IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28644

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled,

Plaintiff / Appellant,

v.

CHILDREN'S CARE HOSPITAL AND SCHOOL,
a South Dakota Corporation,

Defendant / Appellee.

Appeal from the Circuit Court,
Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Lawrence E. Long, Presiding

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Appellant, Benjamin Graff, by and through his parents and guardians, Neil and Debra Graff, appeals from the circuit court's Order granting the Motion in Limine filed by Appellee, Children's Care Hospital and School ("CCHS"), from the jury's verdict in favor of CCHS on all counts, and from the Cost Judgment taxing costs against Neil and Debra Graff, personally, in the amount of $7,606.54.

The Order granting the Motion in Limine was filed on May 4, 2018. The Judgment on the jury's verdict was filed on May 30, 2018, and Notice of Entry of Judgment was filed on May 31, 2018. Ben timely filed his original Notice of Appeal on June 21, 2018. The Cost Judgment was filed on September 10, 2018, and Notice of Entry of Cost Judgment was filed on September 11, 2018. Ben's Amended Notice of Appeal was timely filed on September 12, 2018.

LEGAL ISSUES

I. Whether the circuit court erred in failing to balance the Department of Health surveys' probative value against any unfair prejudice.

St. John v. Peterson, 2011 S.D. 58, 804 N.W.2d 71
Novak v. McEldowney, 2002 S.D. 162, 655 N.W.2d 909
State v. Packed, 2007 S.D. 75, 736 N.W.2d 851
State v. Scott, 2013 S.D. 31, 829 N.W.2d 458

II. Whether the surveys are relevant.

St. John v. Peterson, 2011 S.D. 58, 804 N.W.2d 71
Novak v. McEldowney, 2002 S.D. 162, 655 N.W.2d 909
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III. Whether the probative value of the surveys was substantially outweighed by any unfair prejudice.

SDCL § 19-19-403
Novak v. McEldowney, 2002 S.D. 162, 655 N.W.2d 909
State v. Wright, 1999 S.D. 50, 593 N.W.2d 792

IV. Whether the Cost Judgment against Neil and Debra Graff is in the interest of justice.

SDCL § 15-17-52
Hewitt v. Felderman, 2013 S.D. 91, 841 N.W.2d 258
K.C. v. Schucker, 2014 WL 11537828 (W.D. Tenn., Feb. 25, 2014)
M.D.B v. Walt Disney Parks & Resorts US, Inc., 2017 WL 3065146 (M.D. Fla., July 19, 2017)

STATEMENT OF THE CASE

Benjamin Graff ("Ben"), by and through his parents and guardians, Neil and Debra Graff, brought suit against CCHS, arising out of the abusive treatment of Ben during his residential stay at CCHS.[1] CCHS engaged in a course of conduct of utilizing "prone restraints" – where Ben was placed face down on the ground with three to four people holding him down – over 140 times in just a seven-month stay at CCHS, often leaving this severely developmentally disabled child lying listless on the floor and crying. Ben claimed the use of prone restraints was excessive, unwarranted, and contrary to guidelines, policies, and procedures, and caused him serious emotional injuries. Ben alleged negligence, lack of informed consent, negligent infliction of emotional distress, and intentional infliction of emotional distress.[2]

CCHS moved in limine to exclude from evidence written surveys of audits of CCHS conducted by the South Dakota Department of Health. These surveys documented CCHS's improper use of restraints and were offered by Ben to show CCHS's knowledge and notice that their restraints were in violation of certain rules and regulations and/or utilized incorrectly and to show the absence of any claimed mistake as to the same. Ben also argued the surveys showed CCHS's

[1] Neil and Debra initially asserted they also suffered injuries, but relinquished claim to such injuries prior to trial.

[2] Prior to trial, Ben acknowledged he did not have a separate cause of action of action for lack of informed consent, but that lack of informed consent was part of his other claims.

habit or routine practice of utilizing restraints improperly and contrary to established policies and procedures.

Without conducting the requisite analysis of whether the probative value of the audits was substantially outweighed by any unfair prejudice, the circuit court granted the motion in limine and excluded the surveys, concluding they merely showed *deficiencies in record-keeping* done by CCHS. The circuit court also concluded that SDCL §§ 22-18-5 and 13-32-2 established the standard of care, and the surveys, therefore, had limited relevance. Trial was held in May 2018, and Ben was not allowed to present evidence of the findings of the audits of CCHS as stated in the surveys. The jury returned a defense verdict on all of Ben's claims.

CCHS applied for costs pursuant to SDCL § 15-6-54(d) and SDCL § 15-17-37. Ben opposed taxing costs altogether, opposed the amount sought by CCHS, and opposed taxing costs against Neil and Debra personally. The circuit court awarded costs in the amount of $7,606.54 to CCHS and entered judgment for such costs against Neil and Debra Graff personally.

Ben appeals from the circuit court's Order excluding the surveys from evidence, from the jury's Verdict and Judgment entered on the Verdict, and from the Cost Judgment. CCHS filed Notice of Review, raising four issues on appeal.

STATEMENT OF THE FACTS

A. Benjamin Graff

At the time of the events giving rise to this lawsuit, Ben was sixteen years old. RO1:4-5. Ben is and has always been developmentally disabled, and has

been diagnosed with various conditions including autism, intellectual disability, attention deficit hyperactivity disorder, cognitive disability, and pervasive developmental disability, impulse control disorder, chronic mastoiditis, chronic disability and behavior problems, disruptive disorder, and disruptive anxiety disorder. RO1:4; 363-366; 412-415. As a result, Ben has been deemed severely and emotionally disturbed. RO1:4. Medical professionals have estimated that Ben functions at the level of a three to four-year-old child. RO2:544. However, he is almost entirely nonverbal; thus, his ability to express himself and voice concerns is limited. RO1:5. Ben requires the services of professionals and those well-trained in the education and care of the disabled, and he requires protection to prevent neglect, exploitation, and abuse. RO1:5.

During the mere seven months that Ben was a residential student at CCHS, he was indisputably placed in a prone restraint more than 140 times. RO1:7. During a prone restraint, Ben would be forced to the ground, face-down, with three to four adults holding him down, allowing him to only move his head back and forth a bit; it continued until Ben no longer resisted. RO1:664. This type of restraint was to be used as a "last resort" and only after the least restrictive methods were attempted and failed. RO1:484; 620; 631; 645. Prone restraints are no longer utilized at CCHS. RO1:480.

These prone restraints frequently lasted over one hour, sometimes two hours, and on at least one occasion, Ben was held down by three adults for almost *three hours*. *See* RO4:31 (one hour, two minutes); RO4:59 (one hour, nine

minutes); RO4:156 (two hours, thirty-two minutes); RO4:169 (one hour, twenty-six minutes); RO4:181; 184 (one hour, thirteen minutes); RO4:276 (one hour, four minutes); RO4:789 (one hour, twenty minutes); RO4:1300 (one hour, twenty-eight minutes); RO4:1361 (one hour, two minutes); RO4:1403 (one hour); RO4:1417 (two hours, fifty-five minutes). This developmentally disabled child, who functions at the level of a toddler, was held down so long that on at least four occasions, he urinated in his pants. RO4:161; 398; 112; 1095. Not surprisingly, when the restraints ended, Ben would often be left on the floor, crying for his mother. RO4:25; 172; 884; 1155; 1185; 1253; 1365.

B. Ben's Placement at CCHS

From 1995 to 2010, Ben received services from CCHS, including as a day student, a residential student, a summer student and for rehabilitation. RO2:2606-5571. Ben's residential placement at CCHS was in response to an IEP ("individualized education program") team meeting, to "deal with his behavioral issues." RO1:671. When Ben was moved from in-district schooling to CCHS, it was "an IEP decision that was based upon his individual needs and abilities and what he needed to be successful as a student." RO1:683. Ben was continually classified as a "residential student" at CCHS. RO1:672.

CCHS was subject to the policies and procedures of the South Dakota Department of Education, and acknowledged that it would meet all requirements of the Individuals with Disabilities Education Act. RO1:485-492. It was "the goal of the Children's Care Hospital and School agency/facility to provide full

educational opportunity to all children with disabilities." RO1:493. CCHS maintains a policy regarding IEPs for its students. RO1:367. The IEP addresses not only academics, but also areas such as recreation and leisure, home living and activities of daily living, community participation and behavior, which are all concerns that are addressed by the residential component of Ben's placement at CCHS. RO1:416-423. IEPs also refer to "related services" that are required for the student, including audiology, speech therapy, and occupational therapy. RO1:416; 419; 426; 428; 430; 432; 434. Students who attend the Sioux Falls Public Schools have these related services available to them through the school system. RO1:361. Acknowledging Ben was at CCHS for educational services, CCHS at one time claimed certain regulations did not apply because "Ben was receiving educational services; and those regulations don't apply." RO1:622.

Nearly every single CCHS employee who worked with Ben lacks any medical training, education or experience. RO1:450- 472. Vicki Isler was the "clinical director of education" at CCHS and later its "principal." RO1:479. Isler has no medical training, education or experience. RO1:443-449. Erin Stabnow was one of Ben's teachers at CCHS and had only teaching experience. RO1:450-451. Ben Pray worked with Ben as a "Support Specialist" and his responsibilities included "[e]nsur[ing] the safety and support . . . to people served to achieve the highest level of learning and independence." RO1:452-453; 455-456. Pray was also a "Lead Teaching Assistant" for CCHS, and apparently had no medical education, training, or experience. RO1:452-453; 455-456. Jason Dybsetter was a

Behavior Therapist/Analyst who worked with Ben and who had no medical education, training, or experience. RO1:457. Amber Bruns was also one of Ben's behavioral therapists, who has a degree in psychology and a Master's Degree in applied behavioral analysis, but did not have any medical education, training, or experience. RO1:625.

Other "Support Specialists" who worked with Ben include Lindsay Schlumbohm and Beth Lempkie, both of whom possessed criminal justice degrees, and neither of whom had any medical education, training, or experience, and Gage Smith, who has as high school degree, and no medical education, training or experience. RO1:458-461. Many of CCHS's other employees who worked with Ben were labeled as "Teaching Assistant" or "Education Assistant" by CCHS, and only one of these six assistants had any medical experience or training. RO1:463-472.

C. Department of Health Audits of CCHS

CCHS was regulated by both the South Dakota Department of Education and the South Dakota Department of Health. RO4:3347. Both entities regulated the use of restraints on students at CCHS, as did the federal government through CCHS's participation with the Medicare/Medicaid program. RO4:3347; 3352-3353.

The audits conducted by the Department of Health found numerous deficiencies, including the manner in which CCHS conducted restraints of its students, as documented in the surveys. RO5:93-370. As a result of the audits,

corrective action was proposed by CCHS, including an internal document entitled "Restraint Review Checklist" in which certain requirements of the restraint were to be documented. RO4:5-1435. Included in that Checklist are questions regarding whether there was a physician's order during the restraint or immediately following the restraint; whether a physician or designee was contacted as soon as possible if the primary physician did not order the restraint; whether the physician saw the individual within twenty-four hours after a restraint and before any new restraint is ordered; and whether there was a nurse assessment within one hour after the restraint. RO5:128; 139; 148; 152.

These Checklists show that on numerous occasions several of the requirements applicable to restraints – and that were documented deficiencies in the audits conducted by the Department of Health – were not followed with regard to restraints of Ben. *See id.*; RO5:93-370. The Checklists of Ben's restraints show that CCHS failed to comply with the Department of Health dictates, including the failure to conduct a face-to-face assessment of Ben after the restraint; failure to consult with Ben's physician or other practitioner after the restraint; failure to obtain a physician order for the restraint; failure to assess Ben within 24 hours of the restraint; and failure to ensure the restraint used on Ben was the least restrictive intervention. RO4:5-1435. These same deficiencies were noted in the Department of Health surveys that the circuit court excluded from evidence.

1. Face-to-Face Assessment After Restraint

One of the more prevalent deficiencies noted in the surveys, dating back as far as 2008, was the failure of CCHS to conduct a face-to-face assessment of the student within one hour of the restraint. RO5:112; 161. One survey noted that CCHS failed to ensure that "patients received a physical and behavioral assessment by trained staff within one hour of the start of the restraint." RO5:112. It was further noted that CCHS failed to ensure that this "face-to-face evaluation" was undertaken. RO5:112. This problem was not corrected, as the subsequent audit on September 24, 2008, indicated that this face-to-face evaluation was a standard that had not been met. RO5:248. It was *not only that CCHS failed to properly document* that it conducted this face-to-face assessment; the face-to-face assessment *actually did not occur* within the one hour timeframe. RO5:112; 161 (CCHS "failed to ensure four of six patients … were seen face-to-face within one hour….").

The Checklist specifically included this requirement of the face-to-face assessment. *See e.g.* RO4:67. The Checklists for at least 17 of the restraints of Ben, however, reflect that CCHS failed to comply with this requirement, as the "no" boxed is checked, meaning CCHS did *not* conduct a face-to-face assessment of Ben within an hour of the restraint, for 17 of Ben's restraints. RO4:67; 118; 177; 188; 229-230; 262; 304-305; 317; 329-330; 340, 1041-1042; 1108-1109; 1179-1180; 1189-1190; 1296-1297; 1307-1308; 1337-1338.

2. Consultation with Physician After Face-to-Face Assessment

The audit on July 10, 2008, reflected that CCHS failed to ensure that the nurse who conducted the face-to-face assessment after the restraint, consulted with the attending physician or other licensed independent practitioner, *immediately* or *as soon as possible after* that assessment. RO5:153; 162; 165-169; 173; 186. This deficiency was also noted in the subsequent audit of September 24, 2008. RO5:231; 242; 243; 248; 249. The deficiency noted was not just that CCHS *failed to document* that the physician was consulted; it was that the physician *actually was not timely consulted* after the face-to-face assessment. *See* RO5:153; 162; 165-169; 173; 186; 231; 242; 243; 248; 249.

This requirement was also made a part of CCHS's Checklist. RO2:4250. The Checklists for Ben's restraints show that this requirement was not met in approximately 34 restraints of Ben. RO2:4250-4251; RO4:372; 391; 474; 537; 546; 569; 685; 857; 878; 945; 957; 978; 989; 1031; 1052; 1066; 1088; 1109; 1129; 1140; 1160; 1180; 1190; 1210; 1246; 1257; 1268; 1277; 1286; 1297; 1318; 1328; 1359.

3. Physician Order for Restraint

Another failure in the July 10th audit was that CCHS failed to ensure "restraints were ordered by the physician prior to, during, or immediately following the restraint use" and that the "attending physician was notified of the restraint usage as soon as possible." RO5:112. This failure was noted again in the audit of September 24, 2008. RO5:231. Again, CCHS did not simply *fail to*

document that it obtained the order timely; it *actually failed to obtain the order timely* as required. *See* RO5:112; 231.

Numerous Checklists for the restraints of Ben reflect that this requirement was not met, because in some instances the orders were not received until well *after* the restraint started, and in other instances orders for the restraint were after the restraint *ended*. RO4:287; 365; 374-375; 394; 404; 425; 446; 457; 474; 497; 523; 546; 560.

4. Assessment with Doctor within 24 Hours

The audit on July 10th also noted, "the provider failed to ensure: … patients who were restrained were seen by their physician before another restraint was ordered within 24 hours." RO5:112. The survey deficiency pertains to CCHS's failure to have its students seen within 24 hours after a restraint, not just to its failure to document that it did that. *Id*.

As a result, the Checklist contains the question: "After 24 hours, before writing a new order for restraint, did a physician see and assess the patient?" RO4:141. However, CCHS's Checklists for Ben show that this question was answered "No" on at least 19 occasions. RO4:141; 199; 209; 229; 294; 317; 329; 340; 362; 380; 536; 664; 799; 817; 934; 977; 1020; 1209; 1256.

5. Least Restrictive Interventions

The July 10th audit showed "there was no documentation less restrictive techniques had been tried." RO5:112; 122-123; 181-182. This issue was also documented the September 24th audit, where it was noted that CCHS's duty to

protect and promote the rights of each patient was not met, and that the provider had failed to ensure that "the restraint used was documented as the least restrictive, that the staff completed written documentation in the patient's medical records for patients who have been restrained." RO5:112; 231. The audit reflected that ensuring a least restrictive intervention is not a goal or a desire, but a requirement. RO5:112; 122-123; 181-182; 231.

In response, to these and other deficiencies, CCHS attempted corrective action and noted that for a student aged 9-17, which would be applicable to Ben in 2010, the restraint order could not exceed two hours. RO4:156. The Checklists reflect that at least two of the restraints on Ben exceeded two hours, without any additional physician order. RO4:156; 1417. Further, the Checklists are often missing vital information regarding whether other less restrictive interventions were attempted and regarding the precipitating behavior for the restraint. RO4:12; 40; 57; 219; 707; 717; 945; 977-978; 1020; 1030.

An additional two audits, covering times when Ben was a student at CCHS, show additional deficiencies. For example, an August 2010 audit found that the failure of CCHS staff to properly intervene with behaviors posed a risk to its students. RO5:318. A later audit found that for three of five students, CCHS failed to ensure that parents were properly notified of the policy for restraints in emergencies. RO5:336.

To correct these noted deficiencies, CCHS was required to have a Plan of Correction for each of the identified problems, and if they were not corrected,

CCHS's ability to participate in the Medicare/Medicaid program would be terminated. RO5:93, 103-104, 224-225, 276. CCHS was required to verify how the deficiencies were corrected and how compliance with all conditions of participation *would be maintained*. RO5:104.

D. Suit Against CCHS and Trial

At the request of Neil and Debra, Ben's IEP team met on September 21, 2010, and Ben's parents requested that Ben no longer be a residential student at CCHS. RO2:5222. The following day, Ben started receiving only day student services at CCHS, and all services were terminated as of September 28, 2010. RO2:5222; 5137.

Ben reached the age of majority on January 18, 2012, and by and through his parents and guardians Neil and Debra Graff, brought suit against CCHS on January 7, 2013. RO1:4; 13. Ben alleged negligence, lack of informed consent, negligent infliction of emotional distress, and intentional infliction of emotional distress. RO1:10. CCHS served its Answer on or about February 6, 2013, admitting that Ben was "in the residential program from March 11, 2010 to September 21, 2010 and that he was a day student from September 21, 2010 to September 28, 2010." App. 2.[3] CCHS also admitted that Ben was physically restrained, but generally denied liability and the extent of Ben's injuries. App. 3. CCHS filed an Amended Answer, additionally asserting that "some or all of

[3] The original Answer was never filed, and is made a part of Appellant's Appendix.

Plaintiffs' claims may be barred by the applicable statute of repose, SDCL § 15-2-14.1." RO1:109.

CCHS moved for summary judgment on the basis of the medical malpractice statute of repose. RO1:201. Relying on the Court's opinion in *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D.17, 878 N.W.2d 406, CCHS argued Ben's claims were "medical malpractice claims" and barred by the two-year statute of repose stated in SDCL § 15-2-14.1. RO1:266-269. Ben opposed the Motion for Summary Judgment, arguing *inter alia*, that SDCL § 15-2-14.1 did not apply to CCHS or to the conduct at issue; that even if SDCL § 15-2-14.1 were applicable, that SDCL § 15-2-22 applies and extended the time for instituting suit; and that to the extent *Pitt-Hart* were otherwise applicable, it could not be applied retroactively to Ben's case. RO1:340; 346; 351. During the briefing on the Motion for Summary Judgment, Neil and Debra Graff made clear they were not seeking damages for their own injuries. RO1:323.

The circuit court denied CCHS's Motion for Summary Judgment, concluding Ben's causes of action were not based on medical malpractice. RO1:945. The Court concluded Ben was a student at CCHS and that his claims were grounded in a program "designed around Ben's educational needs." RO1:952. The circuit court found it unnecessary to address the other issues raised in Ben's Opposition to Motion for Summary Judgment. RO1:952.

Prior to trial, CCHS moved to exclude the Department of Health surveys, arguing they were inadmissible "prior acts" and were "not probative of any issues

in this case, and thus are irrelevant and only used for the prejudicial purpose of shedding a bad light on Defendant." RO1:1093; 1119. Ben opposed that Motion in Limine, arguing the deficiencies in the surveys were the same deficiencies alleged by him, and additionally that the surveys were not an improper use of prior acts evidence, but were allowable evidence of CCHS's knowledge, absence of mistake and its pattern, practice and procedure of not properly administering prone restraints. RO1:1294-1297. Ben argued that the only impermissible use of prior acts evidence is to show that CCHS acted in accordance with its character, and that CCHS had not made the requisite showing that the probative value was substantially outweighed by the danger of unfair prejudice, nor even attempted such a showing. RO1:1296-1297.

At the pre-trial conference, CCHS never asserted the surveys were unfairly prejudicial, but argued only that the surveys were irrelevant and constituted improper evidence of prior bad acts:

> What happened in 2008 again is irrelevant because it happened in 2008, not when Ben was there. And the evidence would show -- you know, if it was presented, it would just show that it was corrected. Again, it's evidence of prior bad acts that occurred in 2008. It's an attempt by the plaintiffs just to say, "Hey, look. CCHS is a bad place. The Department of Health came in and they found deficiencies." And, you know, like the arguments we've been making throughout the case, this is something unrelated to Ben. None of these deficiencies were related to Ben. It's just an attempt to say, "Hey, you're bad people."

RO1:1577-1578. The circuit court indicated it would review the surveys, which were provided to the circuit court for in-camera review. RO1:1580-1581; RO5:73-626.

On the Friday before trial, the circuit court granted CCHS's Motion in Limine relating to the surveys, ruling: "The Court finds that any testimony, evidence, or reference to surveys from 2008-20[11] done by the South Dakota Department of Health *show deficiencies in record-keeping* done by [CCHS]. Because SDCL §§ 22-18-5 and 13-32-2 define the standard of care, the surveys have *limited relevance*. Thus, the Court GRANTS Defendant's motion #15 and excludes the records." RO1:1437 (emphasis added). The decision by the circuit court was based upon grounds that had not even been asserted by CCHS.

On the first day of trial, Ben's counsel broached the topic of the surveys again. RO4:3220-3223. CCHS again argued the surveys were irrelevant and constituted prior bad acts evidence:

> They are seeking prior bad act evidence, which was addressed in the prior argument, none of which applies to Benjamin Graff, none of which applies to the relevant time period, which is 2010 in this case, and therefore should be inadmissible.

RO4:3225. Counsel for Ben then submitted an Offer of Proof on the issue of the admissibility of the audits. RO4:3227-3228; RO1:1650-1658. The Offer of Proof detailed the deficiencies cited in the surveys, along with evidence that as to Ben, those same deficiencies were present, as reflected in the Checklists. RO1:1651-1657.

Significantly, while the circuit court based its decision excluding evidence of the audits on its opinion that SDCL § 22-18-5 and 13-32-2 set the standard of care, the court changed course and never instructed the jury on those statutes or even based any instructions on those statutes. RO1:1706-1749; RO4:3229-3230. Rather, the circuit court formulated the jury instructions based on SDCL Ch. 27B-8, concluding that CCHS was a "community services provider" as defined in SDCL § 27B-1-17(3). RO4:3304-3310.

The jury rendered a verdict in favor of CCHS on all of Ben's claims. RO1:1681-1682. CCHS applied for taxation of costs, seeking a total of $24,519.63. RO4:3093. Ben opposed the taxation of costs, arguing the court could not tax costs against Neil and Debra personally, since they were not the real party in interest, but only guardian or next friend of Ben; that taxation of costs against Ben, an incompetent, disabled individual with no resources would be inequitable, unjust and unwarranted; and that some of the costs were not recoverable, and that other costs were unnecessarily incurred and/or excessive. RO4:3099-3110. CCHS argued that because Neil and Debra at one time claimed damages for their emotional distress, that taxation of costs against them personally was warranted. RO4:3136.

The circuit court apportioned the costs based on the number of "claims" each of the Plaintiffs had against CCHS. RO5:647. The court found that Ben had two claims and Neil and Debra had one claim against CCHS, and therefore, apportioned one-third of the costs incurred by CCHS to Neil and Debra

personally, and awarded costs in the amount of $7,606.54 to CCHS and against Neil and Debra personally. *Id.*; RO5:51.

Ben appeals from the circuit court's Order excluding evidence of the South Dakota Department of Health surveys, from the jury's verdict, and from the circuit court's Cost Judgment. RO5:56-72.

ARGUMENT

Standards of Review

"'The trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion. An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.'" *St. John v. Peterson,* 2011 S.D. 58, ¶ 10, 804 N.W.2d 71, 74 (other citations omitted). *See also Ferebee v. Hobart,* 2009 S.D. 102, ¶ 12, 776 N.W.2d 58, 62 ("this Court reviews a decision to admit or deny evidence under the abuse of discretion standard. . . . This applies as well to rulings on motions in limine.") (other citations omitted). "'When a [circuit] court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion.'" *Kurtz v. Squires,* 2008 S.D. 101, ¶ 3, 757 N.W.2d 407, 409 (other citations omitted).

The Court similarly reviews the circuit court's ruling on the allowance of costs under an abuse of discretion standard. *See Eccleston v. State Farm Mut. Auto. Ins. Co.,* 1998 S.D. 116, ¶ 20, 587 N.W.2d 580, 583. "The award of costs in civil actions is discretionary with the court unless otherwise stated by law." *Id.*

A. The Circuit Court Erred in Failing to Balance the Surveys' Probative Value Against any Unfair Prejudice

CCHS moved to exclude the Department of Health surveys under SDCL §§ 19-19-403 and -404(b), and at the pretrial conference, CCHS argued the surveys were not relevant and were inadmissible evidence of prior bad acts. RO1:1577-1579. CCHS never argued the probative value of the surveys was substantially outweighed by the prejudicial effect. *See id.*

Similarly, the circuit court never conducted a balancing test of whether the probative value was substantially outweighed by any unfair prejudice. Notably absent from the hearing and from the circuit court's Order is any discussion, or even mention of the balancing test the circuit court is required to perform under SDCL § 19-19-403. *See St. John*, 2011 S.D. 58, ¶¶ 17-18, 804 N.W.2d at 76-77. The circuit court merely concluded the surveys have "limited relevance" and it neither orally nor in its written order conducted a balancing of the probative value of the surveys versus the prejudicial effect, as required.

In determining whether other "acts evidence" such as the surveys is admissible, "a two-part test applies:"

> (1) Whether the intended purpose for offering the evidence the other acts evidence is relevant to some material issue in the case (factual relevancy), and
>
> (2) Whether the probative value of the evidence is substantially outweighed by its prejudicial effect (logical relevancy)."

Novak v. McEldowney, 2002 S.D. 162, ¶ 12, 655 N.W.2d 909, 913. In *St. John*, 2011 S.D. 58, ¶ 13, 804 N.W.2d at 75, the Court noted, "Rule 401 uses a lenient

standard for relevance. Any proffered item that would appear to alter the probabilities of a consequential fact is relevant, although it may be excluded because of other factors."

After relevancy is determined, the court determines admissibility. "All relevant evidence is admissible, except as otherwise provided by . . . statute . . . ." *Id.* at ¶ 15. Relevant evidence may be inadmissible under Rule 403 if "its probative value is substantially outweighed by the danger of unfair prejudice." *See id.* at ¶ 16. The Court explained the proper analysis when the admissibility of evidence is challenged under Rule 403:

> "Rule 403 is not simply a 'more than, less than' comparison; the test is whether the probative value is substantially outweighed by the danger of unfair prejudice." . . . "To cause unfair prejudice, the evidence must persuade the jury in an unfair and illegitimate way." . . . Once the evidence is found relevant, the balance tips in favor of admission. . . . The party objecting to the admission of evidence has the burden of establishing that the trial concerns expressed in Rule 403 substantially outweigh probative value."

Id. (internal citations omitted). In determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, the balancing of the two must be conducted *on the record*. *See id.* at ¶ 17. *See also State v. Packed*, 2007 S.D. 75, ¶ 22, 736 N.W.2d 851, 858–59 (when evidence is challenged as "unfairly prejudicial, confusing, or misleading, trial courts are required to apply, on the record, the probative versus prejudicial balancing test of SDCL 19–12–3 (Rule 403) in deciding to admit or exclude such evidence.") (other citations omitted); *State v. Scott*, 2013 S.D. 31, ¶ 28, 829 N.W.2d 458, 468 (South

Dakota Supreme Court precedent requires an "on-the-record balancing test for 'other acts evidence.'"); 22A FED. PRAC. & PROC. EVID. § 5214 (2d ed.) ("Rule 403 and the cases require the judge to engage in a conscious balancing of the probative value of the proffered evidence against the harms likely to result from its introduction into evidence."); *In re Investors Funding Corp. of New York*, 635 F.Supp. 1262, 1265 (S.D.N.Y. 1986) ("Rule 403 requires the Court to engage in a conscious process of balancing the probative value of and need for the evidence sought to be excluded against the harm likely to result from its admission.").

