In the Supreme Court
of the
State of South Dakota

Fred Slota, Plaintiff-Appellant, v. Imhoff and Associates P.C. a California Professional Corporation, Henry Evans, Shannon Dorvall, and Manuel de Castro, Jr., Defendants-Appellees.	)	No. 28496

Appeal from the Circuit Court of Minnehaha County
Honorable Rodney J. Steele, Judge

BRIEF FOR APPELLANT FRED SLOTA

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Jurisdictional Statement

On December 19, 2017, the circuit court entered judgment dismissing plaintiff's First Amended Complaint against all defendants, on the merits, with prejudice. On December 22, 2017, all defendants gave notice of entry of judgment. On January 2, 2018, plaintiff filed a timely Notice of Appeal.

Statement of the Issue

1. Does the Amended Complaint adequately allege fraud and deceit?

   The circuit court held that it does not.

   The most relevant authorities are *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *In re Mattson*, 2002 S.D. 112, 651 N.W.2d 278; *Reitz v. Ampro Royalty Trust*, 61 N.W.2d 201 (S.D. 1953); *Masloskie v. Century 21 Am. Real Estate, Inc.*, 2012 S.D. 58, 818 N.W.2d 798; SDCL 20-10-1; SDCL 20-10-2; and Fortney & Johnson, *Legal Malpractice Law* (West 2d. ed. 2008).

Statement of the Case

The trial court was the circuit court of Minnehaha County. The trial judge was the Honorable Rodney J. Steele. Fred Slota, the plaintiff, was convicted in 2014 in the circuit court of Brown County of First Degree Rape of a child and sentenced to

30 years' imprisonment. He brought a habeas corpus action in which his conviction was overturned because of ineffective assistance of counsel. The habeas judge, Jon S. Flemmer, found that "but for trial counsel's unprofessional errors, the result of the trial would have been different." Settled Record ("SR") 74; Appendix 33. Slota was released from prison in 2017, having served three years.

Forty-one days later, Slota sued three of his four criminal defense attorneys for fraud and deceit, all four for legal malpractice, and one for intentional abandonment, a form of legal malpractice. SR 1. He served all defendants by July 14. SR 84. All defendants answered on August 4, 2017. SR 53 and 345.

All defendants moved for summary judgment based on the statute of limitations. The circuit court granted the motion. In this appeal, Slota challenges the circuit court's ruling as to his fraud and deceit claims against Imhoff and Associates, Evans, and Dorvall. Slota's only claim against de Castro was for legal malpractice. Slota concedes that the circuit court correctly ruled that his claim against all defendants for legal malpractice was filed beyond the statute of limitations, and that the circuit court therefore correctly dismissed all his legal malpractice claims.

Statement of Facts

Defendants moved for judgment on the pleadings pursuant to SDCL 15-6-12(c). So this Court "must treat as true all facts properly pleaded in the complaint." *Owen v. Owen*, 444 N.W.2d 710, 711 (S.D. 1989), quoting *Akron Savings Bank v. Charlson*, 158 N.W.2d 523, 524 (S.D. 1968). The parties stipulated to plaintiff filing an Amended Complaint. SR 465. The facts found in the Amended Complaint, SR 407-421, Appendix 3, follow.

Fred Slota is an innocent man, who because of defendants' fraud and deceit, was falsely convicted of First Degree Rape of a child. Amended Complaint ¶ 1. His wife found Vincent Imhoff, a California attorney, the principal of Imhoff and Associates, P.C., on the internet. Slota hired Imhoff to defend him. Amended Complaint ¶¶ 10 and 15.

Imhoff then hired Henry Evans, a Sioux Falls attorney who had little experience in criminal law, had never defended a rape case, and had never tried any case to a jury, to defend Slota. Amended Complaint ¶ 17. Imhoff later assigned Shannon Dorvall, a California attorney, and Manuel de Castro, Jr., a South Dakota attorney, to help Evans defend Slota. Amended Complaint ¶ 18.

Imhoff's business model "is to solicit business by advertising, obtain a substantial amount of money from the accused person, then hire lawyers who are

admitted in the state where the defendant is charged, and pay the lawyers a fraction of the money that Imhoff has already collected." Amended Complaint ¶ 13.

