IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30989
Notice of Appeal Filed February 7, 2025

SHANE JOHNSON and ANDREW STEEN,

Appellants,

v.

SOUTH DAKOTA HIGHWAY PATROL,

Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO NORTHRUP

BRIEF OF APPELLANTS SHANE JOHNSON and ANDREW STEEN

Michael D. Sharp
The Sharp Firm, Prof. LLC
143 N. 3rd St.
PO Box 303
Emery, SD 57332

Attorney for Appellants

Justin Bell, Special Assistant Attorney General
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501

Marty Jackley
Attorney General for South Dakota
1302 E Hwy 14, Ste 1
Pierre, SD 57501

Attorneys for Appellee

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Appellants will be collectively referred to as Plaintiffs where appropriate, and individually as Mr. Johnson and Mr. Steen.

The Appellee will be referred to as the South Dakota Highway Patrol (SDHP) or Defendant.

The Settled Record consists of Hughes County file 32CIV24-000182, which will be cited as "SR" followed by the page number(s) of the SR and specific lines or paragraphs cited, as appropriate. Transcripts of the Motion Hearing will be cited to as "MH" followed by the page and line numbers.

JURISDICTIONAL STATEMENT

This is an appeal from the *Order Granting Motion to Dismiss* entered on January 17, 2025. (SR at 67-68). Appellants' Counsel filed a *Notice of Appeal* on February 7, 2025, and simultaneously perfected service upon Defendant through its counsel of record, via the Odyssey file and serve system. (SR at 72-73).

Jurisdiction is proper in this Court under SDCL § 15-26A-3 because this is an appeal from a final judgment.

STATEMENT OF LEGAL ISSUES

1. Whether the Plaintiffs Complied with the service of process statute.
    a. *Spade v. Branum*, 2002 SD 43,
    b. *State v. Jones*, 2011 SD 60, and
    c. *Wagner v. Truesdell*, 1998 SD 9.
2. Whether Plaintiffs substantially complied with SDCL § 15-6-4.
    a. *Spade v. Branum*, 2002 SD 43, and
    b. *Wagner v. Truesdell*, 1998 SD 9.

STATEMENT OF THE CASE & PROCEDURAL POSTURE

This case stems from Defendant's failure to reasonably accommodate Plaintiffs' disabilities. (SR at 9). On August 29, 2024, Plaintiffs filed the complaint in this case. (SR at 9). The complaint alleged the Defendant violated the South Dakota Human Relations Act of 1972 when it failed to reasonably accommodate back injuries that each of the Plaintiffs suffered. (SR at 1). On September 30, 2024, Defendant filed a motion to dismiss (SR at 12). The motion to dismiss was heard on January 13, 2025. (SR at 23). On January 17, 2025, the Honorable Margo Northrup entered an order granting Defendant's motion to dismiss. (SR At 64). This appeal was subsequently filed on February 7, 2025. (SR at 72-73).

STATEMENT OF THE FACTS

Plaintiffs, Shane Johnson and Andrew Steen, are currently employed by the South Dakota Highway Patrol. (SR at 2). Each of the Plaintiffs suffered a back injury at different points in their lives. (SR at 2 & 7). Due to their injuries, each of the Plaintiffs requested that Defendant provide them with a load bearing vest to allow them perform their duties without further injury. (SR at 4 & 8). Mr. Johnson was told that he would be allowed to wear concealable suspenders under his uniform. (SR at 6). The concealable suspenders failed to distribute the weight of Mr. Johnson's duty belt evenly across his shoulders, and as a result, Mr. Johnson noticed more pain than when he did not use the suspenders at all. (SR at 6). Despite recommendations from a medical doctor that he wear a load bearing vest, Mr. Steen's request for a load bearing vest was denied. (SR at 8). Feeling like they had no other recourse, Plaintiffs decided to file this lawsuit on August 29, 2024. (SR at 1). After filing the lawsuit, Plaintiffs caused the South Dakota Highway Patrol to be personally served. (SR at 69, 70, 75, and 78). Plaintiffs counsel also served Defense counsel, who also is also appointed as

a Special Assistant Attorney General in this matter, via email. (SR at 69 and 74). In response to the lawsuit, Defendant filed a motion to dismiss arguing that Plaintiffs improperly served the summons and complaint as required under SDCL § 15-6-4. (SR at 12). Defendant's motion to dismiss was granted on January 17, 2025. (SR at 64).

STANDARD OF REVIEW

The standard of review for a motion to dismiss is well settled. "A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading not the facts which support it." *Estate of Billings v. Deadwood Congregation*, 506 N.W.2d 138, 140 (SD 1993). "[The] standard of review of a trial court's grant or denial of a motion to dismiss is the same as [the] review for summary judgment – is the pleader entitled to judgment as a matter of law?" *Billings*, 506 N.W.2d at 140 (citing *Jensen Ranch, Inc. v. Marsden*, 440 N.W.2d 762, 764 (SD 1989). "When a court's decision on a motion to dismiss is 'purely grounded in applying the applicable law to presumed facts, [the South Dakota Supreme Court] appl[ies] a de novo standard of review. *Stock v. Garrett*, 2025 SD 8 ¶ 32 (citing *Paul v. Bathurst*, 2023 SD 56 ¶ 11).

ARGUMENT

1. Plaintiffs Complied with SDCL § 15-6-4(d)(5).

When a lawsuit is commenced against the state or any of its institutions, departments, or agencies and the statute authorizing the action does not designate an officer or employee to be served, SDCL § 15-6-4(d)(5) requires service of process to be made "upon the Governor and the attorney general." "That parties be notified of proceedings against them affecting their legal interest is a 'vital corollary' to due process and the right to be heard." *Spade v. Branum*, 2002 SD 43, ¶ 7. Principally, service of process serves two important functions: "to advise the defendant that an action or proceeding has been commenced against him by plaintiff, and warn him that

he must appear within a time and place named and make such defense as he has." *Wagner v. Truesdell*, 1998 SD 9, ¶ 8. Additionally, this Court has recognized that "[it] will not read statutes literally, if they lead to an 'absurd or unreasonable result.'" *State v. Jones*, 2011 SD 60, ¶ 11 (citing *State v. Wilson*, 2004 SD 33, ¶ 9).

Here, the governor and the attorney general of South Dakota were both served in this action at the direction of and through their attorney, a special assistant attorney general, who remains on this case to this day. (SR 34-38, MH 3:23-4:10 & 9:14-20.) Additionally, Plaintiffs caused the summons and complaint to be personally served on a member of the highway patrol command staff. (SR at 69, 70, 75, and 78). Because the South Dakota Highway Patrol is directly controlled by the Governor of South Dakota, the governor was directly served through her appropriate chain of command.

Requiring service to be personally made on South Dakota's governor was unreasonable given the amount of security that regularly attends the governor's presence and the concern for the safety of executive officials during a highly contested, and dangerous, election season. Defense agrees with this point by stating that service of someone at the governor's and service of someone at the attorney general's office would be sufficient for service of process, despite Mr. Jackley and Mrs. Noem not being personally served. (MH 9:1-13.) Since counsel for the highway patrol agrees that personally serving the governor and attorney general would be unreasonable, the instant dispute is what level of staff is appropriate for his and her staff to be served.

The South Dakota Highway Patrol (which is an executive agency that is directly controlled by the governor) received actual service of the action through its command staff by the sheriff's office (SR 39-40.) It is up to that individual command officer to follow whatever internal procedures the State has created, because the

general public (nor lower ranking members of those agencies) will be privy to those policies.

As is noted above, Appellee's counsel is currently serving as a special assistant attorney general. As a special assistant attorney general, Mr. Bell agreed to accept service on behalf of the attorney general and his client. That is exactly what happened in this case. (SR at 69 and 74).

