loan Link's lien was, and demanded Farmers Union make the third check payable only to Thovson and Legendary Loan Link. (SR 824-828) Notwithstanding Thovson's

demand, Farmers Union issued a check payable to Plaintiffs and Thovson for $170,049.81 and mailed it to Turbak Law. (SR 888; SR 890)

In a September 8, 2022 letter, Plaintiffs told Thovson they had received the check and Thovson needed to endorse it so they could be paid. (SR 892) The letter asked Thovson to sign the check by September 20, 2022, and advised of Plaintiffs' intent to take court action if Thovson refused. (SR 892) Thovson refused, insisting Plaintiffs should have taken his case to trial, and this action ensued. (SR 898 at ¶26.)

Thovson has never identified any evidence that Dean or Charles Johs had assets that could have been collected, had the case gone to trial and a verdict over $500,000 obtained. (SR 1076, dep. 202:14-203:7; SR 1086, dep. 243:9-12; SR 1162, dep. 161:18-162:5) Nor has Thovson ever identified evidence that his claim in fact was worth more than the $500,000 settlement Plaintiffs determined was fair and reasonable. (SR 1164, dep.170:5-16)

At hearing, Judge Hoffman had these exchanges with Thovson's counsel:

THE COURT: "[T]he only conclusion that I can come up with is that he wanted to settle the case but he didn't want to pay the third...." (Hearing Transcript ("HT") 12:7-9, Appendix p.15) "[I]f he wanted to go to trial he should have gone to trial.... I mean, he could have hired you to go to trial but he hired you to contest the attorney fee instead. ..." (HT 13:6-10, Appendix p. 16)

...

THE COURT: "Well, why didn't Mr. Thovson hire you before the statute ran to go do that trial and get that excess judgment?"

ATTORNEY GUST: "I don't know, Your Honor."

THE COURT: "I mean, doesn't that undermine your whole argument, if that was such a great idea and he wanted to do that so bad why didn't he do it?"

ATTORNEY GUST: "I don't know. ..." (HT 25:24-26:6, Appendix p. 28)

ARGUMENT

The de novo standard of review applies. *Knecht v. Evridge,* 2020 SD 9 ¶ 51, citing *Zochert v. Prot. Life Ins. Co.*, 2018 S.D. 84, ¶ 18, 921 N.W.2d 479, 486.

Summary judgment is authorized if pleadings, depositions, interrogatory answers, admissions, and affidavits on file show no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. 2020 SD 9 ¶51, citing *Dakota, Minn. & E. R.R. v. Acuity*, 2009 SD 69, ¶ 14, 771 N.W.2d 623. All reasonable inferences favor the nonmoving party; however, there must be some evidence from which a favorable inference may be drawn. *Redlin v. First Interstate Bank,* 2024 SD 5 ¶14, 2 N.W.3d 729. Summary judgment is not defeated by unsupported conclusions and speculative statements or general allegations and denials not setting forth specific facts. *Bordeaux v. Shannon County Sch.,* 2005 SD 117 ¶14, 707 N.W.2d 123.

I. Plaintiffs were entitled to summary judgment on their claim for breach of contract.

The elements of breach of contract are: 1.) An enforceable promise; 2.) breach of the promise; and 3.) resulting damages. *Bowes Constr., Inc. v. S.D. DOT*, 2010 SD

99 ¶ 21, 793 N.W.2d 36, 43, citing *Guthmiller v. Deloitte & Touche, L.L.P.* 2005 S.D. 77, 699 N.W.2d 493, 498. Undisputed facts establish all elements here.

A. Thovson made an enforceable promise.

Thovson sought out Culhane for representation on the wrongful death claim. (SR 545; SR 1046, dep. 84:1-7) Other lawyers had solicited Thovson, but not Turbak Law. (SR 836-37, dep. 8:22- 9:19) Culhane was familiar with Thovson, repeatedly had declined to represent Thovson in the past, and knew Thovson was litigious. (SR 1038-39, dep. 50:21–51:1; 55:5-11; SR 1092, dep. 268:7-13) When Culhane agreed to represent Thovson on this matter, it was under specific terms set out in writing.

To obtain the legal services Thovson wanted Culhane to provide, Thovson promised to pay one-third of his net recovery. Thovson agreed that Turbak Law would have the right to limit its representation to procuring a fair and reasonable settlement offer on his claim. (SR 687, ¶8) Thovson agreed Plaintiffs could withdraw from representation if Thovson refused to accept such an offer. (SR 687, ¶8) Thovson further agreed that if Plaintiffs withdrew upon Thovson refusing a reasonable settlement offer, Plaintiffs would have an attorneys' lien for one-third that offer. (SR 687, ¶8) As noted at the hearing, Thovson is "not a commercially unsophisticated individual." (HT 14:10-14, Appendix p.17) Nevertheless, if he had doubts about the agreement he was negotiating, he could have asked (and perhaps did) the attorney he was consulting at that time on probate matters. (SR 1130, dep. 35:8-18)

To comply with Rule of Professional Conduct 1.5(e),[2] the parties later signed a second agreement. Thovson requested certain changes at that point, which LSA 2 incorporated. However, LSA 2 left unchanged Thovson's promise to pay one-third of his net recovery and his agreement that if he refused a reasonable offer, Plaintiffs could withdraw and retain an attorneys' lien for one-third.

1. Thovson's fee agreement meets the applicable standards.

In South Dakota, an agreement for payment of attorneys' fees requires three things: "(1) That the transaction was perfectly fair; (2) that it was entered into by the client freely; and (3) that it was entered into with such a full understanding of the nature and extent of his rights as to enable the client to thoroughly comprehend the scope and effect of it." *Tidball v. Hetrick,* 363 N.W.2d 414, 416 (SD 1985). Like Thovson, the client in *Tidball* tried to avoid a contingency fee agreement after receiving the legal services contracted for on that basis. The Court noted how a contingency fee benefits the client if the outcome is unfavorable, noted that the client was "not unfamiliar with lawyers and their compensation," and found the one-third fee "perfectly fair and freely entered into." *Id.* at 417. The Court said the lawyer had "served his clients ably and, like any good servant, he is entitled to his just pay." *Id.*

Undisputed facts show the LSAs here met the *Tidball* requirements. Thovson readily agreed to a one-third contingency fee. ("I was more than happy to pay a

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[2] "A division of a fee between lawyers who are not in the same firm may be made only if...the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing...." Rule 1.5(e).

contingency fee on the wrongful death claim if Turbak Law was going to do something to pursue that and prevail...." (SR 1136, dep. 57:14-17)) Thovson understood the fee agreement, and even demonstrated his understanding by calculating in an email what the fees would be on a $100,000 recovery. (SR 1133, dep. 46:4-47:2) When Thovson knew at least $250,000 – and possibly $500,000 – might be recovered, he reaffirmed that agreement as Plaintiffs continued working to see if they could obtain a still greater recovery. Only as Plaintiffs' work wrapped up months later and they had "served their clients ably and, like any good servants, were entitled to just pay" did Thovson start questioning their fees.

Thovson's real argument isn't that the agreement was invalid, but rather that he should be given the benefit of a "heads, I win – tails, you lose" deal. After receiving the legal services he obtained by making a contingency fee agreement, Thovson wants to exchange that agreement for one more beneficial to him in hindsight. Viewing the fee agreement not from when it was made, but only after a known recovery was secured, Thovson hopes his buyer's remorse somehow will excuse the contingency-fee contract he made.

2. Thovson's promise to pay is not excused by his regret.

An axiomatic principle of contract law is that a party is not relieved of a contract term simply because he regrets not negotiating a more favorable one. "One cannot...be relieved of a contract merely because he may have made a bad bargain." *In re Maurice M. Ricard Family Trust*, 2016 S.D. 64 ¶20, 886 N.W.2d 326, quoting *Olson v. Opp,* 85 S.D. 325, 328-29, 182 N.W.2d 220, 222 (1970). Thovson tries to

avoid that principle by emphasizing that the contract here was for legal services, but he cites no authority providing an exception to the principle whenever legal clients regret not negotiating fees appearing more favorable in retrospect.

Tidball is not the only time this Court has affirmed an attorney's right to be paid a contingency fee by a client who receives a favorable outcome, then tries to avoid the fee by substituting some other measure of the work performed or its worth. In *Ofstad v. Beck,* a client who agreed to pay a contingency fee for help securing insurance benefits later claimed it was unfair and unconscionable to be charged one-third. 65 S.D. 387, 274 N.W. 498 (1937). This Court held, "Whether a particular provision for compensation is unreasonable or unconscionable under the particular circumstances is a question of fact to be determined by the trial court." *Id.* at 503. Acknowledging the special nature of a contingency fee, the Court noted that the parties "were not purporting to contract with reference to the reasonable value of the services to the plaintiff, but were in fact thinking only of a speculative venture under which both parties only would secure benefit if their efforts were attending by success." *Id.* The Court then affirmed the trial court's finding that the fee was reasonable. *Id.*

In *Whitman v. Hanson,* a client who agreed to a 40% contingency fee complained after the fact that the agreement was unreasonable and should not be enforced. 69, S.D. 610, 13 N.W.2d 495 (SD 1944). The Court reiterated *Ostad's* observation that when parties make a contingency fee agreement, they are not purporting to measure the value of legal services in any way other than as a risk-

sharing arrangement, and then affirmed the trial court's finding that a 40% fee was reasonable. *Id.* at 498. The Court reiterated that the standard for finding a lawyer's fee agreement unenforceable is whether "the provision made for his compensation is so unreasonable and excessive, when viewed in the light of the circumstances of a particular case, as to evince a fixed purpose on his part to obtain an undue advantage over his prospective client...." *Id.* at 497, quoting *Ofstad* at 503.

There was no evidence whatsoever that a one-third fee on Thovson's net recovery was "so unreasonable and excessive" as to show that Plaintiffs had "a fixed purpose...to obtain an undue advantage" over Thovson. On the contrary, Judge Hoffman found that "...their fees are reasonable, I mean, they are patently reasonable." (HT 39:14-15) Apparently realizing the fee agreement does not violate the standard set out in *Ofstad* and reiterated in *Whitman,* Thovson simply ignores that standard and instead presents a host of dissimilar disciplinary cases, mostly from other jurisdictions. However, this is not a disciplinary case and there has been no disciplinary finding, proceeding, or complaint.

The Rules of Professional Conduct do not govern civil liability (SDCL 16-18-A, Preamble ¶20). However, even consulting the Rules for guidance leads to the same conclusion the trial court reached: Plaintiffs' fees are reasonable. Rule of Professional Conduct 1.5(a) identifies factors determining reasonableness, including whether the fee is contingent; fees customarily charged in the locality for similar services; skill requisite to perform the legal service; experience, reputation and ability of the lawyers; difficulty of questions involved; and the amount involved and results

obtained. SDCL §16-18A-1.5(a). At least one Supreme Court holds that Rule 1.5(a)'s non-contingency fee factors are *not* used to evaluate a contingency fee contract after the fact. *Munger, Reinschmidt & Denne, LLP v. Leinhard Plante,* 940 N.W.2d 361, 364 (Iowa 2020). Nevertheless, even Rule 1.5(a)'s most relevant *non*-contingency factors are addressed below.

Several uncertainties surrounding Thovson's claim made a contingency fee appropriate. For example, Dean Johs' apparent fault may have been partially offset by the fault of Mrs. Thovson, who reportedly was distracted by her cell phone and made no maneuver to avoid the pickup that had entered the intersection ahead of her. (SR 280-82) Also, it was Thovson himself who was talking to her at the time of the crash (SR 1165, dep. 176:12-25), so a North Dakota jury may have been instructed to consider assigning fault to both Thovson and Mrs. Thovson. (SR 1114-15, dep. 56: 25-57:22) Even with perfect liability, recovery might have been very limited. Thovson later swore he had $250,000 of UIM, but that was untrue; his UIM coverage was only $100,000. (SR 1154, dep. 131:7-16; SR 1190 entry 150; SR 1022 ¶10) Thovson was facing medical and funeral expenses, and "all sorts of financial …needs." (SR 709) Under those circumstances, a contingency fee allowed Thovson to afford high quality representation without risking huge legal fees in the event of a limited recovery. (SR 1022, ¶7) It also allowed Thovson's attorneys to work intensely and exhaustively without worrying about having to

charge him for what might seem like excessive time spent on productive work or wasted time on unproductive work. (SR 1022, ¶8)

By offering personal injury and wrongful death clients contingency fee arrangements, attorneys in effect insure their clients and themselves against the possibility of "losing" (minimal or no recovery) by covering those losses with fees in "winning" cases. When parties contract for a contingency fee, they agree to share risks of the unknown; the percentages used in contingency fee cases reflect the risk of a poor recovery in any given case and the overall risks in the practice. The system works because risk is shared between an attorney and client in any one case and more generally among all clients of a contingency fee practice. Given the bargain made, a party cannot retrospectively claim a contingency fee was unreasonable simply by arguing that as it turned out he might have paid less had the fee not been contingent. Thovson himself acknowledged it would be unfair after a poor result for an attorney to demand a fee greater than the contingency fee agreed upon. (SR 1153, dep. 131:21-132:10) Likewise, Thovson has no right to take the benefit of a contingency fee agreement that protected him in the event of a limited recovery, but then complain later about the fee once a favorable outcome was achieved.

As for the locale, Thovson's contingency fee was *lower* than the customary fee in South Daktoa for wrongful death claims from auto collisions – i.e., one-third of the *gross* recovery, with the client reimbursing costs from the client's share of the recovery. (SR 1022, ¶9) As Judge Hoffman observed,

> "...your client negotiated the agreement down to a third off of the net recovery instead of the gross. And so, I mean, you don't see a fee agreement in a case like this for less than that." (HT 39:14-18, Appendix p. 42)

It is undisputed that Plaintiffs had the skills needed to perform the legal services. At Turbak Law, Thovson was getting lawyers with well-honed skills in investigating collisions, dealing with insurance companies, and obtaining favorable outcomes on similar claims. Dickson Law brought familiarity with North Dakota tort law and nuances of North Dakota insurance law, exceptional trial skills, and a North Dakota law license in case formal action there became necessary. Thovson has not identified a single skill his lawyers lacked. In fact, their skills were such that besides the services he contracted for, he *gratuitously* got help with filing health insurance claims, collecting medical payments and death benefits under his own policy, recovering $25,000 of unexpected no-fault benefits, and getting subrogation claims reduced and waived.