"[T]he fraction of the money that Imhoff pays the lawyer or lawyers he hires is insufficient to allow a reasonable competent lawyer to defend the case competently, and was insufficient in this case." Amended Complaint ¶ 14. Imhoff defended Slota incompetently by hiring lawyers who represented him incompetently. It was foreseeable that these lawyers would defend Slota incompetently. Amended Complaint ¶¶ 15-16. The lawyers Imhoff hired were incompetent in many ways. These include, but are not limited to, those described in the habeas court's decision finding that his attorneys had provided ineffective assistance of counsel. Amended Complaint ¶ 24. The habeas court found that "but for trial counsel's unprofessional errors, the result of the trial would have been different." Amended Complaint ¶ 24(y).

Slota's lawyers owed him a fiduciary duty, but committed fraud and deceit against him in many respects. Amended Complaint ¶¶ 25-26. The Amended Complaint identifies 25 separate paragraphs of fraud and deceit. Amended Complaint ¶ 27.

Summarizing those 25 paragraphs, Imhoff misrepresented himself and his practice; misrepresented what he would do for Slota; and despite his claim of specialization in defending sex crimes, hired an "unprofessional" (using the habeas court's term) lawyer who had never tried a jury case, and who did not know how to subpoena the appropriate witness to get critical impeachment into evidence. According to the habeas court, this caused Slota to be convicted instead of acquitted. Amended Complaint ¶ 27(a) to (b).

Imhoff suppressed everything he knew about the inexperience of Evans, the South Dakota lawyer he hired as lead counsel, despite Imhoff's fiduciary duty to disclose it. Imhoff disclosed other facts about Evans that were likely to and did mislead Slota. Amended Complaint ¶ 27(c). Imhoff suppressed his true purpose—to make as much money as possible by hiring the least expensive lawyers available, regardless of their abilities. Amended Complaint ¶ 27(d). Imhoff promised to hire specialists in sex crimes, but had no intention of fulfilling his promise, and completely failed to fulfill it. Amended Complaint ¶ 27(e). Imhoff falsely represented that Shannon Dorvall (one of Imhoff's associates whom he assigned to the case) was "an expert in defending sex crimes." Dorvall later admitted— while the jury was deliberating—that this was false. Amended Complaint ¶ 27(f).

Evans made additional specific false representations to Slota, including how he could get the alleged victim's prior inconsistent statements into evidence, and that Evans would use Imhoff's experts to help defend the case. Amended Complaint ¶ 27(h). Dorvall represented to Slota that she would be active in defending the case during both pre-trial and trial, but in fact did "virtually nothing." Amended Complaint ¶ 27(i).

Evans claimed that de Castro's failure to appear at trial was not important, a fact that Evans knew was untrue. Amended Complaint ¶ 27(j). Evans claimed he would "carefully and extensively" prepare Slota and his wife to testify, but failed to do so. Amended Complaint ¶ 27(k). Evans told Slota that he would prepare Slota and his wife to testify using a lawyer other than Evans, a promise Evans had no intention of performing, and that he failed to perform. Amended Complaint ¶ 27(l).

Slota's wife, Nina Slota, Ph.D., located Lawrence W. Daly, who has extensive experience in helping defend alleged sex crimes. Daly agreed to work with Slota. Imhoff said he would work with Daly but never had any intention of doing so, in order to keep control of the case for himself, and Imhoff refused to work with Daly. Amended Complaint ¶ 27(m).

Imhoff promised to arrange for Slota to take an independent polygraph test, but never had any intention of doing so, and failed to do so. Amended Complaint ¶ 27(n). Imhoff falsely claimed on his web site that "we have well-versed knowledge regarding laws in each state," yet hired lawyers who were, in the habeas judge's opinion, "unprofessional" and "incompetent." Amended Complaint ¶ 27(o). Imhoff knew that his claim that "we have well-versed knowledge regarding laws in each state" was untrue. Amended Complaint ¶ 27(p).

Finally, Imhoff claimed on his web site that "you can rest assured in knowing we will do everything in our power to secure the most favorable outcome possible," which Imhoff knew was false. Amended Complaint ¶¶ 27(q) to (r). Imhoff falsely claimed on his web site that "our firm can vigorously defend your rights, liberties, and reputation against child molestation charges," which Imhoff knew was untrue. Amended Complaint ¶¶ 27(s) to (t). Imhoff falsely claimed on his web site that his attorneys "provide high-quality legal representation in 48 states," which Imhoff knew was untrue. Imhoff & Associates is a small firm that falsely represented itself to be a large firm. Amended Complaint ¶¶ 27(u) through (w).