As Mr. Bell is handling the matter, and agreed to accept service via e-mail, the undersigned caused the summons and complaint to be served on Mr. Bell directly. If Mr. Jackley were served, and Mr. Bell were not served directly, the Appellee could then have argued that the wrong person was served, since Plaintiffs were aware of the appointment of a special assistant attorney general on this specific matter. Indeed, Plaintiffs do not know why a special assistant attorney general was appointed in this matter. It could be that there was a conflict of interest within the attorney general's office, it could be that there was a financial decision to be made, it could be that the governor herself instructed that Mr. Jackley not handle this matter, and it could be something completely different. None of those reasons for appointing a special assistant attorney general matter to the litigation, or for that matter to the Plaintiffs. What *does* matter is that a special assistant attorney general was appointed, that he had extensive conversations with counsel for plaintiffs, and that he agreed to accept service via e-mail.

Thus, requiring that the attorney general be personally served (subsequently hiding service from the special assistant attorney general representing the state on this matter) is unreasonable and such a requirement should not be read into SDCL § 15-6-4(d)(5). Serving the special assistant attorney general working directly on the case

provides the attorney general and the governor with actual notice of the lawsuit and allows the attorney general to decide about how to best defend the action.

The purpose of service of process is to give the defendant adequate notice of the claims against it and to allow the defendant to make arrangements on how to best defend the action. The fact that this case was assigned to a special assistant attorney general proves that the governor and the attorney general were able to decide how to defend the case. Accordingly, Plaintiff complied with the statute and served both the governor and the attorney general through the proper chain of command. If this Court finds that Plaintiffs did not literally comply with the statute, the analysis is not over. Plaintiffs, at a minimum substantially complied with SDCL § 15-6-4(d)(5).

2. Plaintiffs Substantially Complied with SDCL § 15-6-4(d)(5).

This Court has established that there need not be strict compliance with service on the actual attorney general and the governor. Service of process is not defective when the plaintiff substantially complies with the service of process statute. *See Wagner v. Truesdell*, 1998 SD 9, ¶ 6.

> "Substantial compliance" with a statue means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

Id at ¶ 7 (citing *State v. Bunnell*, 324 N.W.2D 418, 420 (SD 1982). "That parties be notified of proceedings against them affecting their legal interest is a 'vital corollary' to due process and the right to be heard." *Spade v. Branum*, 2002 SD 43, ¶ 7. Principally, service of process serves two important functions: "to advise the defendant that an action or proceeding has been commenced against him by plaintiff,

and warn him that he must appear within a time and place named and make such defense as he has." *Wagner*, 1998 SD 9, ¶ 8.

Here, the purpose of the service of process statute is to give the South Dakota Highway Patrol proper notice of the action so that it can defend itself against the action. The South Dakota Highway Patrol was given adequate notice of the case and it was able to obtain counsel and have its position heard in this lawsuit. This is evidenced by the fact that the South Dakota Highway Patrol was able to file a motion, through its counsel, and have that motion heard. Additionally, the purpose of serving the attorney general is to allow the attorney general to assign counsel to the case. That is exactly what happened in this case. The appropriate counsel has been handling this matter from long before the time it was ever filed. (MH 9:14-16.) The attorney general had notice of the action through its Special Assistant Attorney General and the attorney general's office was able to assign someone to handle this matter. Finally, the governor of South Dakota had notice of the lawsuit because the South Dakota Highway Patrol is under the direct responsibility and control of the governor, and the special assistant attorney general agreed to accept service of process via e-mail. Thus, the South Dakota Highway Patrol or its attorney gave the governor notice of the lawsuit and the Plaintiffs substantially complied with the service of process statute by serving the governor through the appropriate chain of command and its attorney.

In *Wagner v. Truesdell*, this Court held that the process server substantially complied with the applicable service of process statute when the handicapped defendant's caretaker was personally served. *See, Wagner v. Truesdell*, 1998 SD 9. This Court reasoned that even if service had properly been made, the caretaker would

have taken the papers away from the defendant and given them to the defendant's attorney. *Wagner*, 1998 SD 9, ¶ 10.

Here, the facts of the instant case are similar to those in *Wagner*. Even if Plaintiffs had not caused the governor and the attorney general to be personally served by consent of the Special Assistant Attorney General handling the matter, those officials would have taken the papers that were served and sent them right back to the same special assistant attorney general to defend the case. Instead of serving the governor and the attorney general directly, counsel agreed to serve the appropriate counsel directly as a professional courtesy and to avoid unnecessary handling of the lawsuit documents. Thus, serving the attorney general through its counsel assigned to the case and serving the governor through the South Dakota Highway Patrol substantially complied with SDCL § 15-6-4(d)(5).

Additionally, before deciding to not serve Mr. Jackley and Mrs. Noem directly, Plaintiffs considered and researched the possibility of serving Mrs. Noem and Mr. Jackley directly. 2024 was an election year where Mrs. Noem was travelling and extensively appeared to be posturing for a position within the federal government (as evidenced by her recent appointment to Secretary of Homeland Security). (SR 49.) The practical aspects of having a process server approach the governor and attorney general during a difficult election season could have resulted in security concerns on what could have been an otherwise routine electronic service on their assigned attorney.[1] Accordingly, the Plaintiffs opted to not create an unsecure environment (as law enforcement officers) and served the appropriate staff in the governor's chain of command.

[1] The security concerns are further evidenced by the recent discussions involving security with Mrs. Noem and a sitting member of the senate. Retrieved from https://abcnews.go.com/Politics/democrats-condemn-sen-alex-padillas-treatment-noem-news/story?id=122787892. Last visited June 19, 2025.

Therefore, Plaintiff's acknowledge that they did not create a safety risk for the individuals who were serving and being served this lawsuit. Rather, they complied with the agreement of opposing counsel and ensured that individuals within the chain of command were actually served. Therefore, at a minimum Plaintiffs have substantially complied with the service of process requirements for the Defendant to have notice of the lawsuit and defend its position.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the Circuit Court's decision to dismiss this motion in its entirety and remand the case to the Circuit Court for further proceedings.

Dated: July 7, 2025

Signed: /s/ Michael D. Sharp

Counsel for Appellants
Michael D. Sharp, Esq.
The Sharp Firm, Prof. LLC
PO Box 303
Emery, SD 57332
(605) 550-3000
Office@TheSharpFirm.com

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 2,586 words from the Preliminary Statement through the Conclusion. I have relied on the word count of the word-processing program to prepare this Certificate.

Dated this 7th day of July, 2025

/s/ Michael D. Sharp
Michael D. Sharp, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellants Shane Johnson and Andrew Steen was served on the following individuals at their designated service email address through the Odyssey File & Serve software as follows:

Justin Bell, Special Assistant Attorney General
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501
jlb@mayadam.net
Counsel for Appellee

Dated this 7th day of July, 2025

/s/ Michael D. Sharp
Michael D. Sharp, Esq.

APPENDIX

ATTACHMENT 1

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

SHANE JOHNSON and ANDREW STEEN, Plaintiffs, v. SOUTH DAKOTA HIGHWAY PATROL, Defendant.	32CIV24-000182 **ORDER GRANTING MOTION TO DISMISS**

This matter came before the Court on Defendant's Motion to Dismiss on January 13, 2025, at 2:00 p.m. in the courtroom of the Hughes County Courthouse in Pierre, South Dakota, before the Honorable Margo D. Northrup, Circuit Court Judge. The Plaintiffs appeared personally, along with their attorney of record, Michael D. Sharp of Emery, South Dakota, and the Defendant appeared by and through its attorney of record, Justin L. Bell of Pierre, South Dakota.