The issue on appeal in the *St. John* case is remarkably similar to the issue here. In *St. John*, the defendant moved to exclude evidence of the defendant's experience with similar medical procedures, and the circuit court granted the motion. *See St. John*, 2011 S.D. 58, ¶ 6, 804 N.W.2d at 73-74. The plaintiff made an offer of proof at trial and sought to introduce expert testimony of the defendant's similar treatment of other patients. *See id.* at ¶ 8, 804 N.W.2d at 74. The jury found in favor of the defendant and the plaintiff appealed, raising one issue: whether the trial court abused its discretion in excluding evidence of the defendant's experience with similar medical procedures. *See id.* at ¶ 9.

The Court noted it was unclear if the trial court in that case found the proffered evidence relevant, as the trial court merely stated "it doesn't believe that there is—sufficient relevancy to overcome the prejudice that would be caused by the introduction of that evidence." *Id.* at ¶ 17, 804 N.W.2d at 76. The Court held the circuit court "improperly stated the language of the rule." *Id.* In addition, the

Court held, "[f]rom this record, it is unclear whether the court not only misstated the rule, but also misapplied the rule. It should have examined whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to [the defendant]. Such a balancing was not conducted on the record in this case." *Id.* *See also Swajian v. General Motors Corp*., 916 F.2d 31, 34 (1st Cir. 1990) (the district court "erred as a matter of law by never fully considering the probative value of the evidence and by never making a determination that the evidence would result in 'unfair prejudice.'"); *State v. Johnson*, 348 N.W.2d 196, 200-01 (Wis. Ct. App. 1984) ("Where a decision requires the exercise of discretion but fails to demonstrate on its face consideration of any factors on which the decision should be properly based, the decision constitutes a misuse of discretion as a matter of law.").

The Court in *St. John* found the circuit court abused its discretion because it "misstated and apparently misapplied the balancing test of Rule 403." *Id.* at ¶ 18. The Court held "it is possible that the exclusion of the evidence 'in all probability affected the outcome of the jury's verdict and thereby constitutes prejudicial error.'" *Id.* (quoting *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 41, 756 N.W.2d 345, 363).

The circuit court in the present case committed errors very similar to those in *St. John*, as it merely found the surveys have "limited relevance." Even worse than in the *St. John* case, where the court at least made some effort to compare relevance to prejudice, the circuit court in this case made no comparison at all.

Rather, it found the evidence had limited relevance *because of statutes the court ultimately did not even apply in the case*. Alleged prejudice from the surveys was not even mentioned by the court in this case. In finding the surveys had limited relevance, without balancing the relevance to the prejudice on the record, the circuit court not only misstated the rule, it also misapplied the rule. *See St. John* 2011 S.D. 58, ¶ 18, 804 N.W.2d at 73-74.

In short, *St. John* is indistinguishable and addresses the very issue presented here. The Court's decision in *St. John* clearly and unequivocally mandates that the circuit court conduct a balancing of the probative value against any unfair prejudice. Unquestionably, the circuit court here failed to conduct that balancing, contrary to the clear dictates set forth in *St. John*. Therefore, unless the Court is to overrule its decision in *St. John*, reversal and a new trial are mandated here. The circuit court's failure to follow *St. John*, its misstatement and misapplication of the rule, and its resultant findings are all erroneous and an abuse of discretion, warranting reversal on this basis alone. *See id.*

B. The Surveys are Admissible Evidence

As noted, when determining the relevancy of the surveys, the circuit court was, at that time, under the impression that SDCL §§ 22-18-5 and 13-32-2 set the standards for CCHS's conduct. The circuit court, *sua sponte*, changed course and determined those statutes were inapplicable and instead, based the jury instructions regarding the use of restraints on SDCL Ch. 27B-8, along with the definitions in SDCL Ch. 27B-1. RO1:1718-1725. Thus, the very reason for the

circuit court's conclusion that the surveys had "limited relevance" was baseless. If the basis for the court's ruling was wrong, which it was, then the ruling is also wrong. On this basis, the court's order excluding this evidence must be reversed.

Further, a proper balancing of the probative value versus its prejudicial effect would have warranted admission of the surveys. Evidence is relevant if it has *any* tendency to the make the existence of *any* fact that is of consequence to the action more or less probable than without such evidence. *See St. John*, 2011 S.D. 58, ¶ 13, 804 N.W.2d at 75; SDCL § 19-19-401 (Rule 401). Rule 401 is a lenient standard, such that evidence that has *any* tendency to alter the probabilities of a consequential fact is relevant. *See St. John*, 2011 S.D. 58, ¶ 13, 804 N.W.2d at 75. The surveys are unquestionably relevant to several permissible uses of such evidence, and any prejudice from the surveys is not "unfair" and does not substantially outweigh the probative value.

In the proper context, not limited by the inapplicable statutes cited by the circuit court, the relevancy of these surveys is undeniable. As documented in the surveys provided to the circuit court and as noted above, audits of CCHS in July and September of 2008 revealed a number of restraint deficiencies, including CCHS's failure to conduct a face-to-face assessment; failure to consult with a physician after that assessment; failure to obtain a physician order for restraint; failure to ensure an assessment by a physician within 24 hours; and failure to use the least restrict intervention. Two additional audits, covering the time Ben was a student at CCHS, revealed the failure of CCHS staff to properly intervene with

behaviors, which posed a risk to its students, and that CCHS failed to ensure some parents were properly notified of the policy for restraints in emergencies. *See* Statement of the Facts, Section C. To attempt to correct these deficiencies, a Restraint Review Checklist was implemented, and those Checklists reveal the very same or substantially similar deficiencies in CCHS's restraints of Ben.

There is seldom specific evidence forecasting the exact wrongdoing that occurred, which is precisely the case here, where several audits of CCHS revealed restraint deficiencies. CCHS was specifically informed that the very conduct that resulted in harm to Ben was in violation of policies and procedures applicable to restraints, and CCHS was specifically required to make changes (via the Checklists), to attempt to rectify its deficiencies. By comparing the surveys to the Checklists of Ben's restraints, however, we know that CCHS never made those changes, despite the notice and knowledge that its use of restraints was wrong, as detailed in the surveys. In spite of notice and knowledge of those deficiencies and that CCHS was required to correct them, CCHS never implemented meaningful change, to the detriment of Ben. The relevancy of the surveys simply cannot be denied. *See e.g. Novak*, 2002 S.D. 162, ¶ 15, 655 N.W.2d at 914 (finding the prior acts evidence was relevant and noting the prior acts were similar to the alleged conduct).

Although clearly relevant, the surveys admittedly could not be used by Ben to prove CCHS's character in order to show that CCHS acted in accordance with such character. *See* SDCL § 19-19-404(b)(1). However, the rule specifically

contemplates that evidence of other wrongs and acts *are* admissible for other purposes, such as to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *See* SDCL § 19-19-404(b)(2). "Given that the list of 'other purposes' under Rule 404(b) for which evidence of other acts may be admitted is nonexclusive, *the possible uses, other than character is limitless*. Rule 404(b) is thus an inclusionary rule, not an exclusionary rule. Evidence is *only* inadmissible under the rule if offered to prove character." *Mousseau*, 2008 S.D. 86, ¶ 24, 756 N.W.2d at 354-55 (emphasis added).

However, Ben never sought to use the surveys to prove CCHS's character or that it acted in accordance with such character. Ben had no reason to use the surveys to demonstrate some character trait of CCHS – it did that on its own – and Ben had no reason to use the surveys to demonstrate that CCHS acted in conformity with any such character trait – CCHS also did that on its own. It is undisputed that the surveys show CCHS's lack of compliance with rules and regulations regarding the use of restraints, and that such noncompliance carried over to the approximately 140 prone restraints of Ben. Ben had no reason to use the surveys to demonstrate character, but instead, sought to use the surveys for the very reasons permissible under the rules of evidence.

1. The Surveys are Relevant to CCHS's Knowledge and Absence of Mistake

As argued to the circuit court, the surveys are relevant to permissible uses of such evidence under Rule 404(b)(2) – knowledge that the use of the prone

restraints was impermissible and the absence of any claimed mistake as to whether the prone restraints were allowed. The surveys are relevant to and demonstrate that CCHS had knowledge of the host of deficiencies in regard to its use of restraints, and that despite such knowledge, CCHS persisted in its improper use of restraints on Ben, resulting in his injuries. *See id.* (allowing prior acts evidence to show knowledge). In a similar vein, the surveys are relevant to show the absence of mistake – that CCHS could not claim it thought what it did to Ben was permissible. *See id.* (allowing prior acts evidence to show absence of mistake).

In two cases concerning the admissibility of the same type of state department of health surveys, the courts found the surveys were relevant to knowledge and notice, and therefore, admissible. In *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221, 223 (Ala. 1990), the trial court admitted into evidence "survey reports by the Alabama Department of Public Health" which the defendants argued on appeal was incorrect. *See id.* The Supreme Court of Alabama disagreed with the defendants, noting "[t]hese reports, compiled by the Alabama Department of Public Health, contained information about deficiencies found in the nursing home." *Id.* The substance of the deficiencies found by the Alabama Department of Health were the same or similar to the issues alleged by the plaintiff, as the court stated, "there was evidence that the care given to Mrs. Stovall was *deficient in the same ways noted in the survey* and the complaint reports." *Id.* at 223-24 (emphasis added). In finding those surveys were properly admitted into evidence, the Alabama Supreme Court explained:

> The trial court gave the jury a limiting instruction stating that the deficiencies noted in the survey and complaint reports were to be considered solely on the issue of whether the defendants had notice of the alleged conditions. As discussed above, the deficiencies cited and admitted into evidence were directly related to the development of pressure sores from which Mrs. Stovall died. The plaintiff deleted deficiencies in the reports that did not relate to the development of pressure sores. Moreover, there was evidence that the care given to Mrs. Stovall was deficient in the same ways as those noted in the survey and complaint reports. Because the jury could find that the deficiencies noted were deficiencies that proximately caused Mrs. Stovall's death, this evidence was admissible and the trial judge did not abuse his discretion in admitting it.

Id. at 224–25.

Recently, in *Scampone v. Grane Healthcare Co.*, 169 A.3d 600, 626-27 (Pa. Super. Ct. 2017), the court considered whether the trial court erred in excluding similar surveys from the Pennsylvania Department of Health ("DOH"). In that case, an action was brought against a nursing home where the deceased had resided prior to her death, which was due to the substandard care provided by the defendant. *Id.* at 605-06. The trial court refused to allow punitive damages to go to the jury, but the jury awarded compensatory damages of $193,500. *Id.* On appeal, the court held the trial court erred in refusing to submit punitive damages to the jury. *Id.* at 607. On a retrial on punitive damages, the jury awarded no punitive damages against the defendant, and the plaintiff again appealed on several grounds, including whether the plaintiff was improperly prohibited from introducing evidence relevant to punitive damages. *See id.* at 626.

The trial court admitted the DOH surveys that related to the failure to hydrate patients properly, which was the condition that led to the resident's death,

but refused to admit DOH surveys that pertained to other substandard patient-care issues found by the DOH at the nursing home. *Id.* On appeal, the plaintiff argued that "that all DOH deficiencies outlined in surveys from August 22, 2002, through July 16, 2004, regarding patient care at the nursing home, were admissible to demonstrate that the defendants were aware of various dangerous conditions that existed at the nursing home and that they recklessly disregarded their responsibility to correct them." *Id.* The court agreed that all of the surveys were relevant, concluding:

> The surveys demonstrated the existence of across-the-board substandard care rendered at the nursing home and were relevant to show that Highland and Grane had *knowledge* of these deficiencies in patient care and blithely ignored them by failing to increase staffing levels. The surveys, Mr. Scampone continues, *notified* Highland/Grane that there were numerous issues regarding the quality of patient care at the facility and proved that, despite this *knowledge*, Highland/Grane knowingly failed to take corrective measures to remedy the neglect of patients at the facility. In other words, the deficiencies involved with Madeline's care were not isolated incidents, and the *DOH surveys demonstrated that the nursing home was operated in a systemic manner such that patient neglect was common.*

Id. at 626-27 (emphasis added).

The two cases above are directly supportive of Ben's position in this case. The South Dakota Department of Health surveys of CCHS, like the surveys in the cases above, noted the very same deficiencies that are at issue with Ben's care, and the care given to Ben was "deficient in the same ways as those noted in the survey[s]" sought to be admitted here. *See Montgomery Health Care Facility, Inc.*, 565 So.2d at 224-5. The surveys are admissible to prove that CCHS had

knowledge or notice of the deficiencies regarding their restraints of students, yet failed to correct them, leading to the injuries suffered by Ben. *See Scampone*, 169 A.3d at 626. The circuit court's exclusion of the surveys was erroneous on this basis, as well.

2. The Surveys Are Relevant to CCHS's Routine Practice

As previously argued, the surveys are also evidence of CCHS's habit and routine practice of using restraints improperly, which is admissible under SDCL § 19-19-406:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine.

SDCL § 19-19-406. "Evidence of an organization's routine practice, '"must be sufficiently detailed and specific, and the situations involved must be similar enough to give rise to a reliable inference.'" *Bad Wound v. Lakota County Homes, Inc*., 1999 S.D. 165, ¶ 18, 603 N.W.2d 723, 728 (other citations omitted). The surveys excluded by the circuit are unquestionably detailed and specific and they cite to numerous deficiencies that are the same or similar to the deficiencies found in the Checklists of Ben's restraints.

As explained, the claims Ben brought against CCHS include allegations that CCHS not only improperly restrained Ben on certain occasions, resulting in physical and emotional injuries to him, but also that CCHS engaged in a practice and pattern of physically restraining Ben in the prone position. In particular, Ben

alleged CCHS engaged in a pattern and practice of "long-term physical restraint without proper supervision, training control and documentation." The surveys show CCHS's employees' habit or routine practice of using restraints improperly in a number of ways, and they show CCHS's routine practice in failing to properly train and supervise its employees on restraints, in failing to properly implement the restraints, and failing to utilize lesser restrictive interventions. These deficiencies are all allegations in relation to Ben, and whether the deficiencies noted in the surveys relate to Ben or to any other student in its care, they are clearly relevant and are admissible pursuant to SDCL § 19-19-406.

In short, there can be no question regarding the relevancy of the surveys, which document deficiencies by CCHS that were frequently repeated in its care of Ben, and caused his injuries. Ben's use of this incredibly probative evidence would not have been to show CCHS's character or that CCHS acted in conformity with such character. CCHS's improper use of prone restraints in the past is not disputed. Nor is CCHS's prone restraint of Ben on approximately 140 occasions. It is also beyond dispute that the deficiencies documented in the surveys are the same deficiencies documented in Ben's Checklists. Thus, Ben had no reason to use the surveys to demonstrate some character trait of CCHS or that CCHS acted in conformity with any such character trait. Ben's only uses of the surveys would have been to show knowledge, absence of mistake, and habit or routine practice, all permitted uses of this highly relevant evidence. On this basis as well, the circuit court erred in excluding the surveys.

3. The Probative Value of the Surveys Is Not Substantially Outweighed by the Danger of Unfair Prejudice

The court may exclude even relevant evidence "if its probative value is *substantially outweighed* by a danger of . . . *unfair* prejudice." SDCL § 19-19-403. As noted, the circuit court wholly failed to analyze this portion of the test of admissibility, which is alone, reversible error. Further, had it done so, it would have concluded that probative value of the surveys is not substantially outweighed by any unfair prejudice.

The Court has cautioned that "admission of the evidence is favored under [Rule 403], and the judicial power to exclude such evidence should be used sparingly." *Novak*, 2002 S.D. 162, ¶ 11, 655 N.W.2d at 913. *See also State v. Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d 792, 799 (""application of Rule 403 must be cautious and sparing."") (other citations omitted). Further, it is CCHS's burden to prove the probative value of the evidence is substantially outweighed by its prejudicial effect. *See Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799 ("[t]he party objecting to the admission of evidence has the burden of establishing that the trial concerns expressed in [Rule 403] substantially outweigh probative value."). Significantly, CCHS never even attempted to establish that the probative value of the surveys is "substantially outweighed by the danger of unfair prejudice" and any attempt to establish the requisite level of unfair prejudice would have been futile.

The Court has recognized that "[d]amage to defendant's position is no basis for exclusion; the harm must come not from prejudice, but from 'unfair' prejudice." *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799. To "cause unfair prejudice, the evidence must persuade the jury in an unfair and illegitimate way." *Novak*, 2002 S.D. 162, ¶ 11, 655 N.W.2d at 913. The Court described unfair prejudice in *Novak*:

> Prejudicial evidence is that which has the capacity to persuade the jury by illegitimate means which results in one party having an unfair advantage. Evidence is not prejudicial merely because its legitimate probative force damages the defendant's case. Even though the admission of acts evidence "will usually result in such prejudice, it will not be admitted only if that prejudice is unfair."

Id.

As noted, CCHS's argument regarding the inadmissibility of the surveys was not that the surveys were unfairly prejudicial at all. Rather, counsel argued only that the surveys were irrelevant because some of the surveys predated Ben's residential placement at CCHS[4] and the surveys constituted improper evidence of prior bad acts. CCHS never argued, and the circuit court never considered whether the probative value was substantially outweighed by the danger of unfair prejudice.

The surveys are certainly damning evidence of CCHS's knowledge, absence of mistake, and habit or routine practice regarding the use of prone restraints and their improper use. This evidence, however, would not have swayed

[4] In fact, Ben received services at CCHS since 2005, and the 2011 surveys covered the year 2010, when Ben was a residential student there.

the jury in any unfair or illegitimate way as required to make them "unfairly prejudicial." Because the surveys reflected the very same deficiencies as documented in the restraints of Ben, they are highly probative, and such probative value is simply not substantially outweighed by any perceived unfair prejudice.

To summarize, the circuit court erred in failing to conduct this analysis, which alone mandates reversal. Further, the proper analysis reveals that the surveys are admissible, as the surveys are unquestionably relevant and their use is permissible under Rules 404(b) and 406. Conversely, the surveys are not unfairly prejudicial in any way and even if they are, such unfair prejudice does not substantially outweigh their probative value. Ben respectfully requests that the circuit court's order excluding the surveys be reversed and he be granted a new trial.

C. The Cost Judgment Against Neil and Debra Graff Personally Is Not in the Interest of Justice

CCHS sought to recover costs allegedly incurred pursuant to SDCL §§ 15-17-37 and 15-6-54(d). SDCL § 15-17-37 provides in relevant part:

> The prevailing party in a civil action or special proceeding may recover expenditures necessarily incurred in gathering and procuring evidence or bringing the matter to trial. Such expenditures include costs of telephonic hearings, costs of telephoto or fax charges, fees of witnesses, interpreters, translators, officers, printers, service of process, filing, expenses from telephone calls, copying, costs of original and copies of transcripts and reporter's attendance fees, court appointed experts, and other similar expenses and charges**.**

SDCL § 15-17-37. However, courts have the power to deny or limit such recovery, pursuant to SDCL § 15-17-52, which states, "the court may limit the

taxation of disbursements in the interests of justice."

The Court in *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 30, 841 N.W.2d 258, 266, reiterated that the "trial court has broad discretion under SDCL 15–17–52 to limit disbursements to a prevailing party 'in the interest of justice.'" The Court explained:

> A court is not required to grant recovery for disbursements simply because a party has achieved the status of a prevailing party. While SDCL 15–17–37 grants no discretion, SDCL 15–17–52 allows a court to "limit the taxation of disbursements in the interests of justice." This statute grants discretion to deny recovery of disbursements even though SDCL 15–17–37 does not.

Id. (other citations omitted). Thus, the Court in *Hewitt* affirmed the trial court's denial of costs in their entirety, even though "judgment was rendered in Felderman's favor when the jury awarded zero damages," stating "Felderman has failed to carry her burden of convincing this Court that the trial court's order was not 'in the interests of justice,' and thereby an abuse of discretion. We conclude the trial court did not abuse its discretion and we affirm the trial court's denial of costs and disbursements." *Id.*

Ben respectfully submits that costs awarded to CCHS are not in the interest of justice because such costs cannot be assessed against Neil and Debra Graff personally, and the amount of costs awarded to CCHS was unjustified and inequitable.

1. Costs Should Not Be Imposed Against Neil and Debra Personally

Ben is the real party in interest in this case, not his parents Neil and Debra,

who acted as Ben's guardians. On this basis, it is improper to impose costs against Neil and Debra Graff personally. *See M.D.B. by & through T.M.B. v. Walt Disney Parks & Resorts US, Inc.*, 2017 WL 3065146, at *5 (M.D. Fla. July 19, 2017) ("American courts have recognized that the liability for a cost judgment obtained against the next friend who filed suit on a minor's behalf, is actually the financial responsibility of the minor.") (other citations omitted). Therefore, Neil and Debra Graff cannot be held personally responsible for the Cost Judgment. *See id. See also K.C. v. Schucker*, 2014 WL 11537828, at *3 (W.D. Tenn. Feb. 25, 2014) (the guardian had no personal liability for costs assessed because she was plaintiff only in a representative capacity). On this basis alone, the Cost Judgment should be reversed.

CCHS argued to the circuit court that because Neil and Debra, at one time, had their own claim for emotional distress, that costs against them are justified. The circuit court appears to have adopted this argument, at least in part, as it awarded CCHS one-third of its requested costs, reasoning that since Ben had two of the three claims against CCHS and Neil and Debra had one claim, that Neil and Debra were responsible for one-third of the costs. RO5:647.

However, Neil and Debra never had their own "claim" or cause of action. Rather, they simply sought damages for their own and Ben's emotional distress. However, those damages arose from the same conduct and the same causes of action as Ben's damages. It was erroneous to award costs based on the number of claims each of the plaintiffs had, where Neil and Debra did not assert their own

claim. The Cost Judgment against Neil and Debra should be reversed on this basis alone.

2. The Amount of Costs Awarded Was Not Justified

If a cost judgment can be against Neil and Debra at all, which is denied, the amount of costs awarded to CCHS was not justified for several reasons. Even if such a pro-rata calculation of costs could be made, there were four causes of action asserted in the Complaint, not three. The Complaint alleged negligence, lack of informed consent, negligent infliction of emotional distress and intentional infliction of emotional distress. If the Court were to allow the circuit court's pro-rata calculation to stand, it should, at a minimum be based on the correct percentage of claims.

Further, any award of costs, whether by a pro-rata calculation or otherwise, should have taken into account the fact that very little of the discovery and trial expenses were actually attributable to Neil and Debra personally. Neil and Debra's own emotional distress was an insignificant part of the overall claims against CCHS, so much so that little to no discovery related to it, and it was voluntarily dismissed prior to trial.

The crux of this case has always been CCHS's treatment of Ben and Ben's resultant injuries. While Neil and Debbie initially requested damages for their own emotional injuries at the beginning of this lawsuit in 2013, little to no discovery ever occurred regarding their own injuries. For instance, CCHS sought over $13,000 in deposition charges, but it is inconceivable how any of those

witnesses could have offered any testimony relevant to Neil and Debra's emotional distress. In fact, the depositions consisted of CCHS employees, who testified in regard to the treatment of Ben and to the policies and procedures relating to prone restraints; of Ben's medical providers, who could have no testimony or opinions about Neil and Debra's emotional distress; and of expert witnesses, none of whom offered any opinions regarding Neil and Debra's emotional distress. Rather, with the limited exception of their own depositions, in which defense counsel devoted mere minutes of the hours-long deposition to Neil and Debra's own allegations of emotional distress, the countless depositions bore no relevance to Neil and Debra's emotional distress.

CCHS also sought $11,000 in costs for printed materials used at or to prepare for trial. Since Neil and Debra's own claim for emotional distress was dismissed prior to trial, such printing costs could not be related to that claim. And, the invoices submitted by CCHS reflect that the printing costs were for Ben's medical records and his records from CCHS, LifeScape and the school district.

In short, costs should not be imposed against Neil and Debra personally, as they were not the real party in interest. Further, in awarding CCHS one-third of the costs sought, by simply basing the amount awarded on the fact that Neil and Debra had one of three claims against CCHS, the circuit court abused its discretion. There were four total claims against CCHS and in any event, CCHS did not incur one-third of its costs in defending against Neil and Debra's single claim that was dismissed prior to trial, to which CCHS devoted little time and

expense. The circuit court's basis for its award of costs is not grounded in fact or reason, is not in the interests of justice, and is an abuse of discretion, warranting reversal of the Cost Judgment. *See Hewitt*, 2013 S.D. 91, ¶ 30, 841 N.W.2d at 266.

CONCLUSION

For all these reasons, Benjamin Graff respectfully requests that the Court reverse the circuit court's order excluding the surveys and reverse the jury's verdict, and requests a new trial. In addition, Ben requests that the Court reverse the Cost Judgment against Neil and Debra Graff.

Dated this 16th day of October, 2018.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellant's Brief contains 9,865 words as counted by Microsoft Word.

/s/ Michael L. Luce
Michael L. Luce

CERTIFICATE OF SERVICE

Michael L. Luce, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 16th day of October, 2018, 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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The undersigned further certifies that the original and two (2) copies of the Brief of Appellant in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Michael L. Luce
Michael L. Luce

APPENDIX

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STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled, Plaintiffs, vs. CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation, Defendant.	CIV. **ANSWER**

Comes now Defendant Children's Care Hospital and School (CCHS), and for its Answer to Plaintiffs' Complaint, states and alleges as follows:

1. Defendant CCHS denies each and every matter, allegation and thing except as specifically admitted or qualified herein.

2. Responding to paragraphs 1 and 2 of the Complaint, Defendant CCHS admits that Neil H. and Debra A. Graff are the parents of Benjamin B. Graff, that Ben turned 18 years of age on January 18, 2012 and admit, upon information and belief, that Neil H. and Debra A. Graff are the duly appointed guardians and conservators of Ben.

3. Responding to the allegations in paragraph 3 through 7 of the Complaint, Defendant CCHS admits that Ben's medical diagnosis has included autism, mental retardation, attention deficit hyperactivity disorder, cognitive disability, and pervasive developmental disability and that these conditions have, at least at times, resulted in emotional disturbance, impaired Ben's ability to provide for his own health care and safety, impaired his ability to

communicate and created special needs. Defendant CCHS further admits that Ben requires special services to assist him with his special needs.

4. Responding to paragraphs 8 and 10 of the Complaint, Defendant CCHS admits that it is a domestic corporation organized under the laws of the State of South Dakota with its principal place of business located in Minnehaha County, South Dakota. Defendant CCHS further admits that it provides educational and other services to children with disabilities and special needs.

5. Responding to the allegations in paragraph 9 of the Complaint, Defendant CCHS admits that venue and jurisdiction are proper in this court. Defendant CCHS states that some of Plaintiffs' claims may be barred by the applicable statute of limitations, SDCL § 15-2-14.1.

6. Defendant CCHS is without sufficient knowledge or information to either admit or deny the allegations contained in paragraph 11 of the Complaint and remit Plaintiffs to their strict proof thereof.

7. Paragraph 12 of the Complaint contains a legal conclusion to which no response is required. To the extent a response is required, Defendant CCHS had duties to Ben Graff in accordance with the laws of the State of South Dakota and applicable laws of the United States.

8. Responding to the allegations in paragraph 13 of the Complaint, Defendant CCHS admits that Ben was in the residential program from March 11, 2010 to September 21, 2010 and that he was a day student from September 21, 2010 to September 28, 2010. Defendant CCHS also admits that Ben received services prior to March 11, 2010.

9. Defendant CCHS denies the allegations contained in paragraph 14 of the Complaint.

10. Responding to the allegations of paragraph 15 of the Complaint, Defendant CCHS incorporates its response to paragraphs 1 through 14 of the Complaint.

11. Paragraphs 16, 20 and 21 of the Complaint contain legal conclusions to which no response is required. To the extent a response is required, Defendant CCHS had duties to Ben Graff in accordance with the laws of the State of South Dakota and applicable laws of the United States.

12. Defendant CCHS denies the allegations in paragraph 17 of the Complaint.

13. Responding to the allegations in paragraphs 18 and 19 of the Complaint, Defendant CCHS admits that its employees who provided services to Ben were acting within the course and scope of their employment during the course of providing care to Ben but Defendant CCHS denies that those employees were negligent and therefore deny liability under doctrine of respondeat superior.

14. Responding to paragraphs 22 and 23 of the Complaint, Defendant CCHS admits that at times Ben was physically restrained, and each physical restraint is documented in his records. Defendant CCHS denies the remaining allegations contained in paragraphs 22 and 23 of the Complaint.

15. Defendant CCHS denies the allegations contained in paragraph 24.

16. Paragraph 25 contains a legal conclusion to which no response is required. To the extent a response is required, Defendant CCHS denies that it violated state statutes and denies that it was negligent *per se*.