Argument

I. The Amended Complaint adequately alleges fraud and deceit against Imhoff and Associates, Henry Evans, and Shannon Dorvall

A. The statute of limitations for fraud and deceit is six years, and Slota met it

The statute of limitations for fraud and deceit is six years. SDCL 15-2-13(6). The statute explicitly mentions fraud, not deceit, but fraud includes deceit. *Chem-Age Indus. v. Glover*, 2002 S.D. 122, ¶ 12, 652 N.W.2d 756, 764 ("In alleging fraud, plaintiffs cite SDCL 20-10-1, which provides that 'one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.'")

Slota's first contact with any defendant was in February, 2013, which is less than six years before the final defendant was served on July 14, 2017. SR 81, 84, and 379. So he met this statute of limitations.

B. The circuit court's conclusion that Slota's fraud and deceit claims are merely legal malpractice artfully pled to appear to be fraud and deceit is a conclusion of law subject to de novo review—and it is wrong

The circuit court dismissed Slota's fraud and deceit claims based on its erroneous legal conclusion that they are merely "artful pleading" of his legal malpractice claims. SR 580, Appendix 1 at 16. This legal conclusion is subject to

de novo review. *Valley Power Sys. v. S.D. Dep't of Revenue*, 2017 S.D. 84, ¶ 9, ___ N.W.2d ___ ("Questions of law are reviewed de novo.")

Other courts have made the same mistake. "Three distinct causes of action are potentially available to clients for misbehavior by their lawyers: (1) breach of fiduciary duty; (2) breach of contract; and (3) the tort of malpractice. The courts, however, are not in agreement on the exact nature of and parameters for these causes of action. Many refuse to recognize the distinctions and dichotomies between and among the actions, and conclude that regardless of how the cause is characterized it is essentially a tort action for malpractice. *Such a conclusion, however, is much too pat. In both pleading and proof, precisely framing the nature of the wrong can have a substantial impact on the outcome of the case, depending upon which cause of action is being alleged."* Fortney & Johnson, *Legal Malpractice Law* (West 2d. ed. 2008) at 25 (emphasis added).

The nature of the wrong that Slota alleged in his fraud and deceit cause of action was fraud and deceit, not legal malpractice. Fortney & Johnson characterize these claims as "breach of fiduciary duty" claims. "Breach of fiduciary duty" constitutes fraud and deceit. *Himrich v. Carpenter*, 1997 S.D. 116, ¶ 11 and 17, 569 N.W.2d 568, 572 (breach of fiduciary duty implies fraud and deceit); *City of Aberdeen*

v. Rich, 2001 S.D. 55, ¶ 21, 625 N.W.2d 582, 587 (breach of fiduciary duty "constitutes fraud and deceit"); *Masloskie v. Century 21 Am. Real Estate, Inc.*, 2012 S.D. 58, ¶ 14, 818 N.W.2d 798, 803 ("allegations of fraudulent misrepresentations . . . could establish actual fraud as well as . . . breach of fiduciary duty . . . . Therefore, the gravamen of Masloskies' claims is based in fraud as much as in negligence, breach of contract, or breach of fiduciary duty. In such cases, the doubt regarding the applicable statute of limitations is resolved in favor of the lower period. We conclude that SDCL 15-2-13(6) [the six-year statute of limitations for fraud] governs Masloskies' cause of action for fraud.")

In effect, the circuit court allowed plaintiff's claim of legal malpractice to serve as a defense to his claim of fraud and deceit, by ruling that the legal malpractice claim swallowed up the fraud and deceit claim. But a legal malpractice claim does no such thing. Slota's allegations of fraud and deceit in the 24 subparagraphs of the Amended Complaint ¶ 27 are just that: allegations of fraud and deceit.

The circuit court should have looked to the nature of the allegations of breach of fiduciary duty. "It is important to explore the nature of fiduciary duty, and why it exists, in order to distinguish an action for breach of fiduciary duty from actions by clients against attorneys for breach of contract or legal malpractice. . . . Fiduciary

duties include acting with utmost fairness to clients [and] making full disclosure . . . ." Fortney & Johnson, *Legal Malpractice Law*, *supra* at 26.