Thovson cannot dispute that Plaintiffs had the experience, reputation, and ability to be effective. Both firms brought decades of experience and excellent reputations to the case. Culhane's skills, contacts, and ability to respond immediately were especially valuable, given Thovson's urgent request for preservation of evidence. The experience and reputations of Turbak Law and Dickson Law were well known to insurers, their involvement a clear signal that insurers likely would have to pay the maximum value of a claim. Indeed, their abilities were proven, among other things, by their effectiveness; they procured the limits of all available insurance, they

left no stone unturned, and Thovson ultimately could accept a settlement knowing there was nothing more to be obtained.

Thovson's assumption that Plaintiffs had done "very little work" by the time settlement offers were received is false. (SR 1181- 1200) It ignores the immediate, extensive, and expert legal services provided in the weeks before offers were received and naively assumes Plaintiffs' involvement and activity played no part in obtaining the offers. Incredibly, Thovson claims insurance companies simply pay the limits of insurance, no matter what. (SR 1136, dep. 58:9 – 59:3) Thovson also ignores the fact that work did not stop when the offers were received *but continued for months* because neither Thovson nor his attorneys were satisfied with the settlement offers until they had confirmed that nothing more could be achieved. (SR 1200-1253)

It is not clear just what Thovson means by "actual work" when he claims contingency fees should be evaluated retrospectively based on "actual work performed." (App. Br. p.25) The *actual work* to be performed in Thovson's case was to procure the best possible recovery for Thovson on his claim – work that was done, both well and promptly. Whether Thovson proposes instead measuring "actual work" by tasks, hours, or some other convention, the cases he cites do not support his position. In *In re Swartz,* for example, the Arizona Supreme Court merely reached the obvious conclusion in a disciplinary case that it was unreasonable to collect a contingency fee on a tort claim that was of absolutely no value to the client because the client's net recovery was entirely offset by workers compensation benefits the client obtained independently. 686 P.2d 1236, 1245 (1984).

In *Munger,* the Iowa Supreme Court carefully analyzed the nature and benefits of contingency fees and various jurisdictions' approaches to determining their reasonableness, then affirmed summary judgment approving a one-third contingency fee in a personal injury claim settled for $7.5 million before litigation. 940 N.W.2d 361, 365-372. The Court cautioned against reevaluating contingency fee contracts from hindsight or assuming the case was simple and success easy. *Id.* at 370. Responding to a suggestion that Rule 1.5(a) factors require hindsight evaluation of a contingency fee contract for reasonableness, the Court responded:

> "We disagree. The [clients] overlook the risk allotted to both parties by the contingency fee contract. Instead, we conclude the contingency fee contract at issue was reasonable at the time of its inception. Consistent with our existing caselaw, we will not use [Rule 1.5(a)'s] noncontingency fee factors to reevaluate this contingency fee contract from a position of hindsight."

3. Plaintiffs did not forfeit fees by withdrawing.

Thovson relies on cases from other jurisdictions about whether an attorney who withdraws without fully performing expected services can claim fees based on *quantum meruit*. No case Thovson cites involves an attorney who completed the agreed-upon work and sued for breach of contract. In one of the few cases Thovson cites where terms of a legal services agreement are even mentioned, the contract expressly required representation "up to and through...trial...and a Motion for a new trial, if any." *Estate of Falco,* 188 Cal. App. Ed 1004, 1008; 233 Cal. Rptr. 807, 809 (1987). (Even that opinion noted that fees denied under *quantum meruit* might nevertheless be required under an unjust enrichment theory. *Id.* at 1019, 816)

Thovson pretends the issue before Judge Hoffman was whether it is a client's right to settle a case, but that was never the issue. He claims Plaintiffs tried to deprive Thovson of that right, but that was never the case. The parties' contract expressly noted that Thovson had the "right and responsibility" to decide whether to accept any settlement offer. Nothing in the contract required Thovson to accept any settlement offer or surrender his right to make that choice. Thovson was free to refuse Farmers Union's offer, as he initially did. Had he gone on to obtain a greater recovery, Plaintiffs could not have claimed any fee on the portion of his recovery exceeding the offer Plaintiffs procured. However, Thovson agreed that while he had the right to accept or refuse a settlement offer, Plaintiffs had the right to decide whether to continue to represent him if he refused a reasonable settlement offer.

While deposing Culhane, Thovson's counsel admitted Plaintiffs had the right to withdraw:

> Q. But the choice of whether or not a lawsuit is going to be brought or the case will be settled is Bill Thovson's, correct?
>
> A. ...[T]hat's his choice whether to do that on his own – his decision whether to settle it is his decision. It's my decision whether to be his lawyer or not.
>
> Q. Yep. Absolutely. One-hundred percent. Okay. I don't disagree with that. (SR 1079, dep. 215:18-216:2)

Indeed, those were the plain terms in the contract Thovson negotiated, which could not have been clearer:

> "It is the right and responsibility of the client to decide whether or not to accept any settlement offer. If the client refuses to accept an offer that is, in the opinion of Turbak Law Office, P.C., fair and reasonable, Turbak Law Office, P.C. has the right to withdraw from the

> representation of the client on the matter and retain a lien against the claim for costs incurred in pursuit of the claim and for fees equal to 33.33% (1/3) of that offer, less costs ... (SR 687 ¶8)

To claim that Plaintiffs had no right to withdraw and forfeited their fee by doing so, Thovson ignores the contract he negotiated and relies instead on wholly dissimilar cases where attorneys abandoned their client by withdrawing without good cause. As Judge Hoffman noted, the supposedly "universal" caselaw Thovson cites nowhere addresses a situation where "you have got all the money on the table and the client won't settle for an irrational reason." (HT 21:13-23) And no case Thovson cites involves a legal services agreement expressly allowing withdrawal, nor does Thovson cite any authority prohibiting such contracts. On the contrary, in *Augustson v. Linea Aerea Nacional-Chile S.A.,* the Fifth Circuit suggested a lawyer concerned about a potentially difficult client "protect himself" at an early stage "by limiting the scope of representation through contract." 76 F.3d 658, 664 (5th Cir. 1996).

Asking this Court to adopt a new legal rule, Thovson admits that nothing in South Dakota law prohibits the contract term Thovson accepted or entitles Thovson to escape paying fees he agreed to in the contract. What Thovson doesn't admit is that existing law already defeats his position; statutory law expressly makes attorney compensation a matter of contract, and professional rules for attorneys specifically allow that contract to limit representation:

> "The compensation of attorneys and counselors at law for services rendered in civil and criminal actions and special proceedings is left to the agreement, express or implied, of the parties. ..." SDCL §15-17-38

> "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Rule of Professional Conduct 1.2(c)

The parties' contractual limitation on promised legal services was reasonable under the circumstances and was consented to by Thovson, and Plaintiffs exercised their contractual right to withdraw only when Thovson irrationally rejected the most reasonable course of action. Plaintiffs had done all that could be done, had gotten Thovson all there was to get. Litigation for the purpose of harassing the defendants would have been frivolous and violated the Rules of Professional Conduct.[3] Litigation and trial not only would have needlessly burdened courts already shut down and backed up by a pandemic, but accomplished nothing and likely left Thovson worse off. (SR 1074, dep. 196:6-13; SR 1076, dep. 202:14-25; SR 1083, dep. 230:19-231:7; SR 1084, dep. 233:1-7; SR 1108-1109, dep. 32:22-35:2; SR1114-15, dep. 56:23-57:22)

The same settlement offer on the table when Plaintiffs withdrew is *exactly the same offer* Thovson ultimately accepted. Unlike some cases Thovson cites, this is not a situation where one attorney runs the ball only halfway down the field, then another takes over and the challenge is to figure out what the first attorney earned. Plaintiffs alone did all the work ever done on this case to provide the recovery obtained. Not only were they justified in exercising their contractual rights under Paragraph 8

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[3] "A lawyer shall not bring...a proceeding...unless there is a basis in law and fact for doing so that is not frivolous...." Rule 3.1.

"In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person...." Rule 4.4(a).

because the settlement was fair and reasonable "in the opinion of Turbak Law Office, P.C.," but *Thovson himself acknowledged the settlement was fair and reasonable by accepting it.* Approximately eighteen months passed between the time Plaintiffs withdrew and when Thovson finally accepted the settlement, but Thovson cannot point to a single stone turned over during that time that in any way contributed to the outcome; the work already had been done by Turbak Law and Dickson Law.

4. The contract was not rescinded or invalidated by North Dakota law.

Thovson complains that Judge Hoffman did not apply North Dakota law. NDCC §9-08-08 makes a contract to prosecute an action for personal injury voidable if made within thirty days of injury, and NDCC §9-08-09 allows a party to rescind such a contract in writing within six months of the injury. However, Thovson himself didn't comply with those statutes, which don't apply here anyway.

NDCC §9-08-08 allows a contract to prosecute a wrongful death claim made within thirty days of death to be voided *only* if the person seeking to void it does so within six months of the death. NDCC §9-08-09. Six months after the death here was January 28, 2021, but Thovson admits that even as of February 18, 2021, he had not taken any action to rescind the LSAs; while he doesn't know when he supposedly rescinded the contracts under ND law, he admits it was not within six months of his wife's death. (SR 1073, dep. 190: 23 – 191:1; 191:19 – 192: 13)

Thovson now claims he was excused from the deadline for rescission by Plaintiffs' withdrawal. (App. Br. p.31) He cites no supporting legal authority, however, and there is none. By exercising their contractual right to withdraw,

Plaintiffs terminated their *representation* of Thovson, not their contract with him. Thovson's contention that he somehow was prevented from rescinding because he did not do so before Plaintiffs withdrew is completely baseless in both fact and law.

All that is academic, though, because North Dakota law doesn't apply in the first place. This Court has adopted the "most significant relationship approach" to resolving choice of law issues. *Chambers v. Dakota Charter, Inc.*, 488 N.W.2d 63, 67-68 (S.D. 1992). Rights and liabilities of parties with respect to an issue are determined by the law of the state with the most significant relationship to the occurrence and the parties as to that issue. *Brazones v. Prothe*, 489 N.W.2d 900, 904 (S.D. 1992). Contacts to be considered include 1) where the injury occurred, 2) where the injury-causing conduct occurred, 3) the domicile, residence, nationality, and place of business of the parties, and 4) the place where any relationship among the parties is centered; contacts are evaluated according to their relative importance with respect to the specific issue. *Id.* Absent statutory directive otherwise, factors relevant to choice of law include the needs of interstate systems; relevant policies of the forum and other interested states; relative interests of those states in determining the issue; protecting justified expectations; policies underlying a particular field of law; certainty, predictability and uniformity of result; and ease in determining and applying the law. *Id.* *Chambers* involved one of thirty-four South Dakota residents who chartered a bus from Dakotah Charter, a South Dakota corporation, to transport them from Sioux Falls to Arkansas. *Id.* at 64. When the bus stopped in Missouri, Charlotte Chambers fell on the bus steps and fractured her ankle. *Id.* She sued

Dakotah Charter in South Dakota, alleging she fell on a piece of candy Dakotah Charter distributed on the bus, and that Dakota Charter was negligent in failing to maintain the bus in a safe condition. *Id.* Chambers argued that Missouri comparative fault law should apply, while Dakotah Charter argued for South Dakota's contributory negligence law. *Id.* On appeal, this Court affirmed the trial court's application of South Dakota law, finding that all important contacts were with South Dakota, not Missouri. *Id.* at 68-69.

Likewise, this case warrants application of South Dakota law. All four contacts to be considered in determining which state had the most significant relationship to the occurrence and the parties favor applying South Dakota law. As in *Chambers*, the conduct of which Thovson complains occurred in South Dakota. Even Thovson's alleged injury occurred in South Dakota, providing even less reason to apply another state's law than in *Chambers*.[4] Turbak Law, Culhane, and Thovson all reside and have their places of business in South Dakota. The parties' relationship was centered in South Dakota, where all meetings between the parties occurred and both written contracts were executed.

The factors relevant to a choice of law no more support applying out-of-state law than they did in *Chambers*. North Dakota's policy is reflected in its enactment of NDCC §9-08-08 and §9-08-09, while South Dakota's policy is reflected in the absence of such provisions. As in *Chambers*, South Dakota has the only significant

[4] The relevant injury is Thovson's claimed injury from Plaintiffs' representation, not Mrs. Thovson's death.

interest in the issue because all the parties' relevant contacts were in South Dakota, and North Dakota's policy would not be furthered by applying it to South Dakota residents.

Finally, when Thovson claims the parties clearly intended to apply North Dakota law because any trial likely would have occurred there, he reveals a fundamental misunderstanding of wrongful death cases, which often are resolved without litigation, much less trial. Thovson also ignores the important fact that the contract specifically allowed Plaintiffs to limit their representation in a way that may not have obliged – and ultimately did not oblige – them to litigate. It was never intended that the contract necessarily would be performed in North Dakota – a fact demonstrated by the reality that *in the end it was performed in South Dakota.*

B. Thovson breached his promise.

When Thovson accepted settlement and was paid on his claim in July 2023, the condition for his promise to pay Plaintiffs was met. Thovson then was obliged to perform his part of the contract: pay the fees and costs. However, Thovson refused to endorse the check intended to pay attorney's fees and costs and otherwise refused to pay the fees and costs he owed under the contract.

C. Damages resulted from Thovson's breach.

Plaintiffs were damaged by being deprived of the money due. Undisputedly, Thovson's net recovery after costs was $493,480.61 ($500,000.00 minus $6,519.39), yielding contractual damages as follows:

Attorney's Fees ($493,480.61 / 3)	164,493.54
Costs Advanced	6,519.39

Total	$ 181,211.53

The Court allowed prejudgment interest on that amount from September 8, 2022, the date Thovson first refused to endorse the Farmers Union check for attorneys' fees. Thovson did not appeal the award or calculation of prejudgment interest.

