IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 28200

SHIRLEY HARVEY and DON HARVEY,
Plaintiffs and Appellants,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, and KATHRYN L. SHOCKEY,

Defendants and Appellees.

APPELLANTS' BRIEF

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

HONORABLE JANE WIPF PFEIFLE
Circuit Court Judge

Notice of Appeal filed March 29, 2017

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PRELIMINARY STATEMENT

The parties will be referred to by their names. References to the record as reflected by the clerk's index are by "R." Documents in the Appendix are referred to by "APP" followed by number designation. References to the hearing transcript are by "T" followed by the page. All deposition transcripts referred to were attached to the Affidavit of Gary D. Jensen at R: 1511 and are referred to by "Deponent Name" followed by page and line number.

JURISDICTIONAL STATEMENT

Shirley and Don Harvey appeal from a Judgment and underlying Order Granting Defendants' Motion for Summary Judgment of the Seventh Judicial Circuit. R: 5925. The Judgment was signed on March 20, 2017, and filed on March 24, 2017. R: 5927. The Defendants served a Notice of Entry of Order and Judgment on March 24, 2017. R: 5953. Harveys filed their Notice of Appeal on March 29, 2017. R: 5960. The court reporter submitted the hearing transcript on May 15, 2017. R: 5985. Jurisdiction in this Court is proper under SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. Whether there is evidence Defendants acted with malice when falsely accusing Shirley Harvey of felony elder abuse.

The Circuit Court held there were no genuine issues of material fact on whether Defendants acted maliciously when falsely accusing Shirley Harvey of slapping and secluding a resident in a senior care facility so entered summary judgment against Harvey on her claim for defamation.

Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657 (1989).

Kieser v. Se. Properties, 1997 S.D. 87, 566 N.W.2d 833.

Setliff v. Akins, 2000 S.D. 124, 616 N.W.2d 878.

II. Whether the Circuit Court erred in failing to impute the actual malice of Edstrom, Ellenbecker, and Meade to the corporate defendants.

Implicit in entering summary judgment on Shirley Harvey's tort claims is that the Circuit Court found no genuine issues of material fact on whether Edstrom, Ellenbecker, and Meade were acting within the course and scope of their employment for the corporate defendants in making their false accusations of slapping and secluding a resident against Shirley Harvey.

Bernie v. Catholic Diocese of Sioux Falls, 2012 S.D. 63, 821 N.W.2d 232.

Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436.

III. Whether wrongfully accusing Shirley Harvey of felony elder abuse is extreme and outrageous conduct.

The Circuit Court held that wrongfully accusing Shirley Harvey of slapping and secluding a disabled elderly resident in a senior care facility is not extreme and outrageous conduct so Harvey's claim of intentional infliction of emotional distress fails.

Citibank (S.D.), N.A. v. Hauff, 2003 S.D. 99, 668 N.W.2d 528.

Hughes v. Stanley County Sch. Bd., 1999 S.D. 65, 594 N.W.2d 346.

Caesar v. Hartford Hosp., 46 F.Supp.2d 174 (D. Conn. 1999).

Kassem v. Washington Hosp. Center, 513 F.3d 251 (D.C.C. 2008).

IV. Whether there is evidence to support a claim for malicious prosecution.

The Circuit Court held that once the prosecutor investigated the accusations a malicious prosecution claim could not lie against Defendants so entered summary judgment against Shirley Harvey on her malicious prosecution claim.

Danielson v. Hess, 2011 S.D. 82, 807 N.W.2d 113.

Restatement (Second) of Torts § 663.

Restatement (Second) of Torts § 664.

V. Whether there is clear and convincing evidence that there is a reasonable basis to believe that Defendants engaged in malicious conduct so Harveys may proceed with their claim for punitive damages.

The Circuit Court held that there was not clear and convincing evidence of malice so entered summary judgment against the Harveys on their punitive damages claim.

SDCL 21-1-4.1

Flockhart v. Wyant, 467 N.W.2d 473 (S.D. 1991).

Fiegen v. North Star, 467 N.W.2d 748 (S.D. 1991).

VI. Whether the Circuit Court erred in granting summary judgment against Shirley Harvey on her wrongful termination and negligent infliction of emotional distress claims.

The Circuit Court granted summary judgment against Shirley Harvey on her claims of wrongful termination and negligent infliction of emotional distress.

Dahl v. Combined Ins. Co., 2001 S.D. 12, 621 N.W.2d 163.

Cormier v. Genesis Healthcare LLC, 129 A.3d 944 (Me. 2015).

Northport Servs., Inc. v. Owens, 158 S.W.3d 164 (Ark. 2004).

Olson v. Bristol-Burlington Health Dist., 863 A.2d 748 (Conn. App. Ct. 2005)

VII. Whether Defendants' Fair Treatment/Grievance Procedure is a contract that was breached by the corporate defendants.

The Circuit Court held that Defendants' Fair Treatment/Grievance Procedure is not a contract so entered summary judgment against Shirley Harvey on her breach of contract claim.

Zavadil v. Alcoa Extrusions, Inc., 363 F.Supp.2d 1187 (D.S.D. 2005).

Meyers v. Am. States Ins. Co., 926 F.Supp. 904 (D.S.D. 1996).

Butterfield v. Citibank of S.D., N.A., 437 N.W.3d 857 (S.D. 1989).

STATEMENT OF THE CASE

Shirley Harvey was a caregiver for eleven years at a senior facility. She was continually given high praise for resident care. A supervisor described Shirley as a "shining example of what you want an employee to be."

After intense, heated conflict developed between the co-workers, two co-caregivers accused Shirley of slapping and secluding a resident. Accuser #1, according to her supervisor, was "worthless, had no business working [at Golden Ridge]," and "was dishonest on things that matter." Accuser # 2 was "out to get" Shirley because Shirley "did things right."

The accusations were "after the fact" because the accusers did, said, and reported nothing in response to witnessing the alleged abuse. They made their accusations only after being solicited. The accusers said the slapping and secluding happened three times in front of other staff and residents who also did, said, and reported nothing.

Shirley Harvey denied the accusations. Defendants did nothing to verify the accusations; Defendants did not bother to walk down the hallway to ask other staff and residents what they had seen. If they had, they would have been told there was no slapping and secluding. Defendants avoided the truth.

Defendants adopted the accusations and restated them as their own when they fired Shirley and communicated with others. Shirley was forced to fight for unemployment benefits (the administrative law judge rejected the accusations and found in Shirley's favor). Her professional license was suspended (then Administrator of the South Dakota Department of Health testified he probably would not have done that had

he known all the facts). Ultimately, Shirley was tried for felony elder abuse (the Circuit Court rejected the accusations too, dismissing the case after the State presented its evidence).

Harveys sued Defendants because their false accusations ruined Shirley's professional career, made her a felony criminal defendant, cost her $100,000 in attorney's fees, and caused overwhelming stress and fear. Defendants moved for summary judgment, and the Circuit Court granted the motion.

STATEMENT OF THE FACTS

Shirley Harvey was a caregiver at Golden Ridge Regional Senior Care in Lead, South Dakota, from 2001 to June 8, 2012. R: 1511, Ex. 21 & Ex. 38 [Vol. II] at 73:1-2. She worked about 22,000 hours. R: 1511, Ex. 5 at 191:24-192:6. Not once did a resident, family member, or co-worker complain about her resident care.[1] APP: 4, ¶ 3; R: 5523. Shirley's supervisor said Shirley "was a shining example of what you want employees to be."[2] *Id*. at ¶ 4. Shirley advocated for resident safety, like requesting security cameras. *Id*. at ¶ 14.

In the spring of 2012, there was conflict between Shirley and certain co-workers. Shirley insisted all staff provide a "pretty high standard" of care and comply with company policies. *Id*. at ¶ 15. One of those co-workers was Jessica Edstrom. It was "heated, intense conflict." *Id*. at ¶ 18. They clashed on subjects like patient priorities and tattoos. *Id*. at ¶¶ 19, 35. Edstrom had been repeatedly disciplined. *Id*. at ¶¶ 21-23, 25.

[1] The exceptions were waking residents for morning showers and night-time checks with a flashlight. APP: 4, ¶ 3; R: 5523.

[2] A summary of evaluations prepared by Defendant Shockey is in APP: 8; R: 1511, Ex. 1.

Director of Nursing Meade acknowledged that her friend Edstrom was "worthless and had no business working [at Golden Ridge]" and "was dishonest on things that matter." *Id*. at ¶ 28. Edstrom's dismal performance was expected to cause conflict. *Id*. at ¶ 29. Edstrom was an example of what you "do not want an employee to be." *Id*. at ¶ 30. Defendant Smith, CEO of Lead-Deadwood Regional Hospital with supervisory authority over Golden Ridge, would not believe Edstrom unless corroborated. Smith Dep. 163:1-3.

The second co-worker in conflict with Shirley was Joelle Ellenbecker. She was angry because Shirley insisted the grooming policy be followed, which required Ellenbecker to take out a nose piercing. APP: 4, ¶ 36; R: 5523. According to a co-worker, Ellenbecker and Meade were "out to get [Shirley]" because "she did things right." *Id*. at ¶ 37.

By June 1, 2012, conflict intensified after derogatory comments by a resident about Edstrom and other "worthless" employees in Shirley's presence. *Id*. at ¶ 38. Meade went to her friends Edstrom and Ellenbecker to ask if they had seen bad behavior by Shirley. Only after Meade made this inquiry did Edstrom and Ellenbecker claim to have watched Shirley slap and seclude resident Christine Lawlor. *Id*. at ¶ 42. These were separate incidences; neither were present for the slapping and seclusion the other claimed to see. *Id*. at ¶ 55.

Edstrom and Ellenbecker did, said, and reported nothing as they witnessed the alleged slapping and seclusion. *Id*. at ¶¶ 41-42. They did not check on Christine because she was "fine." APP: 4, ¶ 49; R: 5523; R: 1511, Ex. 38 [Vol. I] at 74:11-75:7.

Edstrom and Ellenbecker said the slapping (and seclusion) occurred in front of other staff and residents – all of whom also did, said, and reported nothing. APP: 4, ¶ 50; R: 5523.

1. Edstrom said she watched Shirley slap Christine on the mouth on Wednesday, May 30, 2012, and slap Christine on the hands on June 1, 2012, plus later that same day twice seclude her in her room. R: 1511, Ex. 18a.

2. Ellenbecker said "there was one day I was working" when she watched Shirley slap Christine on the hand and immediately (not later like Edstrom claimed) seclude Christine in her room. R: 1511, Ex. 18b.

Three alleged slaps and three seclusions witnessed by staff and residents all of whom said nothing, did nothing, and reported nothing!

The late reporting by Edstrom and Ellenbecker violated statutes and Defendants' policies. SDCL 22-46-10; APP: 4, ¶¶ 56-58; R: 5523. Less than six months earlier, Edstrom was disciplined for "telling co-workers that another employee is abusing a resident instead of bringing it to supervisor[.]" APP: 4, ¶ 25; R: 5523. Edstrom had been told to immediately report such issues to Meade. *Id*. at ¶ 59.

Edstrom and Ellenbecker gave their written accusations to Meade on Monday, June 4, 2012. *Id*. at ¶ 60. An investigation was needed.

Q. And so if there was to be an investigation as we were talking about earlier, you would want not only the accuser talked to, but you would want staff present and residents present to be talked to as a part of the investigation?

A. Right. Correct.

Smith Dep. 25:12-17. Later that day, Shockey, the Director of Human Resources for Golden Ridge, sent an email to Defendant Gisi, Vice President of Human Resources for Defendant Regional Health, Inc., who had to approve terminating Shirley. Shockey

wrote that Meade wanted to terminate Shirley before asking Shirley about the accusations (and before investigating). R: 1511, Ex. 57.

The next day, Tuesday, June 5, 2012, Meade reported the accusations to the South Dakota Department of Health. APP: 4, ¶ 62; R: 5523. On June 6, 2012, Shirley met with Meade and Shockey. *Id*. at ¶ 63. Shirley was not told who her accusers were or other details. R: 1511, Ex. 38 [Vol. I] at 157:13-21, Ex. 38 [Vol. II] at 39:18-21; Shockey Dep. 151:19-152:4. Shirley denied slapping or secluding any resident. APP: 4, ¶ 63; R: 5523. She explained it was routine to lightly touch or "tap" a resident and remove a resident from common areas if the resident was over-stimulated and needed quiet time to relax. R: 1511, Ex. 38 [Vol. II] at 82:1-88:24.[3]

Shirley was told to come back Friday, June 8, 2012. S. Harvey Dep. 66:12-67:2. She did and was terminated. The Corrective Action written by Meade states:

> Gross misconduct – Seclusion of a resident involuntarily in their room as a result [sic] misbehavior. Reported by multiple sources that employee slapped the hand and mouth of a resident.

R: 1511, Ex. 21. Gisi testified, "We terminated Ms. Harvey for seclusion and slapping." Gisi Dep. 86:3-9.

Gisi's memory is poor, and documentation is non-existent. Gisi Dep. 34:4-25. He knew from a recent email that Shirley was "great with the residents" and "performs great patient care" but had conflict with co-workers. APP: 4, ¶ 101; R: 5523. The same

[3] A light touch or "tap" and taking an agitated resident from a common area to their room for quiet time is appropriate: (1) Shirley did both routinely and no one complained, Covell Dep. 5:9-18; Tyler Dep. 6:3-8; (2) Meade admits "some kinds of tapping could be just fine," Meade Dep. 97:21-99:4; (3) Edstrom admits she took Christine to her room "to calm her down," R: 1511, Ex. 5 at 72:7-17; (4) Shockey admits taking Christine to her room to "calm" her is "totally appropriate," Shockey Dep. 67:19-68:5; and (5) Smith and Gisi agreed that may be appropriate. Smith Dep. 128:6-13, Gisi Dep. 109:1-17. Common sense also tells us both are appropriate as do both experts offered by Shirley.

email noted conflict between Shirley and Shockey after Shirley recently filed a grievance against Shockey. *Id*. at ¶ 102. Yet, Gisi put Shockey in charge of the investigation and got all his information from her. *Id*. at ¶ 103; Gisi Dep. 43:14-46:21, 114:9-11. The email also told Gisi there was conflict between Shirley and Edstrom. APP: 4, ¶ 104; R: 5523. He knew that Meade wanted to fire Shirley before even talking with her. *Id*. at ¶ 105.

Gisi acknowledged accusations may be false so must be investigated. *Id*. at ¶ 108. He instructed Shockey to pursue the "very common question" of identifying and interviewing all individuals allegedly present. Gisi Dep. 81:17-21. Gisi does not recall following up to determine if alleged witnesses were identified and interviewed. APP: 4, ¶ 109; R: 5523. He did not identify and interview alleged witnesses. *Id*. at ¶ 110.

The fact is that not one of the Defendants, or anyone on their behalf, identified and interviewed alleged witnesses – not Meade, not Shockey, not Smith, not COO Bryant, not Gisi, not CEO Sughrue. *Id*. at ¶¶ 51, 53, 94, 97, 99, 110-11. Accordingly, when Gisi authorized Shirley's termination for slapping and secluding, it was based solely on the "after the fact" doubtful accusations of two doubtful accusers both of whom were in serious conflict with Shirley.

If Ellenbecker had been asked, she would have said that the slapping (and seclusion) she saw was witnessed by co-workers Karin Tyler and Heidi Covell who were sitting with Ellenbecker at the same table. APP: 4, ¶ 118; R: 5523; R: 1511, Ex. 5 at 155:7-18. However, when asked in later proceedings by Harveys' counsel, Tyler and Covell denied seeing Shirley slap and seclude anyone; they never would see such a thing

because Shirley gave the "very best of care" to residents. APP: 4, ¶ 119; R: 5523; Tyler Dep. 4:1-6:13; Covell Dep. 5:4-25.

Shirley and alleged victim Christine developed a special relationship. R: 1511, Attachment A at ¶ 342; Meade Dep. 22:4-23:8. No one complained about Shirley's care. It was exemplary. Meade testified that Christine "loved" Shirley. Meade Dep. 96:7-12. Meade observed Shirley "touching in general like holding Christine's hand," and giving Christine "a hug or as they were walking, hold her hand." Meade Dep. 96:13-23. Meade never observed concerning behavior by Shirley. APP: 4, ¶ 9; R: 5523.

Edstrom and Ellenbecker said the slapping and seclusion occurred in front of other residents. Edstrom could not remember how many witnesses were there, but wrote "five or six" on one piece of paper, then "10 – 12" on another. R: 1511, Ex. 5 at 41:10-18, 49:7-50:8. Ellenbecker could not recall names or the number, but said there could have been "20 to 25" residents in the lunchroom when she saw Shirley slap Christine. R: 1511, Ex. 5 at 156:20-158:12. Many residents were mentally sharp so were capable of being interviewed. R: 1511, Meade Dep. 168:17-22. None were. APP: 4, ¶ 53; R: 5523. What are the odds that 5 or 6, or 10-12, or 20-25 residents would do nothing, say nothing, and report nothing if one of their fellow residents is slapped (especially three times)?

An investigation was required by South Dakota Department of Health ("DOH") Administrative Rule 44:70:01:07 that states, "Each facility shall report the results of the investigation within five working days after the event." This rule is well known. Stahl Dep. 17:17-18:6. The Department has forms for facilities to use and offers guidance if asked. Stahl Dep. 6:16-22, 72:8-21; *see also* R: 1511 Ex. 82, p. 1 & Ex. 83, p. 1.

The accusations were reported on Friday, June 1, 2012, and put in writing on Monday, June 4, 2012, so the "five-day investigative report" was due on Friday, June 8, 2012, or Tuesday, June 12, 2012. R: 1511, Ex. 57. Defendants did not submit their report until nearly *four months* later on September 24, 2012, an admitted "flagrant violation" of the rule. APP: 4, ¶¶ 87-88; R: 5523.[4]

When Smith finally submitted the report, she represented that, "Residents capable of providing accurate recollection were interviewed." That is false. *Id*. at ¶ 78. Defendants cannot identify a single resident that was interviewed. *Id*. at ¶ 53. Neither can Defendants' legal counsel. R: 1511, Ex. 34.

If Defendants had been complete and timely with their five-day investigative report, the DOH likely would have looked at this matter differently. APP: 4, ¶ 91; R: 5523. It was "very possible" that the DOH would have concluded that the accusations against Shirley were false, which would have ended the matter. APP: 4, ¶ 91; R: 5523; Stahl Dep. 57:4-11.

Defendants were also flagrantly violating their Fair Treatment/Grievance Procedure. R: 1511, Ex. 26. If invoked by an employee, as Shirley did, the Procedure was required to be followed. APP: 5, ¶¶ 12, 15; R: 1502. Gisi said the Procedure was to "reasonably ensure" that employees were given "fair treatment." Gisi Dep. 21:21-25. Employment decisions, including termination, could be reversed under this Procedure after an investigation. APP: 5, ¶¶ 13-14; R: 1502. Defendants' obligation under this

[4] Defendants also failed to: notify law enforcement or the Department of Social Services within 24 hours, SDCL 22-46-9; R: 1511, Ex. 53, Ex. 18c at p. 2; notify Christine's physician within 24 hours (he never was), SDCL 22-46-10; R: 1511, Ex. 54, Ex. 18c at p. 2; Smith Dep. 51:8-23, 75:12-16); and promptly notify Christine's family (they did not notify Mr. Lawlor for 6 to 8 weeks). Smith Dep. 73:14-74:25.

Procedure was to undertake a fair, impartial, objective, and complete investigation – "just like a judge." Smith Dep. 119:1-121:8.

The Fair Treatment/Grievance Procedure was not a rubber stamp; an investigation was required. As Defendants admit, however, no one talked to residents or other alleged witnesses like Tyler and Covell. APP: 5, ¶¶ 19, 25-29, 35-38, 45-46, 55-57: R; 1502.

Under Step One, Meade was to "investigate the complaint and attempt to resolve it, and give the decision to the employee within a reasonable time." APP: 5, ¶¶ 17-18; R: 1502. She did nothing. *Id*. at ¶ 19. She made no effort to identify and interview staff and residents allegedly present. APP: 4, ¶¶ 51, 94; R: 5523; APP: 5, ¶ 19; R: 1502.

Meade denied Shirley's grievance, so Shirley appealed to Step Two. APP: 5, ¶¶ 20-21; R: 1502. Smith was required to "confer with the employee, the supervisor and any other staff members deemed appropriate, investigate the issues, and communicate a decision in writing to the employee[.]" *Id*. at ¶¶ 22-23. The point was to determine whether the accusations were accurate. Smith Dep. 110:16-18. If there were witnesses, Smith was required to meet with them. APP: 5, ¶ 24; R: 1502.

Smith did not meet with the accusers, alleged witnesses Tyler or Covell, or any resident. APP: 5, ¶¶ 25-29; R: 1502. Smith expected Shockey to identify and interview witnesses, but did not know if Shockey did (Shockey did not). Smith Dep. 26:24-27:18. Smith had only the accusations of Edstrom and Ellenbecker to go on when she denied Shirley's Step Two appeal, stating, "Based on eye witness accounts of both inappropriate physical contact and imposed seclusion, I must support the termination of this employee." R: 1511, Ex. 28.

Shirley appealed to Step Three. The Procedure states, "The complaint will be investigated and a recommendation regarding the resolution of the grievance will be submitted to the RHN's Chief Executive Officer and RH's Vice President of Human Resources." COO Bryant was required to investigate. APP: 5, ¶¶ 33-34; R: 1502. He, like Smith, admits he:

1. Did not speak with any resident. APP: 5, ¶ 39; R: 1502.
2. Made no effort to identify staff and residents present. *Id*. at ¶¶ 37-38.
3. Had no idea if Meade spoke to anyone other than the accusers and Shirley (she did not). Bryant Dep. 31:5-8, 36:10-17, 49:1-5.
4. Had no idea if Shockey spoke to anyone other than the accusers and Shirley (she did not). Bryant Dep. 36:2-9, 49:6-9.
5. Did not know what investigation Smith had done (she did none). Bryant Dep. 34:21-35:6, 49:10-23.
6. Did not even know if Edstrom and Ellenbecker were alleging the same single slapping incident or three separate slaps. Bryant Dep. 98:16-99:2.

The list of what Bryant did not know and do is long. All he knew were the accusations of Edstrom and Ellenbecker, and they were the basis upon which he recommended to Defendants Sughrue and Gisi that Shirley's grievance be rejected. APP: 5, ¶ 42; R: 1502.

Sughrue and Gisi, like the others, undertook *no* investigation. *Id*. at ¶¶ 45-46. They denied Shirley's appeal based on the accusations of Edstrom and Ellenbecker, stating, "As outlined in your termination notice, we find that you inappropriately secluded a resident in her room and slapped the hands and mouth of a resident." R: 1511, Ex. 29b. Neither Sughrue nor Gisi knew:

1. What investigation, if any, Meade did in Step One; APP: 5, ¶¶ 47, 50; R: 1502.
2. What investigation, if any, Smith did in Step Two; *Id*. at ¶¶ 48, 51.

3. If staff and residents allegedly present were identified and interviewed; Sughrue Dep. 22:22-23:5, 24:11-16, 153:23-154:2; Gisi Dep. 150:13-151:15.

4. What investigation Bryant did before making his recommendation to reject Shirley's grievance; APP: 5, ¶¶ 49, 52; R: 1502.

Sughrue did not even know if Edstrom and Ellenbecker were alleging one or more slaps. APP: 4, ¶ 113; R: 5523. Defendants' refusal to investigate is described in more detail in APP: 5.

After being terminated, Shirley sought unemployment benefits. Defendant Regional Health Network, Inc., objected on the basis that Shirley was guilty of misconduct. R: 1511, Ex. 39. The administrative law judge rejected the accusations of Edstrom and Ellenbecker and found in Shirley's favor. R: 1511, Ex. 32b. His decision was affirmed by Judge Macy. APP: 4, ¶ 117; R: 5523. Defendants did not send the September 20, 2012, unemployment decision to the DOH with their September 24, 2012, four-month late "five-day investigative report." They should have: "It's certainly something we would be interested in to review and consider." Stahl Dep. 62:3-24.

During Defendants' four-month delay, the DOH forwarded what little information it had to the Lawrence County State's Attorney. APP: 4, ¶ 121; R: 5523. He relied on the same accusers – Edstrom and Ellenbecker – and incomplete information to indict Shirley on felony elder abuse charges. *See* R: 1511, Ex. 33. As noted, the DOH likely would not have submitted this to the State's Attorney if Defendants had timely submitted a legitimate investigation. At the criminal trial, the accusations of Edstrom and Ellenbecker were again rejected; Circuit Court Judge Macy granted Shirley's motion for judgment of acquittal after the State presented its case. R: 1511, Ex. 35.

Defendants knew how to properly handle such accusations and had done so when made against others in their sophisticated organization.

1. Accusations against six male nurses were investigated and found without merit, so the nurses returned to work. Sughrue Dep. 52:17-53:10.

2. At their senior facility in Custer, South Dakota, investigations of abuse accusations are regularly undertaken; when unsubstantiated, the employee returns to work.

    a. An accusation of slapping was not substantiated, so the employee returned to work. R: 1511, Ex. 98; Bryant Dep. 157:4-158:15; Sughrue Dep. 196:8-200:15.

    b. An investigation was conducted overnight, and the employee returned to work the next day because the accusation was unfounded. R: 1511, Ex. 99; Bryant Dep. 158:16-161:9; Sughrue Dep. 200:20-202:24. Please also see R: 1511, Exs. 78, 82, 83, 95-97, 100, 101.[5]

Even Shockey, Smith, and Bryant admit that Shirley, instead of being defamed and fired, may have been allowed to return to work if they had known that Karin Tyler and Heidi Covell were alleged witnesses but, if asked, would have said Ellenbecker's accusation was false. It was possible "this whole course of events might have been different." Shockey Dep. 60:24-61:23, 63:13-18; *see also* Smith Dep. 190:2-7; Bryant Dep. 85:15-20, 103:20-104:1.

Defendants communicated their individual false accusations of slapping and secluding many times to Shirley, to the DOH (knowing they would find their way to law enforcement), to Christine's family (knowing they would become public), and internally (knowing they would be used against her, as they were, when she applied for work). Those communications are detailed in APP: 4, ¶¶ 62, 64-71, 74-83, 85-86; R: 5523.

[5] One and one-half years earlier, Gisi and Shockey were trained on "7 Steps to Investigate Allegations of Employee Misconduct," which included the basics of an objective investigator, assessing accusations, and identifying and interviewing alleged witnesses. APP: 4, ¶¶ 129-31, 135-37; R: 5523.

Defendants' accusations devastated Harveys. Shirley suffered the humiliation of being booked in the local jail and standing trial in her hometown for felony elder abuse. She lost the career she loved and performed with excellence. She eventually took a job as a part-time janitor suffering substantial economic loss. Harveys spent $100,000 in legal fees. They struggle with sleep, peace of mind, and depression.

STANDARD OF REVIEW

This Court reviews "a circuit court's entry of summary judgment under the de novo standard of review." *Estate of Johnson v. Weber*, 2017 S.D. 36, ¶ 15, --- N.W.2d --- (citation omitted). "On review of summary judgment, [the Court] decide[s] only whether genuine issues of material fact exist and whether the law was correctly applied." *Id*. (citations omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party." *Id*. (citation omitted). "All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party." *Dakota, Minn. & E. R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 14, 771 N.W.2d 623 (citation omitted).

ARGUMENT AND AUTHORITIES

While Harveys recognize they brought a claim for wrongful termination, their intentional tort claims are separate from Shirley's status as an employee. Defendants may not falsely accuse anyone, including an at-will employee, of a felony, defame her, maliciously prosecute her, and inflict emotional distress upon her.[6] There are genuine issues of material fact to support each of Harveys' intentional tort claims. The Circuit Court erred in granting summary judgment.

[6] For summary judgment, the accusations are assumed false as Defendants acknowledge. R: 4744, Defendants' Brief in Support of Motion for Summary Judgment at p. 41.

I. Defendants acted with malice when they made their false accusations of felony elder abuse.

Due to the existence of conditional privileges, Harveys must establish malice to prevail on their slander claim.

"Every person is obligated to refrain from infringing upon the right of others not to be defamed." SDCL 20-11-1. There is no exception allowing an employer to defame an employee. Slander is defined by SDCL 20-11-4 as a "false and unprivileged publication, other than libel, which: [c]harges any person with a crime[;] [t]ends directly to injure him in respect to his office, profession, trade, or business[;] or [b]y natural consequence, causes actual damage."

"The charging of a person with a crime is slander per se under SDCL 20-11-4(1)[.]" *Walkon Carpet Corp. v. Klapprodt*, 231 N.W.2d 370, 373 (S.D. 1979) (citation omitted). The elder abuse Defendants accused Shirley of is a felony under SDCL 22-46-2. Accusing a certified nursing assistant of abusing an elderly person with dementia injures the accused in her profession and, by natural consequence, causes actual damage.

Defendants published their individual false accusations to the DOH, the Department of Labor, the alleged victim's family, and internally. A detailed recitation of Defendants' communications to third parties is in APP: 4, ¶¶ 62, 64-71, 74-83, 85-86; R: 5523.

Defendants' publications to the Department of Labor were absolutely privileged. The publications to others were conditionally privileged pursuant to SDCL 20-11-5. A conditional privilege may be lost:

> A "qualified or conditional privilege may be lost when the speaker, on an otherwise privileged occasion, publishes false and defamatory matter concerning another which either (a) he in fact does not believe to be true

> or (b) has no reasonable grounds for believing it to be true." . . . However, a specific showing of malice is required for purposes of raising a genuine issue of material fact. . . . Because malice cannot be presumed; the party bearing the burden of proof must establish that there was a reckless disregard for the truth on the part of the accused. "The real test is whether a defendant's conduct is reckless so as to constitute actual malice is whether he in fact entertained serious doubts as to the truth of his publications."

Kieser v. Se. Properties, 1997 S.D. 87, ¶ 20, 566 N.W.2d 833, 839 (citation omitted). This Court has found questions of fact on the existence of malice that would destroy a conditional privilege. *See, e.g., Pawlovich v. Linke*, 2004 S.D. 109, ¶¶ 21-22, 688 N.W.2d 218, 224-25 (holding there was a genuine issue of material fact concerning malice that would destroy the common interest privilege when, viewing the facts in the light most favorable to the non-moving party, Linke knowingly provided false statements to Pawlovich's supervisor with knowledge that the statements could result in termination or discipline); *see also Setliff v. Akins*, 2000 S.D. 124, 616 N.W.2d 878.

The United States Supreme Court set out a malice framework in the defamation case of *Harte-Hanks Commnc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989). The case dealt with a public-figure plaintiff so its malice standard is stringent due to the "profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, [which] demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Id*. at 686 (citations omitted). That stringent First Amendment malice standard is met here as to non-media defendants and a private citizen plaintiff; therefore, the malice standard necessary to destroy the conditional privilege in this case is also met.

In *Harte-Hanks*, an unsuccessful judicial candidate challenger prevailed in his defamation action against a newspaper. The newspaper, a supporter of the incumbent,

published a front-page story one week before the election quoting a grand jury witness who accused the challenger of "dirty tricks" and offering a job to her and her sister in appreciation for their help with an investigation of the incumbent judge's court services worker who recently resigned and was charged with bribery. *Id*. at 660.

Because the challenger had to prove malice, the Supreme Court explained, "The meaning of such terms as 'actual malice' – and, more particularly, 'reckless disregard' – however, is not readily captured in one fallible definition." *Id*. at 686 (citation omitted). The Court stated a public figure may prevail if the "false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth[.]" *Id*. at 688 (citation omitted). The Court continued:

> A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The standard is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probably falsity." As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish a reckless disregard. *In a case such as this involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports*."

Id. at 688 (internal citations omitted; emphasis added).

The Supreme Court explained there were obvious reasons to doubt the veracity of the accuser and her accusations; doubt easily addressed if the newspaper had: (1) reviewed audio-tapes of the conversation when the alleged "dirty tricks" and offers occurred and, (2) interviewed the accuser's sister who was present during the key conversation. The newspaper failed to take either step. *Id*. at 692. With regard to its failure to interview the sister, the Court stated:

> It is utterly bewildering in light of the fact that the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was likely to confirm Thompson's accounts of the events. However, if the Journal News had serious doubts concerning the truth of Thompson's remarks, but was committed to running the story, there was good reason not to interview Stephens – while denials coming from Connaughton's supporter might be explained as motivated by a desire to assist Connaughton, a denial coming from Stephens would quickly put an end to the story.

Id. at 682.

As applied to the case before this Court:

1. There were "obvious reasons to doubt the veracity" of the accusers. Edstrom was "worthless and had no business working [at Golden Ridge]" and "was dishonest on things that matter." She had been disciplined repeatedly, including for making an inappropriate abuse accusation against a co-worker. Ellenbecker was "out to get" Shirley because "she did things right." Both had serious conflict with Shirley.

2. There were "obvious reasons to doubt the veracity" of the "after the fact" accusations. Edstrom and Ellenbecker said, did, and reported nothing after witnessing the alleged abuse; they did not even check on Christine because she was "fine." They said it occurred in front of other staff and residents who also did, said, and reported nothing – three times!

Given such obviously doubtful accusers and accusations plus the conflict, it is "utterly bewildering" that Defendants refused to walk down the hallway to ask other staff and residents what the truth was. Had they asked Tyler and Covell (or any other staff member or resident) that would have "quickly put an end to the story." As the Court stated:

> Accepting the jury's determination that petitioner's explanations for these omissions [failing to listen to the tape and interview the sister], it is likely the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.

Harte-Hanks, 491 U.S. at 692 (internal citation omitted). Here, there is evidence from which a jury could conclude that Defendants deliberately decided to not walk down the hallway to ask staff and residents what they saw because they did not want to know the truth – purposefully avoiding the truth "to get" Shirley.

The purposeful avoidance of the truth in *Harte-Hanks* is similar to the refusal to read an employee's letter of resignation before publishing a letter to others stating the employee left without notice or explanation as was held by this Court in *Setliff* to be sufficient to raise a genuine issue of material fact as to malice. 2000 S.D. 124 at ¶ 48. Purposefully avoiding or refusing to find out the truth is sufficient to establish malice, which is what the Defendants did here. This case, like *Setliff*, involves a refusal to read before making allegations. Defendant Sughrue was uncertain about the truth of the allegations, APP: 4, ¶ 112; R: 5523, so he made it clear that he wanted them in writing. Sughrue Dep. 17:19-21. They were put in writing, but Sughrue did not bother to read them before this litigation. APP: 4, ¶ 113; R: 5523. He did not know if Edstrom and Ellenbecker were alleging one or more slaps. *Id*. at ¶ 114. Yet, he told the spouse of the alleged victim that he agreed with the removal of two employees as being perpetrators of abuse.[7] *Id*. at ¶ 69. Sughrue's failure to read and otherwise be educated before making his accusations creates a question of fact regarding malice.

During the hearing, the Circuit Court stated the following justification for ruling against Harveys on the issue of malice for their slander claim:

> And the reason I do not find *clear and convincing evidence* of malice here is I simply don't buy the argument that there was this intense heated conflict in large part because of your client's statement that it was irritating; it was a bumpy

[7] In addition to Shirley, unrelated allegations of abuse were made against another CNA.

> relationship; it was cool; it was cold; she wasn't very friendly to me. She didn't have animosity from Meade.
>
> * * *
>
> I just have been unable to find any evidence, other than the one statement that Mr. Jensen made to a witness that there was heated intense conflict and the way in which the witness responds to it when I put that with the plaintiff who doesn't see any heated intense conflict. But, even if there was conflict, I don't find that -- I am simply not persuaded that that would -- under the circumstances that the defendants believed that it was false.

T: 76-77 (emphasis added).

In response, Harveys make three points. First, the Circuit Court applied an erroneous standard. The clear and convincing standard for malice only applies to the determination of whether Harveys may go forward with their punitive damages claim as set forth by SDCL 21-1-4.1 (even then, the standard is not whether there is clear and convincing evidence of malice, but whether there is clear and convincing evidence of a "reasonable basis" to believe there has been malicious conduct).[8] Harveys were not required to show malice by clear and convincing evidence in order to raise questions of fact as to whether the conditional privileges were destroyed and to present their intentional tort claims to the jury. The appropriate standard is whether, viewing the evidence and all reasonable inferences therefrom in a light most favorable to Harveys, there were genuine issues of material fact regarding malice. *Estate of Johnson*, 2017 S.D. 36 at ¶ 15.

Second, there are genuine issues of material fact as to the existence of conflict that the Circuit Court "doesn't buy" as established by the following:

[8] The Circuit Court's application of the wrong standard to the malice determination when addressing the conditional privilege is further evidenced by the exchange with counsel at page 94, lines 3 through 14, of the hearing transcript.

1. When asked, Meade acknowledged heated, intense conflict between Shirley and Edstrom. Meade Dep. 145:14-146:2. This was not a statement of counsel, but rather an answer by Meade under cross-examination. APP: 7.

2. Meade and Shockey testified there was conflict between Shirley and certain co-workers in 2012 because Shirley insisted staff provide a "pretty high standard" of care and comply with company policies and procedures. Meade Dep. 18:2-21:4; Shockey Dep. 33:17-23, 37:14-24, 128:24-130:13; APP: 4, ¶ 15; R: 5523.

3. Shirley took issue with the fact that Edstrom did not get trained in very well for the job, which created friction between the two. APP: 4, ¶ 16; R: 5523.

4. Edstrom's work performance was so dismal that management expected co-workers like Shirley to have conflict with Edstrom. APP: 4, ¶ 29; R: 5523.

5. The conflict between Shirley and Edstrom intensified shortly before the accusations were made on the issue of priorities. Meade Dep. 144:25-147:23. During a subsequent meeting on that subject involving Shirley, Edstrom, Meade, and Shockey, Shirley told Edstrom, "I'm so tired of your shit & so is everyone else here because b/c you don't pull your fair share here." R: 5554, Ex. 11a.

6. After this meeting, a manager wrote to Gisi that Shirley "performs great patient care," but indicated she had conflict with co-workers. R: 1511, Ex. 12b at p.1.

7. Edstrom and Shirley clashed again when Edstrom had to cover a tattoo because Shirley insisted that the Dress and Grooming Policy be followed. That angered Edstrom. APP: 4, ¶ 35; R: 5523.

8. A co-worker testified that Ellenbecker and Meade, who were friends with each other, were "out to get Shirley" because Shirley made everyone "do things right." *Id*. at ¶ 37.

9. Ellenbecker was also mad because Shirley insisted that the Dress and Grooming Policy be followed; Ellenbecker had to remove a nose piercing. *Id*. at ¶ 36.

The foregoing is obvious evidence of conflict, especially when viewed from the perspective of the accusers and their supervisor, which is the perspective that matters. Whether the Circuit Court "buys the argument" is not the standard; it is not for the Circuit Court to "buy" or "not buy" a party's argument or weigh the evidence. The Circuit Court's duty is to determine whether there is evidence upon which a jury could "buy the

argument" that there was conflict between Shirley and her accusers.[9] Clearly such evidence exists, especially when the facts are viewed in the light most favorable to Harveys.

Third, there is more than ample evidence from which a jury could conclude that the Defendants entertained serious doubts as to the truth of the accusations. That evidence, explained above in the *Harte-Hanks* discussion, includes the obviously doubtful accusers making obviously doubtful accusations against an eleven-year exceptional employee. Two judges found the accusations false; a civil jury could find them false and that Defendants had serious doubts about their truthfulness.

There is evidence upon which a jury could determine the defendants acted maliciously. It is a question of fact for a jury.

II. The actual malice of Edstrom, Ellenbecker, and Meade should be imputed to the corporate defendants.

"Under the doctrine of respondeat superior, an employer or principal may be held liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Bernie v. Catholic Diocese of Sioux Falls*, 2012 S.D. 63, ¶ 8, 821 N.W.2d 232, 237 (quotations and citation omitted). A two-prong test is used to determine whether an intentional tort is within the scope of employment: "whether the purpose was to serve the principal and whether the act was foreseeable." *Id* at ¶ 9. "[T]he question of whether the act of a servant was within the scope of employment

[9] Harveys emphasize that Meade admits her friend Edstrom is "dishonest on things that matter." The Circuit Court discounted this testimony stating that Harveys' counsel did not ask Meade to "define what things that matter were." T: 48. Harveys believe making false accusations of felony elder abuse is obviously a "thing that matters." Edstrom's credibility is for the jury.

must, in most cases, be a question of fact for the jury." *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 16, 758 N.W.2d 436, 455 (citations omitted).

This Court has instructed:

> Under the first prong, a principal may be liable for an agent's acts where the agent's purpose, *however misguided*, is wholly or *in part* to further the principal's business. An act furthers the principal's business if it carries out the objectives of the employment. "Within the scope of employment" has been called vague but flexible, referring to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, *even though quite improper ones*, of carrying out the objectives of the employment.

Bernie, 2012 S.D. 63 at ¶ 9 (internal quotations and citations omitted; emphasis added).

A jury could find that Edstrom and Ellenbecker, when making their false accusations, acted at least in part to serve their employer. They were required to report by state law and Defendants' policies, and they reported only in response to a solicitation by their supervisor. A fair inference is that they did not act for purely personal motives but, in part and although misguided and quite improper, to carry out the objectives of Defendants.

As for the second prong, this Court has instructed:

> [A] principal is liable for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which caused the injury; foreseeable is used in the sense that the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business.

Kirlin, 2008 S.D. 107 at ¶ 13 (citation omitted). "In respondeat superior, foreseeability includes a range of conduct which is 'fairly regarded as typical of or *broadly incidental* to the enterprise undertaken by the employer.' " *Id*. at ¶ 14 (citations omitted).

Defendants regularly deal with accusations of abuse, some of which are false, like those against male nurses and employees in Defendants' Custer facility. Edstrom previously accused another co-worker; no one can remember what investigation, if any, there was (the accusation was not reported to the DOH), APP: 4, ¶¶ 25-27; R: 5523, so the reasonable conclusion is that this accusation was false too. Such circumstances demonstrate that a jury could find a false accusation of abuse is "typical of, or incidental to" Defendants' business and not so unusual or startling that it would be unfair to include the resulting damage with its cost of doing business.

If the accusations of Edstrom and Ellenbecker are found by a jury to have been made within the course and scope of their employment, then viewing the evidence in a light most favorable to Harveys, the false accusations, like in *Pawlovich*, are deemed to be knowingly false constituting additional evidence of malice on the part of the corporate defendants:

> Knowingly giving false statements to Pawlovich's supervisor with the knowledge that the alleged conduct could result in termination or other discipline would clearly amount to malice. Pawlovich has adequately raised the question of malice and it presents a question of fact for the fact-finder and not this Court.

2004 S.D. 109, at ¶¶ 21-22.

The jury should also decide whether the corporate Defendants are liable for Meade's conduct. Meade, on behalf of her employer, solicited the accusations and reported them to the DOH. She, on behalf of her employer, selectively investigated the accusations and then stated them as her own to the DOH and the Lead Police Department. Defendants admit that Meade was "acting with the course and scope of her employment

when she investigated the allegations of resident abuse, terminated Harvey and addressed Harvey's grievance." R: 1511, Attachment B at ¶ 57.

III. Wrongfully accusing Shirley Harvey of felony elder abuse is extreme and outrageous conduct.

> The elements of intentional infliction of emotional distress are:
>
> (1) an act by defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause the plaintiff severe emotional distress; (3) the defendant's conduct was the cause-in-fact of plaintiff's distress; and (4) the plaintiff suffered an extreme disabling emotional response to defendant's conduct.

Estate of Johnson, 2017 S.D. 36 at ¶ 17 (citation omitted). "The tort of intentional infliction of emotional distress includes liability on the part of the defendant for reckless conduct resulting in emotional distress." *Id*. (citation omitted). Reckless conduct "is conduct which constitutes a deliberate disregard of a high degree of probability that emotional distress will follow." *Petersen v. Sioux Valley Hosp. Assoc.*, 486 N.W.2d 516, 518 (S.D. 1992) (citation omitted). Shirley is "only required to show that defendants intentionally or recklessly acted in a manner which would create an unreasonable risk of harm to [her], and that they knew or had reason to know of facts which would lead a reasonable man to realize that such actions would create the harm that occurred." *Id*. (citation omitted).

There are genuine issues of material fact as to Defendants' reckless disregard for the high degree of probability that their actions would result in Shirley's emotional distress. There is a high degree of probability that falsely accusing a caregiver of slapping and secluding a disabled nursing home resident would result in emotional distress. In addition to the malice discussed as to slander in Section I, the following is further evidence of reckless disregard. The Defendants submitted their five-day

investigative report to the DOH almost four months late. In doing so, they misrepresented that residents had been interviewed. Defendants also repeatedly violated South Dakota statutes, administrative rules, the Fair Treatment/Grievance Procedure and other corporate policies, and their own training.

While it is for the circuit court to determine, in the first instance, whether a defendant's conduct may be reasonably regarded as extreme and outrageous, "[w]hen reasonable minds may differ, it is for the jury to determine[.]" *Petersen,* 486 N.W.2d at 519 (citation omitted). This Court defines "extreme and outrageous conduct" as "conduct exceeding all bounds usually tolerated by decent society and which is of a nature especially calculated to cause, and does cause, mental distress of a serious kind." *Citibank (S.D.), N.A. v. Hauff*, 2003 S.D. 99, ¶ 24, 668 N.W.2d 528, 535. It "does not consist of mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id*. at ¶ 26.

Falsely accusing a caregiver of slapping and secluding a disabled nursing home resident – felony elder abuse – goes far beyond insult or triviality. It ends careers, threatens prison, and ruins lives. It causes severe emotional distress.[10] As this Court said in reference to sexual assault accusations, "false reports exist and unfounded accusations can destroy marriages, families, and careers of the accused." *Hughes v. Stanley County School Bd.*, 1999 S.D. 65, ¶ 38, 594 N.W.2d 334, 354-64.

A false accusation of patient abuse was sufficient to proceed with an intentional infliction claim (and defamation) in *Caesar v. Hartford Hosp.,* 46 F.Supp.2d 174, 180 (D.Conn. 1999). Submitting false information to a government agency was sufficiently

[10] Defendants do not contest that Shirley suffered severe emotional distress.

outrageous to support an intentional infliction claim in *Kassem v. Washington Hosp. Center*, 513 F.3d 251, 256 (D.C.C. 2008).[11] An employer's false accusation of being a liar, thief, and fraud was sufficient in *Woods v. First Am. Title Ins. Co. of Oregon, Inc.*, 794 P.2d 454 (Or. App. 1990). A hospital's intentional propagation of a falsehood that the plaintiff was a patient's cause of death was found to be extreme and outrageous in *Banyas v. Lower Bucks Hosp*., 437 A.2d 1236, 1238-39 (Pa. Super. Ct. 1981).

The Circuit Court erred in ruling that falsely accusing Shirley of felony elder abuse cannot be "extreme and outrageous." T: 87-88. If not as a matter of law, a jury should decide.