WHEREAS, "[W]hen a defendant moves to dismiss for insufficient service of process, the burden is on the plaintiff to establish a prima facie case that the service was proper." Grajczyk v. Tasca, 2006 S.D. 55, ¶ 22, 717 N.W.2d 624, 631. Proper service of process is no mere technicality: that parties be notified of proceedings against them affecting their legal interests is a vital corollary to due process and the right to be heard. R.B.O. v. Priests of Sacred Heart, 2011 S.D. 86, ¶ 9, 807 N.W.2d 808, 810. Service of process serves two important functions: first, to advise that a legal proceeding has been commenced, and, second, to warn those affected to appear and respond to the claim. Id;

WHEREAS, under SDCL 15-6-4(d)(5), "if no officer or employee is designated" for service of process then service of process must be made "upon the Governor and the attorney general." SDCL 15-6-4(d)(5);

WHEREAS, the plaintiffs admit they did not serve, nor attempt to serve, the Governor or the Attorney General. Nor was there substantial compliance or a showing that the Governor or Attorney General could not have been conveniently or timely served. White Eagle v. City of Fort Pierre, 2000 SD 34, 606 N.W.2nd 926; Lundquist v. S. Dakota Bd. Of Regents, No. CIV11-4098-RAL, 2011 WL 5325621, (D.S.D Nov. 4, 2011);

WHEREAS, upon consideration of the motions, briefs, pleadings, and arguments of counsel, and for the reasons set forth in the Court's oral findings and conclusions entered on January 13, 2025, and for good cause appearing, it is:

ORDERED the Plaintiffs' oral request for additional time to serve the Defendant for excusable neglect pursuant to SDCL 15-6-6(b) is hereby **DENIED**; and

ORDERED the Defendant's Motion to Dismiss is hereby **GRANTED** without prejudice for Insufficiency of Service of Process pursuant to SDCL 15-6-12(b)(4).

BY THE COURT:

Margo D Northrup

Margo D. Northrup
Circuit Court Judge

Attest:
Greene, Ashtin
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30989

SHANE JOHNSON and ANDREW STEEN,

Appellants,

-vs-

SOUTH DAKOTA HIGHWAY PATROL

Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO D. NORTHRUP
CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF APPELLEE
SOUTH DAKOTA HIGHWAY PATROL

MICHAEL D. SHARP
THE SHARP FIRM, PROF. LLC
PO BOX 303
EMERY, SD 57332
(605) 550-3000
Office@TheSharpFirm.com

ATTORNEY FOR APPELLANT

JUSTIN L. BELL
MAY, ADAM, GERDES &
THOMPSON, LLP
PO BOX 160
PIERRE, SD 57501
(605) 224-8803
jlb@mayadam.net

ATTORNEY FOR APPELLEE

NOTICE OF APPEAL FILED FEBRUARY 7, 2025

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SOUTH DAKOTA CONSTITUTION

PRELIMINARY STATEMENT

For the convenience of the Court, Appellee will adopt the abbreviations used in the Appellate Brief. Accordingly, Appellee South Dakota Highway Patrol, will be referred to as "SDHP" or Appellee. Appellant Shane Johnson and Andrew Steen will be referred to collectively as Appellants where appropriate, and individually as Mr. Johnson and Mr. Steen.

Reference to the Settled Record will be indicated by "SR ___."

JURISDICTIONAL STATEMENT

This is an appeal by Appellants from the *Order Granting Motion to Dismiss* entered on January 16, 2025, notice of entry of which was given on January 17, 2025.

The Hughes County Circuit Court entered its *Order Granting Motion to Dismiss*, ruling that Appellants' service of process was improper. On February 7, 2025, the Appellants filed their Notice of Appeal. This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

Issue 1. WHETHER THE CIRCUIT COURT ERRED IN DETERMINING PLAINTIFF'S SERVICE OF PROCESS WAS IMPROPER?

The Circuit Court held that Appellants' service of process was improper under SDCL § 15-6-4(d)(5).

Authority:

Spade v. Branum, 2002 S.D. 43, 643 N.W.2d 765
R.B.O. v. Congregation of Priests of the Sacred Heart, Inc., 2011 S.D. 87, 806 N.W.2d 907.
White Eagle v. City of Fort Pierre, 2000 S.D. 34, 606 N.W.2d 926
SDCL § 15-6-4(d)(5)

Issue 2. IN THE ALTERNATIVE, WHETHER THE COMPLAINT MUST BE DISMISSED BASED ON SOVEREIGN IMMUNITY?

The Circuit Court did not reach this issue.

Authority:

Unruh v. Davison Cty., 2008 S.D. 9, 744 N.W.2d 839
Truman v. Griese, 2009 S.D. 8, 762 N.W.2d 75
Wilson v. Hogan, 473 N.W.2d 492 (S.D. 1991)
LP6 Claimants, LLC v. S.D. Dep't of Tourism, 2020 S.D. 38, 945 N.W.2d 911
S.D. Const., Art. III, § 27,
SDCL 3-22-1
SDCL 3-22-7

Issue 3. IN THE ALTERNATIVE, WHETHER THE COMPLAINT MUST BE DISMISSED BASED ON THE EXCLUSIVE REMEDY DOCTRINE?

The Circuit Court did not reach this issue.

Authority:

Steinberg v. S.D. Dep't of Military & Veterans Affairs, 2000 S.D. 36, 607 N.W.2d 596.
Progressive Halcyon Ins. Co. v. Philippi, 2008 S.D. 69, 754 N.W.2d 646
Harn v. Continental Lumber Co., 506 N.W. 2d 91 (SD 1993)
Fryer v. Kranz, 2000 SD 125, 616 N.W.2d 102
SDCL 62-3-1
SDCL 62-3-2
SDCL 62-3-3

STATEMENT OF THE CASE

On August 29, 2024, Appellants, Shane Johnson and Andrew Steen, filed a summons and complaint against Appellee, South Dakota Highway Patrol, alleging violations of the South Dakota Human Relations Act of 1972 for failure to accommodate the use of load-bearing vests on duty and related back injuries. SR 1-9. Defendant filed a Motion to Dismiss and Supporting Memorandum under SDCL § 15-6-12(b)(5) on September 30, 2024, based on sovereign immunity, the exclusive remedy doctrine, and improper service of process. SR 12-22. The Honorable Judge Margo Northrup conducted

a motions hearing on Appellee's Motion to Dismiss on January 13, 2025. SR 81-96. An order granting Appellee's Motion to Dismiss was then filed on January 16, 2025. SR 63-64. Appellants subsequently filed a notice of appeal on February 7, 2025. SR 72-76.

STATEMENT OF THE FACTS

Appellants, Shane Johnson and Andrew Steen, are troopers employed by the South Dakota Highway Patrol. SR 2. According to the Complaint, Trooper Johnson originally suffered a back injury unrelated to his employment in 2020. SR 2. The Complaint likewise alleges that Trooper Steen originally suffered back injuries while deployed in the Navy and after being struck by a drunk driver while on duty as a Trooper in 2013. SR 7. Both troopers later requested the use of a load-bearing vest to accommodate ongoing back pain allegedly caused by the weight of the duty belt required to be worn as part of their employment as troopers. SR 2, 4, 8.