Slota alleged that the three fraud defendants did not act with fairness, let alone utmost fairness, nor did they make full disclosure. Instead they took his money and took him for a ride that ended with the horrible allegation against him being defended incompetently and unprofessionally (according to the habeas court, SR 74-75, Appendix 33-34), by a lawyer who had never tried *any* jury case. This resulted in Slota being convicted of a crime that (again according to the habeas court, SR 74, Appendix 33) he should have been acquitted of, being sentenced to 30 years, and serving three.

"The fiduciary standard of care is not that of an ordinary, prudent lawyer, but a standard of the most scrupulous honor, good faith and fidelity to his client's interest." Fortney & Johnson, *Legal Malpractice Law*, *supra* at 28 (internal quotation omitted). The fraud defendants showed no honor, no good faith, and total infidelity to their client's interest.

C. A lawyer has a highly fiduciary duty to a client, and must "maintain the utmost good faith, honesty, integrity, fairness, and fidelity" to the client; the chasm between those duties and how the three fraud and deceit defendants treated Slota justifies claims for fraud and deceit

Justice Cardozo wrote: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

South Dakota has expressed the same principle in different words. "The nature of the relationship between attorney and client is highly fiduciary. It consists of a very delicate, exacting and confidential character. It requires the highest degree of fidelity and good faith." *In re Mattson*, 2002 S.D. 112, ¶ 44, 651 N.W.2d 278, 286, quoting *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 264 (S.D. 1988). "[I]n all his relations with his client, it is his [the attorney's] duty to exercise and maintain the utmost good faith, honesty, integrity, fairness, and fidelity." *In re Mattson*, *supra*,

2002 S.D. 112, ¶ 44, 651 N.W.2d at 287, quoting 7A CJS, Attorney & Client § 234 (1980).

An enormous gulf exists between these duties and how Slota's attorneys treated him. As set forth in the Amended Complaint ¶¶ 25-27, and summarized in the Statement of Facts above:

- Attorney Imhoff misrepresented himself and his practice;
- Imhoff misrepresented what he would do for Slota;
- Imhoff, despite his claim of specialization in defending sex crimes, hired an "unprofessional" (using the habeas court's term) lawyer who had never tried a jury case, and who did not know how to subpoena the appropriate witness to get critical impeachment into evidence, and who the habeas court concluded caused Slota to be convicted instead of acquitted (SR 74, Appendix 33);
- Imhoff suppressed everything he knew about the inexperience of Henry Evans, the South Dakota lawyer he hired as lead counsel, despite Imhoff's fiduciary duty to disclose it;
- Imhoff disclosed other facts about Evans that were likely to and did mislead Slota;

- Imhoff suppressed his true purpose—to make as much money as possible by hiring the least expensive lawyers available, regardless of their abilities;
- Imhoff promised to hire specialists in sex crimes, but had no intention of fulfilling his promise, and completely failed to fulfill it;
- Imhoff represented that his associate Shannon Dorvall was "an expert in defending sex crimes"; Dorvall admitted, while the jury deliberated, that this was false;
- Evans made additional specific false representations to Slota, including how he could get the alleged victim's prior inconsistent statements into evidence, and that Evans would use Imhoff's experts to help defend the case;
- Dorvall represented to Slota that she would be active in defending the case during both pre-trial and trial, but did "virtually nothing";
- Evans claimed that de Castro's failure to appear at trial was not important, a fact that Evans knew was untrue;
- Evans claimed he would "carefully and extensively" prepare Slota and his wife to testify, yet failed to do so;

- Evans told Slota that he would prepare Slota and his wife to testify using a lawyer other than Evans, a promise Evans had no intention of performing, and failed to perform;
- Slota's wife located Lawrence W. Daly, who has extensive experience in helping defend sex crimes, and who agreed to work with Slota; Imhoff said he would work with Daly but never had any intention of doing so, in order to keep control of the case for himself, and Imhoff refused to work with Daly;
- Imhoff promised to arrange for Slota to take an independent polygraph test, but never had any intention of doing so, and failed to do so;
- Imhoff falsely claimed on his web site that "we have well-versed knowledge regarding laws in each state," yet hired a lawyer as lead counsel who was, in the habeas court's opinion, "unprofessional" and "incompetent";
- Imhoff knew that his claim that "we have well-versed knowledge regarding laws in each state" was untrue;

- Imhoff claimed on his web site that "you can rest assured in knowing we will do everything in our power to secure the most favorable outcome possible," which Imhoff knew was false;
- Imhoff claimed on his web site that "our firm can vigorously defend your rights, liberties, and reputation against child molestation charges," which Imhoff knew was untrue;
- Imhoff claimed on his web site that his attorneys "provide high-quality legal representation in 48 states," which Imhoff knew was untrue; and
- Imhoff & Associates is a small firm that falsely represented itself to be a large one.