IV. There is evidence to support a claim for malicious prosecution.

The six elements for establishing a cause of action for malicious prosecution are:

(1) The commencement or continuance of an original criminal or civil judicial proceeding;
(2) its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding;
(3) its bona fide termination in favor of the present plaintiff;
(4) the absence of probable cause for such proceeding;
(5) the presence of malice therein; [and]
(6) damage conforming to legal standards resulting to plaintiff.

Danielson v. Hess, 2011 S.D. 82, ¶ 9, 807 N.W.2d 113, 115-16 (citations omitted). As to malice, Harveys incorporate the discussions above.

The Circuit Court held that once the prosecutor investigated the allegations, a malicious prosecution claim could not lie against Defendants. T: 84. With regard to causation, reporting parties insulate themselves only if they provide "full and correct" information. *Danielson*, 2011 S.D. 82 at ¶ 10. Meade and Smith submitted incomplete

[11] The *Kassem* court noted that "many state courts, and federal courts applying state law, have held that the intentional filing of a false report about an employee with government authorities can be sufficiently outrageous to state an IIED claim." 513 F.3d at 256.

information to the DOH four months late. They did not submit interviews of staff and residents because no one interviewed them. Had they taken and submitted such interviews, particularly of Covell and Tyler, then Administrator Stahl testified the DOH "very possibly" would have concluded the accusations were false which would have ended the matter without a referral to the State's Attorney, Stahl Dep. 37:20-38:2, 57:4-11, 58:20-60:1, as happens with male nurses and others wrongfully accused within the corporate Defendants' operations. The Circuit Court admitted a jury could reach this result:

> Mr. Jensen: . . . And if they would have done it right, like they're supposed to do and they did every other time, the point, the overall point, would have been he [State's Attorney] would have never been involved. It wouldn't have gotten past Mr. Stahl and the Department of Health. They would have concluded, like they do in Custer and Regional, nothing happened, there's nothing to do, so it never would have gone there [State's Attorney].
>
> The Court: Well, possibly.
>
> Mr. Jensen: A jury could find that.
>
> The Court: Yes.

T: 82. There are issues of fact as to the legal causation of the criminal proceeding against Shirley.

As for lack of probable cause, the jury could similarly find that the indictment "was procured by false testimony" and "withholding of material evidence," including Tyler and Covell's input. *See* Restatement (Second) of Torts § 664, cmt. b (stating that an indictment may be explained by evidence of the nature referenced in the comments to § 663 on commitments); Restatement (Second) of Torts § 663, cmt. h (stating that the

weight to be given a commitment should take into account evidence that the commitment was procured by false testimony or the withholding of material evidence).[12]

V. There is clear and convincing evidence of a reasonable basis to believe that Defendants engaged in malicious and reckless conduct, allowing Plaintiffs to pursue their claim for punitive damages.

Before a claim for punitive damages can be submitted to a jury: "the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against." SDCL 21-1-4.1. The clear and convincing language modifies the reasonable basis language to make a prima facie showing that punitive damages may be proper. *Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991). "The testimony and evidence necessary to satisfy SDCL 21-1-4.1 is a lower order of proof than that required at trial." *Fiegen v. North Star*, 467 N.W.2d 748, 751 (S.D. 1991). In effect, the statute simply requires "a preliminary showing of a reasonable basis to support a claim for punitive damages to prevent the bringing of unfounded claims for the purpose of harassment." *Id.* at 750.

As set forth above, there is clear and convincing evidence of a reasonable basis to believe there was malicious conduct by Defendants. The Harveys should be permitted to submit their punitive damages claim to the jury.

VI. The jury should determine if Shirley was wrongfully terminated and that Defendants negligently inflicted emotional distress.

The Circuit Court granted summary judgment against Shirley on her wrongful termination claim, holding that her complaints to supervisors about care by co-workers

[12] Section 664 of the Restatement (Second) of Torts was adopted by this Court in *Heib v. Lehrkamp*, 2005 S.D. 98, ¶ 34, 704 N.W.2d 875, 884.

"do not rise to the level of protecting the public good" as is necessary to invoke the whistle blower "public policy exception" to the employment at-will doctrine. T: 23-24. Shirley submits that her complaints fit within the exception. This Court has explained:

> Public policy is primarily determined by the constitution, statutes, and judicial decisions. This Court has held that a cause of action for wrongful discharge arises on behalf of an employee where an employer's motivation for termination contravenes a clear mandate of public policy.

Dahl v. Combined Ins. Co., 2001 S.D. 12, ¶ 8, 621 N.W.2d 163, 166 (internal quotations and citations omitted). In support of her claim, Shirley relies upon the decisions in *Cormier v. Genesis Healthcare LLC*, 129 A.3d 944 (Me. 2015) (caregiver allowed to proceed to trial) and *Northport Health Servs., Inc. v. Owens*, 158 S.W.3d 164 (Ark. 2004) (substantial caregiver verdict for defamation and wrongful discharge upheld where public policy was safeguarding residents in nursing homes). South Dakota, through its reporting statutes and associated legal processes, has made its public policy clear on care for the elderly. *See* SDCL §§ 34-12-13; 22-46-9, 22-46-10; ARSD §§ 44:70:01:07; 44:70:05:02.

The Circuit Court also erred in granting summary judgment on Shirley's claim for negligent infliction of emotional distress. Defendants owed a duty to Shirley, as they would anybody else, to investigate and have a basis for accusing her of felony elder abuse. In *Olson v. Bristol-Burlington Health Dist.*, where an employee was allowed to proceed with her negligent infliction claim after her employer "unreasonably accused [her] of falsifying records, egregious misconduct and deliberate indifference to the health of students under her care," the court stated:

> To prevail on a claim of negligent infliction of emotional distress arising in the employment setting, a plaintiff need not plead or prove that the discharge, itself, was wrongful, but only that the defendant's conduct in the termination process created an unreasonable risk of emotional distress.

863 A.2d 748, 751-52 (Conn. App. Ct. 2005). A jury should make that determination about Defendants' conduct during their termination process.

VII. The Fair Treatment/Grievance Procedure is a contract that was breached by Defendants.

Shirley also brought a breach of contract action based upon Defendants' violations of their Fair Treatment/Grievance Procedure. R: 1511, Ex. 26. The Procedure was required to be followed if invoked like Shirley did. It set forth a mandatory three-step procedure when termination is grieved. Employment decisions could be reversed after an investigation. APP: 5, ¶¶ 11-16; R: 1502.

"Existence of a contract is a question of law." *LaMore Rest. Group, LLC v. Akers*, 2008 S.D. 32, ¶ 12, 748 N.W.2d 756, 761. The legal issue is whether the reasoning of *Zavadil v. Alcoa Extrusions, Inc.*, 363 F.Supp.2d 1187 (D.S.D. 2005) and *Meyers v. American States Ins. Co.*, 926 F.Supp. 904 (D.S.D. 1996) apply in South Dakota; if so, the Procedure is a contract.

The *Zavadil* court concluded that the employer's Peer Review Policy and Procedures was an enforceable contract that could be utilized by a discharged at-will employee. 363 F.Supp.2d at 1193. The pertinent provisions of the policy in *Zavadil* relied upon by that court to find an enforceable contract are strikingly similar to those here. In *Zavadil*, the Peer Review Policy and Procedures provided that Peer Review Panels "may review management actions to ensure that policy or practice was applied properly and consistently." *Id*. Here, the Fair Treatment/Grievance Procedure provided that employment decisions would be reversed after investigation of a grievance. The *Zavadil* Peer Review Policy and Procedure had no "disclaimers of waiving the at-will employment doctrine that are replete in the Employee Handbook." 363 F.Supp.2d at

1193. The same is true within the four corners of Defendants' Fair Treatment/Grievance Procedure.

In *Zavadil*, contrary to the Peer Review Policy and Procedures, the plaintiff was not allowed to appeal his termination to the Peer Review Panels. 363 F.Supp.2d at 1190-91. Here, Shirley Harvey was not denied access to the Fair Treatment/Grievance Procedure, but Defendants violated it repeatedly by refusing to "investigate," "meet," and "review" which effectively denied her access.

In *Zavadil*, the court held that the peer review process was mandatory, stating that "through its Peer Review Policy and Procedures defendant contracted to modify its statutory power to hire and fire at will to the extent that a discharged employee may utilize the policy and a Peer Review Panel may make a final and binding decision to reinstate an employee that was discharged by Management." 363 F.Supp.2d at 1193. Likewise, through the Fair Treatment/Grievance Procedure, Defendants contracted to modify their power to hire and fire at will to the extent that a discharged employee may invoke the Fair Treatment/Grievance Procedure and management could reverse the decision after investigation.

The Fair Treatment/Grievance Procedure is a contract that was breached five times by the Defendants. Each of the three steps required Defendants to "investigate." That included, according to Smith and Sughrue, talking to other staff and residents allegedly present. Smith Dep. 9:14-18-25:12-17; APP: 5, ¶ 24; Sughrue Dep. 27:5-8. Gisi acknowledged identifying and interviewing alleged witness is a "very common" and "standard" question in an investigation. Gisi Dep. 80:24-81:21; 121:10-16.

As explained in detail above, Meade undertook no investigation in Step One. Smith undertook no investigation for Step Two. Bryant (Sughrue and Gisi) undertook no investigation for Step Three. None of them asked Edstrom and Ellenbecker about witnesses, so none of them talked with Karen Tyler, Heidi Covell or any other staff member. None of them talked with a resident. In APP: 6 we provide a copy of a brief to the Circuit Court detailing Defendants' breaches.

Defendants argue that *Zavadil* is inconsistent with South Dakota law in *Butterfield v. Citibank of S.D., N.A.* 437 N.W.2d 857 (S.D. 1989). It is clear, however, that *Butterfield* applies to pre-termination, not post-termination, agreements. *Butterfield* does not prohibit a post-termination contractual agreement from being made like the Peer Review Policy and Procedure in *Zavadil* and the Fair Treatment/Grievance Procedure here. In fact, *Butterfield* stated that there can be employment contracts other than "for cause only" termination agreements. *Butterfield*, 437 N.W.2d at 860 (citations omitted).

The Circuit Court also found that statements in the Employee Handbook retaining at-will employment means the Fair Treatment/Grievance Procedure cannot be a post-termination contract. In response, Harveys refer to *Meyers v. Am. States Ins. Co.*, where, in addressing an employee handbook that contained both disclaimers that the handbook was not a contract and a "Reduction in Staff" procedure, the court concluded:

> I find that American States reserved its right to terminate employees at-will, but also contracted to follow its "Reduction in Staff" procedures set forth in the "Personnel Policies and Procedures Manual."

926 F.Supp. 904, 913 (D.S.D. 1996).

Accordingly, Harveys respectfully submit that the at-will references in the Employee Handbook do not prevent the Fair Treatment/Grievance Procedure from being

a post-termination contract. The individual Defendants testified they were required to follow it. Instead of complying with it, however, they breached at least five times.

During the motions hearing, the Circuit Court rejected the idea that this Court would approve a post-termination contract because such a contract would not meet the two requirements set out in *Butterfield* for finding a pre-termination contract, namely a detailed and exclusive listing of grounds for termination and a specific mandatory termination procedure. T: 16-17. In response, Harveys first offer the following undisputed facts the Circuit Court did not address. The Defendants testified they were required to follow the Procedure if invoked by the employee.[13] The Defendants undertook the Procedure, though they breached it at every turn.[14] The Circuit Court also did not explain why *Butterfield*, which involved a pre-termination contract, governs the determination of whether there can be a post-termination contract.

Harveys ask this Court to accept the reasoning of *Zavadil* and *Meyers* thereby recognizing the Fair Treatment/Grievance Procedure for what the Defendants, by their words and actions, thought it was – an enforceable post-termination contract.

CONCLUSION

What if instead of low-level caregiver Shirley Harvey, these highly doubtful accusations by highly doubtful accusers carrying a personal grudge would have been made against CEO Sughrue, a resident's physician, or a lawyer who had visited a family

[13] A party cannot claim a better version of the facts than their own testimony. *Vaughn v. John Morrell & Co.*, 2000 S.D. 31, ¶ 36, 606 N.W.2d 919, 926.

[14] Defendants are estopped from denying that the Fair Treatment Grievance Procedure is a contract under the doctrines of promissory and equitable estoppel. *See Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 848 (S.D. 1990); *Hahne v. Burr*, 2005 S.D. 108, ¶ 17, 705 N.W.2d 867, 873.

member? Would Defendants' response have been the same – purposefully avoiding the truth by refusing to walk down the hallway to talk with staff and residents? Or, would Defendants have promptly interviewed staff and residents as a part of a legitimate investigation to determine the truth so that CEO Sughrue, the physician, or the lawyer did not have their lives devastated by false accusations?

When viewed in the light most favorable to Harveys, there is evidence upon which a jury could conclude that Defendants acted with malice when they wrongfully accused Shirley Harvey of felony elder abuse. The accusers were obviously doubtful as were their "after the fact" accusations. The accusers had serious conflict with Shirley, an eleven-year "shining example" of what a caregiver should be. Even applying the stringent malice framework in *Harte-Hanks* leaves the issue of malice for the jury on all intentional tort claims and punitive damages.

The jury should also decide whether Harveys have proved their remaining tort claims. There is ample evidence to support each of them, and summary judgment was inappropriate.

Lastly, the Fair Treatment/Grievance Procedure should be determined to be a valid post-termination contract consistent with the testimony of the Defendants and their actions. It should be determined as a matter of law that the Procedure was breached.

Respectfully submitted this 29th day of June, 2017.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: */s/ Gary D. Jensen*
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Attorneys for Appellants, Shirley Harvey and Don Harvey

ORAL ARGUMENT IS RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

I, Gary L. Jensen, one of the attorneys for Appellants, hereby certify that pursuant to SDCL §15-26A-66 the foregoing brief complies with the above mentioned statute in that it is in Times New Roman and that the word processor used to prepare this brief indicated that said brief contains 9929 words in the body of this brief.

Dated this 29th day of June, 2017.

/s/ Gary D. Jensen
Gary D. Jensen

CERTIFICATE OF SERVICE

I certify that on June 29th, 2017, I emailed the foregoing Appellants' Brief and sent two copies of it by U.S. Mail, first-class postage prepaid to:

Sarah Baron Houy
Jeffrey G. Hurd
Bangs, McCullen Law Firm
333 West Blvd., Suite #400
P.O. Box 2670
Rapid City, SD 57709

I further certify that on June 29, 2017, I emailed the foregoing Appellants' Brief and sent the original and two copies of it by U.S. mail, first-class postage prepaid, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070
Scclerkbriefs@ujs.state.sd.us

BEARDSLEY, JENSEN & LEE,
Prof. L.LC

/s/ *Gary D. Jensen*
Gary D. Jensen

APPENDIX INDEX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
PENNINGTON COUNTY	)	SEVENTH JUDICIAL CIRCUIT

SHIRLEY HARVEY and DON HARVEY,

Plaintiffs,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH; and, KATHERYN L. SHOCKEY,

Defendants.

51CIV14-21
Hon. Jane Wipf Pfeifle

Order Granting Defendants' Motion for Summary Judgment

This matter came before the Court on March 15, 2017. Plaintiffs Don and Shirley Harvey appeared personally and through counsel, Gary Jensen and Brett Poppen. Defendants appeared through counsel, Jeff Hurd and Sarah Baron Houy. Defendant Tim Sughrue was also personally present.

Pending before the Court were the following motions: Plaintiffs' Motion for Partial Summary Judgment (Breach of Contract); Defendants' Motion for Summary Judgment on all claims; Defendants' Motion to Exclude Plaintiffs' Experts' Opinions; and Plaintiffs' Motion to Allow Punitive Damage Discovery.

The Court has reviewed the pleadings and the record in its entirety, heard the argument of counsel, and is otherwise fully advised. The Court incorporates by this reference the rulings it issued orally at the March 15 hearing. Based on the foregoing, it is by this Court

ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Breach of Contract) is DENIED; and it is further

ORDERED that Defendants' Motion for Summary Judgment is GRANTED in its entirety and Plaintiffs' claims are hereby dismissed with prejudice; and it is further

ORDERED that Plaintiffs' Motion to Allow Punitive Damage Discovery is DENIED; and it is further

ORDERED that Defendants' Motion to Exclude Plaintiffs' Experts' Opinions is DENIED AS MOOT.

Let Judgment be Entered Accordingly.

Dated March 20, 2017.

BY THE COURT:

Hon. Jane Wipf Pfeifle
Circuit Court Judge

ATTEST:

(Seal)

Clerk of Courts

State of South Dakota) Seventh Judicial
County of Pennington) Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

MAR 24 2017

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 20 2017
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
PENNINGTON COUNTY	)	SEVENTH JUDICIAL CIRCUIT

SHIRLEY HARVEY and DON HARVEY,

Plaintiffs,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH; and, KATHERYN L. SHOCKEY,

Defendants.

51CIV14-21
Hon. Jane Wipf Pfeifle

Judgment

This Court entered its oral ruling granting summary judgment in favor of Defendants and against the Plaintiffs on March 15, 2017, and its written *Order Granting Defendants' Motion for Summary Judgment* on March 20, 2017, both of which are incorporated herein by this reference.

Pursuant to the foregoing, it is hereby

ORDERED, ADJUDGED, and DECREED that the above-captioned action against Defendants Regional Health Network, Inc., Regional Health, Inc., Rapid City Regional Hospital, Inc., Timothy Sughrue, Dale Gisi, Sherry Bea Smith, and Katheryn L. Shockey, is hereby dismissed, with prejudice, and that Defendants recover of the Plaintiffs their costs of defending the action in the sum of $_____, which are to be hereafter determined and taxed by the Clerk of Courts.

Dated March 20, 2017.

BY THE COURT:

Hon. Jane Wipf Pfeifle
Circuit Court Judge

ATTEST:

Clerk of Courts

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

MAR 24 2017

RANAE U. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

2:29 PM
Pennington County, SD
FILED
IN CIRCUIT COURT
MAR 20 2017
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA)
) IN CIRCUIT COURT
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

SHIRLEY HARVEY and DON HARVEY,

Plaintiffs,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH; and KATHRYN L. SHOCKEY,

Defendants.

Civil No. 14-21

MOTIONS HEARING

BEFORE: **THE HONORABLE JANE WIPF PFEIFLE**
Circuit Court Judge
Rapid City, South Dakota
March 15, 2017, at 8:30 a.m.

A P P E A R A N C E S:

Representing the Plaintiffs: **GARY D. JENSEN**
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4200 Beach Drive, Suite 3
Rapid City, South Dakota

Representing the Defendants: **SARAH BARON HOUY**
JEFFREY G. HURD
Bangs, McCullen Law Firm
333 W. Blvd., Suite 400
Rapid City, South Dakota

only termination agreement. That wasn't an argument where they were trying to apply post-termination specific procedure, then apply it the other direction.

I think the case that was referenced, the Aberdeen case, I think that was the *Aberle* case. I think that's a materially different case for one big reason, Your Honor, is that was employment with a public entity and there was an argument about having due process rights. This is -- we're not arguing due process rights, we are arguing and asking the Court to enforce the specific procedure that the employer provided here.

THE COURT: All right. Thank you.

I have reviewed this, the cases cited, and I find that the Fair Treatment -- first of all, the handbook clearly indicates that it's not a contract and there's no guarantee of continued employment. I think it's an adequate disclaimer. It further includes reference to the Fair Treatment/Grievance Procedure, and that each of those policies refer back to each other within the Termination and in the Fair Treatment. And I can't find that any employee would be led to believe that one policy taken out of the handbook could be held in isolation when it refers to termination or discipline, that that could be a contract.

I agree that when you're dealing with benefits that

affects your pay, such as sick leave, that contracts can be made. But I do find that the South Dakota Supreme Court has been very clear and consistently held that in order to have this implied contract, the two requirements, the detail and exclusive list grounds for termination or specific and mandatory termination procedure.

Mrs. Harvey doesn't allege that the Fair Treatment/Grievance Procedure wasn't offered to her, she just is unhappy with the manner in which it was conducted. And I am not persuaded that the South Dakota Supreme Court would find that a post-termination procedure when included in a handbook that has a disclaimer could be a stand alone contract. And so I will deny the summary judgment -- motion for partial summary judgment of the plaintiff and grant the motion for summary judgment by the defendants on this issue.

All right. The next issue -- then turning to defendants' motion for summary judgment, the next issue is the wrongful discharge. That plaintiffs have a public policy claim is how I understand the claim. Defendant?

MS. BARON HOUY: Yes. Thank you, Your Honor.

On the wrongful discharge claim it's very clear that the handbook reserves the at-will doctrine. So I

THE COURT: All right. Thank you.

Anything further, Ms. Baron Houy?

MS. BARON HOUY: Just briefly, Your Honor.

I do believe that the whistle blower type of public policy exception to the at-will doctrine does require the reporting of criminal activity and that simply hasn't been established here and it's not borne out by any evidence.

Thank you.

THE COURT: All right. The Court finds that *Dahl* acknowledges whistle blowing to be a reporting of criminal or unlawful activity to superiors or outside agencies and that that would play an invaluable role.

I did misspeak. Judge Schreier in looking at -- in that *Smoot* case where that was the tissue where they were -- employees were being directed to violate the FDA rules regarding tissues, it was Judge Schreier that said they needed to be made to an outside entity. But I find that only whistle blowing that promotes the public good in South Dakota is protected by the public policy exception. And the allegations that Ms. Harvey made about nose piercings, tattoos, low-slung pants, and wanting cameras do not rise to the level of protecting the public good.

In fact, she has talked significantly in her

deposition about how it was irritating to her and that there was no suggestion that anyone was being harmed by it.

I further find that the way in which -- that there has been no suggestion or I can't find any evidence that she was terminated in retaliation for having made those claims. In her own grievances, it's not raised there anyplace. And so it's the view of the Court that the type of complaints were not the reports that the law seeks to protect and that motion on wrongful discharge will be granted.

All right. The next motion is slander. Now it does appear to me, Mr. Jensen or Mr. Poppen, that you do admit the report to the Department of Labor in response to unemployment that that was privileged; is that fair?

MR. JENSEN: Right.

THE COURT: Okay. And so --

MR. JENSEN: All conditionally privileged.

THE COURT: Unemployment?

MR. POPPEN: Oh, excuse me. Yeah. Unemployment absolutely privileged.

THE COURT: All right. Now the other thing I wanted, quite a few of you mentioned -- or, I mean, plaintiffs, you talked quite a bit, and defendants too, about the unemployment matters and the decisions that were made

testimony, Meade said she was dishonest in things that mattered.

THE COURT: But she also said, Not on everything.

When I read the complete portion of that discussion, she says, Not on everything.

And then you pushed her a bit and you said, On things that matter?

Yeah.

But you never defined what things that matter were.

MR. JENSEN: Well, accusing somebody of slapping might be something that matters.

THE COURT: Sure. It might be, but --

MR. JENSEN: And so if we continue --

THE COURT: Sure.

MR. JENSEN: -- I mean, that's one piece of the puzzle and that's something a jury might find significant.

So we have her behavior never discussed by the defense in any of their briefs. We don't -- that's not discussed.

THE COURT: And the "her" you're referring to is?

MR. JENSEN: Strong Edstrom --

THE COURT: Thank you.

MR. JENSEN: -- in this instance.

And then we have the -- Meade -- no question about this. There's intense heated conflict between

might have done something differently? Sure. But that isn't the test. And I can't -- and you have not persuaded me that they were required to investigate. Particularly when we balance the -- what is clear, the public policy in this state is that we are going to protect elders and that any allegation must be reported.

And so if there was a requirement that that be investigated before being reported, perhaps. As I mentioned, I went through your client's deposition carefully. I read all the citations that you gave me. And the reason that I do not find clear and convincing evidence of malice here is I simply don't buy the argument that there was this intense heated conflict in large part because of your client's statements that it was irritating; it was a bumpy relationship; it was cool; it was cold; she wasn't very friendly to me. She didn't have animosity from Meade.

That this idea that Shirley did things right was a suggestion that she wanted the grooming policy followed. That she didn't like tattoos and she didn't like people bragging about their tattoos, and she didn't like the nose ring or the nose piercing.

I just have been unable to find any evidence, other than the one statement that Mr. Jensen made to a witness that there was heated intense conflict and the way in

which the witness responds to it when I put that with the plaintiff who doesn't see any heated intense conflict. But even if there was conflict, I don't find that that -- I am simply not persuaded that that would be -- under these circumstances that the defendants believed that it was false.

And when the Supreme Court says failure to investigate does not constitute malice, I feel compelled to follow that case authority.

We've already agreed that the unemployment was absolutely privileged. So communications for grievance, that's a common interest. The communications to the Department of Health, I find that that is a common interest. I believe that they may be absolutely privileged. Defendant's took the position that they were conditionally privileged.

The allegation to the Lawler family, I find that those were -- that was also within the common interest. And I think Mr. Jensen had discussed that with Mr. Sughrue at length that -- why they didn't tell them right away. And then the one that did give me pause was the Spearfish Regional HR, that response there. And -- but I am persuaded that they had a common interest in that information as an internal organization.

And so while I most certainly understand how very

that was. But even the broader point here is the State's Attorney would have never been involved. It would have never gone there.

THE COURT: But the State's Attorney had it within his power to investigate any of these issues and --

MR. JENSEN: But he didn't. I under -- yes.

THE COURT: But defendants can't do anything about whether he does a good job or not; is that fair? I mean, yeah, the defendants can't --

MR. JENSEN: If they're going to provide him with some information, I think they have an obligation to provide it all to him. And if they would have done it right, like they're supposed to do and they did every other time, the point, overall point, would have been he would have never been involved. It wouldn't have never gotten past Mr. Stahl and Department of Health. They would have concluded, like they do in Custer and Regional, nothing happened, there's nothing to do, so it never would have gone there.

THE COURT: Well, possibly.

MR. JENSEN: A jury could find that.

THE COURT: Sure.

But once the Grand Jury gets involved and hands down a True Bill, doesn't that -- isn't that the separation?

Anything further?

MS. BARON HOUY: No, Your Honor.

THE COURT: The Court finds that it will follow the law set forth by the South Dakota Supreme Court and that once the state prosecutor does his or her own investigation, prepares the complaint, that the informant, whoever made the report, that malicious prosecution cannot lie at that point. That it is up to the State's Attorney to make a decision about how to proceed and he had the ability to investigate and did. Whether he did it adequately or not is the State's Attorney's decision. That motion for summary judgment will be granted.

All right. Next matter is intentional infliction of emotional distress.

MS. BARON HOUY: Thank you, Your Honor.

I believe that the standard here is, in fact, even higher than what's required for presumed malice and that is the conduct must be specifically calculated to cause and actually cause extremely serious mental distress. And there's no evidence that any of these defendants harbored any such intent or that they -- that their conduct, as the Court found earlier, didn't rise to the level of a reckless disregard, which would be sufficient for reckless intention of emotional distress.

slapping, secluding, and abusing a helpless, elderly resident certainly must be on the list. And, again, because especially what it means once it's made.

THE COURT: Thank you.

The Supreme Court has defined extreme and outrageous conduct as that conduct which exceeds all bounds usually tolerated by a decent society and which is of a nature especially calculated to cause and does cause mental distress of a very serious kind. It has to be conduct which is utterly intolerable in a civilized society.

The South Dakota Supreme Court in *McIntosh v. Carter*, that was where the Carters became aware of their I think daughter's boyfriend who had some suicidal tendencies and so they reported their concern to the proper authorities. And the Court noted particularly that this is exactly the type of thing that society encourages and it says, As evidenced by the child abuse reporting statute.

I believe that because the legislature has seen fit to criminalize abuse of the elderly and because of the statutory framework and the regulations, that society is encouraged to report.

And while certainly the allegation would have been offensive and insulting and hurtful to Mrs. Harvey, I

don't find that a reasonable member of the community would find that report to be atrocious and utterly intolerable in a civilized community.

And I guess I want to make sure I understand your position. It appeared to me that you had conceded that it was not extreme and outrageous to initially report the accusation in your brief. I think it was at Page 55 of your brief you said that. But do you believe that -- am I missing --

MR. JENSEN: I think a jury could find it, again, based on the reckless conduct of Ms. Meade, knowing the accuser, knowing the accusation. So it certainly could have been reckless. I mean, a jury certainly could have found that.

THE COURT: Okay. All right. That doesn't change the Court's ruling.

All right. And the last one is negligent infliction of emotional distress.

MS. BARON HOUY: Thank you, Your Honor.

We've pretty well covered this in the brief, but our position is that the plaintiff cannot establish a duty in this context. She was an employee at will. We owed no duty to her. To the extent she's arguing that foreseeability creates a duty, I think again the line of cases that I just referenced establishes the Supreme

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
SHIRLEY HARVEY and DON HARVEY,	)	51CIV14-000021
Plaintiffs,	)	
vs.	)	
	)	**PLAINTIFFS' STATEMENT**
REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, and KATHRYN L. SHOCKEY,	)	**OF MATERIAL FACTS**
Defendants.	)	

Plaintiffs, pursuant to SDCL 15-6-56(c)(2), submit this separate statement of the material facts as to which they contend a genuine issue exists to be tried:

1. Shirley Harvey did not slap Christine Lawler. (Ex. 38 [Vol. II] at 86:25-87:3; Tyler Dep. 4:11-18; Covell Dep. 5:7-11).

2. Shirley Harvey would remove Christine Lawler from common areas if she was over-stimulated or agitated and needed to calm down. (Ex. 38 [Vol. II] at 81:22-86:24).

3. During her eleven years working at Golden Ridge Regional Senior Care, except for a complaint about waking residents for early morning showers and conducting night-time room checks with a flashlight, prior to the false allegations by Strong Edstrom and Ellenbecker not once did a resident, family member, or co-worker complain about Shirley's resident care. (Ex. 5 at 190:13-23, 192:1-12; Smith Dep. 85:1-86:12; Shockey Dep. 37:1-13).

4. Joelle Meade testified that Shirley "was a shining example of what you want employees to be." (Meade Dep. 136:16-24).

5. Just three months before her termination, Shirley's supervisors stated her annual evaluation that she "goes above and beyond for residents and families" and "ensures resident safety and provides appropriate care needed." (Ex. 3-I).

6. During her eleven years working at Golden Ridge Regional Senior Care, Shirley consistently received high praise for her resident care. (Ex. 1).

7. Family members of residents would tell Meade how much they appreciated Shirley's care. (Ex. 38 [Vol. I] at 162:23-163:16).

8. By June of 2012, Shirley had been Christine's personal care giver for at least three years. (Meade Dep. 22:4-23:8; Attachment A, ¶ 342).

9. During the numerous hours Meade observed Shirley care for Christine Lawler, Meade never saw anything that even hinted at impropriety or that concerned her. (Ex. 38 [Vol. I] at 161:13-162:9; Meade Dep. 101:7-13).

10. Meade observed that the demeanor of residents when they were around Shirley revealed they were happy and comfortable with her care. (Ex. 38 [Vol. I] at 162:13-21).

11. Shirley "always acted with Christine with kindness and compassion and caring." (Tyler Dep. 5:14-17).

12. Christine responded to Shirley better than any other caregiver. (Tyler Dep. 5:11-6:13).

13. After the allegations of abuse were made against Shirley, Meade never asked, and she was unaware of anyone else asking, anybody if they ever observed anything in Shirley that had changed, was bothering her, or was different that made her suddenly become mean to a resident after a decade of stellar care. (Ex. 38 [Vol. I] at 169:7-19).

14. In April of 2012, shortly before the allegations against her, Shirley advocated for surveillance cameras to protect residents from employees, as residents told Shirley about being rough-handled by staff. (Ex. 38 [Vol. II] at 59:12-22, 94:3-20; Shockey Dep. 75:8-21).

15. There was conflict between Shirley and certain co-workers in the spring of 2012, because Shirley insisted that all staff provide a "pretty high standard" of care and comply with company policies and procedures. (Meade Dep. 18:2-21:4; Shockey Dep. 33:17-23, 37:14-24, 128:24-130:13; Covell Dep. 6:10-7:3).

16. Shirley took issue with the fact that Strong Edstrom did not get trained in very well for the job, which created friction between the two. (Attachment N: Grand Jury Transcript of Strong Edstrom, 1/31/13, p. 7).

17. Strong Edstrom and Ellenbecker were friends of Director of Nursing Joelle Meade. (Meade Dep. 89:25-90:24; Ex. 5 at 162:16-163:18; Ex. 38 [Vol. I] at 90:14-92:9).

18. Jessica Strong Edstrom was in "heated, intense conflict" with Shirley. (Meade Dep. 145:14-146:2).

19. In April of 2012, Shirley and Strong Edstrom clashed over whether batteries (Strong Edstrom) or patient care (Shirley) had priority. (Meade Dep. 20:18-21:4; Ex. 11a).

20. After the battery conflict meeting, Shirley filed a grievance against Defendant Shockey. (Ex. 12a).

21. By May and June of 2012, Strong Edstrom had been disciplined month after month for several months. (Exs. 6-10).

22. Strong Edstrom was disciplined after a report that she forced a resident into the bathroom when the resident refused to go. (Ex. 6).

23. In December of 2011, Regional management received reports that Strong Edstrom was rough with residents. (Ex. 9).

24. No one from Regional knew if the report of Strong Edstrom being rough with residents rose to the level of abuse. (Meade Dep. 107:11-108:11; Shockey Dep. 18:4-19:24; Smith Dep. 152:4-153:14; Bryant Dep. 61:25-62:4; Sughrue Dep. 41:16-42:6).

25. In December of 2011, Strong Edstrom was disciplined for "telling co-workers that another employee is abusing a resident instead of bringing it to supervisor[.]" (Ex. 9).

26. No one from Regional knows what was done to investigate the abuse Strong Edstrom alleged against another employee in December of 2011. (Meade Dep. 110:8-115:22; Shockey Dep. 20:25-23:10; Smith Dep. 154:25-158:10; Bryant Dep. 62:9-16; Gisi Dep. 64:9-22; Sughrue Dep. 43:4-19; Defendant Regional Health Network's First Supplemental Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 28).

27. Neither the allegation that Strong Edstrom was rough with residents nor her December 2011 allegation that another employee was abusing a resident was reported to the South Dakota Department of Health. (Meade Dep. 115:2-22; Shockey Dep. 22:17-23:7; Smith Dep. 154:12-16, 155:21-156:3, 158:16-22; Bryant Dep. 62:9-20; Gisi Dep. 64:9-22; Sughrue Dep. 43:20-24).

28. Director of Nursing Meade admitted that Strong Edstrom, her friend, was "worthless and had no business working [at Golden Ridge]" and "was dishonest on things that matter." (Meade Dep. 140:5-141:4, 145:14-146:2, 166:2-5).

29. Strong Edstrom's performance was so dismal that it was expected to cause conflict with employees like Shirley. (Smith Dep. 166:25-167:25; Bryant Dep. 67:8-14).

30. Strong Edstrom's supervisor admitted that Strong Edstrom was an example of what you "do not want an employee to be." (Meade Dep. 140:13-22).

31. COO Glenn Bryant admits Strong Edstrom should not have been working at Golden Ridge. (Bryant 59:2-8).

32. CEO Timothy Sughrue admits Strong Edstrom should not have been working at Golden Ridge. (Sughrue Dep. 37:10-12; 46:21-47:7).

33. Shirley had conflict with co-workers due to insisting that staff follow rules and regulations. (Shockey Dep. 128:24-129:11).

34. In April of 2012, Shirley and Don Harvey met with Meade and Defendant Shockey to complain on behalf of residents about employee body piercings (Ellenbecker), tattoos (Strong Edstrom and Meade), and "butt cracks" in violation of Defendants' Dress and Grooming Policy. (Ex. 38 [Vol. I] at 118-12-25, 123:16-214:5; Ex. 38 [Vol. II] at 56:16-57:21).

35. Strong Edstrom was upset because Shirley insisted on behalf of residents that the grooming policy be followed, which resulted in Strong Edstrom having to cover a tattoo on her forearm. (Meade Dep. 93:9-21).

36. Ellenbecker was upset because Shirley insisted on behalf of residents that the grooming policy be followed, which resulted in Ellenbecker having to take out a nose piercing. (Meade Dep. 90:25-93:8).

37. Co-worker Heidi Covell says Ellenbecker and her friend, the Director of Nursing, were "out to get [Shirley]" because "she did things right." (Covell Dep. 6:10-7:3).

38. Sometime between April and June 4, 2012, Shirley was in a resident's room where staff was discussed. An eavesdropping staff member heard comments such as: "management needed to change;" "There are a few of these girls that need to be fired[;]" "Jessica

[Strong Edstrom], Katie, and Darcy were all worthless and had no business working at the facility[;]" and "Joelle [Meade] just needs to start doing her job right and get rid of the girls." (Ex. 16, p. 2013-000462).

39. Meade told Strong Edstrom about the derogatory comments a resident had made about Strong Edstrom and others while Shirley was in the resident's room. (Meade Dep. 170:11-171:18).

40. It was only after the conversation between Meade and Strong Edstrom about the derogatory comments a resident had made about Strong Edstrom and others while Shirley was in the resident's room that Strong Edstrom first told Meade she saw Shirley slap Christine. (Meade Dep. 176:22-177:1).

41. When Strong Edstrom and Ellenbecker alleged to have witnessed their separate slapping and seclusion events they did nothing, said nothing, and reported nothing. (Meade Dep. 85:9-17, 181:6-182:13; Ex. 38 [Vol. I] at 151:14-153:23).

42. It was only after Meade asked if they had seen bad behavior by Shirley that Strong Edstrom and Ellenbecker claimed to have witnessed Shirley slap and seclude Christine Lawler. (Ex. 5 at 31:10-20, 145:14-146:3; Attachment A: Defendant Regional Health Network, Inc.'s Responses to Plaintiff's First Request for Admissions, ¶¶ 177-78; Attachment N: Grand Jury Testimony of Strong Edstrom, 1/31/13, p. 7).

43. Meade asked Strong Edstrom and Ellenbecker to put their allegations against Shirley in writing. (Meade Dep. 27:10-29:4; 178:18-21; Ex. 5 at 31:10-20, 145:16-19).

44. In her written allegations, Strong Edstrom alleged to have seen Shirley slap Christine on the hands at 7:10 a.m. on June 1, 2012 (which was two days after the date Strong Edstrom alleged to have seen Shirley slap Christine on the mouth). (Ex. 18a).

45. On June 1, 2012, Strong Edstrom reported nothing about the slapping incident she alleged to have seen at 7:10 a.m. that day. (Meade Dep. 181:6-17; Ex. 5 at 48:6-11; Attachment N: Grand Jury Testimony of Strong Edstrom, 1/31/13, p. 7).

46. Meade knew that the day she and Strong Edstrom first talked about the alleged slapping was not the same day on which the alleged slapping was to have taken place. (Meade Dep. 181:6-17).

47. Strong Edstrom immediately reported to Meade an incident that occurred at approximately 11:20 a.m. on June 1, 2012, in which Christine allegedly slapped and scratched Strong Edstrom. (Ex. 5 at 46:20-48:11; Attachment X: Lawler Chart).

48. Strong Edstrom recorded the June 1, 2012, incident in which she says Christine slapped and scratched Strong Edstrom in Christine's chart. (Attachment X: Lawler Chart).

49. Strong Edstrom and Ellenbecker did not even go to Christine to check on her after witnessing their separate slapping and seclusion events. (Ex. 5 at 36:1-14, 45:24-46:10, 61:16-21, 142:16-17; Ex. 38 [Vol. I] at 55:18-24, 74:11-75:7).

50. Strong Edstrom and Ellenbecker also said the slapping (and seclusion) occurred in the presence of other staff and residents all of whom also did nothing, said nothing, and reported nothing. (Ex. 5 at 41:6-43:11, 49:7-50:8, 147:7-18; 156:20-24; 160:10-20; Ex. 38 [Vol. I] at 54:9-22, 64:11-15; *see also* Shockey Dep. 138:4-11).

51. None of the Defendants asked accusers Jessica Strong Edstrom or Joelle Ellenbecker what witnesses were allegedly present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 312, 314-15; Ex. 74, ¶ 311; Meade Dep. 87:2-88:6; Shockey Dep. 71:5-15; Smith Dep. 27:25-28:3, 40:16-18; Gisi Dep. 80:24-81:16; Sughrue Dep. 22:22-23:5, 24:11-16; Ex. 5 at 57:20-58:8, 156:4-15, 203:23-206:15).

52. In 2012, Defendants were unaware of any one beyond Strong Edstrom and Ellenbecker coming forward and making an allegation of elder abuse against Shirley. (Shockey Dep. 138:4-11).

53. No one on the behalf of Defendants ever spoke to residents about the slapping and seclusion allegations against Shirley Harvey. (Attachment A, ¶¶ 241-44, 252, 276, 293, 310, 319; Ex. 74, ¶ 271; Ex. 38 [Vol. I] at 154:13-18, 155:14-19; Shockey Dep. 52:24-53:2, 59:24-25, 151:7-16, 178:2-11 ; Smith Dep. 34:24-35:3, 265:6-18, 267:7-15; Bryant Dep. 31:24-25).

54. The identification and interviewing of witnesses is what Defendants (except Gisi) would want for themselves if they were accused of abuse. (Smith Dep. 5:5-7:24, 9:14-18; Bryant 12:14-20; Sughrue Dep. 27:5-8).

55. Strong Edstrom and Ellenbecker did not allege to have seen the same slapping and seclusion incidents. (Exs. 18a & 18b; Ex. 5 at 41:6-42:14, 50:22-52:3, 57:14-19, 146:8-147:12, 154:22-155:18, 158:22-159:4; Ex. 38 [Vol. I] at 13:3-14, 54:9-22; Attachment K: Meade Interview with Officer Fredericksen, pgs. 9-10).

56. The late reporting by Strong Edstrom and Ellenbecker violated South Dakota statute and Regional's own policy. (Ex. 54, which is SDCL 22-46-10; Ex. 18c, p. 2; Attachment A, ¶¶ 197-98, 200, 202).

57. Regional required its employees to immediately report suspected abuse to their supervisor. (Shockey Dep. 86:2-14; Bryant Dep. 81:9-25; Ex. 38 [Vol. I] at 152:9-16, 155:20-156:3; Ex. 38 [Vol. II] at 52:2-11; Ex. 18c).

58. Strong Edstrom and Ellenbecker had been trained on and knew of the requirement of immediate reporting. (Ex. 5 at 28:18-19, 34:6-16, 144:7-14; Ex. 38 [Vol. I] at 24:9-17, 53:25-54:5; Meade Dep. 183:3-10).

59. Strong Edstrom had been repeatedly told to immediately report issues she observed with co-workers to Meade, her supervisor. (Shockey Dep. 74:5-75:7, 86:15-19).

60. Strong Edstrom and Ellenbecker wrote out their accusations and gave them to Meade on Monday, June 4, 2012. (Exs. 18a & 18b; Shockey Dep. 46:8-23, 56:24-57:1).

61. Meade wanted to terminate Shirley before even asking Shirley about the accusations. (Ex. 57).

62. On June 5, 2012, Meade reported the false allegations of slapping made against Shirley to the South Dakota Department of Health. (Ex. 105, p. DOH000002).

63. When Shirley met with Meade and Shockey on June 6, 2012, she denied abusing a resident. (Shockey Dep. 66:16-68:5; Ex. 5 at 208:1-20).

64. On June 28, 2012, Meade communicated the false allegations of slapping and seclusion made against Shirley to the DOH. (Ex. 105, pp. DOH000007 & DOH000009).

65. On July 3, 2012, Meade reported Regional's conclusion and its accusation that Shirley slapped and secluded a resident to the DOH with the following: "June 8th 2012 – Shirley was terminated for the allegations that I submitted to you." (Ex. 105, p. DOH000010).

66. On August 1, 2012, Meade again reported Regional's conclusion and its accusation that Shirley slapped and secluded a resident to the DOH by attaching a June 8, 2012, Corrective Action, which provided after the line "Define facts of situation":

> Gross misconduct – seclusion of a resident involuntarily in their room as a result misbehavior. Reported by multiple sources that employee slapped the hands and mouth of a resident.

(Ex. 105, pp. DOH000003-5).

67. On or about August 10 or 14, 2012, Joelle Meade, Defendant Smith, and Regional Health Network, Inc. told James F. Lawler and Jimmy J. Lawler that Shirley abused Christine.

(*See* Attachment S: RCRH.SDT1142-43; Attachment T: RCRH. SDT1144-45; Attachment U; RCRH.SDT1171-72; Attachment W: RCRH.SDT1238-39; Ex. 51, p. 2013-000471).

68. On or about August 21, 2012, Meade published Strong Edstrom's and Ellenbecker's written allegations of slapping and seclusion to James F. Lawler and Jimmy J. Lawler. (*See* Attachment R: RCRH.SDT1139).

69. In August of 2012, Defendant Sughrue reported his and Regional's conclusion and accusation that Shirley abused Christine to James F. Lawler, stating to the effect that he "had concurred with the removal action of the two employees for cause as being the perpetrators of the abuse action. The two were dismissed on June 8, 2012." (Attachment W: RCRH.SDT1238-39).

70. On August 27, 2012, Meade published Strong Edstrom's and Ellenbecker's written, false allegations of slapping and seclusion against Shirley to the DOH. (Ex. 105, pp. DOH000017-29).

71. In August of 2012, Meade, Strong Edstrom, and Ellenbecker verbally published the false allegations to Officer Fredericksen of the City of Lead Police Department and also provided him with Strong Edstrom's and Ellenbecker's written allegations. (*See* Declaration of Sarah Baron Houy, Ex. E. pp. 4-8).

72. Neither Meade, Strong Edstrom, nor Ellenbecker told Officer Fredericksen about their conflict with Shirley, that when Strong Edstrom and Ellenbecker alleged to have seen the slapping and seclusion, they said nothing, did nothing, and reported nothing, or that residents and other staff were present for the slapping and did nothing. (Declaration of Sarah Baron Houy, Ex. E, pp. 6-7).

73. After Officer Frederickson investigated the allegations against Shirley, he suggested that the allegations were retaliatory in nature as they took place after the overheard conversation in a resident's room about worthless staff for which Shirley was present. (Declaration of Sarah Baron Houy, Ex. E at p. 8).

74. On September 4, 2012, Smith declared to James F. Lawler that Shirley abused Christine, stating, "June 7, 2012, the two staff members implicated in the abuse were interviewed and suspended pending further investigation. June 8, 2012 the SD Department of Health was notified of the abuse, and the two staff members were terminated." Smith further stated that she, Rita Stacey, and Meade "wanted to be solid in the termination of the employees before the abuse was reported to the family." (Attachment P; RCRH.SDT1135-36).

75. On September 11, 2012, Defendant Smith declared to James F. Lawler that Shirley abused Christine, stating that "the staff members accused of the abuse were interviewed on June 7, 2012, then terminated on June 8, 2012." (Attachment Q; RCRH.SDT1137-38).

76. On September 24, 2012, Defendant Smith wrote to the DOH and provided many items about the false allegations against Shirley. (Ex. 51 at 2013-00045, 2013-000457-59).