II. Plaintiffs were entitled to summary judgment on Thovson's counterclaim.

A. Thovson's breach of fiduciary claim fails as a matter of law for lack of evidence of a breach and resulting damages.

To recover for breach of fiduciary duty, a plaintiff must prove: (1) the defendant was acting as plaintiff's fiduciary; (2) the defendant breached a fiduciary duty to the plaintiff; (3) the plaintiff incurred damages; and (4) the defendant's breach of the fiduciary duty was a cause of plaintiff's damages. *See, e.g., Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, ¶38, 652 N.W.2d 756. Thovson's breach of fiduciary duty claim – the purported basis of which has shifted over time – failed as a matter of law for two independent reasons: 1) no evidence of a breach of duty and 2) no evidence of damages.

Thovson's Counterclaim asserted that Plaintiffs breached a fiduciary duty when they "induced him into LSA II … and suppressed acknowledge of information that would have deterred [Mr. Thovson] entering into the agreement, directly causing him to incur damages." (SR 920, ¶92) Specifically, Thovson alleged that Plaintiffs induced Thovson to sign LSA 2 by hiding the supposedly definitive nature of the surveillance video and suppressing the fact that Farmers Union's had offered to pay a total of $500,000 –. (SR 919, ¶¶ 80-82) However, undisputed facts completely

undermine Thovson's claim that LSA 2 was motivated by an intent to defraud him. Plaintiffs had never seen the video prior to execution of LSA 2. (SR 746-747) And the undisputed evidence is that Plaintiffs first discussed the need for LSA 2 on August 17, 2020 – a week before Farmers Union offered anything in settlement. (SR 704-705.)

In any event, LSA 2 is substantively identical to LSA, which Thovson had never claimed he was wrongly induced to enter. (*Compare* SR 686-687 *with* SR 734-735.) Thovson's assertion that he was induced to enter LSA 2 so Plaintiffs could secure their interest in a contingency fee makes no sense, as LSA already provided the same contingency fee. (SR 686, ¶ 3) The only substantive difference between LSA and LSA 2 – the deletion of the language relating to sales tax – benefitted Thovson. (*Compare* SR 686-687 *with* SR734-735)

There is no evidence that Plaintiffs wrongly induced Thovson to execute LSA 2 and Thovson's breach of fiduciary duty claim failed as a matter of law for that reason alone. However, even if there were such evidence (and there is not), Thovson was not damaged by entering LSA 2; on the contrary, LSA 2 entitled Plaintiffs to the same contingency fee provided under LSA. (*Id.*) LSA 2 did not impose any obligations on Thovson that he did not already have under LSA. (*Id.*) If anything, LSA 2 put Thovson in a better position because of possibly avoiding sales tax. (*Id.*) Accordingly, Thovson's breach of fiduciary duty claim failed for lack of evidence of a breach *and* lack of evidence of damages.

When Plaintiffs moved for summary judgment, Thovson apparently realized the breach of fiduciary claim he had pled failed as a matter of law, and changed the

claimed basis of his claim. Opposing Plaintiffs' motion, Thovson first claimed Plaintiffs had breached their fiduciary duties by not notifying Thovson of Farmers Union's offer to pay the second $250,000 until five days after Turbak Law received the offer, and by Dickson sending Charles Johs' counsel an email that read, in part: "I am trying to put this case to bed and I think I can if I can talk to Mr. Johs." (SR 980-81, ¶¶ 17-19) However, Thovson provided the trial court with neither legal authority nor any opinion from a qualified expert to support his claim that the described conduct constituted a breach of Plaintiffs' fiduciary duties to Thovson. Accordingly, Thovson's breach of fiduciary duty claim failed as a matter of law. And again, even if the conduct in question constituted a breach of fiduciary duties, Thovson's claim still failed for lack of resulting damages. Thovson did not even respond to Plaintiffs' motion to the extent the motion sought summary judgment on the breach of fiduciary duty claim due to lack of any evidence of resulting damages.

Now, on appeal, the basis for Thovson's breach of fiduciary duty claim has shifted yet again. Thovson now claims Plaintiffs breached their fiduciary duties by not advising Thovson of his purported right to rescind LSA 2 before withdrawing from Thovson's representation, which according to Thovson deprived him of the ability to rescind LSA 2. (App. Brf., p. 31.) Because this argument was not made to the Circuit Court, it is deemed to have been waived and cannot form a basis for appeal. *See, e.g., Hauck v. Clay County Commission*, 2023 SD 43 fn4, 994 N.W.2d 707, 709. In any event, Plaintiffs' withdrawal neither terminated LSA 2 nor prevented Thovson from rescinding LSA 2. And even if Plaintiffs' withdrawal had

had that effect (and it did not), Thovson offered no evidence of resulting damages, given that Thovson's obligations under LSA and LSA 2 were identical.

B. Thovson's deceit claim fails as a matter of law for lack of evidence of intent to deceive and resulting damages.

Thovson's Counterclaim claimed Plaintiffs engaged in deceit "in inducing [Thovson] into LSA II, despite having actual prior knowledge that [Thovson] would be paid the policy limits ..." (SR 921, ¶ 98) The deceit claim essentially depended on the same conduct as his breach of fiduciary duty claim. (*Compare* SR 920, ¶ 92 *with* SR 921, ¶98) And it fails for the same reasons: no evidence of actionable conduct and no evidence of resulting damages. It is undisputed that by the time Thovson signed LSA 2, Culhane had told him that the limits of Charles Johs' insurance had been offered and that an identical offer was likely on Dean Johs' policy. (SR 715-16) And in any case, Thovson did not agree to any fee under LSA 2 other than what he already owed under the first LSA.

Thovson now claims Culhane induced Thovson to agree to the *first* LSA by falsely stating that liability insurers would resist paying money on Thovson's claim. (App. Brief at pp. 32-33) Even assuming *arguendo* that Culhane made the statements Thovson claims, such statements are not actionable; an opinion about what third parties might do in the future, as opposed to a false statement of fact, is not deceit. *See, e.g., Western Townsite Co. v. Novotny*, 32 S.D. 565, 143 N.W. 895 (1913). Thovson also could offer no evidence of any intent to induce Thovson by deception; despite what Thovson claimed once litigation began, when he first sought Culhane's

help, he mentioned nothing about preserving evidence, but asked if Culhane would represent him on his wife's fatal crash. (SR 545)

Finally, even if the statements Thovson complains about were actionable (and they are not) and even if there were evidence of an intent to deceive (and there is not), Thovson's claim still fails for lack of resulting damages. Thovson did not even respond to Plaintiffs' motion for summary judgment to the extent it sought summary judgment on Thovson's deceit claim due to lack of evidence of resulting damages.

CONCLUSION

The parties had a contract for legal services. It was fair, clearly understood, and agreed to freely. Plaintiffs performed their obligations under the contract, but Thovson then refused to perform his. There was no evidence that Plaintiffs had a fixed purpose to take unfair advantage of Thovson. As the trial court found, the fees Thovson had promised to pay were reasonable – patently reasonable. The Order granting Plaintiffs' motion for summary judgment on the Complaint, entering money judgment, granting Plaintiffs' motion for summary judgment on Thovson's Counterclaim, and denying Thovson's motion for partial summary judgment on his Counterclaim should be affirmed.

Dated: November 22, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Brief of Appellees has been produced in Microsoft Word using a 12.5 point proportionally spaced typeface for the text of the Brief and a 12.5 point proportionally spaced typeface for footnotes; that the Brief contains 9,973 words, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated: November 22, 2024

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CERTIFICATE OF SERVICE

The undersigned, attorney for the Plaintiffs/Appellees, hereby certifies that on this 22nd day of November 2024, the Appellees' Brief, Appendix1-Appendix 51, and this Certificate of Service in the above-entitled action was duly served upon the interested parties as follows:

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and that she mailed the original of Appellees' Brief to:

Shirley Jameson-Fergel
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APPENDIX
TABLE OF CONTENTS

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF CODINGTON	THIRD JUDICIAL CIRCUIT
SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON, and DICKSON LAW OFFICE, Plaintiff, v. BILL THOVSON, Defendant.	14CIV23-000034 ORDER ON MOTIONS FOR SUMMARY JUDGMENT and MOTION FOR ORDER SDCL §15-6-67 and JUDGMENT

On July 1, 2024 at the Codington County Courthouse, this matter came on for hearing the following dispositive motions:

1. PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT AND ORDER UNDER SDCL §15-6-67;
2. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; and
3. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIM.

Plaintiffs were present and represented by Nancy J. Turbak Berry, Turbak Law Office, P.C., Watertown, SD and Chris Angell, Burke & Thomas, PLLP, Arden Hills, MN; Defendant was present and represented by Michael L. Gust, ABST Law, Fargo, ND. The Court, having read and considered the motions, briefs, pleadings, and filings in this matter, and having considered the arguments of counsel, IT IS HEREBY ORDERED:

1. PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT is hereby GRANTED. Judgment shall be entered against Defendant and in favor of Plaintiffs as follows: Costs advanced in the underlying claim by Turbak Law Office, P.C. in the amount of $6,516.39; Attorney's Fees in the amount of $164,494.54 (1/3 of $493,483.61 net recovery ($500,000-$6,516.39 = $493,483.61)); and Prejudgment interest from September 8, 2022 to July 3, 2024 in

the amount of $31,303.59, yielding a total Judgment of Two Hundred Two Thousand, Three Hundred and Fourteen Dollars and Fifty-Two Cents. ($202,314.52).

2. PLAINTIFFS' MOTION FOR AN ORDER UNDER SDCL §15-6-67 is hereby GRANTED and the Codington County Clerk of Courts is hereby directed to immediately release to Plaintiffs the funds previously deposited by National Farmers Union Property and Casualty Company in this action, in partial satisfaction of the above Judgment entered against Defendant.

3. DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT is hereby DENIED in its entirety.

4. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIM is hereby GRANTED in its entirety on the following grounds:

a. Defendant's claim for rescission under North Dakota Century Code Sections 9-08-08 and 9-08-09 fails as a matter of law because pursuant to choice of law principles those sections are inapplicable in this matter and, even if they were applicable, Defendant failed to provide written notice of rescission within six months of Defendant's wife's death, as required;

b. Defendant's claim for rescission under North Dakota Century Code Sections 9-09-02 and 9-09-04 is deemed to be a claim for rescission under South Dakota Codified Laws Sections 53-11-2 through 53-11-5 and fails as a matter of law because Defendant did not rescind the parties' agreements promptly after discovering the facts that Defendant believes entitled him to rescind, as required;

c. Defendant's claim for actual fraud under North Dakota Century Code Section 9-03-08 is deemed to be a claim for actual fraud under South Dakota Codified Laws Section 53-4-5 and fails as a matter of law because Defendant presented no evidence of any acts committed by Plaintiffs with intent to deceive Defendant or to induce Defendant to enter into a contract and, even if he had, Defendant did not present evidence of any resulting damages;

d. Defendant's claim for deceit under South Dakota Codified Laws Section 16-18-26 also fails as a matter of law because Defendant presented no evidence of any acts of deceit or collusion committed by Plaintiffs and, even if he had, Defendant did not present evidence of any resulting damages;

e. Defendant's claim for breach of fiduciary duty fails as matter of law because Defendant did not present any legal authority or expert opinion supporting a

conclusion that Plaintiffs breached any fiduciary duty and, even if he had, Defendant did not present evidence of any resulting damages; and

f. Defendant's claim for breach of contract fails as a matter of law because Defendant did not present any evidence of a breach on the part of Plaintiffs.

Now, therefore,

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs be awarded judgment against Defendant Bill Thovson in the amount of Two Hundred Two Thousand, Three Hundred and Fourteen Dollars and Fifty-Two Cents. ($202,314.52), together with interest on that sum at the legal rate from July 3, 2024 until this judgment is paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this matter is hereby DISMISSED with prejudice.

7/8/2024 2:20:35 PM

Dated: July __, 2024

BY THE COURT:

Attest:
Beachler, Kaylee
Clerk/Deputy

STATE OF SOUTH DAKOTA) : SS
COUNTY OF CODINGTON)

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT

SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON and DICKSON LAW OFFICE,

Plaintiffs,

-vs-

BILL THOVSON,

Defendant.

14CIV23-000034

TRANSCRIPT OF

MOTIONS HEARING

Before
The Honorable Douglas E. Hoffman
Circuit Court Judge

Codington County Courthouse
Watertown, South Dakota

July 1, 2024

APPEARANCES:

For the Plaintiffs: Nancy Turbak Berry
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Chris Angell
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Fargo, ND 58106-0247

* *

Patricia J. Hartsel, RPR
Official Court Reporter
314 6th Avenue, Suite 6
Brookings, SD 57006

(The following proceedings were held at 10:32 a.m.)

THE COURT: We are gathered together here for the Culhane and Turbak Law Office and Dickson and Dickson Law Office versus Bill Thovson, Civil 23-34, here in Codington County.

And so we have got Nancy Turbak Berry and I'm going to go out on a limb and say Chris Angell?

ATTORNEY ANGELL: Good morning, Your Honor. Perfect. Chris Angell, just like the guy out in Vegas that they call him the mind freak.

THE COURT: Yeah, yeah, my son saw that. He said it was pretty good.

And so here for the plaintiffs.

And so Michael Gust is here for defendant, who is also personally present, Mr. Thovson. And we will see if we can get Mr. Schwab who is local counsel for the defense hooked up one way or the other here, which we probably could just do by speaker phone if the Zoom isn't going to work, but because I'm stubborn and thinking that it should be working and I'm going to just check and see what the skinny is here.

So, Ms. Berry, I mean, didn't my assistant in Sioux Falls Brice send us out some kind of a Zoom link last week?

ATTORNEY TURBAK BERRY: I believe so, sir, I have to admit that I didn't pay much attention to it as I knew I was going to be here in person. But there was a Zoom link. At least once, maybe a couple of times sent out.

THE COURT: Yeah. Well, I have got so much stuff in my inbox it's hard to find it, but let's see if I can find it this way.

ATTORNEY TURBAK BERRY: The person from Mr. Schwab's office who was handling the arrangements I believe was a name of Jennifer Ernst and so you might want to do a search for that you might find it quickly.

THE COURT: Okay. I will take that advice.

ATTORNEY GUST: And that's actually my office, Your Honor, and so it would be like abstlaw.net.

THE COURT: Oh, there it is. Okay. So I will just see if I can do it here on my iPad and see what happens.

(A recess was taken at 10:34 a.m.)

(The following proceedings were held at 10:49 a.m.)