17. Defendant CCHS denies the allegations contained in paragraph 26 of the Complaint.

18. Responding to the allegations contained in paragraph 27 of the Complaint, Defendant CCHS denies that Ben was traumatized and abused under the care of Defendant CCHS and therefore denies paragraph 27 of Plaintiffs' Complaint.

19. Defendant CCHS denies the allegations contained in paragraph 28 of the Complaint.

20. Paragraphs 29 and 30 of the Complaint contain legal conclusions to which no response is required. To the extent a response is required, Defendant CCHS states that the use of physical restraints on Ben was properly monitored and documented and in accordance with the facility's policies.

21. Defendant CCHS denies the allegations contained in paragraphs 31, 32, 33, and 34 of the Complaint.

22. Responding to paragraph 35 of the Complaint, Defendant CCHS incorporates its responses to paragraphs 1 through 34 of the Complaint.

23. Paragraphs 36 and 37 of the Complaint contain legal conclusions to which no response is required. To the extent a response is required, Defendant CCHS states that Ben's parents consented to the use of restraints.

24. Defendant CCHS denies the allegations contained in paragraph 38 of the Complaint.

25. Responding to the allegations in paragraph 39 of the Complaint, Defendant CCHS incorporates its responses to the allegations in paragraphs 1 through 38 of the Complaint.

26. Defendant CCHS denies the allegations contained in paragraphs 40 and 41 of the Complaint.

27. Defendant CCHS is without sufficient knowledge or information to either admit or deny the allegations contained in paragraph 42 of the Complaint.

28. Responding to paragraph 43 of the Complaint, Defendant CCHS incorporates its responses to paragraphs 1 through 42 of the Complaint.

29. Defendant CCHS denies the allegations contained in paragraphs 44 and 46 of the Complaint.

30. Responding to paragraph 45 of the Complaint, Defendant CCHS denies any negligence on its part or on the part of its agents or employees that has caused or contributed to Plaintiffs' claimed injuries, losses and damages.

31. Responding to paragraph 47 of the Complaint, Defendant CCHS incorporates its responses to paragraphs 1 through 46 of the Complaint.

32. Defendant CCHS denies the allegations contained in paragraph 48 of the Complaint.

33. Affirmatively responding, Defendant CCHS asserts that some or all of the claims asserted by parents, Neil H. Graff and Debra A. Graff, may be barred by the applicable statute of limitations.

34. Defendant CCHS denies the nature and extent of the Plaintiffs' alleged damages and remits Plaintiffs to their strict proof thereof.

35. Affirmatively responding, Defendant CCHS asserts that there is no basis for the imposition of punitive damages in this case and that an award of punitive damages in this case would be inconsistent with the provisions of the South Dakota and the United States Constitutions.

36. Affirmatively responding, Defendant CCHS asserts that the Complaint fails to state a claim for relief for *res ipsa loquitur*.

WHEREFORE, Defendant prays that Plaintiffs' Complaint be dismissed on the merits and with prejudice and that Defendant be awarded its costs and attorney's fees and such other and further relief as the court deems just and equitable.

Dated at Sioux Falls, South Dakota, this 6th day of February, 2013.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

Mark W. Haigh
Melissa C. Hinton
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101-1030
Telephone: (605) 336-2880
Facsimile: (605) 335-3639
Attorneys for Defendant

DEMAND FOR TRIAL BY JURY

Defendant CCHS demands trial by jury on all issues of fact.

Melissa C. Hinton

CERTIFICATE OF SERVICE

Melissa C. Hinton, one of the attorneys for Defendant, hereby certifies that a true and correct copy of the foregoing "Answer" was served by mail upon:

Michael L. Luce
Murphy, Goldammer & Prendergast, LLP
101 North Phillips Avenue, Suite 402
PO Box 1535
Sioux Falls, SD 57101
Attorneys for Plaintiffs

on this 6th day of February, 2013.

Melissa C. Hinton

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF & DEBRA A. GRAFF, Parents and Guardians of BENJAMIN B. GRAFF, disabled, *Plaintiffs,* vs. **CHILDRENS CARE HOSPITAL & SCHOOL, a South Dakota Corporation** *Defendant,*	Civ. 14-1363 **ORDER REGARDING DEFENDANT'S MOTION IN LIMINE**

The Court finds that any testimony, evidence, or reference to surveys from 2008-2001 done by the South Dakota Department of Health show deficiencies in record-keeping done by Children's Care Hospital & School. Because SDCL §§ 22-18-5 and 13-32-2 define the standard of care, the surveys have limited relevance. Thus, the Court GRANTS Defendant's motion # 15 and excludes the records.

Dated this 4th day of May, 2016.

BY THE COURT:

Lawrence Long
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

FILED
MAY 04 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF and DEBRA A. GRAFF, as parents and guardians of BENJAMIN B. GRAFF, disabled, Plaintiffs, vs. **CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota corporation,** Defendant.	CIV. 14-1363 **SPECIAL VERDICT FORM**

We, the jury, duly impaneled in the above-entitled action hereby find as follows:

1. **Do you find that Defendant was negligent?**

   ANSWER: _____ YES _X_ NO

   If your answer to Question 1 is "Yes," proceed to Question 2. If your answer to Question 1 is "No," proceed to Question 3.

2. **Was Defendant's negligence a legal cause of damage to Plaintiff Benjamin Graff?**

   ANSWER: _____ YES _____ NO

3. **Do you find that Defendant negligently inflicted emotional distress upon Plaintiff Benjamin Graff as defined in the instructions?**

   ANSWER: _____ YES _X_ NO

   If your answer to Question 3 is "Yes," proceed to Question 4. If your answer to Question 3 is "No," proceed to Question 5.

4. **Was Defendant's negligent infliction of emotional distress a legal cause of damage to Plaintiff Benjamin Graff?**

   ANSWER: _____ YES _____ NO

5. **Do you find that Defendant intentionally inflicted emotional distress upon Plaintiff Benjamin Graff as defined in the instructions?**

ANSWER: _____ YES _X_ NO

If your answer to Question 5 is "Yes," proceed to Question 6. If your answer to Question 5 is "No," proceed to Question 7.

6. **Was Defendant's intentional infliction of emotional distress a legal cause of damage to Plaintiff Benjamin Graff?**

ANSWER: _____ YES _____ NO

7. **Damages:** If you answered "Yes" to Question 2, Question 4, and/or Question 6, please state the amount of damages to Plaintiff Benjamin Graff legally caused by the actions for which you have found Defendant liable: $ 0.00 .

Dated this 25 day of May, 2018.

FILED
MAY 29 2018
Minnehaha County, S.D.
Clerk Circuit Court

Sheri Whitney
Foreperson

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled, Plaintiffs, vs. CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation, Defendant.	CIV. 14-1363 **JUDGMENT**

This action came on for trial before the Court and a jury on May 7, 2018 through May 25, 2018, the Honorable Lawrence E. Long, Circuit Court Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered in favor of the Defendant and that Plaintiffs take nothing, that the action be dismissed on the merits, and that the Defendant recover of Plaintiffs costs in this action in the amount of $_____, to be hereinafter inserted by the clerk.

Dated at Sioux Falls, South Dakota, this 30 day of May, 2018.

BY THE COURT:

Lawrence E. Long, Circuit Court Judge

ATTEST:

ANGELIA M. GRIES, Clerk

By _____ (Deputy)

UNIFIED JUDICIAL SYSTEM STATE OF SOUTH DAKOTA

FILED
MAY 30 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled, Plaintiffs, vs. CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation, Defendant.	CIV. 14-1363 **COST JUDGMENT**

On July 23, 2018, a hearing was held before the Honorable Lawrence E. Long on Defendant Children's Care Hospital and School's Application for Taxation of Costs and Disbursements pursuant to SDCL § 15-17-37. The Court, upon reviewing the pleadings, files and records herein, as well as the arguments of counsel, hereby orders that judgment shall be entered against Plaintiffs Neil H. Graff and Debra A. Graff in the amount of $7,606.54 for the reasonable costs expensed by Defendant Children's Care Hospital and School in gathering and procuring evidence or bringing the matter to trial.

Dated at Sioux Falls, South Dakota, this 10 day of Sept., 2018.

BY THE COURT:

Lawrence E. Long, Circuit Court Judge

ATTEST:

ANGELIA M. GRIES, Clerk

By _____
Deputy

(SEAL)

FILED
SEP 10 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* *

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled, 49CIV15-2096

Plaintiffs,

-vs-

CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,

Defendant.

49CIV14-1363

PRETRIAL CONFERENCE

* *

BEFORE: THE HONORABLE LAWRENCE LONG
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

APPEARANCES: MR. MICHAEL L. LUCE
MS. DANA PALMER
Lynn, Jackson, Shultz & Lebrun, PC
Post Office Box 2700
Sioux Falls, South Dakota 57101
-and-
MR. VINCENT A. PURTELL
Heidepriem, Purtell, Siegel & Olivier, LLP
101 West 69th Street, Suite 105
Sioux Falls, South Dakota 57108

Attorneys for Plaintiffs.

MR. EDWIN E. EVANS
MR. MARK W. HAIGH
MR. TYLER W. HAIGH
Evans, Haigh & Hinton, LLP
Post Office Box 2790
Sioux Falls, South Dakota 57101

Attorneys for the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 9:00 A.M. On the 23rd day of April, 2018, Minnehaha County Courthouse Sioux Falls, South Dakota

* * * * * * * * * * * * *

THE COURT: These are proceedings in civil file 14-1363. Neil Graff and Debra Graff as guardians on behalf of Benjamin Graff, plaintiffs, versus Children's Care Hospital and School, defendant.

Counsel, will you note your appearances, please.

MR. LUCE: Vince Purtell, Dana Palmer, and Mike Luce for the plaintiffs.

MR. HAIGH: Mark Haigh, Ed Evans, and Tyler Haigh for the defendant.

THE COURT: Very well. All right. This is a pretrial conference, and I think most of what we need to do is to work through the motions in limine today so why don't we start there.

Let's start with the plaintiff's motions. And my sense is that some of these are not contested. So why don't we go through the plaintiff's and find out which ones are noncontested and then we can work back through the ones that are contested.

First, evidence of insurance. Defense contest that

they said, "You need to correct," along with all these other topics.

And so in 2008 we then issued a plan back to the State: Here's what we're going to do to correct it. And then there was another inspection, and they said, "You need to fix these other things too. You haven't fully done everything we said."

And so in 2008, early 2009 there was a second survey, and we met and satisfied the State that we've now complied with all state regulations. This was all before Ben Graff was there.

They came back and did surveys again in 2010 and then in 2011 related to the entire hospital again. And in 2010 and 2011 -- 2010 again was when Ben was there -- the State found absolutely no violations of any restraint policies in 2010 or 2011. And so our argument is that what happened in 2008 when Ben wasn't there -- and again, Ben hasn't -- Ben was not involved in any of these deficiencies noted in the 2008 survey. In fact, he wasn't even restrained in 2008 so he couldn't have been one of those students. But none of the deficiencies noted by the Department of Health in 2008 related to Ben. They were corrected. In fact, that's confirmed by the State when they came back and did surveys again in 2010 and 2011.

What happened in 2008 again is irrelevant because it

happened in 2008, not when Ben was there. And the evidence would show -- you know, if it was presented, it would just show that it was corrected. Again, it's evidence of prior bad acts that occurred in 2008. It's an attempt by the plaintiffs just to say, "Hey, look. CCHS is a bad place. The Department of Health came in and they found deficiencies." And, you know, like the arguments we've been making throughout the case, this is something unrelated to Ben. None of these deficiencies were related to Ben. It's just an attempt to say, "Hey, you're bad people."

THE COURT: Okay.

MR. LUCE: 2008 starts it. They're told of all these deficiencies. They go back in '9 -- and this is knowledge, what they knew about problems with their restraints, which is what happened to Ben. 2009 they said they still haven't corrected them. And I don't have these here today, but I do not believe it is an accurate statement -- and they can be provided to the Court, those surveys -- that they found no deficiencies in 2010 and 2011. 2011 by the way the Court says, "Well, that's after Ben left." 2011 is the date of it. It deals with what was going on at Children's Care in 2010, the time when Ben was there.

So from '8 to '11, 2008 to 2011, we start out with

knowledge of deficiencies of the exact nature that Ben experienced. That they were told to correct them. They said they corrected them but they didn't. Ergo. What happened to Ben? The same stuff they had been warned not to do. And this statement amazes me that we now have evidence from an attorney that says, "Well, I know about all these surveys, and they're always finding something wrong." The Court can't make a ruling based on that. That is improper argument. It's without any foundation. And I don't care if a hospital in Belle Fourche was told that they didn't change catheters enough. I do care that a facility in Sioux Falls that was treating this young man were told, "Here's these things you have to do with restraints to be following your practices, policies, and procedures, and you're not doing them. And you didn't do them with Ben."

THE COURT: Okay. I want to see it all in advance. Send me the stuff you want to introduce.

MR. LUCE: Okay.

THE COURT: I want to see the whole business from 8 through 11.

MR. HAIGH: Whole business? Oh, all the surveys?

THE COURT: Yes, all the surveys.

MR. LUCE: And I'll highlight those areas because some are like 20 pages long and stuff so the Court can know which

areas we believe are most significant to Ben's case.
THE COURT: Okay.
MR. HAIGH: I guess the other point I just want to make, there's so much stuff in there that's unrelated to restraints or Ben or anything in this case. Are we agreeable that that's not coming in? I don't know if Mr. Luce --
THE COURT: Well, I -- that's --
MR. LUCE: I think the whole --
THE COURT: Mr. Luce, what's your position with reference to that?
MR. LUCE: I think the whole survey comes in. It's a public record.
THE COURT: How big is it?
MS. PALMER: 231 pages.
MR. LUCE: For all four of them are -- how much?
MS. PALMER: 231.
MR. LUCE: 231 pages.
THE COURT: Does that cover the 2008 through 2011?
MR. LUCE: That's correct, yup. That's the only ones we have that were introduced.
THE COURT: Is it bigger than that?
MR. HAIGH: I haven't looked. It sounds about right.
THE COURT: Well, okay. Well, I guess I'll read all 231 pages. But let's try to sift this stuff down to the stuff

that talks about restraints and mark stuff you want.
MR. LUCE: I'll provide the Court with two copies -- one, the full one, so the Court can take it under -- see the whole thing, and redacted ones with that stuff that relates to not Ben specifically but to restraints and concerns about those restraints -- because that's what this lawsuit's about.
THE COURT: Okay.
MR. HAIGH: Just -- I'm sorry, one technical point so I don't get in trouble with anybody. In the surveys, the children that are discussed are discussed by number.
THE COURT: Okay.
MR. HAIGH: Because we're the ones that were surveyed, we know -- I know what those -- who those students are. But one of them in, I think it was, 2010 or 2011 is Ben Graff. Do you want me to tell you who that is?
MR. LUCE: The number?
MR. HAIGH: I don't want to get in trouble with anybody. I told Mr. Luce what it was.
MR. LUCE: Yeah, I don't -- you can tell him the number.
MR. HAIGH: I don't care what Mr. Luce thinks. I want to known what the Court thinks because I don't want to get in trouble for disclosing something I'm not supposed to disclose.
THE COURT: Well --

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled
Plaintiff,
vs.
CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,
Defendant.

) CIV. 14-1363
) Discussions held outside the presence of the jury

BEFORE: THE HONORABLE LARRY LONG, Circuit Judge, at Sioux Falls, South Dakota, on the 7th of May, 2018.

APPEARANCES:

Michael L. Luce
Dana Palmer
Lynn, Jackson, Shultz & Lebrun, PC
Sioux Falls, South Dakota
-and-
Vincent A. Purtell
Heidepriem, Purtell, Siegel & Olivier, LLP
Sioux Falls, South Dakota
Appearing on behalf of the plaintiff;

Edwin E. Evans
Mark W. Haigh
Tyler W. Haigh
Evans, Haigh & Hinton, LLP
Sioux Falls, South Dakota

Appearing on behalf of the defendant.

instructions and I think one or both of them may have some relevance. I don't think we are going to try to do anything about substantive instructions for a few days yet. So we'll give everybody a chance to, you know, to think about that. But I appreciate your brief, Mr. Luce, and we'll get to work on it.

MR. LUCE: And can I --

THE COURT: Do you want to address it?

MR. LUCE: Yes, please.

THE COURT: Okay.

MR. LUCE: And again, as the Court is aware, on Friday afternoon for this Monday trial, the Court first gave us the heads up that it was concerned about the application of these two statutes and indicated we would talk about that before the jury commenced being selected on Monday morning. So our office immediately started addressing that. This was obviously *sua sponte* because neither side has proposed these either in jury instructions or on the argument regarding the motion in limine regarding the state review records, audits, surveys, whatever you want to call those, nor is any affirmative defense by the defendants. So, we worked on that.

And then later in the day the Court determined that the motion in limine regarding the state audits would not come in and based that ruling on these same two statutes that,

again, were not ever raised as an issue. And so, it really created a difficult position for the plaintiffs and has created a significant concern from the plaintiff's standpoint, not just on jury selection. And again, I believe on jury selection in summarizing this, the problem is the first statute is a criminal statute, 22-18-5. The second statute is, as the annotation reflects, it is the legislature's effort as addressing corporal punishment. It's addressed to the public -- I believe it's a public school instruction and that deals where children claim assault.

This is not a claim of assault against anyone working for a school. This is a case involving the administration, supervision, and enforcement of policies relating to restraints and its application is inapplicable to this case.

The difficulty if this was given to the jury is the jury will hear evidence, which is undisputed, that restraints must be least restrictive. If a jury's instructed on that and then is instructed that, Well, there's the statute that says, As long as you are using reasonable care, you can do corporal punishment, you can restrain. Well, first of all, then what if a jury says, Well, that wasn't the least restrictive they could have done something lesser, but what they did wasn't all that horrible, so under that instruction we can basically

supersede the least restrictive requirement.

And that's not the law. It does not apply to special education matters and it would prejudice this case if that's presented to the jury.

And the -- as this brief reflects, it is clear that these audits and surveys were not just record keeping. They talked about specific things and said, You had to correct those, and Children's Care claimed they were going to correct them. But then when they established a checklist and review of each restraint, it was clear on not just one occasion, not just two occasions, but multiple times they were not following what they were told to follow. And this is extremely relevant, probative, and these two statutes do not serve as the basis to preclude the introduction of evidence regarding those statutes.

And this is -- I don't want to minimize the devastation of this new issue that arose on Friday afternoon. We have spent years preparing this case for trial. My estimate would be just from the number of defense experts and the 23,000 documents that the defense has, 23,000 pages of exhibits that the defense has proposed, this is an expensive trial. It's expensive for my clients, it's expensive for the defense, and if the Court is inclined to follow these statutes both with respect to this significant motion in limine and potentially instructions to the jury, I would ask

that the Court -- so we don't try a case for -- and again, the Supreme Court will decide whether I'm wrong, defense is wrong, or the Court's wrong, but we don't want to have a serious issue overriding this case and go to all of the culmination of years and expenses and then have the case have to be retried. I would even ask that the Court consider granting a continuance to permit the plaintiffs to proceed with a interlocutory appeal on this very substantial important and potentially devastating issue with respect to plaintiff's case.

THE COURT: Mr. Evans, you want to be heard or Mr. Haigh.

MR. HAIGH: Thank you, Your Honor.

With regard to the statutes, first of all, we do believe they apply. As you know, we had a summary judgment hearing. The Court ruled this was not a medical malpractice case and so obviously we cannot use the medical malpractice standard of care.

Second, we know in 2010 there was no law prohibiting restraints in schools. Given these two factors we got to have a standard. And it seems to me that the legislature has spoken as to what the standard is in both of these statutes, particularly the 22-18-5, which specifically addresses the use of restraints and sets forth what the law is in South Dakota with regard to the use of restraints.

will do that. They are seeking prior bad act evidence, which as was addressed in the prior argument, none of which applies to Benjamin Graff, none of which applies to the relevant time period, which is 2010 in this case, and therefore should be inadmissible.

THE COURT: Well --

MR. LUCE: May I briefly respond, Your Honor?

THE COURT: Yes, you may.

MR. LUCE: Just, one, we did argue the motion in limine. These statutes were never apart of that argument. So for counselor to say they are applicable, it's never been raised before by the defense as being applicable. And number two, in terms of jury instruction, we have a reasonable care instruction, we have a standard negligence instruction. That is in our standard set of instructions. That should be given. This one gives the jury in there a chance to say, Well, they didn't do least restrictive, but here -- says right here, they can do that as long as it's reasonable. It permits a defense to an assault case to be used in a rules and regulations case to the prejudice, the extreme prejudice of plaintiff's case.

THE COURT: Mr. Luce, are you asking for a continuance?

MR. LUCE: If the Court is not -- one, I would like the Court to address this before jury selection because it's very important, but if the Court feels, and the Court

MR. LUCE: My view, Your Honor, was that the regular pattern instructions will cover this and there's really no dispute about the obligation to do least restrictive, so it's something that is not an issue that the jury needs to determine because it is undisputed. Every one of the witnesses heard the defense acknowledge that requirement.

THE COURT: Okay. All right. Well, all right. I wanted to put all counsel on notice about these two statutes that I have a sense have some applicability in this case. Because of the length of this trial, we can set that further down the road, but I think we ought to go ahead and pick the jury or attempt to do so. And not going to rule against you right now, Mr. Luce, but I want a little bit of time to contemplate your arguments and to give the defense an opportunity to respond in writing if they want to do so. But I think we'll proceed. Now --

MR. LUCE: Just one other thing, Your Honor, I'm sorry.

THE COURT: Yes.

MR. LUCE: Because motions in limine rulings granting motions I do believe require an offer of proof to protect the record and I would ask that my brief that cites the evidence that comes from exhibits that both sides have introduced, that my brief be considered my offer of proof on the issue regarding the motion in limine regarding the state refused their audits.

THE COURT: Now, Mr. -- I think there are two of them, are there not? There was an original brief and then you submitted a supplemental brief.

MR. LUCE: I'm talking about the brief submitted this morning.

THE COURT: Oh, okay.

MR. LUCE: Yes. That sets forth the evidence on that, yep.

THE COURT: Any objection, Counsel?

MR. HAIGH: I just had a few minutes to read it. I'm inclined to say that's fine to save time, but can I have until noon to tell you?

THE COURT: Sure. Okay. Anything else we need to talk about? Any last minute other stuff? Well, then I got you gentlemen up a little early today. Well, why don't we reconvene at quarter to nine and by then we ought to have a jury list from the bailiffs and we can start that process, so we'll stand at ease until quarter to nine.

(A break in the proceedings was had and jury selection commenced and is not being transcribed at this time.)

(The following discussion was had at 1:13 p.m., outside the presence of the prospective jury panel and with Counsel, the Court, and the litigants present.)

THE COURT: These are proceedings in civil file 14-1363. Counsel is present, the litigants are present, we

are outside the presence of the jury. Mr. Haigh for the defense has just handed me a brief which I have not had the opportunity to look at yet, which I will do. In the meantime my clerks found some other statutes which seem to arguably apply in this case and so, somebody wants to come up and why don't you share one of those with Mr. Luce.

I assume Counsel is familiar with these more so than I was. But in any event, I got these and just briefly got the opportunity to look through them over the lunch hour. These statutes are all found in SDCL 27(b) -- SDCL 27(b)-1-17; next is 27(b)-1-18; next is 27(b)-2-26; one is 27(b)-8-38; next is 27(b)-8-53; last is SDCL 27(b)-8-55.

Now, this packet of statutes appears to address people with developmental disabilities, which I'm guessing there's a good chance that Ben fits that category. These statutes address the restraints and circumstances in which they can be used. It's not the same language as Mr. Luce eluded to in his brief this morning, but I think the requirements and restrictions are substantially similar. I don't know whether CCHS fits within the -- fits within the criteria of the definitions that are attached or at least appear to apply. The facility of Redfield is within these rules or these statutes. In any event, so I don't know that I have any comments on those statutes other than my clerks found them and have been looking at them and have made me a set of

copies. So they are of the -- there is apparently a set of rules that at least accompany part of this 27(b) chapter. I haven't looked at those. I don't know if they address restraints, whether they are applicable to the situation we would litigate. So, Counsel, look at these statutes and I'll look through this brief.

(The portion of the proceedings that is being transcribed at this time is concluded.)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

* *

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled,

Plaintiffs,

-vs-

CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,

Defendant.

49CIV14-1363

PARTIAL TRANSCRIPT FROM COURT TRIAL OF: SETTLING OF JURY INSTRUCTIONS, RENEWAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW, AND TESTIMONY OF DR. MARSO OUTSIDE PRESENCE OF JURY

* *

BEFORE: THE HONORABLE LAWRENCE LONG
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

PROCEEDINGS: The above-entitled proceeding commenced on the 24th day of May, 2018, Minnehaha County Courthouse, Sioux Falls, South Dakota

APPEARANCES: MR. MICHAEL L. LUCE
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Post Office Box 2700
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-and-
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Attorneys for Plaintiffs.

APPEARANCES
CONTINUED: MR. EDWIN E. EVANS
MR. MARK W. HAIGH
MR. TYLER W. HAIGH
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Sioux Falls, South Dakota 57101

Attorneys for the Defendant.

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through them formally, then you make your record then.

MR. EVANS: I will. Thank you.

THE COURT: Okay. Next is the pattern on legal cause.

MR. LUCE: No objection.

MR. EVANS: No objection.

THE COURT: Next is an instruction that begins, "Community services provider." This was taken from 27B. I forget which statute of 27B. But it's not a complete statement of the statute, but I think it's a statement of the pertinent portions of the statute. The purpose -- my purpose in adding it is that it defines a community services provider, which I think CCHS is, and then it defines -- or it defines the limits of what a community service provider or a school can do. And I think it's relevant to the issues in this case.

Is plaintiff going to object to this?

MR. LUCE: I don't believe it's necessary on the corporal punishment, and the seclusion I think would tend to mislead the jury because it doesn't distinguish between time-outs that are instructed on later. So that's my only concerns with this instruction.

THE COURT: Okay. Mr. Evans?

MR. EVANS: Can Mr. Haigh address that issue? He's the expert on 27B.

MR. MARK HAIGH: Your Honor, we're going to object to all

of the 27B instructions.

THE COURT: Okay.

MR. MARK HAIGH: 27B -- and we've been looking at this since we sent these instructions yesterday pretty carefully -- 27B is a statute that governs both the Redfield facility and what are called, as the Court's listed the definition, community service providers, which are a special group of facilities that are regulated by the South Dakota Department of Human Services. And CCHS was not a community service provider under Title 27B in 2010. They were licensed as a specialty hospital under SDCL 34-12-2. And we do -- we're waiting actually -- we called the South Dakota Department of Human Services to confirm that we do not fall under 27B, and they've agreed to sign an affidavit. We're just waiting for them to send it back to us, and hopefully we'll have it by the end of the hearing. But I would like to call Ms. Marso when we get to that point of arguing whether 27B applies to give testimony on this issue.

THE COURT: Okay. What is your position, counsel, with reference to that second sentence which is directly out of the statute that says, "no community service provider or school"? Is it your position that CCHS is not a school who receives public funds and provides services to developmentally disabled people?

MR. MARK HAIGH: Not during the time that the plaintiffs are -- Dr. Marcus said he was only referencing us as a hospital when he testified as to our deficiencies. And so we were only a school for Ben when he was a day student, which would have been before March 11, 2009.

MR. LUCE: The case is based upon him being a student, and it is a school that receives public funds.

THE COURT: Well, okay. Mr. Haigh doesn't like my proposed instruction for one reason, and you don't like it for another reason. I'm the only person who likes it?

MR. LUCE: Well, no. And I tend to agree on this one. There's others where I think the -- I don't agree that 27B, to the extent it deals with schools receiving public funds, other instructions are not applicable. But on this one, I don't think there's any issue of corporal punishment or an issue regarding --

THE COURT: Mr. Luce, you would -- I'm not going to hold you totally to this, but you would propose to strike the corporal punishment aspect of it?

MR. LUCE: Yes.

THE COURT: At a minimum?

MR. LUCE: Yes.

THE COURT: Okay.

MR. LUCE: And I don't mind the seclusion as long as it's somewhere made clear seclusion is not the same as time-out

because the Court instructs on time-out later.

THE COURT: Well -- and I mean it seems to me that the statute, which I think I have parroted here, defines seclusion and says a school can't do it. So seclusion -- at least at the time you were talking about, CCHS was prohibited from engaging in seclusion. I think that's what the law says.

Now I get defense's position that that's not relevant and is inconsistent with your defense about a hospital. But even if CCHS was not then and is not now a community services provider, it seems to me the statute still has applicability if CCHS was at the time a school.

