IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28933

THE STATE OF SOUTH DAKOTA, THE SOUTH DAKOTA PETROLEUM RELEASE COMPENSATION FUND
Plaintiff and Appellant,
vs.
BP plc, BP AMERICA, INC. BP PRODUCTS NORTH AMERICA, INC., BP WEST COAST PRODUCTS, LLC and its predecessor companies and subsidiaries
Defendants and Appellees.

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

The Honorable Patricia J. DeVaney
Presiding Circuit Judge

BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs/Appellants State of South Dakota and the South Dakota Petroleum Release Compensation Fund will be referenced as "PRCF." Defendants/Appellees BP plc, BP America, Inc., BP Products North America, Inc., BP West Coast Products, LLC and their predecessor companies and subsidiaries will be referenced as "BP" or "Amoco." Citations to the settled record, 32CIV10-257, *State of South Dakota v. BP plc, et al,* will be designated[1] by V_SR_ for the Volume and Settled Record page number.

JURISDICTIONAL STATEMENT

PRCF appeals from the trial court February 7, 2019, Judgment. Said Judgment granted BP's Motions for Summary Judgment for the reasons in the trial court's oral ruling of April 16, 2018, and its Memorandum Order and Opinion of January 23, 2019. Notice of Entry was filed on February 12, 2019. PRCF filed a timely Notice of Appeal on March 14, 2019. PRCF also appeals the oral ruling of April 16, 2018, denying its Motion for Sanctions.

STATEMENT OF LEGAL ISSUES

1. Were Amoco's settlement proposals and settlement documents with its insurers inadmissible in this action under SDCL § 19-19-408?

   The trial court found PRCF's proffered use of any or all of the settlement documents and testimony related to the *Amoco v. Lloyds* litigation was precluded under Rule 408.

   C&E Serv., Inc. v. Ashland Inc., 539 F.Supp.2d 316 (D.D.C. 2008)
   Larson Mfg. Co of S.D., Inc. v. Conn. Greenstar, Inc., 929 F.Supp.2d 924 (D.S.D. 2013)
   Ostrow v. GlobalCast America Inc., 825 F.Supp.2d 1267 (S.D. Fla. 2011)

[1] Due to confusion about the settled record at filing, for expediency, citations to certain exhibits are designated SDF (PRCF's Statement of Disputed Facts), Appendix page, #_. BP's missing exhibit will be "BPEx.27. PRCF will file a motion or stipulation pertaining to the record issue.

First Premier Bank v. Kolcraft Enter. Inc., 2004 S.D. 92, 986 N.W.2d 430
SDCL § 19-19-408

2. Whether any genuine issues of material fact exist as to whether the policy terms and exclusions (i.e., the Self-Insured Retention and One Occurrence definition, and Pollution Exclusions) provided coverage or the potential for insurance coverage for Underground Storage Tank (UST) leaks?

   The trial court found there was no insurance coverage because the Self-Insured Retention (hereinafter "SIR") of $5 million was not met and could not be met using the One Occurrence argument. The trial court further found as a matter of law that even if such the SIR could be met, the pollution exclusions precluded coverage for the costs at issue in this suit.

   Whittier Prop. Inc., v Alaska Nat'l Ins. Co, 185 P.3d 84 (Alaska 2008)
   American States Ins. Co. v. Kiger 662 N.E.2d 945 (Ind. 1996)
   Ward v. Lange, 1996 SD 113, ¶10, 553 N.W.2d 246, 249

3. Whether genuine issues of material facts exist as to whether Amoco received value in its insurance settlements for UST cleanup costs at gas stations?

   The trial court concluded as a matter of law that Amoco received no settlement monies for the remediation costs for which they were reimbursed by PRCF.

4. Whether any genuine material disputed facts exist concerning false statements made by Amoco to the PRCF concerning a lack of insurance coverage?

   The trial court found there was no insurance coverage and the settlement monies Amoco received in the *Amoco v. Lloyds* lawsuit did not include monies for the South Dakota UST sites. As a result, the trial court concluded there were no false statements, misrepresentations, or omissions concerning insurance coverage and granted BP's Motion for Summary Judgment on Counts I, III, IV, and V (i.e., the fraud counts).

   N.Am Truck & Trailer, Inc. v. M.C.I. Com. Serv., 2008 S.D. 45, 751 N.W.2d 710,
   Dede v. Rushmore Nat. Life Ins. Co., 470 N.W.2d 256, 259 (S.D. 1991)

5. Whether genuine issues of material facts exist concerning Count II for Amoco's breach of the Subrogation Assignments to the PRCF?

   The trial court held Plaintiffs could not prevail for breach of the subrogation assignments because there were no damages due to a lack of insurance coverage.

6. Whether genuine issues of material fact exist as to when the statute of limitation began to run against the PRCF in connection with Count VI?

   The trial court concluded the statute of limitations began to run at the time a discharge was reported to the PRCF. The trial court found that all claims reported to the State prior to July 2004 were time-barred by the six-year statute of limitations.

   Strassburg v. Citizens State Bank, 1998 SD 72, ¶ 10, 581 N.W.2d 510, 514
   Wissink v. Van De Stroet, 1999 SD 92, ¶ 9, 598 N.W.2d 213, 215-216
   E. Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, ¶ 10, 852 N.W.2d 434, 438
   SDCL 17-1-2, SDCL 17-1-3

7. Whether the trial court abused its discretion in denying PRCF's Motion for Sanctions based upon BP's 30(b)(6) witness' destruction of the three ring binder that included a list of Amoco service stations in South Dakota during the pendency of the litigation?

   The trial court ruled the BP violated their discovery obligations but declined to enter a sanction, finding the destruction of the binder was not willful.

   Chittenden & Eastman Co. v. Smith, 286 N.W.2d 314 (S.D.1979).
   Wuest ex. Re. Carver v. Mckennan Hosp. 2000 S.D. 151, 619 N.W.2d 682,
   West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir.1999)
   Thyen v. Hubbard Feeds, Inc., 2011 S.D. 61, ¶16.
   SDCL 15–6–37

8. Whether the trial court abused its discretion in excluding some of the expert opinions of Mr. Allen as impermissible legal opinions?

   The trial court held the interpretation of the insurance contracts was for the court to decide and Professor Allen's opinions as to insurance coverage were impermissible.

STATEMENT OF THE CASE

This matter was filed in the Sixth Judicial Circuit, Hughes County. The Honorable Patricia J. DeVaney ruled on all matters subject of this appeal. In July 2010, PRCF sued BP to recover payments made to BP or its predecessor, Amoco, for the costs of cleaning up leaks from BP's underground storage tanks at numerous gas stations in

South Dakota. PRCF paid BP directly for 27 sites ("direct sites") approximately $3,100,000. PRCF also paid third parties at 20 sites for leaks that were allegedly BP's responsibility ("indirect sites").

As part of PRCF's application process, to receive funds for corrective action at its UST sites, Amoco had to answer questions concerning its available insurance coverage for petroleum releases. On these disputed sites Amoco uniformly answered that there was no available insurance coverage as it was self-insured. Furthermore, as part of the application process, Amoco executed subrogation assignments in which it assigned to PRCF all rights against any party, including insurers and warranted that no settlement has been made and no release has been or will be given without PRCF's consent.

Nonetheless, in 1993, Amoco sued its own insurers for environmental pollution coverage ("*Amoco v. Lloyds litigation*"). As part of those negotiations, Amoco created massive settlement proposals, discussing Amoco's potential exposure for environmental pollution. Chapter 5 of Amoco's proposals concerned its Marketing System: its gas stations and USTs. Chapter 5 detailed why Amoco had insurance coverage for such losses and described how it could readily defeat Lloyds' defense including the policy language and exclusions, the same defenses BP raised in this matter. Amoco ultimately settled with its insurers for $205 million dollars, including a complete policy buy back and release of all claims that could be made under the policies. The settlements were unallocated in that they did not specify what portion of the settlement was attributable to Amoco's Marketing Systems as compared to its refineries and the like. Amoco never informed PRCF of these settlement negotiations nor the ultimate settlements as it was required to do under the numerous Subrogation Agreements.

Accordingly, on July 1, 2010, PRCF sued BP in Count I for violations of SDCL §34A-13, *et seq.*, and ARDS 74:32:01, maintaining BP made false statements, misrepresentations, concealed material facts and omissions in maintaining it was self-insured. Count II alleged BP breached the Subrogation Assignments in negotiating, settling and releasing all claims with its insurers for UST releases. In Count III, PRCF sought recovery for unjust enrichment in that BP received PRCF funds for cleanup of BP's UST petroleum leakages in South Dakota while also receiving hundreds of millions of dollars from its own insurers. In Counts IV and V, because BP fraudulently mispresented, concealed, and intentionally omitted that it had insurance coverage for UST leaks and received $205 million in unallocated insurance coverage settlements, PRCF sued for fraudulent concealment, fraudulent misrepresentations and fraud. Count VI asserted that BP was strictly liable for remediation of its divested former petroleum fuel dispensing facilities that it owned, operated, leased, controlled, or supplied in South Dakota for which PRCF paid third parties for remediation of BP's leaks. Finally, Count VII sought the recovery of Litigation Costs under SDCL 34A-13-11.

On April 16, 2018, the trial court granted summary judgment in BP's favor on Count VI based upon the statute of limitations for all claims reported to the State before July 2, 2004. This ruling left only one indirect site at issue, Site 6917. On January 13, 2019, the trial court issued a Memorandum Opinion granting summary judgment in BP's favor on all remaining claims. In short, the trial court held: 1. Plaintiffs failed to establish there was insurance coverage for UST leaks; 2. all the settlement documents in *Amoco v. Lloyds* litigation were inadmissible; 3. because there was no coverage, BP's statements of being self-insured were not fraudulent or misleading; 4. BP received no

money for UST leaks in South Dakota in its unallocated insurance settlements, and 5. PRCF could show no damage by the breach of the subrogation assignments because there was no insurance coverage.

STATEMENT OF FACTS

In 1988, the South Dakota Legislature created the PRCF which is administered by the Department of Environmental and Natural Resources (DENR). Amoco submitted "Application Packages" for twenty-seven (27) sites to PRCF between 1990 and 2002. V2-SR1375-1526. Amoco's applications included several components: Application Form, Checklist for Fund Applicants, Subrogation Assignment, and various insurance-related letters consistent with the statutory scheme. PRCF requires applicants to sign a Subrogation Assignment agreement for every application, wherein the Applicant "warrants and represents that no settlement has been made by the Applicant with any party, person, or corporation against whom claim might lie, and no release has been or will be given to anyone responsible for the cost of cleanup, and that no such settlement will be made nor release given by the applicant without the written consent of the PRCF." V1-SR948. In the Subrogation Agreement, the applicant further promises that it

> transfers, and subrogates to the PRCF all of the rights, claims, interest, and rights of action which [Amoco] may have against any party, person, property or corporation, including insurers, liable under any contract or tort theory…., and authorizes the PCRF to sue, compromise, or settle in [Amoco's] name or otherwise all such claims and to execute, sign releases and acquittances, and endorse checks or drafts given in the settlement of such claims in [Amoco's] name with the same force and effect as if [Amoco] executed or endorsed them. It is the intent of the parties the

> PRCF be fully substituted for the undersigned and subrogated to all of the undersigned's rights to the amount paid by PRCF."[2] *Id.*

Despite Amoco's twenty-seven subrogation assignments to PRCF from October 1990 to September 2002, Amoco negotiated settlements with its own many insurers, between 1997 and 1998. Amoco compromised its various insurance policies by releasing all of its UST claims, the consideration of which was a $205 million insurance recovery. V2-SR2950-2953; V3-SR40-45; V2-SR1837-1843. Amoco never invited PRCF to the insurance negotiations and never advised PRCF of its insurance recoveries. SDFpA67#15. In all of its Application Packets, Amoco uniformly told PRCF that it was "self-insured" and never informed PRCF of any of Amoco's coverage programs or policies. V3-SR21; V21837-1843; V2SR2460-2461; V2-SR1386; VR2-SR 1375-1526. On January 20, 1992, Amoco sent PRCF an insurance letter that covered seven sites, stating: "Amoco Oil Company's pollution liability insurance does not provide coverage for the referenced sites as, inter alia, remediation expenses do not exceed the deductible." V2-SR441-442. The rest of Amoco's insurance disclosure letters simply stated that Amoco was self-insured. *See, e.g.,* V2-SR1406.

The Travelers and Amoco Settlement Agreement lists almost three decades of Comprehensive General Liability primary policies issued to Amoco (from 1954–1978).

[2] The application process is consistent with the statutory scheme. By statute the PCRF "shall be subrogated to any insurer, risk retention group or third-party payor" and have "the right to recover, under any pollution liability insurance contract available to a covered party, any applicable contract involving the covered party, or from any tort-feasor liable to a covered party for a release or an intentional release, or any third-party payor and that right may not be waived by contract." SDCL § 34A-13-9.2. Likewise, PRCF requires that all applicants for reimbursement of UST clean-up costs assist the Fund, as a subrogee, in recovering insurance to pay PRCF back for its payments to the applicant. SDCL § 34A-13-9.2; ARSD 74:32:03:02:01.

V2-SR2950-2953; V2-SR3079-3128. The only policy in this coverage program produced in this litigation, however, was Travelers Insurance Company Policy #TNSL 121T271-4, policy period September 1, 1974, to September 1, 1977. V2-SR1838; V2-SR1845-1879. The Amoco Travelers Insurance Company Coverage Program insured Amoco itself generally and its Agents, Sales Agents, and Area Marketers while acting within the scope of their duties at service stations and other Marketing Sites. *Id*. This policy had a $500,000 per occurrence limit and no deductible or aggregate limit. V2-SR1838; V2-SR1845-1879. It has an Expected or Intended Pollution Exclusion (gasoline, petroleum, and petroleum derivatives are *not listed as pollutants*). V2-SR1838; V2-SR1851. This policy contains a separate London Marine Absolute Pollution Exclusion, stating the policy does not apply to property damage arising out of any omission, discharge, seepage, release or escape of petroleum or petroleum derivatives into any body of water; ground water is not a body of water. *Id.*

In its London Market litigation negotiation presentation, Amoco estimated its combined losses for its own UST petroleum contamination at 8,155 sites, including the UST claims relevant here, to be $1,030,531,000. V2-SR1016-1017. Amoco claimed in its London Market Settlement Report that it had pollution releases throughout its entire ownership period of each of its UST sites, including accidental spills and overfills. V2-SR 1022-1023.

One of Amoco's "Key Coverage Issues" raised to support its demands in the London Markets Settlement Offer was that all policies were triggered for all claims. SDFpA75-76#5; pA78#3. Amoco asserted that:

> Losses for each site were allocated across all triggered policy years (excluding policies with "absolute" pollution exclusions). [The] Triggered

> years [were] 1959 to 1985. Costs were allocated equally across all policies, filling the "bathtub" up to the level of the lowest attachment point, and then proceeding to the next attachment point, etc. If coverage was exhausted in any policy year, the remaining costs were reallocated proportionally over remaining policy periods. *Id.*

Mark Hargis, Amoco's primary negotiator in the London Market litigation, took the position in the negotiations that all USTs leaked gasoline while in use on a national basis.[3] SDFA78#4. Hargis also testified that in the settlement negotiations, all of Amoco's policies had the potential for providing insurance coverage for pollution claims, but there were coverage risks. SDFpA79#5. Despite the coverage risk, Amoco obtained a settlement and received monies because of the insurance policies that Amoco had with London markets. SDFpA79-80#3&4. The London Markets settlement was, in general terms, an insurance recovery. *Id.* Amoco's claim generally involved it receiving money compensation to release its UST claims, as Teff testified: "A. Not specifically but within its general terms, I believe so." *Id.*

Before being given to Amoco's insurers in the negotiation process, the Settlement Reports and Settlement Offers were all discussed and approved at Amoco's top corporate levels. SDFpA81-82#1. Amoco's upper management/boards considered the Settlement Reports all at one time, before their use in negotiations. SDFpA82-83. Mr. Hargis viewed the debates over coverage defenses as an opportunity in the negotiation process, and not as problem. SDFpA83#4. Amoco's Settlement Offers reveal Amoco's negotiation positions on the insurer's coverage defenses. SDFpA84#5. Depending on state law and the circumstances of a given settling insurer's coverage, Amoco argued it had a 50% chance of overcoming all UST coverage defenses asserted against it by its

[3] PRCF's expert Ram agreed and opined that releases occurred throughout the operating life of the UST systems SDFpA100-101#3.

various insurers, with the exception of the Sudden and Accidental/Qualified Pollution Exclusion. V3-SR41-45. The odds of overcoming this specific coverage defense were estimated to be a 50% to 57% chance, depending on state law. V3-SR41-45.

The London Markets eventually settled despite the coverage defenses they asserted against Amoco. SDFpA83-84#6. Teff characterized the London Markets settlement as a compromise and not a waiver of Amoco's positions. SDFpAp83#7. One of Amoco's "Key Coverage Issues" positions was that there was a debate over the meaning of the term "sudden" in the Sudden and Accidental/ Qualified Pollution Exclusion in many states. SDFpA85#2. Amoco's position was that it faced a lesser risk on

> certain coverage issues, such as expected/ intended, known loss, and the "accidental" component of the "sudden and accidental" exception to the pollution exclusion. Also, the "bathtub" trigger is conservative, as it assumes all sites were in operation throughout entire period of coverage. SDFpAp85#3.

The coverage law debate over this exclusion included whether petroleum derivatives, i.e., gasoline, is to be considered a pollutant if not specifically listed as such in the provision. V3-SR20-23.

As discussed, the one produced Traveler's primary policy had two separate and distinct pollution exclusions, including: 1. an inland Expected or Intended pollution exclusion which did not list petroleum derivatives, i.e., gasoline, as a pollutant; and 2. a marine Absolute Pollution Exclusion that did list petroleum, and petroleum derivatives as a pollutant. V2-SR1838. One of Amoco's positions in its "Key Coverage Issues" was that these Bifurcated Pollution Exclusions did not bar coverage. SDFpA87#6.