77. In Smith's September 24, 2012, letter to the DOH, she declared, "Administration found the reports to be credible." (Ex. 51 at 2013-000436).

78. In Smith's September 24, 2012, letter to the DOH, she falsely stated, "Residents capable of providing accurate recollection were interviewed." (Ex. 51 at 2013-000436).

79. In Smith's September 24, 2012, letter to the DOH, she provided the DOH with Meade's denial of Step One of the Fair Treatment/Grievance Procedure, which asserted in part, "Legal counsel supports the decision of terminating and indicated that there is validity in the action taken based on reported incidences." (Ex. 51 at 2013-000611).

80. In Smith's September 24, 2012, letter to the DOH, she provided the DOH with her denial of Step Two of the Procedure, which concluded in part, "Based on eye witness accounts of both inappropriate physical contact and imposed seclusion, I must support the termination of this employee." (Ex. at 2013-000613).

81. In Smith's September 24, 2012, letter to the DOH, she provided the DOH with Defendants Sughrue's and Gisi's denial of Step Three of the Procedure, which accused Shirley of slapping and seclusion, stating in part, "As outlined in your termination notice, we find that you inappropriately secluded a resident in their room and slapped the hands and mouth of a resident." (Ex. at 2013-000614; emphasis added). It further declared, "Your termination is appropriate based on the investigation and conclusion regarding gross misconduct." (*Id.*)

82. In Smith's September 24, 2012, letter to the DOH, she provided the DOH with Kathe Shockey's written allegations against Shirley to the Department of Labor, which stated:

> Gross misconduct; was witnessed by co-workers striking a resident in a manner described as a slap to the hands and mouth on more than one occasion; removed a resident from the common area and took resident to their room as a consequence of misbehaving on more than one occasion.

(Ex. 51 at 2013-000623).

83. In Smith's September 24, 2012, letter to the DOH, she provided the DOH with statements the Department of Labor recorded from speaking with Kathe Shockey, which included:

> Kathe verified that Shirley was discharged for resident abuse.
> Kathe stated that we had 3 co-workers that reported different incidents that we did then investigate[.]
> The first one was that Shirley slapped the hand of a resident and we didn't have a date on that one.
> On 5-30-12 a co-worker reported seeing Shirley slapping a resident on the mouth.
> On 6-1-12 we had a co-worker report that they witnesses Shirley slapping both hands of a resident.

> Therefore when this was reported to management we then suspended or put Shirley on un-paid administrative leave to investigate and it was determined that she was abusing residents and she was then terminated.

(Ex. 51 at 2013-000659).

84. In Smith's September 24, 2012, letter to the DOH, she did not tell the DOH what was testified to on August 13 and 30, 2012, during the unemployment hearing and did not mention or provide to the DOH the September 20, 2012, decision of ALJ Underdahl. (*See* Ex. 51).

85. In October of 2012, Defendant Regional Health, Inc.'s in-house counsel Paula McInerney-Hall stated to James F. Lawler that Shirley abused Christine. (*See* Attachment V: RCRH.SDT1199-1203).

86. On November 18, 2013, Defendant Shockey told Colleen DeRosier, Human Resource Coordinator for Spearfish Regional Hospital and Spearfish Regional Medical Clinic, in reference to Shirley that, "She was terminated for gross misconduct that included involuntary seclusion of a resident as a result of misbehavior; in addition, several co-workers reported witnessing Shirley slapping a resident once on the mouth and more than once on the resident's hands." She further stated, "Leadership felt her contact with the resident was punitive regardless of the degree of force used. The contact was described by co-workers as 'loud enough to be heard' and 'not hard enough to leave a mark.' " (Ex. 108).

87. Defendants did not submit their "five-day investigative report" as required by ARSD 44:70:01:07 until nearly four months late on September 24, 2012. (Smith Dep. 70:12-23; Ex. 51).

88. The nearly four-month late "five-day investigative report" was a flagrant violation of ARSD 44:70:01:07. (Smith Dep. 70:24-71:5; Ex. 51).

89. The DOH suspended Shirley's CNA certification. (Stahl Dep. 80:16-21).

90. Defendants provided incomplete information about the allegations of abuse against Shirley to the South Dakota Department of Health. (Stahl Dep. 50:2-57:3, 66:23-67:5).

91. If Defendants had been complete, the Department would likely have looked at this matter much differently and "very possibly" would have concluded that the accusations against Shirley were false which would have been the end of the matter. (Stahl Dep. 37:20-38:2, 57:4-11, 58:20-60:1).

92. If the true and complete facts had been reported to the DOH, the DOH would not have suspended Shirley's CNA certification. (Stahl Dep. 59:10-60:1).

93. As a result of its investigation into the performance of Defendants with regard to the allegations against Shirley, the Department of Health found several deficiencies. (Ex. 52; Smith Dep. 63:24-64:11).

94. Meade never asked Strong Edstrom or Ellenbecker what witnesses were present for the alleged slapping and seclusion. (Meade Dep. 87:2-88:6).

95. Meade knew other staff and residents were present as she reported to Shockey that the alleged slapping occurred in a "common area" and had obtained the written accusations of Strong Edstrom and Ellenbecker referring to "kitchen," "dining room," and taking a resident to her room. (Exs. 18a & 18b, 57).

96. Meade knew that when Strong Edstrom and Ellenbecker alleged to have witnessed their separate slapping and seclusion events they did nothing, said nothing, and reported nothing. (Meade Dep. 85:9-17, 181:6-182:13; Ex. 38 [Vol. I] at 151:14-153:23).

97. Shockey never asked Meade, Strong Edstrom or Ellenbecker what witnesses were present for the alleged slapping and seclusion. (Ex. 5 at 203:23-206:15; Shockey Dep. 71:5-12, 176:17-23, 178:2-11).

98. Shockey knew other staff and residents were present for the alleged slapping and seclusion. (Shockey Dep. 46:21-47:17, 76:17-77:15; Exs. 18a & 18b).

99. Smith did not ask what witnesses were present for the alleged slapping and seclusion, and she did not instruct anyone to ask on her behalf. (Smith Dep. 27:25-28:3, 40:16-18; Attachment A, ¶ 294).

100. Smith understood the slapping to have taken place in the dining room and that "there were other people there." (Smith Dep. 26:24-27:8, 40:19-41:10, 193:7-11).

101. Gisi knew from an email on April 12, 2012, that Shirley was "great with the residents" and "performs great patient care" but had conflict with co-workers. (Ex. 12b, p. 1).

102. Gisi knew from an email on April 12, 2012, that there was conflict between Shirley and Defendant Shockey, because Shirley recently filed a grievance against Shockey. (Ex. 12b, p. 1).

103. Gisi put Shockey in charge of the investigation of the abuse allegations against Shirley. (Gisi Dep. 35:5-36:12, 150:20-151:4).

104. Gisi knew from an email on April 12, 2012, that there was conflict between Shirley and Strong Edstrom over priorities like getting batteries v. responding to patient calls. (Ex. 12b; Gisi Dep. 89:12-14).

105. Gisi knew that Director of Nursing Meade wanted to fire Shirley before even talking with her. (Ex. 57).

106. Gisi knew the Strong Edstrom and Ellenbecker accusations were made "after the fact" so he knew Strong Edstrom and Ellenbecker did nothing, said nothing, and reported nothing when they witnessed the alleged abuse. (Gisi Dep. 73:18-74:3, 75:17-76:4).

107. Gisi had been told the slapping allegedly occurred in a "common area" and had read the written accusations of Strong Edstrom and Ellenbecker referring to "kitchen," "dining room," and taking a resident to her room. (Ex. 57; Gisi Dep. 113:18-114:8; Exs. 18a & 18b).

108. Gisi acknowledged that accusations of elder abuse may not be true so must be investigated. (Gisi Dep. 37:19-38:9).

109. Gisi does not recall following up with Defendant Shockey or anyone else to determine if alleged witnesses were identified and interviewed. (Gisi Dep. 150:13-151:15).

110. Gisi did not identify and interview alleged witnesses. (Gisi Dep. 81:8-16).

111. Sughrue didn't ask if there were witnesses to the alleged slapping and seclusion, and he did not instruct anyone to ask on his behalf. (Sughrue Dep. 22:22-23:5, 24:11-16).

112. Sughrue was uncertain about the truth of the allegations at the onset due to his lack of complete information. (Sughrue Dep. 14:15-15:8).

113. Sughrue didn't know if Strong Edstrom and Ellenbecker were alleging one or more slaps. (Sughrue Dep. 69:8-70:4).

114. Sughrue did not read the written allegations of Strong Edstrom and Ellenbecker prior to this litigation. (Sughrue Dep. 16:8-19:2).

115. When Shirley filed for unemployment benefits, Defendant Regional Health Network, Inc., objected. (Ex. 39).

116. The administrative law judge for the unemployment matter rejected the accusations of Strong Edstrom and Ellenbecker. (*See* Ex. 32b, pp. 3-4).

117. The ALJ's decision was affirmed by Judge Macy. (Ex. 32c).

118. On August 13, 2012, in response to questions by Shirley's attorney in an unemployment proceeding where Shirley's application for unemployment benefits was resisted by her employer, Joelle Ellenbecker identified employees Karin and Heidi as the staff present during the alleged slapping and seclusion. (Ex. 38 [Vol. I] at 54:17-22).

119. During this litigation, employees Karin and Heidi testified that they did not see Shirley Harvey slap a resident. (Tyler Dep. 4:11-18; Covell Dep. 5:7-11).

120. Smith admits that if Tyler and Covell had been talked to, it was possible "this whole course of events might have been different and Shirley might still be working there" and that Shirley would have still been working at Golden Ridge. (Shockey Dep. 60:24-61:23, 63:13-18, 190:2-7).

121. The Department of Health felt compelled on August 1, 2012, to forward what little it knew about this matter to the Lawrence County States Attorney. (Ex. 105, pp. DOH15-16; Stahl Dep. 37:20-38:2).

122. Ellenbecker, while an employee of Regional Health Network, Inc., testified before grand juries on October 11, 2012, and January 31, 2013. (Attachments I & J: Grand Jury Testimony of Ellenbecker, 10/11/12 and 1/31/13).

123. Strong Edstrom, while employed by Regional Health Network, Inc., testified before the grand jury on October 11, 2012. (*See* Declaration of Sarah Baron Houy, Ex. T).

124. The grand jury panel before which Strong Edstrom and Ellenbecker testified on October 11, 2012, did not return an indictment against Shirley, and the matter was presented to a new grand jury panel months later. (*See* Ex. 105, p. DOH000101).

125. On January 31, 2013, when Strong Edstrom and Ellenbecker testified before the grand jury, they both read their written statements. (Attachment J: Grand Jury Testimony of Ellenbecker, 1/31/13; Attachment N: Grand Jury Testimony of Strong Edstrom, 1/31/13).

126. During their testimony before the grand jury panels on October 11, 2102, and January 31, 2013, neither Strong Edstrom nor Ellenbecker mentioned that residents and other staff were present for the slapping and did nothing. (*See* Attachments I & J: Grand Jury Testimony of Ellenbecker, 10/11/12 and 1/31/13; Attachment N: Grand Jury Testimony of Strong Edstrom, 1/31/13; Declaration of Sarah Baron Houy, Ex. T).

127. Judge Macy granted Shirley's motion for judgment of acquittal in the criminal trial against her for felony elder abuse. (Ex. 35).

128. At other Regional facilities, when an accusation of abuse is made, accusers are not taken at their word, an investigation is conducted, and witnesses are identified and interviewed. (Sughrue Dep. 52:17-53:10; Exs. 78, 82, 83, 95-101).

129. Just one and a half years before the allegations against Shirley, Defendants Shockey and Gisi attended a one-day training course entitled "7 Steps to Investigate Allegations of Employee Misconduct" and a half-day training course entitled "Writing a Comprehensive Investigative Report." (Ex. 145, pp. RH0078 & RH0085; Narlock Dep. 7:8-23).

130. Two booklets were part of the materials given to those attending the training courses. (Narlock Dep. 15:8-16:6, 18:17-23; Exs. 147-48).

131. The training materials instruct that the investigation is to be conducted by an investigator who: "Is unbiased and has the appearance of being unbiased;" "Is not in the chain of command of either the complainant or the accused;" and "Is trained in investigative techniques." (Ex. 147, p. 9).

132. Meade was not trained in investigative techniques. (*See* Gisi Dep. 159:9-160:22).

133. Meade was relatively new and had "novice" status. (Smith Dep. 130:22-131:18; *see also* Ex. 105, p. DOH2).

134. Shockey did not evaluate the competency of Meade. (Shockey Dep. 17:1-10).

135. The training materials also instruct that the investigation must include an assessment of the accusers and the accused. (Ex. 147, pp. 47-48, 64; Ex. 148, p. 8).

136. The training materials instruct that the investigation should include a review of the "[p]ersonnel files and investigative files, if any, of the complainant, accused and major witnesses." (Ex. 147, p. 19).

137. The training materials instruct that a proper investigation includes the identification and interviewing of witnesses beyond the accuser and accused. (Ex. 147, pp. 29, 42-43, 48; Ex. 148, pp. 8, 10; *see also* Ex. 147, pp. 18-19, 34-35, 44, 46, 53-55, 60, 64, 71; Ex. 148, p. 2).

138. Meade's job description at Golden Ridge included directing and supervising operations within the Golden Ridge facility and ensuring compliance with state regulations. (Attachment Z: RH0060-62).

139. Meade, Shockey, Smith, Bryant, Gisi, and Sughrue were each acting within the course and scope of their employment in addressing the allegations of abuse against Shirley and in making allegations of abuse against Shirley. (Attachment A, ¶¶ 296, 327, 329; Attachment B, ¶¶ 4, 57).

140. The Fair Treatment/Grievance Procedure set forth in Exhibit 26 was in effect at the time of Shirley's termination. (Smith Dep. 99:12-25; Bryant Dep. 27:7-15; Gisi Dep. 20:4-10; Ex. 118, ¶ (2)(b); Attachment A, ¶ 257; Attachment H: Defendant Regional Health

Network's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory 9(e)).

Dated this 27th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2017, I served copies of the **Plaintiffs' Statement of Material Facts** upon each of the listed people by the following means:

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STATE OF SOUTH DAKOTA) SS. COUNTY OF PENNINGTON)		IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
SHIRLEY HARVEY and DON HARVEY, Plaintiffs, vs. REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, and KATHRYN L. SHOCKEY, Defendants.	)	51CIV14-000021 **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF HARVEYS' MOTION FOR PARTIAL SUMMARY JUDGMENT [BREACH OF CONTRACT]**

Plaintiffs Shirley and Don Harvey, in support of their Motion for Partial Summary Judgment [Breach of Contract], dated February 1, 2017, furnishes this separate, short, and concise statement of the material facts as to which they contend there are no genuine issues to be tried.

1. Golden Ridge Regional Senior Care employees Jessica Strong Edstrom and Joelle Ellenbecker accused Shirley Harvey of slapping and secluding a resident. (Exs. 18a & 18b).

2. The slapping and seclusion alleged by Jessica Strong Edstrom and Joelle Ellenbecker were separate incidences; neither confirmed seeing the slapping or seclusion alleged by the other. (Exs. 18a & 18b; Ex. 5 at 41:6-42:14, 50:22-52:3, 57:14-19, 146:8-147:12, 154:22-155:18, 158:22-159:4; Ex. 38 [Vol. I] at 13:3-14, 54:9-22).

3. Golden Ridge Regional Senior Care terminated Shirley Harvey's employment. (Attachment A: Defendant Regional Health Network, Inc.'s Responses to Plaintiff's First Request for Admissions, ¶ 230; Ex. 21).

4. The Corrective Action documenting Shirley Harvey's termination states in part, "Gross misconduct – Seclusion of a resident involuntarily in their room as a result [sic] misbehavior. Reported by multiple sources that employee slapped the hand and mouth of a resident." (Ex. 21).

5. Jessica Strong Edstrom alleged that residents were present during the alleged slapping and seclusion. (Ex. 5 at 41:6-18, 49:7-50:5; Ex. 38 [Vol. I] at 64:8-15).

6. Joelle Ellenbecker alleged that residents and staff were present during the alleged slapping and seclusion. (Ex. 5 at 147:7-12, 155:7-23, 156:20-158:25; Ex. 38 [Vol. I] at 54:14-22).

7. On August 13, 2012, in response to questions by Shirley's attorney in an unemployment proceeding where Shirley's application for unemployment benefits was resisted by her employer, Joelle Ellenbecker identified employees Karin and Heidi as the staff present during the alleged slapping and seclusion. (Ex. 38 [Vol. I] at 54:17-22).

8. During this litigation, employees Karin and Heidi testified that they did not see Shirley Harvey slap a resident. (Tyler Dep. 4:11-18; Covell Dep. 5:7-11).

9. No one on the behalf of Defendants ever spoke to residents about the slapping and seclusion allegations against Shirley Harvey. (Attachment A, ¶¶ 241-44, 252, 276, 293, 310, 319; Ex. 74, ¶ 271; Ex. 38 [Vol. I] at 154:13-18, 155:14-19; Shockey Dep. 52:24-53:2, 59:24-25, 151:7-16, 178:2-11 ; Smith Dep. 34:24-35:3, 265:6-18, 267:7-15; Bryant Dep. 31:24-25).

10. At the time of the termination of Shirley Harvey's employment, the corporate defendants had in effect a Fair Treatment/Grievance Procedure, RH HR-8371-601. (Ex. 26; Attachment A, ¶ 257; Smith Dep. 99:12-25; Bryant Dep. 27:7-15; Sughrue Dep. 147:2-9).

11. The Fair Treatment/Grievance Procedure was applicable to Shirley Harvey. (Attachment A, ¶ 257; Smith Dep. 99:12-100:7; Bryant Dep. 27:7-15; Sughrue Dep. 147:2-9).

12. The Fair Treatment/Grievance Procedure was required to be followed if invoked by an employee. (Smith Dep. 100:1-7; Bryant Dep. 28:7-11; Gisi Dep. 22:1-7).

13. The Fair Treatment/Grievance Procedure was applicable to termination of employment. (Ex. 26, ¶ A-1; Smith Dep. 102:1-7).

14. Under the Fair Treatment/Grievance Procedure, employment decisions could be reversed after an investigation of the grievance. (Ex. 26, ¶ J; Bryant 28:25-29:11).

15. Shirley Harvey invoked the Fair Treatment/Grievance Procedure by grieving her termination. (Ex. 27a; Attachment A, ¶¶ 260-61; Smith Dep. 100:1-7; Bryant Dep. 87:23-88:11).

16. The process set forth in Paragraph J of the Fair Treatment/Grievance Procedure was applicable to Shirley Harvey. (Smith Dep. 101:1-3; Gisi Dep. 120:4-7).

17. Step One of the Fair Treatment/Grievance Procedure provides in part, "The supervisor who is presented with the grievance is to investigate the complaint and attempt to resolve it, and give the decision to the employee within a reasonable time." (Ex. 26, ¶ J-1; Attachment A, ¶¶ 266-67; Gisi Dep. 26:20-23).

18. Joelle Meade was the supervisor presented with Shirley Harvey's grievance. (Smith Dep. 102:8-12; Meade Dep. 56:22-57:1).

19. After Shirley Harvey submitted her grievance, Joelle Meade did not conduct an investigation. (Ex. 74, ¶¶ 268-72; Meade Dep. 57:10-14; Attachment A, ¶ 319).

20. Joelle Meade denied Shirley Harvey's grievance and upheld the termination. (Ex. 73).

21. Shirley Harvey appealed to Step Two of the Fair Treatment/Grievance Procedure. (Ex. 20c, pp. RCRH.SDT0034-35; Attachment A, ¶ 283).

22. Step Two of the Fair Treatment/Grievance Procedure provides in part, "The party receiving the complaint/grievance will confer with the employee, the supervisor and any other staff members deemed appropriate, investigate the issues, and communicate a decision in writing to the employee[.]" (Ex. 26, ¶ J-2; Smith Dep. 105:19-23; Attachment A, ¶¶ 287-88; Gisi Dep. 26:20-23).

23. Sherry Bea Smith received Shirley Harvey's appeal of Joelle Meade's decision at Step One of the Fair Treatment/Grievance Procedure and was responsible for Step Two. (Attachment A, ¶ 289; Smith Dep. 105:9-18).

24. If there were staff that allegedly witnessed the alleged abuse, Sherry Bea Smith was required by Step Two of the Fair Treatment/Grievance Procedure to meet with them. (Smith Dep. 106:7-107:20, 108:14-109:15).

25. Sherry Bea Smith did not meet with accusers Jessica Strong Edstrom or Joelle Ellenbecker. (Smith Dep. 27:25-28:3, 95:19-22, 106:7-19).

26. Sherry Bea Smith did not ask accusers Jessica Strong Edstrom or Joelle Ellenbecker what witnesses were allegedly present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 291, 312; Ex. 74, ¶ 311; Smith Dep. 27:25-28:3, 40:16-18; Ex. 5 at 57:20-58:8, 156:4-15).

27. Sherry Bea Smith did not know the identity of those alleged by either Jessica Strong Edstrom or Joelle Ellenbecker to be present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 291, 294, 312, 314; Ex. 74, ¶ 311; Smith Dep. 27:25-28:3, 40:16-18, 106:7-109:18; Ex. 5 at 57:20-58:8, 156:4-15).

28. As part of Step Two, Sherry Bea Smith did not meet with any staff other than Rita Stacey, Joelle Meade, and Shirley Harvey. (Smith Dep. 106:1-19, 108:14-24).

29. Sherry Bea Smith did not speak with any residents about the allegations of slapping and seclusion against Shirley Harvey. (Attachment A, ¶¶ 293, 319; Smith Dep. 34:24-35:3, 265:6-18, 267:7-15).

30. As part of Sherry Bea's Smith participation in the grievance process, she did not look at the personnel files of accusers Jessica Strong Edstrom or Joelle Ellenbecker. (Smith Dep. 53:18-54:1).

31. Sherry Bea Smith denied Shirley Harvey's appeal of her grievance and upheld the termination. (Ex. 28; Attachment A, ¶ 297).

32. Shirley Harvey appealed to Step Three of the Fair Treatment/Grievance Procedure. (Ex. 29a; Attachment A, ¶ 300).

33. The first phase of Step Three of the Fair Treatment/Grievance Procedure provides in part, "A decision unsatisfactory to the employee in Step Two may be appealed to the Regional Health Network's Chief Operating Officer. The complaint will be investigated and a recommendation regarding the resolution of the grievance will be submitted to the RHN's Chief Executive Officer and RH's Vice President of Human Resources." (Ex. 26, ¶ J-3; Gisi Dep. 26:20-23).

34. Glenn Bryant, COO of Regional Health Network, Inc., received Shirley Harvey's appeal of Sherry Bea Smith's decision at Step Two of the Fair Treatment/Grievance Procedure and was responsible for the first phase of Step Three. (Bryant Dep. 30:1-18; Gisi Dep. 171:25-172:16).

35. As part of Glenn Bryant's participation in Step Three of the Fair Treatment/Grievance Procedure, he did not speak with any staff other than Sherry Bea Smith and Kathe Shockey. (Bryant Dep. 31:21-23, 33:2-7).

36. As part of Glenn Bryant's participation in Step Three of the Fair Treatment/Grievance Procedure, he did not speak with accusers Jessica Strong Edstrom or Joelle Ellenbecker, or with Shirley Harvey. (Bryant Dep. 31:21-23, 33:2-7; Attachment A, ¶ 310).

37. Glenn Bryant did not ask accusers Jessica Strong Edstrom or Joelle Ellenbecker what witnesses were allegedly present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 310, 312, 321; Ex. 74, ¶ 311; Bryant Dep. 31:21-23, 33:2-7; Ex. 5 at 57:20-58:8, 156:4-15).

38. Glenn Bryant did not know the identity of those alleged by either Jessica Strong Edstrom or Joelle Ellenbecker to be present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 312, 314-15; Ex. 74, ¶ 311; Bryant Dep. 31:21-32:10, 33:2-14; Ex. 5 at 57:20-58:8, 156:4-15).

39. Glenn Bryant did not speak with any residents about the alleged abuse. (Bryant Dep. 31:24-25; Attachment A, ¶¶ 310, 319).

40. Glenn Bryant did not read the written accusations of Strong Edstrom or Ellenbecker at any time before the grievance process was complete. (Bryant Dep. 37:18-38:23).

41. As part of Glenn Bryant's participation in Step Three of the Fair Treatment/Grievance Procedure, he did not examine anybody's personnel file. (Bryant Dep. 25:23-26:22).

42. Glenn Bryant recommended that Shirley Harvey's grievance be rejected and her termination upheld. (Ex. 70).

43. The second phase of Step Three of the Fair Treatment/Grievance Procedure provides in part, "The RCRH Chief Executive Officer/RHCS Chief Administrative Officer and RH's Vice President of Human Resources will review the recommendation and render the final decision." (Ex. 26, ¶ J-4).

44. RCRH CEO Timothy Sughrue and RH's Interim VP of Human Resources Dale Gisi were responsible for phase two of Step Three. (Ex. 26, ¶ J-4; Ex. 29b).

45. After Shirley Harvey appealed to Step Three of the Fair Treatment/Grievance Procedure, Timothy Sughrue did not investigate the slapping and seclusion allegations. (Attachment A, ¶¶ 309-10; Sughrue Dep. 82:25-84:6, 115:25-116:20).

46. After Shirley Harvey appealed to Step Three of the Fair Treatment/Grievance Procedure, Dale Gisi did not investigate the slapping and seclusion allegations. (Attachment A, ¶¶ 309-10; Gisi Dep. 114:12-19).

47. Dale Gisi did not know what investigation, if any, Joelle Meade conducted after the date of Shirley Harvey's termination. (Gisi Dep. 116:25-117:8, 117:17-20).

48. Dale Gisi did not know what investigation, if any, Sherry Bea Smith conducted at Step Two of the Fair/Treatment Grievance Procedure. (Gisi Dep. 117:9-12, 117:21-23).

49. Dale Gisi did not know what investigation, if any, Glenn Bryant conducted at the first phase of Step Three of the Fair/Treatment Grievance Procedure. (Gisi Dep. 117:24-118:13; Bryant Dep. 49:24-50:12, 52:7-21).

50. Timothy Sughrue did not know what investigation, if any, Joelle Meade conducted after the date of Shirley Harvey's termination. (Sughrue Dep. 83:19-84:6, 115:25-116:20).

51. Timothy Sughrue did not know what investigation, if any, Sherry Bea Smith conducted at Step Two of the Fair Treatment/Grievance Procedure. (Sughrue Dep. 81:10-16, 83:9-84:6, 115:25-116:20; Bryant Dep. 51:19-21).

52. Timothy Sughrue did not know what investigation, if any, Glenn Bryant conducted at the first phase of Step Three of the Fair Treatment/Grievance Procedure. (Sughrue Dep. 83:14-84:6, 115:25-116:20; Bryant Dep. 51:16-18, 52:7-21).

53. Timothy Sughrue and Dale Gisi denied Shirley Harvey's appeal of her grievance and upheld her termination. (Ex. 29b).

54. In their denial letter, Timothy Sughrue and Dale Gisi stated in part, "Your termination is appropriate based on the investigation and conclusion regarding gross misconduct." (Ex. 29b).

55. Prior to the denial letter of Timothy Sughrue and Dale Gisi, none of the Defendants asked accusers Jessica Strong Edstrom or Joelle Ellenbecker what witnesses were allegedly present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 312, 314-15; Ex. 74, ¶ 311; Meade Dep. 87:2-88:6; Shockey Dep. 71:5-15; Smith Dep. 27:25-28:3, 40:16-18; Gisi Dep. 80:24-81:16; Sughrue Dep. 22:22-23:5, 24:11-16; Ex. 5 at 57:20-58:8, 156:4-15, 203:23-206:15).

56. Prior to the denial letter of Timothy Sughrue and Dale Gisi, Dale Gisi did not know the identity of those alleged by either Jessica Strong Edstrom or Joelle Ellenbecker to be present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 312, 314-15; Ex. 74, ¶ 311; Gisi Dep. 77:7-78:7, 80:24-81:16, 150:13-151:15; Ex. 5 at 57:20-58:8, 156:4-15).

57. Prior to the denial letter of Timothy Sughrue and Dale Gisi, Timothy Sughrue did not know the identity of those alleged by either Jessica Strong Edstrom or Joelle Ellenbecker to

be present for the alleged slapping. (Attachment A, ¶¶ 253, 255, 312, 314-15; Ex. 74, ¶ 311; Sughrue Dep. 22:22-23:5, 24:11-16; Ex. 5 at 57:20-58:8, 156:4-15).

58. Prior to the denial letter of Timothy Sughrue and Dale Gisi, Timothy Sughrue did not read the written allegations of accusers Jessica Strong Edstrom or Joelle Ellenbecker. (Sughrue Dep. 16:25-17:18, 18:19-19:2).

Dated this 6th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2017, I served copies of the **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF HARVEYS' MOTION FOR PARTIAL SUMMARY JUDGMENT [BREACH OF CONTRACT]** upon each of the listed people by the following means:

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STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS.		
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT
SHIRLEY HARVEY and DON HARVEY,	)	51CIV14-000021
Plaintiffs,	)	
vs.	)	
REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, and KATHRYN L. SHOCKEY,	)	**BRIEF IN SUPPORT OF HARVEYS' MOTION FOR PARTIAL SUMMARY JUDGMENT [BREACH OF CONTRACT]**
Defendants.	)	

Plaintiffs Shirley and Don Harvey submit this brief in support of their motion for partial summary judgment on their claim for breach of contract. The Court should grant Plaintiffs' motion, because the corporate Defendants contracted to follow a specific procedure after certain employment decisions, including termination of employment, but breached their duties under the contract when Shirley grieved her termination.

FACTUAL BACKGROUND

Golden Ridge Regional Senior Care employees Jessica Strong Edstrom and Joelle Ellenbecker accused Shirley Harvey of slapping and secluding a resident. (SUMF ¶ 1). The slapping and seclusion alleged by Strong Edstrom and Ellenbecker were separate incidences; neither confirmed seeing the slapping or seclusion alleged by the other. (SUMF ¶ 2).[1] After the

[1] The only incident alleged to have been seen by both of them had to do with the taking of a sandwich from a resident's hand – not a slap. (Exs. 18a & 18b). While it is true that Strong Edstrom claimed that Shirley secluded the resident following the incident (Ex. 18a), Ellenbecker said nothing about any seclusion in her written statement (Ex. 18b) and instead has testified that

allegations, Golden Ridge Regional Senior Care terminated Shirley's employment. (SUMF ¶ 3). The Corrective Action documenting Shirley's termination states in part, "Gross misconduct – Seclusion of a resident involuntarily in their room as a result [sic] misbehavior. Reported by multiple sources that employee slapped the hand and mouth of a resident." (SUMF ¶ 4).

With regard to the slapping and seclusion alleged by Strong Edstrom, she claimed that residents were present. (SUMF ¶ 5). Ellenbecker claimed that residents and staff were present during the alleged slapping and seclusion she claimed to have seen. (SUMF ¶ 6). On August 13, 2012, in response to questions by Shirley's attorney in an unemployment proceeding where Shirley's application for unemployment benefits was resisted by her employer, Ellenbecker identified employees Karin and Heidi as the staff present during the alleged slapping and seclusion. (SUMF ¶ 7). However, during this litigation both Karin and Heidi testified that they did not see Shirley slap a resident. (SUMF ¶ 8).

At the time of the termination of Shirley's employment, the corporate defendants had in effect a Fair Treatment/Grievance Procedure. (SUMF ¶ 10). The Procedure was applicable to Harvey and was required to be followed if invoked by an employee. (SUMF ¶¶ 11-12). The Procedure was applicable to termination of employment. (SUMF ¶ 13). Under the Procedure, employment decisions could be reversed after an investigation of the grievance. (SUMF ¶ 14).

Shirley invoked the Fair Treatment/Grievance Procedure by grieving her termination.[2] (SUMF ¶ 15). The process set forth in Paragraph J of the Fair Treatment/Grievance Procedure was applicable to her. (SUMF ¶ 16).

Shirley "turned around and walked away" after taking the sandwich and throwing it down. (Ex. 5 at 146:8-147:6; Ex. 38 [Vol. I] at 13:3-14).

[2] In her grievance, Shirley implored Defendants, "I want and need my name cleared." (Ex. 27a).

Step One of the Fair Treatment/Grievance Procedure provides in part, "The supervisor who is presented with the grievance is to investigate the complaint and attempt to resolve it, and give the decision to the employee within a reasonable time." (SUMF ¶ 17). Joelle Meade was the supervisor presented with Shirley's grievance. (SUMF ¶ 18). Meade did not conduct an investigation after Shirley submitted her grievance. (SUMF ¶ 19). Yet, she denied Shirley's grievance and upheld the termination. (SUMF ¶ 20).

Shirley appealed to Step Two of the Fair Treatment/Grievance Procedure. (SUMF ¶ 21). Step Two provides in part, "The party receiving the complaint/grievance will confer with the employee, the supervisor and any other staff members deemed appropriate, investigate the issues, and communicate a decision in writing to the employee[.]" (SUMF ¶ 22). Sherry Bea Smith received Shirley's appeal of Meade's decision at Step One of the Fair Treatment/Grievance Procedure and was responsible for Step Two. (SUMF ¶ 23).

If there were staff that allegedly witnessed the alleged abuse, Smith was required by Step Two of the Fair Treatment/Grievance Procedure to meet with them. (SUMF ¶ 24). However, Smith did not meet with accusers Strong Edstrom or Ellenbecker, so she did not ask either of them what witnesses were allegedly present for the alleged slapping. (SUMF ¶¶ 25-26). Smith did not know the identity of those alleged by either Strong Edstrom or Ellenbecker to be present for the alleged slapping. (SUMF ¶ 27).

As part of Step Two, Smith did not meet with any staff other than Rita Stacey, Joelle Meade, and Shirley Harvey. (SUMF ¶ 28). Smith never spoke with any residents about the allegations of slapping and seclusion against Shirley. (SUMF ¶ 29). As part of Smith's participation in the grievance process, she did not look at the personnel files of accusers Strong

Edstrom or Ellenbecker. (SUMF ¶ 30). Yet, Smith denied Shirley's appeal of her grievance and upheld the termination. (SUMF ¶ 31).

Shirley appealed to Step Three of the Fair Treatment/Grievance Procedure. (SUMF ¶ 32). The first phase of Step Three of the Procedure provides in part, "A decision unsatisfactory to the employee in Step Two may be appealed to the Regional Health Network's Chief Operating Officer. The complaint will be investigated and a recommendation regarding the resolution of the grievance will be submitted to the RHN's Chief Executive Officer and RH's Vice President of Human Resources." (SUMF ¶ 33). Glenn Bryant, COO of Regional Health Network, Inc., received Shirley's appeal of Smith's decision at Step Two of the Procedure and was responsible for the first phase of Step Three. (SUMF ¶ 34).

As part of Bryant's participation in Step Three of the Fair Treatment/Grievance Procedure, he did not speak with any staff other than Sherry Bea Smith and Kathe Shockey (SUMF ¶ 35); he did not speak with accusers Strong Edstrom or Ellenbecker, or with Shirley. (SUMF ¶ 36). Bryant did not ask Strong Edstrom or Ellenbecker what witnesses were allegedly present for the alleged slapping, and he did not know the identity of those alleged by either to be present for the alleged slapping. (SUMF ¶¶ 37-38). Bryant also did not speak with any residents about the alleged slapping and seclusion. (SUMF ¶ 39).

Bryant did not read the written accusations of Strong Edstrom or Ellenbecker at any time before the grievance process was complete. (SUMF ¶ 40). As part of his participation in Step Three of the Fair Treatment/Grievance Procedure, he did not examine anybody's personnel file. (SUMF ¶ 41). Despite all that he didn't do and didn't know, Bryant recommended that Shirley's grievance be rejected and her termination upheld. (SUMF ¶ 42).

The second phase of Step Three of the Fair Treatment/Grievance Procedure provides in part, "The RCRH Chief Executive Officer/RHCS Chief Administrative Officer and RH's Vice President of Human Resources will review the recommendation and render the final decision." (SUMF ¶ 43). RCRH CEO Timothy Sughrue and RH's VP of Human Resources Dale Gisi were responsible for the second phase of Step Three. (SUMF ¶ 44).

After Shirley appealed to Step Three, neither Sughrue nor Gisi investigated the slapping and seclusion allegations. (SUMF ¶¶ 45-46). Neither knew what investigation, if any, Meade, Smith, or Bryant conducted at earlier stages of the Procedure. (SUMF ¶¶ 47-52).

Sughrue and Gisi denied Shirley's appeal of her grievance and upheld her termination. (SUMF ¶ 53). Before doing so, Sughrue did not read the written allegations of accusers Strong Edstrom or Ellenbecker. (SUMF ¶ 58). In their denial letter, Sughrue and Gisi stated in part, "Your termination is appropriate based on the investigation and conclusion regarding gross misconduct." (SUMF ¶ 54).

Prior to the Sughrue and Gisi denial letter, none of the Defendants asked accusers Strong Edstrom or Ellenbecker what witnesses were allegedly present for the alleged slapping. (SUMF ¶ 55). Neither Sughrue nor Gisi knew the identity of those alleged by either Strong Edstrom or Ellenbecker to be present for the alleged slapping. (SUMF ¶¶ 56-57). No one on the behalf of Defendants ever spoke to residents about the slapping and seclusion allegations against Shirley. (SUMF ¶ 9).

SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment "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 facts and that the moving party is entitled to a judgment as a

matter of law[.]" SDCL 15-6-56(c). While the moving party has the burden of showing there are no genuine issues of material fact, the non-moving party "cannot merely rest on the pleading," but must present facts either by way of affidavits or other methods provided in SDCL 15-6-56(e) that would show a genuine issue of material fact. *Wulf v. Senst*, 2003 S.D. 105, ¶ 18, 669 N.W.2d 135, 141-142 (citation omitted).

ARGUMENT AND AUTHORITIES

I. The Fair Treatment/Grievance Procedure is a Contract

"Existence of a contract is a question of law." *LaMore Rest. Group, LLC v. Akers*, 2008 S.D. 32, ¶ 12, 748 N.W.2d 756, 761 (quoting *In Estate of Neiswender*, 2000 S.D. 112, ¶ 9, 616 N.W.2d 83, 86). Under South Dakota law, "an employee handbook may create an implied contract." *Lau v. Behr Heat Transfer Sys., Inc.*, 150 F.Supp.2d 1017, 1022 (D.S.D. 2001) (citing *Osterkamp v. Alkota Mfg., Inc.*, 332 N.W.2d 275 (S.D. 1983)). Applying South Dakota law, certain employer manuals and handbooks have been held to constitute valid and enforceable contracts. *See Zavadil v. Alcoa Extrusions, Inc.*, 363 F.Supp.2d 1187, 1193 (D.S.D. 2005); *Lau.*, 150 F.Supp.2d at 1022; *Meyers v. American States Ins. Co.*, 926 F.Supp. 904, 913 (D.S.D. 1996). The Fair Treatment/Grievance Procedure is a valid and enforceable contract.

The pertinent provisions of the defendant's Peer Review Policy and Procedures in *Zavadil* are strikingly similar to Defendants' Fair Treatment/Grievance Procedure. The Peer Review Policy and Procedures in *Zavadil* provided that Peer Review Panels "may review management's actions to ensure that the policy or practice was applied properly and consistently." 363 F.Supp.2d at 1189. The Peer Review Panels had the authority under the Peer Review Policy and Procedure to make appropriate remedies if it found a policy or practice was not applied properly or consistently. *Id.* In the Harveys' case, Defendants' Fair

Treatment/Grievance Procedure likewise provided that employment decisions could be reversed after an investigation of the grievance. (SUMF ¶ 14). The Peer Review Policy specifically provided that it was applicable to terminations. *Zavadil*, 363 F.Supp.2d at 1190. Likewise, here the Fair Treatment/Grievance Procedure was specifically applicable to termination of employment. (SUMF ¶ 13).

In *Zavadil*, the Peer Review Policy and Procedures had no "disclaimers of waiving the at-will employment doctrine that are replete in the Employee Handbook." 363 F.Supp.2d at 1193. The same is true of the Fair Treatment/Grievance Procedure in this case. (*See* Ex. 26).

In *Zavadil*, contrary to the Peer Review Policy and Procedures, when the plaintiff's employment was terminated, he was not allowed to appeal the termination to the Peer Review Panels. 363 F.Supp.2d at 1190. Here, as further set forth in Part II below, contrary to the Procedure the Defendants did not investigate Shirley's grievance, which was based upon her termination, (SUMF ¶¶ 19, 25-30, 35-41), did not meet with staff deemed appropriate at Step Two (SUMF ¶¶ 6-7, 22, 24-25, 28), and did not review the investigation at the final stage of the Procedure. (SUMF, ¶¶ 47-52, 55-58). SUMF ¶¶ 22, 24).

In *Zavadil*, District Judge Piersol held that the peer review process was mandatory when properly invoked by an employee. *Id.* at 1192. Here, it is undisputed that the provisions of the Fair Treatment/Grievance Procedure were required to be followed when invoked by the employee. (SUMF ¶ 12). Further, like District Judge Piersol noted with regard to the Peer Review Policy and Procedure, the Fair Treatment/Grievance Procedure in this case provided a specific procedure Defendants agreed to follow. *See Zavadil*, 363 F.Supp.2d at 1193; (SUMF ¶¶ 16-17, 22, 33, 43; Ex. 26).

Judge Piersol denied the *Zavadil* defendant's motion to dismiss or, in the alternative, for summary judgment. *Id.* He held that "through its Peer Review Policy and Procedures Defendant contracted to modify its statutory power to hire and fire at will to the extent that a discharged employee may utilize the policy and a Peer Review Panel may make a final and binding decision to reinstate an employee that was discharged by Management." *Id.* Likewise, through the Fair Treatment/Grievance Procedure, Defendants contracted to modify their power to hire and fire at will to the extent that a discharged employee may utilize the Fair Treatment/Grievance Procedure and management may make and render a decision following an investigation. (*See* Ex. 26; SUMF ¶¶ 16-17, 22, 33, 43).

II. Defendants' Breached the Contract

"Contract interpretation is a question of law[.]" *Tri-City Assocs., L.P. v. Belmont, Inc.*, 2014 S.D. 23, ¶ 9, 845 N.W.2d 911, 915 (citing *Poeppel v. Lester*, 2013 S.D. 17, ¶ 16, 827 N.W.2d 580, 584). "In order to ascertain the terms and conditions of a contract, [courts] examine the contract as a whole and give words their plain and ordinary meaning." *Poeppel*, 2013 S.D. 17 at ¶ 16 (quoting *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191) (further citation omitted).

A. Duty to "Investigate"

Steps One and Two and phase one of Step Three of the Fair Treatment/Grievance Procedure required the Regional employee in charge of each step to investigate the subject of the grievance. (SUMF ¶¶ 16-17, 22, 33). Here, the subject of Shirley's grievance was her termination (SUMF ¶ 15), which was based upon allegations of slapping and seclusion. (SUMF ¶¶ 1, 4). Merriam-Webster's online dictionary defines "investigate" as "to observe or study by close examination and systematic inquiry." (App. A; http://www.merriam-

webster.com/dictionary/investigate; *see also* attached at App. A, similar definitions of "investigate" at http://www.dictionary.com/browse/investigate; http://www.thefreedictionary.com/investigate; http://dictionary.cambridge.org/us/dictionary/english/investigate; http://en.oxforddictionaries.com/definition/us/investigate). While the term encompasses many actions, at bottom it includes identifying and interviewing witnesses. This is confirmed by the testimony of Defendants, the training provided to their Human Resources personnel, and their practice in investigating allegations of abuse in other circumstances.

The testimony of Defendants and their agents confirms that "investigate" requires identifying and interviewing alleged witnesses. Defendant Smith testified:

> Q. How would you -- back in June of 2012, in terms of your position and what you were required to do from time to time, how would you define the word investigate?
>
> A. I guess I would define that as making query of those that would be witness to or have knowledge of -- well, I guess knowledge of wouldn't help because that would be hearsay if they didn't witness it, so it would have to be those that witnessed it perhaps.
>
> Q. These that witnessed a particular --
>
> A. The event --
>
> Q. The event --
>
> A. -- that is being described.
>
> Q. And if there was an accusation, that would include the accuser plus everybody that was present when this alleged incident or event happened, including staff and residents, true?
>
> A. True.
>
> Q. And so if there was to be an investigation as we were talking about earlier, you would want not only the accuser talked to, but you would want staff present and residents present to be talked to as part of the investigation?

A. Right. Correct.

(Smith Dep. 24:19-25:17; *see also* Smith Dep. 59:8-60:8).

Identifying and interviewing alleged witnesses is what Defendants would want as part of an investigation if they had been accused of abuse. Defendant Smith, for example, testified, "I would ask for evidence" because an accusation may not be true. That would include taking the "obvious, basic" step of identifying and interviewing staff and residents allegedly present because "I would expect that [the accusation] could be corroborated by others." (Smith Dep. 5:5-7:24, 9:14-18). Smith testified:

Q. Just because someone makes an accusation doesn't make it true, correct?

A. Correct.

Q. And if you did not slap a resident, you would want an investigation done to establish that you didn't slap the person,[3] true?

A. Correct.

Q. And that investigation would include talking to other staff if other staff were allegedly present when you did this slapping, true?

A. Correct.

Q. And it would include talking to residents if, in fact, according to the accuser, the slapping took place in front of other residents, true?

A. Yes.

(Smith Dep. 7:10-24). Defendant Sughrue likewise testified:

Q. You would insist on a complete, thorough investigation including finding out who else was there and talking to them, wouldn't you?

A. I think everyone would hope that is the case.

(Sughrue Dep. 27:5-8).

[3] That is exactly what Shirley asked for in her grievance. She stated, "I want and need my name cleared." (Ex. 27a).

Defendant Gisi acknowledged that asking who else was present for the alleged incident is "[a] very common" and "standard" question in an investigation. (Gisi Dep. 80:24-81:21, 121:10-16). He says that prior to Shirley's termination he instructed that the question be asked and that any such witness be interviewed. (Gisi Dep. 80:24-81:21, Gisi Dep. 150:23-151:4). However, Defendant Gisi does not recall following up to determine if alleged witnesses were identified and interviewed. (Gisi Dep. 121:10-13, 150:13-151:15).

The training provided to Human Resources personnel at Regional further confirms that "investigate" includes identifying and interviewing witnesses. Just one and a half years before the allegations against Shirley, Defendants Shockey and Gisi attended a one-day training course entitled "7 Steps to Investigate Allegations of Employee Misconduct" and a half-day training course entitled "Writing a Comprehensive Investigative Report." (Ex. 145, pp. RH0078 & RH0085; Narlock Dep. 7:8-23). Two booklets (Exs. 147 & 148) were part of the materials given to those attending the training courses. (Narlock Dep. 15:8-16:6, 18:17-23).