MR. MARK HAIGH: Two points I guess I would say in response, Your Honor. One, as you may recall a long time ago, that plaintiff came in here and jumped up and down and said, "This is a school, this is a school, it is not a hospital" over and over and over. It's like a hospital -- he said it was like a hospital with a school nurse. And now this thing has evolved where we're looking at Department of Health regulations and hospital regulations. So I think the plaintiff should be held to what they argued to the Court at the beginning that we're treated as a school.

And so I guess this particular one, the first part that says "community services provider," we would argue that

that should be stricken because we are definitely not a community services provider. If the plaintiffs held to their argument that we're a school, I guess you could give the instruction on this specific one.

You argue then.

MR. EVANS: No.

MR. MARK HAIGH: No. Go. Go.

MR. EVANS: I thought Dr. Ermer just explained it well. That he said that we're a school until Ben was admitted as an inpatient. And once he became admitted as a residential student, he became an inpatient. And then the services we provide him are under the Department of Health. So to the extent that the word "school" is used in this, that would mean while he was a day student.

MR. LUCE: If I have to pick one of the two, I'll take Mr. Haigh's argument. But again, it's a school. I think as I recall, the Court asked a couple of witnesses outside the presence of the jury about this, and there was an understanding that until March 11th, because there were some that he was not a resident starting on March 11th, there was documents that I think, at least Ms. Marso testified to, that once that happens, they had to follow certain policies and procedures. But in any event, I think it's clearly been presented that this is a school. I wasn't jumping up and down that this is a hospital.

I've always consistently argued that our claim is based upon what type of actions this private institution as a school has to take.

THE COURT: Okay. Well, I'm going to modify this and give it in some fashion. And I think what I'm going to do -- and I'll get a clean copy for everybody -- I think I'm going to strike the first sentence which defines community service provider and then I'm going to strike "community service provider" out of the second sentence. So the second sentence will read, "No school that receives public funds and provides services to persons with developmental disabilities may engage in the following practices." Then I'm going to strike "corporal punishment" and then I'm going to leave No. 2, seclusion, there and then strike the last sentence. I'll get you a clean copy.

All right. Next --

MR. LUCE: No objection.

THE COURT: -- the next instruction is I think verbatim or pretty close to verbatim out of the statute that talks about the limitations on the use of restraints.

MR. LUCE: No objection.

MR. EVANS: Only to the extent that, again, it comes from 27B. Do you want to give more on that?

MR. MARK HAIGH: No. I think that if Mr. Luce has now said that we're a school, 27B is completely out because

the only one that applies to schools is the first one you talked about, 27B-1-17(4). The rest of these all refer to community service providers.

THE COURT: All right. I get your point. I'll probably give it anyway.

All right. The next instruction, "The parties agree that Ben Graff is developmentally disabled" and there is the definition of developmental disability. Do the parties, in fact -- as I have said it in the instruction, do the parties, in fact, agree that Ben Graff is developmentally disabled?

MR. LUCE: I don't think there's any dispute about it, and I think that can be just the components of that.

THE COURT: Maybe all I need is the first sentence.

MR. LUCE: That's my view.

THE COURT: Defense?

(Pause.)

THE COURT: And if the parties agree, then I'm not sure that I need to define developmental disability. But 27B is the developmental disability chapter so at least I thought I ought to make a statement about Ben's status.

MR. EVANS: We don't dispute that Ben is developmentally disabled, but again --

THE COURT: You dispute the applicability of the statute for this case?

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

* *

NEIL H. GRAFF and DEBRA A., GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled,

Plaintiffs, 49CIV 14-001363

vs. **MOTIONS HEARING**

CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,

Defendant.

* *

BEFORE: The Honorable Lawrence Long, Circuit Court Judge in and for the Second Judicial Circuit, State of South Dakota, Sioux Falls, South Dakota.

PROCEEDINGS: The above-entitled proceeding commenced at 4:00 p.m. on the 23rd day of July, 2018, in Courtroom 4B at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

APPEARANCES:

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simplistic. It looks to me like there were essentially three causes of action in this case. I don't view the punitive damages as a separate cause of action. That's just a separate measure of damages. And it looks to me like one of those causes of action was by Mr. and Mrs. Graff in their own right rather than in their guardianship capacity or their representative capacity so -- and the other two were against Ben. I agree with plaintiff's counsel that Ben is, for all practical purposes, indigent. And so I'm going to determine that to the extent that Ben is indigent and to the extent that, at least as plead, two-thirds of the litigation involve Ben and one-third involved his parents, I'm going to reduce the requested award by two-thirds. So I'm going to award $8,173.21, which if my math is right is the requested amount divided by three.

Any questions?

MR. M. HAIGH: No, Your Honor.

MS. PALMER: No, Your Honor.

THE COURT: Very well. We'll be in recess. We'll see you all, I guess, tomorrow afternoon.

(Proceedings concluded at 4:25 p.m.)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28644
Notice of Review No. 28657

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of Benjamin B. Graff, disabled,

Plaintiffs/Appellants,

vs.

CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Lawrence E. Long, Presiding Judge

BRIEF OF APPELLEE

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Notice of Appeal filed June 21, 2018
Amended Notice of Appeal Filed September 12, 2018
Notice of Review filed July 10, 2018
Amended Notice of Review filed September 25, 2018

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PRELIMINARY STATEMENT

The Minnehaha County Clerk divided the record into five parts, with each part beginning on page 1. Citations to the Certified Record are referred to as "RO_:____" followed by the applicable part number and page number(s) in the Clerk's Index. References to Appellants' Brief are "Plaintiffs' Brief" followed by the applicable page number(s). References to Appellants' Appendix are "Plaintiffs' App." followed by the applicable page number(s). Plaintiffs Neil H. Graff, Debra A. Graff, and Benjamin B. Graff are collectively referred to as "Plaintiffs." Neil H. Graff and Debra A. Graff may be referred to as "Parents" or as "Neil" and/or "Debra." Benjamin B. Graff is referred to as "Ben." Children's Care Hospital and School is referred to as "CCHS" or "Defendant." References to CCHS's Appendix are "CCHS App." followed by the applicable page number(s).

JURISDICTIONAL STATEMENT

Plaintiffs appeal from an Order Regarding Defendant's Motion in Limine, dated May 4, 2018, in the Second Judicial Circuit, Minnehaha County. RO1:1437. A three-week trial was held on May 7, 2018 through May 25, 2018. A Special Verdict Form was completed finding CCHS was not liable on all three counts alleged against it at trial. RO1:1681-82. Notice of Entry of Order and Judgment was served via Odyssey File & Serve on May 31, 2018. RO4:3071-73. Plaintiffs filed a Notice of Appeal on June 21, 2018. RO4:3116. Plaintiffs also appeal from the trial court's September 10, 2018 Order awarding costs to CCHS in the amount of $7,606.54. RO5:51.

Defendant appeals from a Decision Letter and Order denying Defendant's Motion for Summary Judgment, dated March 22, 2018. RO1:941-54. Defendant also appeals the

jury instructions that were given referencing language contained within South Dakota Codified Laws Title 27B. RO1:1718-26. CCHS also appeals the trial court's September 10, 2018 Order denying CCHS's full Application for Taxation of Costs and Disbursements. *See* RO5:51. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

1. **Whether the trial court erred in excluding evidence of South Dakota Department of Health surveys regarding Children's Care Hospital and School.**

Following an analysis of the relevance and probative value of the South Dakota Department of Health surveys pursuant to SDCL § 19-19-404(b), the trial court correctly ruled that the surveys were inadmissible at trial. RO1:1437

2. **Whether the trial court erred in denying Defendant's Motion for Summary Judgment based upon the statute of repose.**

The trial court erroneously ruled that Plaintiffs' claims "were not based on any medical treatment, but rather protocols followed by non-medical professionals when a student with behavioral disorders acted out." RO1:951. Therefore, the trial court incorrectly found that the statute of repose provided in SDCL § 15-2-14.1 did not bar Plaintiffs' claims. RO1:941-54.

3. **Whether the trial court erred in instructing the jury with regard to the essential elements of Plaintiffs' claims, including the duty owed to Benjamin Graff based upon SDCL Title 27B.**

The trial court erroneously ruled that definitions contained within SDCL Title 27B applied to CCHS and instructed the jury using such definitions. RO1:1718-26. The definitions contained in SDCL 27B apply to entities regulated by the South Dakota Department of Human Services. CCHS was not regulated by the South Dakota

Department of Human Services but by the South Dakota Department of Health. SDCL 27B is inapplicable to the present case. RO1:1447-54.

4. Whether the trial court erred in not awarding Defendant the full amount of its costs for which it applied in the Application for Taxation of Costs and Disbursements pursuant to SDCL §§ 15-6-54(d) and 15-17-37.

Although the trial court awarded costs against Parents to CCHS following its Application for Taxation of Costs and Disbursements, the trial court erred in only allowing CCHS to recover one-third of its costs. RO5:63. The trial court based its decision on the mistaken finding that Parents only were involved in one cause of action. RO5:646-47. The Complaint in this case, however, reveals that Parents made claims to recover damages on all four causes of action. RO1:4-11.

STATEMENT OF THE CASE

This appeal arises from a 15-day jury trial before the Honorable Lawrence E. Long in Minnehaha County, Second Judicial Circuit, South Dakota between May 7 and May 25, 2018. Plaintiffs commenced this action by service of a Summons on January 7, 2013. RO1:13. Plaintiffs then served a complaint dated January 8, 2013. RO1:11. Included in Plaintiffs' Complaint were claims for negligence for breach of the "standards for the treatment of those with significant developmental disabilities, as well as those with emotional and cognitive impairment," and claims for lack of informed consent, negligent infliction of emotional distress, and intentional infliction of emotional distress. RO1:4-11. Plaintiffs' Complaint contained claims for alleged injuries to Ben, as well as alleged injuries of his parents. RO1:6-7. These claims arose out of Ben's care and treatment at CCHS in 2010. RO1:4-11. Defendant served an Answer denying Plaintiffs' claims. Plaintiffs' App. 1-7.

On January 12, 2018, CCHS moved for summary judgment on the grounds that Plaintiffs' claims were barred by the two-year statute of repose prescribed in SDCL § 15-2-14.1. RO1:265-79. Alternatively, CCHS moved to dismiss Parents' claims on the grounds that South Dakota does not recognize a cause of action for parents' emotional distress claims for injuries to a minor child. RO1:277-78. In response to this motion, Parents' dismissed their claims, but asserted that the claims of Ben were not governed by SDCL § 15-2-14.1 because his claims arose out of care at school, not for Ben's care by CCHS as a hospital or "practitioner of the healing arts," and that SDCL § 15-2-14.1 was tolled by Ben's minority age. RO1:322-57. The trial court determined that Plaintiffs' claims were not medical malpractice claims governed by SDCL § 15-2-14.1 and denied CCHS's motion. RO1:941-54.

Although Plaintiffs had taken the position that their claims were not based upon CCHS's status as a hospital or practitioner of the healing arts, Plaintiffs sought to introduce surveys completed by the South Dakota Department of Health ("DOH") in the years 2008 through 2011. RO1:1293-97. These surveys are regularly conducted at CCHS by DOH and detail any deficiencies found in hospital operations. Notably, although the DOH reviewed the restraints conducted on Ben in 2010, none of the DOH deficiencies Plaintiffs sought to introduce related to care provided to Ben and none related to the use of restraints during the time that Ben was a residential student at CCHS. *See* RO5:93-370. CCHS moved in limine to exclude the surveys. RO1:1092-93. At the pre-trial conference, the trial court instructed counsel for Plaintiffs to submit additional information related to several of the motions in limine for purposes of conducting a Rule 404(b) analysis. RO1:1552; RO1:1571-82. In response, Plaintiffs submitted proposed

redacted surveys that created a misleading appearance concerning the content of the surveys. RO5:371-626. After analysis of the proposed redacted surveys submitted by Plaintiffs, the trial court granted CCHS's motion in limine to exclude the surveys. RO1:1437. On the second day of trial, the issue of the surveys was again brought up by Plaintiffs. The trial court maintained its ruling that the surveys were inadmissible, but left open the issue of whether Plaintiffs' counsel could question CCHS witnesses concerning whether the state had directed CCHS to use least restrictive restraint methods and whether CCHS had promised to do so. RO4:3246-47. Despite claiming in this appeal that evidence of notice of these policies to CCHS was crucial to their case, Plaintiffs' counsel elected not to question witnesses on these two issues during the trial.

The trial court instructed the jury that CCHS had duties consistent with SDCL Title 27B. RO1:1718-25. CCHS objected to these instructions on the grounds that CCHS was not licensed as a Department of Human Services facility under Title 27B in 2010 when Ben was a patient at CCHS. RO4:3304-09. CCHS also proposed instructions consistent with its licensure in 2010. RO1:1686-87. The trial refused these instructions. RO1:1706-1749.

After a 15-day jury trial, the jury returned a verdict for CCHS on all counts. RO4:3071-73. Plaintiffs appealed the trial court's ruling excluding the DOH surveys but ordered only transcripts from hearings *outside* the presence of the jury. Plaintiffs did not order a transcript of any portion of the actual testimony presented to the jury.

After judgment was entered for CCHS, CCHS moved for costs pursuant to SDCL §§ 15-6-54(d) and 15-17-37. RO4:3093-97. The trial court found that the costs

submitted were proper but reduced the costs by two-thirds, finding that only one third of the allegations were related to Parents' claims. *See* RO5:633-48.

STATEMENT OF FACTS

CCHS was opened in 1947 to serve children inflicted with polio. As the number of children inflicted with polio decreased and children with physical disabilities became immersed in public schools, the population of children who needed services changed to children with behavioral disabilities. CCHS evolved to meet the needs of this changing population. Ben was one of those children.

Ben was born in 1994 and was diagnosed with severed developmental delays. RO2:656. Ben cannot communicate verbally and has an IQ of 43. RO2:542. When Ben was young, Ben's parents tried numerous treatments to help Ben. Some were conventional such as those through Mayo Clinic. *See* RO2:2428-57; RO2: Others were unconventional such as hyperbaric chamber treatments, experimental drug therapies, and controversial treatments at the Philadelphia Institute for Human Potential. *See* RO1:2862-2901; RO1:3072-78; RO2:701-02.

When Ben reached puberty, his behaviors escalated. At age 13, Ben began to develop dangerous ways of avoiding things he did not like. For example, he had instances of jumping from moving vehicles. RO2:760. On more than one occasion, police had to assist getting Ben to school. *See* RO1:4042; RO2:596. In addition to being a danger to himself, Ben showed aggressive behaviors toward others. RO1:1316-18. Initially Ben's behaviors were directed primarily toward his mother and sisters. RO1:1318. Ben's mother and sisters would lock themselves in their rooms during aggressive episodes to protect themselves. *Id.* Ben's siblings reported being nervous

around Ben, and Ben's mother reported that she was scared of him. RO2:760; RO2:590. Between 2007 and 2009, Ben was hospitalized on five separate occasions for uncontrollable aggressive behaviors. RO1:3241 (admitted August 7, 2007); RO1:3277-78 (admitted August 26, 2007); RO1:3586-91 (admitted October 4, 2007); RO1:3630-33 (admitted November 5, 2008); RO1:3722-27 (admitted September 11, 2009). During those hospitalizations, Ben attacked nurses and a chaplain. *See, e.g.*, RO1:3632. Ben was restrained on numerous occasions during these hospitalizations. *See, e.g.*, RO1:3630-32; RO1:3715-18. Parents attempted to integrate him into public school but those attempts failed. Ben was suspended from Patrick Henry Middle School in Sioux Falls for injuring a teacher aid during school. RO1:3636-40. Ben attempted to attend Sioux Falls Lincoln High School in 2009 but was suspended for becoming aggressive with a staff member from the school. RO1:3722-27.

In November 2009, Parents sought assistance from CCHS to care for Ben. *See* RO2:4547-66. Parents understood that Ben's behaviors could require restraints, and Ben's mother signed an acknowledgment that restraints may be used at CCHS. RO2:4881. The number and type of restraints were discussed during Individualized Education Plan ("IEP") meetings attended by CCHS staff, Sioux Falls Public School representatives, and Parents, and they were outlined in Ben's Treatment and Care Plan. RO4:1581-83; RO4:1601-03; RO4:1609-10; RO4:1614-16; RO4:1643-44; RO4:1667-68; RO4:1671-73; R.2; P.3234-66. Ben was initially admitted as a day student at CCHS. *See* RO2:5092. Beginning in February 2010, Ben's behaviors became so aggressive that restraints became necessary to protect Ben, his classmates, and CCHS staff. In March 2010, Ben became a full-time residential student in an attempt to improve his behavior.

See RO2:4851-55. Ben's aggressive behaviors improved after his residential admission at CCHS, and correspondingly, the number of restraints decreased significantly. *See* RO2:4520-36. In June and July of 2010, CCHS, along with the Sioux Falls School District and Parents, decided to attempt to transition Ben from residential back to day student status. *See* RO2:4445-51; RO2:4511-13. Ben's behavior regressed during this attempt at transition, and Ben's IEP team recommended that the transition to day student be slowed until Ben's aggressive behaviors decreased. *See* RO2:4504-06. Parents rejected these recommendations and continued to transition Ben home against the IEP team's advice. *See* RO4:1636-37. Ben's aggressive behaviors increased in both frequency and intensity requiring more and lengthier restraints to protect Ben and others. RO2:4520-035.

On September 21, 2010, Parents withdrew Ben from the CCHS residential program and continued him in the CCHS day program. RO2:5166. Thereafter, on several occasions, Parents requested assistance from CCHS to transport Ben to school due to his aggressive behaviors. *See, e.g.*, RO2:4504; RO2:5225-32. During one of these occasions, Ben bit the mouth of a member of the CCHS staff. RO2:5223-24. After that incident, CCHS decided that it could no longer safely care for Ben and recommended that Ben be hospitalized at Avera Behavioral Health until he could be assessed for readmission to CCHS. RO4:1671-73. Parents rejected this plan, and Ben was discharged from CCHS on September 28, 2010. *Id.*

ARGUMENT

I. Whether the trial court erred in excluding evidence of South Dakota Department of Health surveys regarding Children's Care Hospital and School

A. Plaintiffs' Appeal of This Issue Should be Dismissed for Failing to Order the Trial Transcript.

Plaintiffs' appeal should be dismissed because Plaintiffs failed to order the transcript of the trial. A trial transcript is necessary for this Court to consider Plaintiffs' appeal that the trial court erred in excluding admission of the DOH surveys. In the alternative, Plaintiffs have cited to portions of the record that were not presented at trial and should not be considered by this Court. Such portions should be stricken from Plaintiffs' briefing.

Under SDCL § 15-26A-49, "[f]ailure to order a transcript within the time fixed by this chapter shall constitute a waiver of the right to such a transcript." The only review that can take place "is a review of that portion of the record which was before the circuit court." *Baltodano v. North Cent. Health Servs., Inc.*, 508 N.W.2d 892, 894 (quoting *Hawkins v. Peterson*, 474 N.W.2d 90, 92-93 (S.D. 1991)).

There is a two-step process in determining whether the trial court has erred such that a new trial is warranted. Plaintiffs must show both that the court erred and that such error was prejudicial. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 59, 764 N.W.2d 474, 491. "[E]videntiary rulings are only reversible 'when error is demonstrated and shown to be prejudicial error.'" *Id.* (citation omitted). Even if this Court were to rule that the trial court erred in not admitting the DOH surveys into evidence, prejudicial error must be established from the record, which in this case would require this Court to review the entirety of the trial transcript. *Id.* at ¶ 58, 764 N.W.2d at 491.

To make a determination of whether error warrants a new trial, this Court asks "whether this error was a prejudicial error that 'in all probability' affected the jury's conclusion." *Supreme Pork*, 2009 SD 20, ¶ 59, 764 N.W.2d at 491. "To show such prejudicial error[,] an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred." *Id.* at ¶ 58. There must be "actual prejudice." *Id.* at ¶ 60. Plaintiffs may not make the argument that prohibiting the DOH records was "inherently prejudicial." *Id.* Instead, there must be a showing of how or why the refusal to allow this evidence led to a different verdict. *Id.* at ¶ 61. Plaintiffs are not able to make this showing without the trial transcript, which they are now barred from ordering under SDCL § 15-26A-49. This portion of Plaintiffs' appeal should be dismissed.

Plaintiffs should not be permitted to use their strategic decision not to order the transcript to gain a tactical advantage in this appeal. For example, Plaintiffs attempt to convince this Court, without record of any trial testimony, that CCHS unjustifiably violated its restraint policies even after being given notice by the DOH of deficiencies in 2008. Plaintiffs Brief 6-12. The trial transcript would have shown the court gave Plaintiffs free rein to discuss the restraint policies and Plaintiffs focused their case on their allegations of CCHS policy violations. The transcript would have shown that CCHS staff explained to the jury why, in many cases, Ben's safety required that he be restrained even though such restraint might technically violate a policy, and on other occasions why it was impossible to comply with the policy due to Ben's aggressive behaviors. By failing to order the transcript, Plaintiffs attempt to circumvent their burden of showing that the trial court's exclusion of the DOH records was prejudicial. *See Supreme Pork,*

2009 SD 20, ¶¶ 58-62, 764 N.W.2d at 491-92 (stating that an appellant must "present how or why the introduction of this evidence" may lead to a different verdict in order to obtain relief on appeal). Without the transcript, Plaintiffs have no way of demonstrating prejudice, but mistakenly attempt to make such showing by asserting that CCHS disregarded restraint policies. *See id.* (error of admission of prejudicial evidence alone, without showing the prejudicial effect of such evidence, is insufficient to prove prejudicial error).

If Plaintiffs would have ordered a transcript, it would have shown that on some occasions the policy requiring Ben to be assessed by a nurse within one hour after restraint could not be followed because Ben was still being restrained for his own safety. The transcript would have shown that all restraints are monitored by a nurse while in progress. The transcript would have shown that in most instances when the primary physician was not contacted immediately after the restraint, it was because the primary physician (from Sanford Clinic) did not immediately respond to CCHS calls to the clinic notifying the physician of the restraint. The transcript would have shown how CCHS staff and a Sanford nurse practitioner testified that in some instances it was unsafe to comply with the policy that Ben be assessed before a subsequent restraint due to Ben going into another crisis before a Sanford practitioner could get to CCHS to assess Ben. A transcript would have shown that because Ben's aggressive episodes sometimes escalated rapidly, it was sometimes necessary to protect Ben from himself by restraining him before a doctor could be contacted to obtain an order. A transcript would have shown that CCHS conducted extensive training and checks to make certain that least

restrictive interventions were used. Most importantly, a transcript would have shown Plaintiffs could not show any injury to Ben due to any of the policy violations.

The Supreme Court "has repeatedly instructed that the party claiming error carries the responsibility of ensuring an adequate record for review." *State v. Ledbetter*, 2018 SD 79, ¶ 24 (quoting *State v. Andrews*, 2007 SD 29, ¶ 9, 730 N.W.2d 416, 420). "In the absence of an adequate record, 'this Court presumes that the trial court acted properly' and 'any claim of alleged error fails.'" *Id.*; *see Baltodano v. North Cent. Health Servs., Inc.*, 508 N.W.2d at 894 ("[T]he ultimate responsibility for presenting an adequate record on appeal falls upon the appellant. . . . When confronted with incomplete records, our presumption is that the circuit court acted properly."). Plaintiffs did not order the transcript and are estopped from offering any notions as to how the evidence may have affected the jury.

In this appeal, there is no possible way for Plaintiffs to "establish affirmatively *from the record* that under the evidence the jury might and probably would have returned a different verdict" if the DOH surveys were admitted. *Supreme Pork*, 2009 SD 20, ¶ 58, 764 N.W.2d at 491 (emphasis added). Plaintiffs cannot use portions of the record that were not presented at trial to circumvent this rule. Accordingly, the Court should dismiss the issue of whether the circuit court erred in excluding evidence of South Dakota Department of Health surveys regarding Children's Care Hospital and School.

B. Plaintiffs' Actions Created Any Error in Exclusion of the Department of Health Surveys.

The court rulings concerning the use of the DOH surveys were correct. Nevertheless, to the extent that this court finds that there was any error, such error was caused by the trial strategies of the Plaintiffs. Plaintiffs should not be rewarded with a

new trial when Plaintiffs created any confusion that may have existed regarding the DOH surveys.

First, in response to CCHS's summary judgment motions, Plaintiffs took the position that they were not suing CCHS in its capacity as a hospital, but rather their claims were based solely on CCHS's status as a school. *See* RO1:341 (Plaintiffs arguing that "when it comes to Ben Graff, CCHS was not acting as a hospital, but acting solely as an educational and residential living center"). Once the trial court denied CCHS's summary judgment motion, Plaintiffs' position changed completely. Even though Plaintiffs argued to the court that they were not suing CCHS as a hospital, they sought to introduce DOH surveys related to CCHS's status as a hospital. Additionally, although Plaintiffs argued in response to Defendant's Motion for Summary Judgment that CCHS was subject to the rules and regulations of the South Dakota Department of Education and to the Individuals with Disabilities Education Act, when the court proposed using SDCL 22-18-5 and 13-32-2 as the law concerning CCHS's duty as a school, Plaintiffs objected and proposed that the duty applicable to CCHS in this case is set by state and federal law governing regulation of hospitals. *See* RO4:3239 (Plaintiffs erroneously arguing that requirements under federal and state laws governed by the DOH regulating entities licensed as hospital are "education laws"); RO4:3221 (Plaintiffs arguing that the case involves "administration, supervision, and enforcement of policies relating to restraints," implying that such laws are related to education, when in fact they are laws regulating hospitals). To the extent there was any error in what regulations applied to this case, such confusion was created by the ever-changing position of the Plaintiffs on this issue.

Second, at the pre-trial hearing, the trial court asked both parties to submit additional information so that it could conduct the Rule 404(b) analysis. *See* RO1:1552 (trial court stating that "Plaintiff is subject to a 404(b) analysis" with regard to a different motion in limine); *see also* RO1:1579-81 (trial court ordering that Plaintiffs submit all surveys in advance of trial so that he can make a determination of whether they are admissible). With regard to the DOH surveys, the court suggested that survey information not related to restraints was not relevant to any issue in the case and determined that Plaintiffs should present a redacted version of the 231 pages of surveys. RO1:1579-81. Instead of redacting the surveys to include only restraint information, Plaintiffs creatively redacted the surveys to include or not include certain information so that the deficiencies appeared different than noted on the unredacted surveys. Most notable, Plaintiffs attempted to redact the surveys that showed no deficiencies in restraint to suggest that deficiencies in restraint may have occurred. *Compare, e.g.*, RO5:548 *with* RO5:277 (related to hazardous fluids and not restraints); *compare* RO5:581 *with* RO5:318 (related to defecation and urination by a patient and not restraint); *compare* RO5:595 *with* RO5:334 (redacting to suggest informed consent deficiency was for restraint when it was for headgear); *compare* RO5:607 *with* RO5:346 (deficiency related to dietary supplements and not restraint.)

Third, and most importantly, while Plaintiffs claim that they were offering the surveys to show notice and knowledge of the deficiencies to CCHS and not for character evidence, the limited record presented by Plaintiffs make it clear that notice and knowledge of the deficiencies were not the true purpose of presenting the surveys. During a hearing outside the presence of the jury on the second day of the trial, the court,

while ruling that the surveys were not admissible, left open the issue as to whether Plaintiffs' counsel could question CCHS staff as to whether the State of South Dakota required CCHS to correct any of the items on the surveys and whether CCHS had agreed to perform the items required by the audit. RO4:3240; RO4:3246. Although the court did not make a ruling on whether those questions could be asked, Plaintiffs did not raise the issue again with the court as to whether they could pose those questions to CCHS witnesses. Plaintiffs' failure to re-address this issue constitutes a waiver of their right to claim error on this issue.

Finally, although Plaintiffs presented what they termed an offer of proof to the court, Plaintiffs had no witnesses to present foundation for the DOH surveys. RO1:1650-58. During the course of the litigation, CCHS had attempted to subpoena the State to determine the methods used and the basis for the deficiencies contained in the 231 pages of surveys proffered by the Plaintiffs. RO1:1215-16. The State objected to the subpoena on the grounds that the surveys were conducted on behalf of the federal government and refused to produce a witness to testify concerning the surveys. RO1:1217-18. Thus, Plaintiffs had no one to lay foundation to get the surveys into evidence. *Id.* Had Plaintiffs actually been offering the surveys as evidence on the issue of notice rather than character as they claimed, they could have easily addressed the issue related to whether CCHS was put on notice of deficiencies in 2008. Despite this issue being left open by the court, Plaintiffs chose not to do so.

C. The Trial Court Did Not Err in Excluding Evidence of Department of Health Surveys.

The trial court properly excluded the DOH surveys. Because CCHS was a licensed specialty hospital, the DOH conducted frequent surveys to determine whether

CCHS was in compliance with its requirements. After completing the survey, the DOH would notify CCHS of any deficiencies that were identified. CCHS would then be given the opportunity to make corrections.