Based on this request, the South Dakota Highway Patrol initially attempted to accommodate the Appellants' conditions by way of load bearing suspenders to wear on duty because the load bearing vests were not in compliance with uniform standards of the Highway Patrol. SR 6-7. Appellants alleged the suspenders caused additional pain and each filed a Charge of Discrimination with the South Dakota Division of Human Rights for the Defendant's failure to accommodate their disabilities. SR 6-8. On September 12, 2023, the South Dakota Division of Human Rights provided a written notice of election closure of the Division of Human Rights file because the Appellant's elected to pursue a civil action in circuit court pursuant to SDCL 20-13-35.1. SR 7, 8. Shortly thereafter, and substantially prior to the filing of a civil action, Appellee agreed to provide Appellants with load bearing vests after the parties established an agreement regarding their use. SR

9. Several months later, Appellants' counsel sent a summons and complaint regarding this matter to Hughes County Sheriff Patrick Callahan, seeking service on "the South Dakota Highway Patrol" on August 29, 2024. SR 35-38. Staff for counsel for Appellants attempted to include counsel for Appellee on the e-mail to the Hughes County Sheriff, but incorrectly typed the email address. *Id.* The email was thereafter forwarded to counsel for Appellee. *Id.* The Hughes County Sheriff's Office served Captain John Stahl, an employee at the SDHP headquarters, in Pierre with the summons and complaint on August 30, 2024. SR 40. No other attempted service was made.

At hearing, counsel for the Appellant conceded service was not effectuated on the Governor or the Attorney General, stating: "Your Honor, in this case as to the defendant's motion to dismiss on insufficient service of process, the plaintiffs can acknowledge, and I am doing so very bluntly that the summons and the complaint were not put in the actual hands of Governor Noem and Attorney General Jackley. That simply did not happen." SR 83; MT 3:11-17.

STANDARD OF REVIEW

"In reviewing the granting of a motion to dismiss, [this Court's] standard of review is well settled. We have often stated that '[o]ur standard of review of a trial court's grant or denial of a motion to dismiss [under Rule 12(b)(5)] is the same as our review of a motion for summary judgment—is the pleader entitled to judgment as a matter of law?' *Lekanidis v. Bendetti*, 2000 S.D. 86, ¶ 15, 613 N.W.2d 542, 545 (citing *White Eagle v. City of Fort Pierre*, 2000 SD 34, ¶ 4, 606 N.W.2d 926, 928). As with summary judgment, "[this Court] can affirm the [circuit] court for any basis which supports the court's ultimate determination." *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, 921

N.W.2d 479, 491 (citing *BAC Home Loans Servicing, LP v. Trancynger*, 2014 S.D. 22, ¶ 8, 847 N.W.2d 137, 140).

"[B]ecause the issue of the validity of service of process is a question of law, 'we review the trial court's decision de novo, with no deference given to the trial court's legal conclusions.'" *Lekanidis v. Bendetti*, 2000 S.D. 86, ¶ 15, 613 N.W.2d 542, 545 (quoting *Yankton Ethanol, Inc. v. Vironment, Inc.*, 1999 S.D. 42, ¶ 6, 592 N.W.2d 596, 598).

"Whether the defendants are protected by sovereign immunity is a question of law[.]" *Hansen*, 1998 S.D. 109, ¶ 7, 584 N.W.2d at 883. Absent abrogation or waiver, sovereign immunity is "jurisdictional in nature[.]" *See Alone*, 2019 S.D. 41, ¶ 24, 931 N.W.2d at 713 (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DISMISSED THIS ACTION BECAUSE PLAINTIFF'S SERVICE OF PROCESS WAS IMPROPER.

"Proper service of process is no mere technicality: that parties be notified of proceedings against them affecting their legal interests is a 'vital corollary' to due process and the right to be heard." *Spade v. Branum*, 2002 S.D. 43, ¶ 7, 643 N.W.2d 765, 768 (citing *Schroeder v. City of New York*, 371 U.S. 208, 212, 83 S. Ct. 279, 282, 9 L. Ed. 2d 255, 259 (1962)). Thus, service of process serves two important functions: "first, to advise that a legal proceeding has been commenced, and, second, to warn those affected to appear and respond to the claim." *Id.* (quoting *Wagner v. Truesdell*, 1998 S.D. 9, ¶ 8, 574 N.W.2d 627, 629).

"[W]hen a defendant moves to dismiss for insufficient service of process, the burden is on the plaintiff to establish a prima facie case that the service was proper." *Grajczyk v. Tasca*, 2006 S.D. 55, ¶ 22, 717 N.W.2d 624, 631 (citing *Northrup King Co. v.*

Compania Productora Semillas Algodoneras Selectas, S.A., 51 F.3d 1383, 1387 (8th Cir. 1995)). This Court "review[s] a circuit court's determination regarding whether a plaintiff presented a prima facie case of sufficient service de novo, giving no deference to the circuit court's legal conclusions." *R.B.O. v. Congregation of Priests of the Sacred Heart, Inc.*, 2011 S.D. 87, ¶ 7, 806 N.W.2d 907, 910. "If service of process is invalid, then 'the trial court had no jurisdiction to hear the case' and the action is 'properly dismissed.'" *Olson v. Huron Regional Medical Center, Inc.*, 2025 S.D. 34, ¶ 48, ___ NW3d ___ (quoting *Lekanidis v. Bendetti*, 2000 S.D. 86, ¶ 33, 613 N.W.2d 542, 549).

Service of process on a state agency in South Dakota is controlled by SDCL 15-6-4(d)(5). The statute provides, "if no officer or employee is designated," service of process must be delivered "upon the Governor and the attorney general." SDCL 15-6-4(d)(5). The South Dakota Highway Patrol and the Department of Public Safety do not have a specific statute which designates an officer or employee for service of process, accordingly, the Governor and Attorney General must be served. "The statutory list of parties that are authorized to receive service under [SDCL 15-6-4(d)(5)] is exhaustive and compliance with the statute is not discretionary." *R.B.O. v. Priests of the Sacred Heart*, 2011 S.D. 86, ¶ 10, 807 N.W.2d 808, 811 (alteration in original).

In the case at hand, a copy of the summons and complaint in this matter was served on Captain John Stahl at the South Dakota Highway Patrol Office headquarters in Pierre by the Hughes County Sheriff's Office. The email requesting service of process that was sent by Appellant's counsel's legal assistant was emailed to Appellee's counsel, a private practice attorney who happens to be a special assistant attorney general. While Plaintiff suggests this was proper service following a chain of command for the Attorney

General and the Governor, it is not proper service under a plain reading of SDCL 15-6-4(d)(5). The statute clearly defines it is not appropriate to serve an officer or employee rather than the Attorney General and Governor "if no officer or employee is designated." SDCL 15-6-4(d)(5). Though they may be employees or officers within the chain of command, no evidence shows Captain John Stahl of the South Dakota Highway Patrol is designated to receive service on behalf of the Governor or that the undersigned counsel has been designated with the power to receive service on behalf of the Attorney General.[1]

Of additional import, even if service of process on a special assistant attorney general was sufficient, merely forwarding an email with the attached summons and complaint to a special assistant attorney general does not comply with the personal service requirements in SDCL 15-6-4(c) and (d) for commencing an action. Service under SDCL 15-6-4(d) "may be made by any person authorized by § 15-6-4(c), anyone duly authorized . . . or designated by order of the court." The attorney for plaintiffs in this case is not a person authorized under SDCL 15-6-4(c) or (d) to provide service, nor does forwarding an email constitute personal service. There is not even any argument presented as to how forwarding an email would comply with the personal service requirements in SDCL 15-6-4(c) and (d). Thus, the Attorney General cannot be said to have been properly served under the governing statute and dismissal is warranted.

Appellants argue that requiring service on the Attorney General and Governor was unreasonable. However, it is not an unreasonable or absurd reading of the statute.

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[1] The Appellants' Brief for states that counsel for Appellee stated that service on someone at the Governor's Office or Attorney General's office would be sufficient process. That is not what was said. Counsel stated "it would be a different case" if the "Office of the Governor" or "Office of the Attorney General" were served. See SR 89, MT 9:1-13. That, of course, did not happen in the case at hand, and would be subject to different analysis.