The training materials instruct that a proper investigation includes the identification and interviewing of witnesses beyond the accuser and accused. (Ex. 147, pp. 29, 42-43, 48; Ex. 148, pp. 8, 10; *see also* Ex. 147, pp. 18-19, 34-35, 44, 46, 53-55, 60, 64, 71; Ex. 148, p. 2). The materials emphasize corroboration through identifying and speaking with those who were there or know about the incident. (*See, e.g.*, Ex. 147, pp. 42-43 & 48). The materials instruct to "set the scene," which "[e]nsures that you ask about other witnesses who were there." (Ex. 147, p. 43).

The practice of Defendants in investigating allegations of employee abuse in other circumstances is yet further confirmation that "investigate" includes identifying and interviewing witnesses. Defendant Sughrue explained that on six occasions there were accusations of

inappropriate touching made against male nurses. The investigations into each of the accusations included the identification and interviewing of alleged witnesses. (Sughrue Dep. 52:17-53:10). There are also numerous examples in which Defendants, in their assisted living facilities in Custer and Sturgis, identified and interviewed others beyond the accusers and the accused in investigating allegations of abuse. (*See* Exs. 78, 82, 95, 99, 100, 101).

Recognizing the failure of Defendants to investigate the grievance as required by the Fair Treatment/Grievance Procedure, Defendant Gisi argues that "investigate" means "review." (*See* Gisi Dep. 114:20-115:15, 118:20-119:9). In addition to being contrary to the plain meaning of the words, however, his argument is further belied by the use of both words in the Procedure itself. Courts "must give effect to the language of the entire contract and particular words and phrases are not interpreted in isolation." *In re Dissolution of Midnight Star Enters., L.P.*, 2006 S.D. 98, ¶ 12, 724 N.W.2d 334, 337 (citations omitted).

The first phase of Step Three of the Fair Treatment/Grievance Procedure provides in part that "[t]he complaint will be investigated" (SUMF ¶ 33), whereas the second phase of Step Three provides in part that the CEO and VP "will review the recommendation[.]" (SUMF ¶ 43). If "investigate" and "review" were to be construed as synonymous, having two different phases (set forth in separate paragraphs) at Step Three would serve no purpose and would render one of the phases and the words therein meaningless. However, language is not to be interpreted "in a manner that renders a portion of the contract meaningless." *Tri-City Assocs., L.P.*, 2014 S.D. 23 at ¶ 11 (citation omitted). "Instead, [courts] interpret the contract to give a reasonable and effective meaning to all its terms." *Id.* (quotations and citations omitted); *see also In re Dissolution of Midnight Star Enters., L.P.*, 2006 S.D. 98 at ¶ 12 ("An interpretation which gives

a reasonable and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable or of no effect."). "Investigate" does not mean "review."[4]

Defendants' testimony about investigations, the training received by Defendants Gisi and Shockey on the subject of investigating allegations of employee misconduct, and Defendants' practice in investigating allegations of abuse in other circumstances confirm that the plain meaning of the word "investigate" includes identifying and interviewing witnesses. The Regional employee in charge of Steps One and Two and phase one of Step Three of the Fair Treatment/Grievance Procedure was required to identify and interview witnesses to the alleged slapping and seclusion.

B. Breach of Duty to Investigate

The corporate defendants breached Steps One and Two and phase one of Step Three of the Fair Treatment/Grievance Procedure by failing to investigate the subject of the grievance – Shirley's termination.

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[4] The South Dakota Supreme Court has provided:

> [A] contract is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract. Rather, a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.

Ziegler Furniture & Funeral Home, Inc. v. Clemanec, 2006 S.D. 6, ¶ 16, 709 N.W.2d 350, 355 (citations omitted). Plaintiffs do not contend that the language of the Fair Treatment/Grievance Procedure is ambiguous. However, even if the court were to conclude otherwise, ambiguities in a contract are "interpreted and construed" against the drafter. *Campion v. Parkview Apartments*, 1999 S.D. 10, ¶ 35, 588 N.W.2d 897, 904 (citations omitted). The Procedure was drafted by Defendant Gisi on the behalf of the corporate defendants (Gisi Dep. 118:20-119:9), so it should be interpreted and construed against Defendants should any ambiguity be found.

1. Step One

Once Shirley grieved her termination, Step One of the Fair Treatment/Grievance Procedure required Joelle Meade to investigate. (SUMF ¶¶ 17-18). However, it is undisputed that after Shirley submitted her grievance Meade did not conduct an investigation before denying the grievance and upholding the termination. (SUMF ¶¶ 19-20). The corporate defendants breached their duty to investigate under Step One of the Fair Treatment/Grievance Procedure.

2. Step Two

Step Two of the Fair Treatment/Grievance Procedure required Sherry Bea Smith to investigate. (SUMF ¶¶ 22-23). As set forth above, this required her, at a minimum, to identify and interview witnesses to the alleged slapping and seclusion. Accusers Strong Edstrom and Ellenbecker alleged that residents and staff were present during the alleged slapping and seclusion. (SUMF ¶¶ 5-6). However, Smith did not identify who either Strong Edstrom or Ellenbecker alleged to have been present during the alleged slapping. (SUMF ¶ 27). She did not ask them. (SUM ¶ 26). No one on behalf of the Defendants did. (SUMF ¶ 55). Without knowing the identity of such witnesses, Smith could not interview them. Indeed, she did not speak with any residents about the slapping and seclusion allegations (SUMF ¶ 29) and did not meet with any staff other than Shirley, Meade and Rita Stacey.[5] (SUMF ¶ 28). Smith also did not look at the personnel files of accusers Strong Edstrom or Ellenbecker. (SUMF ¶ 30). The corporate defendants breached their duty to investigate under Step Two of the Fair Treatment/Grievance Procedure.

[5] When Ellenbecker was later asked by Shirley's attorney who was present during the alleged slapping and seclusion, the staff Ellenbecker identified did not include Meade or Stacey. (SUMF ¶ 7).

3. Step Three

The first phase of Step Three of the Fair Treatment/Grievance Procedure required Glenn Bryant to investigate. (SUMF ¶¶ 33-34). Again, at the very least, this required him to identify and interview witnesses to the alleged slapping and seclusion. However, Bryant did not identify who the accusers, Strong Edstrom and Ellenbecker, alleged to have been present during the alleged slapping. (SUMF ¶ 38). He did not ask them. (SUMF ¶ 37). No one on the behalf of the Defendants did. (SUMF ¶ 55). Without knowing the identity of such witnesses, Bryant could not interview them. Indeed, he did not speak with any residents about the slapping and seclusion allegations (SUMF ¶ 39), did not speak with Strong Edstrom, Ellenbecker, or Shirley (SUMF ¶ 36), and did not speak with any staff other than Smith and Shockey.[6] (SUMF ¶ 35).

Additionally, Bryant did not examine anybody's personnel file. (SUMF ¶ 41). In fact, he did not read the written accusations of Strong Edstrom or Ellenbecker before making his recommendation to reject Shirley's grievance and uphold her termination. (SUMF ¶ 40). The corporate defendants breached their duty to investigate under phase one of Step Three of the Fair Treatment/Grievance Procedure.

C. Duty to Confer with Those "Deemed Appropriate"

One of the duties of Defendant Smith at Step Two of the Fair Treatment/Grievance Procedure was to "confer with the employee, the supervisor and any other staff members deemed appropriate[.]" (SUMF ¶¶ 22-23). It is undisputed that Defendant Smith was required to meet with any staff that allegedly witnessed the alleged slapping and seclusion. (SUMF ¶ 24). Indeed, Smith testified:

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[6] When Ellenbecker was later asked by Shirley's attorney who was present during the alleged slapping and seclusion, the staff Ellenbecker identified did not include Smith or Shockey. (SUMF ¶ 7).

Q. And then it says you should confer also with the supervisor and any other staff members deemed appropriate. Now, here, certainly staff members who allegedly saw this would be deemed appropriate, right?

A. Correct.

(Smith Dep. 106:7-12).

Q. So tell me, what would a staff member -- how would a staff member, when you have accusations of elder abuse, what other staff members would be, quote, deemed appropriate in your view?

A. If there were witnesses. I do not have the information on that that there were other witnesses.

(Smith Dep. 107:15-20).

D. Breach of Duty to Confer with those "Deemed Appropriate"

At Step Two, Smith did not meet with any staff that allegedly witnessed the alleged slapping and seclusion. (SUMF ¶¶ 6-7, 25, 28). She did not meet with Strong Edstrom or Ellenbecker. (SUMF ¶ 25). The only staff she met with were Shirley, Meade, and Stacey. (SUMF ¶28). Yet, employees Karin and Heidi were the staff Ellenbecker alleged to be present for the alleged slapping and seclusion. (SUMF ¶¶ 6-7). The corporate defendants again breached their duty under Step Two of the Fair Treatment/Grievance Procedure when Defendant Smith failed to meet with staff members Strong Edstrom, Ellenbecker, Karin, or Heidi.

E. Duty to "Review"

The second phase of Step Three of the Fair Treatment/Grievance Procedure required Defendants Sughrue and Gisi to "review the recommendation [regarding the resolution of the grievance by Bryant] and render the final decision." (SUMF ¶¶ 43-44). The definitions of "review" on Merriam-Webster's online dictionary include "to examine or study again" and "to go over or examine critically or deliberately." (App. B: http://www.merriam-webster.com/dictionary/review; *see also* attached at App. B, similar definitions of "review" at

http: http://dictionary.cambridge.org/us/dictionary/english/review; http://en.oxforddictionaries.com/definition/us/review). "Review" includes more than reading a conclusory statement; it also includes examining the investigation leading to the conclusion.

As part of their review of the recommendation of COO Bryant, Defendants Sughrue and Gisi acknowledged their obligation to examine the investigation leading to the recommendation. (*See* SUMF ¶ 54). In their letter denying Shirley's appeal and upholding her termination, Defendants Sughrue and Gisi stated in part, "Your termination is appropriate based on the investigation and conclusion regarding gross misconduct." (*Id.* (emphasis added)).

Phase two of the Fair Treatment/Grievance Procedure does not say that Defendants Sughrue and Gisi will rubber stamp the recommendation of the COO or simply "view" the recommendation. To conclude that a "review" does not also include an examination of the investigation leading to the recommendation would be to render phase two of Step Three meaningless and the involvement of Defendants Sughrue (RHN's CEO) and Gisi (RH's Vice President of Human Resources) unnecessary and of no effect. Again, however, language is not to be interpreted "in a manner that renders a portion of the contract meaningless." *Tri-City Assocs., L.P.*, 2014 S.D. 23 at ¶ 11 (citation omitted). "Instead, [courts] interpret the contract to give a reasonable and effective meaning to all its terms." *Id.* (quotations and citations omitted); *see also In re Dissolution of Midnight Star Enters., L.P.*, 2006 S.D. 98 at ¶ 12 ("An interpretation which gives a reasonable and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable or of no effect.").

Defendants Sughrue and Gisi were required by phase two of Step Three of the Fair Treatment/Grievance Procedure to examine COO Bryant's recommendation and the investigation leading to it.

F. **Breach of Duty to "Review"**

The Sughrue/Gisi letter denying Shirley's grievance and upholding her termination stated in part that "Shirley's termination is appropriate based on the investigation and conclusion regarding gross misconduct." (SUMF ¶ 54). The language suggests that they examined both the conclusion and the investigation leading to the conclusion. However, when the curtain was pulled back during discovery in this litigation, it was revealed that this was not done.

Neither Sughrue nor Gisi knew what investigation, if any, Meade, Smith, or Bryant conducted in the previous steps of Shirley's grievance. (SUMF ¶¶ 47-52). Neither investigated the matter for himself. (SUMF ¶¶ 45-46). Prior to their denial letter, neither Sughrue nor Gisi asked Strong Edstrom or Ellenbecker what witnesses were allegedly present for the alleged slapping. (SUMF ¶ 55). None of the Defendants asked that of the accusers. (*Id.*). Unsurprisingly then, neither Sughrue nor Gisi knew the identity of those alleged by either Strong Edstrom or Ellenbecker to have been present for the alleged slapping. (SUMF ¶¶ 56-57). Defendant Sughrue did not even read the written allegations of the accusers before denying Shirley's grievance and upholding her termination. (SUMF ¶ 58).

Without knowing what others did in the previous steps of the grievance and without knowledge of the fundamental part of an investigation – identifying and interviewing witnesses alleged to be present – Defendants Sughrue and Gisi could not and did not conduct a review of the recommendation. The corporate defendants breached phase two of Step Three of the Fair Treatment/Grievance Procedure.

CONCLUSION

The corporate defendants contracted to follow a specific procedure after termination of employment if invoked by an employee. However, when Shirley invoked the procedure, the

corporate defendants breached their duties under the contract. Therefore, the Harveys respectfully request that the Court grant their motion for partial summary judgment on their breach of contract claim holding that the corporate defendants breached the following duties under the Fair Treatment/Grievance Procedure:

1. The duty to investigate at Step One;
2. The duty to investigate at Step Two;
3. The duty to meet with staff deemed appropriate at Step Two;
4. The duty to investigate at phase one of Step Three; and
5. The duty to review at phase two of Step Three.

Dated this 6th day of February, 2017.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: */s/ Gary D. Jensen*

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2017, I served copies of the **BRIEF IN SUPPORT OF HARVEYS' MOTION FOR PARTIAL SUMMARY JUDGMENT [BREACH OF CONTRACT]** upon each of the listed people by the following means:

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Gary D. Jensen

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT

SHIRLEY HARVEY and DON HARVEY,

Plaintiffs,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, AND KATHRYN L. SHOCKEY,

Defendants.

Civil Number 14-21

Volume II
Deposition of:

JOELLE MEADE

DATE: July 26, 2016, at 9:49 a.m.

PLACE: Bangs, McCullen, Butler, Foye & Simmons
333 West Boulevard, Suite 400
Rapid City, SD 57701

APPEARANCES:

FOR THE PLAINTIFFS: MR. GARY D. JENSEN
- and -
MR. BRETT ADAM POPPEN
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Rapid City, SD 57701

Also Present: Shirley & Don Harvey

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Do you remember how many awards Shirley was given for her care of residents there?

A **I don't remember exactly off the top of my head. If -- I don't -- I know for sure she once received the Caregiver of the Year award. I don't remember exactly, but I think that she may have possibly gotten it twice, but I don't recall for sure.**

Q And what is the Caregiver of the Year award? Tell me what your understanding of that was or is.

A **What it is, is each year there's -- when South Dakota has the Assisted Living Association conference every year, any facility can submit any employee who they feel, basically, you know, exceeds or goes above and beyond, you know, with the residents, the facility, you know, in their work.**

Q So it looks to me, when we look at these exhibits, under 4a, for example, that she was given that Caregiver of the Year award in 2003?

A **Yes.**

Q And, again, in 2007 for Region 1, according to Exhibit 4b?

A **Yes.**

Q And is it your understanding that somebody from this institution from Golden Ridge would have been the one to nominate her and then that there was some outside

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of Lead community, a committee or something that --

A **Yes.**

Q -- made a decision?

A **Yes. It would have had to have been someone from Golden Ridge that would have had to nominate her.**

Q Do you know how many times she was selected as Employee of the Year at Golden Ridge?

A **No.**

Q If we look at Exhibit 4c, it looks like that happened in 2002, perhaps among other years, is that fair?

A **Yes.**

Q If we keep looking at the exhibits, we have Exhibit 4d, which is a whole bunch, if you will, of Wow stickers? Do you see that?

A **Yes.**

Q What is a Wow sticker?

A **It was kind of like, basically, anyone, employees' family members, coworkers, even outside people, could -- they just filled it out, at that time they used stickers, and just wrote in for that staff member or whatever because they thought that they had done something good or, you know, something like that.**

Q Fair to say that Shirley got a whole lot of Wow stickers, right?

A **Yes.**

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Q Then are you aware of how many times a fellow employee nominated her for Employee of the Month?

A **No. I'm not aware of how many times.**

Q Do you know how many times she was selected as Employee of the Month?

A **No, I don't recall.**

Q But that happened, right? You knew that?

A **Yes.**

Q So as we get into April of 2012, you knew about Shirley's ten, eleven-year history of exemplary evaluations and performance, true?

A **Yes.**

Q You knew that she had been given Caregiver of the Year at least twice in South Dakota, correct?

A **Yes.**

Q You knew that she had been nominated and selected as Employee of the Month at this facility, right?

A **Yes.**

Q You knew that she had received a whole bunch of Wow stickers for her excellent performance?

A **Yes.**

Q And you -- as you've acknowledged, if somebody came in the door in April of 2012, you would have said, Here's a shining example of Shirley Harvey and how we want you to be. If you can meet her standards of

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performance, you're an excellent employee? All that -- you knew that was in your mind as of April of 2012?

A **Yes. For the most part.**

Q Contrasting that, we have Jessica Strong-Edstrom who, by April of 2012, had received a corrective action, as we've been through, on September 7th, 2011, a conference statement on October 25, 2011, a corrective action on November 9, 2011, a corrective action on December 28, 2012, a corrective action on January 24, 2012, right?

A **Yes.**

Q And if you were going to say to a staff person who came in and joined you in April of 2012, you would have held up Jessica Strong-Edstrom as an example of what you do not want an employee to be, correct?

A **Yes.**

Q For all the reasons identified in these corrective actions and conference statements, right?

A **Yes.**

Q She was terrible, right?

A **Yes. I mean, in certain things.**

Q So including her honesty? She wasn't honest, right?

A **I wouldn't say she wasn't honest about everything.**

Q She was not honest about more than a few things,

right?
A **Yes.**
Q Jessica was dishonest, right?
A **Yes.**
Q So then we get to Exhibit 11a, do you have that?
A **Yes.**
Q You've seen that before?
A **Yes.**
Q So that we keep the time frame in mind for whoever is going to read this transcript, we're now into the next month. We're now into April of 2012, after your evaluation that we've been through this morning, about a month before, correct?
A **Yes.**
Q And we have at odds, if you will here, Shirley Harvey, the shining example of what you want an employee to be, versus Jessica Strong-Edstrom and her history of almost monthly discipline, the example of exactly what you don't want your employee to be, right? That's who was involved here?
A **Yes.**
Q And do you recall that this conflict, if you will, was Shirley's disappointment, if you will, because, in her view, Jessica Strong-Edstrom had given priority to some batteries as opposed to patient

care. That's kind of what this is about, right?
A **Yes.**
Q And, of course, patient care should come first over batteries, right?
A **Yes. They don't involve anything to do with the resident care.**
Q How did this conflict come to you, your knowledge of it?
A **I don't recall for sure if one of them came right to me or if I had gotten a phone call about it. I don't recall for sure.**
Q So what did you do? I mean, what were you told? Just give me your best -- strike that. That's not very good. Let me start over.

Do you remember who told you about whatever this conflict was?
A **I don't recall who came to me first about it. I do recall that I spoke with, you know, both of them about the matter. And I don't recall who initiated the initial contact with me about it.**
Q Did you get something in writing, such as we have here at Exhibit 11a, and then we'll get to 11b? Or did somebody say something to you and you asked them to write it down? How did that work?
A **If I recall correctly, it was verbally brought to me.**

And then, if I recall correctly, which was typically what would happen is asked -- they're asked to document it in writing so that there's a record of it.
Q Okay. When did you involve Ms. Shockey in this conflict?
A **I don't recall for sure. It prob -- typically when I got a complaint or whatever the nature, if it was going to be something that was, you know, involving conference standing, meeting, something like that, then I would typically call Kathe initially, you know, to let her know of the situation and, you know, inform her about it and then we would go from there. But typically she was always contacted when the initial problem presented.**
Q So if you followed your standard protocol, if you will, you would have told her about this, basically, right after you learned about it?
A **For the most part, yes.**
Q So you then asked what Shirley and Ms. -- and Jessica to write out their observations?
A **Yes.**
Q So Exhibit 11a is what Shirley wrote?
A **Yes.**
Q So towards the end of this exhibit that Shirley

wrote, it's a one-page document, right?
A **Yes.**
Q And she signed it, right?
A **Yes.**
Q She wrote, quote, I'm so tired of your shit and so is everyone else here because you don't pull your fair share here. That's what she wrote that she had said to Jessica, right?
A **Yes.**
Q And she was accurate, right? Jessica was not pulling her share of the workload, as was documented in all these discipline actions, correct?
A **Yeah.**
Q And even though Jessica had been told early on after she got the first or second disciplinary action in the months before April, she was told if it happened again, she was going to be fired. It continued to happen and happen and happen and she wasn't fired, true?
A **Yes.**
Q So, for whatever reason, she was allowed to continue not pulling her weight all those months and being dishonest on certain things, correct?
A **Yes.**
Q Then we get to Exhibit 11b, that is Jessica's

two-page handwritten statement of her perspective of this battery versus patient care conflict in April of 2012, right?

A **Yes.**

Q So about halfway down this Exhibit 11b, Jessica writes, I turned and walked out of the kitchen and Shirley proceeded to talk through the kitchen window to me in front of four or five other residents saying repeatedly, quote, Everyone here is sick and tired of you and your shit. I'm going to have a long talk with Sherry Bea about you.

Do you see that?

A **Yes.**

Q So would it be fair to say, Ms. Meade, that certainly if not before, as of early April of 2012, there was more than a little conflict between Shirley and Jessica?

A **Yes.**

Q It was heated, intense conflict, correct?

A **Yes.**

Q Between the shining example of what you wanted an employee to be and the example of exactly what you don't want an employee to be, right?

A **Yes.**

Q Who has proven more than once she's dishonest on

things that matter, correct?

A **Yes.**

Q Exhibit 11c is a two-page document and this is typed, right?

A **Yes.**

Q Did you type this or did someone else type it?

A **I did not type it.**

Q This purports to type up a summary of a meeting that was held on this battery versus patient care conflict issue between Shirley and Jessica. It's talking about a meeting involving those two plus yourself and Kathe Shockey?

A **Yes.**

Q And so if Ms. Shockey testified that this would be her typed summary, you would probably agree with that?

A **Yes.**

Q Because she did that from time to time, right?

A **Yes.**

Q What do you remember about that meeting?

A **I remember it was -- I would say -- I mean, definitely tension-filled, you know, because of the heated nature and interaction between Shirley and Jessica and that. I remember that -- you know, I remember, you know, Jessica talking and Shirley**

talked as well and then, of course, as it states, then things were pointed out of what happened, you know. It was a tension-filled meeting. Just, you know, emotions, anger, whatever, were, you know, there because of the situation happening and stuff.

Q Intense, unresolved conflict between Jessica and Shirley?

A **Yes.**

Q What are some of the things you remember Jessica saying, if you remember any of them?

A **I didn't remember exactly what was said, off the top of my head. I was just going through this here. I do remember Jessica saying how she felt like she couldn't talk to Shirley. That Shirley was always mad at her or wouldn't help her or wouldn't answer or, you know, whatever the nature may be. She -- she -- like she stated, like she felt -- she wasn't comfortable working with her because of just the nature of the interaction between them.**

Q At the end of day or the meeting, so to speak, I mean, it was made clear to Jessica that patient care certainly has priority over batteries, right?

A **Yes.**

Q So added to all of the discipline that Jessica had already been subjected to that you and I had talked

about, now we have this battery incident where she's got her priorities mixed up, right?

A **Yes. If I recall -- I -- I don't recall what the batteries were exactly for. The only time they would have been important is if it had been for an oxygen machine or something like that. That would be important, obviously, if they needed their oxygen.**

Q Did you consider firing Jessica now because, in addition all of the discipline actions, they've got this battery priority mixup?

A **No. I don't recall that I thought about it initially then, no.**

Q Did you and Ms. Shockey talk about that, firing Jessica?

A **Not that I recall.**

Q Does -- strike that.

Was it your observation that by the end of this meeting on April 6th, 2012, where there was already intense, unrelenting, unresolved conflict between Jessica and Shirley, that that conflict got even worse by the end of the meeting as opposed to better?

A **Yes, probably. I don't feel it was any better, for sure. As far as worse? Yes, probably. A little.**

Q Do you remember that the batteries in this deal were for a radio, nothing to do with somebody's health

Work History/Summary/Shirley Harvey

10-07-1996 Hired for Home Health Homemaker at Northern Hills General Hospital
Temporary position with commitment to complete CNA course.

02-25-1997 Terminated....failure to meet extension of timeframe to complete CNA course.

03-07-2001 Hired as Personal Care Assistant at Golden Ridge
Fulltime position
Supervisor: Jane Thoring

06-27-2001 Probationary evaluation/released from probation
Comments: model employee; residents sing her praises; is confident in her responsibilities; very knowledgeable about geriatric care

03-07-2002 Annual evaluation/supervisor Jane Thoring
Score 98/100
Comments: excellent asset to the team; residents sing praises, feel safe in her care, feel confident in her; other staff enjoy working with her, gives her best at work; flexible with shifts; very competent; excellent job administering meds; she is terrific; goes above and beyond her duties with meals and resident needs; makes sure everything is perfect and residents are taken care of after meals; excellent job with documentation and medication administration; very safety conscious; excellent at following all cleaning schedules; comes to all staff meetings.
Goals: become more comfortable with training new staff

03-07-2003 Annual evaluation/supervisor Miranda Hudelson
Score 99/100
Comments: a great team player and works hard; takes pride in doing a good job; a valuable asset; wonderful job with on-call staffing; residents love having her; received well deserved employee of the year award; gives quality care; rarely has medication variances
Goals: seek out additional educational opportunities.

03-07-2004 Annual evaluation/supervisor Miranda Hudelson
Score 94/100
Comments: Wonderful worker; does a great job; willing to work extra; residents enjoy her; appreciated excellent job with medications; very compassionate and helpful to residents; charts when needed; does not always make resident physician visit paperwork; great job cleaning; ensures resident safety at all times; willing to work when

needed; does need to work harder on team work with some fellow employees; attendance is flawless; attends meetings
Goal: 1) become more of a team member with all of her co-workers
2) continue to give great care and do wonderful job with medications

03-07-2005 Annual evaluation/supervisor Miranda Hudelson
Score 98/100
Comments: great job with alerting changes with residents; assist residents with bathing etc and takes extra time with each person; ensures all resident needs are met at meal time; ensures visit forms are done for her shift and others-great job; charts on residents as issues come up; takes on-call staffing; attendance is great; attends monthly meetings.
Goals: 1) make it point to get along with everyone on staff. 2) not listen to rumors

03-07-2006 Annual evaluation/supervisor Miranda Hudelson
Score 95/100
Comments: strives to provide the best possible care to residents and their families; works as a team player and helps co-workers anyway she can; provides ideas to help change processes; takes on change with positive attitude; does a wonderful job.
Goals: 1) maintain current EMT license; 2) present in-service topic at staff meeting; attend minimum of 3 PI committee meetings; approach issues with other in confidential manner; complete year with zero medication errors; chart more on residents.

03-07-2007 Annual evaluation/supervisor Miranda Hudelson
Score: 91.125/100
Comments: maintains EMT status; goes out of her way to ensure residents are taken care of; delivers great customer service; works well with coworkers; provides solutions to problems and shares; supports change-at times not positively; has great communication with residents and family; delivers excellent resident care; follows policy and procedure; notifies proper person of safety issues.
Goals: 1) maintain a positive attitude when confronted with negativity; present in-service at staff meeting; attend in-service on change and transition; attend in-service on communication skills; maintain zero medication errors.

09-04-2007 applied for transfer to Director of Golden Ridge position/not approved

10-12-2007 Received "Caregiver of the Year" for Region I from Assisted Living Association of South Dakota. (newspaper article states this is her second award. First was in 2003. We do not have record of that one)

03-07-2008 Annual evaluation/supervisor Terri Hamil
Score: 81/100

Comments: treats people she comes in contact with in professional manner and respects everyone's rights, property and privacy; enforces facility mission daily; informs director with necessary information; gives wonderful care to each resident according to the care plan.
Goals: working on more conservative manner of voicing concerns and not take happenings so personally.

03-07-2009 Annual evaluation/supervisor Terri Hamil
Score: 78/100
Comments: when unclear about something will ask questions; will talk to supervisor until Shirley understands and supports the decision; will keep supervisor informed on important information; gives excellent care to all residents; goes out of her way to make sure they are safe.
Goals: none

03-07-2010 Annual evaluation/supervisor Terri Hamil
Score 80/100
Comments: will ask questions when trying to understand decisions; offers suggestions when has an idea for change; will provide supervisor with information she feels is necessary; very aware of need for safe and secure environment for the residents; has always given excellent care to the residents; helped Golden Ridge maintain clean and safe home for all resident; would like to see her relationship with new workers improve; needs to be more patient with the new and younger employees.
Goals: none

03-11-2011 Annual evaluation/supervisor Joelle Mead
Score 89/100
Comments: strives to take the best care possible of the residents; is flexible and dependable; always strives to meet the needs of the residents and their family; supports change and tries to help team members with it; communicates well with residents and families; keep director informed of issues; monitors residents, always reports any changes; flexible with schedule and attends meetings.
Goals: none

03-07-2012 Annual evaluation/supervisor Joelle Meade
Score 88/100
Goes above and beyond for residents and families; maintains confidentiality; always willing to help find improvements; supportive of change and encourages others about change; keeps director informed in timely manner; ensures resident safety and provides appropriate care needed.

22-46-9. Mandatory reporting of abuse, neglect, or exploitation--Violation as misdemeanor. Any:

(1) Physician, dentist, doctor of osteopathy, chiropractor, optometrist, podiatrist, religious healing practitioner, hospital intern or resident, nurse, paramedic, emergency medical technician, social worker, or any health care professional;

(2) Psychologist, licensed mental health professional, or counselor engaged in professional counseling; or

(3) State, county, or municipal criminal justice employee or law enforcement officer;

who knows, or has reasonable cause to suspect, that an elder or adult with a disability has been or is being abused, neglected, or exploited, shall, within twenty-four hours, report such knowledge or suspicion orally or in writing to the state's attorney of the county in which the elder or adult with a disability resides or is present, to the Department of Social Services, or to a law enforcement officer. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

A person described in this section is not required to report the abuse, neglect, or exploitation of an elder or adult with a disability if the person knows that another person has already reported to a proper agency the same abuse, neglect, or exploitation that would have been the basis of the person's own report.

Source: SL 2011, ch 119, § 1; SL 2016, ch 120, § 22; SL 2016, ch 128, § 1.

Printer Friendly

22-46-10. Mandatory reporting of abuse or neglect by staff and by person in charge of residential facility or entity providing services to elderly or disabled adult--Violation as misdemeanor. Any staff member of a nursing facility, assisted living facility, adult day care center, or community support provider, or any residential care giver, individual providing homemaker services, victim advocate, or hospital personnel engaged in the admission, examination, care, or treatment of elderly or disabled adults who knows, or has reasonable cause to suspect, that an elderly or disabled adult has been or is being abused or neglected, shall, within twenty-four hours, notify the person in charge of the institution where the elderly or disabled adult resides or is present, or the person in charge of the entity providing the service to the elderly or disabled adult, of the suspected abuse or neglect. The person in charge shall report the information in accordance with the provisions of § 22-46-9. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

Source: SL 2011, ch 119, § 2.

Chapter 22-46

20-11-1. Obligation to refrain from defamation. Every person is obligated to refrain from infringing upon the right of others not to be defamed.

Source: SDC 1939, § 47.0501.

Chapter 20-11

Printer Friendly

20-11-4. Slander defined. Slander is a false and unprivileged publication, other than libel, which:

(1) Charges any person with crime, or with having been indicted, convicted, or punished for crime;

(2) Imputes to him the present existence of an infectious, contagious, or loathsome disease;

(3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;

(4) Imputes to him impotence or want of chastity; or

(5) By natural consequence, causes actual damage.

Source: CivC 1877, § 30; CL 1887, § 2529; RCivC 1903, § 30; RC 1919, § 98; SDC 1939, § 47.0502.

Chapter 20-11

Printer Friendly

20-11-5. Privileged communications--Malice not inferred from publication. A privileged communication is one made:

(1) In the proper discharge of an official duty;

(2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law;

(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;

(4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

In the cases provided for in subdivisions (3) and (4) of this section, malice is not inferred from the communication or publication.

Source: CivC 1877, § 31; CL 1887, § 2530; RCivC 1903, § 31; RC 1919, § 99; SDC 1939, § 47.0503.

Chapter 20-11

Printer Friendly

22-46-2. Abuse or neglect of elder or adult with a disability--Felony or misdemeanor. Any person who physically abuses or neglects an elder or adult with a disability in a manner which does not constitute aggravated assault is guilty of a Class 6 felony.

Any person who emotionally or psychologically abuses an elder or adult with a disability is guilty of a Class 1 misdemeanor.

Source: SL 1986, ch 186, § 2; SL 1990, ch 171, § 2; SL 2005, ch 120, § 341; SL 2007, ch 147, § 3; SL 2016, ch 120, § 2.

Chapter 22-46

Printer Friendly

21-1-4.1. Discovery and trial of exemplary damage claims. In any claim alleging punitive or exemplary damages, before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against.

Source: SL 1986, ch 161.

Chapter 21-1

Printer Friendly

34-12-13. Rules to protect patients' health and safety. The State Department of Health may promulgate rules, pursuant to chapter 1-26, which are necessary to protect the health and safety of patients cared for in licensed health care facilities. The regulations may be in regard to the following areas:

(1) Sanitary and safe conditions of the premises;
(2) Cleanliness of operation;
(3) Fire safety and construction;
(4) Physical equipment found necessary and in the public interest;
(5) Management and administration;
(6) Physician's services;
(7) Nursing and related care;
(8) Dietetic services;
(9) Medication control;
(10) Records;
(11) Diagnostic services;
(12) Hospital complementary services;
(13) Long-term care diversionary services;
(14) Patient safety and health;
(15) Residents' rights in nursing homes and assisted living centers.

Source: SL 1945, ch 108, § 6; SL 1953, ch 123, § 6; SDC Supp 1960, § 27.1206; SL 1980, ch 238, § 22; SL 1986, ch 278, § 8; SL 1991, ch 270, § 1; SL 1991, ch 272, § 2.

Chapter 34-12

Administrative Rules of South Dakota Currentness
Department of Health (Articles 44:06 to 44:80)
Article 44:70 Assisted Living Centers
Chapter 44:70:01 Rules of General Applicability

ARSD 44:70:01:07

44:70:01:07. Reports.

Each licensed facility shall submit to the department the pertinent data necessary to comply with the requirements of SDCL chapter 34-12 and this article.

Each facility shall report to the department within 48 hours of the event any death resulting from other than natural causes originating on facility property such as accidents, abuse, negligence, or suicide; any missing resident; and any allegations of abuse or neglect of any resident by any person.

Each facility shall report the results of the investigation within five working days after the event.

Each facility shall also report to the department as soon as possible any fire with structural damage or where injury or death occurs; any partial or complete evacuation of the facility resulting from natural disaster; or any loss of utilities, such as electricity, natural gas, telephone, emergency generator, fire alarm, sprinklers, and other critical equipment necessary for operation of the facility for more than 24 hours.

Each facility shall notify the department of any anticipated closure or discontinuation of service at least 30 days in advance of the effective date.

Credits

Source: 38 SDR 115, effective January 9, 2012.

General Authority: SDCL 34-12-13(14).

Law Implemented: SDCL 34-12-13(14).

Current through rules published in the South Dakota register dated May 30, 2017.

ARSD 44:70:01:07, SD ADC 44:70:01:07

End of Document

Administrative Rules of South Dakota Currentness
Department of Health (Articles 44:06 to 44:80)
Article 44:70 Assisted Living Centers
Chapter 44:70:05 Nursing and Related Care Services

ARSD 44:70:05:02

44:70:05:02. Resident care plans and programs.

The nursing service of a facility shall provide safe and effective care from the day of admission through the ongoing development and implementation of written care plans for each resident. The care plan shall address medical, physical, mental, and emotional needs of the resident. The facility shall establish and implement procedures for assessment and management of symptoms including pain.

Credits

Source: 38 SDR 115, effective January 9, 2012.

General Authority: SDCL 34-12-13(5) and (14).

Law Implemented: SDCL 34-12-13(5) and (14).

Cross-Reference: Record content, § 44:04:08:03.

Current through rules published in the South Dakota register dated May 30, 2017.

ARSD 44:70:05:02, SD ADC 44:70:05:02

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28200

SHIRLEY HARVEY and DON HARVEY,

Plaintiffs/Appellants,

vs.

REGIONAL HEALTH NETWORK, INC., REGIONAL HEALTH, INC., RAPID CITY REGIONAL HOSPITAL, INC., TIMOTHY SUGHRUE, DALE GISI, SHERRY BEA SMITH, and KATHRYN SHOCKEY,

Defendants/Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Jane Wipf Pfeifle
Circuit Court Judge

Notice of Appeal filed March 29, 2017

APPELLEES' BRIEF

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Preliminary Statement

In this Brief, Appellant Shirley Harvey is referenced as "Harvey" or "Shirley." Appellant Don Harvey is referenced as "Don." Appellee Regional Health Network is referenced as "Regional Network," Regional Health, Inc. as "Regional Health," Rapid City Regional Hospital as "Hospital," and the remaining Defendants by first or last name. Collectively, they will be referred to as "Defendants," as that is the simplest manner of referencing the group.

Harveys' Appendix will be identified as "Harvey App." and Appellees' Appendix will be identified as "Regional App." The Motions Hearing Transcript will be cited as "HT." The Settled Record will be cited as "SR" followed by the appropriate page number.

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Jurisdictional Statement

On March 20, 2017, the circuit court, the Honorable Jane Wipf Pfeifle, entered its Order Granting Defendants' Motion for Summary Judgment and Judgment. SR 5925, 5927. Notice of Entry was served on March 24, 2017. SR 5953. Harveys filed a Notice of Appeal on March 29, 2017. SR 5960. This Court has jurisdiction pursuant to SDCL §15-26A-3(1) & (2).

Statement of Legal Issues

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' SLANDER CLAIM?

The circuit court found the challenged statements were absolutely or qualifiedly privileged, and there was no evidence of malice to overcome the latter.

Most Relevant Authority:

Petersen v. Dacy, 550 N.W.2d 91 (S.D. 1996)
Parr v. Warren-Lamb Lumber Co., 236 N.W. 291 (S.D. 1931)
Peterson v. City of Mitchell, 499 N.W.2d 911 (S.D. 1993)
SDCL §20-11-5

II. WHETHER THE CIRCUIT COURT ERRED IN REJECTING PLAINTIFFS' RESPONDEAT SUPERIOR THEORY?

The circuit court granted summary judgment for the defendants on all claims, rejecting Harveys' theory of vicarious liability.

Most Relevant Authority:

Bernie v. Catholic Diocese of Sioux Falls, 2012 SD 63, 821 N.W.2d 232
Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275 (S.D. 1986)

III. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' IIED CLAIM?

The circuit court held that the challenged conduct was not extreme and outrageous as a matter of law.

Most Relevant Authority:

Citibank (S.D.) N.A. v. Hauff, 2003 SD 99, 668 N.W.2d 528
Fix v. First State Bank of Roscoe, 2011 SD 80, 807 N.W.2d 612
Richardson v. East River Elec. Power Co-op, Inc., 531 N.W.2d 23 (S.D. 1995)
Moysis v. DTG Datanet, 278 F.3d 819 (8th Cir. 2002)

IV. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' MALICIOUS PROSECUTION CLAIM?

The circuit court held that the Defendants did not commence the criminal proceeding against Shirley Harvey.

Most Relevant Authority:

Miessner v. All Dakota Ins. Associates, Inc., 515 N.W.2d 198 (S.D. 1994)
Danielson v. Hess, 2011 SD 82, 807 N.W.2d 113

V. WHETHER THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR PUNITIVE DAMAGE DISCOVERY?

The circuit court denied Harvey's request to proceed with a punitive damages claim.

Most Relevant Authority:

Dahl v. Sittner, 474 N.W.2d 897 (S.D. 1991)
SDCL §21-1-4.1

VI. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' WRONGFUL TERMINATION AND NIED CLAIMS?

The circuit court held that Harvey was an employee at-will, was not a whistleblower, and that Regional Network did not owe her any duty.

Most Relevant Authority:

Dahl v. Combined Ins. Co., 2001 SD 12, 621 N.W.2d 163
Blaha v. Stuard, 2002 SD 19, 640 N.W.2d 85
Janis v. Nash Finch Co., 2010 SD 27, 780 N.W.2d 497
SDCL §60-4-4

VII. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' BREACH OF CONTRACT CLAIM?

The circuit court found that the Fair Treatment/Grievance Procedure was not a contract.

Most Relevant Authority:

Butterfield v. Citibank of S.D., N.A., 437 N.W.2d 857 (S.D. 1989)

Statement of the Case

This is an appeal from the Seventh Judicial Circuit, Pennington County, Judge Jane Wipf Pfeifle. In December of 2013, Harveys

instituted this action, alleging various contract and tort claims[1] arising out of Shirley's termination of employment. After several years of discovery, the Defendants moved for summary judgment. At a motions hearing on March 15, 2017, the circuit court granted Defendants' motion as to all claims.

Statement of the Facts

A. The Named Defendants.

Regional Health is the parent of Regional Network and the Hospital.[2] Regional Network is a single-member, not-for-profit entity that operates acute care facilities outside of Rapid City, as well as several senior care facilities. During the time in question, it operated Golden Ridge Regional Senior Care in Lead, South Dakota. SR 4802, 4901-4903. Joelle Meade was the Director of Golden Ridge. Harvey worked at Golden Ridge as a Personal Care Attendant (PCA), assisting residents with daily needs (bathing, dressing, eating, etc.) and administering medications. SR 2.

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[1] Shirley brought claims of breach of contract, slander, wrongful termination, malicious prosecution, IIED, and NIED. Don brought a consortium claim. Both sought punitive damages. *See* SR 2-24.

[2] The Hospital's only relation to Regional Network is that they share the same parent. Regional App. 7.

During the relevant time period, Tim Sughrue was the CEO of Regional Network. SR 5046-47. Dale Gisi was the Vice President of Human Resources for Regional Health. SR 5061-62. Sherry Bea Smith was the CEO of Lead-Deadwood Regional Hospital and Golden Ridge. SR 5091. Kathe Shockey was the Human Resources Director at Lead-Deadwood Regional Hospital and Golden Ridge. SR 5110. Harvey admits she was not employed by any of these individuals or the Hospital. SR 5513-15.

B. Edstrom and Ellenbecker.

Joelle Ellenbecker, a PCA, was a good worker, and recipient of the 2012 Caregiver of the Year Award. SR 4986, 4989, and 5149. Harvey describes Ellenbecker as exhibiting "coolness" towards her. SR 5017-5019. Harvey did not like that Ellenbecker wore long pants and had a nose piercing. *Id.*

Jessica Strong Edstrom, another PCA, struggled during her employment. She was subject to several disciplinary actions in her first year. A December 8, 2011 note in her file said Edstrom "was telling co-workers that another employee is abusing a resident instead of bringing it to supervisor[.]" SR 4818-19. No one recalls that incident specifically. SR 5150-53, 5111-13.

In terms of work performance, on a scale of 1-10, Harvey rates Edstrom as a 2, Ellenbecker as a 5, and herself as a 9-10. SR 5020.

C. Harvey's difficulties with co-workers.

Harvey began working for Golden Ridge in March of 2001. SR 4814.[3] Her performance evaluations note good technical skills, but substantial difficulty interacting with peers. SR 4814-16. At the time of her termination, Harvey had two recent disciplinary actions on file related to her inability to work with others, and was in the final stage of the corrective action process. Regional App. 31-32, SR 787-89.

Harvey reports that "[Meade] said Shirley was a shining example of what you want employees to be." *Appellants' Brief* at 5. That is a bit disingenuous. It was actually counsel who used those words in Meade's deposition.[4] SR 2335.

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[3] Harvey has no claim against the Hospital. SR 5748, 5041. In the proceedings below, her only "claim" against Regional Health is the naked allegation that, as parent of Regional Network, it is liable to her. She has not alleged, nor proven, any facts necessary to pierce Regional Network's corporate veil. *See Brevet Intern., Inc. v. Great Plains Luggage Co.*, 2000 SD 5, ¶26, 604 N.W.2d 268, 274.

[4] Harveys' briefing to this Court, and in the proceedings below, contains many such discrepancies and "exaggerations," which the circuit court recognized. *See*, *e.g.*, HT at 50:23-51:5, 46:10-24, 47:23-48:9, 49:2-50:1, 50:25-51:15, 62:6-25.

Harvey had difficulty was Edstrom. Harvey described their relationship as "bumpy," and she found Edstrom "irritating" because she tried to diagnose resident's ailments. SR 5009. Harvey did not like that Edstrom had a rough demeanor, took several breaks, drank energy drinks, smoked, brought her son to work, wore baggy pants, and didn't pull her weight at work. SR 5010-11.

In April 2012, Harvey and Edstrom had a dispute when Harvey asked Edstrom to help a resident who had requested assistance. SR 4871-4884. Edstrom responded, "I have to get batteries for [a resident] first and then I will." *Id.* They subsequently argued in the kitchen, and Harvey said, "I'm so sick of your shit and so is everyone else around here!" SR 4871-4872. Meade and Shockey met with both workers about they addressed the situation. Meade "reminded both of them that they were equally at fault, and Shockey "pointed out we are always back in Joelle's office discussing the same issues with Shirley's communication style." AR 4874. At some point, Edstrom stated she was afraid to "address anything with Shirley" and Harvey "laugh[ed]" and made "light of the issue." *Id.* Shockey told Harvey she was being inappropriate. *Id.* Harvey responded by slouching and sitting "with her

leg draped over the arm of the wing chair." *Id.* Shockey scolded Harvey for acting unprofessionally. *Id.*

Thereafter, Harvey filed a grievance against Shockey, claiming she had "humiliated and degraded" Harvey in the meeting. SR 4876. But the grievance policy only applies to the imposition of discipline or the administration of benefits; Harvey was notified her grievance would not be processed, but that she could issue a complaint against Shockey. SR 4824, 4879. Meade offered to speak with Rita Stacey (Director of Patient Services) and Shockey regarding Harvey's concerns, but Harvey declined. SR 4877.

Sometime in the spring of 2012, Don and Shirley met with Meade and Shockey to complain about several employees' tattoos, piercings, and baggy pants. SR 8-9. Harvey attempts to characterize this as advocating for residents, but she was clearly personally irritated with the tattoos and piercings. SR 5010, 5013-5017. Golden Ridge subsequently enforced a stricter dress code, requiring employees to cover up tattoos and piercings. Harvey claims this made Ellenbecker and Edstrom angry.

Harvey reports "heated, intense" conflict with Edstrom. *Appellants' Brief* at 5. This is yet another attempt to ascribe counsel's

inflammatory language to a witness. SR 2344-45. The assertion is belied by Harvey's own testimony, wherein she described her relationship with Edstrom as merely "bumpy." SR 5009-5017. Harvey's efforts to paint a version of facts better than, and contrary to, her own testimony is plainly prohibited. *Swee v. Myrl & Roy's Paving, Inc.*, 283 N.W.2d 570, 572 (S.D. 1979). *See also* HT at 48:24-49:22.