The Amoco 1997-1998 Amoco settlements compromised all policies issued by

nineteen (19) of its insurers. V2-SR2950-2953. As discussed *supra,* Amoco estimated, in its negotiation presentation materials, that its combined losses for UST Pollution at its 8,155 sites to be $1,030,531,000. V2-SR1016-1017. Such an aggregated loss is sufficient to exhaust the London Markets' $5 million or less SIR in its umbrella policy Coverage program. SDFpAp89#1; V2-SR1838-1839; V2-SR1880-2453; V3-SR25-27.

One of Amoco's "Key Coverage Issues" Settlement Offers' positions was to assert aggregation of all UST claims into one occurrence to exhaust the London Markets' umbrella policies $5 Million (less or more, depending on the policy) SIR. SDFpA89-900#2. For example, Amoco argued that courts look to the cause of the … property damage rather than to the number of resulting claims," and that "[c]ourts have held that a corporate decision or pattern of company decision making can constitute one occurrence.…" SDFpA89-900#2. Amoco's aggregation of all claims/one occurrence in short, maintained that 1. "[t]he decision to operate service stations for the distribution of retail fuel products necessitated certain design features, common to all service stations, that created significant environmental risks[,]" and 2. **"**[b]y placing the tanks underground . . . Amoco unknowingly increased the risk that [it] would contaminate soil and groundwater." This became the "One Occurrence Argument." SDFpA89-900#2.

In discussing Amoco's One Occurrence Argument position in the General Reinsurance Corp. and North Star Reinsurance settlement offer, Hargis testified that it was the best possible position to take. SDFpAp91-92#4. Hargis explained that the One Occurrence Argument was useful for the purposes of getting money and doing the due diligence for the reverse underwriting they did. SDFpA92#5. Hargis testified that coverage counsel came up with the single occurrence theory so they could allocate the

whole marketing system based on a single occurrence. SDFpA92#6&7. Hargis agreed that in the settlements, money was, in fact, paid and releases were given, based in part on the One Occurrence Argument position. SDFpA93#8. ("The Witness: Money was paid for the release of the policies, yes.").

The London Market settlement paid money for the satisfaction of any insurance claims that Amoco might have had. SDFpA95#2. Teff testified: "A. In so far as the policies were fully released, I would say yes. Q. And those policies were fully released, were they not? A. They were. *Id*. Despite having opinions as to the value of the UST claims and the coverage defenses they may have had to those claims, London Markets settled this these claims with Amoco. SDFpAp95#3; V2-SR3003-3041. Amoco's settlement approach was to make a global or national based demand and did not to attempt to prove coverage site-by-site/policy-by-policy. V2-SR1187-1188; V2-SR1195-1198; V2-SR1011-1028. Teff agreed the effect of the release language in the London Settlement agreement was to compromise any claim that would have been for the underground storage tank sites. SDFpA98#3. Notably, Teff testified that he would not have settled the case if service stations were not released in the buy-back. SDFpA98#4.

Amoco, however, characterized the settlement process and settlements differently. Nonetheless, the parties agree that in connection with its applications to the PRCF, Amoco submitted letters explaining that it did not have insurance covering costs PRCF reimbursed, indicating that it was "self-insured"—i.e., had no private insurance—for those costs. V2-SR441-442. Amoco's CGL policies contained SIRs of $500,000 per occurrence per year from 1959-1971, $2,500,000 per occurrence per year from 1971-

1972, and $5,000,000 per occurrence per year from 1972-1985. V2-SR885; V-2SR505-506.

In 1993, Amoco brought an environmental coverage suit against the London Market and its other CGL insurers, seeking a declaration that they owed Amoco coverage under Amoco's CGL policies issued between 1959 and 1985 for pollution costs at five high-exposure sites—refineries, chemical plants, etc., that had estimated liabilities ranging from $23 million to over $220 million each. V2SR741-761. After the carriers' responsive pleading and initial discovery, the *Amoco v. Lloyd's* coverage complaint was expanded in 1995 to include 18 additional sites—still limited to large refineries, chemical plants, and the like. BPEx 27. None of the 23 sites at issue in the lawsuit was a service station, and none was located in South Dakota. Amoco did not sue for coverage of any service station sites in the United States. V2-SR741-761; BPEx 27; V2-SR909-910, 928.

In 1996, Amoco retained a team of outside consultants and separate attorneys to engage in parallel-track settlement discussions with Amoco's insurance carriers. V2-SR878, 881-882. According to Amoco, its insurers were only willing to settle the coverage dispute if they could achieve finality with respect to the policies. V2-SR933-934. As a result, during the settlement negotiations that followed, Amoco's settlement team—including lawyers, accountants, and environmental specialists—provided settlement-demand presentations to the carriers covering all of Amoco's potential environmental costs. V2-SR875-876; 934-936.

The Amoco Settlement Reports include Chapter 5, consisting of 98 pages, discussing potential environmental exposure at thousands of Amoco's service stations, terminals, and bulk plants, lumped together were the "marketing system." V2-SR988-

1086; 944. Amoco's consultants included the marketing system to put all of its potential environmental costs on the table to facilitate the finality discussion with insurers. V2-SR866-867, 878, 886-887. One of the Settlement Report's primary authors, Mark Hargis, testified that "the settlement report really doesn't have anything to do with coverage." V2-SR887. "It's quantification of the exposures." *Id.*

In Amoco's Settlement Reports, its settlement counsel crafted a legal argument—the "single occurrence" theory—to give Amoco a basis to include service stations in the settlement discussions. V2-SR856-857. The "single occurrence" theory argued that the common cause of all pollution at Amoco's service stations was a Standard Oil Company (Indiana) corporate decision in 1917 to sell refined petroleum on a retail basis and operate a company-owned system for distributing it. *Id.* The premise of the "single occurrence" theory was, by identifying a purported common cause of all service station pollution, to lump together all exposures from Amoco's thousands of service stations as one "occurrence" under Amoco's insurance policies, so the cumulative costs exceed Amoco's SIRs and provide an argument that these losses could reach its excess coverage. *Id.*; V2-SR940; V2-SR1099-1103. According to Amoco, its insurers rejected and disregarded the single occurrence argument and insisted that each service station site was a separate occurrence. V2-SR890-891. Amoco claimed that the insurers therefore placed no settlement value on the service station component of the Amoco Settlement Report. V2-SR891, 951-954.

PRCF also appeals two other orders. On April 16, 2018, the trial court orally granted summary judgment on Count VI, the "indirect sites" that had discharges reported prior to July 2, 2004 (the cut-off date of the six-year statute of limitations before the

commencement of this lawsuit.) "Indirect sites" were those site locations where another party applied for and received reimbursement from PRCF for Amoco's pollution. The trial court found the accrual date for the statute of limitations was the date PRCF became aware of a discharge, as opposed to the date when PRCF knew or should have known Amoco was potentially responsible.

PRCF also appeals the trial court's April 16, 2018, denial of PRCF's Motion for Sanctions. PRCF first requested a list of service stations Amoco historically owned, operated and leased in South Dakota in its Interrogatories served with its Summons and Complaint in July 2010. Throughout the litigation, several motions were brought concerning Amoco's footprint in South Dakota. *See* SR 697, 876, 881, 1245, 1248, 1553, 2032, 2046, 1918. BP repeatedly insisted that it had no such list and prefaced an interrogatory answer with the following:

> Defendants do not maintain a list of South Dakota retail sites in the ordinary course of business. Thus, this is a lawyer-created list that is likely not comprehensive and likely includes sites Defendants have never owned or operated and for which they do not have any environmental liability. It may also include sites that never actually housed service stations. This list is, however, the best and only document that is responsive to the Plaintiffs' document requests and this Court's March 15, 2015 Order, particularly given the length of time since Amoco or any other affiliate last operated a retail service station in South Dakota. V2-SR2851.

Surprisingly, BP's employee and 30(b)(6) witness, Tammy Brendel, testified that she had a list in a three-ring binder, given to her in 1990, of all locations in all of the states under her jurisdiction where Amoco operated or owned underground storage tanks, including South Dakota. V2-SR2466-2468. According to Brendel, the list contained all the service stations in South Dakota and the channel of trade for each station, meaning whether the station was a jobber location, dealer location, locations at which Amoco

owned the tanks versus locations where it did not own the tanks. "It was just all locations in South Dakota." V2-SR2468. During the pendency of this suit, the three-ring binder with the list was destroyed in December of 2015, over five and a half years, or 66 months, after BP was first asked for that information. Brendel destroyed the list despite that she was aware of the litigation hold. *Id.* The trial court held that BP clearly did not comply with its discovery obligations but denied PRCF's Motion for Sanctions, finding the destruction of the binder was not willful.

ARGUMENT

"This Court reviews a grant of summary judgment 'to determine whether the moving party has demonstrated the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law.'" *Johnson v. Sellers*, 2011 S.D. 24, ¶ 11, 798 N.W.2d 690, 694. "The circuit court's conclusions of law are reviewed *de novo."* *Id.* "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Gail M. Benson Living Trust v. Physicians Office Bldg., Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 342–43.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN RULING THE SETTLEMENT DOCUMENTS ARE BARRED BY RULE 408

A trial court has discretion to determine the admissibility of documents under SDCL 19-19-408. *City of Rapid City v. Big Sky LLC*, 2018 S.D. 45, 914 N.W.2d 541. For Rule 408 to apply, there must be an attempt to compromise a disputed claim, and if so, settlement documents cannot be used to prove liability or the invalidity of that same claim. The meaning of the word "claims" in Rule 408 has been discussed as follows:

> Rule 408 prohibits the admissibility of evidence relating to settlement negotiations only where a "compromise" within the meaning of Rule 408

> occurs. Such a "compromise" happens only where "an actual dispute, or at least an apparent difference of opinion between the parties, as to the validity of a claim" exists . . . In other words, use of the phrase "the claim" limits the rule's application to the same claim as first anticipated by use of the phrase "a claim." And the phrase "when offered to prove liability for, invalidity of, or amount of" qualifies the term "a claim," requiring that term to refer only to the claim under litigation in the pending case. Thus, courts have concluded that Rule 408 unambiguously requires that the claim as to which a settlement offer was made and the claim at issue in the litigation in which the offer is proffered as evidence must be the same claim. [internal citations omitted]

Ostrow v. GlobeCast America Inc., 825 F.Supp.2d 1267, 1272-1273 (S.D. Fla. 2011). Accordingly, the *Ostrow* Court held that compromise offers and negotiations did not bar admission of evidence regarding employer's settlement with another former employee because they were not the same claim. *See also Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293–94 (6th Cir. 1997) ("Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim."); *Armstrong v. HRB Royalty, Inc.*, 392 F. Supp. 2d 1302, 1304 (S.D. Al a. 2005) ("Rule 408 excludes evidence of settlement offers *only* if such evidence is offered to prove liability for or the invalidity [or amount] of the claim under negotiation."). Emphasis added.

Here, BP argued, and the trial court agreed, that there was not a disputed "claim" at the time of the settlement communications.[4] BP repeatedly argued, and witnesses testified, there was no claim being made for UST sites in the *Amoco v. Lloyds* litigation, but rather a "global policy buy back," and that the actual coverage litigation it brought

[4] The trial court stated in footnote 24, "In this case, there is nothing to allocate because the UST sites were neither part of the underlying Lloyds litigation; nor did any possible value which might have been attributed to the policy buybacks include value for the release of the type of UST claims here."

"did not even allege coverage for gas station UST leaks." V2-SR 300-303. In fact, BP argued that "the components of the settlements 'were to resolve Amoco's coverage lawsuit, which did not include USTs and to buy back all CGL coverage." *Id.* In short, if BP's argument and the trial court's finding, that there was no dispute concerning USTs in the *Lloyds* litigation is correct, then logically there was no compromise of a disputed claim to which to apply Rule 408. Simply put, BP cannot have it both ways. Respectfully, the trial court abused its discretion in finding "the UST sites were not part of the underlying Lloyds litigation," but still excluding the evidence under Rule 408 that specifically requires a compromise of a disputed claim. It is beyond logic to argue that the prior litigation and settlements had nothing to do with USTs, but then use a Rule 408 "shield" which requires that the same disputed claim be at issue in this case.

Additionally, factual material that is not disputed is not barred by Rule 408. *See Matter of Estate of Pina*, 443 N.W.2d 627 (S.D. 1989) **(**holding that portion of the letter that counsel attempted to introduce was an undisputed factual assertion, was otherwise discoverable, and is not rendered inadmissible under SDCL 19-12-10); s*ee also Erickson v. Webber*, 58 S.D. 446, 449, 237 N.W. 558, 559 (1931); *United States v. Reserve Mining Company*, 412 F. Supp. 705, 712 (D. Minn.1976); and 31A C.J.S. *Evidence* § 287 (1955). According to BP's own counsel, the settlement report had nothing to do with coverage and was just a factual quantification of exposures. V2-SR 303. Accordingly, such undisputed factual assertions also render Rule 408 inapplicable.

PRCF respectfully submits that the settlement documents at issue here are also admissible for other reasons. Rule 408 does not require exclusion when the evidence is offered for another purpose. First, PRCF offers them for the purpose of proving Amoco

released UST pollution claims, and Amoco took positions about the validity of those claims that directly contradict its current position in this matter. In other words, it was Amoco's belief in 1997 and 1998 that it potentially had coverage for UST releases and could defeat the policy exclusions while simultaneously informing the PRCF it was self-insured. Amoco's belief is not being offered to prove liability. This purpose is not protected under Rule 408. Rule 408 was designed to promote settlements, not to hide fraudulent statements. When it sought money from the PRCF, Amoco said it had no insurance for UST claims. When it sought money from its own insurers for UST claims, Amoco created a 98-page presentation explaining why it potentially had insurance coverage for such losses, and how it could defeat the very coverage defenses that BP raises herein. Once again, BP wants it both ways with impunity.

Further compounding matters, the trial court stated "the most closely analogous factually to the case at hand is *C&E Serv. Inc. v. Ashland Inc*. 539 F.Supp.2d 316 (D.D.C 2008)," but then rejected its holding. The *C&E* court correctly noted that the settlement evidence therein was proffered to prove an alleged fraud or misrepresentation by a party to the negotiation. Accordingly, the *C&E* court approved the admission of the settlement agreement between the defendant subcontractor and government in a prior proceeding relating to overcharging customers, to prove that the subcontractor made later misrepresentations regarding the viability of its prices and the severity of the government's regulations to the plaintiff in that instant case.

The same factual scenario is present here. Amoco told PRCF it had no insurance coverage and assigned its rights to any such insurance coverage to PRCF. Conversely, Amoco then insisted to its own insurers in negotiations that it did have insurance

coverage for UST leaks, and ultimately settled and released all claims for UST leaks previously subrogated to PRCF. This evidence, Chapter 5, Arthur Anderson Report, like that in *C&E,* would be used to show that Amoco made misrepresentations to PRCF regarding the viability of its insurance coverage and also to show the impact of the releases Amoco provided to its insurers on PRCF's subrogation claim. Respectfully, the trial court abused its discretion in excluding this evidence.

A. The trial court incorrectly held PRCF's argument concerning unallocated settlements was irrelevant.

There is no dispute that Amoco released UST claims in obtaining $205 million in settlement funds. Likewise, there is no dispute that the insurers would not have settled with Amoco without such a release. The law is clear that Amoco cannot now allocate the previously unallocated settlements to PRCF's detriment.

The great weight of authority across all jurisdictions has consistently rejected an obligor's attempt to minimize its repayment obligations through after-the fact allocations. *See Wright v Aetna Life Ins. Co*., 110 F.3d 762, 765, n 3 (11th Cir. 1997) (finding that a holding otherwise would allow the insured and the third-party to improperly control insurer's reimbursement rights); *Dimick v Lewis*, 497 A.2d 1221, 1224 (N.H. 1985) (holding that an insured cannot jeopardize the insurer's position by making a unified claim for insured and uninsured losses against a tortfeasor and then unilaterally allocate only a small portion to the insured losses in an effort to frustrate the insurer's rights); *see also Moore v Blue Cross & Blue Shield of the Nat'l Capital Area*, 70 F. Supp. 2d 9, 39 (D.D.C.1999) (holding that a claimant "cannot unilaterally allocate settlement proceeds…to evade subrogation or to buttress an argument that a double recovery would have not resulted.").

Similarly, obligors' settlements with third-parties that do not contain an express allocation are assumed to be concealing a "double-recovery." *Atl. Mut. Ins. Co. v. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1042 (Cal. Ct. App. 2002) (holding that insured's alleged allocation of settlement funds should have been "explicitly set forth in the Settlement Agreement," to avoid the appearance of a desired double recovery). When dealing with multi-party, multi-claim litigation, the settlement and the allocation of proceeds in litigation must meet the requirements of good faith. *See Dillingham Constr., N.A., Inc. v. Nadel P'ship, Inc.*, 64 Cal. App. 4th 264, 280 (Cal. App. 2d Dist. 1998). Absent some good faith agreement between the parties allocating the settlement consideration as between causes of action, a non-settling party is entitled to a setoff of the entire settlement figure. *Knox v. County of L.A.*, 109 Cal. App. 3d 825, 836 (Cal. App. 2d Dist. 1980); *Alcal Roofing & Insulation v. Superior Court*, 8 Cal. App. 4th 1121, 1124-25 (Cal. App. 1st Dist. 1992).

The same rationale is applicable in the tax context. "[W]here a settlement agreement is silent as to what portion, if any, of a settlement payment should be allocated towards damages excludable under 26 U.S.C. § 104(a)(2), the courts will not make that allocation for the parties." *Taggi v. United States*, 835 F. Supp. 744, 746 (S.D.N.Y. 1993), *aff'd*, 35 F.3d 93, 96 (2d Cir. 1994); *see also Villaume v. United States*, 616 F. Supp. 185, 190 (D. Minn. 1985) (holding that because "[t]he parties did not specify at the time of the settlement which portion of the settlement was attributable to lost income or business damages, and which portion was attributable to personal injury damages[,] [t]he Court will therefore treat the entire payment as income.").