THE COURT: Okay. Well, we have already noted the caption in the case, we took a break attempting to connect local counsel for the defense, Mr. Schwab, through Zoom but we are having technical difficulties and the parties are fine proceeding. He wasn't going to be presenting argument and it's fine with the Court.

And so we have got these cross motions for summary judgment and looking everything over from what I printed off from Odyssey I couldn't figure out who filed first or maybe they were filed simultaneously, any help with that?

ATTORNEY TURBAK BERRY: Yes, sir. I think they were filed

simultaneously and that was because when we scheduled the hearing, we anticipated cross motions, we scheduled the hearing and we agreed to a filing deadline. And so plaintiffs' motion for summary judgment on the contract and defendant's motion for partial summary judgment on the contract essentially are opposite sides of the same coin. And then there is a separate issue that Mr. Angell is handling that is a motion for summary judgment on the defendant's counterclaim.

THE COURT: Yeah. Well, so, Mr. Gust, what -- how do all these motions interrelate? I mean, one where -- I mean, if I grant one side or the other, then isn't the case over?

ATTORNEY GUST: I think that's a fair assessment, Your Honor, yes.

THE COURT: Okay.

ATTORNEY GUST: And so I think they are all separate motions, counterclaims, in the plaintiffs' action and Mr. Thovson's defense and counterclaims, but I think in the grand scheme a Court's decision on one of the major issues will probably resolve everything.

THE COURT: Okay. Well, who do you think should get to argue first for sake of clarity and --

ATTORNEY GUST: I think technically, even though they were filed simultaneously, I think Ms. Turbak was the first one to file and if the plaintiffs want to argue first that's fine with me.

THE COURT: Okay. Ms. -- I always call you Ms. Turbak and it's Ms. Berry and so do you have a preference?

ATTORNEY BERRY TURBAK: No. I would just a soon forget the Berry part.

THE COURT: Okay. All right. Well, Ms. Turbak, does that sound good to you, we will start out with your argument?

ATTORNEY BERRY TURBAK: You bet, Your Honor, but I'm going to make it extremely brief because if the Court has had an opportunity to look at the briefs, I am not going to waste anyone's time by going back over the briefs.

THE COURT: Yeah. I have been through all of that.

ATTORNEY BERRY TURBAK: Fair enough. I will just say simply, two things. One is this is a simple breach of contract action, no matter what distractions and detours the defense would have us take, it comes back to a simple breach of contract action and we will rest on the briefs for that.

With regard to the specific procedure in front of the Court, the motion for summary judgment, I would note that the plaintiffs' statement of material facts are all deemed admitted. As the Court is aware under SDCL 15-6-56, our summary judgment rule, a party making a motion for summary judgment has to submit a statement of facts, separate short concise statement with each material fact presented in a separate numbered sequence.

And then the statute expressly provides all material facts set forth in the statement that the moving party is required to

serve shall be admitted unless controverted by the statement required to be served by the opposing party. And the statement that is -- the opposing party is required to serve, if they want to controvert any of those facts, is described in subsection 2 of that statute, and it says the opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

No such response has been filed and so the Court under Rule 56 subsection 2 and 3 shall take the plaintiffs' statement of material facts as deemed admitted and so I think it's very clear that we don't have any factual dispute here, the issue is the plaintiffs' entitlement to judgment as a matter of law for breach of contract.

THE COURT: All right. And so the long and short of it is you are saying we are applying South Dakota Law, we got a breach of contract, and none of the defendant's arguments carry the day and I should grant summary judgment in your favor?

ATTORNEY BERRY TURBAK: Yes, sir.

THE COURT: Okay. Are we ready to hear from Mr. Gust then? It's probably not quite that simple, is it?

ATTORNEY GUST: I don't believe so, Your Honor. Just for the sake of the microphone and stuff, do you mind if I sit down?

THE COURT: Yes, that's perfectly fine.

ATTORNEY GUST: With respect to the procedural allegations

we did submit a counter statement of facts, but frankly more for the sake of clarifying some of the facts. Likewise when I say -- I have got two attorneys representing the plaintiffs on various things and so I will say Turbak and the -- Rich Thomas is working with Mr. Angell on this case.

With respect to the statement of facts submitted by Mr. Thovson. Likewise there is really no contest as to the facts. Your Honor, I think at the end of the day this really does come down to a legal matter and the issue is, I believe an issue of first impression in the State of South Dakota, which is whether or not an attorney that takes a case on a contingency fee basis and withdraws because his client refuses to settle it against his advice, if that lawyer is still entitled to their legal fees in such an action. And the overwhelming majority, in fact all the case law that I can find is a resounding no.

THE COURT: But doesn't that have to be some plausible reason for not wanting to settle? The cases that you cited, if I recall, you know, there is some reason, but here it doesn't seem like there was any reason, was there?

ATTORNEY GUST: Well, Your Honor, from the ethics and the case law the ultimate decision to settle is that of Mr. Thovson whether or not he wants to settle. Mr. Thovson came into the Turbak Law Office a week after his wife was killed in a fatal crash in North Dakota and listened to the spiel that insurance companies won't settle, that this is going to be a fight, and

that I'm going to be your advocate to hold Mr. Johs liable for his actions.

THE COURT: Is there something -- is there something wrong with that?

ATTORNEY GUST: No, but Mr. Thovson wanted a trial to hold Mr. Johs liable for his actions.

THE COURT: Okay. Which the Turbak Firm got an offer of the policy limits and examined all avenues for any kind of excess judgment and determined that there wasn't any possibility of recovering anything further and so what did Mr. Thovson want to get out of that trial, just the satisfaction of a trial?

ATTORNEY GUST: The satisfaction of closure on the accident. And to say that, we don't know at the end of the day whether or not a jury verdict would have come back in excess of the policy limits. And, you know, as Your Honor is likely well aware, judgments are good for, in North Dakota, you know, 10 years and renewable for 20 years. You know, we don't know what Dean Johs or Charles Johs would have done with the judgment in excess of those policy limits.

But at the end of the day, the cases that we cite clearly state that it is the position of the client and the client only on whether or not they are going to accept a settlement. Clearly Mr. Thovson did not want to settle this case.

THE COURT: And they didn't force him to settle, he didn't settle, but they just said we worked the case up and we are

entitled to our fee and then your client didn't go to trial, he didn't settle the case for any more money, he didn't get an excess judgment, he didn't collect any more money, I mean, I'm trying to figure out what he wanted that the Turbak firm didn't provide him.

ATTORNEY GUST: Well, at the time in January he wanted to find, to have a trial. Now --

THE COURT: I mean a trial, I'm sorry to interrupt, but I mean we are talking about some very fundamental precepts here, I'm trying to figure out where you are coming from and that is, I mean, a trial is a means to an end. The trial isn't an end, but the purpose of litigation is to achieve a result and in a wrongful death case that purpose would be to achieve compensation for the loss of life plus any, you know, pain and suffering that the decedent might have suffered as a result of the accident before succumbing to injuries, property damage, economic loss, I mean, there is a number of different factors that we can pencil it all out.

But, I mean, the Court instructs the jury as to these elements of the special and general damages and there is no other purpose for the trial. There isn't -- a purpose of the trial isn't just for some kind of emotional satisfaction I don't think, is it?

ATTORNEY GUST: Well, Your Honor, I mean, yet you are correct in that the trial is an ends to a means, but what those

means are ultimately going to be is the decision of Mr. Thovson. And, you know, Your Honor, the Court has the deposition of Tom Dickson and Mr. Dickson is the local attorney in North Dakota that was, you know, brought onto the case.

And in his deposition there is plenty of discussion about the Morsette case that he has in North Dakota where he admitted that policy limits had been offered and they still took the case to trial.

THE COURT: Sure. I mean, that would make total and complete sense if there was any possibility of getting an excess judgment that could you collect. I don't think anybody --

ATTORNEY GUST: Your Honor, Mr. Dickson's deposition testimony was clear that this guy was essentially a deadbeat that committed this accident and that there was no basis to expect there was going to be any recovery in excess.

THE COURT: Okay. And so what case are we talking about with Mr. Dickson that's of precedential value?

ATTORNEY GUST: Well, I'm just saying, you are saying that, hey, this is an ends to a means and that lawyers don't do this, but in fact Mr. Thovson's counsel Tom Dickson did exactly this in North Dakota. But the analysis isn't whether or not they got a policy limits offer, whether a trial would have been a good idea, Mr. Thovson had the right to go to trial and roll the dice that he is either going to get an excess verdict or a less verdict than the policy limits.

THE COURT: Well, he could have done that, why didn't he do it?

ATTORNEY GUST: Well, I think, you know, for multiple reasons, but I think, you know, Mr. Culhane's email of December 29th is clear that, hey, once we've withdrawn and put our attorney lien, it's going to be really tough for you to find another lawyer to pursue this case. Mr. Thovson is grieving the loss of his wife and, you know, he ultimately, with Mr. Dickson telling him the statute of limitations is going to run in two years, he ultimately decides to settle it, but that's neither here nor there, Your Honor --

THE COURT: Well --

ATTORNEY GUST: -- the client made a choice not to settle the case.

THE COURT: I think it is here or there. I mean, I hear what you are saying because I'm just putting myself into the position of let's say that I was back in private practice and Mr. Thovson came in and said, well, Hoffman, I would like to hire you to represent me on this case and so, okay, well, let's see what's been done so far. Well, I hired the Turbak Firm on a one-third contingent basis, they got a policy limit offer and they researched all possible avenues of collecting any other money and they concluded that there wasn't any opportunity to collect any more money. The client wouldn't settle for the only money that was available and so Turbak withdrew and put a lien

on the file for a third.

And so I'm going to think to myself the only purpose of taking this case would be for me to take at a 40 or 45 percent and keep the balance that's over and above the lien which would make no sense for Mr. Thovson and so he settled it himself for the same amount of money.

And so, I mean, the only conclusion that I can come up with is that he wanted to settle the case but he didn't want to pay the third, which I think you basically admitted because your arguments in your briefs are that the third was too high and that they should have reduced the fee because they settled the case early on.

ATTORNEY GUST: That's a fall back position, yes.

THE COURT: Okay.

ATTORNEY GUST: And that's definitely an issue before the Court as well. But fundamentally, Your Honor, in every single case that we cite for the proposition of a withdrawal on a contingency case, every single party is in Mr. Thovson's position. When the lawyer that they currently have withdraws, they don't know what the end result is ultimately going to be. But fundamentally --

THE COURT: Well, the lawyers told him what the end result is going to be, they said this is all the money you are going to get so --

ATTORNEY GUST: They didn't know that.

THE COURT: Well, they apparently did know that because that is all the money that he did get.

ATTORNEY GUST: Well, because he ultimately settled the case 18 months later on the steps of the statute of limitations expiring.

THE COURT: Right. But I mean if he wanted to go to trial he should have gone to trial between the time that the attorney/client relationship broke down, I mean, he could have hired you to go to trial but he hired you to contest the attorney fee instead. But he knows how to get another lawyer. I'm just trying to figure out you keep saying he had this right to go to trial for no purpose whatsoever. I don't understand it.

ATTORNEY GUST: Your Honor, okay, so let me take a step back. One week after his wife was killed in a motor vehicle accident he goes in to the Turbak Law Office and wants, and informs Mr. Culhane that he wants to hold Mr. Johs liable and responsible for his wife's death. Mr. Culhane tells him insurance companies don't pay, they are going to fight, and we will be your advocate to do this.

In his deposition Mr. Culhane says I don't recall ever telling Mr. Thovson that insurance companies only do that by writing checks.

THE COURT: Only do what by writing checks?

ATTORNEY GUST: Giving him the, holding Mr. Johs

responsible for killing his wife.

THE COURT: Well, how else do you hold an insurance company responsible for their insured committing a tort?

ATTORNEY GUST: Well, Your Honor, vis-à-vis you and I, we can have that discussion. Vis-a-vis Mr. Culhane and Mr. Thovson, an individual that doesn't have any experience in personal injury and wrongful death, he is not aware of that.

THE COURT: Well, but you want me to create new law in the State of South Dakota over some undefined value that I'm not understanding. And Mr. Thovson, I mean, I think the record is -- reflects that he is not a commercially unsophisticated individual, isn't he involved in some kind of business activities?

ATTORNEY GUST: Yes, he is, but commercial law is inapplicable to this matter at all. This is a gentleman that -- if you could say that he has had personal injury cases or wrongful death cases before, then we might be talking apples to apples, but to say that he has some experience in business and commercial law is apples to oranges.

THE COURT: Well, but I mean this case is a breach of contract case, he understands contract.

ATTORNEY GUST: Correct, but the underlying action is the wrongful death case.

THE COURT: He probably understands insurance, too?

ATTORNEY GUST: That's not in the record, Your Honor.

THE COURT: Okay. Well, so I mean he understands money? I mean insurance policies have limits and --

ATTORNEY GUST: But, Your Honor, from a fundamental point it doesn't mean that just because the policies have limits that there is nothing else there.

THE COURT: And so are you saying that the Turbak Firm, and Dickson, too, violated a fiduciary duty to their client when they said if you don't want to settle the case for all the money that is possible to get in this case under any foreseeable circumstance, we are going to withdraw because there is no point in going forward. That's like a breach of fiduciary duty or professional misconduct?

ATTORNEY GUST: I think it's a breach of the duty, Your Honor, and I think the *Stowman* decision out of the Minnesota Supreme Court reflects that very issue where on page 764 of that decision, they state that moreover to allow a contingent fee attorney to withdraw without good cause and then recover fee in quantum meruit may impermissibly shift the balance of power in contingent fee arrangements to favor the attorney's economic interest --

THE COURT: Sure but good cause.

ATTORNEY GUST: -- over the objections of the client.

THE COURT: Right. For good cause. And so if this comes down to whether or not Turbak Firm withdrew with good cause, right?

ATTORNEY GUST: Correct. And as the Fifth Circuit said almost unanimously every single court in the entire country that has ruled that says that good cause does not exist when you withdraw because your client will not settle the case.

And it should be noted that neither of the plaintiffs' attorneys found that any case cited to this Court holding for a contrary proposition. The best that they could come up with was a cite to a South Dakota regarding *Tidvell v Hetrick* which had absolutely nothing do with the withdrawal of an attorney and whether or not that was good or just cause. But as the Fifth Circuit said universally, almost every state court holds that that's not the case.