D. The Employee Handbook.

On September 28, 2010, Harvey signed a Receipt of Employee Handbook Acknowledgement and Consent, which provided, in part:

> I understand nothing in the Employee Handbook in any way creates an express or implied contract of employment between Regional Health and myself[.]
>
> **Employment at Will**
>
> I understand and agree my employment is terminable-at-will, so that both Regional Health and I remain free to choose to end our work relationship at any time for any lawful reason or no reason. Similarly, no Regional Health official has the authority to enter into an oral employment contract, and only the President of Regional Health can enter into a written employment contract.

Regional App. 1.

The Handbook describes general employment conditions and discusses a number of policies and procedures. It states on page 4 (bold in original):

> This handbook and other Regional Health publications only provide general descriptions and are not to be regarded as a promise to provide specific terms and conditions of employment.
>
> **This handbook is not a contract of employment.**
>
> **...**
>
> **Nothing contained in this employee handbook should be construed as a guarantee of continued employment.**

Regional App. 5. Page 24 of the Handbook describes the "Fair Treatment/Grievance Procedure" and references Policy RH HR-8371-601. Regional App. 6.

E. The Grievance Procedure.

The Grievance Proecedure allows employees to appeal disciplinary decisions. Regional App. 8.[5] It specifically references other policies, including the termination and progressive discipline policies. Regional App. 8.

The 3-step grievance process for Regional Network employees such as Harvey is outlined in Paragraph J. Regional App. 10. Gisi, an author of the policy, testified that the process was designed for employees to present information they believe had been overlooked,

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[5] The policy was adopted in September 1998, and revised over the years. SR 4824. The 2008 version was in effect when Harvey grieved her termination. *Id.*

and to give leadership an opportunity to step in if something was missed, or if management had acted contrary to existing policies and practices. SR 5059. Employees were encouraged to utilize the grievance process. *Id.*

F. Reports of abuse.

On June 1, 2012, Meade received verbal reports of resident abuse by Harvey and another PCA, Melody Helsing. SR 679-80, 4894-95, 4897-98, 5114-5117. One report was from Edstrom, who stated that on May 30, 2012, Harvey told a resident named Christine Lawler[6] to "shut up" and slapped her in the mouth. Regional App. 18-19. Edstrom also reported that on the morning of June 1, 2012, Harvey isolated Christine as punishment for using bad language. *Id.* Finally, Edstrom reported that during dinnertime on June 1, Harvey snapped a sandwich from Christine, threw it on the plate, and took her to her room, again as punishment for bad behavior; she identified Ellenbecker as a witness to this event. *Id.*

Meade notified Shockey and Stacey of the allegations, and Shockey notified Smith and Gisi. SR 5128-5131, 5114-5117. Shockey

[6] Christine was a resident with dementia who was quite difficult to work with, and who frequently swore at the PCAs, calling them "slut," "asshole," "bitch," etc. SR 570-71.

asked Meade to obtain written statements from witnesses by Monday, June 4. SR 5117-5119. Meade asked other employees if they had seen Shirley mistreat any residents. SR 5132-35, 5325-26. If an employee witnessed something inappropriate, Meade had them write it down. SR 5136-37. Ellenbecker corroborated the June 1 dinnertime incident, and identified other instances of slapping and seclusion. Regional App. 20-21.

Shockey and Meade interviewed the witnesses. Regional App. 22-27, SR 4846-51, 4868-70, 5121, 5138-5139, 5344. They met with Harvey on June 6, during her first scheduled shift since the allegations. SR 628-30, 780-83, 4974-76, 5345-46. Harvey admitted to "tapping" a resident, but denied "slapping." Regional App. 28-30. She also admitted sending the resident to her room because she was using bad language. *Id.* Meade and Shockey were concerned about Harvey's admissions to such inappropriate behavior. *Id.* *See also* SR 371-73; 4850-52. After the meeting, Harvey was placed on administrative suspension. SR 5022-24.

Meade was inclined to believe the allegations because she had recently witnessed Harvey becoming increasingly frustrated and short with Christine. SR 5126-28, 5145. Meade and Shockey focused on

whether Regional Network could risk keeping her as an employee. SR 4870. They decided they could not, and Harvey was terminated on June 8. SR 471-72, 4831, 5141-42, 5144-45. On Tuesday, June 5, Meade notified the Department of Health of the allegations of abuse, as required by ARSD 44:70:01:07. Regional App. 38.

G. No "Exonerating" Witnesses.

Harvey repeatedly claims Heidi Covell and Karin Tyler would have exonerated her. Not true. According to Meade, when she spoke with these ladies, she asked whether they had ever seen Harvey treat a resident inappropriately. SR 5134-37. They said they hadn't. *Id.* *See* SR 5157 (Covell did not see a slap, as she was around the corner from where it happened); 5441 (Meade did not ask Tyler if she'd seen Shirley slap anyone).

Harvey spins these witness' statements into a total exoneration, but that is not a reasonable inference to draw from their testimony. The witnesses did not say, "We were there and it didn't happen." Instead, they simply have not seen Harvey mistreat a resident.

H. Harvey's grievance.

Harvey grieved her termination, stating she wanted her "name cleared." SR 4832-33. At Step 1, Meade relied upon her prior investigation to uphold the termination. SR 5147-48. After all, it had only been a few weeks since her investigation, and Harvey presented no new facts in her grievance. SR 464-65.

Harvey appealed to Step 2, professing innocence and describing an incident where she attempted to visit Golden Ridge but was escorted out. SR 4834-37. Smith handled Step 2 and met with Harvey, Meade, Shockey, Stacey, and possibly Tyler to discuss the issues. SR 5352-54, 5357-61. She recalls Harvey admitted to striking a resident's hand. SR 5356. Smith was not "taking part of a trial. [She] was reviewing the situation, the process, the documentation, and the incident," and she upheld the termination. SR 5316, 5362-63.

Harvey appealed to Step 3, and claimed that several doctors, lawyers, and other individuals would stand up for her. She also commented that the witnesses against her smoked while pregnant, take long breaks, and play games on the computer. SR 4838-42.

Glenn Bryant handled the first part of Step 3.[7] SR 5372. Bryant had many discussions with Shockey and Smith, including discussions about what Meade's investigation had revealed. SR 5373-76, 5387-90. It was not his standard practice to examine personnel files, or do other things Harvey wishes he would have:

> I -- I don't delve into the background of the people involved. I expect that the other people that I rely on do their job. And if the person filing the grievance has other things they want me to be aware of, you have to have a basis for grieving, for appealing. You know that. When you appeal something, you've got to have a basis for an appeal. I never saw any basis of an appeal from Ms. Harvey other than she was terminated and she wanted to go to the next step.

SR 5368-69, 5377, 5383-85. Bryant "found no reason to overturn" the termination and recommended it be upheld. SR 5381. Thereafter, Gisi and Sughrue handled the latter part of Step 3.

Gisi was familiar with the issues, as he had been kept apprised by Shockey and Smith prior to the termination; specifically, he had had multiple conversations with Shockey, Smith, and Meade and reviewed Shockey's investigative notes and personnel abstracts regarding Harvey, Edstrom, and Ellenbecker. SR 5393-5404, 5408-09. Gisi understood Harvey had admitted to inappropriate conduct, and he was aware of

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[7] Bryant is not a Defendant in this lawsuit.

"conflict" between Harvey and Edstrom because Shockey notified him of it. Regional App. 31-32. *See also* SR 5416-21. Gisi believed the termination was supported by Harvey's admissions, the corroborating witness statements, and the fact that isolation/removal was not a part of Christine's plan of care. SR 5407-09, 5415-16, 5422-25.

Sughrue also relied on information that had been provided to him since the allegations came forward, in his several discussions with Bryant, Smith, Gisi, and the legal department. SR 3110-17, 3130. Sughrue's role "was to determine whether I felt that, indeed, there was adequate reason to either uphold or not uphold" the termination. The written allegations and his reliance upon his subordinates played a critical role in his decision to uphold the termination. SR 3123, 3128, 3179-80. In Sughrue's mind, "the potential risk to the patients was so great that it's a very, very serious matter and not a risk that candidly a prudent person would take " – that is, if we are unsure about an employee's threat to patients, we do not keep that employee. SR 5429.

I. Unemployment hearing.

Golden Ridge denied Harvey's application for unemployment because she had been terminated for employment-related misconduct. SR 5004-05. The Division denied her application, but Harvey appealed,

and the matter was heard by an ALJ. *Id.* *See also* SR 516. At the hearing, Edstrom and Ellenbecker testified. *See* SR 544-876 (unemployment hearing transcript). The ALJ reversed and found Harvey eligible for benefits. The circuit court upheld the ALJ's decision.

J. The criminal prosecution.

No one from Golden Ridge or Regional Health notified law enforcement; instead, the notice came from the Department of Health in August of 2012. *See* SR 5520.

The Department of Health notified Lawrence County State's Attorney John Fitzgerald of the allegations of abuse. SR 4949, 5520. Fitzgerald directed the Lead Police Department to investigate. Regional App. 37. Officer Jeremiah Fredericksen investigated the matter and interviewed Ellenbecker, Edstrom, Nelson, Harvey, and Meade. Regional App. 33-36. He concluded:

> The actions as described by the witnesses of Shirley Harvey's actions *I see as improper but not abusive in nature*. It is my opinion that the witnesses *watched the behavior of Harvey* and only once it became known that Helsing and Harvey made comments concerning the termination of "the girls" did they in fact report Elder Abuse. . . . I believe in the case of Shirley Harvey, no further action be taken.

Regional App. 35.

Despite Fredericksen's recommendation, Fitzgerald submitted the matter to a grand jury, who heard testimony from Fredericksen, Ellenbecker, Edstrom, Nelson, and Jim Lawler (victim's husband). Regional App. 41. The grand jury indicted Harvey on a charge of elder abuse, a Class 6 felony. *Id.*

At the criminal trial, the State called Lawler, Fredricksen, Edstrom, Ellenbecker, and Shockey to testify. SR 186-404. At the close of the State's case, Harvey moved for a judgment of acquittal. The court granted the motion, finding the State had not presented evidence to prove injury. SR 403 ("the State has failed to establish any injury at all").

Standard of Review

This Court will affirm a grant of summary judgment if there are no genuine issues of material fact, and "the legal questions have been correctly decided." *Schwaiger v. Avera Queen of Peace Health Services*, 2006 SD 44, ¶7, 714 N.W.2d 874, 877. The non-moving party "must point to specific facts which establish a genuine, material issue for trial." *Id.* "Summary judgment will be affirmed if there exists any basis which would support the trial court's ruling." *Id.*

Argument

I. THE CIRCUIT COURT CORRECTLY FOUND NO EVIDENCE OF MALICE, THUS DEFEATING HARVEY'S SLANDER CLAIM.[8]

Slander is a false and unprivileged publication, other than libel,[9] which:

> (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> (2) Imputes to him the present existence of an infectious, contagious, or loathsome disease;
>
> (3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
>
> (4) Imputes to him impotence or want of chastity; or
>
> (5) By natural consequence, causes actual damage.

SDCL §20-11-4.

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[8] Harvey concedes that any statements in the unemployment proceeding are absolutely privileged under the he official proceedings privilege. *Flugge v. Wagner*, 532 N.W.2d 419, 421 (S.D. 1995). *See Appellants' Brief* at 17.

[9] Libel refers to statements made by "writing, printing, picture, effigy, or other fixed representation to the eye[.]" SDCL §20-11-3. Harvey did not bring a claim for libel, but a majority of the allegedly "slanderous" statements were written communications. This alone is a sufficient basis to affirm summary judgment as to all written communications.

Applicable statutory privileges are set forth in SDCL §20-11-5, and apply to statements made:

> (2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law ["official proceedings privilege"];
>
> ...
>
> (3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information ["common interest privilege"][.]

Finally, statutory immunity applies to those who, in good faith, make mandatory reports of elder abuse[10] to the Department of Health, or who otherwise cooperate with the Department in connection with such an investigation. SDCL §34-12-51. In this context, "good faith" means "without actual malice." *See Dobson v. Harris*, 530 S.E.2d 829, 834 (N.C. 2000).

[10] Golden Ridge was legally required to report "any allegation of abuse or neglect of any patient or resident by any person" to the South Dakota Department of Health. ARSD §44:70:01:07. The failure to make a required report is a crime. SDCL §§22-46-9, 22-46-10.

A. Communications made within the Regional system, to law enforcement, or to the Lawlers, are qualifiedly privileged.

There is a qualified privilege for communications made under a common interest. SDCL § 20-11-5(3). The privilege attaches to communications between people "having a common interest in a particular matter[, and who] correctly or reasonably believe that there is information that another sharing the common interest is entitled to know." *Pawlovich v. Linke*, 2004 SD 109, ¶9, 688 N.W.2d 218, 224. Only a specific showing of actual malice can defeat the privilege; malice may not be presumed or inferred from the communication. *Id*. at ¶21, 688 N.W.2d at 224; SDCL §20-11-5.

This Court has recognized several situations where a "common interest" exists, especially in the employment setting. *See Parr v. Warren-Lamb Lumber Co*., 236 N.W. 291 (S.D. 1931); *Petersen v. Dacy*, 550 N.W.2d 91 (S.D. 1996); *Blote v. First Federal Sav. And Loan Ass'n of Rapid City,* 422 N.W.2d 834 (S.D. 1988). *See also Uken v. Sloat*, 296 N.W.2d 540 (S.D. 1980) (parents and school workers had common interest in superintendent's performance); *Tibke v. McDougall*, 479 N.W.2d 898 (S.D. 1992) (common interest among those in "horse community" regarding behavior of horse trainer); *Kieser v. Southeast Properties*, 1997 SD 87, 566 N.W.2d 833 (common interest

between landlord and law enforcement regarding suspected theft by former tenant); *Peterson v. City of Mitchell*, 499 N.W.2d 911 (S.D. 1993) (common interest between law enforcement and general public regarding investigation of crimes).

1. Statements within Regional.

The following challenged communications were made within the Regional system:

- Smith's letter denying Step 2 of Harvey's grievance. *See* SR 21, 468-469, 5025-26.
- Sughrue and Gisi's letter denying Step 3 of Harvey's grievance. SR 21, 496, 5026-27.
- The initial reports by Edstrom and Ellenbecker to Meade and Shockey accusing Harvey of abuse. If these allegations were false, they are not attributable to any of the Defendants. *See* Section II, *infra* (discussing *respondeat superior*). In any event, they were made internally.
- 11/18/13 Shockey email to Colleen DeRosier at Spearfish Regional Hospital (part of Regional Network), responding to an internal reference check. SR 4901.[11] *See also* Regional App. 7.

The persons above were obviously interested in the subject matter, and it would be "preposterous" to prevent employers from discussing personnel matters, particularly when the issue has been

[11] A former employee's file is available for review by any entity within the Regional Network system. SR 5786-87. Such information is not available to an outside entity requesting a reference check; in such a case, only dates of employment would have been provided. SR 5790.

presented specifically to them by the plaintiff for review. *Uken*, 296 N.W.2d at 543.

2. Communications to law enforcement.

The only law enforcement statements Harvey has identified as slanderous are the interviews, requested by law enforcement, and given in August of 2012 by Meade, Edstrom, and Ellenbecker to Fredericksen.

First, Edstrom and Ellenbecker's statements, if false, are not attributable to any Defendant. Section II, *infra*. Second, Fredericksen was interested in the reports of abuse, as is evinced by his undertaking a criminal investigation. Moreover, Meade was "requested by [Frederickson] to give the information." SDCL §20-11-5(3). These communications fall within the common interest privilege.

3. Communications to the Lawlers.

Harvey claims that certain communications made between August and October of 2012, by Sughrue, Smith, Meade, Stacey, and Paula McInerney-Hall (in-house counsel for Regional Health), to the Lawler family, were slanderous. *See* SR 5694-5697, 5703-5711. The Lawlers have an interest in hearing about reports that an assisted living

employee struck their wife and mother, so these statements fall within the common interest privilege.

B. Statements to the Department of Health are qualifiedly immune.

Harvey challenges several statements made to the Department of Health, which are detailed at Harvey App. 25-29:

- Meade's initial report on June 5, 2012 (¶62). SR 4505.
- Subsequent reports by Meade to the Department regarding the allegations, the internal investigation, and Harvey's subsequent termination (¶¶63-66, 70). The documents cited as evidence of these statements are not contained in the Record and thus she has waived these issues on appeal.[12]
- Smith's letter to the Department of September 24, 2012, and various components therein (¶¶76-83). SR 3954-4332.

Meade was legally required to make the initial report. A.R.S.D. 44:70:01:07. Golden Ridge and its employees were thereafter expected to communicate with the Department regarding those allegations. *See* SDCL §34-12-51. All of the challenged statements fall within the scope of "good faith" immunity. *Id*.

[12] According to the undersigned's records, the only portions of the document identified as Exhibit 105 that are in the record are those pages bates-stamped as DOH000002, 000015, and 000016. SR 4505-07.

C. Harvey Cannot Establish Malice.

To defeat the privileges and immunity described above, Harvey must establish that the speakers acted with malice when making the challenged communications. To do this, she must show that Defendants "entertain[ed] serious doubts as to the truth," and "that the defendant actually had a *high degree of awareness* of probable falsity." *Dacy*, 555 N.W.2d at 94 (emphasis added).

1. Failure to investigate is not malice.

This Court has repeatedly held that "failure to investigate does not constitute malice." *Kieser*, at ¶21, 566 N.W.2d at 839. *See also Dacy*, 550 N.W.2d at 94; *Peterson*, 499 N.W.2d at 916; *Schwaiger*, at ¶11, 714 N.W.2d at 879. "Proof of reckless disregard for the truth establishing malice requires more than proof of a defendant's failure to investigate." *Peterson*, 499 N.W.2d at 916.

In *Petersen v. Dacy*, the plaintiff, a gas station clerk, was terminated by a manager who accused her of stealing lottery tickets. *Dacy*, 550 N.W.2d at 92. The manager discussed the termination and theft allegations with other employees. The plaintiff maintained her innocence, and, like Harvey, was awarded unemployment benefits. *Id.* This Court affirmed summary judgment for the defendants on

Petersen's defamation claim, finding no evidence that the manager *did not believe* the allegations to be true when she made them. *Id.* at 92-94.

In *Peterson v. City of Mitchell*, police officer Dennis Kaemingk issued a press release to numerous news outlets, reporting that the plaintiff had been arrested and indicted for a string of robberies. *Peterson*, 499 N.W.2d at 912-13. Unbeknownst to Kaemingk, Peterson had *not* been indicted and, although he was a prior suspect, there were no charges pending against him. *Id.* at 913. Importantly, the truth was *readily available* to Kaemingk when he ran the press release – but he failed to consult anyone or anything to confirm its contents. Moreover, after it was publicized, Peterson's boss called the police station to ask whether it was true – and Kaemingk confirmed it was. Although Kaemingk could (and should) have verified the information before issuing the release, this Court affirmed summary judgment for the defendants, reiterating that failure to investigate does not establish malice and noting the absence of any evidence that Kaemingk disbelieved the statements when he made them. *Id.* at 916.

At the motions hearing, the circuit court repeatedly asked Harvey's counsel to explain why this well-settled law was inapplicable to this case. HT at 51:14-53:11. Harvey provided no answer then, and she

has no answer now. *See id*. Instead, she continues to rely on a theory this Court has repeatedly rejected: That the defendants had a duty to investigate. *See Appellants' Brief* at 18-19 (citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989)).

2. ***Harte-Hanks* is Inapplicable.**

Harte-Hanks is a United States Supreme Court case addressing a newspaper's exposure to defamation liability. This constitutional jurisprudence is of limited value here. Newspapers receive constitutional protection, but the press is also held to high journalistic standards because they publish reports to a general audience, whose only interest might be curiosity, about people who frequently have no way to respond. Thus, whether a newspaper acted maliciously in publishing a story is a far cry from whether an employer acted maliciously in handling a termination or grievance. Shockey, Smith, Gisi, and Sughrue were not held to journalistic standards when examining allegations of employee misconduct. Indeed, a private employer in South Dakota is not held to *any* standard in terminating an employee, except for those limited exceptions to the at-will doctrine, all of which are inapplicable here. *Harte-Hanks* is therefore not

controlling, and is helpful only to the extent it provides language consistent with existing, applicable, and controlling South Dakota law.

As detailed above, South Dakota law is clear: Failure to investigate is not malice. A plaintiff must show the defendant "knew or believed" the statement to be false. Harvey has no evidence of this.[13] In fact, all of the evidence in the record is to the contrary: Shockey, Smith, Gisi, and Sughrue believed the allegations to be true in the summer of 2012, and they still believe that today. SR 4991.

3. No Evidence of Actual Malice.

Harvey claims there were obvious reasons to doubt the witnesses, and that Edstrom and Ellenbecker conspired against her to concoct allegations of abuse. Even if Harvey's theory were plausible, it is nevertheless insufficient to establish malice by Defendants.

Edstrom was not the best employee, but even bad employees tell the truth. Further, Ellenbecker, who was regarded as a very good employee, she corroborated the allegations. Moreover, the allegations weren't all "after the fact" – the June 1 events were reported that day.

[13] Unlike many reported defamation cases, Harvey has never established the allegations are false. Ellenbecker and Edstrom have never withdrawn their allegations, and they have testified to them three times under oath. For summary judgment, the Court assumes they were false, but the Court does not assume that anyone *believed* they were false. *Peterson*, 499 N.W.2d at 916.

Harvey herself admitted to wrongdoing, but sought to downplay her actions. Meade and Shockey knew the work histories of all involved, and Shockey harbored credibility concerns about both Harvey and Edstrom. SR 2503.

Also relevant to this analysis is that other independent entities, including law enforcement, found that Harvey's behavior was improper. She admitted to Fredericksen that she grabbed Christine with enough force to create a slapping sound, and she did so for disciplinary reasons. SR 356-58. Fredericksen bore her no malice, and he actually recommended no criminal charges against her, but even he concluded Harvey was not capable of "conducting herself in a professional manner within that environment." SR 365, 367.

Finally, even if the Defendants were resolving a doubt against Harvey and in favor of resident safety, it would be dangerous to find such an exercise of discretion to constitute *actual malice*, thereby subjecting an employer to tort liability to the discharged employee.

Harvey relies on *Pawlovich v. Linke* for the proposition that her denial of abuse creates a genuine issue of material fact on the issue of malice. In *Pawlovich*, the plaintiff nurse was terminated as a result of what she claims were false accusations of breach of patient privacy.

Rather than sue the supervisors who investigated the accusation and terminated her, Pawlovich sued the person who made the allegation (Linke), and thus the question was whether the accuser acted with malice. This Court held there was a question of fact because the plaintiff and *her accuser* told opposing stories. *Pawlovich*, at ¶22, 688 N.W.2d at 225.

This case is distinguishable because Harvey has not sued the accusers, and truth or falsity of the accusation is "not the test" of whether the Defendants believed the statements they made about Harvey and her termination. *Dacy*, 550 N.W.2d at 94. Consequently, Harvey's denial of misconduct is insufficient to create an issue of material fact as to the speaker's state of mind – and it is contrary to her multiple admissions of inappropriate behavior.

Setliff v. Akins, 2000 SD 124, 616 N.W.2d 878, is also distinguishable for a few reasons. First, Setliff admitted that he intentionally refused to read a letter sent to him by Akins, the substance of which bore directly upon the matters addressed in the allegedly libelous letter. *Setliff*, at n.9. Here, there is no evidence that anyone intentionally ignored information provided—Harvey merely argues that Defendants should have had more. Second, *Setliff* involved a letter

disseminated outside of the employer's office and sent to every patient of the clinic, and there was a question as to whether a common interest existed. Moreover, the letter appeared to exceed the scope of any common interest by containing more information than necessary to notify patients of Akins' departure. *Id.* at ¶¶46-48, 616 N.W.2d at 891-92. Here, the challenged communications were made purely internally, to a government agency, or to the victim's immediate family. The scope of such communications were plainly tailored to the degree of "interest" held by the parties involved.

Finally, Harvey's argument that the circuit court applied an incorrect standard of proof also fails. It is unclear from the court's comments whether it was imposing a clear and convincing standard on the defamation claim, making reference to the punitive damages analysis, or if the court simply misspoke.[14] HT at 74:20-78:7. Regardless, it is irrelevant because the standard in summary judgment is not the evidentiary burden that would otherwise apply at trial; rather, the non-moving party must identify a genuine issue of material fact. *Schwaiger*, *supra*.

[14] It is unlikely the circuit court was imposing a heightened burden, as nobody advocated for such a burden in the briefing or at the hearing.

Harvey has *no evidence* that any defendant seriously doubted the truth of the statements they made. Thus, there is no genuine issue of material fact and her slander claim fails.

II. HARVEYS' RESPONDEAT SUPERIOR THEORY FAILS BECAUSE FALSE ALLEGATIONS AND PERJURY ARE NOT WITHIN ANYONE'S SCOPE OF EMPLOYMENT.

Harvey argues that "the actual malice of Edstrom, Ellenbecker, and Meade should be imputed to the corporate defendants." *Appellants' Brief* at 24. She does not explain why those employees would be an agent of any corporate defendant except Regional Network.[15]

While certain agent *conduct* may be imputed to a principal, Harvey cites no authority for the proposition that an agent's *malice* becomes the malice of the principal. The failure to cite authority is fatal to the argument. *Steele v. Bonner*, 2010 S.D. 37, ¶ 35, 782 N.W.2d 379, 386. Even if the Court reframes the issues to consider whether the making of false allegations is imputable to Regional Network, the answer must be no, because that conduct was not motivated by a desire to serve the employer. Further, if Harvey's allegations are true, the

[15] Harvey, Meade, Edstrom, and Ellenbecker were employees of Regional Network. SR 5512.

challenged conduct is so extreme that it is not a foreseeable cost of doing business.

A. False allegations do not serve RHN.

Harvey must show a factual dispute about whether her coworkers' allegedly false statements were motivated by their desire to serve Regional Network. *Bernie v. Catholic Diocese of Sioux Falls*, 2012 SD 63, ¶8, 821 N.W.2d 232, 237. An act "furthers the principal's business if it carries out the objectives of the employment." *Id*. If an employee is acting from "purely personal motives" then the employer is not liable. *Id*. at ¶9, 821 N.W.2d at 238.

1. <u>Harvey's version of events show a purely personal motive.</u>

Harvey's version of the facts would prove that Edstrom and Ellenbecker acted entirely for themselves, in furtherance of a personal grudge, and *against* what they knew would be best for Regional Network:

> In the spring of 2012, there was conflict between Shirley and certain co-workers. Shirley *insisted all staff provide a "pretty high standard" of care and comply with company policies*. One of those co-workers was Jessica Edstrom. It was "heated, intense conflict." They clashed on subjects like patient priorities and tattoos. Edstrom had been repeatedly disciplined.

...

> The second co-worker in conflict with Shirley was Joelle Ellenbecker. She was angry because Shirley *insisted the grooming policy be followed*, which required Ellenbecker to take out a nose piercing. According to a coworker, Ellenbecker and Meade were "out to get [Shirley]" because "she *did things right*."

Appellants' Brief at 5-6 (emphasis added). Those motivations imply that the actors were each motivated by her personal hatred of Harvey, and they hated her because she was such a dedicated employee. That is a motivation to hurt, not help Regional Network, so it is not vicariously liable for such conduct. *See Bernie*, ¶9, 821 N.W.2d at 238.

2. <u>Regional Network is not served by false allegations of resident abuse.</u>

Golden Ridge was in the business of providing assisted living and nursing services to residents. If employees conspired to concoct false allegations of resident mistreatment, there is no world in which that conduct serves the employer. Rather, such conduct is devastating to the employer: creating fear and anxiety about resident safety, additional regulatory scrutiny, exposure to civil liability, and the loss (according to Harvey) of one of its best employees.

B. False allegations and perjury are not foreseeable.

"[W]here the question is one of vicarious liability, the inquiry should be whether the risk was one 'that may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer." *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275, 280 (S.D. 1986). The conduct "must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business." *Id.* at 280-81. Thus, foreseeability largely depends on the reprehensibility of the act.

Some risks are inherent in business, even the commission of minor crimes. RESTATEMENT (SECOND) OF AGENCY §231, cmt. a ("The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do."). For example, mistaken allegations of abuse may be foreseeable. Harvey points to such an allegation in Custer, and also to Edstrom's disciplinary records about a prior reprimand for, *inter alia*, saying an employee was abusing a resident, but failing to report it to a supervisor. *Appellants' Brief* at 26.

But Harvey does not claim to be the subject of a mere mistake. Rather, she claims to be the victim of a conspiracy to frame her for elder abuse, by witnesses who repeatedly perjured themselves in an effort to pursue retribution against her. That is not a mistake; it is a premeditated plot. Such behavior cannot fairly be considered a "cost of doing business." RESTATEMENT (SECOND) OF AGENCY §231, cmt. a ("[A] gardener using a small stick in an assault upon a trespassing child to exclude him from the premises may be found to be acting within the scope of the employment; if, however, the gardener were to shoot the child for the same purpose, it would be difficult to find the act within the scope of employment.").

III. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON HARVEYS' IIED CLAIM.

The tort of IIED requires proof that the defendant:

(1) by extreme and outrageous conduct,

(2) acted intentionally or recklessly to cause the plaintiff severe emotional distress,

(3) which conduct in fact caused the plaintiff severe distress, and

(4) the plaintiff suffered an extreme, disabling emotional response to the defendant's conduct. [16]

Citibank (S.D.), N.A. v. Hauff, 2003 SD 99, ¶24, 668 N.W.2d 528, 535. The proof necessary to establish liability under this tort "must exceed a rigorous benchmark." *Fix v. First State Bank of Roscoe*, 2011 SD 80, ¶7, 807 N.W.2d 612, 618.

Harvey has not met this burden.

A. The conduct was not extreme and outrageous.

It is a question of law whether the conduct in question "may be reasonably regarded as so extreme and outrageous as to permit recovery." *Citibank*, at ¶24, 668 N.W.2d at 535. Extreme and outrageous conduct is that which exceeds "all bounds usually tolerated by decent society and which is of a nature especially calculated to cause, and does cause, mental distress of a very serious kind." *Id.* It must be regarded as "atrocious, and utterly intolerable in a civilized community." *Id.*

Harvey relies on *Caesar v. Hartford Hospital*, 46 F. Supp.2d 174 (D. Conn. 1999) to support her IIED claim. But *Ceasar* is distinguishable in several critical respects. First, *Caesar* was a Title VII

[16] Contrary to Harveys' assertion, Defendants dispute that Shirley suffered "severe emotional distress." *See Appellants' Brief* at 28, n.10.

case, so it did not involve issues with at-will employment, and to the extent it did, it involved Connecticut law.

Second, *Caesar* involved a pre-*Iqbal* motion to dismiss, so the Court accepted as true the factual allegations stated in the Complaint, including the alleged intentional false reporting of abuse. That is not the standard here. *See Jackson v. Health Resources of Rockville, Inc.*, 357 F. Supp.2d 507, 521-22 (D. Conn. 2005) (rejecting the argument that *Caesar* compelled the denial of summary judgment due to differing burdens of plaintiff resisting motion to dismiss).

Third, the mandatory reporting law in *Caesar* required the reporter to have "reasonable cause to suspect or believe" that abuse had occurred. *Caesar*, 46 F. Supp.2d at 179. Here, the rule required Golden Ridge to report "*any allegations* of abuse or neglect of any resident by any person." ARSD 44:70:01:07.

Just as Harvey cannot establish malice, she cannot establish extreme and outrageous conduct. An employer's decision to terminate an employee who has admitted to improper conduct is not, as a matter of law, extreme and outrageous. It was not "atrocious" to report the allegations to the Department of Health, to deny unemployment benefits, or to uphold the termination in the grievance process. It was

not "utterly intolerable" to err, if at all, on the side of resident safety. No reasonable person in the community would disagree.

Moreover, the alleged conduct was legally required, immune, or privileged, as described in other sections of this Brief. It cannot, therefore, be beyond all possible bounds of decency. RESTATEMENT (SECOND) OF TORTS § 46 cmt. g, illus. 14 (1965). *See also* SDPJI (Civil) 20-110-50, comment.

B. Harvey cannot prove intent.

Harvey has no evidence that any Defendant specifically intended to cause harm, so she focuses on the "reckless" argument. *Appellants' Brief* at 27; SR 5032-5040. To prove recklessness, she must prove "that the defendant deliberately disregarded a high degree of probability that emotional distress would result from the conduct." SDPJI (Civil) 20-100-20. This she cannot do.

The cases where this Court has recognized the viability of an employee's IIED claim are those where the employer knew the employee "was particularly susceptible to emotional distress by reason of some physical or mental condition or peculiarity." *Moysis v. DTG Datanet*, 278 F.3d 819, 827 (8th Cir. 2002) (applying South Dakota law). *See also Petersen v. Sioux Valley Hosp. Ass'n*, 486 N.W.2d 516,

519 (S.D. 1992); *Richardson v. East River Elec. Power Co-op., Inc.*, 531 N.W.2d 23 (S.D. 1995). In other words, "liability arises from the actor's knowledge that the other party is *particularly susceptible to emotional distress by reason of some physical or mental condition or peculiarity*." *Moysis*, at 827 (emphasis added).

There is no such evidence here. Indeed, the undisputed facts are to the contrary: Harvey was bold and confrontational, she irritated her co-workers and they irritated her, and she was not reticent about letting others know what she thought of them.

The circuit court's grant of summary judgment should be upheld.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT HARVEYS' MALICIOUS PROSECUTION CLAIM FAILS AS A MATTER OF LAW.

Malicious prosecution requires proof of six elements:

1. The commencement or continuance of an original criminal or civil judicial proceeding;
2. Legal causation by the present defendant against plaintiff, who was defendant in the original proceeding;
3. A bona fide termination in favor of the present plaintiff;
4. The absence of probable cause for such proceeding;
5. The presence of malice; and
6. Damages conforming to legal standards resulting to plaintiff.

Manuel v. Wilka, 2000 S.D. 61, ¶ 18, 610 N.W.2d 458, 462. Malicious prosecution actions are largely disfavored because public policy encourages people who believe the law has been violated "to bring that information to the attention of the law enforcement." *Miessner v. All Dakota Ins. Associates, Inc.*, 515 N.W.2d 198, 200 (S.D. 1994).

A. Regional did not commence the criminal proceeding.

A defendant does not commence a criminal proceeding unless he "takes some active part in instigating or encouraging" the prosecution. PROSSER AND KEETON ON TORTS §119 at 872 (5th ed. 1984). If law enforcement or a state's attorney "pushes the prosecution forward," the defendant is not liable. *Danielson v. Hess*, 2011 SD 82, ¶10, 807 N.W.2d 113, 116. *See also* PROSSER, supra at §119 (When the decision to prosecute is left "entirely to the uncontrolled discretion of the officer, or if the officer makes an independent investigation," the defendant did not commence the proceeding).

Harvey concedes the Department of Health made the initial report to law enforcement. SR 5520 (¶¶38-39). No defendant was interviewed by police, and no defendant testified before the grand jury. *See* SR 4940-4972. And, Fitzgerald's decision to prosecute came after

Fredericksen conducted an investigation and recommended no charges. After all of this, the grand jury voted to indict. SR 531.

In a last ditch effort to salvage her claim, Harvey argues "Meade and Smith submitted incomplete information to the DOH four months late." *Appellants' Brief* at 29-30. That theory fails, though, because if information was "withheld or false,"[17] such withholding or falsity must be the "legal cause of the prosecution." *Danielson*, at ¶10, 807 N.W.2d at 116. Harvey has no evidence that Fitzgerald or the grand jury would have done anything differently under any circumstance at all, let alone that the alleged "incomplete" information given to the Department of Health was the "but-for" cause of her prosecution. *See id.*

In *Danielson*, the plaintiff was fired when his employer, a vehicle repair shop, suspected him of theft. *Danielson*, at ¶¶2-4, 807 N.W.2d at 114-15. The employer investigated and turned over its materials to the Spearfish police department. The police investigated and recommended criminal charges, which State's Attorney Fitzgerald pursued. *Id.* at ¶¶4-5, 807 N.W.2d at 115. Later, the plaintiff's private investigator presented evidence to Fitzgerald that the employer had

[17] If someone did provide "false" or "incomplete" information to the police or the grand jury, it was Edstrom or Ellenbecker and, as described above, such conduct cannot be ascribed to Regional Network.

falsified information regarding the alleged thefts. Fitzgerald proceeded with the prosecution anyway, and Danielson was acquitted. *Id*. at ¶¶5-6, 807 N.W.2d at 115. This Court affirmed summary judgment for the employer, finding that Fitzgerald's independent investigation and decision-making precluded a finding that the employer's allegedly false information was the legal cause of the prosecution. *Id*., at ¶14, 807 N.W.2d at 118.

As in *Danielson*, law enforcement investigated, and then Fitzgerald exercised his own independent discretion in proceeding with a grand jury indictment and criminal charges against Harvey. As a matter of law, it cannot be said that any defendant initiated the criminal proceedings.

B. Harvey cannot prove an absence of probable cause.

Harvey must prove the "absence of probable cause for the underlying criminal proceeding." *Miessner*, 515 N.W.2d at 202. The existence of probable cause is generally a question of law for the court. PROSSER, *supra*, at 882.

Probable cause is a "reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused in guilty." *Miessner*, 515 N.W.2d at

202. Probable cause is an objective test focused on what was reasonably known to the defendant at the time of instituting the underlying proceeding, not in light of subsequently-determined facts. *Manuel*, ¶32, 610 N.W.2d at 464. An acquittal is not evidence of a lack of probable cause. PROSSER, *supra*, at 880. On the other hand, an indictment "is prima facie evidence or presumptive evidence that the defendant had probable cause for his alleged part in the prosecution[.]" J.D. Perovich, Annotation, *Malicious prosecution: effect of grand jury indictment on issue of probable cause*, 28 A.L.R. 3d 748, §2 [a] (1969) (updated weekly). *See also* PROSSER, *supra*, at 881 (noting "prima face" really means "important evidence" in this context, since it is plaintiff's burden to prove absence of probable cause).

Regional's communications with the Department of Health were based on the internal investigation wherein it was determined that Harvey had admitted to improper contact with a resident. Except for Fredericksen's report, the Defendants had the same information that was presented to the grand jury. This was sufficient probable cause to believe that abuse had occurred; importantly, the grand jury agreed.

C. Harvey cannot prove malice.

Malice is "essential" to the maintenance of a malicious prosecution claim. *Manuel*, ¶39, 610 N.W.2d at 465. Malice in this context is regarded as akin to the malice necessary to overcome a conditional privilege in the defamation context. PROSSER, *supra*, at 883. As discussed above, there is no evidence that anyone acted maliciously.

V. THE CIRCUIT COURT PROPERLY DENIED HARVEYS' MOTION TO PROCEED WITH PUNITIVE DAMAGES.

A. Harvey Cannot Show Malice.

Before a party may conduct discovery related to punitive damages (and before the issue may be submitted to a jury), the Court must first determine whether, "after a hearing and based upon clear and convincing evidence . . . there is a reasonable basis to believe that there has been willful, wanton, or malicious conduct on the part of the party claimed against." SDCL §21-1-4.1. *See also Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991).

As detailed above, Harvey cannot show that any of the defendants acted maliciously in investigating the allegations,[18] handling her grievance, or communicating with the Department of Health, the Lawlers, or internally. Section I, *supra*. Consequently, her request to proceed with punitive damage discovery fails.

B. Harvey Cannot Establish a Basis for Corporate Liability.

As it pertains to Regional Network, Harvey must meet the "complicity rule" to seek punitive damages against an employer for the acts of an agent. *Dahl*, 474 N.W.2d at 903. Punitive damages may be allowable against a principal because of an act by a malicious agent *only if*:

> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

[18] Harvey cites to events at other facilities owned by Regional Network, or instances at the Hospital, as evidence of malice or extreme conduct. *Appellants' Brief* at 15 Such information is irrelevant and inadmissible because those facilities had completely different management than Golden Ridge. SR 4903 (¶7). *See Semple v. Federal Exp. Corp.*, 566 F.3d 788, 794 (8th Cir. 2009); *Murphy v. Kmart Corp.*, 2008 WL 5429643, *7 (D.S.D. 2008).

> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Id. (citing RESTATEMENT (SECOND) OF TORTS §909 and RESTATEMENT (SECOND) OF AGENCY §217c).

Because Harvey cannot establish that Meade, Shockey, Smith, Gisi, or Sughrue acted with malice, prong (c) is inapplicable. Prongs (a) and (d) are also inapplicable, because there is no evidence of authorization or ratification of the leveling of false accusations[19] against Harvey.

Nor can Harvey establish under prong (b) that Edstrom or Ellenbecker was "unfit" or that Regional Network was "reckless" in employing them. To establish prong (b), Harvey must do more than a create a fact question about whether Edstrom was generally an "unfit" employee. Harvey must show that Edstrom was unfit in the specific way that gave rise to the claim of fabricating abuse allegations. RESTATEMENT (SECOND) OF TORTS §909 cmt. a ("It is, however, within the general spirit of the rule to make liable an employer who has

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[19] Regional denies the accusations were false. Believing that the allegations are true is not the equivalent of ratifying or approving the making of false allegations.

recklessly employed a known-to-be vicious servant where the harm resulted *from such quality*."). As Harvey has pointed out, Edstrom was disciplined for *failing* to report suspected abuse to her supervisor—the opposite unfitness from what Harvey must show. Further, mere "failure to dismiss a servant, unaccompanied by conduct indicating approval of the wrongful conduct, is not a sufficient basis on which to impose punitive damages." RESTATEMENT (SECOND) OF AGENCY § 217c, cmt. b. Harvey claims Edstrom and Ellenbecker concocted the allegations; even if she is correct, there is no evidence that such behavior was approved. Harvey should not be permitted to proceed on a corporate punitive damage claim.

VI. THE CIRCUIT COURT CORRECTLY FOUND THAT HARVEYS' WRONGFUL TERMINATION AND NIED CLAIMS FAIL AS A MATTER OF LAW.

A. Harvey cannot overcome her at-will status.

Harvey concedes she is an at-will employee. SR 5864. To avoid the implications of this, she claims "her complaints about coworkers" make her a whistleblower.[20] Contrary to Harvey's suggestion, the

[20] In her Brief, Harvey does not explain why she believes she is a whistleblower. That failure effectively abandons the issue. *See Centrol, Inc. v. Morrow*, 489 N.W.2d 890, 893–94 (S.D. 1992). *See also* SDCL §15-26A-60(6). It is also important to note that Harvey never claimed to be a

question of whether she is a whistleblower is one of law for the court. *Dahl v. Combined Ins. Co.*, 2001 S.D. 12, ¶ 11 n. 3, 621 N.W.2d 163, 167; *Zacher v. Budd Co.*, 396 N.W.2d 122, 135 (S.D. 1986).

Whistleblower status applies only when an employee has complained of unlawful or criminal conduct. In *Dahl*, the plaintiff suspected a co-worker was embezzling customer premiums. *Dahl*, ¶2, 621 N.W.2d at 165. Dahl reported his suspicions to the Division of Insurance, and was terminated one year later. *Id.* at ¶3, 621 N.W.2d at 165. Dahl brought a wrongful termination claim, and his employer moved for summary judgment. This Court held it would recognize a limited public policy exception to the at-will doctrine for whistleblowing – "the *reporting of unlawful or criminal conduct* to a supervisor or outside agency." *Id.* at ¶12, 621 N.W.2d at 167 (emphasis added).

Harvey has never alleged that she reported unlawful or criminal behavior. In her Statement of Facts, she reports that her conflict with co-workers was the result of her insistence that "all staff provide a pretty high standard of care and comply with company policies." *Appellants' Brief* at 5. She says she clashed with coworkers "on subjects

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whistleblower until she filed her brief in opposition to the Motion for Summary Judgment (i.e., after discovery closed).

like patient priorities[21] and tattoos" and piercings. *Id*. at 5-6. Each of these conflicts (which hardly rise to the level of "complaints") pertain to internal company matters, not criminal or unlawful behavior. *Dahl*, ¶ 11, 621 N.W.2d 163.

Harvey also claims she suggested purchasing security cameras. *Appellants' Brief* at 5. The record contains no evidence as to what she requested, why, or when. Regardless, the request was not met with resistance and had nothing to do with her termination. Golden Ridge actually installed the cameras. SR 2507, 2847-48. Nothing about this makes Harvey a whistleblower.

Harvey relies on *Cormier v. Genesis Healthcare, LLC*, 129 A.3d 944 (Me. 2015), and *Northport Health Services, Inc. v. Owens*, 158 S.W.3d 164 (Ark. 2004). These cases are unhelpful to her because they apply different law and involve different facts. In *Cormier*, a nursing home cut staffing, and the terminated employee repeatedly complained that the inadequate staffing was endangering the residents. *Cormier*, ¶3, 129 A.3d at 947. The plaintiffs in *Northport* were terminated after complaining that co-workers were abusing and neglecting residents.

[21] This relates to the April 2012 batteries incident, when Harvey and Edstrom were reprimanded for arguing in a public area – Harvey's complaint about Edstrom was *in defense of* her own behavior. SR 2067-68.

Northport Health Services, 158 S.W.3d at 168. Here, Harvey complained about tattoos and piercings.

The Court should affirm the circuit court's summary judgment on wrongful termination.

B. Harvey's NIED claim fails because there was no duty.

In her claim of NIED, Harvey must prove:

> (1) The defendant engaged in negligent conduct.
>
> (2) The plaintiff suffered emotional distress.
>
> (3) The defendant's conduct was a legal cause of plaintiff's emotional distress.
>
> (4) The plaintiff suffered a physical manifestation of the distress.

SDPJI (Civil) 20-100-80. Proof on the first elements requires proof of duty, breach, causation, and injury. *Blaha v. Stuard*, 2002 SD 19, ¶19, 640 N.W.2d 85, 90.

Harvey has limited her NIED claim to conduct arising *after her termination* on June 8, 2012. SR 5503. Thus, her termination, or the process of it, cannot form the basis for her NIED claim.

Duty is a legal question for the court. *Janis v. Nash Finch Co.*, 2010 SD 27, ¶ 8, 780 N.W.2d 497, 500-01. Harvey has identified no legal duty that any of the defendants owed to her as it relates to their

conduct after June 8, 2012.[22] Her only argument on this claim is one sentence: "Defendants owed a duty to Shirley, as they would anybody else, to investigate and have a basis for accusing her of felony elder abuse."[23] *Appellants' Brief* at 32. She cites no authority for that proposition, so she waives it. *Steele v. Bonner*, 2010 S.D. 37, ¶ 35, 782 N.W.2d 379, 386. The only case she references is *Olson v. Bristol-Burlington Health District*, 863 A.2d 748 (Conn. App. 2005), but *Olson* says nothing about duty, and it certainly says nothing about a duty to investigate. *Id*. at 752. It is further distinguishable because of its procedural posture (pre-*Iqbal*/*Twombly* motion to dismiss) and because, unlike South Dakota law, Connecticut's NIED elements do not require physical injury. *Olson*, 863 A.2d at 752.