In 2008, 2010, and 2011, the DOH conducted six surveys at CCHS. RO5:93-370. During each of these surveys, the DOH determined that there were items that could be corrected and notified CCHS. CCHS made the corrections, and the DOH determined that CCHS had complied with the deficiencies. RO5:227; RO5:275; RO5:303; RO5:332; RO5:353; RO5:354.

This Court should find that the trial court did not err in excluding evidence of the surveys conducted by the DOH. The surveys were irrelevant to the issues in the present case and were attempted to be used as a subterfuge to show prior bad acts. Additionally, even if this Court was able to find that there was error in not admitting the DOH surveys at trial, the Plaintiffs cannot show that such error was prejudicial without having the trial transcript for this Court to review. The trial court's decision should be affirmed.

1. Evidentiary Rulings Standard of Review

In order for Plaintiffs to receive a new trial due to the trial court's exclusion of the DOH survey records at trial, Plaintiffs must show the court erred and that such error was prejudicial. *Supreme Pork, Inc. v. Master Blast, Inc.*, 2009 SD 20, ¶ 59, 764 N.W.2d 474, 491. "[E]videntiary rulings are only reversible 'when error is demonstrated and shown to be prejudicial error.'" *Id.* (citation omitted).

In making this determination, this Court determines "whether the trial court abused its discretion in making an evidentiary ruling[.]" *Id.; JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 SD 54, ¶ 21, 835 N.W.2d 117, 125 (stating that "[t]his applies as well to rulings on motions in limine") (quoting *Ferebee v. Hobart*, 2009 SD 102, ¶ 12, 776

N.W.2d 58, 62). In determining whether there was an abuse of discretion, this Court should look to whether "a trial court misapplies a rule of evidence, not [whether] it merely allows or refuses questionable evidence." *JAS Enters., Inc.*, 2013 SD 54, ¶ 21, 835 N.W.2d at 125 (quoting *State v. Asmussen*, 2006 SD 37, ¶ 13, 713 N.W.2d 580, 586). If the Court finds that there was an abuse of discretion in refusing to admit the evidence, the Court next determines whether such refusal was prejudicial. "To show such prejudicial error[,] an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred." *Supreme Pork*, 2009 SD 20, ¶ 59, 764 N.W.2d at 491.

2. The trial court properly held that the Department of Health surveys were irrelevant to the issues in this case

The trial court correctly determined that the DOH surveys from 2008 through 2011 are irrelevant in this case and should be excluded at trial. Generally, evidence that is relevant is admissible and evidence that is not relevant is inadmissible. SDCL § 19-19-402. "Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." SDCL § 19-19-401. In this case, the DOH surveys do not have any bearing on whether or not CCHS was negligent in its care of Ben, and they are not a "fact of consequence in determining the action." Accordingly, the DOH surveys are irrelevant and inadmissible at trial.

The evidence that Plaintiffs' sought to present at trial consists of six sets of DOH surveys that were conducted in 2008, 2010, and 2011. RO5:93-370. The surveys consisted of recertification surveys or complaint surveys. *See id.* After each survey, the DOH sent a letter to CCHS with a list of deficiencies that needed to be corrected in order

to be in compliance with state or federal law. RO5:103-04; RO5:224-25; RO5:276; RO5:305-06; RO5:333; RO5:355. For each of the six surveys, a plan of correction was submitted and accepted by the DOH, and the DOH found CCHS in compliance with state and federal law. RO5:227, RO5:275; RO5:303; RO5:332; RO5:353; RO5:354. Notably, during a 2011 complaint survey, the DOH specifically reviewed Ben's file to determine if there were any deficiencies while Ben was a student at CCHS in 2010. RO5:331-51; *see* RO1:1408-14 (revealing Ben's patient identification number, which is not found anywhere in the February 2011 complaint survey). There is not a single restraint deficiency related to Ben in that survey or any survey. *See id.*[1]

Plaintiffs argue that the DOH surveys are relevant because they go to knowledge that CCHS has about alleged deficiencies at the facility. Specifically, Plaintiffs stated that the surveys were evidence of CCHS's policy and procedure of improper utilization of restraints. This assertion is inconsistent with the actual issues in the case and with Plaintiffs' true purpose for relying on the DOH surveys during the trial.

In determining whether other acts evidence is admissible, a two-part test applies. *Novak v. McEldowney*, 2002 SD 162, ¶ 12, 655 N.W.2d 909, 913. First, the court must determine whether the intended purpose for offering the other acts evidence is relevant to some material issue in the case. *Id.* This is referred to as "factual relevancy." *Id.* Second, the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect. *Id.* This is referred to as "logical relevancy." *Id.* In this case, the DOH surveys are neither factually nor logically relevant.

[1] The only survey that was conducted with Ben listed as one of the patients was the February 3, 2011 survey. RO5:331-51; *see* RO1:1408-14 (listing Ben's identification number). No deficiencies related to restraints were found.

CCHS has never claimed that it did not have knowledge of the deficiencies noted in the surveys or that it did not know what was expected of them in caring for their patients. Notice was not an issue at trial. In fact, much of the testimony at trial confirmed that CCHS administration and staff were aware of the policies and admitted that they were unable to comply with every policy at all times despite their best efforts. Yet, the jury found that these deficiencies still did not cause damages to Ben or did not create negligence on the part of CCHS. Other acts evidence "is admissible when similar in nature and relevant to a material issue, and not substantially outweighed by its prejudicial impact." *State v. Boe*¸ 2014 SD 29, ¶ 20, 847 N.W.2d 315, 320. "Relevancy is demonstrated where evidence is necessary to prove an element of the crime, not simply to demonstrate defendant's character." *State v. Lassiter*, 2005 SD 8, ¶ 14, 692 N.W.2d 171, 175 n.2. In this case, none of the elements for any of the causes of action require that CCHS have knowledge that its conduct was wrongful. Accordingly, the surveys were not factually relevant because they do not have any effect on the elements of the causes of action alleged by Plaintiffs.

Additionally, it is important to highlight that the actual purpose for Plaintiffs' reliance on the DOH surveys is to show that CCHS had a propensity to be deficient. "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." SDCL § 19-19-404(b)(1). In this case, there is no purpose for the DOH surveys, aside from offering them for the purpose of showing that CCHS has an alleged propensity to be deficient in its care. None of these DOH surveys reference deficiencies related to Ben. In fact, the February 3, 2011 DOH survey indicates that Ben was a

student whose files were reviewed, but there was not a single deficiency referencing Ben. RO1:334-51; RO1:1408-14. Records that contain no reference to Ben, no reference to restraints, and are remote from dates that Ben attended CCHS are simply irrelevant and could only be used as propensity evidence.

3. The trial court conducted the proper test for determining whether the Department of Health surveys were admissible at trial

"For evidence to be admitted during trial, it must be found to be relevant. Once the evidence is found to be relevant, it is admissible unless it is specifically excluded." *Supreme Pork*, 2009 SD 20, ¶ 30, 764 N.W.2d 474, 484. "'Relevance' and 'admissibility' are separate concepts." *Id.* at ¶ 43, 764 N.W.2d at 487. In this case, the trial court conducted the proper test in determining whether the DOH surveys were admissible at trial. The trial court's ruling should be upheld.

In its ruling on this evidentiary issue, the court found that "any testimony, evidence, or reference to surveys from 2008-20[11] done by the South Dakota Department of Health show deficiencies in record-keeping done by Children's Care Hospital and School. Because SDCL §§ 22-18-5 and 13-32-2 define the standard of care, the surveys have limited relevance." RO1:1437. Accordingly, the court made its determination that the deficiencies have limited relevance under the first step of its analysis.

Plaintiffs argue that the trial court incorrectly initially found that the standard of care was set by SDCL §§ 22-18-5 and 13-32-2. Plaintiffs' Brief 22-23. Plaintiffs make this assertion based upon the fact that the court did not instruct the jury as to the language contained within these statutes. *Id.* Initially, when CCHS brought a Motion for

Summary Judgment, Plaintiffs argued that this case was not a negligence case grounded in medical malpractice. *See* RO1:322-358. Specifically, Plaintiffs argued that "the sole purpose of Ben's placement at CCHS was to meet his educational needs," and that "the 'care' provided by CCHS's employees was not medical care." RO1:338.

The trial court properly made its analysis under SDCL § 19-19-404(b) for determining whether prior bad acts evidence is permissible. This analysis is set forth in *McDowell v. Citicorp U.S.A.*, 2007 SD 53, 734 N.W.2d 14:

> Generally, the process of deciding the admissibility of Rule 404(b) evidence can be broken down into steps. Initially, the proponent must show the relevance of the "other acts" evidence. Then, if the evidence is relevant, the court must weigh the probative value against the danger of unfair prejudice. The opponent has the burden of establishing that the danger of unfair prejudice substantially outweighs the probative value. Last, if the evidence is admitted, the court should instruct the jury on the limited purpose for which the jury may consider the evidence.

McDowell, 2007 SD 53, ¶ 20, 734 N.W.2d at 20 (internal citations omitted). The court eluded to this analysis during the pretrial hearing. *See* RO1:1552 (stating "that anything you want to offer along that line, plaintiff is subject to a 404(b) analysis"); RO1:1571-82 (stating that the court wants to see "the whole business from [200]8 through [20]11" as it relates to the DOH surveys). While Plaintiffs suggest that no such analysis was made, it is apparent, reading the hearing transcript as a whole, that the court was requesting documents for the very purpose of making a Rule 404(b) analysis. During that hearing, the court asked counsel to provide additional information as to some of the motions in limine so that it could review the evidence before trial. *Id.* Specifically, as it related to a separate motion in limine, the court noted that it would rule that "anything you want to offer along that line, plaintiff is subject to a 404(b) analysis. And I think I have to do that outside the presence of the jury so I want you to submit that as well." *Id.* As it related to

the motion in limine asking the court to exclude evidence of the DOH surveys, the court stated that it wanted to see all the surveys and would make its determination. RO1:1579. Despite not explicitly stating that it was performing an analysis under SDCL § 19-19-404(b) as it relates to the DOH surveys, the court was well aware that it must perform such an analysis for each of the pieces of evidence for which it was requesting more information at the pre-trial hearing. RO5:1552. Refusal to exclude evidence of a party's prior acts is not an abuse of discretion where it appears from the record that the trial court did acknowledge that it weighed the probative value as against prejudicial effect of the evidence. *See State v. Cochrun*, 328 N.W.2d 271, 274 (S.D. 1983) ("Some degree of rationale on the 'weighing' must be shown in the record."); *State v. Cross*, 390 N.W.2d 564, 568 (S.D. 1986) (upholding a 404(b) analysis where "[t]he trial court knew its duty and was engaged in a balancing process based on that duty"); *State v. King*, 346 N.W.2d 750, 752 (S.D. 1984) ("[A]s long as there is some consideration of the matter and an indication, on the record, that some weighing of factors occurred, no abuse of discretion will be found."). The court acknowledged that it was weighing the evidence in this case in determining whether the DOH surveys constituted prior bad acts.

Plaintiffs rely heavily upon *St. John v. Peterson*, 2011 S.D. 58, 804 N.W.2d 71 in their argument that the court erred in excluding the DOH surveys. However, *St. John* is distinguishable for three reasons. First, in *St. John*, the trial court improperly applied the balancing test stating that "it doesn't believe that there is – sufficient relevancy to overcome the prejudice that would be caused by the introduction of that evidence." This Court found that the trial court misapplied the rule and should have examined whether "the probative value of the evidence was substantially outweighed by the danger of unfair

prejudice to [defendant]." *Id*. at ¶ 17. In this case, the court understood the appropriate Rule 404(b) balancing test and presumably applied it to all of the proposed evidence that was requested of the parties at the pre-trial hearing.[2]

St. John is also distinguishable because the court, in addition to excluding evidence of prior lawsuits, also directed plaintiff's counsel not to question defendant as to whether he has had problems with the subject procedure in the past. *Id*. at ¶ 7. In this case, the court left open the question as to whether Plaintiffs could question CCHS staff as to whether they had been given notice of prior violations and had agreed to correct those violations. Plaintiffs, apparently for strategic reasons, chose not to further pursue this issue.

Finally, while not explicitly stated in *St. John*, it appears from the opinion (specifically footnote 2), that the trial court had a full record of the trial in order to determine whether the exclusion of evidence affected the outcome of the jury's verdict. In this case, Plaintiffs have not ordered the transcript, and there is no basis upon which to find that any error affected the jury's verdict.

4. Even if the trial court did err in excluding the DOH surveys from evidence, Plaintiffs cannot show that failure to admit such was prejudicial

Plaintiffs failed to order the trial transcript, which precludes them from being able to show that there was a prejudicial effect, even if the DOH surveys were erroneously excluded from trial. Accordingly, the trial court's evidentiary ruling should be affirmed.

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[2] The balance testing was discussed in pre-trial briefing. There is nothing to suggest the court was unaware or did not correctly apply this test when ruling on motions in limine. *See* RO1:1297 (Plaintiffs' briefing explaining the balancing test that the trial court must use under a 404(b) analysis).

This Court has consistently held that "[w]here an appellant waives the right to a transcript by failing to order it, the only review which can take place 'is a review of that portion of the record which was before the circuit court.'" *Baltodano v. North Cent. Health Servs., Inc.*, 508 N.W.2d 892, 894 (quoting *Hawkins v. Peterson*, 474 N.W.2d 90, 92-93 (S.D. 1991)). "Where the record contains no transcript, the record on appeal is confined to those pleadings and papers transmitted from the circuit court." *Id.* (citing *Reed v. Heath*, 383 N.W.2d 873, 874 (S.D. 1986)). In order for Plaintiffs to receive a new trial due to the trial court's refusal to allow the DOH survey records to be presented at trial, Plaintiffs must show that the court erred and that it was a prejudicial error. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, ¶ 59, 764 N.W.2d 474, 491. "[E]videntiary rulings are only reversible 'when error is demonstrated and shown to be prejudicial error.'" *Id.* (citation omitted).

In this case, even if this Court were to find that the trial court abused its discretion in prohibiting reference to the DOH surveys during trial, the next question is whether such error was prejudicial. To make this determination, this Court asks "whether this error was a prejudicial error that 'in all probability' affected the jury's conclusion." *Supreme Pork*, 2009 SD 20, ¶ 59, 764 N.W.2d at 491. "To show such prejudicial error[,] an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred." *Id.* at ¶ 58. There must be "actual prejudice." *Id.* at ¶ 60. Plaintiffs cannot argue that prohibiting the DOH surveys was "inherently prejudicial." *Id.* Instead, there must be a showing of how or why the refusal to allow this evidence led to a different verdict. *Id.* at ¶ 61.

Here, Plaintiffs chose not to order the trial transcript. As a result, this Court is unable to review the record to determine whether there was actual prejudice that could establish that the jury probably would have returned a different verdict if the DOH surveys had been admitted into evidence at trial. Plaintiffs cannot point to any specific testimony or evidence at trial that would have been different had Plaintiffs been able to present the DOH surveys. In fact, reviewing the surveys would have shown that the DOH reviewed Ben's file from 2010 during the February 3, 2011 survey and found absolutely no deficiencies in the use of restraints. RO5:334-51.

Plaintiffs are left to argue that refusal to allow the DOH surveys was "inherently prejudicial." This notion has been explicitly rejected by the South Dakota Supreme Court. *See Supreme Pork*, 2009 SD 20, ¶¶ 60-61, 764 N.W.2d at 491. A finding of "'inherent prejudice' has no precedent in our evidentiary rulings. . . . [an] 'inherent prejudice' standard of review requires absolute perfection by trial courts on every evidentiary ruling, by requiring remand on evidentiary errors however slight or inconsequential." *Id.* Accordingly, Plaintiffs cannot meet their burden in showing prejudicial error. The trial court's ruling should be affirmed.

II. Whether the trial court erred in denying Defendant's Motion for Summary Judgment based upon the statute of repose.

Ben was born on January 12, 1994. He turned eighteen on January 12, 2012. RO1:4. Ben began residential treatment at CCHS on March 11, 2010. RO1:106. He remained in the residential program until September 21, 2010, at which time he became a day student. RO1:106. On September 28, 2010, Ben was discharged from CCHS. RO1:6. This action was commenced by service of process upon CCHS on January 7, 2013. RO1:12-13.

CCHS made a motion for summary judgment on all claims, contending that Plaintiffs failed to bring this action within the two-year statute of repose pursuant to SDCL § 15-2-14.1. RO1:201-02; RO1:265-80. Agreeing with Plaintiffs' argument, the court held that Plaintiffs' claims were "not based on any medical treatment but rather the protocols followed by non-medical professionals when a student with behavioral disorders acted out." RO1:951. Further, the court concluded that "[t]he setting and context of these claims are not grounded in a medical atmosphere but rather an IEP program designed around Ben's educational needs." RO1:952.

The evidence, however, demonstrates that Plaintiffs' claims were directly related to negligence in a medical malpractice context. Plaintiffs' theory of the case, as argued through their expert testimony, attacked the medical behavioral health plan and care that CCHS provided to Ben. Accordingly, the court erred in denying CCHS's Motion for Summary Judgment.

A. Summary Judgment Standard of Review

In determining whether summary judgment should be granted "[t]he burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law." *Cooper v. James*, 2001 SD 59, ¶ 6, 627 N.W.2d 784, 787. "It is well settled that 'summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."'" *Greene v. Morgan, Theeler, Cogley & Peterson*, 1998 SD 16, ¶ 6, 575 N.W.2d 457, 459.

In response to the summary judgment motion, the court improperly ruled that "at the very least, there is a genuine issue of material fact on whether this is a medical

malpractice case." RO1:952. The determination as to whether SDCL § 15-2-14.1 applies to this set of facts is a question of law for the court to determine. "The construction of a statute and its application to particular facts presents a question of law, reviewed de novo." *Stratmeyer v. Stratmeyer*, 1997 SD 97, ¶ 11, 567 N.W.2d 220, 222 (citing *Bosse v. Quam*, 537 N.W.2d 8, 10 (S.D. 1995)). The court should have found that this was a medical malpractice action as a matter of law. This Court reviews the facts under a de novo standard, without giving any deference to the trial court. *City of Colton v. Schwebach*, 1997 SD 4, ¶ 8, 557 N.W.2d 769, 771.

B. SDCL § 15-2-14.1 is the applicable statute of repose

This Court has firmly held that SDCL § 15-2-14.1 is a statute of repose for causes of action alleging medical negligence. *Pitt-Hart v. Sanford USD Medical Center*, 2016 SD 33, ¶ 18, 878 N.W.2d 406, 413. As a statute of repose, SDCL § 15-2-14.1 "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014)). In the present case, the last date of treatment was on September 28, 2010. RO1:6. The lawsuit was not commenced until January 7, 2013, long beyond the two-year time period set by SDCL § 15-2-14.1. RO1:12-13.

Plaintiffs have argued that this case is not a medical negligence action. *See* RO1:340-346. The type of conduct contemplated by SDCL § 15-2-14.1, however, is broad. *Pitt-Hart*, 2016 SD 33, ¶¶ 13-15, 878 N.W.2d at 411-12. "[T]he phrase *malpractice, error, mistake, or failure to cure* necessarily has a broader meaning than the term *malpractice* alone." *Id.* at ¶ 13. Additionally, it has been noted that a statute of repose is not subject to tolling. The "critical distinction [between a statute of repose and a statute of limitations] is that a repose period is fixed and its expiration *will not be*

delayed by estoppel or tolling[.]" *Id.* at ¶ 20. The statute of repose bars Plaintiffs' claims in their entirety.

1. CCHS is a licensed hospital and regulated by the South Dakota Department of Health

In 2010, CCHS was a licensed specialty hospital regulated by the DOH. RO1:1447-54. Plaintiffs' issue on appeal is whether DOH survey records should have been admitted at trial. Plaintiffs' somehow argue that the DOH records are relevant to showing how CCHS was negligent as a hospital in providing care to Ben, while simultaneously arguing that CCHS is not a hospital. The use of restraints at CCHS were regulated by the DOH, which found that there were no deficiencies related to the care of Ben. Accordingly, the court's finding that this case is not "grounded in a medical atmosphere" was erroneous. *See* RO1:952.

2. Plaintiffs' case focused on the medical care that CCHS provided

Plaintiffs' expert witnesses identified that this case is about the medical behavioral care that Ben received while at CCHS. Both of Plaintiffs' experts at trial submitted reports in which they criticized the treatment for Ben provided by CCHS. Dr. Jeffrey Marcus, a psychiatrist from Madison, Wisconsin, opined that CCHS breached the standard of care in several regards. *See* RO1:1815-24. Similarly, Dr. Tracy Stephens, a licensed psychologist from Sioux Falls, was critical of the care CCHS provided as it related to Ben's medical condition. RO1:1798-1800. Both experts' opinions demonstrate that this case is, in fact, a medical malpractice case.

In Dr. Marcus's report, he focused on the "lack of consideration of medical acuity." RO1:1820. Dr. Marcus contended that CCHS fell below the standard of care because it failed to make attempts to "alleviate possible discomfort." RO1:1821. While

Dr. Marcus asserted that CCHS failed to give Ben the appropriate treatment by not giving him medications or addressing possible pain or discomfort, it was also his belief that the medical care CCHS did provide was below the standard of care. RO1:1820-21. Dr. Marcus criticized physicians for failing to "document an association between his ear infection and problem behaviors." RO1:1821. Further, Dr. Marcus stated that the medical documentation kept by CCHS was "grossly insufficient." RO1:1822.

Similarly, Dr. Stephens made criticisms that relate to the medical behavioral care provided by CCHS. Dr. Stephens condemned the use of prone restraints at CCHS noting that it was not a typical procedure used in the field of behavioral intervention. RO1:1799. It was Dr. Stephens' opinion that there "appeared to be a lack of appropriately addressing underlying medical conditions that very reasonably were affecting the behavioral functioning of this young man at the time and general failure to ensure least restrictive interventions." *Id.* Dr. Stephens' criticisms are directly related to medical behavioral care that Ben should have been receiving.

In their Complaint, Plaintiffs initially argued that there was a cause of action for lack of informed consent. RO1:9-10. A cause of action for lack of informed consent has only been recognized in South Dakota as one that pertains to legal or medical malpractice cases. *See Matter of Estate of Laible*, 343 N.W.2d 388, 389 (S.D. 1984) (declining to "extend the informed consent doctrine" beyond legal and malpractice litigation to a case involving the banking industry). Plaintiffs' claim of lack of informed consent is further indicia that this case was brought as a medical negligence action.

Plaintiffs cannot deny that the purpose for Ben's placement at CCHS was to address the behavioral issues. It was necessary to place Ben in treatment at CCHS so that

he could be treated for these problems while still receiving an education. Plaintiffs, however, disguised this action as one about Ben's educational needs, rather than medical negligence as contemplated by SDCL § 15-2-14.1 to avoid having the action barred by the statute of repose. The court erred in failing to recognize that this was a medical malpractice action under which the statute of repose had expired when it denied CCHS's Motion for Summary Judgment.

C. Tolling does not apply to the statute of repose set in SDCL § 15-2-14.1

It has been determined by this Court that tolling does not pertain to statutes of repose. "[P]rinciples of estoppel and tolling are inapplicable to a period of repose." *Pitt-Hart*, 2016 SD 33, ¶ 21, 878 N.W.2d 406, 414. Therefore, if this Court finds that SDCL § 15-2-14.1 is applicable to the instant case, Plaintiffs' causes of action should have been dismissed on summary judgment.

Plaintiffs argued below that SDCL § 15-2-22 should toll the statute of repose laid out in SDCL § 15-2-14.1, because Ben was a minor. This Court's firm stance against tolling a repose period affirms the legislature's objective of setting a fixed time limit on a medical provider's liability for negligence. *Pitt-Hart,* 2016 SD 33, ¶ 21, 878 N.W.2d at 414. SDCL § 15-2-14.1 makes clear that a claim of medical negligence "can be commenced *only* within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred. . . ." SDCL § 15-2-14.1 (emphasis added); *see Pitt-Hart*, 2016 SD 33, ¶ 22, 878 N.W.2d at 414.

Additionally, tolling should not apply under these facts because there is no equitable purpose for delaying the time for starting this lawsuit. Tolling has been recognized as a "remedy reserved for circumstances that are 'truly beyond the control of

the plaintiff.'" *Dakota Truck Underwriters v. South Dakota Subsequent Injury Fund*, 2004 SD 120, ¶ 20, 689 N.W.2d 196, 202 (quoting *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989)). In this case, a lawsuit was commenced on behalf of Ben, a minor child with developmental disabilities. The lawsuit was brought by Ben's parents, who were appointed as guardians ad litem. Even though Ben could not, and likely will never be able to, comprehend and protect his own legal rights, Ben's guardians were certainly able to understand and protect such rights prior to the running of the repose deadline. They were not prevented from bringing a lawsuit on Ben's behalf based on mental illness or infancy and cannot reasonably argue that their actions were tolled for equitable reasons.

III. Whether the trial court erred in instructing the jury with regard to the essential elements of Plaintiffs' claims including the duty owed to Benjamin Graff and whether it was error to include instructions based upon SDCL Title 27B.

In Jury Instructions 21 through 29, the trial court set out the duties that were owed to Ben as it relates to developmentally disabled persons administered and evaluated by the Department of Human Services. RO1:1718-26. Because CCHS was not regulated by the Department of Human Services, the trial court erred in instructing the jury on the essential elements of Plaintiffs' claims.

A. Jury Instructions Standard of Review

"[F]ailure to give an instruction that correctly states the law is prejudicial error." *First Nat. Bank in Sioux Falls v. Drier*, 1998 SD 1, ¶ 10, 574 N.W.2d 597, 600. While the trial court's instructions are reviewed under an abuse of discretion standard for the wording and arrangement of the instructions, "when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo."

Vetter v. Cam Wal Elec. Co-op., Inc., 2006 SD 21, ¶ 10, 711 N.W.2d 612, 615. Under the de novo standard of review, the South Dakota Supreme Court "construe[s] jury instructions as a whole to learn if they provided a full and correct statement of the law." *Id.* (quoting *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 SD 92, ¶ 40, 686 N.W.2d 430, 448).

B. CCHS was not governed by the Department of Human Services under SDCL Title 27B

Under South Dakota law, "[t]he Department of Human Services shall develop, adopt, approve, coordinate, monitor, evaluate, and administer state and federally funded services for persons with developmental disabilities and their families within South Dakota. . . ." SDCL § 27B-1-15. Specifically, the Department of Human Services shall "[f]acilitate or provide technical assistance to community service providers in planning, developing, and implementing services and supports for persons with developmental disabilities[.]" SDCL § 27B-1-15(3). The evidence in this case undisputedly demonstrates that CCHS was not evaluated or administered by the Department of Human Service. Rather, CCHS was governed by the DOH as a licensed specialty hospital. RO4:3346-50.

Several of the instructions that were given to the jury contained language taken from SDCL § 27B-1-17, which provides definitions of the terms used in Title 27B. RO1:1718-26. For example, the circuit court instructed the jury on the definitions of "destructive behavior," "danger to others," and "danger to self" in Jury Instruction No. 24, instructed the jury on the definition of "least restrictive" in Jury Instruction No. 26, and instructed the jury on the definition of "informed consent" in Jury Instruction No. 29. RO1:1721; RO1:1723; RO1:1726. The same section defines "Department" as "the

Department of Human Services." SDCL § 27B-1-17(7). Further, SDCL § 27B-2-20 states that the "Department of Human Services shall coordinate the utilization of existing facilities, state departments, boards, or commissions involved in the field of developmental disabilities." Moreover, SDCL § 27B-2-21 states that the Department of Human Services has charge of and operates all properties authorized by statute. CCHS is not managed, operated, or coordinated by the Department of Human Services. RO4:3346-50. It is strictly within the authority of the DOH to evaluate CCHS to determine whether they are operating in accordance with the administrative rules and laws under SDCL Title 34. *See* RO1:1447-54.

In settling jury instructions, the trial court concluded its belief that CCHS was a "community service provider" at the time Ben was receiving care. RO4:3304. While CCHS may fit the definition under SDCL § 27B-1-17(4), it is not a "community service provider" in the context of Title 27B. A community service provider is an entity governed by the Department of Human Services, while CCHS was a licensed specialty hospital under SDCL § 34-12-2. *See* RO1:1447-54. Nevertheless, the circuit court instructed the jury on the standard for entities governed by the Department of Human Services under Title 27B rather than for entities licensed by the DOH under SDCL Chapter 34-12. By doing so, the court's instructions placed duties on CCHS that were inconsistent with state law. For example, Jury Instruction No. 28 lists requirements of behavior intervention programs under the direction of the Department of Human Services. RO1:1725.