THE COURT: I don't remember any cases though that you cited that were on par with this case where all the possible money was on the table. And so, I mean, absolutely those cases would apply when you have got some weak kneed lawyer that says let's take the easy money because I'm scared to go to trial, but we know that's not the case here.

But, I mean, it seems to me like it's almost more problematic if a lawyer is, if you have got your entire goal of achieving, I mean, litigation can only achieve so much so and when we are dealing with dollars and cents when you have got all the money, then going to trial for no purpose other than burning up more costs, I mean, yeah, the attorneys are going to burn up more attorney time and I get it, that's not -- that's not a

justification for taking a haircut but, I mean, you are going to go, you are going to be hiring experts, you are going to have, I mean, the client's result is going to be diminished the further you push the case once you got all the money on the table.

ATTORNEY GUST: Your Honor, when you say you have all the money on the table you are saying when you say you have all the policy limits on the table from the insurance company. We don't know as we sit here today nor will we ever know now whether or not, quote unquote, all of the money was on the table.

THE COURT: Well, but isn't that your responsibility to show that there was some plausible way to get any more money? I mean, my understanding is the Turbak Firm, Dickson Firm, they investigated these folks to see whether or not they were solvent and able to, I mean, if it would -- I don't know all the details, but basically are like, okay, what have they got and is there any money to get?

Understanding that there is bankruptcy and there is other protections for debtors like you can't take their homestead, you can't go in and take their clothes, you can't take the family bible, you can't take their church pew, I mean, those are some of the provisions in some of those archaic debtor/creditor law and so, I mean, that's a legal analysis, too.

And so if the Turbak Firm said we investigated this and our conclusion is there is no more money to be had I'm thinking, you know, under Rule 56 now you have got to come in and say, well,

look, here it is, we took the tortfeasor's deposition, here's their estate, here's their bank accounts, here's their loan applications and their balance sheets and there was money, they couldn't have washed this in bankruptcy, we could have gone after them and gotten more money.

ATTORNEY GUST: But, Your Honor, you are asking Mr. Thovson now in this action to go back to 2020 and say at that point in time that, you know, we knew they had something. People do this all the time, Your Honor. If I may and I'm not wanting to waste the Court's time here.

THE COURT: Sure.

ATTORNEY GUST: But this is Mr. Dickson's testimony: And the defendant in that case was a gentleman by the name of Jordan Morsette? Yes. Was he the only individual in the vehicle, in his vehicle? Yes. And I don't want a question from me, and I don't want to spend a lot of time on it, correct me if I'm wrong, my understanding was that Mr. Morsette had spent the day and evening drinking? Yes. And he was three to four times the legal limit? Yes. Pretty darn near close to .3.

And then we go on and on and on.

THE COURT: Well, what --

ATTORNEY GUST: And the whole reason why Mr. Dickson, sorry to interrupt you, Judge, but the whole reason why Mr. Dickson is brought in is Mr. Culhane is saying, hey, this is one bad ass lawyer from North Dakota and he gets stuff done. And I don't

have to read it, you can go to pages 13 to 16, exactly what happened in that case. Okay.

THE COURT: Well, was he trying to get a punitive damage award because this guy was drunk that couldn't be discharged in bankruptcy and you could chase him forever, chase him to the grave I guess for his estate?

ATTORNEY GUST: Well, and so I actually practice in bankruptcy a lot and so under a 523 type of claim, you would have to show that it was willful and malicious. Just because somebody is drunk doesn't necessarily mean that they are not going to get a discharge. Dean Johs was under the, according to the police reports, under the influence of narcotics because he had had a shoulder surgery or shoulder injury prior to this accident.

THE COURT: Right.

ATTORNEY GUST: But the point is as Mr. Dickson proved in his Morsette case and that he testified to at length in his deposition, just because we got policy limits offers doesn't mean that it was done. They took the case --

THE COURT: Sure.

ATTORNEY GUST: -- and he said specifically, even acknowledged that Mr. Morsette didn't have anything else.

THE COURT: But that doesn't prove anything because that's not a State Supreme Court case, it's of no precedential value and it doesn't establish anything. You have to establish that

the Turbak Firm breached some kind of duty to your client by withdrawing when they got him all the possible money that was available and he stubbornly wouldn't take it for some inexplicable reason is basically what I'm seeing the facts of the case to be.

ATTORNEY GUST: It -- Your Honor, the Morsette case is relevant because Mr. Culhane is telling Mr. Thovson let's get this guy involved. And Mr. Culhane testified I got him involved because he got a billion dollar verdict in North Dakota. He thought it was two billion, but it wasn't. But here is the point, Your Honor --

THE COURT: It was a fee sharing agreement, it didn't cost Mr. Thovson another penny to bring in another lawyer so I don't see what the relevance of that is other than the fact that Mr. Dickson, I mean, provided -- increased the quality of the representation.

ATTORNEY GUST: That's arguable, but the Morsette case shows that plaintiff's personal injury lawyers and wrongful death lawyers go to trial. Mr. Thovson's attorney goes to trial. When this -- can I just finish this real quick?

THE COURT: That establishes a standard of care that I need to recognize here in South Dakota.

ATTORNEY GUST: No, I'm not saying that, Your Honor. What I'm saying is that it is evidence that Mr. Dickson as a wrongful death attorney in this case has taken cases to trial when policy

limits are on the table and when there is no other source of recovery of any more money. The exact situation that Your Honor is painting.

THE COURT: Okay. Well --

ATTORNEY GUST: Okay. And so we know he takes that. Universally, Your Honor, universally every single state that's looked at this issue has said the choice to settle, regardless of the circumstances, the choice to settle is the client's.

THE COURT: Sure.

ATTORNEY GUST: And --

THE COURT: But it doesn't mean that the attorneys can't put a lien on the file for the work that they did.

ATTORNEY GUST: It does, Your Honor. Because the case law is universal. The plaintiffs can't cite a single case to this Court's standing for a different proposition that if you withdraw because your client won't settle, which is clearly the facts here, such a withdrawal does not fit the definition of good cause.

THE COURT: When you have got all the money on the table and the client won't settle for an irrational reason, that's what the case law says?

ATTORNEY GUST: I don't know if that specifically is in the case law, but there is plenty of cases that say that the settlement was essentially the same or similar if you dive in and read every single case.

THE COURT: I mean --

ATTORNEY GUST: But the ultimate, the ultimate decision, Your Honor, isn't made in retrospect, it's whether or not at the time of withdrawal --

THE COURT: Yeah.

ATTORNEY GUST: -- did the attorney act in good faith.

THE COURT: It's not --

ATTORNEY GUEST: They do not act in good faith if they withdraw because their client won't settle the case.

THE COURT: If this were a criminal case, right, you get a plea bargain for a misdemeanor instead of life imprisonment felony and the client wants to roll the dice and go to trial, we go to trial, not going to withdraw, in fact can't withdraw. Divorce case, I get an offer to settle and my client is going to get two-thirds of the property and going to receive alimony and getting full custody of the kids but the client won't settle because they want more, going to go to trial.

Of course we are charging by the hour in those cases but, I mean, there is at least theoretically there is something more to be gained. Maybe you are going to get a full acquittal, maybe the judge is going to get so upset that they are going to give you everything and send the person to the poor house, but there is nothing to be gained here. It makes no sense.

ATTORNEY GUST: There is a possibility of a judgment in excess of the policy limits.

THE COURT: Yeah.

ATTORNEY GUST: And that's good for ten years.

THE COURT: Yeah.

ATTORNEY GUST: And good for another ten years. If Dean Johs strikes the -- he has been unlucky in his life, he has had shoulder injuries, he killed a woman while drinking and all of a sudden he wins the lottery.

THE COURT: It could happen.

ATTORNEY GUST: Could happen. That's the point, we don't know what's going to happen. They could have taken the case and gotten more than the policy limits, we don't know.

THE COURT: Could have got less.

ATTORNEY GUST: Could have. But you know what, that decision is Mr. Thovson's to make.

THE COURT: Yeah.

ATTORNEY GUST: And I understand, but as the *Stowman* case in Minnesota points out, you know, the attorney doesn't get to withdraw for good cause simply because the client says I want a trial and I don't want to settle and the lawyer saying I don't think it's a good thing to do because I don't know if I can get you any more money at trial.

THE COURT: But the contract said they could do that, didn't it?

ATTORNEY GUST: It did, Your Honor. But let me ask you this question. Because if their contract also said, hey, if we

get a settlement, their contract says if we get a settlement that we think is fair and reasonable and you won't take it, we can withdraw. Okay.

THE COURT: Yeah.

ATTORNEY GUST: But courts have struck that, you know, the idea is, that idea that they get to withdraw, is contrary to the rules of professional responsibility and we strike that all -- courts strike contract provisions all the time.

If the Turbak Law Office had a provision, hypothetically speaking, that if we get a fair and reasonable offer and you don't want to accept it we are going to get to withdraw. And by the way, if we withdraw you agree, by contract, because it's in writing, that you are waiving the attorney/client privilege and we can discuss this matter with any third party.

I would be hard pressed to believe that any court would state we are going to uphold that contracting away of a rule of professional responsibility. And just like that it's clear in the professional rules of responsibility that settlement is always the province of the client.

THE COURT: Okay. Where does it say that?

ATTORNEY GUST: In the rules?

THE COURT: Yeah.

ATTORNEY GUST: I can't give you a specific cite, Your Honor.

THE COURT: Okay. So you are paraphrasing.

ATTORNEY GUST: I am paraphrasing, correct.

THE COURT: Yeah, yeah. All right.

ATTORNEY GUST: And every single case in the entire United States that have dealt with this issue.

THE COURT: Okay. But Mr. Thovson read the contract, he is commercially sophisticated, he knew what it said, and he was fine with it when he signed the contract, but then afterwards he wasn't fine with it any more.

ATTORNEY GUST: He wasn't fine with it when he told his lawyers I want to go to trial and they said we are not going to go to trial.

THE COURT: Yeah. And so you think the law should be that lawyers need to go to trial on personal injury cases for unreasonable and futile purposes and if they don't that it's professional misconduct?

ATTORNEY GUST: I'm not saying that they have to go for unreasonable and futile purposes, but it's the client's decision and clearly, you know, these cases do go. We don't know. You are sitting on the bench today saying I think it would be futile to do that. We don't know. We have no idea whether it would be or not. The entire essence of their background search was a credit report and then Mr. Dickson driving by the Charles Johs farm.

THE COURT: Well, why didn't Mr. Thovson hire you before the statute ran to go do that trial and get that excess

judgment?

ATTORNEY GUST: I don't know, Your Honor.

THE COURT: I mean, doesn't that undermine your whole argument, if that was such a great idea and he wanted to do that so bad why didn't he do it?

ATTORNEY GUST: I don't know. But you can maybe look at the email of Mr. Culhane where he says once that occurs the defense will know that you are no longer represented. Meanwhile given that there is no additional money to be obtained given that there will be pending attorney liens on the proceeds of any claims means that it will be difficult, if not impossible, to find additional counsel to represent you. Maybe that's what happened.

THE COURT: Well, I mean, that was good advice. He was telling Mr. Thovson the truth and trying to keep him from making a mistake that would end him up in a situation just like this now where instead of getting all the money, other than the Turbak's one-third, now he has got, there is going to be what, a ton of prejudgment interest and now he has got your attorney's fees and everything else. I mean, he may not have a whole lot left once this is all over.

And so Mr. Culhane sounds to me like was giving him very good advice and trying to warn his client not to make a terrible mistake.

ATTORNEY GUST: Your Honor, going again to the *Stowman*

decision, specifically allowing recovery following withdrawal without good cause would encourage attorneys to withdraw from a case simply because a client refused to settle the case, even though an attorney must abide by that client's decision to settle the matter.

It's a fundamental tenant of law that Mr. Thovson controls settlement. It's a fundamental tenant of law that if you withdraw as legal counsel because he won't settle, that's not a good cause withdrawal. There is not a single case in the entire country that says it is and that is the only reason why they withdrew is because he would not settle the case.

Yes, it may have cost them more time, more effort, more costs, but that's Mr. Thovson's decision to make and when you take on a contingency case, when you take on any case, that's what you are signing up for as an attorney.

THE COURT: Yeah. And so is that it, is it time to hear from Mr. Angell now?

ATTORNEY GUST: Yes, Your Honor.

THE COURT: Okay.

ATTORNEY ANGELL: Your Honor, thank you, thank you very much. Chris Angell from Burke and Thomas. You know, our office submitted more stuff to this Court than anybody else. I have got 69 exhibits I think that I submitted. And I had prepared for this morning a long presentation that I was going to give, but I'm not going to do any of that. I just want to make a few

points about the counterclaim and then I will be done, I promise.

And so there are two statutory claims for recission. They are both based on North Dakota statutes, I talked about the choice of law issue in my brief, I'm not going to go over that again, it doesn't matter because both of those claims failed. Didn't give notice of recission within six months of the injury as is required under North Dakota Century Code 09-08-08 and 09-08-09.

And then the other rescission statute says that you need to withdraw, give notice of rescission promptly upon learning of the facts that believe you entitled to rescind. And again we talked about this in our brief, Mr. Thovson was aware of the facts that at least in his mind entitled him to rescind in January of 2021, but yet did not give notice of rescission until January of 2023.

And we cited in our briefs South Dakota cases talking about -- and by the way whether or not that's prompt or not prompt is a question of law for the Court, I cited that in my brief. I have cited cases from South Dakota that have held that delays between one year and two years are not prompt and in this case it was actually a little more than two years. And so his rescission claims both fail as a matter of law regardless of the choice of law.

I want to talk just briefly about the fraud claims. There

are two of them, there is one that's based on a South Dakota statute, there is another one that's based on a North Dakota statute, but that has a counterpart here in South Dakota. I don't think it matters. The claims fail for two reasons.

Number one, Mr. Thovson had -- it's not any statement that will give rise to an act of fraud, for example, a statement as to a future event, if it turns out to be wrong that's not actionable, we talked about that in our brief.

And Mr. Thovson, what he said in his counterclaim, the actual document which is Exhibit 65, in his counterclaim what he said was he had been induced to enter into the second legal services agreement because Turbak Dickson suppressed the definitive nature of the surveillance video of the accident and did not tell Mr. Thovson of the insurance company's offer to pay the limits of Dean Johs' insurance policy before Mr. Thovson executed that second legal services agreement.