The circuit court correctly found that the defendants owed Harvey no duty. HT at 93:17-94:2.

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[22] She has not identified a duty for pre-termination conduct either, and no such duty exists as it relates to an at-will employee.

[23] Harvey's argument is wrong, both in its premise and its conclusion. No defendant accused Harvey of abuse. (And not even the reporting coworkers accused her of a "felony" – the grand jury and State's Attorney did that.) The conclusion is wrong because there is no duty to investigate.

VII. THE CIRCUIT COURT CORRECTLY FOUND THE GRIEVANCE POLICY IS NOT A CONTRACT.

A. *Butterfield* defeats Harvey's claim.

In South Dakota, a "for cause only" agreement may be implied in a handbook or policy, but only when the document contains 1) a detailed list of exclusive grounds for discipline or discharge, **and**, 2) a mandatory and specific procedure that the employer will follow *prior* to termination. *Butterfield v. Citibank of S. Dakota, N.A.*, 437 N.W.2d 857, 859 (S.D. 1989).[24]

Harvey has not argued that the Grievance Policy meets either of those requirements. Instead, she claims *Butterfield* addressed only pre-termination policies, not post-termination policies. *Butterfield* contains no such limitation. It's not that *Butterfield* does not apply to post-termination procedures; rather, it *requires* a mandatory and specific pre-termination process in order to find a relinquishment of employer's right to fire at-will. Harvey's attempt to recast *Butterfield*'s requirement into a limitation on its applicability should be rejected. *See*, *e.g.*, *Aberle v. City of Aberdeen*, 718 N.W.2d 615 (S.D. 2006); *Holland*

[24] An employer may also expressly surrender its at-will power via an explicit provision to that effect. *Butterfield*, 437 N.W.2d at 859.

v. FEM Elec. Ass'n, Inc., 637 N.W.2d 717 (S.D. 2001); *Larson v. Kreiser's Inc.*, 472 N.W.2d 761 (S.D. 1991).

Additionally, the Grievance Policy is not even the correct policy to consider when examining whether *Butterfield* is met. There is a Corrective Action policy and Termination of Employment policy, both of which are referenced in the Grievance Policy. Both policies expressly reserve the right to fire at-will and plainly do not meet *Butterfield*. Regional App. 13-17.

B. *Zavadil* has no precedential authority, and it is wrongly decided under South Dakota law.

In support of her theory that the Grievance Policy is a contract, Harvey relies on *Zavadil v. Alcoa Extrusions, Inc.*, 363 F.Supp.2d 1187 (D.S.D. 2005), a federal district court decision. Federal district court decisions have no precedential value on state courts. *Camreta v. Greene*, 563 U.S. 692, 709, n. 7 (2011). On matters of South Dakota law, this Court's decisions are the final authority. *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940). And most important to this case, the Eighth Circuit rejected the suggestion that there is any rule but *Butterfield*, including the holding in *Zavadil*. *Semple v. Federal Express Corp.*, 566 F.3d 788, 793 n.8 (8th Cir. 2009).

Zavadil is also distinguishable. In *Zavadil*, the policy at issue was enacted *after* the Handbook, and it contained a post-termination appeal procedure that the employer was required to follow if invoked by an employee. When Zavadil was terminated, he wanted to appeal but the employer denied his request, and he was deprived of the process entirely.

The district court held that, although the Handbook was not a contract and did not meet *Butterfield*, the post-termination policy was a separate contract that partially modified the employer's right to fire at-will. *Id*. at 1191-93. In so ruling, the court relied largely on the fact that the policy was issued *after* the Employee Handbook, and contained no disclaimers regarding the at-will doctrine. *Id*. Here, the Grievance Policy was enacted before, and specifically referenced, quoted, and incorporated into the Handbook. Regional App. 6, 8. It was subject to all of the disclaimers contained in the Handbook, which are quoted extensively above. Regional App. 1-5. Thus, to the extent *Zavadil* recognizes a breach of contract claim, it is inapplicable here.

C. Even if the Grievance Policy were a contract, Harvey cannot establish damages.

Harvey cites no case, and Defendants are aware of none, where the aggrieved employee actually received the demanded process, but had a claim because she was dissatisfied with the result. Not even *Zavadil* supports such a claim – indeed, the remedy in *Zavadil* was to give the plaintiff the process. But even if Harvey states a colorable contract claim, she cannot prove damages.

"Essential to proving contract damages is evidence that damages were in fact caused by the breach." *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603. Harvey asked for the grievance procedure, and she got it. Her damage is that the grievance process upheld her termination, which she claims was the product of a botched investigation. Therefore, she must prove that, *but for* the bad investigation, she would have been reinstated. This she cannot do.

There is no evidence that a different investigation would have resulted in a different decision. Harvey has not identified anyone who says that the accusations are untrue, except herself. And she only challenges the force of her blows—tapping with the force of a baby-burp, as opposed to slapping. SR 5248-49.

The people who ruled on Harvey's grievance have testified they still believe the allegations against her. SR 4991. Indeed, it is undisputed that, even knowing everything that Harvey has brought forward in this litigation, the defendants still believe she improperly secluded and struck a resident. *Id.*

The Grievance Policy is not a contract. Even if it were, Defendants performed under the policy, and there is no evidence that a different investigation would have led to a different outcome, so there is no damage and Harvey's contract claim fails.

Conclusion

When coworkers accuse an employee of misconduct, it is inherently stressful. Faced the allegation, the employer must make a decision. Defendants decided that Harvey's admissions of her behavior, while claiming they were exaggerated or mischaracterized by her coworkers, created an unreasonable risk, so she was terminated. In the highly regulated area of health care, Defendants were also required to report the allegations to the Department of Health. Harvey has produced no evidence that give her viable action against Defendants.

An at-will employee has no claim against her former employer for failing to adequately investigate the reasons for her discharge.

Defendants' reporting the allegations, discussing them amongst themselves, and communicating with the victim's family is legally privileged, statutorily immune conduct. Harvey has no evidence of actual malice to overcome those privileges and immunities. Lastly, the report to the Department of Health was far too attenuated from Harvey's criminal prosecution to constitute the commencement of a criminal proceeding.

The Court should affirm the circuit court's summary judgment.

Respectfully submitted August 23, 2017.

BANGS, MCCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

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Certificate of Compliance

Pursuant to SDCL §15-26A-66(b)(4), Appellee's counsel states that the foregoing brief is typed in proportionally spaced typeface in

Georgia 13 point. The word processor used to prepare this brief indicated that there are a total of 9,989 words in the body of the brief.

/s/ Jeffrey G. Hurd
Jeffrey G. Hurd

Certificate of Service

The undersigned hereby certifies that on August 23, 2017, the foregoing *Appellees' Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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and a true and correct copy of *Appellees' Brief* was provided by electronic mail and mail as follows, to:

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APPENDIX

[25] Appellants failed to include this document in their Appendix, in violation of SDCL §15-26A-60(8)(b). Thus, Appellees have included it in this Appendix.

[26] See Note 1, *supra*.

APPENDIX

[1] Appellants failed to include this document in their Appendix, in violation of SDCL §15-26A-60(8)(b). Thus, Appellees have included it in this Appendix.
[2] See Note 1, *supra*.

EXHIBIT 125
Shirley Harvey
C. HARKINS 10-18-16

REGIONAL HEALTH
Human Resources

Receipt of Employee Handbook Acknowledgement and Consent

LDRH

Receipt of Employee Handbook

I have been advised that a copy of the Regional Health Employee Handbook can be accessed on the Regional Health Intranet. I have also been advised that a hard copy of the Regional Health Employee Handbook can be made available to me at my request. I understand this handbook supersedes all previous written and unwritten policies, including any previous handbooks. I have either read the Regional Health Employee Handbook or have had it read to me carefully. I understand all of its rules, policies, terms, and conditions, and agree to abide by them, realizing failure to do so can result in disciplinary action and/or termination.

I understand nothing in the Employee Handbook in any way creates an express or implied contract of employment between Regional Health and myself, but is intended to foster a better working atmosphere while the employment relationship exists.

Employment at Will

I understand and agree my employment is terminable-at-will, so that both Regional Health and I remain free to choose to end our work relationship at any time for any lawful reason or no reason. Similarly, no Regional Health official has the authority to enter into an oral employment contract, and only the President of Regional Health can enter into a written employment contract.

Computer Monitoring

I understand that Regional Health will monitor my computer files, Internet activity, email messages, and voice mail messages for various reasons. Regional Health will disclose such activity and messages to a third party without my consent when it deems such action necessary. I consent to Regional Health monitoring of my computer files, email transmissions, voice mail messages, and Internet activity.

Media Consent

I understand for marketing, educational, or other purposes, I might be interviewed, photographed, or filmed by my employer or by others regarding Regional Health. My employer or other parties might use such interviews, photographs, or films in newspapers, newsletters, billboards, magazines, or other printed material or by means of radio, television, or other electronic transmission. I consent to such actions as approved by my employer.

Corporate Responsibility

I understand that Regional Health supports a culture of open communication and I may contact anyone in the organization without fear of retaliation to refer or report a compliance or regulatory issue, a concern about false claims or a business transaction, or any policy violation (to include harassment, hostile work environment, etc.). I realize I can report an issue to my immediate supervisor. I also realize I do not have to go through the chain of command to file a concern and I can also call the Compliance Hotline at any time at 1-877-800-6907.

Performance Standards

A set of performance standards has been developed by the employees of Regional Health to establish specific behaviors all employees and volunteers are expected to practice while at work. These standards are a measure of overall work performance. Employees and volunteers are expected to adhere to and practice the standards of performance outlined in the *Standards of Performance: Our Commitment to Excellence* handbook. I have read and understand the *Standards of Performance: Our Commitment to Excellence* handbook. I agree to comply with and practice the standards.

I agree to receive the Employee Handbook electronically via electronic posting. If I do not want to review this document electronically, I will notify my local HR office so that I can receive a free paper copy.

Employee Printed Name: Shirley E. Harvey

Employee Signature: Shirley E Harvey Date: 9/28/10

Witness Printed Name: KATHRYN SHOCKEY

Witness Signature: Kathryn Shockey Date: 9-28-10

REGIONAL HEALTH

EMPLOYEE HANDBOOK

Table of Contents

Welcome To Regional Health

We are pleased you have decided to join us and hope you will share with us our strong sense of pride in our organization.

One of our goals is to provide patients with high quality care and service. Individual dedication to quality is essential in meeting this goal. Reaching this goal helps Regional Health offer continued opportunity to you and your fellow employees.

Our Mission

Our mission is to provide and support health care excellence in partnership with the communities we serve.

Our Vision

Our vision is to be the premier regional health system providing health care excellence in the communities we serve.

Our Values

Quality/High Standards of Performance
Striving to continually exceed the expectations of every patient and customer in regard to service, effort, and professional standards.

Integrity
Demonstrating honest, positive, and ethical behavior and communication in dealing with our patients, customers, and employees.

Fiscal Responsibility/Cost Effectiveness
Making decisions that will ensure the long-term viability of the organization while providing quality services at the lowest possible cost.

Skilled, Caring People
Recruiting and supporting highly skilled, caring people who demonstrate respect and concern for all persons.

Innovation
Employing new techniques, processes, and methods to enhance the delivery of care.

Lifelong Learning
Learning, applying, and sharing knowledge, which improves and promotes health.

This handbook describes policies and programs in effect at the time it was approved for printing. However, policies and programs can be added, deleted, or revised at any time. This handbook and other Regional Health publications only provide general descriptions and are not to be regarded as a promise to provide specific terms and conditions of employment.

This handbook is not a contract of employment. The policies, procedures, practices, and benefits described in this handbook supersede all those written and unwritten at an earlier time. This handbook and its contents replace any earlier written and unwritten versions of our policies, including any prior handbooks. An electronic version of this handbook and all current Regional Health policies can be found on Regional Health's Intranet site. Paper copies can also be obtained from your local Human Resources office.

Nothing contained in this employee handbook should be construed as a guarantee of continued employment. Regional Health does not guarantee continued employment to employees and reserves the right to terminate or lay off employees at will for any lawful reason with or without notice. Also, nothing contained in any statement of Regional Health's philosophy, including statements made in the course of performance evaluations and wage reviews, should be taken as an express or implied promise of continuing employment. No one has the authority to enter into an oral employment contract on behalf of Regional Health. Only the President of Regional Health can enter into a written employment contract.

We firmly believe employees feel better about the place they work if they have as much information as possible. Ask your supervisor questions regarding any policy or benefit you do not fully understand.

Some facilities can, due to size, location, and availability of services mentioned in these policies, have facility-specific policies that are at variance with information in this handbook. You are expected to follow your facility's Human Resources policies in these cases.

This disciplinary suspension without pay is regarded as time off for the employer to decide whether or not to continue the employee's employment at Regional Health. A disciplinary suspension can be assessed for up to five days without pay; suspension beyond five days may occur at the discretion of the immediate Director, Human Resources, Regional Health Vice President of Human Resources, or CEO.

Employees who have been charged in a criminal case may be suspended indefinitely with or without pay or terminated pending Regional Health's review of the case. Human Resources must approve such a suspension decision. Suspension, with or without pay, may also occur when the employer needs time to conduct an investigation to determine whether termination is warranted.

Termination: Termination may result when no improvement is made in the employee's performance, attendance, or behaviors.

An employee may also be terminated without receiving prior constructive counseling, verbal warning, written warning, or suspension, depending on the severity of the incident. The Department Director, when determining whether or not employment should be terminated, may consider recent disciplinary actions against an employee. In all cases regarding termination of employees who have passed their Introductory Period, the Director must consult with Human Resources before an employee may be terminated from employment. All terminations must be approved by the Regional Health Vice President of Human Resources, or designee. If possible, the incident should be discussed with the employee before any action is taken toward termination. Written documentation of the incident from the employee can be submitted. Immediate termination is usually reserved for severe cases of unacceptable performance or behavior. The Department Director completes a Termination/Change Notice form.

Access to Your Personnel Record

Your official personnel record is maintained in Human Resources. You can, through Human Resources, request to review your personnel record. No copies of your record will be made without Human Resources approval. There may be a charge for copies of your personnel file.

Fair Treatment / Grievance Procedure

Policy: RH HR-8371-601

Whenever an employee has a question or concern, Regional Health asks that the employee work with their supervisor through an informal communication process of discussion, information gathering, and resolution with the supervisor.

Regional Health expects supervisors to be well informed of Regional Health policies and practices and, if the supervisor is unsure of the answer, to communicate with local Human Resources to gather the information.

When an issue or complaint cannot be resolved with the supervisor after the informal communication process and the concern deals with the application or interpretation of a Regional Health policy, the employee can exercise a formal grievance procedure.

In addition, if the employee believes the supervisor is an inappropriate person with whom to discuss their complaint, they can proceed to the next step of the grievance procedure.

A representative from Human Resources will assist the employee in putting the complaint/grievance in writing if requested by the employee.

Drug-Free Workplace

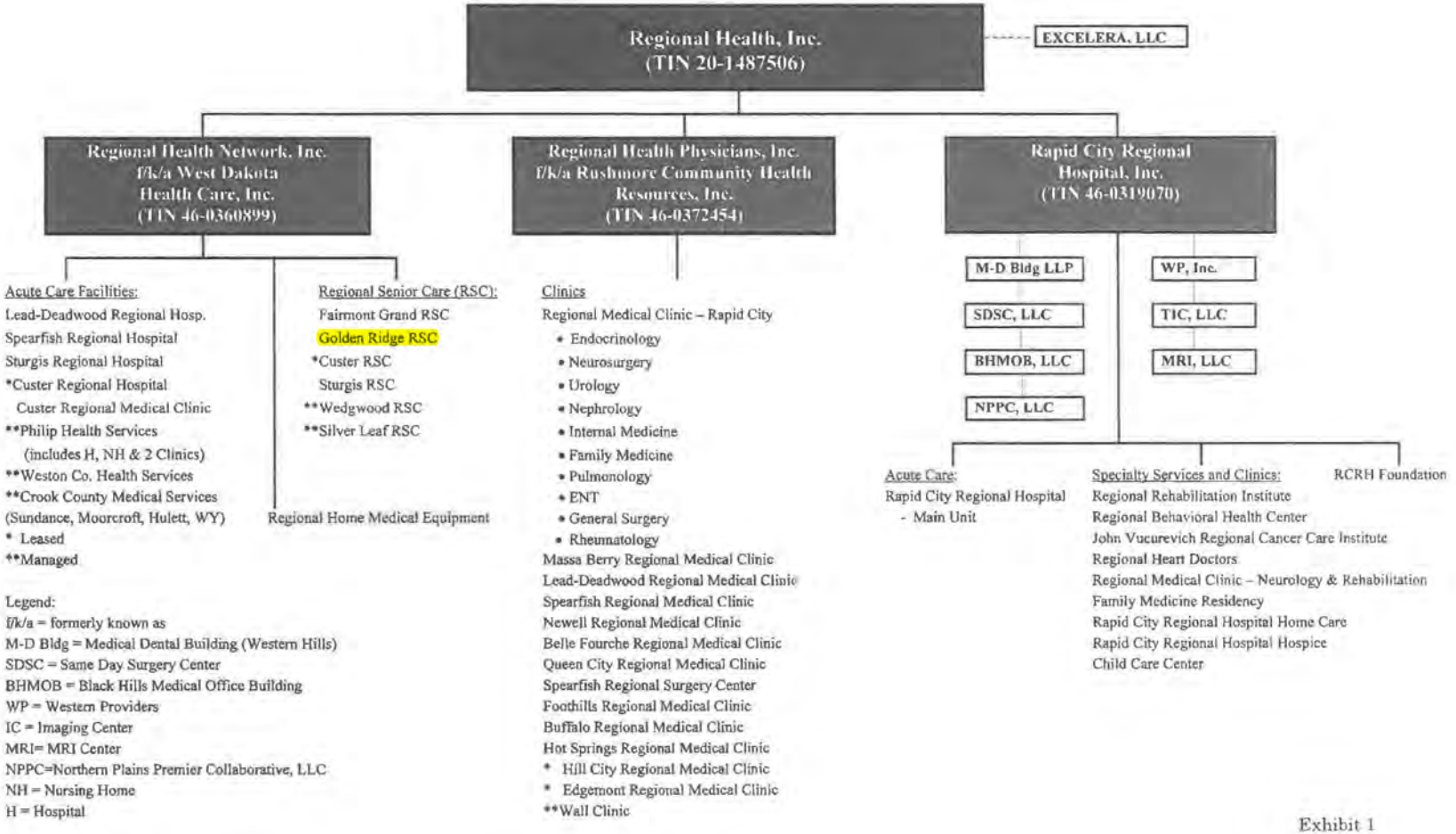
Policy: PRS-8371-512

Regional Health is committed to providing a safe and healthy environment for you, your coworkers, patients, residents, physicians, and visitors to our facilities. Violations of the Drug Testing Guidelines policy (PRS-8371-510) subject the employee to disciplinary action, which can include immediate termination. Drug and/or alcohol testing will be conducted in the following circumstances.

Department of Transportation Required Testing: Employees covered include those whose responsibilities include driving a Department of Transportation-regulated vehicle, when such vehicle has a gross weight rating of 26,001 or more pounds and/or when such vehicle is designed to transport 16 or more passengers, including the driver, and/or is of any size and used in the transportation of materials found to be hazardous under the Hazardous Materials Transportation Act.

November 2011

CURRENT REGIONAL HEALTH LEGAL STRUCTURE



Legend:
f/k/a = formerly known as
M-D Bldg = Medical Dental Building (Western Hills)
SDSC = Same Day Surgery Center
BHMOB = Black Hills Medical Office Building
WP = Western Providers
IC = Imaging Center
MRI= MRI Center
NPPC=Northern Plains Premier Collaborative, LLC
NH = Nursing Home
H = Hospital

Exhibit 1

Regional Health, Inc.

Policy Number:	RH HR-8371-601
Policy Title:	FAIR TREATMENT / GRIEVANCE PROCEDURE
Applies To:	Regional Health
Department:	RCRH-Human Resources
Effective Date:	September 1998
Review/Revision Date(s):	April 2008 March 2007 August 2004
Supersedes:	FAIR TREATMENT (PRS-8371-601) FAIR TREATMENT / GRIEVANCE PROCEDURE OWNED AND LEASED AFFILIATES (RHN HR-8371-603)
Referenced Policy(ies):	TERMINATION OF EMPLOYMENT (RH HR-8371-201) PROGRESSIVE DISCIPLINE (RH HR-8371-501) ANTI-DISCRIMINATION (RH HR-8371-504)
Attachment(s):	
Authored by:	Dale Gisi, Director
Reviewed by:	Dennis Schroedter, Director
Approved by:	Robert Mcglone, VP of Human Resources

POLICY STATEMENT

Regional Health believes that the majority of employee concerns can be resolved through positive, clear and direct communication with supervisory personnel. Every effort will be made to ensure that these matters are communicated, informally, to the most appropriate levels of management within the organization prior to any formal actions being initiated.

Regional Health also provides employees with an opportunity to formally communicate work related complaints and to appeal management decisions regarding the dispensing of discipline, without fear of retaliation, through a fair treatment/grievance resolution procedure. Participants in the procedure will attempt to promptly resolve all complaints/grievances that are appropriate for inclusion under this policy. In matters regarding this procedure the RCRH Human Resource Office will be consulted.

The grievance procedure is not open to management or supervisory employees, to new hire probationary employees, temporary or PRN staff.

GUIDELINES

A. An appropriate complaint/grievance is defined as an employee's expressed feeling of dissatisfaction concerning the interpretation or application of a work related policy by management. Examples of matters, which may be causes of grievances appropriate under this policy include:

1. Formal disciplinary actions taken against an employee, including written warnings, suspensions, and/or termination of employment.

2. Improper or unfair administration of employee benefits or conditions of employment, such as scheduling, or vacations.

B. The following practices are not appropriate for resolution through the grievance procedure:
   1. The development and implementation of policies, procedures, rules and regulations by authorized managerial and administrative personnel.
   2. Actions that are the result of alleged discrimination against an employee because of his or her race, color, sex, age, religion, national origin, marital or military status or disability. These actions may be appealed directly to Administration.

C. Prior to the complaint/grievance being processed through the grievance process, every attempt will be made to resolve the complaint through an informal resolution process involving the complainant and other appropriate parties.

D. Employees must notify their supervisor, in a timely fashion, of any complaint/grievance not resolved through the informal means of resolution. As used in this policy, the terms "timely fashion", "reasonable time", and "promptly", will mean five (5) working days unless a reasonable excuse is provided.

E. Employees are not to be penalized for the proper use of the grievance procedure. However, it will be inappropriate for an employee to abuse the procedure by raising grievances in bad faith for the purposes of delay or harassment, or by repeatedly raising grievances that a reasonable person would judge to have no merit. In these instances the Chief Executive Officer of RCRH, in consultation with Regional Health's Vice of Human Resources, may deny the employee's right to the use of the grievance procedure.

F. The grievance procedure is considered an internal affair. Legal representatives of the employee are not permitted to attend the hearing and no tape recordings of the hearing will be allowed.

G. The grievance procedure is a four (4)-step process. Grievances may be resolved at any step of the process. Grievances will be processed through the procedure until the employee is satisfied, does not file a timely appeal, or exhausts the right of appeal.

H. Employees who feel they have an appropriate grievance that cannot or has not been resolved through informal resolution should proceed as follows:

I. Employees of Rapid City Regional Hospital (RCRH) and Regional Health Corporate Services (RHCS) will utilize the following process;

   1. Step-One: Promptly bring the complaint/grievance to the attention of the immediate Supervisor through the submission of a grievance form obtainable in the Human Resource Office. A representative from the RCRH Human Resource Office will assist the employee in reducing the complaint/grievance to writing if requested by the employee. The supervisor who is presented with the grievance is to investigate the complaint and attempt to resolve it, and give the decision to the employee within a reasonable time. The decision should be in writing, summarizing the complaint, resolution, or reason for denial and be dated and signed by the supervisor. A copy of the decision is to be included in a file separate from the employee's personnel file in the Human Resource Office. If the complaint/grievance involves the immediate supervisor whom is not the head of the department, the employee can elect to move directly to Step two of the grievance procedure.

2. Step Two: If the complaint/grievance is not resolved in Step One, the employee may appeal the supervisor's decision to the head of the department. This appeal must be made in writing and submitted in a timely fashion. The party receiving the complaint/grievance will confer with the employee, the supervisor and any other staff members deemed appropriate, investigate the issues, and communicate a decision in writing to the employee, the employee's department head and immediate supervisor, and to the Human Resource Office.

3. Step Three: A decision unsatisfactory to the employee in Step Two may be appealed to the appropriate division Vice President of Rapid City Regional Hospital/Regional Health Corporate Services. The complaint will be investigated and a recommendation regarding the resolution of the grievance will be submitted to the RCRH Chief Executive Officer/RHCS Chief Administrative Officer and Regional Health's Vice President of Human Resources.

4. The RCRH Chief Executive Officer/ RHCS Chief Administrative Officer and Regional Health's Vice President of Human Resources will review the recommendation and render the final decision. Final decisions will be communicated in writing to the employee and all other appropriate parties.

J. Employee of Regional Health Network (RHN) will utilize the following process;

1. Step One: Promptly bring the complaint/grievance to the attention of the immediate Supervisor through the submission of a grievance form, obtainable in the Human Resource Office. A representative from the Organization's Human Resource Office will assist the employee in reducing the complaint/grievance to writing if requested by the employee. If the complaint/grievance involves the immediate supervisor, it is then permissible for the employee to submit the grievance to the next level of supervision within the department. The supervisor who is presented with the grievance is to investigate the complaint and attempt to resolve it, and give the decision to the employee within a reasonable time. The decision should be in writing, summarizing the complaint, resolution, or reason for denial and be dated and signed by the supervisor. A copy of the decision is to be included in a file separate from the employee's personnel file in the Human Resource Office.

2. Step Two: If the complaint/grievance is not resolved in Step One, the employee may appeal the supervisor's decision to the head of the department or to the CEO / Administrator of the employee's facility, if the immediate superiors had been bypassed in Step One. This appeal must be made in writing and submitted in a timely fashion. The party receiving the complaint/grievance will confer with the employee, the supervisor and any other staff members deemed appropriate, investigate the issues, and communicate a decision in writing to the employee, the employee's department head and immediate supervisor, and to the Human Resource Office.

3. Step Three: A decision unsatisfactory to the employee in Step Two may be appealed to the Regional Health Network's Chief Operating Officer. The complaint will be investigated and a recommendation regarding the resolution of the grievance will be submitted to the RHN's Chief Executive Officer and RH's Vice President of Human Resources.

4. The RHN's Chief Executive Officer and RH's Vice President of Human Resources will review the recommendation and render the final decision. Final decisions will be communicated in writing to the employee and all other appropriate parties.

K. Employee of Regional Health Physicians (RHP) will utilize the following process;

1. Step One: Promptly bring the complaint/grievance to the attention of the immediate Supervisor through the submission of a grievance form, obtainable in the Human Resource Office. A representative from the Organization's Human Resource Office will assist the employee in reducing the complaint/grievance to writing if requested by the employee. If the complaint/grievance involves the immediate supervisor, it is then permissible for the employee to submit the grievance to the next level of supervision within the department. The supervisor who is presented with the grievance is to investigate the complaint and attempt to resolve it, and give the decision to the employee within a reasonable time. The decision should be in writing, summarizing the complaint, resolution, or reason for denial and be dated and signed by the supervisor. A copy of the decision is to be included in a file separate from the employee's personnel file in the Human Resource Office.

2. Step Two: If the complaint/grievance is not resolved in Step One, the employee may appeal the supervisor's decision to the head of the Clinic or to the Executive Director of RHP, if the immediate superiors had been bypassed in Step one. This appeal must be made in writing and submitted in a timely fashion. The party receiving the complaint/grievance will confer with the employee, the supervisor and any other staff members deemed appropriate, investigate the issues and communicate a decision in writing to the employee, the employee's department head and immediate supervisor, and to the Human Resource Office.

3. Step Three: A decision unsatisfactory to the employee in Step Two may be appealed to the Executive Director of Regional Health Physicians. The complaint will be investigated and a recommendation regarding the resolution of the grievance will be submitted to RHP's Chief Executive Officer and RH's Vice President of Human Resources.

4. RHP's Chief Executive Officer and RH's Vice President of Human Resources will review the recommendation and render the final decision. Final decisions will be communicated in writing to the employee and all other appropriate parties.

L. Final decisions on complaints/grievances will not be precedent setting or binding on future complaints/grievances.

M. Information concerning an employee's complaint/grievance is to be held in strict confidence. Supervisors, department heads, and others who are involved in the investigation of the complaint/grievance are to discuss it only with individuals on a need-to-know basis or who are needed to provide necessary background information.

N. Time spent by employees in the processing of the grievance during their normal working hours will be considered worked time for pay purposes.

RESOURCES *(The Resources used during the creation of the policy)*

A. [Click here and type Resources (people) or type "**Not Applicable**" if there are none]

REFERENCES *(The References used during the creation of the policy)*

A. [Click here and type References (books, printed material, important aspects of care, etc.)]

REGULATIONS / STANDARDS

A. [Click here and type Regulations / Standards or type "**Not Applicable**" if there are none]

Policy Number:	RH HR-8371-501
Policy Title:	Corrective Action
Applies To:	Regional Health
Department:	Regional Health
Effective Date:	September 1998
Review/Revision Date(s):	September 2010 August 2008 August 2006
Supersedes:	Corrective Action (RH HR-8371-501)
Referenced Policy(ies):	TERMINATION / CHANGE NOTICE FORM (PRS-8371-202) FAIR TREATMENT (PRS-8371-601) TERMINATION OF EMPLOYMENT (PRS-8371-201)
Attachment(s):	
Authored by:	Dennis Schroedter, Director
Reviewed by:	Joella Carlson, Director Kathryn Shockey, Director Dale Gisi, Director Ginger Chord, Coordinator Jane Garness, Coordinator Colleen Derosier, Coordinator Nancy Moser, Coordinator Patsy Aiken, HR Coordinator
Approved by:	Robert Mcglone, VP of Human Resources

POLICY STATEMENT

An employee whose performance is below acceptable standards or whose conduct violates rules, policies, or procedures is subject to disciplinary action.

Regional Health reserves the right to determine the disciplinary process to be used and the nature and extent of discipline to be imposed for at will employees or contracted employees. This process may include verbal warnings, written warnings, suspensions or terminations at the sole discretion of the System. Prior to administering formal discipline, department directors are encouraged to use corrective counseling as a means to resolve a problem. Corrective counseling is not considered disciplinary action.

While the System reserves the absolute right to determine what action or conduct will result in discipline, the following is a non-exhaustive list of examples of unacceptable conduct that may result in discipline or immediate termination: theft, falsification of any records, including pay records, breach of confidentiality, any action which could harm a patient or staff member, any action which may endanger Regional Health's good will in the community, possession or use of controlled substances or alcohol while on the System's premises, appearing for work under the influence of a controlled substance or alcohol, failure to accept supervision and work direction, failure to exercise safety measures and adhere to the safety policies of the System, sleeping on the premises, and any actions or conduct that the System determines, in its sole discretion, to be inconsistent with the operation of its business and/or the delivery of patient care. The examples cited above are for illustration only and shall not be considered as comprehensive or limiting the Regional Health's right to discipline or discharge as it determines appropriate. Violation of the same rule is not required to proceed to the next step of the disciplinary process. Violations of different rules of reasonable management expectations can result in moving to the next step or the omission of step(s) in the process.

The following procedure outlines the steps that may be taken when progressive discipline, rather than

immediate termination is chosen for the conduct under review. At the discretion of the System one or more levels of discipline may be omitted, depending upon the severity of the incident.

GUIDELINES

A. Written Warning and Action Plan. There are times when a written warning without a prior verbal warning is necessary and appropriate. The Department Director may issue a written warning to the employee. The Department Director completes a Disciplinary Memorandum and discusses it with the employee. The employee is asked to sign the Memorandum, acknowledging that he or she has received a copy of the document and that it has been discussed with the employee. One copy is given to the employee, the Department Director retains one copy and the original signed copy is filed in the employee's personnel file. Should the employee refuse to sign the memorandum, the Department Director will note such on the document and provide the employee with a copy of the document.

Action Plan Guidelines – When appropriate based upon the type of violation being addressed in the Disciplinary Memorandum, an Action Plan should be completed and should contain the following elements

1. **Description of the violation or performance deficiency** – This should include:
   * The policy, rule, regulation or performance standard that was violated.
   * When and where the violation took place
   * How the violation was observed (i.e. witnesses, reports, complaints, etc)
2. **Statement of future performance expectations** – include what is the minimum expectation in order for the staff member to avoid additional discipline. No further late arrivals or early departures without approval, completion of assignments within expected due date unless agreed to in advance, etc.)
3. **Define follow-up** – Explain how performance will be formally reviewed (i.e. 30-60-90 days), but include that future violations may result in additional discipline or immediate termination; and that the expected improved performance, beyond the formal review period is expected to continuous and consistent.
4. **Define further actions** – Explain what additional actions may be applied should performance not improve or additional violations occur.
5. **Sign and Date** - Provide the staff member with a copy of the completed Action Plan, as explained above should the staff member refuse to sign the Action Plan note this on the document.

Note: Action Plan Templates are available through the Human Resource Office or on the Regional Health Intranet.

B. Suspension or 2nd Written Warning- An employee may be placed on disciplinary suspension without pay, or given a 2nd written warning for inadequate performance, rule or policy violations, unscheduled absences or tardiness or inappropriate behavior.

An employee may be placed on disciplinary suspension without having received any previous disciplinary actions, depending on the severity of the incident. In all cases, the Department Director consults with the Human Resources before an employee is suspended. As stated in Section A an Action Plan may be appropriate at this step if one had not been completed at the 1st. written warning.

A disciplinary suspension can be granted up to five days without pay; suspension beyond five days may occur at the discretion of the immediate Director, Human Resources, Regional Health Vice President of Human Resources, and CEO.

Employees who have been charged in a criminal case may be suspended indefinitely with or without pay pending the disposition of the case. Human Resources must approve such a suspension decision. Suspension, with or without pay, may also occur when the System needs time to conduct an investigation to determine whether termination is warranted.

Suspensions are most appropriate for rule or policy violations, while 2nd written warnings should be considered for attendance or performance problems not attributable to negligence.

C. Termination. Termination may result when no improvement is made in the employee's performance, attendance or behaviors.

D. After 12 months from the date of issue, if there is no recurrence of similar behavior or performance, disciplinary actions may, be considered to have aged in terms of further progressive discipline. A decision to void a prior disciplinary action will be made jointly by the Department Director and Human Resources. Copies of all Disciplinary Actions are retained in the employee's personnel file.

E. Termination. An employee may also be terminated without receiving prior constructive counseling, oral warnings, written warnings, or suspensions, depending on the severity of the incident. The Department Director when determining whether or not employment should be terminated may consider recent disciplinary actions against an employee. In all cases of termination of employees who have passed their introductory period, the Department Director must consult with Human Resources before an employee may be terminated from employment. All terminations must be approved by Human Resources, with the concurrence of the Vice President of Human Resources, Regional Health or designee. If possible the incident must be discussed with the employee before any action is taken toward termination. Written documentation of the incident from the employee may be submitted. Immediate termination is usually reserved for severe cases of unacceptable performance or behavior.

RESOURCES

A. Not Applicable

REFERENCES

A. Not Applicable

REGULATIONS / STANDARDS

A. Family Medical Leave Act

Policy Number:	RH HR-8371-201
Policy Title:	TERMINATION OF EMPLOYMENT
Applies To:	Regional Health
Department:	Regional Health
Effective Date:	May 1984
Review/Revision Date(s):	February 2010 August 2006 January 2005
Supersedes:	TERMINATION OF EMPLOYMENT (RH HR-8371-201)
Referenced Policy(ies):	
Attachment(s):	
Authored by:	Dale Gisi, Director
Reviewed by:	Dennis Schroedter, Director Joella Carlson, Director Kathryn Shockey, Director Ginger Chord, Coordinator Jane Garness, Coordinator Colleen Derosier, Coordinator Pamela Williams, Director Nancy Moser, Coordinator Patsy Aiken, HR Coordinator
Approved by:	Robert Mcglone, VP of Human Resources

POLICY STATEMENT

An individual's employment within the Regional Health may be terminated because of the employee's resignation, discharge, or retirement, the expiration of an employment contract, or a permanent reduction in the workforce. In the absence of a written agreement to the contrary, employees are free to resign at any time and for any reason; and the organization reserves the right to terminate employment at any time and for any reason.

GUIDELINES

A. Employees are requested to give written notice of their intent to resign. Notices should be presented to the employee's Department Supervisor in accordance with the following recommended guidelines:
    1. Supervisors, Management staff, licensed professionals (exception Certified Nursing Assistants) should give four weeks notice.
    2. All other employees should give at least two weeks' notice.
    3. Employees are expected to work during the notice period. PPL and EIAB usage may not be accepted as part of the employee's expected notice.
B. Upon Receiving the employees notice of resignation or following the decision to discharge a employee the Department Director / Employee's Supervisor must:
    1. Immediately complete a Change /Termination Notice , and forward along with the employees resignation notice to the Human Resource Department.
    2. The Department Director will arrange for the employee to complete an exit interview either in person by scheduling with the Human Resource Department, or through our exit interview vendor by phone or on-line.
    3. If needed, notify the Information System's Help Desk of the employee's termination to secure all computer access accounts.

4. If needed, secure all department property by changing locks and punch in codes, which may have allowed access to non-public areas or confidential information.
5. Make arrangements to secure all property belonging to the organization prior to the employees last day of employment including: keys, ID badge, office and other equipment belonging to the organization (i.e. computers, laptops, PDA's etc.), credit cards issued by the organization.

C.

D. Generally, the employee's paycheck will be issued on the next regularly scheduled payday. Unless notified of other arrangements by the employee in writing, the last paycheck will be direct deposited. The employee's final paycheck may be held until all items belonging to the organization have been secured.

E. Employees who are absent from work for two consecutive scheduled shifts without being excused or without having given proper notice will be considered as having voluntarily quit. Human Resources will notify employees of their termination by registered letter sent to their last-known address.

F. Involuntary terminations Must be cleared with the Human Resources before any final action is taken.

G. Requests for employment references should be made in writing to the Human Resource Department and should include an authorization by the employee for the release of the information. Human Resources will not release reference information without the employee's signed release, or will limit the information to verification of the employee's position and dates of employment.

H. Termination and discharge procedures are only guidelines and do not create a contractual relationship between the facility and its employees.

RESOURCES

A. Not Applicable

REFERENCES

A. Not Applicable

REGULATIONS / STANDARDS

A. Not Applicable

On Wednesday, 5-30-12
At approximately 0830, I was coming From independent wing and when the med cart came into view, I saw Christine Lawler standing by Shirley Harvey; Shirley said something to Christine - (I couldn't hear) Christine told Shirley to "Shut up" and Shirley slapped Christine in the mouth.

On Friday, 6-1-12 @0710
Christine Lawler walked up to the med cart and took a pen off the cart. I told Christine "No thank you" and she set it back down. She walked towards the kitchen and picked up a stack of napkins. Shirley Harvey walked up to her, took them forcibly out of Christines hands, and slapped both hands. Later on in the afternoon around 1530, Christine told me to "go to hell". Shirley Harvey took resident to her room UnH and did not come out for more than 10 minutes later. When I seen Christine @1600, she was on the verge of crying, with trembling lips. (over)

Harvey00041

(gone?

(Still May 1st 2012)

At 1745, Shirley was helping me clear tables. Maxine Gross called out to Shirley, and Shirley snapped at Maxine and said "WHAT?" Maxine said "Christine is going to take off with her sandwich." Christine was standing next to Maxine with her sandwich in her hand. Shirley grabbed Christines sandwich and threw it on her plate. Shirley then took Christine to her room and was in there with her for approximately 5-10 minutes. I did not see christine again until morning. This incident was also witnessed by the staff coming on for nightshift meds. Joelle Ellenbecker

Jessica Strang-Edstrom

6-1-12 - came to work Shirley was in during room wearing tavus and max tried to get her attention and she snapped "what" and then took a part of a sandwich out of crissys hand and threw it on the table.

5-01-12 observed shirley standing over the back of crissy telling her she will sit in the chair and not move until supper is served or she'll go sit in her room. Crissy did get up and was walked to her room as a consequence of getting up.

- there has been several occasions that a resident wants to sleep in for awhile and they are not allowed to. when mel & shirley are working the wake everyone up as soon as they get here, and won't let them sleep in like they want to. (residents' viola, mary, cher

- I have witnessed several occassions when medications have been forcefully given to residents by mel Helsing. (ex: donna, cris

- the worst I've seen is when Barb was still here, the verbal abuse to her was awful. when she would try to walk they would obtain upset with her.

Harvey00039

- both mel and shirley refuse to help residents with little things. ex... cheryl had a brace that needs to be put on every Am. she struggles sometimes with it and getting ready in the Am. depending on how shes feeling. they will let her sit there until she gets it ON. have heard mel say "get back in there and put your brace ON" and cheryl goes back IN. cheryl has voiced several times that she's afraid of mel and cries when she knows she's gonna be working. and says shes really ruff when giving her showers.

there's was one day I was working w/ shirley and crissy was having a bad day and was verbally venting her frustration. shirley had got up from the table, slapped her on the hand and said don't say that, took her by the hand and led her to her room and told her to stay there until she could behave.

Jessie Winchester

Joelle Ellenbecker

1) 06-01-12 Shirley Harvey snapped "what"; took food out of resident's (Crissy) hand; threw it on the table.
2) 05-21-12 observed Shirley telling resident (Crissy) to sit in the chair and not move until supper is served or she will go sit in her room. Observed Shirley take Crissy to her room as a consequence of getting up.
3) Shirley and Mel Helsing wake everyone up first thing and do not allow any resident to sleep in. (Viola, Mary, Cheryl prefer to sleep later)
4) Observed Mel forcefully giving medications to residents (Donna and Crissy)
5) Observed Shirley and Mel get upset with resident (Barb) when she tried to walk; reports Mel and Shirley were verbally abusive to Barb.
6) Shirley and Mel refuse to help residents with little things (Cheryl's brace); Heard Mel say "Get back in there and put your brace on".
7) Resident (Cheryl) voiced several times she is afraid of Mel and cries when she knows Mel is working; Cheryl states Mel is rough when giving her showers.
8) Resident (Chrissy) was having bad day and verbally venting her frustration. Shirley slapped Crissy on the hand and said "Don't say that". Shirley took Crissy by the hand and led Crissy to her room and told Crissy to stay there until she could behave.

Jessica Strong-Edstrom

9) 05-30-12 observed resident (Christine) and Shirley Harvey in conversation by the med cart. Unable to hear everything said but did hear Christine tell Shirley to "Shut up". Observed Shirley slap Christine in the mouth.
10) 06-01-12 Observed resident (Christine) pick up a stack of napkins. Shirley took the napkins forcibly out of Christine's hands and slapped both of Christine's hands.
11) Later the same day, (1530) observed Christine say "Go to hell" and Shirley took Christine to her room and did not come out until more than 10 minutes later. At 1600 observed Christine on verge of crying with trembling lips.
12) At 1745 on same day observed Shirley snap at resident (Maxine) who reported Christine taking food. Shirley grabbed Christine's food and threw it on the plate; Shirley took Christine to her room and was there for 5-10 minutes.
13) Witnessed on numerous occasions, Mel Helsing verbally bullying residents (Cheryl, Joanna, Viola, Barbara, and Mary). Jessica does not recall specifics.
14) Mel Helsing yelled at Jessica; met with Joelle Meade to resolve conflict. Post meeting Mel Helsing either did not speak to Jessica or belittled her for doing the wrong thing (taking break at wrong time).
15) Mel Helsing does not communicate important information to Jessica that is necessary to do her job effectively. (resident out of the building) have to ask Mel for information that should be shared.

EXHIBIT 124
Shirley Harvey
C. HARKINS 10-18-16

16) A few weeks ago Shirley filled in for housekeeper position, Mel Helsing and Shirley disappeared from 11:30 to 12:20. Jessica did not receive any help during this time.

Melody Nelson

17) Shirley Harvey, Melody Helsing and resident (Phyllis Long) were in room 104. Overheard Phyllis complaining about Darcy Anderson (co-worker) and the tattoos Darcy has. Phyllis made comment that management needed to change. Melody Nelson quotes Phyllis as saying "There are a few of these girls that need to be fired." Mel Helsing said "we are working on getting a couple of the girls fired or let go". Phyllis named Jessica, Katie and Darcy stating they were worthless and had no business working at the facility. Mel Helsing replied it would be hard to get rid of Darcy because she is a friend of Joelle Meade. Phyllis commented that Joelle needs to start doing her job right and get rid of the girls. Mel Helsing made the comment that "they can do so much and hope that Joelle gets rid of them, but they would keep working on getting rid of the girls. Shirley Harvey did not say anything except "I know" and she laughed.
18) Resident (Phyllis) made the comment to Mel Helsing to "do whatever she has to do or say to get rid of the girls and she (Phyllis) would back her up as long as we can get those girls out of here."
19) Sometime around end of February/beginning of March between 6:00 and 6:30 am, observed Mel Helsing take all of Chrissy's (resident) pills and put them in Chrissy's mouth at once and told her to swallow them. Observed Mel Helsing take a 32 oz glass of water and start pouring it into Chrissy's mouth. Melody Nelson asked Mel Helsing why she didn't do one pill at a time and Mel Helsing said "I don't have time to be messing around with her.". Observed Mel Helsing dump entire glass of water into Chrissy's mouth and then filled up the cup and starting dumping it down her. Melody Nelson told Mel Helsing she would watch Chrissy so Mel Helsing could go do other stuff. Observed Mel Helsing poking at Chrissy's cheeks and Melody Nelson again told Mel Helsing to just go. Melody Nelson observed Chrissy crying and after Mel Helsing walked away, Melody Nelson had Chrissy spit the pills out because she could swallow all of them.
20) In April on day shift, observed Mel Helsing take Donna's (resident) Klor Kon (potassium powder); dump it into Donna's mouth without mixing it and made Donna drink water. Donna slapped at Mel Helsing.
21) Observed Mel Helsing standing in front of Joelle Meade's office door reading all the notes taped on the door. Mel Helsing stated she just wanted to make sure none of the notes were about her; then she re-taped the notes and put them back on the door.
22) In April, overheard Mel Helsing yelling at Cheryl (resident) to stop being helpless and to learn to do things for herself or she was going to a nursing home. Cheryl asked Mel Helsing to help put on her brace. Mel Helsing told Cheryl she didn't have time. After Mel Helsing left the room, Melody Nelson went in and helped Cheryl with her brace. Cheryl asked why "Big Mel" (Helsing) was so mean. Melody Nelson told Cheryl to talk to Joelle Meade. Cheryl told Melody Nelson she was too scared of what "Big Mel" would do to her if she did.
23) December or January Phyllis (resident) asked Melody Nelson if she was the coat she bought for Mel (Helsing). Phyllis said she felt bad because Mel (Helsing) didn't have a warm coat and couldn't afford to buy one so she bought one for her. A few days later, Mel Helsing asked

Melody Nelson if she liked her new coat. She told Melody Nelson that Phyllis bought it for her. Melody Nelson told Mel Helsing that must be nice. The coat would keep her warm.