Such is plainly required by the plain language of the governing statute, and it has been repeatedly enforced. Even assuming actual notice, "[a]ctual notice will not subject defendants to personal jurisdiction absent *substantial compliance* with [the governing service-of-process statute]." *R.B.O.*, 2011 S.D. 86, ¶ 17, 807 N.W.2d at 813 (quoting *Wagner*, 1998 S.D. 9, ¶ 9, 574 N.W.2d at 629). While actual notice of the action is not disputed, service was not in actual or substantial compliance with the clear requirements of law. "'Substantial compliance' with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute." *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835. Under the Plaintiffs' argument, any state employee or officer would be deemed "the Attorney General" or "the Governor," rendering the language of the statute without meaning. "The Plaintiffs cannot utilize the substantial compliance doctrine as a substitute for the express notice requirements of [SDCL 15–6–4(d)(5)]. To hold otherwise would render the statute meaningless." *R.B.O.*, 2011 S.D. 87, ¶ 17, 806 N.W.2d at 913 (alteration in original). Since neither the Governor nor the Attorney General were served, the statute was not substantially complied with, and this matter must be dismissed. *See R.B.O. v. Priests of the Sacred Heart*, 2011 S.D. 86, 807 N.W.2d 808 (reversing circuit court for not dismissing case for improper service of process).

Plaintiff argues *Wagner v. Truesdell,* 1998 S.D. 9, 574 N.W.2d 627 is controlling by comparing proper service of process on a handicapped defendant's caretaker as similar to service on a special assistant attorney general and the South Dakota Highway Patrol on behalf of the Attorney General and Governor. This argument is misguided. *See White Eagle v. City of Fort Pierre*, 2000 S.D. 34, ¶¶ 13-14, 606 N.W.2d 926, 930. The

defendant in *Wagner* could not have reasonably been notified or warned when accounting for his mental incompetence. This case is distinguished from *Wagner* because the Attorney General and Governor are competent to choose what to do with the service, and it is only an assumption by plaintiffs that the information would have been given to the current special assistant attorney general had the option been presented. This case is parallel to the improper service in *White Eagle* where the statute expressly defined "the mayor or any alderman or commissioner" be served to constitute service, and "[a]bsent such a service, jurisdiction is totally lacking." *Id.* at ¶ 12. In that case, this Court concluded:

> [T]here was no showing that the mayor or any one of the six common council members could not have been conveniently or timely served. SDCL 15–6–4(d) clearly delineates those that may be served in order for a court to obtain jurisdiction. Absent such service, there is not actual compliance with respect to the substance essential to every reasonable objective of the statute. Under the facts of this case the statute has not been followed sufficiently to carry out the intent for which it was adopted. We therefore decline to apply the substantial compliance doctrine Indeed, an extension of the doctrine under these facts would ultimately serve to eradicate service of process statutes.

Id. at ¶ 14.

The improper service of process in this case is more similarly presented in cases like *Lundquist v. S. Dakota Bd. of Regents,* No. CIV 11-4098-RAL, 2011 WL 5325621, at *1-2 (D.S.D. Nov. 4, 2011), where dismissal was granted after plaintiff served the executive administrative secretary of the Board of Regents, but failed to serve the Attorney General as required by SDCL 15-6-4(d)(5). *See also Richmond v. Anderson,* No. 4:24-CV-04067-ECS, 2025 WL 815721, at *4-5 (D.S.D. Mar. 14, 2025) (dismissing an action for improper service on the State of South Dakota under SDCL 15-6-4(d)(5) where the plaintiff failed to serve both the Governor and the Attorney General by mailing

the summons to the attorney general's office); *Hodges v. South Dakota School of Mines and Technology*, 634 F. Supp. 3d 638, 653 (D.S.D. 2022) (ruling service on the School of Mines was ineffective where SDCL 15-6-4(d)(5) requires service on the Governor and the Attorney General). Likewise, the dismissal in this case should therefore be affirmed.

II. DISMISSAL MAY BE AFFIRMED BASED ON SOVEREIGN IMMUNITY.

Appellee submits that this matter is most appropriately resolved by affirming the circuit court solely on the narrow ground that was ruled on by the circuit court. However, in the alternative, the motion to dismiss may also be affirmed based upon the two additional arguments raised by Appellees to the circuit court but not ruled on based on the court's ruling on the threshold service of process question. *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, 921 N.W.2d 479, 491 (citing *BAC Home Loans Servicing, LP v. Trancynger*, 2014 S.D. 22, ¶ 8, 847 N.W.2d 137, 140) ("[this Court] can affirm the [circuit] court for any basis which supports the court's ultimate determination.").

As it relates to sovereign immunity, "[t]he States' sovereign immunity derives from English law and was ratified in Article III, Section 2 of the United States Constitution." *Unruh v. Davison Cty.*, 2008 S.D. 9, ¶ 7, 744 N.W.2d 839, 842 (citing *Alden v. Main*, 527 U.S. 706, 713, 119 (1999)). "Sovereign immunity is established on a state level by Article III, Section 27 of the South Dakota Constitution: 'The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.'" *Id.* at ¶ 8. The South Dakota Supreme Court "recognizes that sovereign immunity arises in part from the common law." *Id.* "In the absence of constitutional or statutory authority, an action cannot be maintained against the State." *Truman v. Griese*, 2009 S.D. 8, ¶ 9, 762 N.W.2d 75, 78 (further citations omitted). "Whether sovereign immunity

precludes a plaintiff from pursuing a claim is a question of law which is reviewed de novo." *Id.* at ¶ 10 (quoting *King v. Landguth*, 2007 SD 2, ¶ 8, 726 N.W.2d 603, 607). Any waiver of the State's sovereign immunity must be expressly identified by the Legislature. *LP6 Claimants, LLC v. S.D. Dep't of Tourism*, 2020 S.D. 38, ¶ 13, 945 N.W.2d 911, 915 (*citing High-Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, 739 (S.D. 1980)). In other words: "An express waiver of sovereign immunity is required." *Adrian v. Vonk*, 2011 S.D. 84, ¶ 12, 807 N.W.2d 119, 123 (further citations omitted).

Sovereign immunity as applied to the South Dakota Highway Patrol as a state agency precludes the Plaintiff from pursuing a claim for damages in the present case. The Complaint is brought pursuant to the South Dakota Human Relations Act of 1972, as codified at SDCL ch. 20-13. It is not disputed that the State of South Dakota is included within the general definition of "person" that would make SDCL ch. 20-13 generally applicable to the State of South Dakota as an employer subject to the provision of the chapter. However, there is no language in the chapter that is an express waiver of sovereign immunity. Indeed, there is no language whatsoever regarding the State being subject to damages or waiving sovereign immunity.

In such cases, when the State is explicitly included in a generally appliable statute but there is no express waiver of sovereign immunity, the only reasonable way to interpret the statute is to find that sovereign immunity continues to bar a claim for monetary relief, but a right of action exists for the State to be sued for declaratory or injunctive relief regarding the duties imposed by the statute. *See Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 31, 706 N.W.2d 239, 251 (declaratory judgments not barred by sovereign immunity).

Moreover, the Complaint contends that the State's risk liability pool waives sovereign immunity. While SDCL 21-32-16 provides that liability insurance waives the state's common law doctrine of sovereign immunity, the PEPL fund, however, does not waive sovereign immunity. SDCL 21-32A-1 points this out when stating, "[t]o the extent that any public entity, *other than the state*, participates in a risk sharing pool or purchases liability insurance . . . the public entity shall be deemed to have waived the common law doctrine of sovereign immunity." SDCL 21-32A-1 (emphasis added). "Even though self-insurance through participation in a risk sharing pool accomplishes the same purpose as purchase of commercial insurance, it has been held that participation in such a risk sharing pool does not waive the state's sovereign immunity under SDCL 21–32–16." *Wilson v. Hogan*, 473 N.W.2d 492, 495 (S.D. 1991).