But there is no evidence that any of the plaintiffs had seen these surveillance video at any time before that second legal services agreement was executed, much less evidence that they knew that it was so definitive that it would prevent any dispute by an insurance company.

And in any event, as Your Honor has noted, the second legal services agreement didn't impose any additional obligations on Mr. Thovson that he was already obligated under the first legal services agreement. And so even assuming arguendo that he was

fraudulently induced to enter into the second agreement, he didn't lose anything because he had the same obligations under the first legal services agreement.

Now, in response to the motion, Mr. Thovson says, well, I was fraudulently induced to enter into the first legal services agreement. That doesn't appear in his counterclaim, that's an argument that Mr. Thovson made in response to the motion for summary judgment. And as an initial matter as Your Honor knows you have to plead fraud with particularity and here Mr. Thovson's fraud claims don't say anything, at least the counterclaim itself, about that first legal services agreement, and so that's one reason to reject that argument.

But in any event, the statements that Mr. Thovson now claims induced him to enter into that first legal services agreement are not actionable because they were statements relating to future acts or events and we cited the case law in our brief that those are not actionable for fraud.

Very briefly, I want to address the last two claims, the breach of fiduciary duty claim and the breach of contract claim. Your Honor has already kind of addressed the breach of contract claim so I will do it very quickly. The claim is is that, and this is coming straight from Mr. Thovson's counterclaim, was that Turbak breached the contract by virtue of filing an attorney's lien. But as Your Honor knows the contract specifically allowed Turbak to withdraw and file an attorney's

lien and we pointed that out in our motion for summary judgment and the response was silent on the breach of contract claim.

And so at least with respect to that claim, Your Honor, we would respectfully submit that the motion is unopposed.

And one final point, and I promise I will be quiet after this, and it has to do with breach of fiduciary duty claim that Your Honor had asked about. His counterclaim alleged that Turbak and Dickson breached the fiduciary duty by allegedly inducing him to enter into the second legal services agreement. That was what he said in the counterclaim.

That claim fails for the very same reason that his fraud claims fail, the ones that I just mentioned, among other things, no evidence of damages.

In response to our motion, however, Mr. Thovson says, well, no, you breached your fiduciary duty by not notifying me immediately of the offer to pay the full 500,000, the insurers' offer to pay the full 500,000 before the execution of the second legal services agreement.

He also asserts that Turbak Dickson breached a fiduciary duty by sending an email to Charles Johs' lawyer stating that they were trying to put the case to bed and without first obtaining Mr. Thovson's authorization to do that. But Mr. Thovson has not provided this Court with any authority, either in the form of law or an expert opinion, that either of those things constitute a breach of fiduciary duty.

And in any event, what difference does it make because it gets back to the point that Your Honor made which was that he wasn't damaged. Even if he was -- some breach or some fraud induced Mr. Thovson to enter into the second legal services agreement, even if he had never entered into that second legal services agreement, he had the very same obligation under the first legal services agreement that's at issue in the case.

Your Honor, for all those reasons the counterclaim fails as a matter of law and we ask that the motion to dismiss the counterclaim via summary judgment be granted. Thank you for indulging me.

THE COURT: Okay. Thank you. Mr. Gust, back to you.

ATTORNEY GUST: Your Honor, with respect to the choice of law, plaintiff's cite to a tort case, the *Chambers* decision, that doesn't talk about 53-1-4 at all and the contract provisions of South Dakota Law and the case law. The *Briggs* decision that we cite is clear that, you know, the Court can look to the intent of the parties. If it wasn't the intent of the parties that the work would be performed in North Dakota Mr. Dickson's appearance here was pointless.

Furthermore, Mr. Culhane swore out an affidavit in support of the attorney's lien saying that the services he will provide was in Morrill County, North Dakota, clearly indicating that the contract was being performed in North Dakota and so North Dakota law should apply.

Now, with respect to 9-08-08 and 9-08-09, that gives six months from the date of the accident, not 180 days, but six months from the date of the accident which occurred on July 28th. And so six months would be January 28th. Counsel withdrew prior to that date and so there was no contract for Mr. Thovson to rescind at that point. Under North Dakota law futile and idle acts are not, are not necessary to be done because there is no point in doing that. And so the idea that he would have to go in and now rescind the contract that his clients have already, excuse me, that his attorneys have already terminated is not the case.

With respect to the inducement, you know, the facts before the Court where he was being told the insurance company is not going to do this, the insurance company is not going to do that, we are going to be your advocate, you know, and we are going to fight for you.

When he signs, he is looking for that advocate when he is being told this is what we are going to do for you, he is being induced, fraudulently induced to enter into that contract when not 60 days later Mr. Culhane is emailing Mr. Dickson saying, on October 7 saying, I don't have any desire to try this case. And so --

THE COURT: He is really emailing him and saying we won the case, isn't he?

ATTORNEY GUST: I don't believe so because the email says

that if we want to sue it out we have a valid as hell -- valid as hell case.

THE COURT: It seems to me like what you are arguing boils down to that the client should be able to hire the attorneys to take the personal injury or wrongful death case, the attorneys can go and do all the work necessary in order to get all the available money and then your client should be allowed to rescind for some reason that doesn't make any sense and then the attorney -- and so then he gets to settle the case after he rescinds to keep all the money.

ATTORNEY GUST: No, Your Honor. And actually that leads me to the next point that I was going to address is the idea that in South Dakota fees have to be reasonable. Okay. And you are saying after they have done all this work. The record is essentially bare of, quote unquote, all this work because on August 12th, eight days after they are retained, the insurance company says, hey, we don't have authority yet to release the policy limits, but we have made the request and we are working on that with our client. On August 20th -- that's for Charles Johs.

THE COURT: Yeah.

ATTORNEY GUST: Because you have Charles Johs, Dean Johs, same insurance company, two separate adjusters working. Susan Courtney is working for Charles Johs. And I'm going to butcher his last name, but Paul Simenauer (sp?) is working on Dean Johs.

Okay. And so on August 24th, 12 days after her initial email, and I'm trying to do the math in my head real quick, 17 days after the Turbak Law Office is retained, they give the first policy limits offer, immediately tell Mr. Thovson they receive it. Two days later Paul Simenauer emails and says we will also offer Dean Johs'. For some reason they don't immediately tell him that either, they wait for five days until after he signs the second LSA.

Okay. But here's the deal. The courts have said that you have to look at the contingent nature of the case to determine whether it's reasonable or not, not only at the time of contract but what was actually done.

THE COURT: The second LSA doesn't change anything. Right?

ATTORNEY GUST: No. Well, there is some provisions, you know, tweaked and what not. I mean, it's a novation of a first LSA. But the point being, Your Honor, is that the fees that they charge have to be reasonable.

THE COURT: And so I'm trying to understand this. But it seems you want to, it seems to me you want to create new law in South Dakota that maybe is along the lines of the existing law in North Dakota which is the clients will be able to, the clients can agree to a fee structure and then after the fact they can challenge it because they think that the case was too easy.

And it just, I'm very reluctant to think that that's

prudent policy here or anywhere, frankly, but I certainly don't want to follow some other states to get involved in some imprudent policy because, you know, if you have understanding of how plaintiff's personal injury litigation works, you know that there is some lawyers that are really good at it and have a tremendous reputation and the insurance companies know it.

And so some little guy might take a big case and struggle with it for a couple of years and not get anywhere and then they wise up and they hire one of the big shots and then all of a sudden all of the money is on the table, you know, a couple weeks or a month later. And I have seen it.

ATTORNEY GUST: You may have seen it, Your Honor, but there is not a single piece of evidence before this Court that National Farmers Union knew of Seamus Culhane and Turbak Law --

THE COURT: Sure --

ATTORNEY GUST: -- they did not know about Dickson, there is no evidence before the Court that Susan Courtney knew about it, there is no evidence that Paul Simenauer knew about it. What the evidence is is that there was a video of the crash that they knew about and that clearly the insurance company was like, okay, we have got evidence of a crash showing our insured at 58 miles an hour, ignoring rumble strips, plowing through a stop sign.

THE COURT: They didn't know that before the first LSA.

ATTORNEY GUST: Who didn't?

THE COURT: Well, your client didn't know it, how did Turbak know about it before they talked to your client?

ATTORNEY GUST: When you say know about it, what do you mean know about it?

THE COURT: You are saying that they have this videotape that showed that it was crystal clear liability before the contract was signed. How would --

ATTORNEY GUST: I won't say crystal clear liability, but they certainly knew that there was video evidence of the crash.

THE COURT: Before your client even contacted them, they didn't even know about the crash.

ATTORNEY GUST: No, they found out about it on August 5th after they contacted them, it's in my affidavit.

THE COURT: All right. Well, when was the first contract signed?

ATTORNEY GUST: August 7th, two days later.

THE COURT: Okay. With the Turbak Firm?

ATTORNEY GUST: Correct.

THE COURT: All right.

ATTORNEY GUST: And so when Turbak took the case, now they say we don't know what it's going to show, but they knew there was video evidence of it.

THE COURT: Okay. But they hadn't seen it?

ATTORNEY GUST: Correct.

THE COURT: Okay. So you are saying they committed fraud

because they knew there was a crash, they knew there was a videotape, and they knew they were going to be shooting ducks in a barrel, and they nonetheless signed your guy up for a third. And so what should they have done, signed him up for a lesser percentage?

ATTORNEY GUST: No, I'm saying that the South Dakota Supreme Court in the *Dorothy* decision cited to in our brief and the *Ofstad v Beck* decision.

THE COURT: Well, the *Dorothy* decision wasn't even a contingent fee case, it was a transactional case, if I recall, or it was a divorce actually and, I mean.

ATTORNEY GUST: Well, but the idea that courts have inherent power --

THE COURT: Yeah.

ATTORNEY GUEST: -- to look at the fee arrangements between lawyers, it doesn't matter if it's contingent or by the hour.

THE COURT: In fact --

ATTORNEY GUST: But the courts have the inherent power to look at --

THE COURT: I think in the *Dorothy* case what was happening is exactly what you were saying is the lawyers should have done here is keep working a case that was pointless and then but *Dorothy* billed by the hour and so his fees became astronomic.

ATTORNEY GUST: I disagree with the assertion that the case was pointless but, no, what I'm saying is that you have to look

at the reasonableness of the fees. And there is no evidence that as Your Honor said like, hey, if you go out and get an experienced lawyer with a good reputation, there is zero evidence before the Court that National Farmer's Union even know of these people --

THE COURT: Right.

ATTORNEY GUST: -- and that the adjusters knew of them, and that their reputation had anything to do with this settlement, there is nothing.

THE COURT: If I accept your argument then we have to apply that to every case and so.

ATTORNEY GUST: Well, it is the attorney's burden to prove that their fees are reasonable.

THE COURT: Well, I know, but their fees are reasonable, I mean, they are patently reasonable. They -- your client negotiated the agreement down to a third off of the net recovery instead of the gross. And so, I mean, you don't see a fee agreement in a case like this for less than that.

ATTORNEY GUST: But when they have done almost zero work by the time --

THE COURT: You don't do any work before you sign the agreement, that's the whole point of signing the contingent fee agreement. In fact, don't the rules of professional conduct require that you sign your fee agreement with your client before you start doing work?

ATTORNEY GUST: Well, clearly then they breached, if that's the Court's ruling, then clearly the Turbak Law Firm breached their professional duties of professional responsibility because they claim they started working on it on August 4th, 5th, and 6th.

THE COURT: That's not what your lawsuit is about here.

ATTORNEY GUST: No, but Your Honor made the point that that's what it would be. So but what I'm saying is when they signed up on August 7th, if that's the date you want to take, between August 7th and August 12th there is minimal legal or factual work being done and then they get an email saying, hey, we don't have the authority yet to do it, but we will get back to you.

THE COURT: Yeah. And then they ultimately got the offer, they examined the prospects of getting a deficiency award from the tortfeasors and concluded that that wasn't viable and then advised the client this is all the money that's to be had and we recommend that you settle the case because there is no point going forward and the fee agreement is a third on the net and your client decided that he didn't want to pay that much so --

ATTORNEY GUST: No, my client decided he didn't want to settle for what was on the table.

THE COURT: Okay. And so basically the same. And so the argument is that the fee agreement was unconscionable and so they should have said this was too easy, we want to cut our fee

back to 25 percent?

ATTORNEY GUST: The argument is that the Court always has inherent power to review this and looking at it the answer is, yes, this was too easy to get 33 percent.

THE COURT: Okay. And so is this supposed to be a jury question now, am I supposed to have a jury decide if the fee agreement was unconscionable or is that the Court's decision?

ATTORNEY GUST: I believe that's the Court's decision because the -- the South Dakota cases say that it's not a jury's inherent duty, it's the Court's inherent duty to look at fee structures.

THE COURT: Well, I mean, I don't think it was unconscionable.

ATTORNEY GUST: Then you apparently made your decision and then we will see how that works.

THE COURT: Yeah, I guess we will but, I mean, I haven't -- you haven't presented anything to me that suggests that it wasn't, that it was unconscionable.

ATTORNEY GUST: The idea that you want a third of $500,000 when within five days of the accident -- well, of retaining the client, having no evidence before the Court that this insurance company has any knowledge of the reputation and experience that the Court is apparently giving to the Turbak Law Office in this case, that the insurance company has no knowledge of that and then the email saying we are, we don't have authority yet but

we are working on it. And then the Turbak Law Office, they didn't write a single letter to the insurance company doing anything in this case other than saying, hey, we have been retained.

THE COURT: Yeah. I think to me the law in South Dakota is that if you have a tort case and you think that you should hire a lawyer and you do hire a lawyer and you agree to a percentage fee that's a reasonable percentage fee, which one-third on the net is a very reasonable fee in this kind of a case, and then they go out and they get all the money and they say we achieved 100 percent total victory and so let's wrap this up and the client says, no, I don't want to, I want to go to a futile trial that has no reasonable plausibility to achieve any additional benefit but is just going to --

ATTORNEY GUST: Your Honor, you don't know that, you are concluding that, you don't know that.

THE COURT: And so that's the attorney's reasonable interpretation here. And so if you presented evidence that showed that there was more money to be gotten, then we would have something. And so but we don't have that, that's speculation and conjecture even charitably.

And so I think, yeah, I don't think, I don't think in South Dakota you should be able to come back under these facts and claim that there is some factual dispute that the fee agreement was unconscionable and I don't think we have any evidence to

suggest that the contract was induced by fraud.