24) Beginning of May, heard Mel Helsing comment on Darcy's tattoos. Mel Helsing stated we should not be able to have tattoos on our arms and Darcy needed to have them covered. She also said "we are working and had no business showing our tattoos."
25) May 29th came to work at 1830. Walked into kitchen and found a mess (like a hurricane went through it) Had to clean everything including fridge, walls, floor and sinks. Took until 4:30 am to clean it all up.
26) Observed Mel Helsing yell at residents (Helen or Arvilla) "Get your ass back to your room and put different clothes on." Also heard Mel Helsing yelling at residents (Chrissy, Donna, and Helen) when she arrives at 0600 that "It is too damn early to be up and they need to go back to their rooms.".
27) When any of the co-workers confront Mel Helsing on something, she starts yelling at us and then treats us like dirt so we keep our mouths shut because we don't want to walk on egg shells. Mel gets mad at day shift if they do any work to help out night shift. Mel Helsing tells the day shift it is not her job to help night shift do their work.
28) Have witnessed Mel Helsing and Barb Boyer (co-worker) treating Jessica (co-worker) very badly. They yell at her and Mel Helsing makes Jessica do all the showers because "it is her job".

Darcy Anderson

29) Overheard Mel Helsing and Shirley Harvey talking about who (residents) have showers that day. Shirley asked when she should do them and Mel Helsing said "right now". This was at 6:30 am. Darcy spoke up and mentioned several residents (Cheryl and Mary) who like to sleep in. Observed Mel Helsing and Shirley look at each other and walk into the pod toward Mary and Cheryl's rooms. Overheard Mel Helsing say "They don't have a choice, they were gonna get up now."
30) Have observed Mel Helsing make Christy sit at the table for a meal; be rude to Christy or yell at her when she gets up.

All of these events took place about one month ago or so.

Summary specific to Shirley Harvey

Joelle Ellenbecker

1) Snapped "What?"; took food out of Crissy's hand and threw it on table.
2) Told Crissy to sit in her chair-not move until supper served or she'll go to her room
3) Does not allow resident to sleep in on her shift; gets them up at 6:30 for showers
5) Verbal abuse to Barb (resident)
6) Refuses to help resident with little things i.e. Cheryl's brace
7) (Mel H.)
8) Slapped Crissy on the hand/led her to her room/told her to stay there until she could behave

Jessica Strong-Edstrom

9) Slapped Chrissy in the mouth and told her to "shut up"
10) Slapped Chrissy on both hands after forcefully removing stack of napkins
11) Chrissy said "go to hell" ; Shirley took Chrissy to her room and stayed for about 10 minutes.. Jessica noted Chrissy 20-30 minutes later was "on verge of crying with trembling lips"
12) Christine was reported for taking sandwich from another resident; Shirley removed the sandwich; threw it on the plate and took Christine to her room; remained there for 5-10 minutes. Christine did not come out of her room until morning.
13) (Mel H)
14) (Mel H)
15) (Mel H)
16) Shirley and Mel "disappeared" during busy time

Melody Nelson

17) Shirley said "I know and laughed when resident and Mel H. were talking about getting girls fired.

Darcy Anderson

Nothing to report on Shirley

Meeting 06-06-12

Shirley Harvey, Joelle Meade, Kathe Shockey

Meeting today to discuss some concerns that have been raised pertaining to Quality of Life expectations under the Articles 44:04 for Medical Facilities. (44:04:17:09)

Specifically two sections: freedom from verbal, sexual, physical, or mental abuse and freedom from involuntary seclusion, neglect or exploitation.

We are conducting a research into concerns reported to Joelle.

1) Tell us about any occasions at work where you have spoken to a resident in a tone that would be described as firm.
2) Tell us about any occasions at work where you have raised your voice to the level those around you would view as yelling.
3) Tell us about any occasions where your tone of voice has been described as "snapped at". Typically one word....."What"....leaving the other person with a negative perception of your willingness to assist.
4) What is your standard practice when a resident is not following directives from staff?
5) You have been observed telling resident to sit in the chair, not to move until meal is served or she will go sit in her room. Then walked resident to their room as a consequence of getting up. Please tell us about this situation.
6) Have you ever sent a resident to their room as the result of behavior problems?
7) Have you accepted anything of value from a resident?
8) Do you have knowledge of any one employed at Golden Ridge that has accepted anything of value from a resident?
9) Do you have knowledge of an employee of Golden Ridge accepting a winter coat from a resident?
10) Have you and another co-worker had lunch out of the building with a resident at Golden Ridge: How often? Who pays for the lunches?
11) Has this resident ever purchased items and gifted them to you?
12) You have been observed refusing to assist a resident with what is described as "little things". Can you tell us about your understanding of an appropriate level of assistance?
13) Has a resident ever made you frustrated enough to touch them in a manner that would be considered by others as excessive or inappropriate?
14) You have been observed taking food out of a residents hand and "throwing" it on the table. Please tell us about this incident.
15) There was a situation where a resident verbally used inappropriate language..."go to hell". Do you recall this occasion? Please tell us what you remember about it.
16) You were observed getting up from the table, slapping the resident on the hand and saying "don't say that". You were observed taking the resident to her room, and telling the resident to stay there until she could behave. Please tell us about this incident.

17) What happened after you took the resident to her room? You were observed remaining in the room for about 10 minutes. (it was the perception of other staff members that this resident appeared upset following this incident) Please describe your views on this perception.
18) On one occasion, a resident was observed walking toward the kitchen and picking up a stack of napkins. What can you tell us about this incident?
19) You were observed walking up to the resident, removing the napkins in a manner that was described as "forcibly"; and then slapped both hands of the resident. Please tell us why you slapped her hands.
20) On Wednesday May 30th you were observed talking to a resident... In the course of the conversation the resident told you to "Shut up". You were observed slapping the resident in the mouth. Please tell us about this incident.
21) Recently you were in the room of resident Phyllis Lang with Mel Helsing where Phyllis was heard saying "there are a few of these girls that need to be fired." Please tell us what you remember about this conversation.
22) The names Jessica, Katie and Darcy were mentioned by Phyllis as those girls who were worthless and had no business working at the facility. Are there any concerns about their quality of care that we need to know about?
23) In your opinion, is Phyllis dissatisfied with the leadership at Golden Ridge? Are there any changes you feel need to be made?
24) Did Phyllis make a comment to Mel that she should do whatever she has to do or say to get rid of the girls and she would back up Mel as long as we can get these girls out of here?
25) Is there some reason you can think of why someone would make this up?
26)

Following a meeting with Joelle Meade, documentation provided by co-worker Joelle Ellenbecker states: Joelle Ellenbecker observed Shirley get upset with resident Barb. Joelle E. states Shirley was verbally abusive to Barb when she tried to walk.

1) Shirley states she does use a firm tone to her voice when she speaks to certain residents in response to multiple comment or questions. She states Viola has a bad attitude and Christine shadows Shirley. When she turns around and Christine is right behind her she is firm when asking Christine not to stand so close to her. She asks the question....how else do you get across to Christine? Shirley denies yelling. States she can't think of anytime she would yell and further states I don't think you would yell at a resident and then states she wouldn't. She further states the comment that she snaps the word "what" as something she would not do but if she is in the middle of meds and Jo called, she is just busy. Shirley denies taking food out of a residents hand and throwing it on the table.

Following a meeting with Joelle Meade, documentation provided by co-worker Joelle Ellenbecker states: On May 21, 2012 observed Shirley tell resident Christine to sit in the chair and not move until supper is served or Christine would go to her room and then observed Shirley take Christine to her room as a consequence of getting up from the chair.

Following a meeting with Joelle Meade, documentation provided by co-worker Jessica Strong-Edstrom states: on 06-01-12 observed Christine say "go to hell" and Shirley took Christine to her room and did not come out until 10 minutes later. Observed Christine 20 minutes later on verge of crying and trembling lips.

Following a meeting with Joelle Meade, documentation provided by Jessica Strong-Edstrom states: On June 1, 2012 observed resident Christine with a sandwich in her hand standing by another resident. Observed Shirley grab the sandwich, throw it on the plate and then take Christine to her room. Shirley remained in the room for 5-10 minutes.

2) Shirley states she did tell Christine if she doesn't stop using bad language she will be taken to her room. Shirley states it upsets the other residents when Christine uses bad language. Shirley states she took Christine to her room, placed her feet on a stool, and turned on her TV. Shirley does not recall how long she was in the room. Shirley doesn't remember doing or saying anything else while she was in the room. Shirley states Christine was upset all along and when she did come out of her room she was more mellow. Shirley states it bothers others when Christine is up and down and won't sit still. Shirley admits she does take Christine to her room as the result of behavior problems.

Following a meeting with Joelle Meade, documentation provided by co-worker Jessica Strong-Edstrom states: observed resident Christine pick up a stack of napkins. Observed Shirley Harvey take the napkins forcibly out of Christine's hand and slapped both hands.

Reported to Joelle Meade by co-worker Jessica Strong-Edstrom: on May 30, 2012 observed Christine standing by Shirley in dining area. Did not hear Shirley's comment to Christine but did hear Christine say "Shut up".
Observed Shirley slap Christine in the mouth.

Following a meeting with Joelle Meade, documentation provided by Joelle Ellenbecker: observed Christine having a bad day and verbally venting her frustrations (bad language). Observed Shirley get up from the table, slap Christine on the hand and said "don't say that", then took Christine to her room and told her to stay there until she could behave.

3) Shirley states she would never slap a resident. She states slapping and tapping are totally different. Shirley states she has tapped a resident on the hand. When asked what the difference is, Shirley demonstrates a tap on her hand as a quick, light contact. Shirley states "excuse me, I don't think so. I would never slap or forcibly remove things. Shirley states "this is getting absurd and feels like I am being accused of abusing my residents." She further states everyone knows she jokes around with her residents. She also states she respects her residents.

Following a meeting with Joelle Meade, documentation provided by co-worker Joelle Ellenbecker states: Shirley Harvey does not always help residents with little requests.

4) Shirley states she is always willing to help her residents.

Following a meeting with Joelle Meade, documentation provided by co-worker Darcy Anderson states: Heard conversation between Mel Helsing and Shirley Harvey about waking up residents for their showers. Darcy reminded both that some residents like to sleep in and take showers later in the morning. Shirley went with Mel to wake up the residents anyway.

Asked by Joelle Meade if Shirley has ever accepted a gift from a resident.

5) At first she said no. Then Shirley recalls she received a small gift card as did all the other girls who work there. She denies having knowledge of anyone at Golden Ridge receiving a gift from a resident. When asked specifically about a coat, Shirley states she has no knowledge of anyone receiving the gift of a coat. Shirley then states she received a jacket 3 or 4 years ago from the family of a deceased resident. She did not know she could not accept gifts and states she still has the jacket and will return it.

Reported to Joelle Meade by co-worker Mel Nelson: Shirley was in the room of resident Phyllis with Mel Helsing. The conversation between Mel Helsing and Phyllis pertained to getting some workers fired specifically Jessica, Katie and Darcy.

6) Shirley states she doesn't pay much attention to things like that; she lets it go in one ear and out the other. She states she hears complaints all the time about staff from residents. The remark she heard about Katie was that she is lazy and doesn't know how to make a bed. Everyone calls Jessica "the doctor" and Darcy is loud. Shirley states she doesn't know why Phyllis would say she wants them fired. Also does not recall Phyllis making a statement about backing Mel up if she can get these girls fired. Shirley does not think Mel would do anything like that.

When asked if there is some reason she can think of why someone would make this up, Shirley replies she can be a butthead sometimes. She states they (everyone at Golden Ridge) know she has been called in to the office several times and that she is supposed to be minding her P's and Q's.

Joelle Meade states when she met with the individuals that provided documentation she was very concerned that no one reported these incidents as they occurred. She indicated to each one that she was very upset they did not report these things as they happened. She asked each one why they did not come to her earlier. Mel Nelson, Jessica Strong-Edstrom and Joelle Ellenbecker all stated they are afraid of Mel Helsing and when any of them confront Mel Helsing on something, she starts yelling at them and then treats them like dirt. So they keep their mouths shut. Joelle has already talked to me about her concerns that staff did not report things as they happened. We will be meeting with Sherry Bea Smith to determine what consequences will be for individuals who failed to report occurrences in a timely manner.

Joelle Meade spoke to Paula McInerney-Hall and expressed her thoughts and concerns.

- Residents admit they are scared of Melody Helsing and won't call for assistance while she is working because they say she is rude and rough and yells at them.
- Golden Ridge cannot provide a safe environment for these residents and also are not providing the service that they are paying for.
- If the residents are afraid to call for help, they may attempt to do things on their own that they shouldn't and could end up getting hurt.
- Shirley Harvey admitted to "tapping" a resident on the hand but denies "slapping".
- Shirley Harvey admits she did make a resident go to their room and stay there because they were behaving badly.
- If Shirley "taps" a resident on the hand, is she capable of slapping a resident on the mouth for saying "Shut up".
- Joelle states it is inappropriate to touch any resident by tapping or slapping or anything else.

After speaking with each individual involved, Joelle feels the appropriate action is to terminate employment of both employees. Joelle states she is concerned and feels the issues will continue to happen if the employees are not terminated. She is very concerned with providing a safe environment for the residents and feels she would not be able to do that if these two are allowed to continue employment at Golden Ridge.

Dale, I support Joelle's request for termination.
Of the four employees who provided the documented incidents, both Mel Nelson and Joelle Ellenbecker are high performing and trustworthy. Jessica has had conflict with Shirley in the past and has participated in the negative behaviors. Shirley and Jessica are both in the final step of corrective action.
Darcy is fairly new and doesn't have any glaring issues although many residents complain that she Is loud especially when she laughs.
I believe the accounts documented by these four are valid and have accurately represented actual, witnessed incidents. Rita Stacey, Joelle Meade and I referred to the Articles 44:04 for Medical Facilities (44:04:17:09) specific to: freedom from verbal, sexual, physical or mental abuse and freedom from involuntary seclusion, neglect or exploitation. It is our collective determination that both Mel Helsing and Shirley Harvey have both violated article section 17:09

Shockey, Kathryn (Kathe)

From: Shockey, Kathryn (Kathe)
Sent: Wednesday, July 11, 2012 1:50 PM
To: Gisi, Dale
Subject: RE: corrective action information

Joelle confirms 1st and 2nd
Kathe

From: Gisi, Dale
Sent: Wednesday, July 11, 2012 11:58 AM
To: Shockey, Kathryn (Kathe)
Subject: RE: corrective action information

Was this a 1st (Feb) and a 2nd (April)?

From: Shockey, Kathryn (Kathe)
Sent: Wednesday, July 11, 2012 11:23 AM
To: Gisi, Dale
Subject: corrective action information

Dale, I spoke with Joelle this morning and have the following information to share.
Joelle has had a number of coaching sessions with Shirley Harvey concerning her poor communication style and lack of co-worker/team support. She received a corrective action in February 2012 for a number of negative interactions with co-workers. She received another corrective action in April 2012 for a disrespectful interaction with co-worker Jessica where she used inappropriate language and behaviors during their interaction. Action plans include the requirement to attend Regional Way Journey to Excellence for the second time; and attend educations classes: Respect-Honoring the Dignity and Worth of Each Person; Communication: Striving for Clear and Positive Communication; and Teamwork: Being a Productive Member of Our Team.
Joelle can provide details of the reported confrontations with co-workers if you need them.
Kathe

Continuation Report

Summary

By request of the State's Attorney's Office. The Officer investigated a case of possible Elder Abuse. A report was submitted

Persons Involved

ELLENBECKER, Joelle Ann - WITNESS
[redacted] Lead SD 57754
Phone: 605-222-9172 DOB: [redacted]
Employer: Emp Phone:

HARVEY, Shirley - SUSPECT
[redacted] Lead SD 57754
Phone: 605-584-2943 DOB [redacted]
Employer: Emp Phone:

HELSING, Melody B - SUSPECT
[redacted]
Phone: 605-645-1927 DOB: [redacted]
Employer: Emp Phone:

MEADE, Joelle Ann - FIELD CONTACT
[redacted] Lead SD 57754
Phone: 605-722-4924 DOB: [redacted]
Employer: Golden Ridge Retirement Emp Phone:

NELSON, Melody - WITNESS
[redacted] Lead SD 47754
Phone: 605-890-1492 DOB: [redacted]
Employer: Emp Phone:

STRONG, Jessica Jean - WITNESS
[redacted] Lead SD 57754
Phone: 605-920-0433 DOB: [redacted]
Employer: Emp Phone:

Action Taken

On 9 August 2012, at approximately 1440, I was given a request from the Lawrence County States Attorneys Office. The request was to investigate a possible elder abuse case that had happened at the Golden Ridge Retirement Home located at 200 Montana Avenue in Lead.

On 9 August 2012, I went to 200 Montana Ave in Lead. I made contact with Joelle Meade. Meade is the director for the Golden Ridge Assisted Living Center. Meade had reported that Christeen Lawler had been abused by Shirley Harvey. Meade received complaints from staff

members Jessica Strong, Joelle Ellenbecker, and Melody Nelson. Meade was not witness to the allegations. Meade stated that Harvey has since been terminated due to the allegations and other discipline issues. Meade provided copies of the complaints given to her by staff members. Meade stated that Lawler was never verbally or nonverbally fearful of Harvey. Meade also stated that the residents doors could not be locked thus the residents could come and go from their rooms at will. Meade stated that Nelson had reported Melody Helsing had Lawler place all of Lawler's pills into her mouth at one time. Helsing then made Lawler force water to get the pills down. It was also reported that on a separate incident with a different resident Helsing made a resident place a powder into the residents mouth then forced water to put powder down. The powder was supposed to be mixed in water then consumed.

While at the Golden Ridge Center, I interviewed Joelle Ellenbecker. Ellenbecker stated that she witnessed Harvey slap Lawler on the hand and escort Lawler to her room. Ellenbecker stated she could hear Lawler's hand get slapped. Ellenbecker stated she did not observe any bruising or marks after the slap. Ellenbecker also stated Lawler never displayed any verbal or nonverbal fear of Harvey. Ellenbecker also stated that Harvey's actions were more control tactics and did not originate from anger. Ellenbecker also claims to have seen Melody Helsing forcefully give medications to residents.

I interviewed Jessica Strong on May 30, 2012. Strong stated she witnessed Harvey slap Lawler on the mouth after Lawler had told Harvey to shut up. Strong also witnessed, on the morning of June 1, 2012, Harvey forcibly remove napkins from Lawler's hands then slap Lawler's right hand. Strong stated at approximately 1530 Lawler told Strong to "Go to hell." at which point Harvey escorted Lawler to Lawler's room. Lawler stayed in the room about 10 minutes and came back out. Strong stated that at approximately 1745 she witnessed a resident call out to Harvey to complain that Lawler was standing over the resident with food. Harvey then took the sandwich out of Lawler's hand and put it back onto the plate on the table. Harvey afterwards escorted Lawler to Lawler's room again. Strong stated that when Lawler was slapped in the mouth it was audible from 15-25 feet away. Strong stated that Harvey's actions were that of a mother scolding a child. Strong stated that she redirects Lawler by ignoring Lawler's actions. However Helsing, and Harvey remove Lawler from the area and escorts Lawler to the Lawler's room. Strong stated that Jamie Olson had seen multiple acts of abuse that were worse in nature but did not state any specifics.

I next interviewed Melody Nelson. Nelson stated that she had witnessed Harvey slap and seclude Lawler on multiple occassions. Nelson was very emotional in her recollections of the events. Nelson stated that the conduct was against policy and unacceptable. Nelson stated that Harvey's behavior had changed within the past six months and she had become more aggressive towards the residents. Nelson also stated that Harvey was more apt to be aggressive with patients that had dementia. Nelson stated that she did not see Harvey slap Lawler. Nelson stated that Harvey told Nelson about slapping Lawler. Nelson stated that Lawler came crying to her after Harvey had allegedly slapped Lawler. Nelson stated that the residents feared Melody Helsing. In March of 2012 Nelson witnessed Helsing try to force all of Lawlers pills at once. Helsing had Lawler place all of the morning pills into Lawler's mouth and told Lawler to swallow them. Helsing then began to pour a glass of water into Lawler's mouth. Helsing then tried to push a second glass of water into Lawler. Nelson claims in April of 2012 she witnessed Helsing put a powdered substance "klor kon" into a residents mouth and force water onto the resident. This medication is supposed to be dissolved in water, then drank.

My final interview was with Shirley Harvey. Harvey denied all allegations of slapping residents. Harvey admitted that she would take Lawler to Lawler's room when Lawler was being disruptive or vulgar in the common areas of the facility. Harvey stated that if Lawler was acting in a way that

was offensive to other residents she would take Lawler to her room. Lawler's room was never secured. Lawler was able to leave her room at will. Harvey stated that by removing Lawler from the current hostile environment and escorting Lawler to her room, Lawler would then calm down and return to the common area without hostile behavior. Harvey stated this action was to maintain control of the facility and overall quality of life for all of the residents. Harvey also stated that many of the residents and family members of the residents have inquired as to her availability for in home health care.

A statement was provided to me by Joelle Meade. The statement was from Melody Nelson. I find this statement to be of great concern. In the statement, Nelson claims to have overheard Melody Helsing, Phyllis Lang(a resident at the facility) & Shirley Harvey talking. The conversation overheard consisted of comments that management and many of the employees should be fired. All of the witnesses to the elder abuse were mentioned in this overheard conversation. The two employees, Harvey and Helsing, that made these comments have since been fired. The actions of Melody Helsing as described by the witnesses I do find to be abusive. The actions as described by the witnesses of Shirley Harvey's actions I see as improper but not abusive in nature. It is my opinion that the witnesses watched the behavior of Harvey and only once it became known that Helsing and Harvey made comments concerning the termination of "the girls" did they in fact report Elder Abuse. I believe in the case of Shirley Harvey, no further action be taken. I left voice mail with Melody Helsing. Melody Helsing has not responded.

Attachments

Statements from Joelle Meade by Melody Nelson
Statements from Joelle Meade by Jessica Strong-Edstrom
Statements from Joelle Meade by Joelle Ellenbecker

Evidence/Property

1 Digital Audio Recording Joelle Meade
2 Digital Audio Recording Melody Nelson
3 Digital Audio Recording Jessica Strong
4 Digital Audio Recording Joelle Ellenbeck
5 Employee Statements

Charges/Charges Requested

22-46-2. Abuse or neglect of elder or adult with a disability--Felony. Any person who abuses or neglects an elder or a disabled adult in a manner which does not constitute aggravated assault is guilty of a Class 6 felony.

22-46-10. Mandatory reporting of abuse or neglect by staff and by person in charge of residential facility or entity providing services to elderly or disabled adult--Violation as misdemeanor. Any staff member of a nursing facility, assisted living facility, adult day care center, or community support provider, or any residential care giver, individual providing homemaker services, victim advocate, or hospital personnel engaged in the admission, examination, care, or treatment of elderly or disabled adults who knows, or has reasonable cause to suspect, that an elderly or disabled adult has been or is being abused or neglected, shall, within twenty-four hours, notify the person in charge of the institution where the elderly or disabled adult resides or is present, or the person in charge of the entity providing the service to the elderly or disabled adult, of the suspected abuse or neglect. The

person in charge shall report the information in accordance with the provisions of § 22-46-9. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

Date/ ID: **8/22/2012 330** **Fredericksen, Jeremiah** ***Incident:*** 201202847

Officer's Signature: _____ **Date:** _____

LAWRENCE COUNTY
STATE'S ATTORNEY'S OFFICE

90 SHERMAN STREET
DEADWOOD, SOUTH DAKOTA 57732
TELEPHONE (605) 578-1707 FAX (605) 578-1468

August 3, 2012

Chief John Wainman
Lead Police Department

-SENT VIA FACSIMILE-

Re: Shirley Harvey

Dear Chief:

The attached information was submitted to the State's Attorney Office by Anthony Nelson of the South Dakota Department of Health.

I am requesting that the Lead Police Department investigate the allegations of elder abuse to determine whether or not criminal charges should be pursued. Please interview witnesses and submit a report to our office.

Thank you for your assistance.

If you have any questions, please contact our office.

Sincerely,

Brenda K. Harvey
State's Attorney

Zeigler, Adeina

From:	Zeigler, Adeina
Sent:	Tuesday, June 05, 2012 3:33 PM
To:	Wegleitner, Deb; Stahl, Bob; Anderson, Vickee (DOH); Weiland, Diana
Cc:	DOH OLC Complaint; Nelson, Anthony; Zeigler, Adeina
Subject:	Golden Ridge ALC Lead Susp CNA abuse physical and verbal
Importance:	High

At 3:01 p.m. I received a phone call from Joell Meade manager of Golden Ridge ALC Lead. She had asked how to make a report on abuse as she is new.
She had been informed a CNA had been verbal with and slapping a resident with dementia [redacted] er talking with her legal department and lawyers she was to contact us for guidance on reporting. (This is a Rapid City Regional facility) She waited to call today as she was waiting for the written statement from the employee who had reported the abuse. The report from the employee was turned in yesterday. She will be sending in her report, the employee's statement, and the CNA's info. I had also informed her to contact her local ombudsman for further guidance.

SOUTH DAKOTA DEPARTMENT OF HEALTH

Adeina Zeigler, RN
Licensure & Certification
615 E 4th Street
Pierre, SD 57501
(605)773-3356
(605)773-6667 (fax)
adeina.zeigler@state.sd.us

6/28/12

Shirley Harvey- Shirley has multiple reprimands on file; we can provide all of those if needed.

The allegations made against Shirley Harvey were that she was witnessed "slapping" a resident in the mouth when they told her to shut up. Also, Shirley was witnessed "slapping" the hands of a resident when she kept picking up things off of the counter that she wasn't supposed to. The last allegation was that Shirley secluded a resident in her room involuntarily for swearing in the dining room and upsetting other residents.

DOH: 3/7/2001

DOB: [redacted]

SS# [redacted] Lead SD 57784-2215

584-2943

CNA License#: A017932

Melody Helsing- Prior reprimands included.

The allegations made against Melody Helsing were that the residents feared her. Two separate residents came to facility director and stated that Melody was rough, loud and mean with them. They also stated that they were afraid of her and wouldn't call for help when she was working because of it.

DOH: 11/11/02

DOB: [redacted]

SS#

7/3/12

As discussed on the phone with you on 7/2/12 here is a summary of the two reprimands that Shirley Harvey received from me while employed under my supervision.

1. February 2012- Shirley was reprimanded for improper conduct towards a co-worker. She was given a written warning and was required to attend "The Regional Way" a course that outlines proper conduct and expectations of Regional Health employees
2. April 2012- Shirley again was reprimanded and received 2nd written warning due to improper conduct with a co-worker. Also, during that meeting she had inappropriate conduct with the facility's HR director and was also reprimanded for that.
3. June 8th 2012- Shirley was terminated for the allegations that I submitted to you.

Joelle Meade
Director G.R.R.S.C

RECEIVED
JUL 03 2012
SD DOH L&C

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LAWRENCE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

****

STATE OF SOUTH DAKOTA,
Plaintiff,

VS.

SHIRLEY HARVEY,
DOB 5-20-1958
Defendant.

13- 102

I N D I C T M E N T

****

THE LAWRENCE COUNTY GRAND JURY CHARGES:

COUNT I: ABUSE OR NEGLECT OF ELDER OR ADULT WITH DISABILTY (CLASS 6 FELONY)

That on or about Spring, 2012, in the County of Lawrence, State of South Dakota, the Defendant did abuse or neglect an elder or a disabled adult, namely Christine Ann Lawler, in a manner which does not constitute aggravated assault. Contrary to SDCL 22-46-2.

Dated this 31st day of January, 2013, Deadwood, South Dakota.

A TRUE BILL
"A TRUE BILL"

THIS INDICTMENT IS MADE WITH THE CONCURRENCE OF AT LEAST SIX GRAND JURORS.

Grand Jury Foreman

WITNESSES WHO TESTIFIED BEFORE THE GRAND JURY IN REGARDS TO THIS MATTER

Jeremiah Fredericksen
James Lawler
Jessica Strong-Edstrom
Melody Nelson
Joelle Ellenbecker

FILED
JAN 31 2013
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)ss	
PENNINGTON COUNTY	)	SEVENTH JUDICIAL CIRCUIT

SHIRLEY HARVEY and DON HARVEY,

Plaintiffs,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH; and, KATHERYN L. SHOCKEY,

Defendants.

51CIV14-21
Hon. Jane Wipf Pfeifle

Defendants' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment

Defendants, pursuant to SDCL §15-6-56(c)(1), submit that the following material facts are undisputed and warranty the entry of summary judgment on each of Plaintiffs' claims in favor of all Defendants.

1. Plaintiff Shirley Harvey was an employee of Golden Ridge Regional Senior Care, an assisted living facility in Lead, South Dakota. *Complaint* at ¶¶1-2.

2. During Shirley's employment at Golden Ridge, it was owned and operated by Regional Health Network, Inc ("RHN"). Ex. B.

3. RHN is a single-member not-for-profit entity; the single member is Regional Health, Inc ("RHI"). Ex. A, B.

4. Golden Ridge had a zero-tolerance approach to elder abuse. *See* Ex. 123 at RHN1494.

5. Rapid City Regional Hospital, Inc. ("RCRH") was not Shirley's employer, and had no contract with her. Ex. A, B. Ex. K (*S. Harvey Dep.*) at 197:23-25.

6. RHI was the parent company of RHN, and it had no contract with Shirley. Ex. A, B.

7. Tim Sughrue was not Shirley's employer. Ex. A, B.

8. Dale Gisi was not Shirley's employer. Ex. A, B.

9. Sherry Bea Smith was not Shirley's employer. Ex. A, B.

10. Kathe Shockey was not Shirley's employer. Ex. A, B.

11. On September 28, 2010, Shirley signed a "Receipt of Employee Handbook Acknowledgment and Consent" for the September 2010 Employee Handbook. Ex. 125; Ex. C.

12. Only the President of Regional Health had the authority to enter into a written employment contract. Ex. 125; Ex. C at 4.

13. Shirley did not have a written contract of employment with the President of Regional Health or any of the Defendants. Ex. K (*S. Harvey Dep.*) at 57:4-20; Ex. G at 2 (identifying the Fair Treatment Grievance Procedure as Shirley's "written contract of employment" with all of the Defendants).

14. The following language appears, in bold, on page 4 of the Employee Handbook:

> This handbook is not a contract of employment. The policies, procedures, practices, and benefits described in this handbook supersede all those written and unwritten at an earlier time. This handbook and its contents replace any earlier written and unwritten versions of our policies, including any prior handbooks. An electronic version of this handbook and all current Regional Health policies can be found on Regional Health's Intranet site. Paper copies can also be obtained from your local Human Resources office. Nothing contained in this employee handbook should be construed as a guarantee of continued employment. Regional Health does not guarantee continued employment to employees and reserves the right to terminate or lay off employees at will for any lawful reason with or without notice. Also, nothing contained in any statement of Regional Health's philosophy, including statements made in the course of performance evaluations and wage reviews, should be taken as an express or implied promise of continuing employment. No one has the authority

to enter into an oral employment contract on behalf of Regional Health. Only the President of Regional Health can enter into a written employment contract.

Ex. C at 4.

15. The Fair Treatment/Grievance Procedure Policy was enacted prior to the 2010 Handbook, and it is specifically identified and discussed in that Handbook. Ex. C at 24.

16. The Employee Handbook does not state that discharge can occur "for cause only." *See generally* Ex. C.

17. The Employee handbook does not contain a detailed list of exclusive grounds for employee discipline or discharge. *See generally* Ex. C.

18. The Employee Handbook does not contain a mandatory and specific procedure that RH or RHN agreed to follow prior to any employee's termination. *See generally* Ex. C.

19. The Fair Treatment/Grievance Procedure Policy does not contain a detailed list of exclusive grounds for employee discipline or discharge. *See generally* Ex. 26.

20. The Fair Treatment/Grievance Procedure Policy does not contain a mandatory and specific procedure that RH or RHN agreed to follow prior to any employee's termination. *See generally* Ex. 26.

21. ARSD 44:70:01:07 states, in part:

> Each [licensed assisted living] facility shall report to the department [of Health] within 48 hours of the event . . . any allegations of abuse or neglect of any resident by any person.

22. SDCL 22-46-9 states (emphasis added):

> Any:
>
> (1) Physician, dentist, doctor of osteopathy, chiropractor, optometrist, podiatrist, religious healing practitioner, hospital

intern or resident, nurse, paramedic, emergency medical technician, social worker, or any health care professional;

(2) Psychologist, licensed mental health professional, or counselor engaged in professional counseling; or

(3) State, county, or municipal criminal justice employee or law enforcement officer;

who knows, or has reasonable cause to suspect, that an elder or adult with a disability has been or is being abused, neglected, or exploited, shall, within twenty-four hours, report such knowledge or suspicion orally or in writing to the state's attorney of the county in which the elder or adult with a disability resides or is present, to the Department of Social Services, or to a law enforcement officer. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

A person described in this section is not required to report the abuse, neglect, or exploitation of an elder or adult with a disability if the person knows that another person has already reported to a proper agency the same abuse, neglect, or exploitation that would have been the basis of the person's own report.

23. SDCL 22-46-10 states:

Any staff member of a nursing facility, assisted living facility, adult day care center, or community support provider, or any residential care giver, individual providing homemaker services, victim advocate, or hospital personnel engaged in the admission, examination, care, or treatment of elderly or disabled adults who knows, or has reasonable cause to suspect, that an elderly or disabled adult has been or is being abused or neglected, shall, within twenty-four hours, notify the person in charge of the institution where the elderly or disabled adult resides or is present, or the person in charge of the entity providing the service to the elderly or disabled adult, of the suspected abuse or neglect. The person in charge shall report the information in accordance with the provisions of § 22-46-9. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

24. On Friday, June 1, 2012, Joelle Meade, Director of Golden Ridge, received a verbal report from employee Jessica Strong Edstrom that Shirley had abused a resident. *See* Ex. P (*Shockey Dep.*) at 43-46; Ex. 144 at RCRH.SDT 1856-57, 1865-66.

25. After conferring with Kathe Shockey, Meade requested Strong Edstrom reduce her report to writing, which she did on Monday, June 4, 2012. Ex. P (*Shockey Dep.*) at 43-46; Ex. S at DOH 2.

26. Strong Edstrom's written report referenced incidents that had occurred on May 31, 2012 and June 1, 2012, and identified Joelle Ellenbecker as a witness. Ex. 18a.

27. Joelle Ellenbecker provided a written statement outlining instances that she had witnesses Shirley (and other employees) mistreating residents, including corroborating the June 1 event reported by Edstrom. Ex. 18b.

28. Ellenbecker's report referenced incidents that occurred on June 1, 2012 and May 21, 2012. Ex. 18b.

29. On June 5, 2012, Meade reported the allegations of abuse to the Department of Health. Ex. S at DOH 2.

30. Shockey and Meade interviewed the reporting witnesses. Ex. P (*Shockey Dep.*) at 52:3-15.

31. Shockey and Meade interviewed the employees accused of abuse. Ex. P (*Shockey Dep.*) at 52:3-15.

32. During her interview, Shockey and Meade perceived that Shirley admitted to "tapping" a resident. Ex. 126; Ex. F[1] at 188:9-13 (Shockey testimony).

33. During her interview, Shockey and Meade perceived that Shirley admitted to placing a resident in her room as a consequence of her behavior. Ex. 126; Ex. F at 188:9-13 (Shockey testimony).

34. On June 8, 2012, Golden Ridge terminated Shirley. Ex. 123.

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[1] The full jury trial transcript was attached as Exhibit 5 to Plaintiffs' Complaint and is on file with the Court.

35. Shirley grieved her termination under the Fair Treatment Grievance Procedure Policy. Ex. 123.

36. Shirley's termination was upheld at every stage of the grievance process. Ex. 123.

37. None of the Defendants published or communicated the allegations of abuse to anyone outside of the organization, except for the Department of Health and the Department of Labor.[2] *See* Ex. K (*S. Harvey Dep.*) at 121:10-127:9.

38. In August of 2012, the Department of Health reported the abuse allegations to the Lawrence County State's Attorney's Office. Ex. S at DOH 15-16.

39. The Defendants did not report the allegations to law enforcement. Ex. K (*S. Harvey Dep.*) at 125-26; Ex. E at 10.

40. On August 3, 2012, the Lawrence County State's Attorney requested the Lead Police Department investigate the allegations. Ex. E at 10.

41. Lead Police Officer Jeremiah Fredericksen investigated the allegations and recommended that no charges be filed against Harvey. Ex. E at 6-9.

42. Lawrence County State's Attorney John Fitzgerald presented the abuse allegations against Shirley to a grand jury. Ex. 33.

43. No Defendant testified before the grand jury. Ex. 33.

44. On January 13, 2013, the grand jury returned a "true bill" and voted to indict Shirley on a charge of felony elder abuse. Ex. 33.

[2] It is not possible to cite to the record for this negative proposition.

Respectfully submitted the 6th day of February 2017.

BANGS, MCCULLEN, BUTLER, FOYE
& SIMMONS, L.L.P.

By: _____

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ATTORNEYS FOR DEFENDANTS

Certificate of Service

I certify that, on February 6, 2017, I served copies of this document upon each of the listed people by the following means:

[ ]	First Class Mail	[ ]	Overnight Mail
[X]	Hand Delivery	[ ]	Facsimile
[ ]	Electronic Mail w/ Cert. of Serv. By Fax	[ ]	ECF System

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STATE OF SOUTH DAKOTA) SS.		IN CIRCUIT COURT
COUNTY OF PENNINGTON)		SEVENTH JUDICIAL CIRCUIT
SHIRLEY HARVEY and DON HARVEY,	)	51CIV14-000021
Plaintiffs,	)	
vs.	)	
REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, and KATHRYN L. SHOCKEY,	)	**PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Defendants.	)	

Plaintiffs, pursuant to SDCL 15-6-56(c)(2), submit this Response to Defendants' Statement of Undisputed Material Facts:

1. Plaintiff Shirley Harvey was an employee of Golden Ridge Regional Senior Care, an assisted living facility in Lead, South Dakota. *Complaint* at ¶¶1-2.

   RESPONSE: Admit.

2. During Shirley's employment at Golden Ridge, it was owned and operated by Regional Health Network, Inc. ("RHN"). Ex. B.

   RESPONSE: Admit.

3. RHN is a single-member not-for-profit entity; the single member is Regional Health, Inc. ("RHI"). Ex. A, B.

   RESPONSE: Deny. The cited sources do not state that Regional Health Network, Inc. is a not-for-profit entity. Further, the cited sources do not state that Regional Health Network, Inc. is a single-member entity, but Plaintiffs admit that Regional Health Network, Inc. is a subsidiary of Regional Health, Inc.

4. Golden Ridge had a zero-tolerance approach to elder abuse. *See* Ex. 123 at RHN1494.

   RESPONSE: Objection. This statement is vague and ambiguous in that it cannot be determined whether it is alleging Golden Ridge had a zero-tolerance approach upon receiving allegations of elder abuse or upon substantiating elder abuse without resorting to

speculation and conjecture. Without waiving the objection, the statement is Denied. Strong Edstrom forced a resident into the bathroom when the resident refused to go (Ex. 6), management received reports that Strong Edstrom was rough with residents (Ex. 9), and management received reports that Strong Edstrom was telling co-workers that another employee was abusing a resident (Ex. 9). Strong Edstrom was not fired for these incidents, and there is no evidence the person Strong Edstrom accused was fired. No one knows what was done to investigate the abuse Strong Edstrom alleged against the other employee. (Meade Dep. 110:8-115:22; Shockey Dep. 20:25-23:10; Smith Dep. 154:25-158:10; Bryant Dep. 62:9-16; Gisi Dep. 64:9-22; Sughrue Dep. 43:4-19; Attachment G: Defendant Regional Health Network's First Supplemental Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 28). Additionally, Golden Ridge was owned and operated by Regional Health Network, Inc., which also owned and operated Custer Regional Senior Care. Employees accused of elder abuse at Custer Regional Senior Care were not dismissed at the word of the accuser. (Exs. 78, 82-83, 95-101). In one instance at Custer Regional Senior Care, an employee was alleged to have grabbed a resident's arm and flung her around in an attempt to re-direct her. After an investigation, including speaking to an eyewitness beyond the accused, accuser, and alleged victim, it was concluded that the allegations were substantiated. However, the employee was not terminated but was instead suspended for five days. (Ex. 100). Regional Health, Inc. was the parent company of both Regional Health Network, Inc. and Rapid City Regional Hospital, Inc. On about 6 occasions at Rapid City Regional Hospital, an accusation of inappropriate touching was made against male nurses. The accusation was investigated, usually found to be without merit, and the male nurse returned to work concluding the matter. (Sughrue Dep. 52:17-53:10).

5. Rapid City Regional Hospital, Inc. ("RCRH") was not Shirley's employer, and had no contract with her. Ex. A, B. Ex. K (*S. Harvey Dep.*) at 197:23-25.

   RESPONSE: Admit.

6. RHI was the parent company of RHN, and it had no contract with Shirley. Ex. A, B.

   RESPONSE: Objection. This statement is compound. Without waiving the objection, admit that Regional Health, Inc. was the parent company of Regional Health Network, Inc. but deny that Regional Health, Inc. had no contract with Shirley. Exhibit 26, the Fair Treatment/Grievance Procedure, states that it applies to "Regional Health" and is on Regional Health, Inc. paper. (Ex. 26). Also Regional Health, Inc.'s VP of Human Resources was partly responsible for the second phase of Step Three of the Fair Treatment/Grievance Procedure. (Ex. 26, ¶ J-4).

7. Tim Sughrue was not Shirley's employer. Ex. A, B.

   RESPONSE: Admit.

8. Dale Gisi was not Shirley's employer. Ex. A, B.

RESPONSE: Admit.

9. Sherry Bea Smith was not Shirley's employer. Ex. A, B.

RESPONSE: Admit.

10. Kathe Shockey was not Shirley's employer. Ex. A, B.

RESPONSE: Admit.

11. On September 28, 2010, Shirley signed a "Receipt of Employee Handbook Acknowledgment and Consent" for the September 2010 Employee Handbook. Ex. 125; Ex. C.

RESPONSE: Admit that on September 28, 2010, Shirley signed a "Receipt of Employee Handbook Acknowledgement and Consent" but deny that the Receipt was for a September 2010 version of the Employee Handbook, as the cited portions of the record do not indicate what version of the handbook Shirley received on September 28, 2010. Exhibit 125 does not have an attached handbook and does not reference a version or print date for the employee handbook referenced therein. Exhibit C does not list a version or print date.

12. Only the President of Regional Health had the authority to enter into a written employment contract. Ex. 125; Ex. C at 4.

RESPONSE: Deny. Exhibit 26, the Fair Treatment/Grievance Procedure, was a contract between Shirley and Regional Health Network, Inc. and Regional Health, Inc. (Ex. 26). It was in effect at the time of Shirley's termination. (Smith Dep. 99:12-25; Bryant Dep. 27:7-15; Gisi Dep. 20:4-10; Attachment A, ¶ 257; Attachment H: Defendant Regional Health Network's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory 9(e)). The Procedure was required to be followed when Shirley invoked it. (Smith Dep. 99:12-100:7; Bryant Dep. 28:7-11; Gisi Dep. 20:4-22:7). The former Vice President of Human Resources for Regional Health, Inc., who was designated by the corporate Defendants under SDCL 15-6-30(b)(6) to testify on their behalf as to "revisions, amendments," and other topics with regard to "Policy Number RH HR-8371-601, FAIR TREATMENT/GRIEVANCE PROCEDURE, the version in effect in 2012 (Exhibit 26 to Complaint)," confirmed that Exhibit 26 was effective and required to be followed when invoked. (Ex. 118, ¶ 2(b); Gisi Dep. 20:4-22:7). Employees of Regional Health Network, Inc. and Regional Health, Inc. initiated the Procedure after Shirley invoked it and indicated to Shirley that they were following it. (*See* Ex. 73, 27b, 28, 123 at p. RHN1493; 70, Ex. 29b).

13. Shirley did not have a written contract of employment with the President of Regional Health or any of the Defendants. Ex. K (*S. Harvey Dep.*) at 57:4-20; Ex. G at 2 (identifying the Fair Treatment Grievance Procedure as Shirley's "written contract of employment" with all of the Defendants).

RESPONSE: Deny. Exhibit 26, the Fair Treatment/Grievance Procedure, was a contract between Shirley and Regional Health Network, Inc. and Regional Health, Inc. (Ex. 26). It was in effect at the time of Shirley's termination. (Smith Dep. 99:12-25; Bryant Dep. 27:7-15; Gisi Dep. 20:4-10; Attachment A, ¶ 257; Attachment H: Defendant Regional Health Network's Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory 9(e)). The Procedure was required to be followed when Shirley invoked it. (Smith Dep. 99:12-100:7; Bryant Dep. 28:7-11; Gisi Dep. 20:4-22:7). The former Vice President of Human Resources for Regional Health, Inc., who was designated by the corporate Defendants under SDCL 15-6-30(b)(6) to testify on their behalf as to "revisions, amendments," and other topics with regard to "Policy Number RH HR-8371-601, FAIR TREATMENT/GRIEVANCE PROCEDURE, the version in effect in 2012 (Exhibit 26 to Complaint)," confirmed that Exhibit 26 was effective and required to be followed when invoked. (Ex. 118, ¶ 2(b); Gisi Dep. 20:4-22:7) Employees of Regional Health Network, Inc. and Regional Health, Inc. initiated the Procedure after Shirley invoked it and indicated to Shirley that they were following it. (*See* Ex. 73, 27b, 28, 123 at p. RHN1493; 70, Ex. 29b).

14. The following language appears, in bold, on page 4 of the Employee Handbook:

> This handbook is not a contract of employment. The policies, procedures, practices, and benefits described in this handbook supersede all those written and unwritten at an earlier time. This handbook and its contents replace any earlier written and unwritten versions of our policies, including any prior handbooks. An electronic version of this handbook and all current Regional Health policies can be found on Regional Health's Intranet site. Paper copies can also be obtained from your local Human Resources office. Nothing contained in this employee handbook should be construed as a guarantee of continued employment. Regional Health does not guarantee continued employment to employees and reserves the right to terminate or lay off employees at will for any lawful reason with or without notice. Also, nothing contained in any statement of Regional Health's philosophy, including statements made in the course of performance evaluations and wage reviews, should be taken as an express or implied promise of continuing employment. No one has the authority to enter into an oral employment contract on behalf of Regional Health. Only the President of Regional Health can enter into a written employment contract.

Ex. C at 4.

RESPONSE: Admit that the foregoing language appears in the employee handbook labeled as Exhibit C but deny this is a material fact.