Amoco and its insurers chose not to allocate the settlement proceeds and cannot now allocate them to PRCF's detriment. SDFpA99#7.

B. The trial court erred in concluding Amoco did not receive any settlement monies for UST sites.

The settlement agreements themselves are not ambiguous. Amoco clearly released all claims for pollution at USTs and received value for their release. There is no need for parole evidence to determine whether Amoco received value for releasing all claims under the policies. Even considering parole evidence, however, the trial court did not draw all reasonable inferences in PRCF's favor. Instead, the trial court impermissibly weighed the evidence and reached an erroneous conclusion. The settlements themselves released all claims for UST contamination, and the insurers testified would not have settled with Amoco without a release of UST claims. Therefore, by definition, the release of the UST claims had value, and that fact, or at the least this reasonable inference, should have been drawn in PRCF's favor. Accordingly, the trial court improperly concluded Amoco received no value for releasing UST claims.

C. Because Amoco did not have to prove coverage for every UST site released in their unallocated settlements, it is estopped from demanding PRCF do so now, after-the-fact.

At its core, this case is about BP's bad conduct, *i.e.*, misrepresenting insurance coverage and concealing from PRCF the fact that it had potential insurance coverage as a primary source of payment. BP's attempt to change the narrative, however, insisting that PRCF must prove there was actual insurance coverage for every single UST site at issue, should not be condoned. BP and the trial court ignored that none of the insurance payments to Amoco in its insurance settlements allocated any of the claims that were compromised. Thus, all of the UST losses were included as part of an unallocated

consideration for the insurers' payments to Amoco. BP did not prove there was insurance coverage for every single petroleum release at the thousands of UST sites it released. Consequently, BP should be equitably estopped from insisting on an after-the-fact, site-specific allocation of coverage now.

The test for equitable estoppel in South Dakota is:

> (1) False representations or concealment of material facts must exist; (2) The party to whom it was made must have been without knowledge of the real facts; (3) The representations or concealment must have been made with the intention that it should be acted upon; and (4) The party to whom it was made must have relied thereon to his prejudice or injury.

Hahne v. Burr, 2005 SD 108, ¶ 17, 705 N.W.2d 867, 873.

BP entered into the unallocated settlements with its insurance carriers, releasing all liability for UST environmental pollution losses. Not a single UST site nationwide was given any settlement value, nor was any specific insurance coverage attached to a specific release at a specific UST site. BP received clean-up cost reimbursements from PRCF but failed to disclose these insurance settlements to PRCF, either before, during or after. PRCF did not know, nor did it have any reason to know, about the unallocated settlements. Therefore, according to the doctrine of equitable estoppel, BP cannot now require PRCF to prove insurance coverage, policy-by-policy, for every UST site at issue.

Respectfully, the trial court erred in concluding PRCF's argument in this regard was misplaced because this is not a settlement conference. V3-SR858 fn6. Because of the subrogation assignments, it was not Amoco's argument to make to its insurers regarding the availability of coverage for UST leaks. Nor was it Amoco's place to reach an unallocated settlement and release all claims under the policies for coverage. Amoco

had already assigned its UST claims to PRCF. Thus, PRCF was damaged by being precluded from the negotiation table and then told after the fact its claim had no value.

II. THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THE SIR AND POLLUTION EXCLUSIONS BARRED COVERAGE.

For the reasons stated above, PRCF should not have been required to prove coverage on a site by site, policy by policy basis. When properly framed, the real issue is whether there was insurance coverage, or the potential for coverage, based on the law in 1993-1998 when Amoco sued its insurers and began negotiating a release of all claims despite previously subrogating such rights to PRCF. Based on Amoco's own admissions in its global settlement report for UST stations, there was potential coverage which is precisely why the insurers would only settle if all claims were released.

The trial court disregarded several factual issues in making its ruling. First, Amoco itself advocated that it could beat all of the coverage defenses it has asserted herein, including the large SIR, with its "one occurrence" theory and the pollution exclusions. Amoco's powerful admission was simply ignored. Likewise, the trial court overlooked that both PRCF's expert Mr. Ram and Amoco, itself, maintained that all tanks leaked from the inception of their use. As such, the trial court erred in finding as a matter of law that the pollution exclusions barred the potential for insurance coverage. Stated differently, the trial court impermissibly weighed this evidence, disregarded it, and concluded that PRCF could not provide specific examples, rather than utilizing the proper standard at the summary judgment stage.

In that regard, Mr. Garth Allen's reports were not impermissible legal opinions. Rather, his opinions concerned the historical debates concerning certain often-used definitions and exclusions during the relevant time frame, i.e., when Amoco was telling

PRCF it was self-insured. The purpose of Mr. Allen's expertise was to provide the framework under which the settling insurers and Amoco viewed such provisions in the 1990's, given the then-current legal precedent. Mr. Allen's actual opinion, that there was the potential for coverage despite the exclusions, was not improper.

Moreover, the trial court correctly noted that the party maintaining that there is no duty to defend must show that the "the claim clearly falls outside of policy coverage." *Lowery Construction & Concrete*, 2017 S.D. 54 at ¶8 901 N.W.2d at 484. The trial court further stated the duty is determined by the allegations of the complaint, and that BP stepped into the role of the insurer. BP thus carried a heavy burden of clearly showing the claims fall outside of the policy coverage. Instead of imposing that burden, the trial court erroneously concluded that PRCF must show coverage existed on a site-by-site basis. Amoco did not clearly show the exclusions applied, precluding coverage. By Amoco's own admission, its "one occurrence" argument could potentially overcome the SIR issues at that time. As to the absolute pollution exclusion, there was authority for the proposition that gasoline at a gas station is not a pollutant in a CGL policy. *American States Ins. Co v. Kiger,* 662 N.E.2d 945, 948-49 (Ind. 1996). Likewise, Amoco did not clearly show at each site that the releases were not sudden and accidental. *See Demary v. DeSmet Farm Mut. Ins. Co*. 2011 S.D. 39 ¶12, 801 N.W.2d 284, 288. Thus, the same would hold true on the qualified pollution exclusions. Respectfully, the trial court improperly reversed the burden of proof in concluding "Plaintiff has the burden to come forward with site specific facts showing which policies may have been triggered," when in fact it was BP maintaining there was no coverage because of policy exclusions.

III. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF BP ON COUNT II FOR BREACH OF THE SUBROGATION AGREEMENTS.

The trial court correctly noted Count II did plead a failure to abide by the subrogation assignments, but it ultimately granted summary judgment in Amoco's favor because PRCF could not prove damages. V3-SR876. Such a finding ignored the unallocated settlements released rights that had already been assigned to PRCF, and that one cannot allocate after-the-fact. Likewise, the trial court failed to construe all facts and reasonable inferences in PRCF's favor and instead impermissibly weighed the evidence and reached conclusions in favor of BP, the movant. The undisputed evidence established there would have been no settlement if UST claims were not released in the settlement agreements. The reasonable inference is that the UST claims had value. It is implausible to argue a release of certain claims had no value while at the same time admitting that the settlements would not have occurred without such a release.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR ON THE FRAUD BASED COUNTS.

A claim of fraudulent misrepresentation is established by proving:

> 1) A defendant made a representation as a statement of fact; 2) The representation was untrue; 3) The defendant knew the representation was untrue or he made the representation recklessly; 4) The defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it; 5) The plaintiff justifiably relied on the representation; and 6) The plaintiff suffered damage as a result.

See N. Am. Truck & Trailer, Inc. v. M.C.I. Com. Serv., 2008 S.D. 45, ¶ 10, 751 N.W.2d 710, 714. Silence, in the absence of duty to speak is generally not enough. "Where, however, a trust or other confidential relationship does exist between the parties, silence on the part of one having the duty to disclose, constitutes fraudulent concealment in the

absence of any affirmative act." *Hinkle v. Hargens,* 76 S.D. 520, 525, 81 N.W.2d 881, 891. "Questions of fraud and deceit are generally questions of fact and as such they are to be determined by a jury." *Dede v. Rushmore Nat. Life Ins. Co.,*470 N.W.2d 256, 259 (S.D. 1991).

It is uncontested that Amoco has a statutory duty to PRCF to be truthful. To that end, South Dakota law required that Amoco, when applying to the PRCF for reimbursement for UST clean-up costs: (i) confirm whether it had insurance coverage applicable to UST site losses, and (ii) execute Subrogation Assignments to those policies.

Amoco's insurance recovery negotiations alone obligated it to tell PRCF that Amoco had available insurance. Contrary to Amoco's obligation, it never informed PRCF, but instead continued to apply for and receive PRCF reimbursements for the clean-up of Amoco's UST sites. Based on the foregoing evidence, Amoco's self-insured statements to PRCF were not truthful, or at a minimum there is a genuine issue of material fact to be resolved by a trier of fact. Moreover, each time Amoco filed an application, Amoco "warrants and represents that no settlement has been made by the Applicant with any party, person, or corporation against whom claim *might* lie, and no release has been or will be given to anyone responsible for the cost of cleanup, and that no such settlement will be made nor release given by [Amoco] without the written consent of the PRCF.**"** Emphasis added**.** Clearly, a claim might lie against these insurers in that Amoco explained its ability to recover for this potential exposure for its Marketing System in Chapter 5.

Furthermore, Amoco employees who actually submitted the applications to PRCF that failed to disclose the available insurance were never told about the availability of

coverage for UST clean-up. Even after 1997, "upper management" and the "board" at Amoco knew, but did not inform their employees dealing with the PRCF, (i) about the settlement negotiations and insurance recoveries, or (ii) that state funds had paid them millions of dollars. Such employees were never informed of the settlement negotiations and thus unaware of the facts that made the self- insured statements false. Given the divergent statements Amoco made to PRCF and to its own insurers concerning insurance coverage, clearly genuine issues of material fact exist precluding summary judgment on the fraud counts and Counts I, III, IV and V should be reversed.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SITE 6197.

The trial court's ruling on this issue best exemplifies how it erred in weighing the evidence and reaching a conclusion as opposed to simply determining whether there was an issue of fact precluding summary judgment. For example, the trial court stated "[t]he clear inference here, is that if Kertzman had any inkling that Amoco was in fact responsible for the leaks at Site 6917, he would have similarly advised the Department." V3-SR 879. Clearly, the trial court drew a favorable inference in favor of BP, the movant. Conversely, with respect to PRCF and the expert report of Neil Ram, the trial court acknowledged his report indicated release dates of pre-1995 for which Amoco would be responsible while commenting his opinion "might be unreliable." V3-SR882. The trial court at this summary judgment stage was required to draw all reasonable inference in favor of PRCF, not against it.

Had the trial court drawn all reasonable inference in PRCF's favor, there is evidence there were Amoco petroleum releases from 1952 to 1992. V2-SR1251-1254. In fact, Amoco was the owner of the site from 1952 to 1992. V2-SR1249-1251. As

such, the remediation requirements applied to Amoco. SDCL § 34A-13-1-14; ARSD §74:56:01:03; §74:56:01:44; V2-SR1254. Moreover, PRCF can recover from any third party who contributed to the release. SDCL 34A-13-9.2. Even BP concedes that Mr. Ram's expert report opines releases occurred while Amoco was an owner. SR 315-316. Respectfully, the trial court improperly granted summary judgment for BP.

None of the cases BP or the trial court cited stand for the proposition that only the person DENR named as the responsible party *at the time of the reported release* can be held liable for the release. The statutory construction and rights of subrogation afforded to PRCF provide otherwise. PRCF is not seeking a reversal of the original DENR determination, but rather to hold a party responsible for the corrective action costs PRCF expended in cleaning the petroleum leak.

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN BP'S FAVOR ON THE INDIRECT SITES BASED ON THE STATUTE OF LIMITATIONS.

A cause of action accrues when "the plaintiff either has actual notice of a cause of action or is charged with notice." *Strassburg v. Citizens State Bank,* 1998 SD 72, ¶ 10, 581 N.W.2d 510, 514 (citing SDCL 17-1-2, SDCL 17-1-3). Importantly, while the question of *what* constitutes accrual is one of law, the question of *when* accrual occurred is one of fact generally reserved for trial. *Wissink v. Van De Stroet,* 1999 SD 92, ¶ 9, 598 N.W.2d 213, 215-216; *see also Strassburg v. Citizens Bank* 1998 S.D. 72, ¶ 7, 581 N.W.2d at 513 (stating that "[b]ecause the point at which a period of limitations begins to run must be decided from the facts of each case, statute of limitations questions are normally left for a jury."). Summary judgment is proper on statute of limitations issues

only when application of the law is in question, and not when there are remaining issues of material fact. *Kurylas, Inc. v. Bradsky,* 452 N.W.2d 111, 113 (S.D. 1990).

Here, the trial court concluded that PRCF was put on notice once it became aware of a release. Respectfully, the proper accrual date should have been not when PRCF knew contamination existed but rather, when PRCF knew or should have known BP was potentially responsible for that contamination.

In that regard, the instant case is analogous to *E. Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, ¶ 10, 852 N.W.2d 434, 438. In *East Side Lutheran Church,* the Court stated, "[b]ecause what a reasonably prudent person should inquire into when learning of water infiltration can differ depending on the circumstances, we conclude there is a genuine issue of material fact as to when East Side's structural design error and construction error claims accrued." *Id.* ¶ 15. If East Side was not put on actual or constructive notice of the alleged deficiency because of the actual notice of the water infiltration, then a claim based on that alleged deficiency is a separate cause of action with a separate accrual date. *Id.* ¶ 13. The *East Side Lutheran Church* Court declined to decide the issue as a matter of law and left the question of the accrual date for the statute of limitations to the jury. *Id.*

The same analysis is applicable here. Water infiltration is analogous to petroleum releases, and to what a reasonably prudent person should inquire differs depending on the facts, precluding summary judgment. Respectfully, the issue is when PRCF knew or reasonably should have known BP previously owned or operated the site at issue and was potentially responsible for the release. The trial court erred in granting summary judgment in BP's favor on the indirect sites and should be reversed.

VII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PRCF'S MOTION FOR SANCTIONS.

A circuit court discovery sanction under SDCL 15–6–37 is reviewed under an abuse of discretion standard. *Chittenden & Eastman Co. v. Smith,* 286 N.W.2d 314, 316 (S.D.1979). "Imposing a sanction such as the exclusion of the testimony should result when 'failure to comply has been due to . . . willfulness, bad faith, or . . . [fault].'" *Id.* Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Wuest ex. Re. Carver v. Mckennan Hosp*. 2000 S.D. 151, fn 1, 619 N.W.2d 682, 691. "When it is established, a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction." *Thyen v. Hubbard Feeds, Inc.,* 2011 S.D. 61, ¶16. While predominantly a criminal matter, the spoliation of evidence rule applies with equal force in civil case. *Id.*

At issue from the outset of this case was Amoco's footprint in the State of South Dakota, meaning where it owned, leased, or operated stations within the State. It was the subject of Motions to Compel and various discovery disputes. V1-SR589, 876, 892, 1245, 1248, 2032, 2046. BP repeatedly argued that it did not maintain such a list, and when the trial court compelled it to compile such a list, maintained the list was not likely comprehensive.

Despite BP's repeated statements to the contrary, it was revealed that such a list existed and was kept in the usual course of business. Moreover, the list was kept by BP's own 30(b)(6) witness, Ms. Brendel. Ms. Brendel testified that in April of 1990 she had a three-ring binder with a list of all locations where Amoco owned or operated underground storage tanks in South Dakota. V2-SR2466. The binder contained all

service stations in South Dakota and a channel of trade, i.e., jobber, dealer, owned. V2-SR2467. Ms. Brendel further testified that she destroyed the three-ring binder in December of 2015 despite being aware of a litigation hold. V2-SR2467. It can only be characterized as willful for BP not to ask its own 30(b)(6) witness for more than 5 years, or 66 months, if such a list existed, during the pendency of this suit, particularly in light of the various motions on the subject. Instead, BP sat silent and allowed the list to be destroyed. While the trial court correctly noted this was an obvious violation of BP's discovery obligations, it declined to impose a sanction. This was an abuse of discretion given the numerous efforts to obtain such a list. Instead, PRCF was forced to rely upon counsel's compiled list that was likely not comprehensive. Consequently, the trial court should be reversed on this issue.

CONCLUSION

For the reasons stated herein, PRCF respectfully requests that the trial court's decisions to grant summary judgment on all counts[5] be reversed with all counts being reinstated and remanded for trial. PRCF also requests that the ruling on the Motion for Sanctions be reversed with the matter remanded to the trial court with instructions to impose a proper sanction.

REQUEST FOR ORAL ARGUMENT

PRCF respectfully requests the opportunity for oral argument to address the issues raised by this appeal.

Respectfully submitted this 1st day of July, 2019.

[5] PRCF has not specifically addressed Count VII because the trial court held its prior ruling rendered this count moot. Respectfully, reversal or remand on all or some of the counts should include Count VII because it would no longer be considered moot.

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CERTIFICATE OF COMPLIANCE

Judith K. Zeigler Wehrkamp, Appellants' counsel of record, hereby certifies that the Appellant's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellant's Brief contains 9670 words. Further, the undersigned relied upon the word count of the word processing system used to prepare Appellant's Brief (Microsoft Word Version 16.10).

Dated this 1st day of July, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Brief and Appendix is electronically served on the attorneys for Appellee by email at jcollins@lynnjackson.com, tfritz@lynnjackson.com, martin.roth@kirkland.com, daniel.siegfried@kirkland.com, dzott@kirkland.com when the Brief and Appendix are electronically filed at SCClerkBriefs@ujs.state.sd.us.

/s/ Judith K. Zeigler Wehrkamp
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28933

THE STATE OF SOUTH DAKOTA, THE SOUTH DAKOTA PETROLEUM RELEASE COMPENSATION FUND

Plaintiff and Appellant,

vs.

BP plc, BP AMERICA, INC., BP PRODUCTS NORTH AMERICA INC., BP WEST COAST PRODUCTS, LLC and its predecessor companies and subsidiaries

Defendants and Appellees.