Jury Instruction Nos. 21 through 29 are all statements of the law coming from Title 27B. RO1:1718-26. Title 27B is not applicable in the present case because the

Department of Human Services does not regulate CCHS. Accordingly, the court erred when instructing the jury on the standards found in SDCL Title 27B, namely Jury Instruction Nos. 21 through 29.

IV. Whether the trial court erred in not awarding Defendant the full amount of its costs for which it applied in the Application for Taxation of Costs and Disbursements pursuant to SDCL §§ 15-6-54(d) and 15-17-37.

Under South Dakota law, "costs and disbursements, other than attorneys' fees, shall be allowed as of course to the prevailing party unless the court otherwise directs." SDCL § 15-6-54(d). In the present case, CCHS applied for recovery of costs against Parents (not Ben) after the court entered judgment in favor of CCHS. RO4:3093-97. CCHS sought to recover $22,819.63 in costs that were expended under SDCL § 15-17-37. RO4:3149. Plaintiffs opposed the Application for Taxation of Costs and Disbursements filed by CCHS, contending that costs would not be in the interest of justice because they would be made against Ben personally, and Parents' claims were very limited in this case. RO4:3099-3112. After a hearing, the court determined that costs were appropriate, but that they should be taxed against Parents for one-third of those applied for because Parents had one of three causes of action "in their own right rather than in their guardianship capacity or their representative capacity. . . ." RO5:647. The court erred in its ruling for two reasons. First, the costs for which CCHS applied are against Parents, because Parents were the ones who maintained this cause of action and made all the critical strategy decisions on behalf of Ben. Second, Parents initially brought claims for emotional distress in all of the claims made in the Complaint.

The issue to be decided by this Court is whether judgments for costs and disbursements should be entered against the next friend or guardian that is acting in a

disabled person's capacity. Under South Dakota law, "[i]f disbursements are awarded or taxed against an infant plaintiff, the guardian, by whom he appeared in the action, is responsible for them." SDCL § 15-17-48. In this case, Parents appeared as guardians for Ben. The claims were based upon CCHS's care of Ben during the time he was an infant. This statute is instructive of the South Dakota Legislature's desire to have costs taxed against guardians in cases such as this one. *See Gohl v. Livonia Public Schools*, 2018 WL 1128254 *2 (D. Mich. March 2, 2018) (The rationale behind this rule is to create responsibility in the party who forces the litigation to continue, when the claims do not result in recovery.); *Reynolds v. Great Northern Ry. Co.*, 206 F. 1003 (E.D. Wash. 1913).

The trial court erred in finding that Parents are only liable for one-third of the costs that were expended in preparing this case for trial. Instead, the trial court, under its own rationale that Parents are liable for any cause of action they brought "in their own right," should have awarded costs to CCHS for all causes of action. CCHS is entitled to recover costs in this case from Parents, because Parents maintained this action and played the most critical role in hiring attorneys and making important decisions. Parents should not be allowed to shift responsibility to CCHS simply by hiding behind the notion that Ben is the real party in interest. Parents brought all the claims. They had their own claims and discovery was conducted related to those claims. Accordingly, the Court should find that CCHS is entitled to the full amount of $22,819.63 for which it applied in its Application for Taxation of Costs and Disbursements.

CONCLUSION

For the reasons set forth above, Defendant CCHS requests that this court affirm the judgment for Defendant. CCHS also requests that the court remand the cost judgment

to the trial court with instructions to enter a cost judgment against Parents for the full amount of costs incurred by CCHS.

Dated at Sioux Falls, South Dakota, this 29th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Defendant complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 9,856 words, excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 29th day of November, 2018.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28644
Notice of Review No. 28657

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of Benjamin B. Graff, disabled,

Plaintiffs/Appellants,

vs.

CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Lawrence E. Long, Presiding Judge

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Notice of Appeal filed June 21, 2018
Amended Notice of Appeal Filed September 12, 2018
Notice of Review filed July 10, 2018
Amended Notice of Review filed September 25, 2018

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CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES
425 North Dakota Avenue
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Re: Graff v. Children's Care Hosp. & School 49CIV14-1363
Defendant's Motion for Summary Judgment

Dear Counsel,

This matter came before the Court on the Defendant's Motion for Summary Judgment. A hearing was held on Friday, March 9, 2018 at 2:00 p.m.

After fully reviewing the parties' arguments, reading all the written submissions and relevant authorities, and carefully considering the issues presented, the Court issues the following decision:

FACTUAL BACKGROUND

Neil H. Graff and Debra A. Graff ("Parents") are the parents and appointed guardians and conservators of their son, Benjamin B. Graff ("Ben") (collectively referred to as "Plaintiffs"). Ben was born on January 12, 1994. He turned eighteen on January 12, 2012. Ben is severely disabled, and he has been diagnosed with Autism, Mental Retardation, Attention Deficit Hyperactivity Disorder, Cognitive Disability, and Pervasive Developmental Disability. Plaintiffs state that Ben has been diagnosed with a variety of conditions, and the diagnosis varies depending on the physician he is treated by.[1] These conditions have, at least at times, resulted in emotional disturbance, impaired Ben's ability to provide for his own health care and safety, diminished his ability to communicate, and created numerous special needs with regards to his education. As a result, the Ben requires special services to assist him with his special needs.

The Sioux Falls School District was unable to provide Ben with the appropriate public school setting due to his behavioral issues. Every student that receives special education services is put on an individualized education program ("IEP"). If a child cannot be served within a public school setting, then IEP teams will look for an alternative setting that can serve that student. For Ben, the IEP team determined that Children's Care Hospital and School("CCHS") would be an appropriate placement.

Prior to March 2010, Ben received his special education services at CCHS. Plaintiffs state that Ben has received services since 1995 as a day student, a residential student, a summer student and for rehabilitation. On March 11, 2010, Parents enrolled Ben in CCHS's residential program. Ben remained in the residential program until September 21, 2010. Ben was removed from the residential program on September 21, 2010, but remained in CCHS's care as a day student until September 28, 2010. CCHS discontinued treating Ben on September 28, 2010.

In Plaintiffs' Complaint, they allege (1) negligence; (2) lack of informed consent; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress against CCHS in its treatment of Ben. Plaintiffs'

[1] For example, he has also been diagnosed with Impulse Control Disorder, not otherwise specified; Chronic Mastoiditis; Chronic Disability and Behavior Problems; Disruptive Disorder not otherwise specified; and Disruptive Anxiety Disorder, not otherwise specified.

allegations stem from CCHS's practice of physically restraining Ben.

Plaintiffs state that Ben was placed in a "prone restraint"[2] by CCHS employees approximately 141 times over a six- to seven-month period. "Such restraints involved forcing Ben to the ground, in a face-down position, with at least two adults, and sometime up to four adults, holding him down." Plaintiff states that "[m]any institutions, including now CCHS, no longer authorize such restraints as part of their accepted procedures."

Specifically, Plaintiffs allege that CCHS had a duty but failed to

> [e]xercise reasonable care in the implementation and development of plans for Ben; to make sure plans, policies and standards were followed; to properly monitor Ben's services, including any implementation of restraints, to make sure such restraints adhered to legal and professional standards; to properly train, supervise and monitor staff; and to correct any violations by staff as to plans and standards before additional harm or damage would be sustained by Ben . . . [proximately causing] damages and injuries set forth in this complaint.

Pertaining to the claim for intentional infliction of emotional distress, Plaintiffs state that the actions of CCHS fall below state, federal, and professional standards and would be described as extreme and outrageous. Plaintiff also states that because Ben was considered a "student", CCHS was subject to the policies and procedures of the South Dakota Department of Education due to Ben being in an IEP program.

As a result of CCHS's alleged negligence, Plaintiffs claim Ben suffered "serious and permanent damage." In addition, Plaintiffs claim that CCHS's methods caused both Ben and Parents emotional harm. CCHS denies that it was negligent in any matter, and it asserts that it complied with all professional standards and legal requirements.

Plaintiffs commenced this action by service of process upon Defendant on January 7, 2013. By that time, CCHS had not provided services to Ben for over two years. Defendant moves

[2] Plaintiffs state that "a prone restraint is where the student is placed face down on the ground." Luce Aff., Exs. 7, 8 (Isler Depo., p.34; Rajski Depo. p. 37).

this Court to grant its Motion for Summary Judgment, finding that Plaintiffs' claims are barred by the statute of repose in SDCL § 15-2-14.1. Plaintiffs state that they are not suing for medical malpractice, but, rather, the claims involve the improper administration of restraints to a student. In the alternative, Defendant moves the Court for summary judgment on Parents' claims in the Complaint for failing to state a claim for which relief can be granted.[3]

STANDARD OF REVIEW

"Summary judgment is an extreme remedy, is not intended as a substitute for a trial." *Discover Bank v. Stanley*, 2008 SD 111, ¶ 19, 757 N.W.2d 756, 762 (citations omitted). "[T]he moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 SD 23, ¶ 8, 779 N.W.2d 690, 693 (citations omitted). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Id.* (citations omitted).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). "A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the nonmoving party.'" *Gul v. Ctr. for Fam. Med.*, 2009 SD 12, ¶ 8, 762 N.W.2d 629, 633 (citations omitted). "Unsupported conclusions and speculative statements do not raise a genuine issue of fact." *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 SD 39, ¶ 20, 766 N.W.2d 510,516.

"Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* ¶ 11, 766 N.W.2d at 513 (citations omitted). The nonmoving party must "show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Bordeaux v. Shannon Cty. Sch.*,

[3] The parents of Ben Graff agree that their claims against CCHS would be prevented if this Court finds that this is a medical malpractice cause of action.

2005 SD 117, ¶ 14, 707 N.W.2d 123, 127. "The nonmoving party may not rely on mere denials or allegations in its pleadings but must designate specific facts showing that there is a genuine issue for trial." *U.S. Bank Nat'l Ass'n v. Scott*, 2003 SD 149, ¶ 39, 673 N.W.2d 646, 657.

ISSUES

A. Whether these causes of actions are considered medical malpractice actions when Ben was identified as a "student" for IEP purposes.
B. If this is a medical malpractice cause of action, whether the cause of action is time barred under the statute of repose or does Ben fall under the tolling provisions that apply to minors or those with disabilities.

LEGAL ANALYSIS

A. These causes of action are not based on a medical malpractice action.

States, in response to a growing number of medical malpractice actions, embraced tort reform and enacted short statutes of limitations/repose to the causes of actions. In South Dakota, the law provides:

> An action against a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts for malpractice, error, mistake, or failure to cure, whether based upon contract or tort, can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred . . . .

SDCL § 15-2-14.1. There is no distinction in this statutory language, or in South Dakota precedent, between direct or vicarious liability under the statute. *Pitt-Hart v. Sanford USD Med. Center*, 2016 SD 33, ¶ 10, 878 N.W.2d 406, 410-11.

"[M]alpractice [is defined as] '[a]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties . . . .'" *Martinmaas v. Engelmann*, 2000 SD 85, ¶ 27, 612 N.W.2d 600, 607 (quoting *Bruske v. Hille*, 1997 SD 108, ¶ 13, 567 N.W.2d at 872).[4]

[4] The South Dakota Supreme Court found that "[s]exual misconduct [was] clearly encompassed in the concept of 'professional misconduct'" in a tort action for

The statute was enacted in response to the "perceived" crisis in medical malpractice actions. *Lyons v. Lederle Laboratories, A Division of American Cyanamid Co.*, 440 N.W.2d 769, 772 (S.D. 1989).[5]

There has been a trend of "plaintiffs seeking to avoid the statutes [by] argu[ing] that a particular claim falls outside the definition of medical malpractice." Holly Piehler Rockwell, *What patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice*, 89 A.L.R. 887 § 2(a) (1991) [hereinafter *Piehler*]. If not a medical malpractice claim, then, of course, the statute of repose would not apply.

"The courts have struggled with proper categorization of patient claims which arise in connection, however slight, with health care." *Id.* Such courts have focused on various considerations in their decisions such as statutory language, legislative history, facts of the claim, and the context surrounding the claim. *Id.*

In determining the meaning of a statute, the plain language is first examined. SDCL § 2-14-1; *Magellan Pipeline Co.*, 2013 SD 68, ¶ 9, 837 N.W.2d at 404. Looking at the language of SDCL § 15-2-14.1, it broadly states "[a]n action . . . in contract or tort." "[A]ction" is limited by the words "for malpractice, error, mistake, or failure to cure . . . ."

The South Dakota Supreme Court stated that "the phrase malpractice, error, mistake, or failure to cure necessarily has a broader meaning than the term malpractice alone." *Pitt-Hart*, 2016 SD 33, ¶ 13, 878 N.W.2d at 412. The Court went on to define error and mistake as follows:

> The term *error* means: "1. An act, an assertion, or a belief that unintentionally deviates from what is correct, right or true. 2. The condition of having incorrect or false knowledge. 3. *The act or an instance*

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insurance coverage for intentional acts brought against a physician who performed pelvic examinations on the plaintiffs. *Martinmaas*, 2000 SD 85, ¶ 29, 612 N.W.2d at 608.

[5] Some have noted that the severity of the "crisis" has been questioned. Gail Eiesland, Miller v. Gilmore: *The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations*, S.D. L. REV. 672, 688-89 (1993) (citing authorities that consider the problem was inflated and the legislation passed to cure the problem was inappropriate, and also noting that some courts have found the legislation unconstitutional under certain circumstances).

> *of deviating from an accepted code of behavior.* 4. A mistake." *The Am. Heritage Coll. Dictionary* 467 (3d ed.1997) (emphasis added). The term *mistake* means: "1. An error or *a fault resulting from* defective judgment, deficient knowledge, or *carelessness*. 2. A misconception or misunderstanding." *Id.* at 873 (emphasis added). Thus, while SDCL 15-2-14.1 applies to a personal injury resulting from medical care (i.e., "[a]n action against a physician ... for malpractice ... based upon ... tort"), it also seems to apply to a variety of other conduct involving unlicensed hospital personnel, such as a dispute regarding a bill for hospital services (i.e., "[a]n action against a ... hospital ... for ... error ... based upon contract").

Id. ¶ 14.

Here, the matter concerns the treatment of Ben while in the care of CCHS. This claim could possibly involve either an error or mistake in deviating from an accepted code of behavior; or being at fault due to defective judgment. However, a mere error or mistake does not necessarily transform this claim into medical malpractice cause of action.

In looking at the factual basis of a claim,

> courts may consider whether a particular wrong is "treatment related" or was caused by a dereliction of professional skill or duty, whether the wrong can be evaluated based on common knowledge or requires expert evidence to determine whether the appropriate standard of care was breached, or whether the act at issue involved assessment of the patient's condition. In addition, courts have considered factors such as whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform, whether the injury would have occurred if the patient had not sought treatment, and whether the tort alleged was intentional.

Piehler, 89 A.L.R. 887 § 2(a). Ultimately, in tort claims, a focus is put "more on the wrong alleged than on the legal theory upon which the claim is sought." *Id.*; *see also Bruske v. Hill*, 1997 SD 108, ¶¶ 11-14, 567 N.W.2d 872, 877 (holding that fraud

and deceit claims "sounded in negligence" and that SDCL 15-2-14.1 applied).[6]

CCHS maintains that it provided medical care to Ben during his time as a student at CCHS and the allegations in the case stem from the medical behavior care. "Despite his classification of being a student, . . . it was clear that the purpose of Ben's treatment at CCHS was to help manage his behavioral medical issues that persisted and could not be addressed in public schools." CCHS states it is a hospital, employs numerous staff members who provide medical care, and is licensed as a hospital in South Dakota, which includes being monitored by the South Dakota Department of Health. Plaintiff argues that even though CCHS could be considered a hospital, Ben was there for educational purposes as instructed under his IEP organized by the school district.

In coming to a decision, this Court also considers whether CCHS is considered a "physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts."

A "Hospital" is defined as

> any establishment with an organized medical staff with permanent facilities that include inpatient beds and is

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[6] *See also Mendelson v. Clarkstown Medical Associates, P.C.*, 271 A.D.2d 584, 584 (N.Y. App. Div. 2000) (Slip Opinion) ("In determining whether an action sounds in medical malpractice or in simple negligence for purposes of determining the applicable Statute of Limitations, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached. When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence."); *Pascarelli v. Corning Clinical Laboratories, Inc.*, No. 325312, 1999 WL 155381, at * 2-4 (Conn. Super. Ct. 1997) (finding that blood laboratory's false notification that plaintiff had HIV was not medical malpractice claim and stating that "[w]hether the plaintiff's cause of action is one for malpractice depends upon the definition of that word and the allegations of the complaint ... Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services."); *Howard v. Ozark Guidance Center*, 930 S.W.2d 341 (Ark. 1996) (holding that complaint alleging that counseling center was negligent in its handling of employee's relationship with client did not allege "medical injury" so the two-year statute of limitations for medical malpractice did not apply and stating that how medical office supervised its staff was not matter of medical science or rendition of professional service).

> primarily engaged in providing by or under the supervision of physicians, to inpatients, any of the following services: diagnostic or therapeutic services for the medical diagnosis, treatment, or care of injured, disabled, or sick persons; obstetrical services including the care of the newborn; or rehabilitation services for injured, disabled, or sick persons. In no event may the inpatient beds include nursing facility beds or assisted living center beds unless the same are licensed as such pursuant to this chapter . . . .

SDCL 34-12-1.1. "Sanitarium" is not defined in the present South Dakota Codified Laws. The term was removed in 2017 from the definition of "Health Care Facility" which states

> any institution, birth center, ambulatory surgery center, chemical dependency treatment facility, hospital, nursing facility, assisted living center, rural primary care hospital, adult foster care home, inpatient hospice, residential hospice, freestanding emergency care facility, community living home, place, building, or agency in which any accommodation is maintained, furnished, or offered for the hospitalization, nursing care, or supervised care of the sick or injured . . . .

SDCL 34-12-1.1 (4); *see also* SL 2010, ch. 149., § 1 (deleting "sanitarium," following "institution," and inserting "community living home").

"Health care" is defined as

> any care, treatment, service, or procedure to maintain, diagnose, or treat a person's physical or mental condition. The term also includes admission to, and personal and custodial care provided by, a licensed health care facility as defined in § 34-12-1.1 . . . .

SDCL 34-12C-1(3). Defendant also states that many of its employees should be considered "practitioner[s] of healing arts." "Healing art" is defined as

> any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or practice for the ascertainment, cure relief, palliation, adjustment, or correction of any human disease, ailment, deformity,

> injury, unhealthy or abnormal physical or mental condition.

SDCL § 36-2-1.

Having a license, being monitored by the South Dakota Department of health, and possibly practicing healing arts does not necessarily make CCHS a "hospital" for purposes of the medical malpractice statute of repose, however. *See Pitt-Hart*, 2016 SD 33, ¶ 15, 878 N.W.2d at 412 ("This decision does not require us to conclude that SDCL 15-2-14.1 applies to all negligence actions against a hospital. This is not a case of a nonpatient slipping on an icy sidewalk while walking past a hospital; instead, it involves a health-care technician who allegedly dropped a post-operative, knee-replacement patient contrary to standing orders that the patient required assistance to get out of bed. In other words, there is a nexus between the injury suffered by the plaintiff and the health care he received from the hospital.").

This Court also considers the factual basis of Plaintiffs' claim in its consideration of whether the claim is a medical malpractice claim in disguise. In other words, the Court "must . . . determine whether the conduct alleged is of a type contemplated by SDCL 15-2-14.1." *Pitt-Hart*, 2016 SD 33, ¶ 12, 878 N.W.2d at 411. As stated above, in tort claims, a focus is put "more on the wrong alleged than on the legal theory upon which the claim is sought." *Piehler*, 89 A.L.R. 887 § 2(a); *see also Bruske v. Hill*, 1997 SD 108, ¶¶ 11-14, 567 N.W.2d 872, 877 (holding that a fraud and deceit claims "sounded in negligence" and that SDCL 15-2-14.1 applied).

In *Bruske*, the South Dakota Supreme Court defined malpractice as "[a]ny professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties." *Bruske*, 1997 SD 108, ¶ 13, 567 N.W.2d at 876-77. In that case, the trial court granted summary judgment in favor of a surgeon who was sued by a former patient and the decision was affirmed on appeal. *Id.* ¶ 1, 567 N.W.2d at 874. The plaintiff's cause of action was the tort of fraud and deceit, stating the physician allegedly failed to timely inform the patient of the dangers of a defective implant in her jaw. *Id.* ¶ 4. The Court found that the fraud and deceit claims were disguising the medical malpractice claim. *Id.* ¶ 12, 567 N.W.2d at 876. In doing so, the Court looked to how Bruske attempted to prove her claim. *Id.* ¶¶ 11-12. Bruske attempted to convince the Court that the source of the physician's duty to

inform her of the implant "lie[d] not merely in the physician-patient relationship but upon" the duty of suppressing a fact by one who is bound to disclose it. *Id.* However, because the actual duty arose under the patient-doctor relationship and due to Bruske's own witness stating that the physician breached the standard of care by not disclosing, the Court found that her claim was based in medical malpractice. *Id.*

Here, on the other hand, Ben was categorized as a student and received services at CCHS which were paid for by the school district. The claim is not based on any medical treatment but rather the protocols followed by non-medical professionals when a student with behavioral disorders acted out. Thus, the duty here did not arise from a medical standpoint. Any duty that arose stemmed from the educational needs of Ben under his IEP.

This Court finds great importance in the reasoning behind Ben's placement at CCHS. All children with disabilities must be provided with "'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected.'" *Sioux Falls School Dist. V. Koupal*, 526 N.W.2d 248, 250 (S.D. 1994) (quoting 20 U.S.C. § 1400(c)). The term "free appropriate education" is defined as follows:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.... We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. (quoting *Hendrick Hudson, Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 200-01 (1982)). Furthermore, "[a] disabled child's unique education needs *must* be tailored by means of an IEP." *Id.* (citing 20 U.S.C. § 1400(c)) (emphasis added). A child also must be given "sufficient support services to permit [him or her] to benefit educationally." *Id.* (quoting *Rawley*, 458 U.S. at 203). The types of services provided include

> transportation and such developmental, corrective, and other supportive services (including speech pathology

> and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as are required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id. (quoting 20 U.S.C. § 1401 (a) (17)); *see also* ARSD 24:05:13:01 (30) (defining "related services" as "services that support the provision of special education, including transportation and those developmental, corrective, and other supportive services determined by an IEP team to be required for an eligible child to benefit from special education"). Special education, as with Ben, could take place in a variety of locations, including a place determined to be a hospital, and be paid for by the school district. ARSD 24:05:13:01 (35).

Under these facts and viewing them in a light most favorable to Ben and Parents, this Court finds that, at the very least, there is a genuine issue of material fact on whether this is a medical malpractice case. The setting and context of these claims are not grounded in a medical atmosphere but rather an IEP program designed around Ben's educational needs. CCHS provided education related services to Ben. It is not up to this Court to change what types of educational needs Ben required under his IEP. *Koupal*, 526 N.W.2d at 251 (quoting *Rowley*, 458 U.S. at 198) ("[C]ourts may not substitute their 'notions of sound educational policy for those of the school authorities.'"). This Court finds that the causes of action are not disguising a medical malpractice action.

Because this Court finds that the claims are not disguising a medical malpractice action, the issue of whether the action would be tolled by Ben's minority no longer needs to be addressed.[7] Defendant's alternative motion to dismiss for failure to state a claim is also denied.

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[7] This Court is well-aware of the *Pitt-Hart* decision from 2016. Notably, this cause of action was filed on June 13, 2014, just short of two years prior to the clarification from the South Dakota Supreme Court. This Court is concerned that the law was unclear and misunderstood at the time of the filing of this cause of action and up until *Pitt-Hart*. It may be likely that the cause of action was commenced and, thus, delayed by Ben's minority (such as a continuing-tort) under SDCL § 15-2-22. "Words used in the South Dakota Codified Laws are to be understood in their ordinary sense." *Pitt-Hart*, 2016 SD 33, ¶ 10, 878 N.W.2d at 410 (quoting SDCL § 2-14-1). Under SDCL § 26-1-3,

the only way "[a] minor may enforce his or her rights by civil action or other legal proceedings in the same manner as a person of full age," is to have a guardian or conservator appointed to conduct the same. A minor cannot enforce his or her own rights and it has been South Dakota law for quite some time. SDC 1939, § 43.0109. A minor must wait until the age of eighteen to redeem any tax certificate. SDCL § 10-24-3, *amended by* H.B. 1147, 93rd Leg., Reg. Sess. (S.D. 2018). *See also Fink v. Fink*, 17 N.W.2d 717 (S.D. 1945) ("If the action is brought during his minority, it must be brought in his behalf by some person legally authorized to do so."). Minors must be represented in civil actions. SDCL § 15-6-17(c) (providing that a court shall appoint an appropriate person to a minor's or "*shall make such other order as it deems proper for the protection of the minor . . . .*"). *See also Beermann v. Beermann*, 1997 SD 11, ¶ 8, 559 N.W.2d 868, 870 (holding that the requirement of appointing an appropriate person to bring suit on behalf of the minor is a procedural bar, not a jurisdictional one). The Legislature clearly intends to preserve the right of minors to bring a cause of action by either providing a way to bring the action as a minor or to wait until the minority status no longer delays the commencement of the action. *See also* SDCL § 15-2-1 ("Civil action can only be commenced within the periods prescribed in this title after the cause of action shall have accrued except where in special cases a different limitation is prescribed by statute.").

The South Dakota Supreme Court has refused to apply the tolling statute in cases where the rights of a minor never arose. *In re Estate of Erdmann*, 447 N.W.2d 356 (S.D. 1989); *M.S. v. Dinkytown Day Care Center, Inc.*, 485 N.W.2d 587 (S.D. 1992).

In *Lyons*, the prior minority tolling statute was overturned by the South Dakota Supreme Court for violating equal protection. 440 N.W.2d at 771. The force behind the Court's decision was the conclusion that there was no logical reason to find that a requirement that minors bring their medical malpractice suits sooner than any other tort or contract claims would have any impact on the rationale behind the medical malpractice statute of repose: to address the alleged "crisis." *Id.* at 771-72. The Court found that the distinction between which cause of actions are brought bore no rational relationship that would alleviate a medical malpractice crisis. *Id.*

Here, Ben's right to bring a cause of action existed. There is no condition precedent to a medical malpractice action. There is a possibility that there is no logical reason to prevent Ben from bringing this cause of action based on his age that is rationally related to a medical malpractice crisis. Further, it would be concerning to this Court if the result of the strict application of the statute of repose in this case was intended by the Legislature when it was addressing the crisis.

ORDER

Based on the foregoing:

ORDERED that Defendant's Motion for Summary Judgment is DENIED.

ORDERED that Defendant's alternative Motion to Dismiss is DENIED.

Dated this 21 day of March, 2018.

BY THE COURT:

Larry E. Long
Presiding Judge

FILED
MAR 22 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF and DEBRA A. GRAFF, as parents and guardians of BENJAMIN B. GRAFF, disabled, Plaintiffs, vs. **CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota corporation,** Defendant.	CIV. 14-1363 **JURY INSTRUCTIONS**

Instruction No. 9

LADIES AND GENTLEMEN OF THE JURY:

Both sides having rested, it is now the duty of the Court to give you the instructions that are to guide and govern you in arriving at a verdict. The law that applies to this case is contained in these instructions and the preliminary instructions previously given, and it is your duty to follow them. You must consider these instructions as a whole and not single out one instruction and disregard others. The order in which the instructions are given has no significance as to their relative importance.

By the language of these instructions, the Court does not intend to imply what any of the disputed facts in this case are, or what your verdict in this case should be.

Each of you must faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of the parties. Neither sympathy nor prejudice should influence you. Your verdict must be based on the evidence and not upon speculation, guess, or conjecture.

Instruction No. 21

No school who receives public funds and provides services to persons with developmental disabilities may engage in seclusion, which is the placement of a person alone in a room or other area from which egress is prevented.

Instruction No. 23

Use of restraints may be applied only if a person with a developmental disability exhibits destructive behavior and if alternative techniques including positive behavior intervention techniques have failed.

Instruction No. 23

The parties agree that Ben Graff is developmentally disabled.

Instruction No. 24

"Destructive behavior" is defined as behavior that presents a danger to self or a danger to others.

"Danger to others" is defined as behavior which supports a reasonable expectation that the person will inflict serious physical injury upon another person in the very near future. Such behavior shall be evidenced by recent acts which constitute a danger of serious physical injury to another person. Such acts may include a recently expressed threat if the threat is such that, if considering its context or person's recent previous acts, it is substantially supportive of an expectation that the threat will be carried out.

"Danger to self" is defined as recent behavior or related physical conditions which show there is a danger of serious personal harm in the very near future as evidenced by an inability to provide for some basic human needs such as food, clothing, shelter, physical health, or personal safety.