In fact, the PEPL fund expressly applies to those claims "which [are] not barred or avoidable through sovereign immunity or other substantive law." SDCL 3-22-7. "Nothing in [chapter 3-22] may be construed to . . . waive or limit any immunity or legal defense otherwise available to any covered claim." SDCL 3-22-1. "Pursuant to S.D. Const., Art. III, § 27, suits against the state are authorized only for a covered claim to the extent coverage is provided in the coverage document." SDCL 3-22-17. The PEPL fund Memorandum of Liability states: "Except to the extent that coverage is specifically provided under this Memorandum, the State reserves on behalf of itself and the employees all rights of sovereign or governmental immunity." The Public Entity Pool for Liability, *Memorandum of Liability Coverage to the Employees of the State of South Dakota,* July 1, 2025. Therefore, coverage is not provided here through the PEPL fund, and this suit is not authorized under S.D. Const., Art. III, § 27.

At the circuit court level, Appellants argued that holding that the State is immune from liability for such acts would invite "the Defendant to engage in invidious discrimination that is Constitutionally impermissible." However, such is not the case because there are other remedies for unconstitutional actions and because Defendant does not deny that it is subject to the Human Relations Act for purposes of declaratory and injunctive relief. However, Plaintiffs' complaint seeks only monetary damages, and claims for monetary relief are barred by sovereign immunity. Accordingly, the dismissal may be affirmed on this basis.

III. DISMISSAL MAY BE AFFIRMED BASED ON THE EXCLUSIVE REMEDY DOCTRINE.

Similar to the prior issue, the circuit court's order granting Appellee's motion to dismiss may also be affirmed based upon the two additional arguments raised by Appellees to the circuit court but not ruled on based on the exclusive remedy doctrine. "[W]orkers' compensation is the exclusive remedy against employers for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer." *Steinberg v. S.D. Dep't of Military & Veterans Affairs*, 2000 S.D. 36, ¶ 14, 607 N.W.2d 596, 601 (citing SDCL 62-3-2; *Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 95 (SD 1993)). "The compensation provided by this title is the measure of responsibility which the Employer has assumed for injuries to or death of any employee." SDCL 62-3-1.

"The rights and remedies granted to an employee subject to this title, on account of personal injury or death *arising out of and in the course of employment*, shall exclude all other rights and remedies of the employee . . . except rights and remedies arising from intentional tort." SDCL 62-3-2 (emphasis added). One application of the "arising out of and in the course of employment" standard under SDCL 62-3-2 is to determine "when an

injured employee's exclusive remedy is the receipt of workers' compensation benefits." *Progressive Halcyon Ins. Co. v. Philippi*, 2008 S.D. 69, ¶ 14, 754 N.W.2d 646, 652.

"The rights and remedies granted to an employee subject to this title, . . . *shall exclude all other rights and remedies of the employee* . . . except . . . from intentional tort." SDCL 62-3-2 (emphasis added). The purpose of the Workers Compensation Act is to limit injuries caused by an employee or other employees to intentional conduct. The high standard provides the injured employee with a remedy that is expeditious and independent of proof of fault and provides employers and co-employees liability which is limited and determinate. SDCL 62-3-2; *Brazones v. Vprothe*, 489 N.W.2d 900 (SD 1992); *Harn v. Continental Lumber Co.*, 506 N.W.2d 91 (SD 1993).

"[T]o bring a . . . suit against employers, workers 'must allege facts that plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of employer's conduct.'" *Alhoff v. Pro-Tec Roofing, Inc.*, 2022 S.D. 49, ¶ 12, 979 N.W.2d 148, 152 (quoting *Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 95 (S.D. 1993) (further citations omitted). "To establish intentional conduct, *more than the knowledge and appreciation of risk is necessary*; the known danger must . . . become a *substantial certainty*." *Id.* (quoting *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370, 372 (S.D. 1991) (citation omitted).

Worker's compensation statutes liberally provide coverage even when the worker would prefer to avoid it. *Harn v. Continental Lumber Co.*, 506 N.W.2d 91. "Even when employers act or fail to act with a conscious realization that injury is a *probable* result, worker's compensation is still the exclusive remedy for workers thereby injured." *Harn*, 506 N.W.2d at 95 (citing *Jensen*, 469 N.W.2d at 372 and *VerBouwens*, 334 N.W.2d at

876) (emphasis in original, internal quotation marks and ellipsis omitted). "No matter what form Employer conduct takes, be it careless, grossly negligent, reckless, or wanton, if it is not a conscious and deliberate intent directed to the purpose of inflecting an injury, worker's compensation remains the exclusive remedy for employment – related accidental injury." *Fryer v. Kranz*, 2000 SD 125, 616 N.W.2d 102. "Even when an injury is a probable result of Employer's conduct, worker's compensation is still the exclusive remedy." *Id.*

In the case at hand, the only alleged damage that seems to be alleged is an aggravation of a prior existing back injury, and the resulting back pain, until the matter was resolved to the plaintiffs' satisfaction. However, any claim for monetary damages would be limited to a claim for workers' compensation benefits. Since the exclusive remedy remains worker's compensation, this Court lacks subject matter jurisdiction to hear the complaints contained within the Complaint in this matter.

CONCLUSION

For all of the foregoing reasons, South Dakota Highway Patrol prays the Court enter its order affirming the Circuit Court's Order Granting Defendant's Motion to Dismiss.

Dated this 21st day of August, 2025.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
JUSTIN L. BELL
Attorneys for South Dakota Highway Patrol
503 S. Pierre St.
PO Box 160
Pierre, SD 57501
(605)224-8803
jlb@mayadam.net

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date above written one electronic copy of the Brief of Appellee in the above-entitled action was electronically served on:

Michael D. Sharp
The Sharp Firm, Prof. LLC
PO Box, 303
Emery, SD 57332
Office@TheSharpFirm.com

The undersigned further certifies that one original of the Brief of Appellant in the above-entitled action was mailed by US Mail, First Class, to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the date above written.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell
JUSTIN L. BELL
Attorneys for South Dakota Highway Patrol
503 S. Pierre St.
PO Box 160
Pierre, SD 57501
(605)224-8803
jlb@mayadam.net

CERTIFICATE OF COMPLIANCE

Justin L. Bell, attorney for Appellee, hereby certifies on the date above written that the foregoing Brief of Appellee complies with the type-volume limitation imposed by SDCL 15-26A-66(2). Proportionally spaced typeface Times New Roman has been used. Brief of Appellant does not exceed 32 pages. This brief contains 4,101 words exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, Certificate of Service, and Certificates of Counsel. Counsel relied on the word count of Microsoft Word, the word processing software used to prepare this Brief at font size 12, Times New Roman, and left justified.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Justin L. Bell

JUSTIN L. BELL
Attorneys for South Dakota Highway Patrol
503 S. Pierre St.
PO Box 160
Pierre, SD 57501
(605)224-8803
jlb@mayadam.net

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30989
Notice of Appeal Filed February 7, 2025

SHANE JOHNSON and ANDREW STEEN,

Appellants,

v.