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable Patricia J. DeVaney, Presiding

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JURISDICTIONAL STATEMENT

On February 7, 2019, the Circuit Court entered final judgment on Defendants' Motions for Summary Judgment for the reasons stated in the court's April 16, 2018 oral ruling and January 23, 2019 Memorandum Opinion. Plaintiff-Appellant, the State of South Dakota, filed its notice of appeal on March 12, 2019.

STATEMENT OF LEGAL ISSUES

1. Whether the Circuit Court correctly held the State's claims failed as a matter of law where it did not and could not identify a single applicable insurance policy.

The Circuit Court held that the State did not "identif[y] the specific policies providing coverage for each of the 27 sites at issue," Op. 8 (App'x 34)[1], and separately that Amoco's insurance policies unambiguously preclude coverage for gas station cleanup costs as a matter of law under the policies' plain and unambiguous terms, *id.* at 10-17 (App'x 36-43).

Lowery Constr. & Concrete, LLC v. Owners Ins. Co., 2017 S.D. 53, 901 N.W.2d 481

Swenson v. Auto Owners Ins. Co., 2013 S.D. 38, 831 N.W.2d 402

Whittier Props., Inc. v. Alaska Nat'l Ins., 185 P.3d 84 (Alaska 2008)

Demaray v. De Smet Farm Mut. Ins. Co., 2011 S.D. 39, 801 N.W.2d 284

2. Whether the Circuit Court abused its discretion in excluding settlement evidence where the State sought to use it to prove liability and to interpret unambiguous insurance policies.

The Circuit Court held that the State's intended use of settlement evidence is "precisely" what Rule 408 prohibits. Op. 18 (App'x 44). The court further held that "statements made during settlement would not be admissible as extrinsic evidence to alter

[1] Both of the Circuit Court's opinions granting Amoco's motions for summary judgment are included in Amoco's appendix and are cited to throughout this brief as "App'x."

the existing contractual language in the parties' unambiguous insurance contracts." *Id.* at 18, n.15 (App'x 44). Finally, the court found that the inadmissible settlement evidence could not defeat summary judgment even if admitted because the State "failed to point to any specific facts from which it can be reasonably inferred that the settlement monies received by Defendants included value for costs of cleanup from UST leaks at gas stations in general, much less at the 27 sites at issue here." *Id.* at 22 (App'x 48).

First Premier Bank v. Kolcraft Enters., Inc., 2004 S.D. 92, 686 N.W.2d 430

Swenson v. Auto Owners Ins. Co., 2013 S.D. 38, 831 N.W.2d 402

LaMore Rest. Grp. v. Akers, 2008 S.D. 32, 748 N.W.2d 756

SDCL § 19-19-408

3. Whether the Circuit Court correctly granted summary judgment on the State's subrogation and fraud claims where Amoco did not have insurance coverage for gas station cleanup costs as a matter of law.

The Circuit Court held that the State's subrogation and fraud claims turn on whether Amoco had insurance coverage for gas station cleanup costs. Op. 27 (App'x 53). And because Amoco neither had coverage for such costs nor received settlement value for such costs, these claims failed as a matter of law.

Allied Mut. Ins. Co. v. Heiken, 675 N.W.2d 820 (Iowa 2004)

United States v. Munsey Tr. Co. of Washington, D.C., 332 U.S. 234 (1947)

Meyer v. Santema, 1997 S.D. 21, ¶ 11, 559 N.W.2d 251, 255

4. Whether the Circuit Court correctly granted summary judgment on the State's strict liability claims because (1) no legal avenue exists for reversing a prior agency determination that a third party, and not Amoco, was responsible for the gas station cleanup costs at issue; and (2) the State had knowledge of the relevant facts more than six years before it filed suit.

The Circuit Court held "it is without the legal authority to now modify or overturn this agency decision that was never modified or reversed by the Department before it

became final, nor appealed by the [responsible] person ... at the time." Op. 33 (App'x 59). The Circuit Court further concluded that the limitations period began running on the State's strict liability claims when the leaks at issue were reported. App'x 10. Because all but one of these leaks were reported before 2004—6 years before the State filed suit—the court held those claims are barred by the statute of limitations.

Gades v. Meyer Modernizing Co., 2015 S.D. 42, 865 N.W.2d 155

E. Side Lutheran Church of Sioux Falls v. NEXT, Inc., 2014 S.D. 59, 852 N.W.2d 434

Peterson v. Safway Steel Scaffolds Co., 400 N.W.2d 909 (S.D. 1987)

SDCL § 34A-12-16

5. Whether the Circuit Court abused its discretion in denying the State's motion for sanctions related to alleged spoliation where the State presented no evidence of bad faith or prejudice.

The Circuit Court denied the State's motion for sanctions because the State (1) presented no evidence that Amoco acted in bad faith, (2) had access to all of the allegedly spoliated information, and (3) the court's ruling did not depend in any way on the allegedly spoliated information. App'x 19-21.

Thyen v. Hubbard Feeds, Inc., 2011 S.D. 61, 804 N.W.2d 435

State v. Engesser, 2003 S.D. 47, 661 N.W.2d 739

Dudley v. Huizenga, 2003 S.D. 84, 667 N.W.2d 644

SDCL § 15-6-37

STATEMENT OF THE CASE

The State of South Dakota and the South Dakota Petroleum Release Compensation Fund ("PRCF" or "Fund," and together, the "State"), allege that Amoco Oil Company[2] had insurance coverage for the same gasoline pollution cleanup costs that the Fund reimbursed for 27 gas stations in the State. Counts I through V of the State's Amended Complaint are all based on this allegation of overlapping insurance coverage and supposed "double dipping" from both the Fund and insurance.

Years of discovery failed to bear out the State's allegations. At summary judgment, the State could not identify a single insurance policy that covered the same costs as the Fund—and that alone requires affirming the Circuit Court's grant of summary judgment. Under settled South Dakota law, insurance coverage is a question of law "determined by the language of the contract," *Swenson v. Auto Owners Ins. Co.*, 2013 S.D. 38, ¶ 13, 831 N.W.2d 402, 407, and the Circuit Court correctly held—after methodically analyzing all of the policies in the record—that each of Amoco's policies unambiguously preclude coverage for the gas station cleanup costs at issue here through high attachment points and pollution exclusions.

The State strains to fill that fatal legal and evidentiary void by trying to use Rule 408 settlement evidence to create an issue of material fact about the scope of Amoco's insurance coverage. Tellingly, the State begins its argument with eight pages devoted solely to Amoco's settlement negotiations with its third-party insurers—not the policies themselves—and its statement of facts is limited entirely to reciting inadmissible

[2] BP's retail gas stations include the combined operations of three formerly independent U.S. oil refiners that merged between 1998 and 2000: (1) Amoco, (2) Standard Oil of Ohio, and (3) Atlantic Richfield. Only Amoco applied to or received reimbursement from the Fund.

settlement evidence. But interpretation of unambiguous insurance policies is a question of law for the court based on the policies alone. Insurance coverage either exists or it does not under the policies' plain language, and extrinsic evidence cannot be used to interpret, much less override, an unambiguous insurance policy's plain terms. This is doubly true for the State's settlement evidence, which is inadmissible under South Dakota Rule of Evidence 408. The Circuit Court correctly disregarded this "evidence," which did not support double-recovery in any event.

The Circuit Court also properly granted summary judgment for Amoco on Count VI—the State's so-called "indirect" claims, which it tacked on five years into the case when it realized discovery had not borne out its primary "double dip" allegations. The Fund's "indirect" theory asserts that Amoco is strictly liable for cleanup costs for which the Fund "reimbursed third parties," without regard to Amoco's alleged insurance coverage. CR1-0969-70. The Circuit Court correctly concluded the State lacks legal authority to bring these claims and, independently, they are barred by the applicable statute of limitations because the State knew all the relevant facts about Amoco's prior involvement at these sites more than six years before filing suit.

In short, Judge DeVaney carefully analyzed the record before rejecting each of the State's legally and factually flawed arguments in two comprehensive, well-reasoned opinions. The State now tries to rehash its scattershot, often undeveloped arguments before this Court—and in fact in several instances does not even challenge the Circuit Court's alternative holdings that now flatly preclude the State's claims. For these and other reasons explained below, there is no basis to disturb the Circuit Court's rulings, and the judgment should be affirmed.

STATEMENT OF FACTS

A. The Petroleum Release Compensation Fund

In 1988, the U.S. Environmental Protection Agency began requiring that all owners of gasoline underground storage tanks ("USTs") have $1 million in financial assurance to cover the cost of cleaning up potential leaks. CR1-4766-68. Given the financial burden and lack of available insurance products from commercial insurers, states responded by creating funds to help tank owners satisfy the EPA's rule. South Dakota was no exception, and the legislature created the Petroleum Release Compensation Fund in 1988. *See* SDCL § 34A-13-8.1 *et seq*. The Fund was designed to partially reimburse costs retail gas station owners and operators incur for cleaning up gasoline leaks from USTs. *Id.* It is funded through a two-cent-per-gallon fee paid by bulk gasoline marketers and importers, including Amoco. SDCL § 34A-13-20; ARSD § 74:32:02:01-02. That money is then paid out to eligible tank owners for certain cleanup costs up to $1 million per leak (minus a $10,000 deductible the applicant pays). SDCL § 34A-13-8.1.

Each time a tank leaks and the owner wants reimbursement for its cleanup costs, the owner must submit an application to the Fund. CR1-4616. Among other things, the application requires the owner to submit a letter identifying "what coverage [its insurers] provide for Pollution/Contamination cleanup." *Id.* Having private insurance does not preclude eligibility for reimbursement. CR1-4621; CR1-4555-56; CR1-4582. Instead, the application includes a Subrogation Agreement, which assigns the Fund all rights the applicant may have against any third-party, including insurers, related to costs the Fund reimbursed. CR1-4631.

Amoco applied for and received partial reimbursement for eligible cleanup expenses at 27 gas stations in the State. As part of its applications, Amoco submitted letters to the Fund accurately stating that it was self-insured for the costs the Fund reimbursed. CR1-4629; CR1-4633. In one letter, for example, Amoco explained that it did have liability insurance that could cover pollution events, but the insurance "does not provide coverage for the referenced sites as, *inter alia*, remediation expenses do not exceed the [policy] deductible." CR1-4629. Later that year, Amoco reiterated it was "self-insured for liabilities regarding contamination caused through operation of marketing or distribution facilities," like gas stations. CR1-4633. The Fund reimbursed Amoco without inquiring further about the insurance Amoco disclosed. CR1-4600; CR1-4586. In total, Amoco received approximately $3.1 million in reimbursements from the Fund. CR1-4626-27.

B. Amoco's Insurance Coverage

Given the broad scope of Amoco's refining and manufacturing operations, Amoco began purchasing comprehensive general liability ("CGL") insurance in the 1950s. CR2-0032-33; CR1-4797-98; CR2-0059. In light of its financial resources, however, Amoco did not purchase first-layer, primary liability insurance. CR1-4797. Instead, it purchased only "excess" CGL policies, subject to high per-occurrence self-insured retentions ("SIRs") that Amoco would have to pay out of its own pocket before coverage could be triggered under the policies. CR2-0042; CR2-0032-34; CR1-4797. SIRs are similar to deductibles and prevent insurance policies from attaching or providing any coverage until liability exceeds the SIR. CR2-0064; CR2-0066-67. Because Amoco's policies were "occurrence" policies, liability had to reach the SIRs for each occurrence before coverage attached. CR2-0010-11; CR2-0043-44. Amoco's policies

contained per-occurrence SIRs of $500,000 from 1959-1971, $2,500,000 from 1971-1972, and $5,000,000 from 1972-1985. CR2-0033; CR1-4797; *see also, e.g.*, CR1-4884; CR1-4920; CR1-4964. As the phrase "*self-insured* retention" suggests, Amoco had no insurance coverage for any occurrence where the amount of the loss was below its SIR. CR2-0066-68; CR2-0032-34.

As the scope of potential environmental liabilities from U.S. manufacturing and industrial companies increased, CGL insurers began writing new terms into policies to limit coverage for environmental claims. CR2-0070-71. By 1973, all of Amoco's CGL policies contained pollution exclusions. *See* CR2-0011-12; CR2-0061-62. These early pollution exclusions, referred to as "qualified" pollution exclusions, carved out gradual pollution liability claims, limiting coverage to occurrences that were "sudden and accidental." CR2-0011-12; CR2-0061-62. Other variations excluded coverage for "expected or intended" pollution. CR2-0032; CR2-0072-74. To further shield themselves from liability for environmental pollution claims, insurers added an "absolute" pollution exclusion to CGL policies in 1985. CR2-0010-12; CR2-0061-62; CR1-4776; CR1-4608. The absolute pollution exclusion barred coverage for *all* pollution claims, including UST cleanup costs. CR2-0010-12; CR2-0061-62; CR1-4776; CR1-4608.

Because of the high SIRs and pollution exclusions in Amoco's insurance policies, and the absolute pollution exclusion in particular, every fact witness testified that Amoco had no insurance coverage for gas station cleanup costs like those the Fund reimbursed. CR2-0031-32, CR2-0034; CR2-0100-101; *see also* CR2-0072-74; CR1-4596-97.

Each of the UST releases at the 27 sites at issue in this case occurred between 1987 and 1998—a period in which Amoco had a $5 million SIR and absolute pollution exclusions in all of its policies. Op. 5, 10 (App'x 3, 36) (citing CR2-0682-84). The most that Amoco received in reimbursements at any of the 27 sites was $677,800—far below the $5 million SIR. CR1-4626-27; CR1-4571-72.

C. Amoco's Insurance Settlements

In the early 1990s, the London Market (also known as Lloyd's of London) and others that insured Amoco and many other companies grew concerned about exposure from a large number of high-value pollution claims being filed against their policies. CR2-0045-50. As a result, the London Market engaged in a restructuring designed to "run-off" its legacy CGL insurance policies and liabilities. CR2-0045-48.

In response, Amoco filed a coverage lawsuit against the London Market and other CGL insurers seeking a declaration that they owed coverage under Amoco's CGL policies issued between 1959 and 1985 for pollution costs at 23 specific, high-exposure sites—refineries, chemical plants, and other large-scale industrial sites. CR1-4656; CR1-4740. None of the 23 sites in the suit was a gas station, and none was in South Dakota. CR1-4656; CR1-4740; CR2-0057-58; CR2-0075-76.

Several years after Amoco filed suit, Amoco and its insurers entered settlement discussions.[3] CR2-0026; CR2-0029-30. Amoco's insurers made clear they would settle the ongoing coverage dispute only if they could achieve finality—*i.e.*, if Amoco bought back and extinguished the policies altogether, releasing the insurers from all potential claims. CR2-0054-55, 0081-84; CR2-0104; CR2-0026. To facilitate the policy buyback,

[3] As discussed below, this settlement evidence is inadmissible under Rule 408. Amoco includes this discussion of it for completeness and subject to its objection.

Amoco retained a team of consultants to prepare a confidential, Rule 408 settlement report to quantify Amoco's total environmental exposure for contamination existing before June 1, 1985, when the absolute pollution exclusion began barring claims. CR2-0023-24; CR2-0082-84; CR2-0160. The settlement report dedicated multiple chapters and well over a thousand pages to the 23 high-exposure sites at issue in the coverage lawsuit, including detailed, site-by-site analysis of environmental conditions and expected costs. CR2-0034-36; CR2-0094-95. Amoco's demand for those 23 litigation sites alone was $2.7 billion. CR2-0351-53.

The settlement report also included a much smaller chapter, just 98-pages, about potential exposure at Amoco's gas stations, terminals, and bulk plants, which Amoco referred to in combination as its "marketing system." CR2-0137; CR2-0092. Like the rest of the report, the marketing chapter was limited only to pollution that occurred before June 1, 1985 to avoid the absolute pollution exclusion. CR2-0160. The marketing chapter also included an explicit disclaimer that "[n]othing in this Report Chapter constitutes an averment or admission of fact or the adoption of any legal or environmental regulatory position by Amoco Corporation, its subsidiaries or affiliates, or any of its counsel." CR2-0159. Unlike the chapters discussing the high-exposure sites, the marketing chapter did not have a site-by-site analysis of potential liability. CR2-0014-15; CR2-0035-36; CR2-0137. Instead, because the costs at each individual gas station would never have exceeded Amoco's high per-occurrence SIRs, Amoco's consultants presented all gas station costs for settlement purposes as just a single occurrence. Specifically, they aggregated the estimated costs from thousands of gas stations, over many decades, and posited they could all be treated as just a single

occurrence caused by Amoco's decision in 1917 to start storing gasoline in USTs at retail gas stations. CR2-0004-5; CR2-0036-38; CR2-0088; CR2-0265-69. The consultants did not consider the actual conditions at any marketing system site, but instead estimated a back-of-the-envelope figure per station and multiplied it by an estimate of the total number of Amoco gas stations. *Id.*

Amoco's consultants knew the single-occurrence theory was unsupportable, admitting it "was a difficult argument to make." CR2-0036-38. Amoco assumed the single-occurrence theory "was not going to bear fruit" and "didn't think that the carriers were going to take it seriously." CR2-0019; CR2-0036-38. As expected, Amoco's insurers uniformly rejected the single-occurrence theory and refused to place settlement value on gas stations cleanup costs. CR2-0038-39; CR2-0089-90; *see also* CR2-0087-88; CR2-0276; CR2-0278-81. According to Mark Hargis, Amoco's lead negotiator, "Not a single carrier actually spent any time discussing the single occurrence. They told us that it was not something they were willing to settle on or pay significant money for settling." CR2-0038-39. Jim Teff, lead negotiator for the London Market, similarly testified that he gave no credit to the single occurrence theory and did not pay settlement value for gas station cleanup costs. CR2-0089-90, 0100-102. Other insurers explained that legal rulings in lawsuits brought by other insureds dismissed the single occurrence theory and that it was inconsistent with the language in Amoco's policies. CR2-0276; CR2-0278-81. The insurers also recognized that the only sites Amoco legitimately valued were included in the coverage lawsuit. CR2-0078-79.