Instruction No. 25

The use of any highly restrictive procedures, including restraints and time-out, shall be described in written behavior intervention programs. Use of restraints shall be applied only in an emergency if alternative techniques have failed. Physical restraint intended to restrict the movement or normal functioning of a portion of a person's body through direct contact by staff, shall be employed only if necessary to protect the person with a developmental disability from immediate injury to self or others. No physical restraint may be employed as punishment, for the convenience of staff, or as a substitute for a program of services and supports. Physical restraint shall be applied only after alternative techniques have failed and only if such restraint is imposed in the least possible restriction consistent with its purpose. No chemical restraint and medication may be used excessively, as punishment, for the convenience of staff, as a substitute for a program, or in quantities that interfere with a person's developmental program.

Instruction No. 26

"Least restrictive" means an intervention in the life of a person with a developmental disability that is the least intrusive and disruptive to the person's life and represents the least departure from normal patterns of living that can be effective in meeting the person's developmental needs.

Instruction No. 27

Time-out rooms used for separating a person with a developmental disability from other persons receiving services and group activities may be employed only under close and direct staff supervision and only as a technique in behavior intervention programs. No time-out room may be used in an emergency situation.

Instruction No. 98

Any behavior intervention program shall use, develop, and promote positive, respectful approaches for teaching in every aspect of life. Behavior intervention programs may only be implemented following the completion of a comprehensive functional assessment if alternative nonrestrictive procedures have been proven to be ineffective, and only with the informed consent of the person with a developmental disability, if eighteen years of age or over and capable of giving informed consent, or the person's parent or legal guardian.

Instruction No. 29

"Informed consent" is written consent voluntarily, knowingly, and competently given without any element of force, fraud, deceit, duress, threat, or other form of coercion, after explanation of all information that a reasonable person would consider significant to the decision in a manner reasonably comprehensible to general lay understanding;

STATE OF SOUTH DAKOTA) : SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled, Plaintiffs, vs. CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation, Defendant.	CIV. 14-1363 **COST JUDGMENT**

On July 23, 2018, a hearing was held before the Honorable Lawrence E. Long on Defendant Children's Care Hospital and School's Application for Taxation of Costs and Disbursements pursuant to SDCL § 15-17-37. The Court, upon reviewing the pleadings, files and records herein, as well as the arguments of counsel, hereby orders that judgment shall be entered against Plaintiffs Neil H. Graff and Debra A. Graff in the amount of $7,606.54 for the reasonable costs expensed by Defendant Children's Care Hospital and School in gathering and procuring evidence or bringing the matter to trial.

Dated at Sioux Falls, South Dakota, this 10 day of Sept., 2018.

BY THE COURT:

Lawrence E. Long, Circuit Court Judge

ATTEST:

ANGELIA M. GRIES, Clerk

By _____
Deputy

(SEAL)

FILED
SEP 10 2018
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

* *

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled,
49CIV15-2096

49CIV14-1363

PRETRIAL CONFERENCE

Plaintiffs,

-vs-

CHILDREN'S CARE HOSPITAL AND SCHOOL, a South Dakota Corporation,

Defendant.

* *

BEFORE: THE HONORABLE LAWRENCE LONG
Circuit Court Judge
in and for the Second Judicial Circuit
State of South Dakota
Sioux Falls, South Dakota

APPEARANCES: MR. MICHAEL L. LUCE
MS. DANA PALMER
Lynn, Jackson, Shultz & Lebrun, PC
Post Office Box 2700
Sioux Falls, South Dakota 57101
-and-
MR. VINCENT A. PURTELL
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Attorneys for Plaintiffs.

MR. EDWIN E. EVANS
MR. MARK W. HAIGH
MR. TYLER W. HAIGH
Evans, Haigh & Hinton, LLP
Post Office Box 2790
Sioux Falls, South Dakota 57101

Attorneys for the Defendant.

PROCEEDINGS: The above-entitled proceeding commenced at 9:00 A.M. On the 23rd day of April, 2018, Minnehaha County Courthouse Sioux Falls, South Dakota

* * * * * * * * * * * * *

THE COURT: These are proceedings in civil file 14-1363. Neil Graff and Debra Graff as guardians on behalf of Benjamin Graff, plaintiffs, versus Children's Care Hospital and School, defendant.

Counsel, will you note your appearances, please.

MR. LUCE: Vince Purtell, Dana Palmer, and Mike Luce for the plaintiffs.

MR. HAIGH: Mark Haigh, Ed Evans, and Tyler Haigh for the defendant.

THE COURT: Very well. All right. This is a pretrial conference, and I think most of what we need to do is to work through the motions in limine today so why don't we start there.

Let's start with the plaintiff's motions. And my sense is that some of these are not contested. So why don't we go through the plaintiff's and find out which ones are noncontested and then we can work back through the ones that are contested.

First, evidence of insurance. Defense contest that

nonconforming conduct. It has to be a crime, it has to be wrong, it has to be inconsistent with the position that you've taken. But you don't prove it with opinion testimony; you prove it with an act. So I'm going to rule with reference to 8 that anything you want to offer along that line, plaintiff is subject to a 404(B) analysis. And I think I have to do that in advance and outside the presence of the jury so I want you to submit that as well. And it's got to be with reference specifically to -- I mean obviously if it's referenced to Ben, then that's probably going to come in. But if it's reference to some other child, then you have to come with the specifics of it, and it's got to come from somebody who knows the facts of someone who was there, someone who saw it. So submit what you want to offer with reference to treatment of other students and the source, the witness, and the nature of the testimony and then copy opposing counsel and we'll make a ruling.

All right. Number 9, excluding speculative testimony that Ben Graff did not want to go to CCHS because he did not like it there. Ms. Palmer.

MR. LUCE: I'll address that, Your Honor.

THE COURT: Very well.

MR. LUCE: Fundamentally it needs to be recognized that in this case we're dealing with a young man that can't speak,

prejudicial evidence. It's their burden to say which is prejudicial and what they would be harmed by, and they haven't done that. Charlene Hay is qualified to give lay opinions if not expert opinions. She's had 27 years' experience as an advocate. She was Ben's advocate. She was involved in his care, in his IEP meetings, and she was at the IEP meeting when he was discharged. She has relevant testimony that comes in under 701.

THE COURT: Well, I'm not sure I agree with either position. If she has relevant expert testimony and you intend to extract it, you need to tell me which ones you want. Okay?

MS. PALMER: And I wouldn't say relevant expert testimony but relevant opinion testimony.

THE COURT: Well, I didn't use the word "expert." You used the word "expert."

Okay. Now I want to know what you want in, and I want to know what you want out. So each of you submit some type of summary so that I can sort that out. I agree that the motion is broad. Okay? And I agree that Charlene Hay probably has dozens of opinions on all sorts of things. Okay? Pick the ones you want, pick the ones you don't want, and tell me what they are and I'll sort it out.

Okay. Number 14 was granted.

Number 15, excluding any testimony, evidence, or

reference to surveys from the South Dakota Department of Health.

MR. LUCE: On one hand, I guess I'm not surprised that there's this motion in limine because this is the most significant evidence in this case. The State conducts surveys as to its facilities to determine whether services are being properly administered, to protect the safety of those being served. It is public information.

When I went through those surveys with one of the Children's Care witnesses -- more than one -- I immediately afterwards got some subpoenas -- or some interrogatories saying, "Where did you get this stuff? Uh-oh. We're upset. This is stuff that nobody should see because it shows our conduct."

And I responded: It was public information. We didn't get it from a whistleblower at Children's Care.

Litigation-wise we usually go through cases where we don't have clear evidence as to what a defendant knew, what a defendant had been warned about, what a defendant was told, what it should do to properly administer safety.

We tried truck cases where we don't have any evidence that, A, knew and had been reprimanded by the highway department that their trucks are always running beyond hours. So we try to present evidence that, yeah, they knew. And a lot of times the jury will say, "I really

don't know if they knew."

Here we have the best evidence possible. We have this information as to what they knew. The defense says, "Well, a lot of it doesn't relate to Ben Graff." And I've heard that and the Court has heard that practically in response to every motion in limine today because the defense wants to frame this as Ben was one person, Ben was a troubled child, and we did what we had to do.

We want to show this case for what it is. It's an institutional failure where the institution knew what they were supposed to do, what was right, what was wrong, and they failed to follow what they were supposed to do. Not only from their practices, policies, and procedures but from what the State had told them. It's relevant and so important.

We're not dealing with something like bad acts where we're talking about an overweight truck ten years ago. We're talking about evidence that specifically deals with the time frame when Ben was being served; this 2008 to 2010 time frame. 2008 it starts out showing deficiencies. Well, what deficiencies? We're showing this as to evidence of failure to properly administer restraints, prone restraints. The worst restraint there is according to their own testimony. A restraint of last resort that was done over 140 times in six months. These warnings

from the State is, "You are not attempting less restrictive alternatives."

They examined six files, and six out of six showed a failure to consider less restrictive alternatives.

You don't have the nursing supervision. You don't have appropriate orders and timely orders from doctors, concerns about the duration and scope of restraints. All of those deal specifically with what happened to this young man. This lawsuit is against the institution, it's not against individuals. Knowledge, foreseeability are critical elements in every case and are critical in this case.

This is knowledge. They were warned. This goes to habit, routine, practice. It goes to their failure to have a safe environment. It is admissible under SDCL 19-19-404(B)ii. It's the type of evidence that is admissible for knowledge, intent, plan. There's a bunch of those. And it's not an inclusive list. I would add foreseeability. I would add that they had an understanding of what they should do. What could have been done with Ben Graff to prevent the reason we're in court here today? They had the opportunity.

It is critical evidence. I understand why they were upset because it came to become part of this evidence because it shows to the jury what they knew, where a lot

of times you have to speculate on that. Here there is no speculation. They knew and they didn't act appropriately with that knowledge. They engaged in harmful restraints for a number of different reasons that have already been pointed out to them by the State.

THE COURT: Now if I read defendant's brief correctly, defendant indicated they haven't -- you haven't gotten copies of this stuff?

MR. HAIGH: I'm sorry?

THE COURT: You didn't get copies of this?

MR. HAIGH: Oh. No, we have copies.

THE COURT: Okay.

MR. HAIGH: I think -- well...

THE COURT: The brief indicated that you tried and couldn't get it or...

MR. HAIGH: We have copies of the surveys, Your Honor. I'm sorry. The thing that we couldn't get was any information beyond the surveys. So we asked the South Dakota Department of Health who does these surveys for their notes and specifics about why they felt that these particular items were deficient in 2008. The response we got was a letter from the federal government that said, "We're the federal government. We don't have to obey subpoenas so you can't have it."

And then they did tell me -- Jim Powers, who was

representing the state in that, did say, "Well, if you made a Freedom of Information request, we need to get the names of the students whose files were surveyed by the Department of Health." And we already have that so we did not make that Freedom of Information request.

But that's the information we don't have. We don't have any other background other than the surveys themselves as to what...

THE COURT: Okay.

MR. HAIGH: Can I just tell you what happened?

THE COURT: Yes, please. Yes.

MR. HAIGH: So just so you have background. In 2008, the Department of Health surveys every hospital in the state at various times. They can do it just randomly. They can do it in response to a complaint. The facility never knows why they're doing it, but they show up one day and say, "We're going to do a survey." It's common.

THE COURT: Okay.

MR. HAIGH: Every hospital -- I guess I don't have empirical evidence of this, but every time a survey is done, they find some stuff.

So in 2008 they did the survey and they came back and said, "Here's your deficiencies." And there's several different categories of deficiencies, one of which is restraint. Documentation. There were several things that

they said, "You need to correct," along with all these other topics.

And so in 2008 we then issued a plan back to the State: Here's what we're going to do to correct it. And then there was another inspection, and they said, "You need to fix these other things too. You haven't fully done everything we said."

And so in 2008, early 2009 there was a second survey, and we met and satisfied the State that we've now complied with all state regulations. This was all before Ben Graff was there.

They came back and did surveys again in 2010 and then in 2011 related to the entire hospital again. And in 2010 and 2011 -- 2010 again was when Ben was there -- the State found absolutely no violations of any restraint policies in 2010 or 2011. And so our argument is that what happened in 2008 when Ben wasn't there -- and again, Ben hasn't -- Ben was not involved in any of these deficiencies noted in the 2008 survey. In fact, he wasn't even restrained in 2008 so he couldn't have been one of those students. But none of the deficiencies noted by the Department of Health in 2008 related to Ben. They were corrected. In fact, that's confirmed by the State when they came back and did surveys again in 2010 and 2011.

What happened in 2008 again is irrelevant because it

happened in 2008, not when Ben was there. And the evidence would show -- you know, if it was presented, it would just show that it was corrected. Again, it's evidence of prior bad acts that occurred in 2008. It's an attempt by the plaintiffs just to say, "Hey, look. CCHS is a bad place. The Department of Health came in and they found deficiencies." And, you know, like the arguments we've been making throughout the case, this is something unrelated to Ben. None of these deficiencies were related to Ben. It's just an attempt to say, "Hey, you're bad people."

THE COURT: Okay.

MR. LUCE: 2008 starts it. They're told of all these deficiencies. They go back in '9 -- and this is knowledge, what they knew about problems with their restraints, which is what happened to Ben. 2009 they said they still haven't corrected them. And I don't have these here today, but I do not believe it is an accurate statement -- and they can be provided to the Court, those surveys -- that they found no deficiencies in 2010 and 2011. 2011 by the way the Court says, "Well, that's after Ben left." 2011 is the date of it. It deals with what was going on at Children's Care in 2010, the time when Ben was there.

So from '8 to '11, 2008 to 2011, we start out with

knowledge of deficiencies of the exact nature that Ben experienced. That they were told to correct them. They said they corrected them but they didn't. Ergo. What happened to Ben? The same stuff they had been warned not to do. And this statement amazes me that we now have evidence from an attorney that says, "Well, I know about all these surveys, and they're always finding something wrong." The Court can't make a ruling based on that. That is improper argument. It's without any foundation. And I don't care if a hospital in Belle Fourche was told that they didn't change catheters enough. I do care that a facility in Sioux Falls that was treating this young man were told, "Here's these things you have to do with restraints to be following your practices, policies, and procedures, and you're not doing them. And you didn't do them with Ben."

THE COURT: Okay. I want to see it all in advance. Send me the stuff you want to introduce.

MR. LUCE: Okay.

THE COURT: I want to see the whole business from 8 through 11.

MR. HAIGH: Whole business? Oh, all the surveys?

THE COURT: Yes, all the surveys.

MR. LUCE: And I'll highlight those areas because some are like 20 pages long and stuff so the Court can know which

areas we believe are most significant to Ben's case.
THE COURT: Okay.
MR. HAIGH: I guess the other point I just want to make, there's so much stuff in there that's unrelated to restraints or Ben or anything in this case. Are we agreeable that that's not coming in? I don't know if Mr. Luce --
THE COURT: Well, I -- that's --
MR. LUCE: I think the whole --
THE COURT: Mr. Luce, what's your position with reference to that?
MR. LUCE: I think the whole survey comes in. It's a public record.
THE COURT: How big is it?
MS. PALMER: 231 pages.
MR. LUCE: For all four of them are -- how much?
MS. PALMER: 231.
MR. LUCE: 231 pages.
THE COURT: Does that cover the 2008 through 2011?
MR. LUCE: That's correct, yup. That's the only ones we have that were introduced.
THE COURT: Is it bigger than that?
MR. HAIGH: I haven't looked. It sounds about right.
THE COURT: Well, okay. Well, I guess I'll read all 231 pages. But let's try to sift this stuff down to the stuff

that talks about restraints and mark stuff you want.
MR. LUCE: I'll provide the Court with two copies -- one, the full one, so the Court can take it under -- see the whole thing, and redacted ones with that stuff that relates to not Ben specifically but to restraints and concerns about those restraints -- because that's what this lawsuit's about.
THE COURT: Okay.
MR. HAIGH: Just -- I'm sorry, one technical point so I don't get in trouble with anybody. In the surveys, the children that are discussed are discussed by number.
THE COURT: Okay.
MR. HAIGH: Because we're the ones that were surveyed, we know -- I know what those -- who those students are. But one of them in, I think it was, 2010 or 2011 is Ben Graff. Do you want me to tell you who that is?
MR. LUCE: The number?
MR. HAIGH: I don't want to get in trouble with anybody. I told Mr. Luce what it was.
MR. LUCE: Yeah, I don't -- you can tell him the number.
MR. HAIGH: I don't care what Mr. Luce thinks. I want to known what the Court thinks because I don't want to get in trouble for disclosing something I'm not supposed to disclose.
THE COURT: Well --

MR. HAIGH: I mean do you want me to tell you who that is? Which one is Ben Graff?

THE COURT: Yeah, I probably ought to know.

MR. HAIGH: Okay.

MR. EVANS: You can maybe do that in a confidential cover letter that gets filed under seal.

THE COURT: Under seal, yeah.

MR. HAIGH: Okay.

THE COURT: That makes sense?

MR. LUCE: That's fine. I mean I don't mind.

THE COURT: I'll put it in the file under seal and then it's covered.

Okay. Item 16, excluding hearsay statements. Okay. That might be a little broad.

MR. HAIGH: Well, we listed them, Judge.

THE COURT: Okay.

MR. HAIGH: They're specifically listed. I won't take up your time. They're all clearly hearsay. Plaintiff says that they were too broad. Those specific ones we listed are the ones we want out. The other ones we'll object to.

MS. PALMER: I think they're listed on page 27 of their brief.

THE COURT: I'm trying to get to it.

MS. PALMER: 27 and 28 it looks like.

THE COURT: Okay. Well, there's Charlene Hay again.

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
NEIL H. GRAFF & DEBRA A. GRAFF, Parents and Guardians of BENJAMIN B. GRAFF, disabled, *Plaintiffs,* vs. **CHILDRENS CARE HOSPITAL & SCHOOL, a South Dakota Corporation** *Defendant,*	Civ. 14-1363 **ORDER REGARDING DEFENDANT'S MOTION IN LIMINE**

The Court finds that any testimony, evidence, or reference to surveys from 2008-2001 done by the South Dakota Department of Health show deficiencies in record-keeping done by Children's Care Hospital & School. Because SDCL §§ 22-18-5 and 13-32-2 define the standard of care, the surveys have limited relevance. Thus, the Court GRANTS Defendant's motion # 15 and excludes the records.

Dated this 4th day of May, 2016.

BY THE COURT:

Lawrence Long
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, CLERK OF COURTS
BY: _____, DEPUTY
(SEAL)

FILED
MAY 04 2018
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28644

NEIL H. GRAFF and DEBRA A. GRAFF, as Parents and Guardians of BENJAMIN B. GRAFF, disabled,

Plaintiff / Appellant,

v.

CHILDREN'S CARE HOSPITAL AND SCHOOL,
a South Dakota Corporation,

Defendant / Appellee.

Appeal from the Circuit Court,
Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Lawrence E. Long, Presiding

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NOTICE OF APPEAL FILED JUNE 21, 2018;
AMENDED NOTICE OF APPEAL FILED SEPTEMBER 12, 2018

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Neil and Debra Graff, as parents and guardians of Benjamin Graff ("Ben"), respectfully submit this Reply Brief.

RESPONSE TO CCHS'S STATEMENTS

In its Statement of the Issues,[1] Children's Care Hospital and School ("CCHS") provides only a small portion of the circuit court's ruling on the Motion for Summary Judgment. In addition to what CCHS states, the court, in its 14-page letter opinion, also held, "Ben was categorized as a student and received services at CCHS which were paid for by the school district. The claim is not based on any medical treatment but rather the protocols followed by non-medical professionals when a student with behavioral disorders acted out. Thus, the duty here did not arise from a medical standpoint. Any duty that arose stemmed from the educational needs of Ben under his IEP." RO1:951. The circuit court also found "great importance in the reasoning behind Ben's placement at CCHS," noting the "setting and context of these claims are not grounded in a medical atmosphere but rather an IEP program designed around Ben's educational needs. CCHS provided education related services to Ben. . . .This Court finds that the causes of action are not disguising a medical malpractice action." RO2:2606-5571 (Ben received services at CCHS from 1995 to 2010); RO5:952.

CCHS also states, "although the DOH reviewed the restraints conducted on Ben in 2010, none of the DOH deficiencies Plaintiffs sought to introduce related to

[1] CCHS failed to include the most apposite authorities as required by SDCL § 15-26A-60(4) and -61.

care provided to Ben and none related to the use of restraints during the time that Ben was a *residential student* at CCHS." The surveys were not during the time Ben was a *residential* student at CCHS, but he was receiving educational services at CCHS at the time of the surveys. RO5:93-370.

CCHS then states that Ben "submitted proposed redacted surveys that created a misleading appearance concerning the content of the surveys." CCHS Brief, p. 4-5. In fact, the surveys were redacted to show only relevant conduct, *i.e.*, conduct relating to restraints. What CCHS did not inform this Court is that Ben also submitted a completely unredacted set of the surveys. RO5:73-626.

CCHS goes on to claim that the court "left open the issue of whether Plaintiffs' counsel could question CCHS witnesses concerning whether the state had directed CCHS to *use least restrictive restraint methods and whether CCHS had promised to do so.*" CCHS Brief, p. 5. The circuit court never answered counsel's question about whether he could ask CCHS employees those questions, and that questioning was never permitted by the circuit court. RO4:3246-47. In any event, those questions regarding use of least restrictive intervention and face-to-face notifications were only two of numerous restraint-related deficiencies noted in the surveys and repeated on Ben, as reflected in his restraint checklists. RO4:11-1435.

Notably, CCHS offers no response or disagrees with *any* of the facts stated

by Ben.[2] Further, CCHS omits significant facts that bear on whether Ben's action should be deemed a medical malpractice action, and the facts related to that issue as stated in Ben's Brief, and properly supported by citations to the record, must be deemed correct and complete. Graff Brief, pp. 4-6.

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY EXCLUDED THE SURVEYS

A. The Transcript of the Entire Trial is Unnecessary

CCHS argues that Ben's appeal should be dismissed because he did not order the transcript for the entire three-week trial. CCHS omits the fact that it filed a Motion for Order Requiring Plaintiffs to Order Trial Transcript, requesting the circuit court require Ben to order the entire transcript pursuant to SDCL § 15-26A-50, and submitted a ten-page supporting brief. RO4:3252-3264. CCHS made the same arguments in that brief that it makes now – that the trial transcript is necessary for the Court's determination of whether the circuit court erred in failing to determine whether the probative value of the surveys was substantially outweighed by its prejudicial effect. *Id.*

Before Ben could submit any responsive brief, however, CCHS inexplicably and voluntarily withdrew its motion, presumably so it could make its argument that Ben's appeal should be dismissed. RO4:3267. CCHS should not

[2] The first paragraph of CCHS's Statement of Facts contains no citations to the record and should be disregarded. *See* SDCL § 15-26A-60(5).

benefit from its strategy in withdrawing a motion that could have forced Ben to order the transcript that CCHS claims is necessary.

In any event, the transcript of the trial is unnecessary to the Court's determination of whether the circuit court's failure to conduct the requisite analysis was erroneous. The error in the circuit court's pretrial ruling is threefold: the court erred in failing to conduct the analysis under SDCL § 19-19-403 at all, it erred in failing to do so on the record, and it erred in excluding the surveys based on statutes ultimately not even part of the case.

The full trial transcript is unnecessary to this Court's determination of these issues. The trial court's errors in failing to conduct the analysis at all or on the record are evident from the transcript of the pretrial conference and from the circuit court's written ruling. It is not, and cannot be based upon later proceedings that were not part of the court's ruling. Further, the trial transcript is not necessary for this Court to conduct the analysis now because in determining whether probative value is substantially outweighed by unfair prejudice, the only evidence reviewed in the Rule 403 analysis is the evidence sought to be excluded, and the entire transcript is unnecessary. *See St. John v. Peterson*, 2011 S.D. 58, ¶ 16, 804 N.W.2d 71, 76.

The one case cited by CCHS – *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 59, 764 N.W.2d 474, 491 – did not address the issue now before the court: the failure to conduct the Rule 403 analysis. And, the error in that case was *admission* of the evidence, not the exclusion. *Id.* Here, the circuit court's

complete failure to conduct the Rule 403 analysis is not the same as an "evidentiary error" that requires a showing of prejudice. *Id.* Rather, it was a "fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full consideration is arbitrary or unreasonable.'" *St. John v.*, 2011 S.D. 58, ¶ 19, 804 N.W.2d at 77. In other words, that failure to conduct the Rule 403 analysis is, in and of itself, prejudicial. *Id.* ("it is possible that the exclusion of the evidence 'in all probability affected the outcome of the jury's verdict and thereby constitutes prejudicial error.'").

B. The Probative Value of the Surveys is Clear and Significant

CCHS argues the circuit court correctly determined the surveys are irrelevant. As noted, the court ruled "[b]ecause SDCL §§ 22-18-5 and 13-32-2 define the standard of care, the surveys have limited relevance."[3] The circuit court changed course, however, and never applied those statutes to the case. *See* RO1:1706-1749. A determination of irrelevancy based on inapplicable standards simply cannot be correct. *See MinnComm Util. Const. Co. v. Yaggy Colby Associates, Inc.*, No. A11-1211, 2012 WL 1470191, at *6 (Minn. Ct. App. Apr. 30, 2012) (reversing summary judgment because it was based on inapplicable rule of law); *Turner v. Helen of Troy, L.P.*, No. 490 EDA 2017, 2017 WL 6395940, at *2 (Pa. Super. Ct. Dec. 15, 2017) ("We will reverse any decree based on palpably wrong or clearly inapplicable rules of law."); *Mackintosh v. Hampshire*, 832 P.2d

[3] The court also found the surveys reflected merely "deficiencies in record-keeping." This conclusion, too, is erroneous and notably, CCHS implicitly acknowledges the surveys are more than deficiencies in record-keeping.

1298, 1302 (Utah Ct. App. 1992) (reversing because lower court's conclusion was based on statute of frauds which was inapplicable).

Regardless, the probative value of the surveys is unquestionable. The surveys document CCHS's deficiencies in its use of restraints in a number of ways: restraints not being used according to provider policy; failure to ensure restraints were ordered by the physician, to ensure the restraint was the least restrictive, to ensure the restraints were properly monitored by appropriately-trained staff, to ensure that less restrictive interventions were attempted; and other related deficiencies. RO4:11-1435. The surveys are damning evidence of CCHS's policy and procedure of improper utilization of restraints, as the deficiencies noted are the same or similar to deficiencies repeated in restraining Ben, as documented in the restraint checklists. *Compare* RO5:93-370 (surveys) *with* RO4:11-1435 (checklists). The deficiencies support Ben's allegations that CCHS failed to utilize lesser restrictive interventions for Ben; that they failed to make sure the restraints of Ben adhered to legal and professional standards; and that they failed to train, supervise, and monitor staff regarding the restraints.

The surveys are also probative of CCHS's knowledge and notice, which are elements of all Ben's claims. The surveys reflected that CCHS knew laws, policies, and standards were not being followed with regard to its use of restraints. The circuit court's ruling prevented Ben from presenting any evidence of such knowledge and notice, depriving him of the ability to establish negligence, *see e.g. Weeks v. Prostrollo Sons, Inc*., 169 N.W.2d 725, 727 (S.D. 1969) (a "knew or

should have known" standard applies to negligence claims), RO1:1717 (Jury Instruction No. 20 – foreseeability is a factor in proving causation); depriving Ben of the ability to establish CCHS's conduct was reckless and/or extreme and outrageous for his claim of intentional infliction, *see Wangen v. Knudson*, 428 N.W.2d 242, 248 (S.D. 1988) (the "extreme and outrageous character of the conduct" arises from the "actor's knowledge"), RO1:1733-34 (Jury Instruction No. 35 – knowledge relevant to whether conduct was extreme and outrageous and No. 36 – knowledge relevant to intent); and depriving Ben of the ability to establish CCHS's conduct was oppressive, willful and wanton, malicious and/or in disregard of humanity, which is satisfied by showing CCHS's knowledge as shown in the surveys, *see e.g. Minick v. Englert*, 167 N.W.2d 551, 555 (S.D. 1969).

The surveys are also relevant and admissible to show that CCHS had knowledge that its use of prone restraints was impermissible and that CCHS could not claim mistake in violating restraint regulations and policies when restraining Ben. SDCL § 19-19-403(b)(2). The surveys show CCHS's habit and routine practice of failing to properly train and supervise its employees on restraints, failing to properly implement the restraints, and failing to utilize lesser restrictive interventions. SDCL § 19-19-406.

The circuit court's conclusion that the surveys had limited relevance, based on statutes the court ultimately found inapplicable, is error. The relevancy of the

surveys is undeniable, and the court was required to conduct the analyses under both Rules 403 and 404(b), which it failed to do.