SOUTH DAKOTA HIGHWAY PATROL,

Appellee.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO NORTHRUP

REPLY BRIEF OF APPELLANTS SHANE JOHNSON and ANDREW STEEN

Michael D. Sharp
The Sharp Firm, Prof. LLC
143 N. 3rd St.
PO Box 303
Emery, SD 57332

Attorney for Appellants

Justin Bell, Special Assistant Attorney General
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501

Marty Jackley
Attorney General for South Dakota
1302 E Hwy 14, Ste 1
Pierre, SD 57501

Attorneys for Appellee

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PRELIMINARY STATEMENT

For purposes of brevity and clarity, the Appellants will be collectively referred to as Plaintiffs where appropriate, and individually as Mr. Johnson and Mr. Steen.

The Appellee will be referred to as the South Dakota Highway Patrol (SDHP) or Defendant.

The Settled Record consists of Hughes County file 32CIV24-000182, which will be cited as "SR" followed by the page number(s) of the SR and specific lines or paragraphs cited, as appropriate. Transcripts of the Motion Hearing will be cited to as "MH" followed by the page and line numbers.

ARGUMENT

I. Appellant and Appellee Agree that Plaintiffs Substantially Complied with SDCL 15-6-4(d)(5).

Plaintiffs stand on their earlier argument that actual compliance was satisfied by the agreed electronic service of counsel, and therefore the waiver of strict compliance, for the State of South Dakota and actual service on the South Dakota Highway Patrol.

In an effort to prevent this Court from spending time on an issue which does not appear to need further argument, Plaintiffs point out that the Plaintiff's substantially complied with SDCL § 15-6-4(d)(5).

Service of process is not defective when the plaintiff substantially complies with the service of process statute. *See, Wagner v. Truesdell*, 1998 SD 9, ¶ 6. "'Substantial compliance' with a statute is actual compliance with respect to the substance essential to every reasonable objective of the statute." *Id.* at ¶ 7. "Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served." *Id.* Principally, service of process serves two important functions: "to advise the defendant that an action or

proceeding has been commenced against him by plaintiff, and warn him that he must appear within a time and place named and make such defense as he has." *Id* at ¶ 8.

Here, every reasonable objective of SDCL 15-6-4(d)(5) is to give the defendant notice of the lawsuit so that it may defend the suit. Plaintiffs agree that they did not comply with every minute technicality of the statute by not placing the lawsuit in the direct hands of the Governor and the direct hands of the Attorney General, because counsel for the State agreed to accept electronic service. Counsel for the State agrees that "'it would be a different case' if the 'Office of the Governor' *or* 'Office of the Attorney General' were served." (emphasis added.) Appellee's Br. Pg. 7, FN 1. Yet, "actual notice of the action is not disputed..." Appellee's Br. Pg. 8.

Therefore, Plaintiffs actually complied with every objective of SDCL 15-6-4(d)(5) and the purpose of the statute has been fulfilled by the waiver of counsel for the State mandating that *the* attorney general and *the* governor be served. This analysis allows for this Court to address the question of substantial compliance without further argument.

a. Plaintiffs served the Office of the Attorney General through the Special Assistant Attorney General.

The Defendant argues that service was not in substantial compliance with SDCL 15-6-4(d)(5) because neither the Governor nor the Attorney General were served. Appellee's Br. Pg. 8. Such an argument is not in accord with the facts because the Attorney General was properly served through the Special Assistant Attorney General assigned to this case. Defendants concede that "'it would be a different case' if the 'Office of the Governor' or "Office of the Attorney General' were served." Appellee's Br. Pg. 7 (citing SR 89, MT 9:1-13).

Here, the Office of the Attorney General was served. SDCL § 1-11-5 authorizes the attorney general to appoint assistant attorneys-general on a part-time

basis for special assignments. "All assistant attorneys general shall be employees of the Office of the Attorney General." SDCL § 1-32-8. Special assistant attorneys general work directly under the Office of the Attorney General. Therefore, Counsel for Appellee works in the Office of the Attorney General for the limited task of litigating this case on behalf of the State of South Dakota. Thus, by serving the special assistant attorney general assigned to this case, Plaintiffs served the Office of the Attorney General, thereby changing the analysis that the Defendant proposes. By serving a member of the Office of the Attorney General, Plaintiffs served the Attorney General in this matter.

The Defendant further argues that "even if service of process on a special assistant attorney general was sufficient, merely forwarding an email with the attached summons and complaint to a special assistant attorney general does not comply with the personal service requirements in SDCL 15-6-4(c) and (d) for commencing an action." Appellee's Br. Pg. 7. This argument is misguided given the fact that Counsel for Appellee agreed to accept electronic service on behalf of the attorney general and the State. Because Counsel for Appellee agreed to accept service, perfecting service via a process server is unnecessary in this matter. Additionally, by having its counsel agree to accept service, Defendant waived its right to argue that it was not properly served by a process server.

Accordingly, the Attorney General was properly served through its Special Assistant Attorney General in this case.

b. Plaintiffs served the Governor through the proper chain of command.

This Court has long recognized that "[it] will not read statutes literally, if they lead to an 'absurd or unreasonable result.'" *State v. Jones*, 2011 SD 60, ¶ 11 (citing *State v. Wilson*, 2004 SD 33, ¶ 9). A literal reading of SDCL 15-6-4(d)(5) would

require the Plaintiffs to hire a process server to physically approach the Governor and place the lawsuit in his or her hands.

The Defendant argues that requiring the Attorney General and the Governor to be personally served is not unreasonable given that it is "plainly required by the plain language of the governing statute." Appellee's Br. Pg. 8. This argument directly contradicts the earlier argument that "'it would be a different case' if the 'Office of the Governor' or "Office of the Attorney General' were served." Appellee's Br. Pg. 7 (citing SR 89, MT 9:1-13). These two positions stand in direct conflict with one another.

Additionally, this argument discounts the practical reality of the safety of those holding political office particularly during contentious election cycles. Requiring litigants to hire someone to personally approach high profile political figures during a contentious election year is unreasonable because it requires litigants to create situations which would be a cause for concern to the Governor's personal safety and those who are providing that security. Accordingly, the only way to properly serve the Governor is through the proper chain of command.

The Defendant does not dispute that the South Dakota Highway Patrol was actually served in this case at its headquarters in Pierre via command staff. The South Dakota Highway Patrol is directly controlled by the South Dakota Governor. Because the South Dakota Highway Patrol reports directly to the Governor, serving the South Dakota Highway Patrol places the lawsuit in the hands of the proper personnel to safely give the Governor notice of the lawsuit. Holding that service on the South Dakota Highway Patrol is insufficient either requires litigants to create situations in which the process server's motives for approaching the Governor will be questioned or punishes individual litigants for the South Dakota Highway Patrol's failure to run

the lawsuit up the proper chain of command. Plaintiffs opted, during a contentious election cycle wherein the governor was a high profile individual for appointment within the presidents cabinet, to take the safer course and directly serve the South Dakota Highway Patrol.

c. The case law cited by Defendant does not support its position.

In support of its position, Defendant likens this case to several other cases. Each of those cases is distinguishable from the facts of this case.

First, Defendant relies on *White Eagle v. City of Fort Pierre*, 2000 S.D. 34. In *White Eagle,* the plaintiff only served the City's finance officer when the statute provided that service could be made by serving the mayor or any alderman. *Id* at ¶ 3. This Court then held that the plaintiff did not substantially comply with the service of process statute. *Id* at ¶ 14. *White Eagle* is factually distinct from this case because here, service was effectuated on the Office of the Attorney General and the Governor's proper chain of command. In *White Eagle*, an employee of the city was served. The office of the mayor or any of the alderman were not served which is the case here. Accordingly, Defendant's reliance on *White Eagle* is misguided.