Amoco ultimately entered 23 settlement agreements for approximately $191 million—a fraction of the $2.7 billion that Amoco demanded for the litigation sites

alone (none of which were gas stations). CR2-0039; CR2-0099; CR2-0100-102; CR2-0351-53. The settlement agreements expressly excluded past and future reimbursements from state UST funds. CR2-0289.

D. Third-Party Sites

Separate from its insurance-based claims, the State also seeks to recover reimbursements the Fund paid to eligible, third-party applicants at 19 South Dakota gas stations where Amoco neither sought nor received Fund reimbursement. CR1-5055-56. At these sites, some third-party unaffiliated with Amoco reported the release, the State identified that third party as responsible for the release, and the third party cleaned up the site, submitted applications to the Fund, was approved for Fund reimbursement, and received all payments. CR1-0969-70. The State claims Amoco previously owned these 19 sites, the releases occurred when Amoco owned them, and Amoco should have been named responsible.

The 19 "indirect" releases for which Plaintiffs seek damages were reported to the State between 1989 and 2004, and all but one was reported by 1998. CR1-2331; CR1-2392. To the extent Amoco ever had any involvement at these gas stations, it has not in at least 20 years. CR1-2406. Amoco's prior ownership, where applicable, was not only a matter of public record, but in many cases was also documented in the State's own files. *E.g.*, CR1-2333.

The Circuit Court granted Amoco's motion for summary judgment on statute-of-limitations grounds for all indirect sites except one: Site 6917. App'x 14; CR1-5058. Amoco sold Site 6917 in 1986. CR1-5060. The new owners replaced Amoco's USTs shortly after the sale but did not report any gasoline contamination until 2004—18 years after Amoco sold the station. CR1-5064, 5135-36. After the new owners reported the

leak, the State fulfilled its statutory obligation to "conduct an investigation to determine the responsible person" and "designate as the responsible person the person deemed to be the most responsible for the occurrence of the discharge," and it identified the new owners as the responsible party for the leak. SDCL § 34A-12-16; CR1-5138. Both the new owners and the State knew Amoco formerly owned this station; neither suggested at the time that Amoco should be designated the responsible party. CR1-4576; CR1-5060-62. The Circuit Court subsequently granted summary judgment as to Site 6917 on grounds the State does not have a legal avenue for challenging its own prior administrative decision and the State did not produce any evidence Amoco was responsible for the release. Op. 28-33 (App'x 54-59).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo and will affirm "so long as there is a legal basis to support [the] decision." *Heitmann v. Am. Family Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, 883 N.W.2d 506, 508-09. Contract interpretation, including interpreting insurance policies, is a question of law for the Court. *Lowery Constr. & Concrete, LLC v. Owners Ins. Co.*, 2017 S.D. 53, ¶ 7, 901 N.W.2d 481, 484. Evidentiary and discovery determinations, including exclusions under Rule 408, are reviewed for abuse of discretion and "presumed to be correct." *Thompson v. Mehlhaff*, 2005 S.D. 69, ¶ 32, 698 N.W.2d 512, 522.

ARGUMENT

I. THE COURT SHOULD AFFIRM SUMMARY JUDGMENT ON THE INSURANCE-BASED CLAIMS BECAUSE AMOCO DID NOT HAVE APPLICABLE INSURANCE AS A MATTER OF LAW.

The Circuit Court correctly granted summary judgment on Counts I-V because Amoco did not have insurance for the gas station cleanup costs the Fund reimbursed as a

matter of law. These claims all turn on the same flawed allegation that Amoco failed to tell the Fund that it had insurance coverage for the costs the Fund reimbursed. Op. 9 (App'x 35) ("Counts I to V … are all dependent on whether Defendants in fact had insurance coverage"); CR1-0955-69. To defeat summary judgment, the State therefore bore the burden to adduce evidence that Amoco had applicable insurance for each of the 27 sites where Amoco received Fund reimbursement—namely, that coverage exists under a specific policy's terms and that each reimbursed leak occurred during the period of the supposedly applicable insurance contract. *Lowery*, 2017 S.D. 53, ¶ 12, 901 N.W.2d at 485 (coverage "must be determined by the plain meaning of the language of each specific policy and the scope of coverage as applied to the unique facts of the case"); SDCL § 15-6-56(e).

The State failed to meet its burden—and the Circuit Court correctly granted summary judgment—for two independent reasons. *First*, the State did not even try to point to any policy that provided applicable coverage, much less tie any of the 27 leaks to a specific policy. *Second*, under their plain and unambiguous terms, Amoco's policies did not cover any of the 27 leaks.

A. The State Could Not Identify A Single Policy That Provided Applicable Coverage.

Whether insurance coverage exists is a pure question of law, "determined by the language of the contract." *Swenson*, 2013 S.D. 38, ¶ 13, 831 N.W.2d at 407; *Lowery*, 2017 S.D. 53, ¶ 12, 901 N.W.2d at 485. Yet the State does not and cannot cite a single insurance policy whose terms provide coverage for any—let alone *each*—of the 27 leaks. *See* Op. 8 (App'x 34) ("Plaintiff has not identified the specific policies providing coverage for each of the 27 sites at issue"). That is fatal—and entitles Amoco to

summary judgment. Without linking policies to particular sites, the State cannot show Amoco had insurance for any costs the Fund reimbursed.[4]

The State's only response is to try to shift its summary judgment burden to Amoco, citing "duty to defend" cases to argue Amoco must prove it did *not* have coverage. Br. 24-25. To begin, establishing a duty to defend would not even help the State: its claims all turn on whether Amoco had actual insurance *coverage*, not whether Amoco's insurers would have had a "duty to defend" a lawsuit over coverage. *See* Op. 9 (App'x 35). The State also conflates the Circuit Court's ruling that the State failed to meet its burden to "identif[y] the specific policies providing coverage" with the court's separate and independent holding related to policy *exclusions* (discussed below). Op. 8 (App'x 34). The State did not point to a single policy it claims was triggered for even a single release—and that initial burden falls on the party seeking coverage. Policy exclusions—which insurers can use to prove they do not have a duty to defend—are not relevant at all until a plaintiff raises coverage under a particular policy in the first instance.

B. The Policies' Plain Terms Preclude Coverage.

The Circuit Court could have stopped there, but its alternative holdings construing the policy terms provide independent grounds to affirm. The State argues the Circuit

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[4] The State mentions a Traveler's policy in its statement of facts, Br. 10, but does not discuss it in its argument. Br. 24-25. Any claim it provided coverage is therefore waived. *Duerre v. Hepler*, 2017 S.D. 8, ¶ 28, 892 N.W.2d 209, 219–20. In any event, the Circuit Court correctly held the Traveler's policy did not provide applicable coverage based on its plain terms. Op. 10 (App'x 36). First, it was limited to occurrences between 1974 and 1977, and the State has no evidence of a release during that period. CR2-0993, 1014. Second, the policy's coverage was limited to losses caused by specific Amoco "agents" or from premises owned by Amoco agents. It did not cover leaks, like these, that were *Amoco's* responsibility from USTs on property *Amoco* owned or operated. CR2-1000, CR2-1003.

Court "disregarded several factual issues" about the existence of coverage. Br. 24. But "[t]he interpretation of an insurance policy is a question of law," and "[t]he existence of the rights and obligations of parties to an insurance contract are determined by the language of the contract." *Swenson*, 2013 S.D. 38, ¶ 13, 831 N.W.2d at 407. Here, the plain language of Amoco's policies—which the State has never suggested is ambiguous—unambiguously preclude coverage for gas station cleanup costs.

First, the court correctly held that coverage "was clearly not available to cover to cleanup costs" due to the policies' self-insured retentions (SIRs), which presented "an insurmountable math problem" for the State. Op. 10 (App'x 36). Amoco's policies contained SIRs of at least $2.5 million per occurrence since 1971 and $5 million per occurrence from 1972 onward. Br. 12-13; Op. 10 (App'x 36); CR2-0033; CR1-4797-98. Amoco therefore had no insurance—*i.e.*, was "self-insured"—for any losses below the SIR amount. CR2-0066-67. Fund reimbursement, meanwhile, was capped at a maximum of $1 million per release—well below Amoco's SIR. *See* SDCL § 34A-13-8.1. In fact, the most Amoco received in Fund reimbursement for any single site was $677,800, for a leak that occurred 15 years after Amoco's policies contained the $5 million SIR. CR1-4626-27. It is thus impossible that any costs the Fund reimbursed could have exceeded the SIR in any of Amoco's policies and triggered any insurance coverage.

The State's only response is to point to Amoco's supposed "admissions in its global settlement report" that a "'one occurrence' argument could potentially overcome the SIR issues." Br. 24-25. But insurance coverage is a question of law, and a party's settlement position cannot change the law. Further, statements Amoco made during

settlement negotiations are inadmissible both under Rule 408 and because extrinsic evidence cannot alter unambiguous contracts (as discussed below). Equally important, no court has ever accepted this so-called one-occurrence argument—*i.e.*, that leaks at all of company's gas stations in different locations across the county can be lumped together and treated as a single occurrence—and the State cites none. Op. 13 (App'x 39) ("This Court finds the Court's analysis in the *Douglas Oil v. Allianz* case to be persuasive."); CR2-0276 (noting the judge "dismissed [the] single occurrence argument as flippantly as I did"). And as the Circuit Court explained, the one-occurrence argument would not even help the State here, because it still would not exceed the SIRs in Amoco's policies even if all stations at issue were aggregated—an alternative holding the State does not even challenge. Op. 13 (App'x 39) (explaining the State "could not have" exceeded the $5 million SIR "utilizing only the costs reimbursed in South Dakota").

Second, and independently, the court correctly held that pollution exclusions in Amoco's policies preclude coverage as a matter of law. Op. 13-17 (App'x 39-43). Starting in 1985, all of Amoco's policies contained an "Absolute Pollution Exclusion" that completely barred coverage for environmental pollution claims. CR2-0010; CR2-0061-62; *see also, e.g.*, CR1-5026 ("This insurance shall not apply to … seepage and pollution"). Courts across the country agree, routinely holding UST leaks fall within the absolute pollution exclusion as a matter of law. *See, e.g.*, *Whittier Props., Inc. v. Alaska Nat'l Ins.*, 185 P.3d 84, 90-91 & n.29 (Alaska 2008) ("Over 100 appellate court cases and 36 jurisdictions have ruled that pollution exclusions like the one at issue here unambiguously bar coverage for harms caused by exposure to many different types of pollutants."); *accord, e.g.*, *Nascimento v. Preferred Mut. Ins. Co.*, 478 F. Supp. 2d 143,

149 (D. Mass. 2007) (granting summary judgment because UST leaks fell within exclusion); *Union Mut. Fire Ins. Co. v. Hatch*, 835 F. Supp. 59, 67 (D.N.H. 1993) (same). The State can cite just a single outlier case from Indiana that has *ever* come out the other way, based on unique considerations not relevant here.[5] Br. 25. And even the Indiana Supreme Court has since "retreated from the concerns that the court expressed" in that case. *See Nautilus Ins. v. Sunset Strip, Inc.*, 2015 WL 4545876, at *9 (S.D. Ind. July 28, 2015).

The State's only other response is that the Circuit Court "overlooked that both PRCF's expert Mr. Ram and Amoco, itself, maintained all tanks leaked from the inception of their use."[6] Br. 24. Not so. There is no evidence that leaks at *these* 27 sites occurred before 1985, as needed to trigger policies without an absolute pollution exclusion. Rather, as the Circuit Court recognized, "[t]he earliest known reported discharge at any of these sites occurred in 1987." Op. 11 (App'x 37). The State did not challenge that holding on appeal. *See* Br. 24-25. Even if it had, Dr. Ram's speculation is contrary to the record evidence and thus could not raise a genuine issue of fact: "Speculation and general assertions that all sites leaked are not enough." Op. 17 (App'x 43); *see also Lawrence Cnty. v. Miller*, 2010 S.D. 60, ¶ 15, 786 N.W.2d 360, 367. The

[5] That case addressed the exclusion in a garage liability policy, which involves policy considerations not relevant in the CGL context. *See American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 949 (Ind. 1996).

[6] The State's assertion about Amoco's position has no citation but appears to refer to positions taken during settlement negotiations. Amoco took no such position in settlement—and certainly said nothing about the release dates at these 27 sites. Indeed, the settlement report actually assumed only 25 percent of tanks leak. CR2-0165. Even if it had, however, any such statements would be inadmissible under Rule 408.

State cannot overcome the absolute pollution exclusion, as the Circuit Court correctly held. Op. 14-16 (App'x 40-42).[7]

Independently, Amoco's pre-1985 policies contained "qualified" pollution exclusions, which excluded coverage for pollution unless the release happened "abrupt[ly]." Op. 16 (App'x 42); *Demaray v. De Smet Farm Mut. Ins. Co.*, 2011 S.D. 39, ¶¶ 14-15, 801 N.W.2d 284, 289; CR2-0011; CR2-0061; *see also, e.g.*, CR1-4954. As the Circuit Court correctly concluded, Plaintiffs did not "point[] to any evidence … from which it can be inferred that the releases at any of the 27 sites at issue were sudden," and in fact "the only specific evidence of the record shows the opposite"—the Fund's 30(b)(6) designee admitted that "[m]ore often than not" UST leaks "are *not* a sudden release," and thus are excluded under qualified pollution exclusions. Op. 16 (App'x 42); CR1-4552-53 (emphasis added).

* * *

In sum, the Circuit Court correctly identified three independent reasons why Amoco did not have applicable insurance as a matter of law, any of which is sufficient to affirm summary judgment on the State's insurance-based claims (Counts I-V): (1) the State failed to meet its burden to identify specific policies whose terms provided

[7] The State also argues its expert's opinion "that there was the potential for coverage," at each site was not an inadmissible legal opinion. Br. 24-25. The State does not support this argument with any authority and thus waived it. *Duerre*, 2017 S.D. 8, ¶ 28, 892 N.W.2d at 219-20. Moreover, coverage is a legal question for the court based on the terms of the policies, so no extrinsic evidence would be admissible to alter the terms of the unambiguous polices—much less inadmissible expert legal opinion. *See supra* at 21. The Circuit Court properly "decline[d] to rely upon" Mr. Allen's conclusions regarding coverage. Op. 9 (App'x 35); *S. Pine Helicopters, Inc. v. Phoenix Aviation Mgrs., Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) ("expert testimony on legal matters is not admissible").

applicable coverage; (2) the policies' SIRs barred coverage; and (3) the policies' pollution exclusions barred coverage.

II. THE CIRCUIT COURT CORRECTLY REJECTED THE STATE'S SETTLEMENT ARGUMENTS.

Instead of grappling with the actual terms of Amoco's insurance policies, which on their face preclude the State's claims, the State leads with arguments about—and devotes its entire statement of facts to—extrinsic, Rule 408 settlement evidence the Court need not even reach. Specifically, the State argues this settlement evidence shows Amoco's unambiguous polices had the "potential" for coverage (tacitly conceding their unambiguous terms did not *actually* provide coverage). Br. 16-25.

The State's position is a non-starter. Once again, settled South Dakota law provides that insurance coverage is "determined by the language of the contract, which must be construed according to the plain meaning of its terms." *Swenson*, 2013 S.D. 38, ¶ 13, 831 N.W.2d at 407. Extrinsic evidence is inadmissible to alter the contracts' plain meaning. *See LaMore Rest. Grp. v. Akers*, 2008 S.D. 32, ¶ 30, 748 N.W.2d 756, 764; *see also* Op. 18 n.15 (App'x 44). Because Amoco's policies are unambiguous, the court need not consider the State's Rule 408 argument at all.

But it also fails on the merits, and the Circuit Court correctly rejected it for two additional reasons. *First*, the settlement evidence is inadmissible under Rule 408. Op. 18-22 (App'x 44-48). *Second*, "even if the settlement documents were admissible under Rule 408, they do not contain evidence showing that Amoco's insurers paid any value for UST cleanup costs at gas stations." Op. 22 (App'x 48).

A. Rule 408 Bars Settlement Evidence.

The Circuit Court correctly held the settlement evidence inadmissible under Rule 408. Like all evidentiary decisions, the Circuit Court's ruling is presumed correct and may not be reversed absent a clear abuse of discretion. *First Premier Bank v. Kolcraft Enters., Inc.*, 2004 S.D. 92, ¶ 27, 686 N.W.2d 430, 444, *superseded on other grounds by* S. Ct. Rule 06-67. A Circuit Court abuses its discretion only when its decision is "clearly against reason and evidence." *Ronan v. Sanford Health*, 2012 S.D. 6, ¶ 8, 809 N.W.2d 834, 836. Neither is true here.

South Dakota Rule of Evidence 408 "forbids admission of a settlement or settlement negotiations 'to prove liability for or invalidity of the claim or its amount.'" *First pre* (citations omitted). The State's repeated admissions both before the Circuit Court and on appeal make it "abundantly clear … that [it] is offering the settlement evidence for *precisely* the purposes that are prohibited." Op. 18 (App'x 44). Below, the State argued that the "settlements here in fact are evidence of the availability of coverage." CR2-0422. The State's admissions on appeal are equally telling. It explicitly seeks to use the settlement evidence to show (1) "it was Amoco's belief in 1997 and 1998 that it potentially had coverage for UST releases," and (2) "the viability of [Amoco's] insurance coverage." Br. 19-20. In other words, the State admits it wants to use settlement evidence to prove liability on the State's insurance coverage claims—that Amoco's settlement position shows its insurance policies covered gas station cleanup costs. But that is exactly what the Rule prohibits. Consequently, the Circuit Court reasonably (and correctly) excluded the settlement evidence. Notably, two other courts facing the same issue, involving the same documents, in virtually identical cases brought by other states' UST funds reached the same conclusion. *Petroleum Underground*

Storage Tank Release Compensation Board v. Standard Oil Co., No. 2017-00834PR, at *9-11 (Ohio Ct. Claims May 17, 2019) ("Ohio Op.") (App'x 0323) ("[T]he Board is offering the settlement evidence for the exact reason that such evidence is deemed inadmissible under Evid. R. 408."); *Petroleum Tank Release Compensation Board v. BP PLC*, No. 62-CV-14-842, at *9-10 (Minn. D. Ct. Dec. 29, 2015) ("Minn. Op.") (CR-3830) ("Amoco's objection to the admissibility of the Settlement Report and related discussions must be sustained.").