So I guess that's the bottom line. I think I'm granting summary judgment for the plaintiff on their claims and against the defendant on the counterclaims and I think the whole case is over on summary judgment. And so I think the plaintiffs just need to prepare the judgment for my signature.

ATTORNEY TURBAK BERRY: Sir, one other, a secondary motion that is before the Court is to ask the Court to then to order the Clerk to release the check. You might recall, Your Honor, that National Farmer's Union deposited the check.

THE COURT: Right.

ATTORNEY TURBAK BERRY: Which the Clerk is holding and that should be released in partial satisfaction of the judgment.

THE COURT: Right. Because you are going to be asking for more money now.

ATTORNEY TURBAK BERRY: Correct.

THE COURT: And so, Mr. Gust, any reason why I shouldn't release the check to the plaintiffs --

ATTORNEY GUST: No, Your Honor.

THE COURT: -- given my ruling.

ATTORNEY GUST: Given your ruling, no, Your Honor.

THE COURT: Yeah, and so you can put that in the order, too.

ATTORNEY GUST: One question, Your Honor.

ATTORNEY TURBAK BERRY: Thank you, Your Honor.

ATTORNEY GUST: You did cite some cases and the rules about when the accrual of prejudgment interest would stop. I don't know if the Court is making a decision on that now.

THE COURT: When are we saying that the prejudgment interest is starting, from the time that you got the offer or from the time that Mr. Thovson -- from the time that he got the settlement agreement or from the time that the check was first cut?

ATTORNEY TURBAK BERRY: I believe it was from the time that the check would have been cut.

THE COURT: And so that, I mean, that's the most favorable interpretation for Mr. Thovson.

ATTORNEY TURBAK BERRY: Yes, sir.

THE COURT: And so you are not pushing it any further than that?

ATTORNEY TURBAK BERRY: No.

THE COURT: Yeah. And so then -- and then you are saying when the prejudgment interest should stop and so that should be today?

ATTORNEY GUST: We argue, Your Honor, I believe it's August 8th when the money was put on deposit with the Court.

THE COURT: Okay. Is there authority to support that?

ATTORNEY GUST: I believe we cited that in our brief, Your Honor.

THE COURT: Okay.

ATTORNEY TURBAK BERRY: Your Honor, our position is that had Mr. Thovson posted that money, the case cited would have allowed him to have prejudgment interest, but he didn't post the money and in fact he actively opposed the insurance company posting it and so there isn't anything I can see in that case that excuses Mr. Thovson from continuing prejudgment interest up until the date that judgment as directed today is granted.

THE COURT: Okay. I better look at that case again. Does anybody have the cite handy?

ATTORNEY TURBAK BERRY: The case they relied on is -- it's at the end of their brief somewhere. Do you have that, Mike?

ATTORNEY GUST: I am looking for it, but I haven't put my finger on it yet.

ATTORNEY TURBAK BERRY: It's *Schmidt versus Iowa Beef*. We have addressed it on page 11 of our reply brief. The cite is 347 NW2d 897. *Schmidt versus Iowa Beef*, 347 NW2d 897.

THE COURT: Okay. So it says before a tender of payment totals the accumulation of interest, the tender must be unconditional. And so this was not an unconditional tender.

ATTORNEY GUST: I don't know how it could not be construed as unconditional, Your Honor. The insurance company was -- they tendered the funds that were in dispute and they were removed from the case.

ATTORNEY TURBAK BERRY: Well, Your Honor, it was unconditional as to the insurance company and so certainly they

absolved themselves of anything from that point, but it was not unconditional as to Mr. Thovson. We have been fighting about this ever since and as I pointed out he even actively filed opposition to them -- to their interpleader, he didn't even want them depositing it. And so there isn't anything in that case that excuses prejudgment interest with regard to Mr. Thovson.

THE COURT: Mr. Gust, I mean, that's what seems to make sense to me. Because that was the money the plaintiffs were entitled to and your client held it up and said, no, they shouldn't get this money. And so but the insurance company just said, hey, look, we want to pay this into the Court and so we can get out of here and quit incurring additional time and expense.

ATTORNEY GUST: I think part and parcel of the idea of prejudgment interest is the use of the funds and the property of time which Mr. Thovson didn't have.

THE COURT: Yeah, I think the main point is that the plaintiffs didn't have it because it was tied up at the clerk's office. And so, yeah, up to the date of the judgment will be the calculation.

ATTORNEY TURBAK BERRY: Thank you, Your Honor.

THE COURT: Does that cover all the bases?

ATTORNEY TURBAK BERRY: Yes, sir, thank you.

ATTORNEY GUST: It does, Your Honor. Thank you.

THE COURT: All right. Thank you, everybody.

ATTORNEY ANGELL: Thank you, Your Honor.

(The proceedings adjourned at 11:53 a.m.)

STATE OF SOUTH DAKOTA)
: SS CERTIFICATE
COUNTY OF BROOKINGS)

I, the undersigned, a Registered Professional Reporter of the State of South Dakota, do hereby certify that I acted as the official court reporter at the hearing in the above-entitled matter at the time and place indicated.

That I took in shorthand all of the proceedings had at the said time and place and that said shorthand notes were reduced to typewriting, and that the foregoing typewritten pages are a full and complete transcript of the shorthand notes so taken.

Dated this 19h day of August, 2024.

/s/ Patricia J. Hartsel

Patricia J. Hartsel, RPR
Official Court Reporter

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA
APPEAL NO. 30782

SEAMUS CULHANE, TURBAK LAW OFFICE, P.C., THOMAS DICKSON AND DICKSON LAW OFFICE
Plaintiff/Appellee.

v.

BILL THOVSON,
Defendant/Appellant.

REPLY BRIEF OF APPELLANT BILL THOVSON

APPEAL FROM THE THIRD JUDICIAL CIRCUIT
CODINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE DOUGLAS E. HOFFMAN
CIRCUIT COURT JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOUTH DAKOTA CASES

OTHER CASES

SOUTH DAKOTA STATUTES

OTHER AUTHORITIES

OTHER STATUTES

INTRODUCTION

Not surprisingly, Seamus Culhane, Turbak Law Office, P.C., Thomas Dickson, and Dickson Law Office (hereinafter collectively "Turbak") continue their disingenuous posturing of the facts and law of this case. Turbak's recitation of the facts (which the district court did not even articulate in its ruling) and applicable law once again misses the mark. Turbak has taken the position, literally, that so long as their contract allows it, the South Dakota Rules of Professional Conduct, codified at S.D.C.L. § 16-18-A, do not apply to their relationship with their clients. In his Appellant's Brief, Bill Thovson queried whether South Dakota law would allow a lawyer to contract away the attorney-client privilege. Shockingly, Turbak's brief leads to a single conclusion: In Turbak's legal universe the answer to Thovson's hypothetical question is alarmingly, yes. Per Turbak, as long as the contract entered into between the law firm and client includes a contractual term that the attorney-client privilege no longer applies after an attorney withdraws from representation, then South Dakota courts should not get involved in that contractual relationship.

Turbak in no way disputes that it withdrew from representing Thovson because he would not settle the case. Almost universally, courts around the country and legal treatises on the issue hold that withdrawal from a contingency fee case because your client will not settle does not constitute "good cause" to withdraw. As a result, the courts and legal treatises are in agreement that no fees should be awarded to a withdrawing attorney under these circumstances,

i.e. withdrawing without cause. Thovson respectfully requests that South Dakota join the vast majority of states that have reached this conclusion

I. TURBAK'S RECITATION OF THE FACTS ARE INCORRECT AND MISLEADING.

Turbak's Statement of the Case, facts surrounding the case, and its factual statement are at best, incomplete. As it relates to its own recitation of the facts, Turbak asserts that, "all those facts were admitted by Thovson failing to submit a response as required by SDCL § 15-6-56(c)(2)(3)." Contrary to this erroneous statement, Thovson filed not one, but two, Counterstatement of Facts. Because Nancy J. Turbak Berry and Richard J. Thomas, both representing Plaintiffs in this matter, submitted separate Statements of Material Fact, S.D.C.L. § 15-6-56(c)(2) requires, a separate response, to each Statement of Material Fact be filed separately. R. 984 and 989. The district court never opined on this issue.

But Turbak's incorrect statement of facts is only the beginning of this assertion. Turbak asserts that the North Dakota Highway Patrol Report would report that Paula Thovson was distracted by talking on a hand-held electronic device. What Turbak won't tell the Court is that in the exact same report, the North Dakota Highway Patrol concluded that Mrs. Thovson was not a contributing cause to the traffic fatality. So while Turbak's factual statement is a correct quote, it is wholly misleading, taken out of context, and incomplete.

Turbak goes on to assert, Turbak Brief, pg. 6, that, "Thovson likely was not entitled to UIM benefits . . . However, Plaintiffs deduced that Thovson's insurer

should honor North Dakota's minimum requirement of $30,000 in medical benefits . . . . " The payment of this amount is required under North Dakota law. There was no deducing anything. It is black letter law. It is, or should be, known by any lawyer practicing personal injury/wrongful death in North Dakota that this provision exists.

Although there is a litany of erroneous assertions, Thovson will end with this. Turbak asserts that on November 20, 2020, in a meeting between Thovson, Seamus Culhane, and Tom Dickson, Thovson agreed to settle under three conditions. Turbak then asserts that the conditions were met and Thovson reneged on his agreement. Yet there is no evidence of this agreement but for the after-the-fact, self-serving testimony of Culhane and Dickson. Obviously, Thovson would testify differently and his testimony would be alleged to be self-serving as well. Luckily, it is not necessary to rely on any of this testimony. The terms of the alleged agreement was emailed to Thovson after the meeting. Contrary, to the assertion that there was an agreement, Thovson responds, the same day, thanking Culhane and Dickson for the meeting, advising them that he was pressed for time, and indicating that he would review their narrative over the weekend. SC 38, R. 1322. Thovson never accepted the proposal.

II. LEGAL AUTHORITY AROUND THE COUNTRY REJECTS TURBAK'S POSITION.

A. "Good Cause" Withdrawal Does Not Cover Turbak.

The paramount, undisputed fact before this Court is that Turbak withdrew because it received a settlement agreement it deemed fair and reasonable, and Thovson was not willing to accept the same. While contractually Turbak may have had the right to withdraw, it does not follow that such withdrawal was for good cause.

"Certainly, a client's unwillingness to settle on terms that the lawyer considers reasonable is not good cause for withdrawal." *See Turns of the Contingent Fee Key to the Courthouse Door*, Douglas R. Richmond, Buffalo Law Review, Volume 65, Number 5, p. 1015-1016 (citing *Lofton v. Fairmont Specialty Ins. Managers*, 367 S.W.2d 593, 597 (Ky. 2012); *Law Offices of Scott E. Combs v. Dishluk*, 2005 WL 3190341, at * 3 (Mich. Ct. App. Nov. 29, 2005); *In re Petition for Distribution of Attorney's Fees Between Stowman Law Firm, P.A.*, 870 N.W.2d 755, 766 (Minn. 2015); *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F. 3d 658, 663 (5th Cir. 1996) (stating that "the cases are in almost universal agreement, that failure of a client to accept a settlement offer does not constitute just cause for a withdrawing attorney to collect fees) (emphasis added).

Withdrawal, without good cause, terminates any right to recover attorney's fees. "When an attorney voluntarily withdraws from a contingency fee case without good cause, he or she forfeits any fee." *B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley, L.P.A.*, 373 S.W.3d 419, 423 (Ky. 2012)

(internal citations omitted); *see also* 7A C.J.S. Attorney & Client § 360 (2012). In addition to those cases previously cited by Thovson, Montana joined, "the modern majority rule . . . that an attorney who voluntarily withdraws from a contingency fee case without good cause forfeits recovery of compensation for services performed." *Bell & Marra, P.C. v. Sullivan*, 6 P.3d 965, 970 (Mont. 2000). In reaching this conclusion, the Montana Supreme Court analyzed the interplay between client and attorney in contingent fee cases. In joining the modern majority rule, Montana ruled that as a matter of law, "an attorney should not be allowed to withdraw from a 'bad case' on the grounds that the client wishes to proceed to trial or pursue an appeal, eliminating his or her exposure to risk, and still be entitled to recover fees for that case." Id. Recovery of any fees requires the attorney to show that their withdrawal was in good faith. Id.

In this case, the facts are crystal clear. Within approximately five weeks of Paula Thovson's death, approximately three weeks after they were retained, and having no substantive dialogue with the insurance company for both Charles Johs and Dean Johs, policy limit offers were made for both Charles and Dean. Policy limit offers, however, do not mean that is the limit that could be obtained at trial. After continued dialogue with Thovson, legal counsel decided that the policy limits offer was fair and reasonable. Thovson, however, wanted a trial to hold Dean Johs responsible for his wife's homicide and had been provided little information that Charles or Dean did not have, or would not have, additional assets. Legal counsel, Turbak and Dickson, did not want to go to trial and

withdrew due to Thovson's refusal to settle. The only legally supportable conclusion is that their withdrawal was not done in good faith. As a result of their own decision, Turbak and Dickson are not entitled to **any** recovery in this case.

Turbak cites the Court to *Tidball v. Hetrick*, 363 N.W.2d 414, 416 (S.D. 1985) and *Ofstad v. Beck*, 274 N.W. 498 (1937), for the proposition that South Dakota courts refuse to listen to clients who think their contingency fee agreements were unfair after the work was completed. *Tidball* and *Ofstad* both require that the transaction entered into was fair. Furthermore, *Ofstad* requires the Court to consider the facts and circumstances of that particular case in determining whether fees were reasonable. To wit:

> We would be grossly derelict in the discharge of our highest duty if we disregarded the direct reflection upon the courts and the consequent loss of public confidence and trust in that most important institution of government which must inevitably result from any sharp or unconscionable dealings by its representatives as such. To provide what we regard as necessary and wholesome protection to the reputation of the courts and the bar, as well as to the interests of the public they serve, we align ourselves with those courts which hold that when a lawyer is bargaining with a prospective client, if the provision made for his compensation is so unreasonable and excessive, when viewed in the light of the circumstances of the particular case, as to evince a fixed purpose on his part to obtain an undue advantage over his prospective client, the contract should not, and will not, be upheld.