15. The Fair Treatment/Grievance Procedure Policy was enacted prior to the 2010 Handbook, and it is specifically identified and discussed in that Handbook. Ex. C at 24.

RESPONSE: Deny. The cited document does not set forth the enactment date of the employee handbook. Admit that the Fair Treatment/Grievance Procedure, Policy RH HR-8371-601, is referenced on page 24 of the employee handbook labeled Exhibit C.

16. The Employee Handbook does not state that discharge can occur "for cause only." *See generally* Ex. C.

RESPONSE: Admit that the employee handbook labeled Exhibit C does not state that discharge can occur "for cause only."

17. The Employee handbook does not contain a detailed list of exclusive grounds for employee discipline or discharge. *See generally* Ex. C.

RESPONSE: Admit that the employee handbook labeled Exhibit C does not contain a detailed list of exclusive grounds for employee discipline or discharge.

18. The Employee Handbook does not contain a mandatory and specific procedure that RH or RHN agreed to follow prior to any employee's termination. *See generally* Ex. C.

RESPONSE: Admit that the employee handbook labeled Exhibit C does not itself contain a mandatory and specific procedure that RH or RHN agreed to follow prior to any employee's termination.

19. The Fair Treatment/Grievance Procedure Policy does not contain a detailed list of exclusive grounds for employee discipline or discharge. *See generally* Ex. 26.

RESPONSE: Admit that Exhibit 26, the Fair Treatment/Grievance Procedure does not contain a detailed list of exclusive grounds for employee discipline or discharge.

20. The Fair Treatment/Grievance Procedure Policy does not contain a mandatory and specific procedure that RH or RHN agreed to follow prior to any employee's termination. *See generally* Ex. 26.

RESPONSE: Deny. Exhibit 26, the Fair Treatment/Grievance Procedure, applied to many disciplinary actions that could take place prior to an employee's termination. (Ex. 26, ¶ A). The Procedure was required to be followed by Regional Health, Inc. and Regional Health Network, Inc. when an employee invoked it. (Smith Dep. 99:12-100:7; Bryant Dep. 28:7-11; Gisi Dep. 20:4-22:7).

21. ARSD 44:70:01:07 states, in part:

> Each [licensed assisted living] facility shall report to the department [of Health] within 48 hours of the event . . . any allegations of abuse or neglect of any resident by any person.

RESPONSE: Objection. This is a statement of law, not fact.

22. SDCL 22-46-9 states (emphasis added):

Any:

(1) Physician, dentist, doctor of osteopathy, chiropractor, optometrist, podiatrist, religious healing practitioner, hospital intern or resident, nurse, paramedic, emergency medical technician, social worker, or any health care professional;

(2) Psychologist, licensed mental health professional, or counselor engaged in professional counseling; or

(3) State, county, or municipal criminal justice employee or law enforcement officer;

who knows, or has reasonable cause to suspect, that an elder or adult with a disability has been or is being abused, neglected, or exploited, shall, within twenty-four hours, report such knowledge or suspicion orally or in writing to the state's attorney of the county in which the elder or adult with a disability resides or is present, to the Department of Social Services, or to a law enforcement officer. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

A person described in this section is not required to report the abuse, neglect, or exploitation of an elder or adult with a disability if the person knows that another person has already reported to a proper agency the same abuse, neglect, or exploitation that would have been the basis of the person's own report.

RESPONSE: Objection. This is a statement of law, not fact.

23. SDCL 22-46-10 states:

Any staff member of a nursing facility, assisted living facility, adult day care center, or community support provider, or any residential care giver, individual providing homemaker services, victim advocate, or hospital personnel engaged in the admission, examination, care, or treatment of elderly or disabled adults who knows, or has reasonable cause to suspect, that an elderly or disabled adult has been or is being abused or neglected, shall, within twenty-four hours, notify the person in charge of the institution where the elderly or disabled adult resides or is present, or the person in charge of the entity providing the service to the elderly or disabled adult, of the suspected abuse or neglect. The person in charge shall report the information in accordance with the provisions of § 22-46-9. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

RESPONSE: Objection. This is a statement of law, not fact.

24. On Friday, June 1, 2012, Joelle Meade, Director of Golden Ridge, received a verbal report from employee Jessica Strong Edstrom that Shirley had abused a resident. *See* Ex. P (*Shockey Dep.*) at 43-46; Ex. 144 at RCRH.SDT 1856-57, 1865-66.

Deny. Jessica Strong Edstrom testified that she told Joelle Meade about Christine slapping Strong Edstrom on June 1, 2012, but that Strong Edstrom said nothing to Meade on that date about Shirley slapping or abusing Christine. (Ex. 5 at 46:20-48:11). Strong-Edstrom claimed that Meade asked her about witnessing Shirley abusing residents a couple of weeks after this incident. (Attachment N: Grand Jury testimony of Strong-Edstrom, 1/31/13, page 7). Moreover, Meade testified that the day Strong Edstrom told Meade about the alleged slapping was not the day on which the slapping was alleged to have taken place. (Meade Dep. 181:6-182:10). Defendant Smith represented to the South Dakota Department of Health that the alleged abuse was reported "several weeks/months after it allegedly occurred." (Ex. 51, p. 2013-000470). Also, Meade did not receive a verbal report from employee Jessica Strong Edstrom that Shirley had abused a resident; Meade solicited the report. (Ex. 5 at 31:10-20, 145:14-146:3; Attachment A: Defendant Regional Health Network, Inc.'s Responses to Plaintiff's First Request for Admissions, ¶ 177; Attachment N: Grand Jury testimony of Strong-Edstrom, 1/31/13, page 7).

25. After conferring with Kathe Shockey, Meade requested Strong Edstrom reduce her report to writing, which she did on Monday, June 4, 2012. Ex. P (*Shockey Dep.*) at 43-46; Ex. S at DOH 2.

RESPONSE: Deny. Meade asked Strong Edstrom to put her allegations against Shirley in writing before Meade spoke with Shockey. (Meade Dep. 27:10-29:4; 178:18-21; Ex. 5 at 31:10-20). Admit that Meade and Shockey received Strong Edstrom's written allegations against Shirley on Monday, June 4, 2012.

26. Strong Edstrom's written report referenced incidents that had occurred on May 31, 2012 and June 1, 2012, and identified Joelle Ellenbecker as a witness. Ex. 18a.

RESPONSE: Deny. Strong Edstrom's written allegations referenced an incident occurring on May 30, 2012, and several incidents on June 1, 2012. (Ex. 18a). In her written allegations, Strong Edstrom alleged that Joelle Ellenbecker witnessed Shirley take a sandwich out of Christine's hand and then take Christine to her room. (Ex. 18a). Strong Edstrom's written allegations did not indicate that Ellenbecker witnessed any other incident. (Ex. 18a).

27. Joelle Ellenbecker provided a written statement outlining instances that she had witnesses Shirley (and other employees) mistreating residents, including corroborating the June 1 event reported by Edstrom. Ex. 18b.

RESPONSE: Objection. This statement is compound. Without waiving the objection, admit that Joelle Ellenbecker provided written allegations against Shirley and another employee. (Ex. 18b). Deny that Ellenbecker's written allegations corroborated "the June 1 event reported by Edstrom." Strong Edstrom alleged that several incidents took place on June 1 but only alleged that Ellenbecker witnessed the sandwich incident. (Ex. 18a). Strong Edstrom alleged that after Shirley took resident Maxine's sandwich out of Christine's hand, which was not abuse, Shirley took Christine to her room. (Ex. 18a). By material contrast, Ellenbecker's written allegations said nothing about Shirley taking

Christine to her room after allegedly witnessing Shirley take resident Max's sandwich out of Christine's hand. (Ex. 18b). This distinction was even recognized by Meade. (Attachment K: Meade Interview with Officer Fredericksen, pgs. 9-10). Ellenbecker later testified that after Shirley allegedly threw the sandwich down, Shirley just walked away. (Ex. 5 at 146:8-147:6; Ex. 38 [Vol. I] at 13:3-14).

28. Ellenbecker's report referenced incidents that occurred on June 1, 2012 and May 21, 2012. Ex. 18b.

RESPONSE: Admit that in her written allegations Ellenbecker referred to one incident on June 1, 2012, and one incident on May 21, 2012. (Ex. 18b).

29. On June 5, 2012, Meade reported the allegations of abuse to the Department of Health. Ex. S at DOH 2.

RESPONSE: Admit.

30. Shockey and Meade interviewed the reporting witnesses. Ex. P (*Shockey Dep.*) at 52:3-15.

RESPONSE: Admit that Shockey and Meade spoke with Strong Edstrom and Ellenbecker.

31. Shockey and Meade interviewed the employees accused of abuse. Ex. P (*Shockey Dep.*) at 52:3-15.

RESPONSE: Admit that Shockey and Meade spoke with Shirley and Mel Helsing.

32. During her interview, Shockey and Meade perceived that Shirley admitted to "tapping" a resident. Ex. 126; Ex. F at 188:9-13 (Shockey testimony).

RESPONSE: Admit.

33. During her interview, Shockey and Meade perceived that Shirley admitted to placing a resident in her room as a consequence of her behavior. Ex. 126; Ex. F at 188:9-13 (Shockey testimony).

RESPONSE: Deny. Shockey testified under oath that Shirley stated that she took Christine back to her room because she wanted to calm her down and that Shirley then put on the television for Christine and stayed with her for a few minutes. (Shockey Dep. 67:19-68:3; Ex. 5 at 208:1-18). Shockey testified that would have been totally appropriate. (Shockey Dep. 67:19-68:5; Ex. 5 at 208:1-20). The cited testimony from Exhibit F references tapping, not taking a resident back to her room.

34. On June 8, 2012, Golden Ridge terminated Shirley. Ex. 123.

RESPONSE: Admit.

35. Shirley grieved her termination under the Fair Treatment Grievance Procedure Policy. Ex. 123.

RESPONSE: Admit that Shirley grieved her termination under Exhibit 26, the Fair Treatment/Grievance Procedure.

36. Shirley's termination was upheld at every stage of the grievance process. Ex. 123.

RESPONSE: Admit.

37. None of the Defendants published or communicated the allegations of abuse to anyone outside of the organization, except for the Department of Health and the Department of Labor. *See* Ex. K (*S. Harvey Dep.*) at 121:10-127:9.

RESPONSE: Deny. Joelle Meade, Defendant Smith, and Rita Stacey communicated the allegations of abuse to James F. Lawler and Jimmy J. Lawler on or about August 10 or 14, 2012. (*See* Attachment S: RCRH.SDT1142-43; Attachment T: RCRH. SDT1144-45; Attachment U: RCRH.SDT1171-72; Attachment W: RCRH.SDT1238-39; Ex. 51, p. 2013-000471). Joelle Meade published the written allegations of abuse to James F. Lawler and Jimmy J. Lawler on August 21, 2012. (*See* Attachment R: RCRH.SDT1139). Defendant Sughrue communicated the allegations of abuse to James F. Lawler in August of 2012. (*See* Attachment W: RCRH.SDT1238-39). Defendant Smith communicated the allegations of abuse to James F. Lawler on September 4, 2012 (Attachment P: RCRH.SDT1135-36) and on September 11, 2012 (Attachment Q: RCRH.SDT1137-38). In-house counsel Paula McInerney-Hall communicated the allegations of abuse to James F. Lawler in October of 2012. (*See* Attachment V: RCRH.SDT1199-1200). While still employees of Regional Health Network, Inc., Joelle Meade, Jessica Strong Edstrom, and Joelle Ellenbecker repeated the false allegations to officer Fredericksen of the City of Lead Police Department. (*See* Declaration of Sarah Baron Houy, Ex. E, pp. 4-8). Defendants have submitted no affidavits to support their assertion that none of them published or communicated the allegations of abuse to any outside of the organization, except for the Department of Health and the Department of Labor.

38. In August of 2012, the Department of Health reported the abuse allegations to the Lawrence County State's Attorney's Office. Ex. S at DOH 15-16.

RESPONSE: Admit.

39. The Defendants did not report the allegations to law enforcement. Ex. K (*S. Harvey Dep.*) at 125-26; Ex. E at 10.

RESPONSE: Admit that Defendants did not directly make the initial report of the allegations to law enforcement. However, while still employees of Regional Health Network, Inc., Joelle Meade, Jessica Strong Edstrom, and Joelle Ellenbecker told Officer Fredericksen of the City of Lead Police Department that Shirley slapped and secluded a resident. (*See* Declaration of Sarah Baron Houy, Ex. E, pp. 4-8).

40. On August 3, 2012, the Lawrence County State's Attorney requested the Lead Police Department investigate the allegations. Ex. E at 10.

RESPONSE: Admit.

41. Lead Police Officer Jeremiah Fredericksen investigated the allegations and recommended that no charges be filed against Harvey. Ex. E at 6-9.

RESPONSE: Admit.

42. Lawrence County State's Attorney John Fitzgerald presented the abuse allegations against Shirley to a grand jury. Ex. 33.

RESPONSE: Admit.

43. No Defendant testified before the grand jury. Ex. 33.

RESPONSE: Deny. Joelle Ellenbecker was employed by Regional Health Network, Inc. when she testified before grand juries on October 11, 2012, and January 31, 2013. (Attachments I & J: Grand Jury Testimony of Ellenbecker, 10/11/12 and 1/31/13). Jessica Strong Edstrom was employed by Regional Health Network, Inc. when she testified before the grand jury on October 11, 2012. (*See* Declaration of Sarah Baron Houy, Ex. T).

44. On January 13, 2013, the grand jury returned a "true bill" and voted to indict Shirley on a charge of felony elder abuse. Ex. 33.

RESPONSE: Admit.

Dated this 27th day of February, 2017.

BEARDSLEY, JENSEN & LEE,
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2017, I served copies of the **Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment** upon each of the listed people by the following means:

Jeffrey G. Hurd Sarah Baron Houy 333 West Boulevard, Ste. 400 PO Box 2670 Rapid City, SD 57709 jhurd@bangsmccullen.com sbaronhouy@bangsmccullen.com *Attorneys for Defendants*	[ ] [X] [ ] [ ]	First Class Mail Hand Delivery Odyssey System Electronic Mail

/s/ *Gary D. Jensen*
Gary D. Jensen

34-12-51. Immunity from liability for reporting abuse, exploitation, or neglect of elder or adult with a disability

Any institution regulated pursuant to chapter 34-12 and any employee, agent, or member of a medical or dental staff thereof who, in good faith, makes a report of abuse, exploitation, or neglect of any elder or disabled adult, is immune from any liability, civil or criminal, that might otherwise be incurred or imposed, and has the same immunity with respect to participation in any judicial proceeding resulting from the report. This immunity extends in a like manner to any public official involved in the investigation of abuse, exploitation, or neglect of any elder or disabled adult, or to any person or institution who in good faith cooperates with any public officials in an investigation. The provisions of this section do not extend to any person alleged to have committed any act of abuse or neglect of any elder or disabled adult or to any person who has aided and abetted any such act.

S.D. Codified Laws § 34-12-51

22-46-9. Mandatory reporting of abuse, neglect, or exploitation--Violation as misdemeanor

Any:

(1) Physician, dentist, doctor of osteopathy, chiropractor, optometrist, podiatrist, religious healing practitioner, hospital intern or resident, nurse, paramedic, emergency medical technician, social worker, or any health care professional;
(2) Psychologist, licensed mental health professional, or counselor engaged in professional counseling; or
(3) State, county, or municipal criminal justice employee or law enforcement officer;

who knows, or has reasonable cause to suspect, that an elder or adult with a disability has been or is being abused, neglected, or exploited, shall, within twenty-four hours, report such knowledge or suspicion orally or in writing to the state's attorney of the county in which the elder or adult with a disability resides or is present, to the Department of Human Services, or to a law enforcement officer. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

A person described in this section is not required to report the abuse, neglect, or exploitation of an elder or adult with a disability if the person knows that another person has already reported to a proper agency the same abuse, neglect, or exploitation that would have been the basis of the person's own report.

S.D. Codified Laws § 22-46-9

22-46-10. Mandatory reporting of abuse or neglect by staff and by person in charge of residential facility or entity providing services to elderly or disabled adult--Violation as misdemeanor

Any staff member of a nursing facility, assisted living facility, adult day care center, or community support provider, or any residential care giver, individual providing homemaker services, victim advocate, or hospital personnel engaged in the admission, examination, care, or treatment of elderly or disabled adults who knows, or has reasonable cause to suspect, that an elderly or disabled adult has been or is being abused or neglected, shall, within twenty-four hours, notify the person in charge of the institution where the elderly or disabled adult resides or is present, or the person in charge of the entity providing the service to the elderly or disabled adult, of the suspected abuse or neglect. The person in charge shall report the information in accordance with the provisions of § 22-46-9. Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.

S.D. Codified Laws § 22-46-10

44:70:01:07. Reports. Each licensed facility shall submit to the department the pertinent data necessary to comply with the requirements of SDCL chapter 34-12 and this article.

Each facility shall report to the department within 48 hours of the event any death resulting from other than natural causes originating on facility property such as accidents, abuse, negligence, or suicide; any missing resident; and any allegations of abuse or neglect of any resident by any person.

Each facility shall report the results of the investigation within five working days after the event.

Each facility shall also report to the department as soon as possible any fire with structural damage or where injury or death occurs; any partial or complete evacuation of the facility resulting from natural disaster; or any loss of utilities, such as electricity, natural gas, telephone, emergency generator, fire alarm, sprinklers, and other critical equipment necessary for operation of the facility for more than 24 hours.

Each facility shall notify the department of any anticipated closure or discontinuation of service at least 30 days in advance of the effective date.

Source: 38 SDR 115, effective January 9, 2012.

General Authority: SDCL 34-12-13(14).

Law Implemented: SDCL 34-12-13(14).

Back to 44:70:01 | 44:70:01:07

EXHIBIT 55
Smith
C. HARKINS 4-26-16

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 28200

SHIRLEY HARVEY and DON HARVEY,
Plaintiffs and Appellants,

vs.

REGIONAL HEALTH NETWORK, INC.; REGIONAL HEALTH, INC.; RAPID CITY REGIONAL HOSPITAL, INC.; TIMOTHY SUGHRUE; DALE GISI; SHERRY BEA SMITH, and KATHRYN L. SHOCKEY,

Defendants and Appellees.

APPELLANTS' REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

HONORABLE JANE WIPF PFEIFLE
Circuit Court Judge

Notice of Appeal filed March 29, 2017

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ISSUES

I. Whether there is evidence Defendants acted with malice when falsely accusing Shirley Harvey of felony elder abuse.

All agree that Harveys must establish malice to overcome the qualified privilege applicable to the defamatory statements at issue.[1] Appellants' Brief, pp. 17-18; Appellees' Brief, p. 25. However, the parties disagree whether the malice framework in *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 647 (1989) applies.

Defendants argue *Harte-Hanks* does not apply because "high journalistic" standards applied to the press are "a far cry" from the lesser standards applied to them. Appellees' Brief, p. 27. However, Harveys do not seek to impose standards on Defendants from *Harte-Hanks*. Harveys impose upon themselves the stringent *Harte-Hanks* malice framework. If Harveys meet that standard, they meet any legal standard to get the issue of malice to a jury.

In *Harte-Hanks*, the Court defined malice – reckless disregard – as this Court has defined it:

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[1] Defendants argue summary judgment should be entered for written communications because they constitute libel not slander. Appellees' Brief, n.9. This argument was not raised by Defendants at the trial court so cannot be raised for the first time on appeal. *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 50, 652 N.W.2d 742, 755 (citation omitted). While Shirley labels her claims as slander, defamation is the core. "Defamation is effected by: (1) Libel; or (2) Slander." SDCL 20-11-2. Shirley has always relied upon written and verbal publications for her claims. *See* APP: 4, ¶¶ 40, 42-43, 60, 62, 64-71, 74-86; R: 5523. The false publications charged Shirley with a crime and injured her in her profession or occupation. Whether the defamation is libel or slander does not change the dispute. *See* SDCL 20-11-4(1) and (3); *Walkhon Carpet Corp. v. Klappordt*, 231 N.W.2d 370, 373 (S.D. 1979); SDCL 20-11-3; *Fendrich v. Lauck*, 307 N.W.2d 607, 609 (S.D. 1981).

Had this argument been raised at the trial court, Harveys would have moved to amend their Complaint. Defendants are not prejudiced by such a motion, which Harveys will bring upon remand.

> A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publications. The standard is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish a reckless disregard. *In a case such as this involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports*.

491 U.S. at 688 (internal citations omitted; emphasis added). Defendants did not address the *Harte-Hanks* standard or its application here.

Like *Harte-Hanks*, there were "obvious reasons to doubt" Shirley's accusers:

1. Edstrom, according to her supervisor (a friend), was "worthless and had no business working [at Golden Ridge]" and "was dishonest on things that matter." APP: 4, ¶ 28; R: 5523. Defendant Smith would not believe Edstrom unless corroborated. Smith Dep. 163:1-3. Edstrom was in serious conflict with Shirley.[2] *See* Appellants' Brief, p. 23. Edstrom previously accused another co-worker of abuse, but the accusation was not reported to the DOH. APP: 4, ¶¶ 25-27; R: 5523. The reasonable inference is this allegation was also false.

   > Defendants did *not* address the foregoing, stating only that Edstrom "struggled during her employment" and "was not the best employee." Appellees' Brief, pp. 5, 28.

2. Ellenbecker, according to a co-worker, was "out to get [Shirley]" because "she did things right." APP: 4, ¶ 37; R: 5523. Ellenbecker was in conflict with Shirley. *Id*. at ¶ 36.

   > Defendants did *not* address the foregoing, stating only that Ellenbecker was "regarded as a very good employee" and a "good worker, and recipient of the 2012 Caregiver of the Year Award" (nominated by her friend Meade). Appellees' Brief, pp. 5, 28; Meade Dep. 83:6-15.

Furthermore, like *Harte-Hanks*, there were "obvious reasons to doubt" the accusations against Shirley:

[2] The perspective of the accusers and supervisor, not the accused, is key for conflict.

1. Edstrom and Ellenbecker did nothing when they witnessed the alleged abuse. APP: 4, ¶¶ 41-42; R: 5523. They did not check on Christine because she was "fine." APP: 4, ¶ 49; R: 5523; R: 1511, Ex. 38 [Vol. I] at 74:11-75:7.

   Defendants did *not* address these facts.

2. Edstrom and Ellenbecker said this abuse occurred in front of staff and up to 20 to 25 other residents who all did nothing – three times! APP: 4, ¶ 50; R: 5523; R: 1511, Ex. 5 at 41:10-18, 49:7-50:8, 156:20-158:12.

   Defendants did *not* address these facts. As Harveys wrote at page 10 of their original Brief, "What are the odds that 5 or 6, or 10-12, or 20-25 residents would do nothing, say nothing, and report nothing if one of their fellow residents is slapped (especially three times)?" Defendants did not respond, because the odds are *zero*.

Also like *Harte-Hanks*, obvious doubts about Edstrom and Ellenbecker and their accusations were easily addressed. Defendants simply had to walk down the hallway to ask staff and residents what the truth was. Defendants failed to take those steps which, like in *Harte-Hanks*, is "utterly bewildering." It is a basis for a jury to find "purposeful avoidance of the truth" and malice.

> Accepting the jury's determination that petitioner's explanations for these omissions [failing to listen to the tapes and interview the sister], it is likely the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.

Harte-Hanks, 491 U.S. at 692.[3]

[3] Defendants rely upon *Petersen v. Dacy*, 550 N.W.2d 91 (S.D. 1996) and *Peterson v. City of Mitchell*, 499 N.W.2d 911 (S.D. 1993) primarily for the principle that "failure to investigate" alone does not establish malice. Appellees' Brief, pp. 25-26. Harveys have always acknowledged that principle, including it with the pertinent language from *Harte-Hanks*. Defendants ignore the "purposeful avoidance of the truth" principle like they ignore the obviously doubtful accusers and accusations principles. Those principles were not involved in *Petersen* or *Peterson*.

Accuser Ellenbecker said co-workers Karen Tyler and Heidi Covell were at the *same table* with Ellenbecker when she watched Shirley slap Christine. APP: 4, ¶ 118; R: 5523; R: 1511, Ex. 5 at 155:7-18. Tyler and Covell, if asked by Defendants, would have said they did not see a slap and never would because Shirley "gave the best of care" to residents. APP: 4, ¶ 119; R: 5523; Tyler Dep. 4:1-6:13; Covell Dep. 5:4-25. Defendants omitted this "same table" testimony in arguing at page 13 of their Brief that Covell and Tyler are not "exonerating witnesses."

There is additional evidence of malice Defendants did not address:

1. Their failure to timely report to family and physician. Appellants' Brief, n.4.

2. Their failure to pursue the "very common question" of identifying and interviewing all individuals allegedly present. Gisi Dep. 81:17-21; APP: 4, ¶¶ 51, 53, 94, 97, 99, 110-11; R: 5523.

3. Their interaction with the DOH including submitting a 5-day investigation report four months late, APP: 4, ¶¶ 87-88; R: 5523, failing to submit the Department of Labor ruling favorable to Shirley (rejecting the accusations of Edstrom and Ellenbecker), Stahl Dep. 62:3-24; R: 1511, Ex. 32b, and falsely representing they interviewed residents. APP: 4, ¶¶ 53, 78; R: 5523.

4. Their violations of the Fair Treatment/Grievance Procedure. *See* Appellants' Brief, pp. 11-14.

Defendants argue that "even if the Defendants were resolving doubt against Harvey and in favor of resident safety, it would be dangerous to find such an exercise of discretion to constitute actual malice, thereby subjecting an employer to tort liability to the discharged employee." Appellees' Brief, p. 29. However, Defendants did not merely report the allegations of Edstrom and Ellenbecker to others. They made their own false accusations to the DOH, to Christine's family, to Officer Fredericksen, and within

Regionals' organization.[4] *Resident safety is not served by falsely reporting that someone abused a resident.*

If Defendants doubted whether Shirley slapped and secluded a resident but told others she did, that alone is malice. *See Kieser v. Se. Properties*, 1997 S.D. 87, ¶ 20, 566 N.W.2d 833, 839. There is ample evidence that is what happened. For example, Defendant Sughrue was uncertain about the truth of the allegations due to lack of complete information. APP: 4, ¶ 112; R: 5523.[5] Yet, he never obtained such information; he did not know if there were witnesses beyond the accusers or if Edstrom and Ellenbecker were alleging one or more slaps; and he did not read the written allegations. *Id*. at ¶¶ 111, 113-14. Regardless, Sughrue told James Lawler he concurred with Shirley's termination for cause as being a perpetrator of abuse. *Id*. at ¶ 69.

Defendants made other statements Harveys must address:

1. Ellenbecker did not "corroborate" Edstrom as Defendants argue at page 28 of their Brief. Edstrom claimed she saw Shirley slap and seclude Christine twice, while Ellenbecker claimed she saw Shirley slap and seclude Christine once. These were separate incidences; neither was present for what the other claimed to see. APP: 4, ¶ 55; R: 5523. If anything, Ellenbecker "corroborated" a sandwich incident not involving slapping or secluding. After the incident, Edstrom said Shirley immediately took Christine to her room, while Ellenbecker said nothing about seclusion. *See* R: 1511, Ex. 18a and Ex. 18b.

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[4] After the initial report, Defendants did not simply tell the DOH and others that employees accused Shirley of abuse but Defendants had reached no conclusion of their own. Instead, Defendants told others they concluded that Shirley abused a resident. Pursuant to the principles in *Harte-Hanks* and the decisions of this Court, Defendants are liable for: (1) publication of Ellenbecker's and Edstrom's false accusations and (2) publication of Defendants' own accusations of abuse.

[5] Defendant Smith similarly expressed doubt, stating to Mr. Lawler that nothing had been said to him months earlier because she and Meade wanted to be "*solid* in the termination of the employees" before notifying him of "the abuse." APP: 4, ¶ 74; R: 5523. Yet, Smith never identified any witness or spoke with the accusers or a resident. *Id*. at ¶¶ 51, 53, 99-100; APP: 5, ¶ 25-27, 29; R: 1502.

2. Defendants argue that "the allegations weren't all 'after the fact' – the June 1 events were reported that day." Appellees' Brief, p. 28. However, Edstrom and Ellenbecker admit they did nothing when they witnessed the alleged slapping and secluding. R: 1511, Ex. 5 at 28:14-17, 31:8-17, 152:15-25, Ex. 38 [Vol. I] at 21:3-24:8, 71:10-75:7. Meade testified the slapping had happened sometime in the past, not the day Edstrom first said something. Meade Dep. 181:6-17. Edstrom's written allegations state she saw Shirley slap Christine at 7:10 a.m. on June 1. APP: 4, ¶ 44; R: 5523. At 11:20 a.m. the same day, Edstrom immediately reported to Meade that *Christine* slapped Edstrom. *Id*. at ¶ 47. Yet, Edstrom said *nothing* to Meade about seeing *Shirley* slap Christine. R: 1511, Ex. 5 at 46:20-48:11. Edstrom and Ellenbecker made their accusations only after being solicited by Meade. APP: 4, ¶ 42; R: 5523.

3. Shirley did not "admit to wrongdoing" as Defendants claim at page 29. Shirley explained at page 8 of her original Brief that she lightly touched or "tapped" residents and removed them from a common area if they were over-stimulated needing quiet time. Such is routine as explained in footnote 3, to which Defendants made no response.

4. The criminal trial direct testimony of Officer Fredericksen referred to by Defendants at page 29 of their brief was impeached by contrary references in his reports. R: 1511, Ex. 5 at 174:3-175:22; R: 4810, Ex. E at pp. 4-5. Shirley has always denied slapping and secluding. R: 1511, Ex. 38 [Vol. II] at 86:25-87:3; APP: 4, ¶ 63, R: 5523.

5. Defendants assert that the portions of Exhibit 105 cited by Harveys at ¶¶ 64-66 and 70 of Appendix 4 to Harveys' Brief are not part of the Record. Appellees' Brief, p. 24. That is incorrect. They are attached to the February 27, 2017, Affidavit of Gary D. Jensen as Attachment Y. R: 5554, Attachment Y; APP: 4, ¶¶ 64-66, 70; R: 5523.

Defendants also argue two decisions cited by Harveys are not applicable. However, as in *Pawlovich v. Linke*, 2004 S.D. 109, ¶ 22, 688 N.W.2d 218, 224-25, it would "clearly amount to malice" if Defendants "knowingly" communicated false information with "the knowledge that the alleged conduct could result in termination or other discipline" for Shirley. Such evidence exists at least as to Edstrom, Ellenbecker, and Meade for which corporate Defendants are liable. *See supra* Part II. As for *Setliff v. Akins*, 2000 S.D. 124, 616 N.W.2d 878, there is evidence upon which a jury could

conclude that Defendants "purposefully avoided the truth" by failing to walk down the hallway which is essentially the same as ignoring the letter in *Setliff*.

Defendants also claim Harveys' argument that the circuit court applied the incorrect standard fails although the best Defendants can do to support the circuit court is to say it's "unclear" what it said. Appellees' Brief, p. 31. With respect, the circuit court's statements are clear. It wrongly applied a "clear and convincing standard." It made a decision on the merits – "I simply don't buy the argument there was intense, heated conflict" – rather than determining if there was evidence upon which a jury "could buy" Harveys' case. *See* T: 76-78. The circuit court ignored overwhelming evidence of conflict as set out by Harveys at page 23 of their Brief, which Defendants also did not respond to.

The circuit court and Defendants are critical of Harveys – claiming exaggeration and being disingenuous – because Harveys cite answers during cross-examination:

1. At page 6 of their Brief, Defendants state Harveys are "a bit disingenuous" when they write that "[Meade] said Shirley was a shining example of what you want employees to be." That comes from cross-examination of Meade:

    Q. She was a shining example of how you wanted your employees to be?

    A. Yes.

    Meade Dep. 136:22-24.

2. Regarding "heated, intense conflict," which the circuit court belittled as a statement from counsel, we again refer to cross-examination of Meade:

    Q. So would it be fair to say, Ms. Meade, that certainly if not before, as of early April 2012, there was more than a little conflict between Shirley and Jessica?

    A. Yes.

    Q. It was heated, intense conflict, correct?

A. Yes.[6]

APP: 7; Meade Dep. 145:14-20.

Harveys are unaware of legal authority holding it is improper to cite cross-examination answers.

Accordingly, there is ample evidence of malice applying the malice frame-work from this Court's decisions and *Harte-Hanks*. There were "obvious reasons to doubt" Edstrom and Ellenbecker and their "after the fact" accusations. A jury could conclude that Defendants probably knew the accusations were false and "purposefully avoided the truth" by refusing to walk down the hallway to ask staff and residents what the truth was.

II. Whether the Circuit Court erred in failing to impute the actual malice of Edstrom, Ellenbecker, and Meade to the corporate defendants.

Citing *Bernie v. Catholic Diocese of Sioux Falls*, 2012 S.D. 63, 821 N.W.2d 232, Defendants agree a two-prong test determines whether an intentional tort is within the scope of employment. Appellees' Brief, pp. 32-34.

Regarding the first prong, Defendants did not cite or address the Court's instruction that a principal may be liable for an agent's acts even when the agent is "misguided" and uses "quite improper" methods so long as his purpose is "wholly or *in part*" to further the principal's business. *Bernie*, 2012 S.D. 63 at ¶ 9. Given their duty under state law and Defendants' policies to report alleged abuse and their reporting only

[6] The following are other "discrepancies" raised by the circuit court followed by support in the record for Harveys' briefing:

- T: 50:23-51:15 . . . Shockey Dep. 61:9-14 (HR Director); Smith Dep. 190:2-7;
- T: 46:10-24 . . . Meade Dep. 164:16-166:5;
- T: 47:23-48:9 . . . Meade Dep. 140:23-141:4, 145:25-146:2; Appellants' Brief n.9;
- T: 62:6-25 . . . T: 62:16-63:7; R: 1511, Ex. 5 at 140:1-141:15, Ex. 32c at pp. 6-8; APP: 4, ¶ 49; R: 5523.

after solicited by their supervisor, a jury could conclude that Edstrom and Ellenbecker were *in part* acting to further Defendants' business.[7]

With regard to the second prong, Defendants admit "mistaken allegations of abuse may be foreseeable," but argue that Shirley claims the accusations of Edstrom and Ellenbecker are a "premeditated plot" so cannot be foreseeable. Appellees' Brief, pp. 35-36. Defendants offer no legal authority that false allegations are foreseeable or not based upon their motivation (often disputed). The reality is that false accusations are a fact of life, as Defendant Gisi admitted, so are foreseeable. *See* APP: 4, ¶ 108; R: 5523. It is especially true here given Edstrom's prior false allegation of abuse against other staff.

Whether Edstrom's and Ellenbecker's accusations, even if misguided and quite improper, were made at least in part to serve the corporate Defendants and were foreseeable is a question of fact for the jury. *See Kirlin v. Halverson*, 2008 S.D. 107, ¶ 16, 758 N.W.2d 436, 455. The same is true for Supervisor Meade, who Defendants did not address.

III. Whether wrongfully accusing Shirley Harvey of felony elder abuse is extreme and outrageous conduct.

Harveys explained in their original Brief that falsely accusing a caregiver of slapping and secluding an elderly resident constitutes extreme and outrageous conduct; it "does not consist of mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities." Appellants' Brief, p. 28. It is similar to a false accusation of sexual

[7] Edstrom reported her allegations only because she was solicited by Meade and agreed to write them if she was not the only one, "because I'm not personally attacking her or having it look like I'm attacking her." R: 1511, Ex. 5 at 31:10-20; R: 5554, Ex. N at p. 7. After that, Meade solicited allegations from her friend Ellenbecker. R: 1511, Ex. 5 at 145:13-146:3. All this occurred after an employee overheard a resident's derogatory comments to Shirley and others about "worthless" employees, including Edstrom and Meade. APP: 4, ¶¶ 38-40; R: 5523.

assault about which this Court said, "false reports exist and unfounded accusations can destroy marriages, families, and careers of the accused." *Hughes v. Stanley Cty. Sch. Bd.*, 1999 S.D. 65, ¶ 38, 594 N.W.2d 334, 354-55. False accusations of abuse – whether sexual or elder – destroy lives.

Defendants addressed none of this, saying instead:

> An employer's decision to terminate an employee who has admitted to improper conduct is not, as a matter of law, extreme and outrageous. It was not "atrocious" to report the allegations to the Department of Health, to deny unemployment benefits, or to uphold the termination in the grievance process. It was not "utterly intolerable" to err, if at all, on the side of resident safety. No reasonable person in the community would disagree.

Appellees' Brief, pp. 38-39. Absent from Defendants' argumentative list is the basis of Harveys' intentional infliction claim – Defendants' false accusations of slapping and secluding. Focusing on Shirley's "at will" status while ignoring their false accusations has always been Defendants' strategy. Yet, Shirley's "at will" status is irrelevant on this issue. Harveys are aware of no legal authority allowing an employer to defame an "at will" employee.

Harveys cited four cases to support their IIED claim. Appellants' Brief, pp. 28-29. Defendants addressed one, focusing on technical differences while ignoring the point that "false reports to DPH for the malicious purpose to retaliate against her and jeopardize her profession" was sufficient to proceed with her intentional infliction claim. *Caesar v. Hartford Hosp.*, 46 F.Supp.2d 174, 180 (D. Conn. 1999). *Caesar* was discussed in *Kassem v. Washington Hosp. Center*, ignored by Defendants, where the court stated:

> Moreover, many state courts, and federal courts applying state law, have held that the intentional filing of a false report about an employee with

> government authorities can be sufficiently outrageous to state an IIED claim.

513 F.3d 251, 256 (D.C.C. 2008).

Defendants also argue that Harveys' claim fails because she has not proven she is "particularly susceptible to emotional distress," which is a necessary element according to Defendants. Appellees' Brief, pp. 39-40. Defendants are mistaken. The concept of "particular susceptibility" *may expand* what is "extreme and outrageous," but it is not a necessary element in every case. *Wangen v. Knudson*, 428 N.W.2d 242, 248 (S.D. 1988) ("Actions which may not make an actor liable in one situation may make him liable in another.") (citing RESTATEMENT (SECOND) OF TORTS, § 46, cmt. f); *see also Hayes v. N. Hills Gen. Hosp.*, 1999 S.D. 28, ¶ 39, 590 N.W.2d 243, 251. Anyone falsely accused of slapping and secluding an elderly person would find the accusation extreme and outrageous.

Accordingly, Harveys ask the Court to allow Harveys' IIED claim to proceed while holding that falsely accusing a caregiver of slapping and secluding an elderly resident is "extreme and outrageous." If the Court believes reasonable minds may differ, the issue of "extreme and outrageous" conduct should be submitted to the jury. *Hayes*, 1999 S.D. 28 at ¶ 39 (citation omitted).

IV. Whether there is evidence to support a claim for malicious prosecution.

"This Court and many other jurisdictions have held that defendants cannot insulate themselves from a malicious prosecution in reporting crimes to the authorities unless they have given 'full and correct' information to those authorities." *Danielson v. Hess*, 2011 S.D. 82, ¶ 10, 807 N.W.2d 113, 116 (citation omitted). Harveys explained that Meade and Defendant Smith submitted incomplete information (no interviews of

Covell, Tyler, or residents and no disclosure of the highly doubtful nature of the accusers and their accusations) four months late to the Department of Health. Appellants' Brief, pp. 29-30. Defendants responded by arguing there is no evidence that the incomplete information to DOH was the "but-for" cause of her prosecution. Appellees' Brief, p. 42.

Administrator Stahl testified if DOH had been given full and complete information including interviews from Covell and Tyler, it "very possibly" would have concluded the accusations were false and ended the matter without referral to the State's Attorney. *See* Stahl Dep. 37:20-38:2, 57:4-11, 58:20-60:1. Even the circuit court acknowledged a jury could reach that result. T: 82. Defendants did not address Stahl's testimony or the circuit court's acknowledgment. A question of fact exists as to the legal cause of Shirley's prosecution.

The same lack of "full and complete" information along with the false accusations of Edstrom and Ellenbecker could also lead the jury to conclude there was no probable cause for Shirley's prosecution. *See* RESTATEMENT (SECOND) OF TORTS, §§ 663, cmt. h and 664, cmt. b, which Defendants did not address.

V. Whether there is clear and convincing evidence that there is a reasonable basis to believe that Defendants engaged in malicious conduct so Harveys may proceed with their claim for punitive damages.

Harveys incorporate the malice discussion above. The standard of SDCL 21-1-4.1 is met.

As to the corporate Defendants' liability under the "complicity rule" in *Dahl v. Sittner*, 474 N.W.2d 897, 903 (S.D. 1991), there is overwhelming evidence that Edstrom was "unfit and the principal or a managerial agent was reckless in employing or retaining her," which imposes liability under prong (b). Edstrom was "worthless, had no business

working [at Golden Ridge]" and was "dishonest on things that matter." APP: 4, ¶ 28; R: 5523. COO Bryant and Defendant Sughrue admitted she should not have been working there. *Id*. at ¶¶ 31-32. Edstrom's dismal performance was expected to cause conflict. *Id*. at ¶ 29. Defendant Smith said Edstrom was "not someone I would want on my team" and would not believe Edstrom unless corroborated. Smith Dep. 163:1-25. Edstrom made a prior false accusation against another co-worker. What else would it take to impose corporate liability for Edstrom's behavior?

Under prong (a) there is liability when a manager authorizes the doing and the manner of the act. *Dahl*, 474 N.W.2d at 903. Meade solicited the accusations and instructed they be reduced to writing. Meade did not just authorize the act, she instigated it.

The managerial agents of corporate Defendants ratified the accusations of Edstrom and Ellenbecker and adopted them as their own, triggering liability under prong (d). *Dahl*, 474 N.W.2d at 903. Prong (c) imposes corporate liability when the "agent was employed in a managerial capacity and was acting in the scope of employment." *Id.* at 903. Defendant Regional Health Network, Inc. admitted its "managers" Meade and Defendants Shockey, Smith, and Sughrue were acting within the course and scope of their employment in various dealings with Shirley. The same is true for Defendant Gisi and in-house counsel McInerney-Hall with regard to Regional Health, Inc. *See* R: 1511, Attachment A at ¶¶ 296, 327, 329, Attachment B at ¶¶ 4, 57; Appellees' Brief, p. 23. Therefore, the respective corporate Defendants are vicariously liable, including for punitive damages.

VI. Whether the Circuit Court erred in granting summary judgment against Shirley Harvey on her wrongful termination and negligent infliction of emotional distress claims.

Defendants argue Shirley's wrongful discharge claim fails because a whistle blower claim "applies only when an employee has complained of unlawful or criminal conduct." Appellees' Brief, p. 49. Harveys believe the protection is broader given the Court's holding that a wrongful discharge claim exists when an employer's termination "contravenes a clear mandate of public policy," and "[p]ublic policy is primarily determined by the constitution, statutes, and judicial decisions." *Dahl v. Combined Ins. Co.*, 2001 S.D. 12, ¶ 8, 621 N.W.2d 163, 166. South Dakota public policy regarding our elderly is clear in statutes and regulations. Whistle blowing in support of that public policy by complaining about unsafe staff performance should be allowed as in the cases Harveys cite. Appellants' Brief, p. 32.

Defendants also argue that Shirley offered no authority establishing a duty so Shirley's claim for negligent infliction of emotional distress fails. Appellees' Brief, pp. 51-52. What Defendants forget is that Harveys began their slander discussion by quoting SDCL 20-11-1, "Every person is obligated to refrain from infringing upon the right of others not to be defamed." Duty and obligation are synonyms. Even employers of at will employees have a statutory obligation – a duty – to refrain from defaming others. The foreseeable risk of harm creates the duty. *See Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 15, 780 N.W.2d 497, 502-503.

VII. Whether Defendants' Fair Treatment/Grievance Procedure is a contract that was breached by the corporate defendants.

In arguing their Fair Treatment/Grievance Procedure is not a contract, Defendants ignore their own testimony that they were required to follow the Procedure, APP: 5, ¶¶

12, 15; R: 1502, and purported to (even though they breached it repeatedly). Defendants also ignored their undisputed testimony that employment decisions were reversed by application of the Procedure. *Id*. at ¶ 14. The circuit court did not address this testimony. T: 16-17.

Squarely before the Court is whether the two requirements in *Butterfield v. Citibank of S.D., N.A.*, 437 N.W.2d 857, 859 (S.D. 1989) for a pre-termination contract must exist for there to be a post-termination contract, or whether a post-termination contract can exist without altering original termination rights. A post-termination contract is what the Defendants thought the Procedure was, like what was found in *Zavadil v. Alcoa Extrusions, Inc.*, 363 F.Supp.2d 1187 (D.S.D. 2005). There is no policy reason to reject a standalone post-termination agreement; it can be valuable to employer and employee and should be left to them.

Contrary to Defendants' argument, there is no indication the *Zavadil* court placed importance on whether the post-termination Peer Review Policy or Employee Handbook came first or second. Defendants also mistakenly state their Procedure was "quoted" in their Handbook; it was not. *Compare* R: 1511, Ex. 26 *with* R: 4810, Ex. C at p. 24.

Defendants argue Shirley cannot prove she was damaged by their breaches, asserting "[t]here is no evidence that a different investigation would have resulted in a different decision." Appellees' Brief, p. 56. Defendants ignore the testimony of Defendants Shockey and Smith, who admitted that Shirley, instead of being fired, may have been allowed to return to work if Defendants had talked to Covell and Tyler. Shockey Dep. 60:24-61:23, 63:13-18; Smith Dep. 190:2-7; *see also* Bryant Dep. 85:15-20, 103:20-104:1. It is another question of fact for the jury.

CONCLUSION

What Defendants did to Shirley is shameful. It never would have happened to "higher up" employees like Defendants. It did not happen to "lowly" at-will employees at Custer or Rapid City Regional Hospital because the truth was sought, not purposely avoided.

Two judges rejected the accusations of Edstrom and Ellenbecker. A jury could likewise conclude that those accusations, and the subsequent ones made by Defendants, were false and that Defendants probably knew they were false. Defendants just had to walk down the hallway to find the truth.

A jury should decide the issue of malice on Harveys' claims of defamation, intentional infliction of emotional distress, and punitive damages. The jury should also decide Harveys' other claims, including breach of the post-termination agreement embodied in the Fair Treatment/Grievance Procedure, which Defendants obviously believed was a contract.

Respectfully submitted this 8th day of September, 2017.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

I, Gary L. Jensen, one of the attorneys for Appellants, hereby certify that pursuant to SDCL §15-26A-66 the foregoing brief complies with the above mentioned statute in that it is in Times New Roman and that the word processor used to prepare this brief indicated that said brief contains 4,921 words in the body of this brief.

Dated this 8th day of September, 2017.

/s/ Gary D. Jensen
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CERTIFICATE OF SERVICE

I certify that on September 8, 2017, I emailed the foregoing Appellants' Reply Brief and sent two copies of it by U.S. Mail, first-class postage prepaid to:

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I further certify that on September 8, 2017, I emailed the foregoing Appellants' Reply Brief and sent the original and two copies of it by U.S. mail, first-class postage prepaid, to:

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