The State's attempts to avoid Rule 408 all fail. *First*, it argues Rule 408 does not apply because there was no "disputed claim" during settlement negotiations.[8] Br. 16-18. That argument, as the Circuit Court put it, is "entirely facetious." Op. 20 (App'x 46). The entire "crux" of the State's argument is that Amoco made a claim for gas station cleanup costs in settlement negotiations with its insurers and received settlement value for these "claims." *Id.* Indeed, the State alleges on appeal that "Amoco *claimed* in its London Market Settlement Report that it had pollution releases throughout its entire ownership of each of its UST sites" and argued in settlement "*demands* ... that all policies were triggered for all *claims*." Br. 8 (emphasis added). The State contends that Rule 408 does not apply because Amoco did not believe its settlement argument that the insurance policies covered gas station cleanup costs. *Id.* at 17-18. But that only cements Rule 408's applicability. Settlement evidence is inadmissible *because* negotiations "are typically punctuated with numerous instances of puffing and posturing" and "could very

[8] The State also suggests Rule 408 does not apply to settlements with third parties. *See* Br. 16-17. To the contrary, South Dakota law expressly prohibits a plaintiff from showing "a defendant's liability by proof of a defendant's settlement *with a third person*." *First Premier Bank*, 2004 S.D. 92, at ¶ 21, 686 N.W.2d at 443 (emphasis added).

well not be the sort of evidence which the parties would otherwise contend to be wholly true." *Eid v. Saint-Gobain Abrasives, Inc.*, 377 F. App'x 438, 444 (6th Cir. 2010) (citations omitted).

Second, the State argues Rule 408 does not apply to "factual material that is not disputed." Br. 18. Even assuming that were legally true, this case does not concern undisputed factual material. Far from it: Amoco's insurance coverage is "hotly disputed"—the central dispute in this case, in fact—and a *legal* issue. Op. 21 (App'x 47). The State is not seeking to admit a fact unrelated to the compromised claim; it wants to admit settlement evidence to establish Amoco's liability.

Third, the State claims it is not using settlement evidence to show liability, but for "another purpose" allowed under Rule 408. Br. 18-19. It is not. Indeed, the State refutes its own argument, suggesting its "other" purpose is to show that "Amoco took positions about the validity of those claims that directly *contradict* Defendants' current position in this matter." *Id.* at 19 (emphasis added); *see also* CR2-0425. Rule 408 expressly prohibits using settlement evidence "to impeach by a prior inconsistent statement or *contradiction*." SDCL § 19-19-408 (emphasis added); Op. 18 (App'x 44).

Fourth, the Circuit Court did not abuse its discretion, as the State contends, by distinguishing and disagreeing with the magistrate's decision in *C&E Services, Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 320-21 (D.D.C. 2008). *See* Br. 19-20. To start, the case is not binding precedent and is very factually distinct from this one. There, the plaintiffs wanted to use settlement evidence only for the limited purpose of proving the defendant had lied to the plaintiff about the amount of a prior settlement. *C&E Services*, 539 F. Supp. 2d at 319-20. In admitting the evidence for that narrow purpose, the court

emphasized that the evidence could "be presented as briefly as possible … in the form of a stipulation" and that the plaintiffs could not use the evidence to establish "a necessary element of the plaintiffs'" claim, which would be "too 'close to the Rule's categorical prohibition of evidence proving liability.'" *C&E Services*, 539 F. Supp. 2d at 320-21. Here, the opposite is true: whether Amoco had insurance coverage for gas station cleanup costs is the central issue in this case and a necessary element of each of the State's claims. In any event, the mere fact that another judge from a different jurisdiction might reach a different conclusion is no basis to establish an abuse of discretion: "The test is not whether we would have made the same ruling, but whether we believe a judicial mind, in view of the law and the circumstances, could have reasonably reached the same conclusion." *Wangsness v. Builders Cashway, Inc.*, 2010 S.D. 14, ¶ 11, 779 N.W.2d 136, 140. That is true for the Circuit Court's Rule 408 ruling here, which reasonably and correctly distinguished *C&E*. In fact, every court to address this *very* settlement evidence has sided with the Circuit Court, not the State. *See* Ohio Op. at *9-11 (App'x 0321-23) (excluding settlement evidence); Minn. Op. at *9-10 (CR1-3830) (same).

Fifth, the State argues "Amoco cannot now allocate the previously unallocated settlements," Br. 20, but this claim is both legally incorrect and completely beside the point. *None* of the cases the State relies on even address Rule 408 or the admissibility of settlement evidence. Nor do the cases the State cites remotely support its position that the "great weight of authority across all jurisdictions has consistently rejected an obligor's attempt to minimize its repayment obligations through after-the fact allocations," Br. 20, considering they expressly *order* after-the-fact allocation. *E.g.*,

Wright v. Aetna Life Ins. Co., 110 F.3d 762, 765 (11th Cir. 1997) (remanding "to determine the extent to which the net amount of Wright's settlement is attributable to medical expenses"); *Dimick v. Lewis*, 497 A.2d 1221, 1224 (N.H. 1985) (remanding to "determine the amount of the net proceeds to which Blue Cross/Blue Shield is entitled on a pro-rata basis, proportionate to the plaintiff-father's share of the total settlement").

Finally, the State's last-ditch estoppel argument—that taking one position during settlement discussions prohibits taking a contrary position in litigation—simply underscores why that Rule 408 applies. Rule 408 "is designed to encourage out-of-court resolution of disputes." *First Premier Bank*, 2004 SD 92, ¶ 21. If a party could be faced with later estoppel claims based on positions taken during settlement negotiations, the purpose of Rule 408 would be eviscerated. Far from rendering Rule 408 inapplicable, such evidence is actually what it seeks to protect. *See* SDCL § 19-19-408 (holding that settlement evidence is inadmissible "to impeach by a prior inconsistent statement or contradiction"). Nor is there any merit to the State's argument that it need not point to specific policies to establish coverage because Amoco did not do so during Rule 408 settlement negotiations (Br. 22-23)—a position the insurers rejected, no less. *See infra* at 28-29. As the Circuit Court correctly held: "This is not a settlement conference. In order to prevail against a summary judgment motion, Plaintiff carries the burden of identifying specific facts which support each of the elements of its claims." Op. 8, n.6 (App'x 34).

B. Settlement Evidence Would Not Help In Any Event.

Even if settlement evidence were admissible, the decision to exclude "must be prejudicial before this Court will overturn the Circuit Court's evidentiary ruling." *Wangsness*, 2010 S.D. 14, ¶ 11, 779 N.W.2d at 140. The State could not make that

showing here, because the settlement evidence is uncontroverted that Amoco did not receive value for gas station cleanup costs. Excluding it therefore could not have prejudiced the State.

To begin, Amoco's settlement report on its face was limited to pollution in existence *before* June 1, 1985, because the absolute pollution exclusion barred coverage after that date. CR2-0160. Any settlement payments Amoco received necessarily related to pre-1985 pollution, and the State has not challenged the Circuit Court's finding that all evidence in the record shows all 27 leaks at issue here occurred *after* 1985. Op. 26, n.21 (App'x 52) ("Plaintiff failed to produce evidence showing that the costs related to the releases at any of the 27 UST sites at issue here, all reported after 1985, would have been covered by any of these policies."); *id.* at 24 (App'x 50) ("Plaintiff has failed to point to any specific evidence indicating that any of the releases at the 27 sites at issue occurred before 1985."). Thus, the settlement evidence the State wants to use could not possibly support is claims of double recovery.

Independently, the Circuit Court concluded that the State "failed to point to any specific facts from which it can be reasonably inferred that the settlement monies received by Defendants included value for costs of cleanup from UST leaks at gas stations in general, much less at the 27 sites at issue here." Op. 22 (App'x 48). All record evidence shows that Amoco did not receive settlement money for gas station cleanup costs.

First, Amoco's insurers paid settlement value only to buy back their insurance policies and any coverage that actually existed under the policies—specifically, the 23 sites at issue in the underlying lawsuit, none of which were gas stations. Op. 22-24

(App'x 48-50). James Teff, lead negotiator for the London Market, testified that he created settlement reserves based exclusively "on the major sites in litigation" (which did not include gas stations) and only paid settlements out of those reserves. CR2-0057-58, 0079. Amoco asserted $2.7 billion in costs for the litigation sites alone—the sites with actual value, which excluded gas stations—and received $191 million in settlements, or less than 7% of its asserted costs for just the 23 litigation sites. CR2-0350-53. And the record is otherwise clear that no value was paid for service stations.

Mr. Teff explained that Amoco's insurers were only willing to settle the coverage dispute if they could achieve "finality" with respect to both the litigation and the policies themselves—*i.e.*, if Amoco not only settled the litigation, but also sold back the insurance policies and thus transferred all potential exposure from the insurers back to Amoco. CR2-0081-82. When asked whether "the Lloyd's settlement amount gave any credit to the costs of cleaning up underground storage tank leaks at Amoco's gas stations," Mr. Teff answered, "[N]o." CR2-0101-02. He further agreed that the London Market did not "pay any additional value to Amoco to achieve this broader release that went beyond the claims reserved for, as reflected in the coverage case." CR2-0100.

Second, the record evidence is undisputed that Amoco's insurers uniformly rejected and placed no value on the single-occurrence theory, which was the only conceivable way UST sites could have exceeded the high SIRs in Amoco's policies. Op. 23-24 (App'x 49-50). Mr. Teff testified unequivocally that he rejected the single-occurrence argument and that the London Market's settlement did not give any credit to Amoco for gas station cleanup costs. CR2-0089-90, 0100-102. Other insurers similarly rejected the argument. For instance, one sent Amoco a letter attaching a judicial decision

rejecting another oil company's attempt to pursue a similar "single occurrence" theory in court, noting the judge "dismissed [the] single occurrence argument as flippantly as I did." CR2-0276. Another stated that it did "not agree that Amoco can at will aggregate those claims as one 'system' to circumvent the policy language." CR2-0280. And Mark Hargis, Amoco's lead negotiator, testified that "[n]ot a single carrier actually spent any time discussing the single occurrence. They told us that it was not something they were willing to settle on or pay significant money for settling." CR2-0038-39.

Finally, the settlement report and ultimate settlement agreements "expressly excluded amounts received, or to be received, by Amoco from any state or federal program established for the purpose of funding the investigation and cleanup of underground storage tanks." Op. 24 (App'x 50) (citing CR2-0289; CR2-2163-64; CR2-0164). Under South Dakota law, the plain terms of the settlement agreements are controlling. *See Lewis v. Benjamin Moore & Co.*, 1998 S.D. 14, ¶¶ 3-9, 574 N.W.2d 887, 888-89. By definition and as a matter of law, there could not have been any double recovery.

The State did not, and still has not, presented any evidence to the contrary. It still has not cited any evidence supporting its argument that the settlement agreements covered or paid money for gas station cleanup costs. Thus, even if settlement evidence were admissible (and it is not), the State was not prejudiced by its exclusion.

III. THE COURT SHOULD AFFIRM SUMMARY JUDGMENT ON THE SUBROGATION AND FRAUD CLAIMS BECAUSE AMOCO DID NOT HAVE APPLICABLE INSURANCE.

A. The Circuit Court Correctly Granted Summary Judgment on the State's Subrogation Claim.

The Circuit Court correctly granted summary judgment on the State's claim that Amoco breached subrogation agreements by settling with its historical CGL insurers (Count II). In fact, as the Circuit Court observed, this claim necessarily falls with the State's insurance arguments: To succeed on a claim for breach of subrogation, the State would not just have to show that its subrogation rights were lost, but also that it was prejudiced by the loss because it would have succeeded in recovering against the insurers—which in turn requires showing Amoco had insurance coverage for the 27 sites at issue. Op. 27 (App'x 53) (citing *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820, 826-29 (Iowa 2004)); *see also United States v. Munsey Tr. Co.*, 332 U.S. 234, 242 (1947) ("[I]t is elementary that one cannot acquire by subrogation what another whose rights he claims did not have.") Thus, the Circuit Court explained, the State's subrogation claim "comes full circle, back to the issue whether Amoco had insurance coverage." Op. 27 (App'x 53). Because it did not, the State was not prejudiced by Amoco's settlement agreements, and this claim "fail[s] as a matter of law." *Id.*

The State's arguments to the contrary are both undeveloped—without a single citation to the record or legal authority, Br. 26—and legally incorrect. The Circuit Court did not "ignore[] [that] the unallocated settlements released rights to PRCF." *Id.* Rather, the court held that the State could not prove prejudice because Amoco (and therefore the State, which would step into Amoco's shoes) had no rights under the insurance policies to recover against the insurers in the first instance. Op. 27 (App'x 53). Nor did the

Circuit Court "impermissibly weigh[] the evidence" in reaching that conclusion, as the State claims. Br. 26. The Circuit Court's holding about the scope of Amoco's insurance coverage was a pure question of law. *See Swenson*, 2013 S.D. 38, ¶ 13, 831 N.W.2d at 407.

B. The Circuit Court Correctly Granted Summary Judgment on the State's Fraud Claims.

The Circuit Court also correctly granted summary judgment on the State's fraud claims (Counts I, III, IV, and V), because the undisputed record demonstrated there were no false statements, misrepresentations, or omissions. Op. 27-28 (App'x 53-54). As set forth above, the court correctly concluded that Amoco did not have applicable insurance as a matter of law. Accordingly, Amoco's applications were truthful. The State counters by arguing that not only did Amoco have to disclose if it had insurance coverage but also if it "might" have had coverage under any policy. Br. 27. No matter. An applicant that does not have insurance as a matter of law has nothing to report regardless of how equivocal the question presented. Moreover, not only were Amoco's statements correct as a matter of law, but to be fraud a statement must be susceptible of truth or falsity. *See Meyer v. Santema*, 1997 S.D. 21, ¶ 11, 559 N.W.2d 251, 255 ("false representations must be of past or existing facts").

Notably, the Circuit Court did not even reach the issue of scienter because there were no false statements or omissions (though the court noted the "merit" to Amoco's position that the undisputed evidence belied any inference of scienter or materiality). Br. 27-28; Op. 28 (App'x 54). This Court can, however, affirm on any ground supported by the record, and the evidence is uncontroverted that every witness believed Amoco did not have insurance for the costs the Fund reimbursed. *See* CR1-4590-4591, 4596-4597;

CR2-0031-34. The State presented no contrary evidence, arguing only that Amoco senior management knew about Amoco's global settlement agreements with its insurers. Br. 28. That is not evidence that anyone at Amoco believed the company had coverage for gas station cleanup costs, and therefore cannot create a genuine issue of fact. This is yet another independent basis to affirm.

IV. THE COURT SHOULD AFFIRM SUMMARY JUDGMENT ON THE STATE'S "INDIRECT CLAIMS."

The State's so-called "indirect claims" relate to sites at which a third-party reported the release, the State identified that same third party as responsible for the release, and the third party cleaned up the site, submitted applications to the Fund, was approved for Fund reimbursement, and received all payment. The Circuit Court correctly held that the State lacks a legal avenue for attacking those agency decisions and that, even if there were a legal avenue, virtually all are barred by the statute of limitations.

A. The Court Should Affirm Summary Judgment on the State's Indirect Claim Related to Site 6197.

The State's undeveloped argument regarding Site 6197 identifies no basis for reversal. To begin, the State failed even to properly present this issue for appeal. It is not listed in the State's statement of issues, nor did the State mention it in its statement of facts or include citations to any pertinent legal authority in the argument. The State thus failed to comply with SDCL § 15-26A-60, and its argument is waived. *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 911-12 (S.D. 1987).

It also lacks merit even if the Court were to reach it. The State argues only that the Circuit Court erred by improperly weighing evidence when granting Amoco summary judgment on this strict liability claim. Br. 28. That misapprehends the holding below. The Circuit Court granted summary judgment because, among other things, the State

lacked an "available legal avenue allowing [it] to now hold Defendants liable." Op. 33 (App'x 59). Specifically, the Circuit Court concluded, after a thorough examination of the relevant statutory authorities—none of which the State mentions, much less analyzes—that "it is without the legal authority to now modify or overturn this agency decision that was never modified or reversed by the Department before it became final, nor appealed" by the third party held responsible at the time. *Id.*; *see also id.* at 31-32 (App'x 57-58).

The State did not challenge the Circuit Court's statutory construction or appeal its primary, statutory basis for granting summary judgment. It thus presents no possible basis to disturb the Circuit Court's judgment on this issue. Simply put, even if this Court credited the State's arguments regarding the Circuit Court's independent holding that this claim fails on the undisputed facts (and it should not),[9] there still would be no basis for reversal.

B. The Circuit Court Correctly Held The Remaining Indirect Claims Were Time-Barred.

The Circuit Court properly granted summary judgment for Amoco on the other "indirect" claims too. Once again, the State's challenge is futile, because even if

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[9] While this Court need not reach it, the Circuit Court's alternative holding—that the State did not meet its evidentiary burden to defeat summary judgment—should also be affirmed. *See* Op. 33 (App'x 59). To raise a triable issue that Amoco is liable for the release at Site 6917, the State needed evidence the leak occurred when Amoco owned or operated the USTs. The Circuit Court correctly concluded there was no evidence that this leak, reported in 2004, actually occurred before 1986 (when Amoco sold the site). CR1-5060-62; CR2-0399. Rather than producing actual evidence, the State conceded it did not know "who caused the release or when the release occurred" and relied exclusively on its expert witness's self-described "assumption" about when the leak occurred. CR2-0403; CR1-4603-04. The court correctly concluded that is not proper evidence and cannot defeat summary judgment. *E.g.*, *Lawrence Cnty.*, 2010 S.D. 60, ¶ 15, 786 N.W.2d at 367.

successful it would not impact the judgment: As explained above, the Circuit Court held as a matter of law that the State lacked an "available legal avenue" to bring these strict liability claims, Op. 31-33 (App'x 57-59), and the State did not appeal that ruling. The State's appeal of the court's statute of limitations decision cannot alter that now-binding holding.