Ofstad at 503. The circumstances of a particular case, with respect to whether the fees charged are "unreasonable and excessive," are only known after a representation agreement has been entered into.

This Court's decision in *Ofstad* is in accord with case law from around the country. These cases stand for the proposition that fees collected must be

reasonable based upon the actual work that a law firm has to perform. *See e.g. In re Swartz*, 686 P.2d. 1236, 1243 (Ariz. 1984) (stating that, "[w]e do not believe, however, that recognition of the propriety of the initial fee arrangement gives the lawyer carte blanche to charge the agreed percentage regardless of the circumstances which eventually develop"); *Munger, Reinschmidt & Denne, LLP v. Lienhard Plante*, 940 N.W.2d 361, 367 (Iowa 2020) (identifying exceptions to general rule on contingent fees includes the collection of large fees "unearned by either effort or a significant period of risk" are unreasonable (internal citations omitted); *Clark*, 161 F. Supp. 3d at 762 (determining that reasonableness of contingent fees is determined at the conclusion of the case); *In re Hoffman*, 572 N.W.2d 904, 908 (Iowa 1997) (holding that while fee arrangement may have been reasonable when entered into, changes in the extending circumstances, made a 1/3 contingency fee unreasonable and excessive); *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1109 (3rd Cir. 1979) (stating courts have the inherent power to examine contingency fee cases); *Anderson v. Kenelly*, 547 P.2d 260, 261 (Colo. 1976) (holding that under a court's general authority it, "may and should scrutinize contingent fee contracts and determine the reasonableness of the terms thereof").

As this Court is well-aware, it is not Thovson's burden to bear to show the Court that Turbak's fees were unreasonable. It is well settled that it is incumbent on the attorney to demonstrate that their fees are reasonable. *In re Dorothy*, 2000 S.D. 23, ¶ 27, 605 N.W.2d 493. To that end, Turbak submitted Exhibit N to

the Affidavit of Culhane to the district court purportedly substantiating their fees in accordance with the work performed. Exhibit N totals 1,030 entries. No time records were kept, just a log of activity. Notably, however, 174 of the entries occurred after Turbak's withdrawal. While actually retained by Thovson, Turbak can point to 856 entries as examples of the work purportedly done for Thovson's benefit. An analysis of these entries, however, show that 259 of the entries occurred on October 7, 2020 and thereafter. October 7, 2020 is notable because on that date, per Exhibit N, Culhane and Dickson have decided, without Thovson's input, "that the end of this case is now here." See Entry Number 598. From that date until their withdrawal, Culhane and Dickson were less interested in formulating a winning trial strategy and more interested in convincing Thovson that he had to settle. See e.g. Entry Number 603, "I realize I am inadvertently grinding your ass on this deal. Please understand that it is not me, it is that I just don't want to leave any stone unturned because Bill is as anal as anyone I've ever represented;" Entry Number 608, "I am trying to get this civil case wrapped up;" Entry Number 623, "I am helping a South Dakota lawyer with a difficult client in a wrongful death case." From and after October 7, 2020, while Thovson believed his counsel to be putting forth their best effort to get the best result possible, the facts are they were working to try to find reasons to demand that Thovson settle.

Furthermore, of the 597 remaining entries, while Exhibit N can quantify by numerical entry things which occurred, it cannot qualify these entries as a basis

of performing actual legal work to get the policy limit offers received by Thovson. For example, Turbak has trumpeted the 93 separate tasks which Turbak did from the first contact from Thovson on August 4, 2020 until LSA 1 is signed on August 7, 2020. While certainly not exhaustive, a simple analysis of Exhibit N shows that such an assertion is meaningless in the context of proving Turbak did substantial work. For example, tasks 2-8 occurred over a 20 minute span with four "tasks" being accomplished in one minute. What were these tasks? An exchange of text messages trying to set up a meeting. Eight more tasks "were accomplished" on August 4, 2020, in the span of 19 minutes. These "tasks" were more text messages and emails back and forth from Thovson relaying basic information regarding the traffic fatality. Six tasks were performed on August 6, 2020, 76-81, which include sending out correspondence about representation and drafting nearly identical antispoliation letters to witnesses Thovson had identified. Five "separate tasks" were likewise performed on August 7, 2020. What were these tasks which were accomplished? Text messages exchanged between Thovson and Culhane setting a meeting time and telling Thovson to come to the west door. The list goes on and on of basic, mundane administrative tasks "performed" purportedly all done to get a policy limits offer from the insurance company. Such administrative tasks does not lead to the conclusion that Turbak's fees for legal services were reasonable.

In support of their fees, Turbak sets forth the applicable factors that a South Dakota court should consider when determining if the fees were

reasonable. While Thovson does not dispute the general proposition that these factors are to be considered, the facts of this case make several of them moot. As the Court is certainly aware by now, the first written policy limits offer came to Turbak on August 24, 2020. Thereafter, the second written policy limits offer came on August 26, 2020. The record revealed, however, that email correspondence strongly suggested that from the outset, with minimal legal work put in, the insurance company would be making these offers. From the time Thovson engaged legal counsel until these offers were made, Turbak had only a handful of contacts with representatives of the insurance company. The facts are undisputed, however, that Turbak provided the insurance company with no factual or legal analysis at all. To the contrary, the video recording of the accident scene appears all that was necessary for the insurance companies to offer up policy limits. Evidence that Turbak knew existed before LSA-1 was ever signed.

Furthermore, Turbak contends that, "[T]he experience and reputations of Turbak Law and Dickson Law were well known to insurers, their involvement a clear signal that insurers likely will have to pay the maximum value of the claim. Indeed, their abilities were proven, among other things, by their effectiveness; they procured the limits of all available insurance . . . ." This tidbit was accepted and adopted by the district court; but, there is one little problem with that. While this certainly is a nice self-serving proclamation by Turbak, there *was zero evidence in the record that the claim adjusters for the insurance company, or the insurance company at-large, had any idea at all who Seamus Culhane or*

Thomas Dickson were or any knowledge of Turbak Law or Dickson Law. There is no evidence whatsoever in the record that the insurance company agrees with Turbak's conclusion that their experience and reputation was given consideration as to the policy limits offer in this case. There is not a single grain of evidence that anybody's reputation had anything to do with the simple fact that there was video evidence of Johs's truck speeding through a stop sign at a high rate of speed causing the collision with, and death of, Paula Thovson.

Turbak argues that there was nothing more to get. There were, however, two liable parties, Charles and Dean. In North Dakota, however, initial judgments are good for ten years; and, thereafter may be renewed for ten more. N.D.C.C. § 28-20-21. What Charles or Dean would have agreed to pay in excess of their insurance policy limits is unknown.

Recognizing that virtually every court which has considered this issue has ruled against Turbak's position, Turbak next argues that because their contract allowed withdrawal, it follows that their withdrawal was for good cause. Yet, Turbak, who bears the burden in this matter, cannot cite this Court to a single case that supports such a position. Furthermore, Turbak fails to cite any case standing for the proposition that it is not incumbent upon courts to review fees charged by attorneys. Essentially, without any legal support, Turbak argues that because it has a contract the Court should not even examine this case.

The mere fact that Turbak and Thovson signed a contract is not dispositive that Turbak is entitled to fees. South Dakota courts have "long ago

taken the position that [courts] will not sit idly by while clients are financially abused by officers of the bar . . . ." *In re Dorothy*, 2000 S.D. 23, ¶ 32, 605 N.W.2d 493. Citing *Ofstad v. Beck*, 65 S.D. 387, 274 N.W. 498, 503 (1937), the South Dakota Supreme Court aligned itself, "with those courts which hold that when a lawyer is bargaining with a prospective client, if the provision made for his compensation is so unreasonable and excessive . . . the contract should not, and will not, be upheld." Id; *Simon v. Chicago, Milwaukee & St. P. Ry. Co.*, 177 N.W.107, 108 (1920); *Clark v. General Motors, LLC*, 161 F. Supp.3d 752, 758 (W.D. Mo. 2015) (stating that a contract prohibited by law is void).

Courts have the inherent power to regulate the practice of law. *See e.g. Perius v. Nodak. Mut. Ins. Co.*, 2012 ND 54, ¶ 34, 813 N.W.2d 580 (concurring opinion); *In re Kunkle*, 88 S.D. 269, 218 N.W.2d 521, 527 (S.D. 1974). This includes the inherent right to determine the reasonable amount of legal fees. Indeed, the South Dakota Supreme Court, and the trial courts, "may be considered experts upon the value of legal services." *Stanton v. Saks*, 311 N.W.2d 584, 585 (S.D. 1981); *Wahl v. Northern Imp. Co.*, 2011 ND 146, ¶ 17, 800 N.W.2d 700 (holding that trial courts are experts in determining attorney fee issues). Both North Dakota and South Dakota, pursuant to Rule 1.5 of their respective Professional Rules of Practice, require that attorney's fees must be reasonable based upon the work performed. *In re Hoffman*, 2013 ND 137, ¶ 25, 834 N.W.2d 636; *In re Dorothy*, 2000 SD 23, ¶ 21. Turbak's contractual rights do not trump their obligations under the Rules of Professional Conduct.

In support of its argument that its fees were reasonable, Turbak relies upon the fact that roughly 18 months later, Thovson settled the case for policy limits. But, that fact does not relieve Turbak of its obligation to prove its withdrawal was for "good cause." The determination of "good cause" takes into consideration the reason of withdrawal, not the outcome of the case. Indeed, Turbak does not cite a single case to support its conclusion. And, it is of paramount importance for this Court to recognize that Thovson did not fire Turbak, as the district court alludes to, to get out of fees. Turbak quit.

III. THE DISTRICT COURT ERRONEOUSLY APPLIED SOUTH DAKOTA LAW TO THIS CASE.

It is irrefutable that the parties to the LSAs executed between Turbak, Dickson, and Thovson intended their agreements to be performed in North Dakota. First, if the LSAs were not to be performed in North Dakota, there was no reason whatsoever for Turbak to search for, discover, and ultimately bring Dickson, a North Dakota licensed attorney not licensed in South Dakota, onto the case. Indeed, the only reason Turbak brought Dickson onto the case was because Culhane, nor other attorneys at Turbak, were licensed to practice law in North Dakota. Second, as Dickson testified, his only changes to LSA 2 were to include specific language regarding the split of attorney's fees which he believed to be required under North Dakota law. Third, pursuant to Turbak's purported attorney lien, specifically the Sworn Statement of Contractual and Statutory Attorneys' Lien (SDCL 16-18-21 and SDCL 44-2-3), Culhane has sworn on oath that the action for the wrongful death litigation, "will be properly venued for

litigation in LaMoure County, North Dakota." Fourth, with respect to the wrongful death litigation, it is undisputed that the fatal crash occurred in LaMoure County, North Dakota; the physical evidence of the fatal crash was located in North Dakota; any and all witnesses to the accident, its aftermath, and investigation were located in North Dakota; and the defendants, Charles Johs and Dean Johs, were located in North Dakota. Finally, it is undisputed that Dickson executed LSA 2 in North Dakota. As the evidence clearly indicates that the wrongful death litigation was to be performed in North Dakota, North Dakota law should apply.

Turbak, however, asserts that the controlling case for the Court to follow is *Chambers v. Dakota Charter Inc.*, 488 N.W.2d 63 (S.D. 1992). *Chambers*, however, is a tort case, not a contract case. Indeed, in the entirety of the *Chambers* decision there is simply no analysis of choice of law questions with respect to contracts. Notably, S.D.C.L. § 53-1-4, law and usage of place of performance, application to contracts, is not even mentioned in the decision, let alone considered.

Contrary to Plaintiffs unsupported position, S.D.C.L. § 53-1-4 requires the application of North Dakota law to this contract dispute. South Dakota law provides that, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of where it is made." S.D.C.L. § 53-1-4; *O'Neill Farms, Inc. v. Reinert*, 2010 S.D. 25, ¶ 12, 780 N.W.2d 55; *South*

Dakota Wheat Growers Assoc. v. Chief Industries, Inc., 337 F. Supp. 891 (D.S.D. 2018).

In applying North Dakota law, the Court is allowed to consider the intentions of the party. *Briggs v. United Services Life Ins. Co.*, 117 N.W.2d 804, 807 (S.D. 1962). While Turbak has argued post hoc that there was no discussion of North Dakota law applying and that the services under the Legal Services Agreements were performed in South Dakota, this is a patent falsehood created solely for purposes of the pending litigation. Turbak's true intentions are shown by the indisputable fact that Culhane executed a sworn statement that the services to be provided in the wrongful death of Paula Thovson would be venued for litigation in LaMoure County, North Dakota, i.e. his work and the work of his firm would be done in North Dakota. Furthermore, and directly to this point, Turbak has failed to, in fact cannot, explain to the Court why the addition of Dickson was necessary if this contract was to be performed in South Dakota. Only now, after the fact, and having troublesome North Dakota statutes to deal with, i.e. N.D.C.C. § 9-08-08 and 9-08-09, has Turbak concocted the theory that their services were to be performed in South Dakota.

This contract was for a North Dakota case. Turbak intended their services to be performed in North Dakota in a North Dakota wrongful death case. The Court should have applied North Dakota law.

CONCLUSION

In this matter of first impression in South Dakota, Thovson respectfully requests that this Court join the majority of courts which have decided the issue and rule, as a matter of law, that an attorney who withdraws from his representation because his client will not settle a case does not withdraw for "good cause." Thovson further requests that this Court join the majority of courts which have considered the issue and hold, as a matter of law, that if an attorney does not withdraw based upon "good cause," the attorney forfeits his right to compensation for his work on the matter.

In the alternative, in the event the Court upholds the contract between the parties, Thovson urges this Court to rule, as a matter of law, that Turbak's fees were unreasonable in light of the facts and circumstances of the case. In this instance, the matter should be remanded solely for the purpose of conducting an evidentiary hearing to determine the actual value of Turbak's services.

Dated this 23rd day of December, 2024.

/s/ Michael L. Gust

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this reply brief complies with the requirements set forth in the South Dakota Codified Laws. This reply brief was prepared using Microsoft Word, and contains 4,227 words, excluding the table of contents, table of cases, and certificates of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

/s/ Michael L. Gust
Michael L. Gust

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Appellant was served via Odyssey File and Serve upon the following:

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on this 23rd day of December, 2024.

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