C. The Circuit Court Failed to Conduct the Requisite Analyses Prior to Excluding the Surveys

The circuit court was required but failed to weigh the probative value of the surveys against any unfair prejudice. *See* SDCL § 19-19-403. CCHS argues the court "conducted the proper test" for admissibility of the surveys; however, the only "test" CCHS identifies as having been done by the circuit court is under Rule 404(b). CCHS Brief, p. 20-22. And, the authorities cited by CCHS are all in relation to a 404(b) analysis, not a 403 analysis. *Id*.

There is a distinct difference between the analyses under Rules 403 and 404(b), and the circuit court was required to perform both. *See State v. Wright*, 1999 S.D. 50, ¶ 17, 593 N.W.2d 792, 800 ("under [Rule 404(b)], the admissibility of other acts evidence depends on a two-step analysis: (1) whether the evidence is relevant to an issue other than character, and (2) whether 'the probative value of the evidence is substantially outweighed by its prejudicial effect.'"); 64 AM.JUR. *Trials* 543 § 4 ("Rule 403 is the final barrier for *any* piece of evidence. Before evidence can be admitted at trial it must pass the Rule 403 'unfair prejudice' test. . . . after a piece of evidence is admissible under Rule 404(b), a determination still must be made whether Rule 403 has been satisfied."); 29 AM.JUR.2D *Evidence* § 331 ("when determining the admissibility of relevant evidence of similar acts

under Rule 404(b), the judge must find that the probative value of the evidence is not substantially outweighed by one of the dangers enumerated in Rule 403.").

The record is devoid of any indication that the circuit court did either analysis here. The circuit court only mentioned Rule 404(b) in passing. RO1:1552 (" So I'm going to rule with reference to 8 that anything you want to offer along that line, plaintiff is subject to a 404(B) analysis."). There is nothing more on the record or in the written decision on the admissibility of the surveys indicating that the circuit court conducted the requisite analysis under either Rule 404(b) or Rule 403. The circuit court never concluded the surveys even constituted impermissible character evidence, the only use of the surveys that could preclude their admission under Rule 404(b). *See* SDCL § 19-19-404(b).

Rule 404(b)(1) specifically contemplates that evidence of other crimes, wrongs, and acts *are* admissible for purposes other than to show the person acted in accordance with the character, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *See* SDCL § 19-19-404(b)(2). "Given that the list of 'other purposes' under Rule 404(b) for which evidence of other acts may be admitted is nonexclusive, the possible uses, other than character is limitless. Rule 404(b) is thus an inclusionary rule, not an exclusionary rule. Evidence is *only* inadmissible under the rule if offered to prove character." *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 24, 756 N.W.2d 345, 354–55 (emphasis added). Ben never intended to nor had any reason to use the surveys to show CCHS's character; CCHS established its character on

its own by restraining Ben over 140 times over seven months. Ben's use of the surveys was, instead, for the very purposes allowed under the rule: to show CCHS's knowledge that the use of the prone restraints was impermissible, to show the absence of any claimed mistake as to whether the prone restraints were allowed, and to show it was CCHS's habit and routine in impermissibly using the prone restraint. *See* SDCL §§ 19-19-404(b) and -406.

Moreover, CCHS did not attempt to and could not establish that the surveys are "substantially outweighed by the danger of unfair prejudice" and the circuit court never made such a finding. As previously explained, establishing "unfair prejudice" is a high standard (which CCHS never attempted to meet previously or even now). *Novak v. McEldowney*, 2002 S.D. 162, ¶ 11, 655 N.W.2d 909, 913 ("admission of the evidence is favored under [Rule 403], and the judicial power to exclude such evidence should be used sparingly."); *Wright*, 1999 S.D. 50, ¶ 16, 593 N.W.2d at 799 (same). To "cause unfair prejudice, the evidence must persuade the jury in an unfair and illegitimate way." *Novak*, 2002 S.D. 162, ¶ 11, 655 N.W.2d at 913. While the surveys are damning evidence of CCHS's knowledge, absence of mistake, and habit or routine practice regarding the use of prone restraints and their improper use, they would not have swayed the jury in any unfair or illegitimate way as required to make them "unfairly prejudicial," and CCHS has never claimed they would have.

D. Prejudice from Exclusion of the Surveys is Clear

When Ben was deprived of the ability to present the surveys to the jury, it was impossible for him to prove the elements to his claims, particularly those that require a degree of knowing conduct. *See* Section I., B., above. The prejudice resulting from the circuit court's failure to conduct the requisite analysis and from its exclusion of the surveys is not just possible, as in *St. John*, but unquestionable. *See also Mousseau*, 2008 S.D. 86, ¶ 41, 756 N.W.2d at 363 (exclusion of the evidence "in all probability affected the outcome of the jury's verdict and thereby constitutes prejudicial error."); *Carpenter v. City of Belle Fourche*, 2000 S.D. 55, ¶ 23, 609 N.W.2d 751, 761 ("Prejudicial error is error which in all probability produced some effect upon the jury's verdict. . . .").

CCHS argues that if Ben had ordered the transcript, it would have reflected many of CCHS's excuses for its deficiencies in regard to the restraints. CCHS Brief, p. 11.[4] However, the Rule 403 analysis does not look to other evidence in determining admissibility; rather, the court only weighs the probative value *of the surveys* against any unfair prejudice *from the surveys*. Moreover, what this evidence demonstrates is further prejudice from the circuit court's exclusion of the surveys – while CCHS was able to present evidence of all its excuses for its treatment and wrongful use of restraints, Ben was prohibited from presenting evidence that those excuses were invalid, as the surveys put CCHS on notice that it was not in compliance with state and federal laws and regulations.

[4] Again, CCHS fails to cite to any record evidence for these assertions.

E. Ben's Actions Did Not Create Confusion

CCHS argues that Ben created error in excluding the surveys by his "trial strategies" when he first took the position that this is not a medical malpractice action and CCHS's role was not as a hospital, and then he sought admission of the surveys. The infirmity with this argument lies in the fact that the surveys are *not* relevant *only* to hospitals. *See e.g. Scampone v. Grane Healthcare Co.*, 169 A.3d 600, 626-27 (Pa. Super. Ct. 2017) and *Montgomery Health Care Facility, Inc. v. Ballard*, 565 So.2d 221, 223 (Ala. 1990) (both admitting DOH surveys in non-medical malpractice actions seeking compensatory and punitive damages against nursing homes).[5]

Further, the surveys are not relevant only if CCHS was a hospital or only if Ben was suing for medical negligence. The surveys' relevance lies in the fact that they reveal CCHS's improper use of restraints in the past, which was, in turn, relevant to prove CCHS's knowledge and notice that its use of restraints on Ben was likewise improper. *See Scampone*, 169 A.3d at 626-27; *Montgomery Health Care Facility*, 565 So.2d at 223. This is true whether CCHS was acting in its capacity as a school or in its capacity as a hospital. In any event, the circuit court did not exclude the surveys because it previously concluded this was not a medical malpractice action. RO1:1437.

[5] CCHS never attempts to distinguish either of these cases which are directly supportive of the relevancy and admissibility of the surveys. *See* Graff Brief, pp. 26-29.

CCHS's next argument that Ben "creatively redacted" the surveys requires little response. The circuit court's request for in camera review required Ben's counsel to redact almost 300 pages of surveys in a short amount of time. To the extent anything was incorrectly redacted, it was mere error and nothing more, and apparently occurred on only 3 of almost 300 pages. The circuit court was, in any event, also provided the unredacted surveys.

CCHS's third argument is equally unavailing. It argues that although Ben maintained the surveys were relevant to notice and knowledge and not offered to prove CCHS's character, that was not his true intent. In support, CCHS claims the court "*left open the issue*" (but did not permit) questioning CCHS staff regarding whether the State required CCHS to correct the deficiencies noted in the surveys. CCHS Brief, p. 15. In granting CCHS's motion in limine, the circuit excluded "any testimony, evidence or reference to" the surveys, RO1:1093; 1437, and the court made it clear at trial that the surveys were inadmissible. RO4:3244 ("I have ruled they are not coming in and they are not coming in. They are not coming in."). How then, was counsel to question CCHS staff regarding deficiencies in those surveys?[6]

[6] CCHS's argument regarding foundation of the surveys merits little discussion. Foundation issues for evidence excluded in advance of trial are the subject of pure speculation. Further, CCHS offers no authorities in support of this argument and it should be disregarded. *Veith v. O'Brien,* 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29.

II. THE CIRCUIT COURT PROPERLY DENIED SUMMARY JUDGMENT

For its appeal, CCHS argues the circuit court erred in denying its Motion for Summary Judgment, which was based on its argument that SDCL § 15-2-14.1, recently considered in *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406, applies to Ben's claims and is a bar to such.

A. Ben's Placement was Educational and His Claims are Not Based on Medical Negligence

In support of its claim that Ben's case focused on medical care, CCHS takes four statements from Dr. Marcus's ten-page expert report out of context. CCHS states Dr. Marcus focused on the "lack of consideration of medical acuity." Dr. Marcus actually stated, "[t]here appeared to be a lack of consideration of medical acuity and physical discomfort *as a cause or precipitant of Ben's behavior problem.*" RO1:1820. Dr. Marcus was not offering any opinion on the lack of medical acuity, except as it pertained to it being a precipitating factor in Ben's problem behavior, which was in turn a precipitating factor in CCHS using a restraint on Ben. *Id.* Dr. Marcus's statements regarding CCHS's "fail[ure] to make attempts to 'alleviate possible discomfort,'" were similarly taken out of context, as Dr. Marcus also made that statement in the context of CCHS ignoring Ben's discomfort, resulting in a behavior, which in turn, resulted in more restraints. *Id.* Dr. Marcus was not "critical" of the physician's failure to document an association between the ear infection and his behavior, but only noted it, stating, "*[i]nterestingly,* the physician did not document an association

between his ear infection and problem behaviors." RO1:1821.[7] The noted lack of documentation regarding restraints has nothing to do with medical care, but CCHS's lack of compliance with standards regarding restraints. In short, the identified statements have nothing to do with medical care, and everything to do with CCHS's failure to address Ben's behaviors before implementing a restraint, which Dr. Marcus concluded was a breach of the "*professional*," not medical, standard of care. RO1:1815, 1822.

Dr. Stephens's opinions are likewise taken out of context and are unrelated to any medical care, as her opinion regarding CCHS's failure to address Ben's medical conditions was also in the context of that failure "affecting the behavioral functioning . . . and general *failure to ensure least restrictive interventions*," the crux of Ben's case. RO1:1799. Dr. Stephens's opinions, like Dr. Marcus's have nothing to do with medical care, but CCHS's actions and inactions related solely to its improper use of restraints on Ben. *See id.*

CCHS's argument that because Ben pled "lack of informed consent" in his Complaint, this must be a medical malpractice action, ignores the fact that "informed consent" is a requirement under the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1414. *See* RO1:485-492 (CCHS is regulated by Department of Education and required to follow the IDEA). Further, this claim was based on CCHS's failure to obtain Neil and Debra's consent to use restraints on Ben, which is completely unrelated to medical care. RO1:9.

[7] Any physicians involved in Ben's care at CCHS were not CCHS employees.

In its final attempt to convince this Court that Ben's case was a medical malpractice action, CCHS states, *without citation to any record evidence*, that "Plaintiffs cannot deny that the purpose for Ben's placement at CCHS was to address the behavioral issues." This statement ignores undisputed *record* evidence establishing the purpose of Ben's placement at CCHS was educational, and the great majority of those working with him and involved in the restraints had no medical background at all. Graff Brief, pp. 4-6; RO1:328-338 (undisputed facts that Ben's placement at CCHS was to meet his educational needs and the services CCHS and its staff provided to Ben were not medical). CCHS offers no response to those two pages of undisputed record evidence that Ben's placement and receipt of services at CCHS was educational. The basis for Ben's placement at CCHS was educational, not medical, and CCHS's tortious actions were undertaken during the course and scope of his education there. The circuit court's denial of CCHS's Motion for Summary Judgment, should be affirmed.[8]

B. CCHS is Not the Type of Defendant Enumerated in SDCL § 15-2-14.1

In *Pitt-Hart*, the plaintiff was an in-patient at Sanford Hospital, and he was injured as a result of a fall when he was assisted by a "patient-care technician."

[8] This was the basis for the circuit court's ruling on the summary judgment motion. Accordingly, the circuit court did not consider Ben's other arguments opposing the application of SDCL § 15-2-14.1. However, this Court can affirm on any basis supported in the record. *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174 ("We will affirm a circuit court's decision so long as there is a legal basis to support its decision."); *Horne v. Crozier*, 1997 S.D. 65, ¶ 5, 565 N.W.2d 50, 52 ("if the circuit court reaches the right conclusion for the wrong reason, we will nonetheless affirm.").

See Pitt-Hart, 2016 S.D. 33, ¶ 2, 878 N.W.2d at 409. In determining whether this statute was applicable in *Pitt-Hart*, the Court explained, "[f]irst, we must determine whether the type of defendant in this case is among those enumerated in SDCL 15–2–14.1." *Pitt-Hart*, 2016 S.D. 33, ¶ 11, 878 N.W.2d at 411. The Court concluded Sanford Hospital, and not its employee, was the named defendant, and there was "no dispute that Sanford is a hospital. Therefore, under the plain language of SDCL 15–2–14.1, the defendant in this action is of a type enumerated by that statute." *Id.* CCHS is *both* a school *and* a hospital and the determination of whether CCHS is the type of entity specified in SDCL § 15-2-14.1 must be viewed in the context of what capacity CCHS is being sued.

CCHS was at all times, in regard to Ben and the improper restraints, acting as a school and not any one of the entities or persons specified in SDCL § 15-2-14.1. The impetus for Ben's placement was his education and CCHS was subject to the rules and regulations of the Department of Education and the IDEA. Ben was routinely referred to as a "student." The vast majority of CCHS employees in daily contact with Ben were not medical providers of any type and had no medical education, training or experience. Were it not for the difficulty with Ben's behavior issues, he would have continued his education with the Sioux Falls School District. Conversely, Ben was not in need of any in-patient medical treatment that a hospital like Sanford provides. Rather, medical care that was provided to Ben was merely incidental to the educational purpose of his stay at

CCHS and even necessitated by the very negligence that is the subject of this lawsuit.

All record evidence supports the conclusion that CCHS was not a hospital, but was a school. On this basis, SDCL § 15-2-14.1 has no applicability to Ben's claims.

C. The Conduct Alleged is Not a Type Contemplated by SDCL § 15-2.14.1

The conduct at issue in this case is the improper and unjustified prone restraints on Ben. This conduct is not a type contemplated by SDCL § 15-2-14.1, as it does not involve malpractice, error, mistake or failure to cure, but involves the violation of laws and regulations.

The Court in *Pitt-Hart* explained the meaning of the words "error" and "mistake" and concluded, "there is a nexus between the injury suffered by the plaintiff and the health care he received from the hospital. Therefore, Pitt–Hart's action is one against a hospital for error or mistake based upon tort, and SDCL 15–2–14.1 applies." *Id.* at ¶ 15.

In this case, the conduct at issue was not in a hospital setting, nor at the hands of any type of health care provider. It cannot be said that CCHS's restraints of Ben were an error or a "deviation from an accepted code of behavior" and restraining Ben the way CCHS did was not an unintentional "error." *See id.* Further, these improper restraints were not the result of carelessness or a mistake, which connotes behavior that is unintentional, an oversight, a misunderstanding or a miscalculation. *See id.* To classify this conduct of placing a student in a

physical restraint in the prone position approximately 141 times in 6 to 7 months as a mistake or error, is absurd.

CCHS cannot establish either that CCHS is the type of defendant enumerated in SDCL § 15-2-14.1, or that the conduct alleged is a type contemplated by that statute of repose. The statute of repose is therefore inapplicable.

D. Ben's Minority Extends the Time for Bringing an Action

Even if SDCL § 15-2-14.1 were applicable, Ben's minority at the time of the negligence tolls the running of the statute, pursuant to SDCL § 15-2-22. While this statute expressly lists exceptions to this tolling period, stating, "[t]he provisions of this section do not apply to actions for the foreclosure of any real estate mortgage, either by action or by advertisement," there is no exception for medical malpractice actions or any other actions that are subject to the limitations period of SDCL § 15-2-14.1. *See* SDCL § 15-2-22. "SDCL 15-2-22(1) tolls the statute of limitations for most civil actions accruing to a minor until one year after reaching age eighteen." *Weegar v. Bakeberg*, 527 N.W.2d 676, 678 (S.D. 1995). Nevertheless, CCHS claims that because SDCL § 15-2-14.1 is a statute of repose, tolling is inapplicable and SDCL § 15-2-22 cannot apply.

1. SDCL § 15-2-22 is Not Equitable Tolling

When discussing tolling of the medical malpractice statute of repose, the Court in *Pitt-Hart* addressed whether equitable tolling based on fraudulent concealment applied and considered other instances of "equitable tolling," such as

that argued in *Anson v. Star Brite Inn Motel*, 2010 S.D. 73, 788 N.W.2d 822. *See Pitt-Hart*, 2016 S.D. 33, ¶ 22, 878 N.W.2d at 414. If SDCL § 15-2-22 can be described as a tolling provision, it most certainly is not the type of equitable tolling the Court faced in *Pitt-Hart* or *Anson*.

Moreover, courts have concluded that while equitable tolling cannot toll a statute of repose, legal or statutory tolling can. *See Arivella v. Lucent Technologies, Inc.*, 623 F.Supp.2d 164, 177 (D. Mass. 2009) (holding that legal tolling is compatible with tolling a statute of repose); *Andrews v. Chevy Chase Bank*, 243 F.R.D. 313, 316 (E.D. Wis. 2007) (distinguishing between legal and equitable tolling because equitable tolling does not apply to a statute of repose). The "tolling" afforded a minor pursuant to SDCL § 15-2-22 must be treated differently than equitable tolling, and should be allowed.

2. Refusal to Apply SDCL § 15-2-22 Would Violate Equal Protection

If the Court were to refuse to apply SDCL § 15-2-22 to medical malpractice actions, it would violate equal protection. In *Lyons v. Lederle Laboratories*, 440 N.W.2d 769 (S.D. 1989), the Court addressed a statute that has since been repealed, SDCL § 15-2-22.1, which stated:

> Notwithstanding any provision of § 15-2-22, respecting minors as defined in § 26-1-1, any action described in § 15-2-14.1 shall be commenced only within three years after the alleged malpractice, error, mistake or failure to cure occurred, unless the minor is less than six years of age at the time of the alleged malpractice, error, mistake or failure to cure in which case the action shall then be commenced within two years after the sixth birthday of the minor.

Lyons, 440 N.W.2d at 770. The court in *Lyons* explained the effect of the statute was to create different age classifications, which it concluded was a "classic example of the arbitrariness of the classification," explaining that for the same injury, "Lyons commenced action in product liability against the manufacturer of the medicine and in medical malpractice against the physician who dispensed it. His suit against the physician is dismissed under the statute, while his claim against the manufacturer stands." *Id.* at 771.

The Court also fail[ed] to perceive any rational basis for assuming that medical malpractice claims will diminish simply by requiring that suits be instituted at an earlier date." *Id.* The Court in *Lyons* agreed with the court in *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337, 1339 (1983), which concluded that the statute "create[d] an irrational classification which does not rationally further the purpose of [the legislation]," and held it was "unconstitutional on its face with respect to medical malpractice litigants who are minors.'" *Lyons*, 440 N.W.2d at 772.

Refusal to apply SDCL § 15-2-22 to medical malpractice cases would have the same unconstitutional result that the Court identified in *Lyons.* For any other tort case, a minor would have up to one year after turning 18 years old to institute suit. But, as to medical malpractice cases only, the extension or "tolling" during the period of minority would not apply. This is the "classic example" of an arbitrary classification found by the Court in *Lyons*, which has no rational basis, and is unconstitutional. *See Lyons*, 440 N.W.2d at 772.

3. Refusal to Apply SDCL § 15-2-22 is an Improper Statutory Amendment

Additionally, the refusal to apply SDCL § 15-2-22 to malpractice cases would be an improper statutory amendment by judicial decision. *See Hagemann ex rel. Estate of Hagemann v. NJS Engineering, Inc.*, 2001 S.D. 102, ¶ 8, 632 N.W.2d 840, 845-46 and n.9. In that case, the Court explained, "[i]t is not the task of this court to revise or amend statutes, or to 'liberally construe a statute to avoid a seemingly harsh result where such action would do violence to the plain meaning of the statute under construction.'. . . If the result appears to be harsh or unfair, the Legislature is the proper venue to amend the statutes, not the courts." *Id*. (citations omitted).

If the Court were to refuse to apply SDCL § 15-2-22 to medical malpractice actions, it would essentially be rewriting that statute, which as written, applies to every action "other than for the recovery of real property" or to the "foreclosure of any real estate mortgage." Providing for such an exception is the job of the legislature, not the courts. *See id.*

E. The *Pitt-Hart* Decision Cannot be Applied Retroactively

Ben also submits that the *Pitt-Hart* decision should not be applied retroactively to this case that was commenced over three years prior to the decision in *Pitt-Hart*. This action was commenced January 7, 2013, over *three years prior* to the April 2016 *Pitt-Hart* decision. Ben did not and could not know at the time of commencement, either that the Court would construe SDCL § 15-2-14.1 as a statute of repose, or that a court might conclude that a statute or repose

could not be tolled during a plaintiff's minority. Ben could not have anticipated that it would be alleged that SDCL § 15-2-22 would have an additional exception for medical malpractice actions. It would work an injustice to impose such newly-pronounced restrictions on Ben.

In *Fisher v. Sears, Roebuck & Co.*, 214 N.W.2d 85 (S.D. 1974), the Court summarized the considerations in determining retroactivity of a decision:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed, ... Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' . . . Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Fisher, 214 N.W.2d at 87. The Court in *Fisher* held prospective only application applies to "cases of first impression which seek clarification of statutory interpretations, especially where the public has reasonably relied on a differing concept." *Id.* at 88. *See also People in Interest of S.H.*, 323 N.W.2d 851, 851-52 (S.D. 1982) (full retroactive application of a newly-adopted standard could "produce substantial inequitable results" recognizing the "possible number of serious decisions that may have been made in reliance on [prior decisions]."); *Vogt v. Billion*, 405 N.W.2d 635, 636-37 (S.D. 1987) (reversing retroactive application of rules pronounced in two cases, stating "[w]hen retroactive application of a

decision could produce substantial inequitable results, justification exists for holding the decision nonretroactive" and finding a "full retroactive application of the *Shamburger* decision could produce substantial inequitable results.").

Application of the above factors demonstrates that the *Pitt-Hart* decision, should it apply here at all, should not be applied retroactively to this case. First, the *Pitt-Hart* decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." For the first time, the Court in *Pitt-Hart* conclusively identified SDCL § 15-2-14.1 as a statute of repose instead of a statute of limitations. Indeed, the Court in *Pitt-Hart* admitted the confusion and inconsistency surrounding SDCL § 15-2-14.1. *See Pitt-Hart*, 2016 S.D. 33, ¶ 17, 878 N.W.2d at 412–13.

In numerous decisions prior to *Pitt-Hart*, the Court repeatedly described SDCL § 15-2-14.1 as a statute of limitations. *See Schmidt v. Loewen*, 2010 S.D. 76, ¶ 11, 789 N.W.2d 312, 315; *Burgard v. Benedictine Living Communities*, 2004 S.D. 58, ¶ 5, 680 N.W.2d 296, 297; *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 8, 635 N.W.2d 556, 561; *Peterson v. Hohm*, 2000 S.D. 27, ¶ 9-18, 607 N.W.2d 8, 11-14; *Beckel v. Gerber*, 1998 S.D. 48, ¶ 9, 578 N.W.2d 574, 576. As such, when suit was commenced, Ben had every reason to believe that SDCL § 15-2-14.1 was a statute of limitation and not a statute of repose, and that SDCL § 15-2-22 is fully applicable to cases such as the present. Previous case law also indicated that "SDCL 15-2-22(1) tolls the statute of limitations for most civil

actions accruing to a minor until one year after reaching age eighteen." *Weegar*, 527 N.W.2d at 678.

The present case is fully distinguishable from the few cases in which the Court has found retroactive application of a decision to be appropriate. *See Burgard*, 2004 S.D. 58, ¶ 11, 680 N.W.2d at 300 (commenced eight months *after* the decision was announced); *Baatz v. Arrow Bar*, 426 N.W.2d 298 (S.D. 1988) (commenced two years *after* the decision at issue).

There can be little doubt that retroactive application of *Pitt-Hart* would have "substantial inequitable results" and result in "injustice or hardship." The public, including Ben, has "reasonably relied" on the identification of SDCL § 15-2-14.1 as a statute of limitation, and on the continued application of SDCL § 15-2-22 to all cases except those specifically named. To reverse course based on a decision issued three years after his lawsuit commenced in reasonable reliance on previous interpretations of the law, would be inequitable and unjustified.

Application of the medical malpractice statute of repose as suggested by CCHS would dramatically change the ability of minors to pursue medical malpractice claims, and would affect pending claims. For these reasons, even if the medical malpractice statute of repose were applicable and the Court ignored the other infirmities that arise if SDCL § 15-2-22 were disregarded, the *Pitt-Hart* decision should not be applied retroactively to this case. All these reasons, individually and combined, demonstrate that Ben's action was timely commenced and summary judgment was properly denied.

III. The Circuit Court's Jury Instructions Were Not Erroneous

CCHS next appeals the circuit court's jury instructions, arguing Jury Instructions Nos. 21 through 29 should not have been given. It does not, however, appeal from the circuit court's refusal to give certain instructions. Appellee's Brief, p. 31-32. The standard of review of jury instructions given at trial is settled:

> Jury instructions are reviewed as a whole and are sufficient if they correctly state the law and inform the jury. Error is not reversible unless it is prejudicial. The burden of demonstrating prejudice in failure to give a proposed instruction is on the party contending error.

Sundt Corp. v. State By & Through South Dakota Dep't of Transp., 1997 S.D. 91, ¶ 19, 566 N.W.2d 476, 480.

The jury was never instructed that SDCL Ch. 27B applies and was never instructed that CCHS is a community services provider, which is what CCHS claims was error. RO1:1706-1749. The circuit court merely used the definitions in SDCL Ch. 27B as a reference for defining pertinent terms and explaining what CCHS was allowed and prohibited from doing, which set the standard that required definition for the jury and that were otherwise undefined. RO1:1718-1726.

Further, CCHS fails to specify how the given instructions based on that chapter are erroneous, and ironically, CCHS does not even attempt to establish prejudice from the given instructions. CCHS Brief, pp. 32-33. In fact, there is simply no possible prejudice that could have resulted to CCHS from the

instructions that were given – the jury found in favor of CCHS on every one of Ben's claims.

IV. CCHS Was Not Entitled to Recover its Costs

For his response to CCHS's argument regarding the circuit court's taxation of costs, Ben relies primarily on his opening Brief, pp. 33-38. Notably, CCHS never attempts to distinguish the arguments and authorities relied on by Ben.

Rather, it argues that SDCL § 15-17-48 requires Ben's parents to bear the costs. However, that statute has no application here, as it applies to taxing costs against an "infant" and has no application to a case brought for a "disabled person." SDCL § 15-17-48. To accept CCHS's argument, the Court would have to add words to SDCL § 15-17-48, which under settled rules of statutory construction, it cannot do. *See In re Marvin M. Schwan Charitable Found*., 2016 S.D. 45, ¶ 23, 880 N.W.2d 88, 94; *City of Sioux Falls v. Ewoldt*, 1997 S.D. 106, ¶ 13, 568 N.W.2d 764, 767. Further, the very next statute, which appears to have more applicability here, expressly states otherwise. *See* SDCL § 15-17-49.

The other authorities likewise lack persuasion, as the decision regarding costs in *Gohl v. Livonia*, is on appeal, and therefore, has limited value. *See Gohl v. Livonia*, Appeal No. 18-1306 (6th Cir.) (appeal filed March 20, 2018). The court in the 1913 case of *Reynolds v. Great Northern Railway*, based its decision awarding costs against the guardian completely on a provision of the Washington code from 1901. *See Reynolds*, 206 F. 1003, (E.D. Wash. 1913). There is no similar provision under South Dakota law.

CONCLUSION

For all these reasons, as well as those explained in his initial brief, Benjamin Graff respectfully requests that the Court reverse the circuit court's order excluding the surveys, reverse the jury's verdict, reverse the Cost Judgment, and grant him a new trial. In addition, Ben requests that the Court affirm the circuit court's denial of CCHS's Motion for Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Benjamin Graff respectfully requests oral argument.

Dated this 31st day of January, 2019.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellant's Reply Brief contains 7,294 words as counted by Microsoft Word.

/s/ Michael L. Luce
Michael L. Luce

CERTIFICATE OF SERVICE

Michael L. Luce, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 31st day of January, 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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The undersigned further certifies that the original and two (2) copies of the Appellant's Reply Brief in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

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