Regardless, the Circuit Court's statute of limitations holding is correct and should be affirmed. The State's "indirect" claims allege Amoco is strictly liable for cleanup costs at sites it formerly owned even though the State previously determined third-party subsequent owners were responsible and those third parties—not Amoco—were the ones who applied for and received Fund reimbursement. These claims are governed by a six-year limitations period. SDCL §15-2-13; SDCL § 15-2-2.

Under South Dakota law, claims accrue and statutes of limitations begin to run "when plaintiffs first become aware of facts prompting a reasonably prudent person to seek information about the problem and its cause." *Gades v. Meyer Modernizing Co.*, 2015 S.D. 42, ¶ 9, 865 N.W.2d 155, 158-59. The "problem" in a strict-liability pollution claim is the pollution—*i.e.*, when the State "knew or reasonably should have known that there were leaks that caused damage." App'x 10. Thus, as the Circuit Court concluded, any claims accrued once the third-party gas station owners reported their UST leaks to the State. App'x 10-11. At that point, the State had actual notice of the petroleum contamination, and it could have identified any prior owners of the site or any other party that could be responsible for the contamination. App'x 12-13. Indeed, under South Dakota law, the State had an affirmative statutory obligation to investigate UST leaks and determine the identity of the responsible party: "If the department has determined that a

discharge has occurred, the department *shall* conduct an investigation to determine the responsible person." SDCL § 34A-12-16 (emphasis added). Given that statutory obligation, the statute of limitations began running "when the discharges were reported." App'x 13.

Here, it is undisputed that the State had knowledge of all of these releases by 2004. In fact, all but one was reported to the Fund by 1998. CR1-2331; CR1-2392. Yet the State did not bring these indirect claims until 2015—or sue Amoco at all until 2010—over a decade after the limitations period began running.

The State argues in response that the statute of limitations did not begin to run "when PRCF knew contamination existed but rather, when PRCF knew or should have known [Amoco] was potentially responsible," citing *East Side Lutheran Church of Sioux Falls v. NEXT, Inc.*, 2014 S.D. 59, 852 N.W.2d 434. Br. 30. *East Side Lutheran* is inapposite. That case concerned whether the plaintiff's knowledge of one construction-related claim (water infiltration) barred other claims (structural design and construction errors) entirely distinct from the water infiltration. *E.*. The Court held that the plaintiff's water infiltration claim was barred by the statute of limitations, but a fact question remained about whether the knowledge of water infiltration provided constructive notice of the other construction claims. *Id.* at ¶¶ 14-15, 440. In other words, the issue was whether knowledge of one problem provided constructive notice of other problems caused by other construction errors. Here, however, the State's claims all stem from a single "problem"—pollution from leaking USTs—which they admittedly knew about. This is the exact reason the Court in *Gades* distinguished *East Side Lutheran*. *Gades*, 2015 S.D. 42, ¶ 11, 865 N.W.2d at 160 ("[I]n contrast to the plaintiff in *East Side*

Lutheran Church, the Gadeses admit the entirety of their claim relates to the asserted water infiltration.").

The State's position, meanwhile, would read the statute of limitations out of existence, allowing the State to re-open its own responsible-party determinations and bring claims against previously uninvolved parties any time it decided its original investigation was not thorough enough—decades after the cleanups are completed. That is exactly what limitations periods are supposed to prevent: "Statutes of limitations are primarily designed to … promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Dakota Truck Underwriters v. S. Dakota Subsequent Injury Fund*, 2004 S.D. 120, ¶ 30, 689 N.W.2d 196, 203-04 (citations omitted). The Court should affirm summary judgment on these untimely indirect claims.

V. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN DENYING THE STATE'S MOTION FOR SANCTIONS, WHICH COULD NOT IMPACT THE JUDGMENT IN ANY EVENT.

Finally, the Circuit Court did not abuse its discretion when denying a discovery spoliation motion that did not meet the applicable standards and could not create reversible error in any event. The State's sanctions motion was purportedly relevant to its claim to recover for allegedly "undiscovered" pollution, which the court rejected as constitutionally defective. App'x 19 ("it is clear to me right now that the constitutional requirements for ripeness and standing are not present to entertain this claim"). The State is not appealing that ruling, and thus even if successful the State's sanctions challenge would not affect the judgment below. Any purported error would be harmless as a matter of law, and once again the Court need not consider this issue. SDCL § 15-6-61.

Regardless, the Circuit Court did not abuse its discretion. Spoliation requires "the intentional destruction of evidence," in bad faith, to suppress the truth. *Thyen v. Hubbard Feeds, Inc.*, 2011 S.D. 61, ¶ 16, 804 N.W.2d 435, 439. Destruction of evidence "by mistake, inadvertence, oversight, misjudgment, negligence, or ignorance" is not enough. *State v. Engesser*, 2003 S.D. 47, ¶ 44, 661 N.W.2d 739, 754. A party seeking sanctions also must show it was prejudiced by the discovery violation. *Dudley v. Huizenga*, 2003 S.D. 84, ¶ 15, 667 N.W.2d 644, 649; SDCL § 15-6-37(c) (sanctions not appropriate where conduct was "harmless").

The State's motion arose from an interrogatory seeking a list of every site in South Dakota with which Amoco ever had any affiliation. Amoco does not keep such a list in the ordinary course, and it went to great lengths to construct one, conducting a page-by-page review of voluminous records and compiling a list of 509 locations in South Dakota, covering service stations dating back to 1926. CR1-4228; *see also* CR1-4212-4259.

The parties subsequently learned that a former Amoco employee, Tammy Brendel, received a binder in 1990 listing the "25 to 30 sites" Amoco owned at the time. The binder was "a snapshot in time," and did not contain any information about sites Amoco no longer owned as of 1990. The information in the binder was all based on registration records the State already had in its possession. CR1-3845-46, 3849-50. Brendel also confirmed that every one of the 25 to 30 sites in her binder appeared on the list of the 509 locations Amoco identified in response to Plaintiffs' interrogatory. CR1-3850-3852.

When she retired from the company, Brendel mistakenly disposed of the binder—not because of any bad faith or intent to conceal the truth, but because "it was long beyond BP's record retention policy" and she did not think it was appropriate to retain. Brendel was aware of a legal hold for this case "involving UST reimbursements in South Dakota," but it "didn't dawn on [her] that [she] should possibly keep a list of service stations." CR1-3844.

The State nevertheless moved for sanctions, arguing Brendel's inadvertent mistake constituted spoliation. After reviewing the record, the Circuit Court correctly rejected the State's motion on three separate and independent grounds: (1) there was no evidence of bad faith, (2) any discovery violation was harmless because the State still had access to all of the allegedly spoliated information, and (3) there could not possibly be any prejudice to the State because the Circuit Court was granting summary judgment for Amoco on the State's "undiscovered" theory on ground "not dependent on the information contained in that … binder." App'x 20 ("[E]ven assuming it contained everything that the Plaintiffs suggest was contained there, it wouldn't affect my ruling.").

Nothing in the state's brief challenges *any* of the Circuit Court's bases for rejecting the sanctions motion, let alone all three. Br. 31-32. While this Court need not consider the sanctions issue at all, the State has not come close to identifying any abuse of discretion in the Circuit Court's ruling.

CONCLUSION

For all of these reasons, Amoco respectfully requests that the Court affirm summary judgment.

Dated September 4, 2019.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the length requirements of SDCL § 15-26A-66(b). Appellees' Brief contains 9,944 words as counted by Microsoft Word, excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues. The brief is written in proportionally spaced, 12-point Times New Roman font.

/s/ Jeffery D. Collins
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CERTIFICATE OF SERVICE

Jeffery D. Collins, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 30th day of August, 2019, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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/s/ Jeffery D. Collins
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28933

THE STATE OF SOUTH DAKOTA, THE SOUTH DAKOTA PETROLEUM RELEASE COMPENSATION FUND
Plaintiff and Appellant,
vs.
BP plc, BP AMEICA, INC. BP PRODUCTS NORTH AMERICA, INC., BP WEST COAST PRODUCTS, LLC and its predecessor companies and subsidiaries
Defendants and Appellees.

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

The Honorable Patricia J. DeVaney
Presiding Circuit Judge

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STATEMENT OF THE CASE

SDCL 15-26A-60(5) provides that "[a] statement of the case shall first be presented identifying the trial court and the trial judge and indicating briefly the nature of the case and its disposition in the trial court.…" BP's Statement of the Case is argument and should be stricken or disregarded.

I. THE TRIAL COURT ABUSED IS DISCRETION UNDER RULE 408 IN FINDING ALL SETTLEMENT EVIDENCE INADMISSIBLE

SDCL §19-19-408 prohibits the admissibility of evidence of compromise offers and negotiations "to prove or disprove the validity or amount ***of a disputed claim*** . . . compromising or attempting to compromise ***the claim*** …" or "[c]onduct or a statement made during compromise negotiations about ***the claim***…." The evidence, however, may be admitted "for another purpose." BP ignores the crucial factor for the invocation of Rule 408. To apply, Rule 408 requires a disputed claim during the settlement negotiations concerning the same claim as the current litigation. *See Ostrow v. GlobeCast America Inc.*, 825 F.Supp.2d 1267, 1272-1273 (S.D. Fla. 2011). The *Ostrow* Court held that compromise offers and negotiations do not bar admission of evidence of employer's settlement with another former employee because they were not the same claim. *See also Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293–94 (6th Cir. 1997) ("Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of the compromise, not some other claim."); *Armstrong v. HRB Royalty, Inc.*, 392 F. Supp. 2d 1302, 1304 (S.D. Ala. 2005) ("Rule 408 excludes evidence of settlement offers *only* if such evidence is offered to prove liability for or the invalidity [or amount] of the claim under negotiation."). (Emphasis added).

BP does not dispute these statements of the law. In fact, BP repeatedly tries to convince the trial court and this Court that the *Lloyds' litigation* and its settlements did not encompass UST contamination. Thus, BP's own words, themselves, establish that the claims here are *not* the same claims Amoco brought in the *Lloyds'* litigation, so Rule 408 should not apply. Those statements include the following:

1. "Indeed those settlements resolved a coverage lawsuit that did not even allege coverage for gas station UST Leaks." CR1-4485-4486. (Citation to the Current Record is CR Volume number-page number).
2. "…the components of the settlements 'were to resolve Amoco's coverage lawsuit, which did not include USTs, and to buy back all CGL coverage.'" 4488-4489.
3. "As its primary author, Mark Hargis explained, 'the settlement report really doesn't have anything to do with coverage. It's a quantification of exposures.'" CR1-4490.
4. "But there is no evidence whatsoever that the insurers paid settlement value for service station costs." CR1-4492.
5. "After responsive pleading by the carriers and initial discovery, the *Amoco v. Lloyd's* coverage complaint was expanded in 1995 to include 18 additional sites – still limited to large refineries, chemical plants, and other sites where Amoco had major environmental liabilities." CR1-4518.
6. "None of the 23 sites at issue in the *Amoco v. Lloyds* coverage lawsuit was for a service station, and none was located in South Dakota; Amoco did not sue any insurer for coverage of any service station sites – in South Dakota or elsewhere." CR1-4518.
7. "Despite the Settlement Report's inclusion of service stations among Amoco's potential environmental liabilities, Amoco never made an actual insurance 'claim' related to any South Dakota service stations, which would have required providing contemporaneous 'notice' to its insurers, and are presented through brokers or in litigation." CR-4522.
8. "The insurers also recognized that the sites Amoco thought were covered by insurance and had any real value were the ones they actually pursued in court, and Amoco did not include service stations in the coverage lawsuit." CR1-4525.

Taking its numerous statements as fact, BP clearly believed no disputed claim existed concerning UST tanks in the *Lloyd's* litigation. The only real dispute, according to BP, was the large refineries. Consequently, BP's own position renders Rule 408 inapplicable here. Accordingly, the trial court should be reversed on this issue.

BP also inaccurately states that every court to address this very settlement evidence issue has sided with the trial court and not the State, citing opinions from Ohio

and Minnesota. A Colorado Court, however, rejected the oil companies' Rule 408 objection in virtually the identical fact pattern[1]. *See* App'x1-16. *See* 12CV451. In *State of Colorado et al v. ConcocoPhillips Co.,* the Court stated:

> COP's arguments about the role of CRE 408 on the admissibility of its settlement of the California Litigation misapprehended the role of Rule 408(a). The fundamental issue in this case is whether … COP was … required to disclose the very settlement in issue, a subject not rendered inadmissible by either CRE 408(b), 403 or 401. The existence of the settlement of the California Litigation is *the* issue which will make more or less probably the State's claim and COP's defenses to the breach of contract claim. (Emphasis in original) App'x12.

Ironically, BP hides behind Rule 408's purpose, citing the goals of promoting settlements, and that such negotiations are typically punctuated with puffing and posturing. That did not happen here. Here, BP took money from PRCF, attesting it had no insurance coverage for UST leaks and assigning all rights to insurance coverage to PRCF. BP promised it had not and would not make any settlements against whom a claim may lie. CR1-948. At the same time, unbeknown to the PRCF, BP sued its own insurers, claiming it had insurance coverage for UST leaks and ultimately reaching unallocated settlements for hundreds of millions of dollars that released the claims for insurance coverage for UST leaks. Because of Amoco's Subrogation Assignments, BP retained no argument to make whether insurance coverage existed, and more importantly, BP had no right to release any such claims without the PRCF's consent. This constitutes fraud, and the shield of Rule 408 should not be invoked as a sword here to condone fraud.

Consequently, the trial court abused its discretion by deciding *C&E Services Inc. v. Ashland Inc.*, 539 F.Supp.2d 316 (D.D.C 2008) was the most factually similar case to

[1] Additionally, the Colorado Court denied the oil company's Motion for Summary Judgment that raised the very same arguments BP raises here. *See* App'x5-7.

this one, but ignoring its holding. BP concedes that "plaintiffs wanted to use the settlement evidence only for the limited purpose of proving the defendant had lied to the plaintiff about the amount of the prior settlement." Appellee Brief p. 20. Here, PRCF seeks to use the settlement evidence to prove BP lied about no insurance coverage, and BP's release of claims against the insurers for UST leaks breached its subrogation assignments. In similar fraud circumstances, courts have rejected the use of Rule 408.

For example, a Michigan federal court held that "[t]he application of an estoppel exception to Rule 408 is quite consistent with its goal of encouraging settlement, as it is difficult to understand how protecting fraud and deception will in any way advance parties' confidence in the settlement process." *Dow Chemical Co. and Subsidiaries v. United States*, 250 F.Supp.2d 748, 805 (E.D. Mich. 2003). Similarly, a South Dakota federal court denied a motion to dismiss a fraud count, finding that Defendants' power-point statements fall within the fraud exception to Rule 408. *Larson Mfg. Co. of South Dakota, Inc. v Connecticut Greenstar Inc*, 929 F.Supp.2d 924, 933 (D.S.D. 2013).

Likewise, BP cannot hide its fraud under the auspices of Rule 408. The Rule's purpose is undoubtedly to promote free and honest communications in the context of promoting settlements. That did not occur here, and BP's invocation of the Rule is illogical given its steadfast assertions that the *Lloyd's* litigation did not cover UST leaks.

Additionally, BP does not disagree that Rule 408 does not bar undisputed factual material. *See Matter of Estate of Pina*, 443 N.W.2d 627 (S.D. 1989) (holding that portion of the letter that counsel attempted to introduce was an undisputed factual assertion, was otherwise discoverable, and is not rendered inadmissible under SDCL 19-12-10.) Instead, BP argues Amoco's insurance coverage is a hotly disputed legal issue *in this*

case, missing the point. Factual material that was undisputed in the *Lloyd's* litigation may be admissible in this case because of BP's persistence that "the settlement report really doesn't have anything to do with coverage. It's a quantification of exposures." CR1 4490. As such, Rule 408 does not limit this factual quantification of exposures. In sum, the trial court abused its discretion in finding all settlement documents inadmissible.

II. WITH THE ADMISSIBLITY OF THE SETTLEMENT EVIDENCE SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO THE PRCF'S DAMAGES.

As this Court is well-aware, the summary judgment standard requires that "[t]he circuit court's conclusions of law are reviewed *de novo,"* and "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Johnson v. Sellers*, 2011 S.D. 24, ¶ 11, 798 N.W.2d 690, 694.

BP misconstrues PRCF's non-allocation-of-the-settlements arguments. The law requires that an obligors' settlements with third-parties not containing an express allocation are assumed to be concealing a "double-recovery." *Atl. Mut. Ins. Co. v. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1042 (Cal. Ct. App. 2002) (holding that insured's alleged allocation of settlement funds should have been "explicitly set forth in the Settlement Agreement," to avoid the appearance of a desired double recovery). When dealing with multi-party, multi-claim litigation, the settlement and the allocation of proceeds in litigation must meet the requirements of good faith. *See Dillingham Constr., N.A., Inc. v. Nadel P'ship, Inc.*, 64 Cal. App. 4th 264, 280 (Cal. App. 2d Dist. 1998). Absent some good faith agreement between the parties, allocating the settlement consideration as between causes of action, a non-settling party is entitled to a setoff of the entire settlement figure. *Knox v. County of L.A.*, 109 Cal. App. 3d 825, 836 (Cal. App. 2d Dist.

1980); *Alcal Roofing & Insulation v. Superior Court*, 8 Cal. App. 4th 1121, 1124-25 (Cal. App. 1st Dist. 1992); *see also Moore v Blue Cross & Blue Shield of the Nat'l Capital Area*, 70 F. Supp. 2d 9, 39 (D.D.C.1999) (holding that a claimant "cannot unilaterally allocate settlement proceeds…to evade subrogation or to buttress an argument that a double recovery would have not resulted.").