This argument seems to again contradict the earlier argument that "'it would be a different case' if the 'Office of the Governor' or "Office of the Attorney General' were served." Appellee's Br. Pg. 7 (citing SR 89, MT 9:1-13). Since an employee of the office was served, then the Defendants argument stated above would agree that there has been substantial compliance.

Defendant further relies on *Lundquist v. S. Dakota Bd. of Regents*, 2011 WL 5325621 (D. S.D. 2011). In *Lundquist*, the plaintiff served the defendants and wholly failed to serve either the Governor or the Attorney General. *Id* at 2. Thus, neither the Attorney General nor the Governor had any notice of the action.

Here, the actual attorney assigned to the matter by the Attorney General was involved in the matter prior to the lawsuit being filed, and he had agreed to accept electronic service on behalf of the state. Additionally, as a special assistant attorney general, "[a]ll assistant attorneys general shall be employees of the Office of the Attorney General." SDCL § 1-32-8. Therefore, this case is not factually similar to *Lundquist* and the Defendant's reliance on the case is misguided.

The Defendant also relies on *Richmond v. Anderson*, WL 815721 (D. S.D. 2025). In *Richmond*, the plaintiff's case was dismissed because the plaintiff served the Attorney General by mailing the summons and complaint to the Attorney General but failed to include two copies of the notice and admission of service form and never filed proof of service. *Richmond*, WL 815721 at 4. Notably, the plaintiff was not in contact with anyone from the Attorney General's office before filing and nobody from that office agreed to accept service. Here, the process was not insufficient as was the case in *Richmond*. Additionally, Counsel for Appellee agreed to accept service via electronic mail. Thus, this case is factually distinct from *Richmond* and this Court should find that it is not persuasive.

Finally, the Defendant relies on *Hodges v. South Dakota School of Mines*, 634 F. Supp. 3d 638 (D. S.D. 2022). The plaintiff's claim in *Hodges* was dismissed because the plaintiff failed to serve the Attorney General and the Governor within the statute of limitations. *Hodges*, 634 F. Supp. 638, 653. Here, there is no claim that the Governor and the Attorney General were not served within the statute of limitations. Thus, this case is factually distinct from *Hodges* and the Defendant's reliance on *Hodges* is misguided.

d. Conclusion

"'Substantial compliance' with a statute is actual compliance with respect to the substance essential to every reasonable objective of the statute." *Wagner v. Truesdell*, 1998 SD 9, ¶ 7. The reasonable objective of SDCL 15-6-4(d)(5) is to give the Governor and the Attorney General actual notice of the action so that they may defend it. "[A]ctual notice of the action is not disputed." Appellee's Br. Pg. 8. As evidenced by the vigorous defense brought by the special assistant attorney general in this matter, the objective of the statute has been met. The only claimed deficiencies with the service of process are that the Attorney General and the Governor were not actually served in this case.

The Defendant is seeking dismissal of this case on the basis of the Plaintiffs' failure to comply with every minute technicality of SDCL 15-6-4(d)(5). While the Plaintiffs did not comply with a literal reading of SDCL 15-6-4(d)(5); counsel for the state agreed to waive strict compliance. The Plaintiffs also actually complied with every reasonable objective of the statute. Accordingly, the Plaintiffs respectfully request that this Court reverse the Circuit Court's decision to dismiss this case and remand the case to the Circuit Court for further proceedings.

II. This Court should not base its decisions on the Defendant's arguments related to Sovereign Immunity and the Exclusive Remedy Doctrine.

The Defendant attempts to raise new issues for this Court to consider without having properly filed a Notice of Review.[1] An appellee may obtain review of a judgment or order entered in the same action which may adversely affect him by filing a notice of review and section B of the docketing statement required by

[1] It is the Plaintiffs belief that these unnoticed issues are raised, because the defendant is aware that the matter should properly be reversed and remanded under the analysis above provided.

subdivision 15-26A-4(2) with the clerk of the Supreme Court within twenty days after the service of the notice of appeal. The clerk of the Supreme Court shall not accept for filing such notice of review unless accompanied by a docketing statement and proof of service of such notice and docketing statement on all other parties. The notice of review shall specify the judgment or order to be reviewed." SDCL § 15-26A-22.

"This Court has consistently held that failure to comply with the notice of review requirements results in a waiver." *A.L.S. Props., Silver Glen v. Graen*, 465 N.W.2d 783, 787 (S.D. 1991). "[U]nless service of the notice of review is made on all other parties, this Court acquires no jurisdiction and dismissal of the cross-appeal is required." *Lake Hendricks Improvement Ass'n v. Brookings Cnty. Plan. & Zoning Comm'n*, 2016 S.D. 17, ¶ 6.

The Defendant asserts that this Court may base its decision on "the two additional arguments raised by Appellees to the circuit court but not ruled on based on the court's ruling on the threshold service of process question." Appellee's Br. Pg. 10. Yet, the Defendant did not serve a Notice of Review. Therefore, this Court does not have jurisdiction to consider those issues.

In support for its position that this Court can rule on the issues, on which there was no notices of review, the Defendant cites *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84. Appellee's Br. Pg. 10. The citation in *Zochert* specifically references other cases in which this Court has stated that affirmance of *summary judgment* is proper if there is any basis which supports the trial court's ruling. *De Smet Farm Mut. Ins. Co. of S.D. v. Busskohl,* 2013 S.D. 52, ¶ 11. Contrary to the Defendant's position, this Court has "long held that issues not addressed or ruled upon by the trial court will not be addressed by [the South Dakota Supreme Court] for the first time on appeal." *City of Watertown v. Dakota, Minnesota & Eastern R. Co.*, 1996 S.D. 82 ¶ 26. This Court

has further stated that "[a] reviewing court will not consider matters not properly before it *or matters not determined by the trial court. . . .*" *Schull Const. Co. v. Koenig*, 121 N.W.2d 559, 561 (S.D. 1963) (citing (*Edgemont Imp. Co. v. N. S. Tubbs Sheep Co.*, 115 N.W. 1130; *Tripp v. First National Bank of Yankton*, 205 N.W. 666) (emphasis added). Thus, when read together, the case law makes clear that this Court can affirm summary judgment on any factual basis that supports the circuit court's ultimate decision. On the other hand, where the circuit court did not even address an entire issue, this Court has consistently declined to address that issue for the first time on appeal. This is not a situation where this Court should abandon its prior jurisprudence on deciding issues which have not been decided at the trial court.

Here, the two additional issues raised by the Defendant were not addressed nor were they ruled upon by the Circuit Court. Judge Northrup specifically stated that "[she could not] hear any of the other arguments or the merits under the case." MH 14:12-13. Because the two additional issues raised by the Defendant were neither decided nor addressed by the circuit court, this Court should not hear those issues for the first time on appeal.

Because the circuit court did not address nor decide the two additional issues raised by the Defendant and because those issues were not properly raised in this appeal, this Court should not hear those issues.

III. Conclusion

For the foregoing reasons, Appellants respectfully request that this Court reverse the circuit court's ruling and remand this case for further proceedings consistent with this Court's ruling.

Counsel for Plaintiffs
Michael D. Sharp, Esq.
PO Box 303
Emery, SD 57332
(605) 550-3000
Office@TheSharpFirm.com

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 2,749 from the Preliminary Statement through the Conclusion. I have relied on the word count of the word-processing program to prepare this Certificate.

Dated this 22nd day of September, 2025

Michael D. Sharp, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Appellants Shane Johnson and Andrew Steen was served on the following individuals at their designated service email address through the Odyssey File & Serve software as follows:

Justin Bell, Special Assistant Attorney General
May Adam, Gerdes & Thompson LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501
jlb@mayadam.net
Counsel for Appellee

Dated this 22nd day of September, 2025

Michael D. Sharp, Esq.