Thus, had the trial court allowed the matter to proceed, pretrial motions would have been filed about the presumption that PRCF was entitled to prove its damages with the unallocated settlements. Moreover, BP readily admits that its insurers would not have settled without a release of all claims including those related to UST contamination. Amoco repeatedly states the litigation sites alone included $2.7 billion in costs. CR2-350-353. Nonetheless, BP ignores that its own Settlement Report states a potential exposure of $1.732 billion for its Marketing Systems of which service stations (USTs) comprised $886 million. CR3-693. Drawing all reasonable inferences in PRCF's favor, the only conclusion is that those claims have value. Respectfully, the trial court erred in finding as a matter of law there were no settlement funds paid for UST releases.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR BP ON THE STATE'S SUBROGATION CLAIM.

BP makes no effort to dispute the effect or validity of the Subrogation Assignments. Nor does BP deny releasing PRCF's rights to make and compromise the very arguments BP itself made in Chapter 5 of its Settlement Proposals and supporting documentation. Instead, BP follows the trial court's lead and mistakenly concludes PRCF was not prejudiced.

Undoubtedly, PRCF was prejudiced. PRCF was unaware, through no fault of its own, that BP was negotiating, settling, and releasing the very rights it subrogated to

PRCF. BP was obligated to inform and bring PRCF to the table where it could have negotiated, or BP and its insurers should have settled without releasing PRCF's rights. BP did neither, all the while repeatedly attesting that no settlement was made with anyone for which a claim **may lie**. Despite the foregoing, BP's assertions of no harm are why the unallocated-settlements law is crucial. Given BP's insurers' testimony, that they would not have settled without a release of the Marketing Systems/UST claims, the trial court's conclusion, that the UST claims had no value, is incorrect. Moreover, at this stage, the trial court's task was not as trier of fact, but simply to determine if questions of fact exist as to the claims' value.

In addition, BP's settlement presentations, themselves, present genuine issues of material fact as to whether the claims had value when they were made in the mid to late 1990s. *See* CR2-2770-3199; *see* CR2-2701-2718 (summary). In its settlement proposals, Amoco consistently made the same claims to various insurers: 1) losses at each site were allocated across all triggered policy years of 1959-1985; 2) the "one occurrence" argument has validity, citing numerous cases; 3) because the UST sites are located across the country both the insurers and Amoco face risks on coverage issues; and 4) Amoco faces a lesser risk on certain coverage issues [as compared to the one occurrence claim], such as expected/intended, known loss, and the "accidental" component of the sudden and accidental" exception to the pollution exclusion. In other words, Amoco claimed in 1997, it could defeat the very defenses it now claims herein, which constitutes a genuine issue of material fact. In that regard, both BP and the trial are incorrect. The question is the value of the UST claims in 1997, under the then-current state of the law, given that the insurers wanted a complete buy-back. To conclude the claims had no value defies

reason. The trial court's ruling on the breach of the subrogation claims should be reversed.

IV. THE TRIAL COURT ERRED IN FINDING THERE WAS NO INSURANCE COVERAGE AS A MATTER OF LAW

As discussed above, the crux of the case concerns whether there may have been insurance coverage when Amoco was negotiating with its insurers after executing subrogation assignments in PRCF's favor. If potential coverage existed, s BP was obligated to inform PRCF. PRCF was entitled to make the very arguments Amoco made to its own insurers regarding coverage. More importantly, it was not Amoco's right to settle claims and release insurance policies that it assigned to PRCF. An after-the-fact determination of insurance coverage does not change those obligations.

The Travelers and Amoco Settlement Agreement lists almost three decades of Comprehensive General Liability primary policies issued to Amoco (from 1954–1978). CR2-2228-2254 at 2249-2252. In this litigation, Amoco only produced one of those policies. Travelers Insurance Company Policy #TNSL 121T271-4, policy period 9/1/1974 to 9/1/1977, had no deductible and a $500,000 per occurrence limit. CR2 993-1027. Remember, Amoco submitted Applications, no-insurance letters and assigned Subrogation rights to PRCF at the same time it sued its own insurers. If BP would have informed PRCF in 1995-1998, when it was negotiating with its own insurers, about the existence of potential coverage under these policies as required by the subrogation assignments, more than the single Travelers policy could have been located in 2010 and thereafter. Conveniently, BP offers no response to the argument that whether coverage existed in 1995 to 1998 is a far different issue than the same question more than two decades later with the accompanying jurisprudence. Moreover, under the subrogation

assignments, PRCF was entitled to know if any coverage may have existed just as Amoco argued it did in the mid-1990s, while expressly telling the PRCF it did not.

In addition, to the equitable estoppel issue as to why PRCF is not obligated to provide site-by-site proof to establish coverage, Amoco's own settlement proposals show there was potentially coverage. *See* II and III above. Moreover, Amoco claimed that all tanks leaked since they were opened, and that Amoco could defeat the coverage issues raised by the insurers then and by BP now. CR3-651. For these reasons, the plain terms do no not defeat coverage. BP's argument, that no evidence exists that there were leaks prior to 1985, contradicts both its own settlement proposals and its chief negotiator's testimony.

BP also concedes it has the burden to prove the applicability of a Policy Exclusion. Appellee's Brief p. 12. Yet, it fails to provide site-by-site proof and analysis as to the qualified pollution exclusions. For instance, the trial court stated, "[t]he Plaintiff has not alleged in their Amended Complaint, nor pointed to any evidence in response to this summary judgment motion, from which it can be inferred that the releases at any of the 27 sites at issue were sudden, i.e., abrupt or immediate." CR2-3589. This, however, was an exclusion and thus BP's burden to prove -- not PRCF's to disprove. Respectfully, the trial court incorrectly shifted the burden and thus erred in finding BP entitled to summary judgment because there was no coverage as a matter of law.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE FRAUD CLAIMS.

The elements of fraudulent misrepresentation include that a defendant 1) made a representation as a statement of fact 2) that was untrue; 3) knew the representation was untrue or he made the representation recklessly; 4) made the representation with intent to

deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it; 5) The plaintiff justifiably relied on the representation; and 6) The plaintiff suffered damage as a result. *See N. Am. Truck & Trailer, Inc. v. M.C.I. Com. Serv.*, 2008 S.D. 45, ¶ 10, 751. "Questions of fraud and deceit are generally questions of fact[,] and as such they are to be determined by a jury." *Dede v. Rushmore Nat. Life Ins. Co.*, 470 N.W.2d 256, 259 (S.D. 1991).

Regarding PRCF's fraud claims, BP ignores that each time Amoco filed an application, it "warrants and represents that no settlement has been made by the Applicant with any party, person, or corporation against whom claim *might lie, and no release has been or will be given* to anyone responsible for the cost of cleanup, and that no such settlement will be made nor release given by [Amoco] without the written consent of the PRCF." (Emphasis added.) CR1-948. Thus, contrary to BP's argument, an after-the-fact determination of insurance coverage does not warrant BP's denials. Clearly, a claim might lie against Amoco's own insurers as Amoco demonstrated by spending large sums of money in the *Lloyds*' litigation to organize documentation and hire consultants to explain Amoco's ability to recover for this contamination caused by its Marketing System. This explains PRCF's use of such broad language in its subrogation assignments – to enable it to determine the validity and value of claims that might exist. It is incomprehensible that Amoco could warrant and represent to the PRCF that no claims might lie against its insurers while at exactly the same time making such claims against its own insurers.

BP apparently recognizes the trial court's error and instead relies on issues not reached by the trial court to substantiate the judgment. BP argues that every witness

believed Amoco had no insurance for the costs the PRCF reimbursed, so there was a lack of scienter. Each witness BP references, however, was unaware of Amoco's Settlement Proposals being made to Amoco's insurers and unaware of its arguments that there was coverage for UST leaks. Moreover, Amoco's boards and upper management reviewed and approved each of the settlement proposals. CR3-660-663. Thus, at a minimum, genuine issues of material fact exist as to whether BP's uninformed employees' statements were false or recklessly made. Respectfully, the judgment on the fraud claims should be reversed, and the issue of scienter should be remanded to the trial court as it suggests. "(In the event this Court's ruling is overturned, the scienter and materiality issues can be further addressed on remand, if necessary.)" CR2-3601.

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON SITE 6197

BP asserts PRCF waived this issue on appeal, citing *Peterson v. Safway Steel Scaffolds Co*. 400 N.W.2d 909, 911-912 (S.D. 1987). *Peterson*, however, is inapplicable here. In *Peterson*, the "Appellant states in his brief that while he raises only the strict liability issue against both defendants, he does not mean to imply that he waives an appeal of the warranty and negligence claims." *Id.* at 911. Accordingly, the *Peterson* Court correctly concluded, "[h]owever, having failed to raise any argument or authority in support of the warranty and negligence claims, we hold he has abandoned any appeal on those issues." *Id.* In its initial brief, PRCF raised and argued the issue of whether the trial court correctly entered judgment related to Site 6197.

The trial court's opinion is replete with examples where it weighed the evidence and drew favorable conclusions for BP. Some examples include:

1)"The clear inference here, is that if Kertzman had any inkling that Amoco was in fact responsible for the leaks at Site 6917, he would have similarly advised the Department." CR2-3605.

2) With respect to PRCF and the expert report of Neil Ram, the trial court acknowledged his report indicated release dates of pre-1995 for which Amoco would be responsible while commenting his opinion "might be unreliable." CR2-3602.

3) Ram's conclusion is also based upon his faulty assumption that "the removal and replacement of the original USTs, more likely than not indicates that the original USTs were leaking at the time of their removal." *Id.*

4) "Other than Ram's estimate for Site 6917, which this Court finds to be both speculative and unreliable[.]" CR2-3604.

Noticeably, the trial court did not find Ram's Report or opinions in regard to this site inadmissible. Instead, the trial court weighed the evidence and gave it little or no weight, contrary to the summary judgment standards requiring all reasonable inferences to be drawn in the non-movants favor. Even BP concedes that Mr. Ram's expert report opines releases occurred while Amoco was an owner. CR1-4503-4504. Additionally, Hargis, Amoco's primary negotiator, took the position all tanks leaked since they were opened. CR3-651. Respectfully, the trial court improperly weighed the evidence and failed to make all reasonable inferences in PRCF's favor, requiring reversal of the summary judgment as it relates to Site 6197.

Further, SDCL § 34A-12-12, regarding strict liability for costs of corrective action, provides that "[a]ny person who has caused a discharge of a regulated substance in violation of § 34A-12-8 is strictly liable for the corrective action costs expended by the department . . . ." Likewise, SDCL § 34A-13-9.2 provides that [t]he [PRCF] shall be subrogated to any insurer, risk retention group, or third-party payor," and "has the right to recover, under any pollution liability insurance contract available to a covered party, any

applicable contract involving the covered party, ***or from any tort-feasor liable to a covered party*** for a release or an intentional release, or any third-party payor and that right may not be waived by contract." (Emphasis added). Further, SDCL §34A-13-1(6) defines "[c]overed party," [as] a responsible person, an employee of a responsible person, or any person having legal custody of a responsible person's real property."

The foregoing statutory scheme clearly shows PRCF can recover from more than just the responsible person. Otherwise, the highlighted portion of SCDL § 34A-13-9.2 would be mere surplusage, and "the Legislature does not insert surplusage into its enactments." *Mid–Century Ins. Co. v. Lyon,* 1997 SD 50, ¶ 9, 562 N.W.2d 888, 892 (internal citations omitted); *see also Delano v. Petteys,*520 N.W.2d 606, 609 (S.D.1994) (stating "[t]his court will not construe a statute in a way that renders parts to be duplicative and surplusage.")(internal citations omitted).

None of the cases BP or the trial court cite support that only the person DENR named as the responsible party *at the time of the reported release* can be held liable for the release. The statutory construction and rights of subrogation afforded to PRCF provide otherwise. Thus, summary judgment on this issue should be reversed.

VII. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR BP ON THE INDIRECT SITES BASED ON THE STATUTE OF LIMITATIONS.

BP argues that the PRCF waived the right to appeal this ruling. The trial court granted summary judgment on the indirect sites on based upon the statute of limitations on April 16, 2018. Citing no authority, BP argues PRCF must also appeal the court's subsequent ruling of January 23, 2019, as it relates to Site 6197. BP is incorrect for several reasons. First, there is no authority for the proposition a party must appeal from

subsequent orders entered after judgment was already granted. Second, the trial court's January 23, 2019, ruling related to Site 6197 was site-specific with numerous facts related to the site's history. CR2-3601. Third, PRCF clearly appealed in its opening brief the trial court's ruling as related to Site 6197 as discussed above.

Further, a cause of action accrues when "the plaintiff either has actual notice of a cause of action or is charged with notice." *Strassburg v. Citizens State Bank,* 1998 SD 72, ¶ 10, 581 N.W.2d 510, 514 (citing SDCL §17-1-2, SDCL 17-1-3). The question of *what* constitutes accrual is one of law, the question of *when* accrual occurred is one of fact generally reserved for trial. *Wissink v. Van De Stroet,* 1999 SD 92, ¶ 9, 598 N.W.2d 213, 215-216; *see also Strassburg v. Citizens Bank* 1998 S.D. 72, ¶ 7, 581 N.W.2d at 513 (stating that "[b]ecause the point at which a period of limitations begins to run must be decided from the facts of each case, statute of limitations questions are normally left for a jury.").

In the context of when PRCF should know Amoco was potentially responsible for a particular leak, it is notable what Amoco told its insurers in 1997. Recall that in its settlement presentations, Amoco only sought coverage for pre-1985 contamination. In 1997, however, Amoco states there was contamination at 8,155 sites, and it had not even located or begun to remediate 5,156 of them. CR3-696. If, at a minimum, some twelve years later, Amoco had not yet identified or begun remediation for its own contamination, it is impossible for PRCF to immediately identify Amoco's involvement. Because each site is fact intensive, and the point at which a period of limitations begins must be decided from the facts of each case, the trial court erred in granting summary judgment in BP's favor.

VIII. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PRCF'S MOTION FOR SANCTIONS.

"Imposing a sanction such as the exclusion of the testimony should result when 'failure to comply has been due to . . . willfulness, bad faith, or … [fault].'" *Chittenden & Eastman Co. v. Smith,* 286 N.W.2d 314, 316 (S.D.1979). Spoliation is the destruction of significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *Wuest ex. Re. Carver v. Mckennan Hosp*. 2000 S.D. 151, fn 1, 619 N.W.2d 682, 691. "When it is established, a fact finder may infer that the evidence destroyed was unfavorable to the party responsible for its destruction." *Thyen v. Hubbard Feeds, Inc.,* 2011 S.D. 61, ¶16.

BP erroneously informs this Court the sanctions motion only related to a Count PRCF chose not to appeal, and this dispute arose from a single interrogatory request. Quite the contrary, this issue concerning Amoco's footprint, or where it had conducted business in South Dakota, was litigated numerous times because of BP's assertion that it did not maintain such a list. *See* CR1-692; CR1-697. "As BP has repeatedly told Plaintiffs, there are no Site Lists to compel." CR1-702; CR1-823-825; CR1-876-878; CR1-1235-1310; CR1-2032-2043 at 2034; CR1-2851. In other words, an inordinate amount of time was spent on this issue, and on each occasion, BP told PRCF and the trial court that no such lists existed. Notably, BP made these representations in 2015, five years after this case was filed, while the list still existed and in Ms. Brendel's possession.

Ms. Brendel testified that in April of 1990, she had a three-ring binder with a list of all locations where Amoco owned or operated underground storage tanks in South Dakota. CR1-2853-2854. The binder contained all service stations in South Dakota and a channel of trade, i.e., jobber, dealer, owned. *Id*. She further testified that she destroyed

the three-ring binder in December of 2015, despite being aware of a litigation hold. *Id*. It can only be characterized as willful for BP not to ask its own 30(b)(6) witness for more than 5 years, if such a list existed, during the pendency of this suit, particularly in light of the various motions on the subject. Instead, BP and its counsel sat silent and allowed the list to be destroyed.

Although the trial court found Ms. Brendel's destruction of the evidence to be inadvertent, BP's continuous representations to PRCF and the trial court, that such a list did not exist, when it did and was in the possession of its own 30(b)(6) witness, can only be characterized as bad faith. Moreover, the discovery violation was not harmless in that PRCF was forced to litigate the issue many times which could have been avoided by BP's production of the list. Even if this ruling on the Motion for Sanctions may not affect the underlying judgment, it does not mean sanctions were not warranted. Should this matter be remanded, the trial court can determine an appropriate sanction and/or a possible adverse inference instruction if the matter proceeds to trial.

CONCLUSION

For the reasons stated herein, PRCF respectfully requests that the trial court's decisions to grant summary judgment on all counts[2] be reversed, with all counts being reinstated and remanded for trial. PRCF also requests that the ruling on the Motion for Sanctions be reversed with the matter remanded to the trial court with instructions to impose a proper sanction.

[2] PRCF has not addressed Count VII because the trial court held its prior ruling rendered this count moot. Respectfully, reversal or remand on all or some of the counts should include Count VII because it would no longer be considered moot.

Respectfully submitted this 30th day of September, 2019.

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REQUEST FOR ORAL ARGUMENT

PRCF respectfully requests the opportunity for oral argument to address the issues raised by this appeal.

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CERTIFICATE OF COMPLIANCE

Judith K. Zeigler Wehrkamp, Appellants' counsel of record, hereby certifies that the Appellant's Reply Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b). The Appellant's Brief contains sixteen pages in proportional typeface and contains 25,709 characters and 4,934 words. Further, the undersigned relied upon the word count of the Word Software, Version 16.16.5 for Mac.

Dated this 30th of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Appellant's Reply Brief and Appendix is electronically served on the attorneys for Appellee by email at jcollins@lynnjackson.com, tfritz@lynnjackson.com, martin.roth@kirkland.com, daniel.siegfried@kirkland.com, dzott@kirkland.com when the Brief and Appendix are electronically filed at SCClerkBriefs@ujs.state.sd.us.

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