In light of an attorney's "highly fiduciary" relationship with his client, these actions constitute fraud and deceit. SDCL 20-10-1 provides: "One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." SDCL 20-10-2 provides:

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

"(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

"(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

"(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

"(4) A promise made without any intention of performing."

The elements of fraud are: "[T]hat a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." *Masloskie v. Century 21 Am. Real Estate, Inc.*, 2012 S.D. 58, ¶ 14 n.3, 818 N.W.2d 798, 803, quoting *North American Truck & Trailer, Inc. v. M.C.I. Commun. Servs., Inc.*, 2008 S.D. 45, ¶ 8, 751 N.W.2d 710, 713.

It is hard to imagine how any attorneys could have more thoroughly deceived Slota. It is equally hard to imagine how the "highly fiduciary" relationship between attorney and client is not breached by these actions, resulting in liability for fraud and deceit for the resulting damages.

D. South Dakota neither narrowly nor rigidly defines fraud and deceit, especially in fiduciary relationships, and scrutinizes the entire transaction to determine whether plaintiff has an actionable claim for fraud and deceit

Fraud and deceit have never been narrowly or rigidly defined in South Dakota, particularly when the defendant owes the plaintiff a fiduciary duty. *Reitz v. Ampro Royalty Trust*, 61 N.W.2d 201, 203 (S.D. 1953), rejected defendant's claim that "actionable fraud must relate to a past or existing fact and not to future occurrences; and that fraud cannot be predicated on . . . statements . . . [that are] promissory in nature." The rationale is that "Courts have quite effectively declined to open the door to the crafty by refusing to fix hard and fast rules defining fraud and thereby to set a fixed pattern around which might be devised lawful yet fraudulent schemes." *Id.*

Under *Reitz*, fraud includes "A promise relating to a future event . . . when made without intention of performance"; it includes "A "misrepresentation as to a future event . . . where the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the misrepresentations relate"; and it includes "Misrepresentations of a promissory nature . . . when blended with misrepresentations of fact." *Id.* at 204. These definitions of fraud apply closely to the fraud and deceit defendants' conduct

here. The fraud and deceit defendants blended promises relating to future events made without intention of performing, misrepresentations made with superior knowledge concerning legal representations, and misrepresentations of fact. They went far beyond the prohibited standard of "crafty."

Parties who owe a fiduciary relationship to another are held to a high standard. They "must disclose material facts" and "defects [they] knew or should have known." *Schwaiger v. Mitchell Radiology Assocs., P.C.*, 2002 S.D. 97, ¶ 18, 652 N.W.2d 372, 380. A fiduciary duty requires "full and frank disclosure of the circumstances" of the transaction. *Lindskov v. Lindskov*, 2011 S.D. 34, ¶ 15, 800 N.W.2d 715, 719. Acts of omission can constitute fraud and deceit. *City of Aberdeen v. Rich*, 2001 S.D. 55, ¶ 20, 625 N.W.2d 582, 587 ("Fraud and deceit include not only affirmative acts, but also acts of omission.")

Here, the three fraud and deceit defendants failed to disclose numerous material facts, circumstances, and deficiencies in their relationship with Slota. Their conduct is unimaginably far from the conduct of an honest lawyer who honors the attorney-client fiduciary relationship by "exercis[ing] and maintain[ing] the utmost good faith, honesty, integrity, fairness, and fidelity." *In re Mattson*, *supra*, 2002 S.D. 112, ¶ 44, 651 N.W.2d at 287, quoting 7A CJS, Attorney & Client § 234 (1980).

E. The conclusion that Slota may sue for fraud and deceit is buttressed by the rule that when more than one cause of action arises from a transaction, the longer statute of limitations applies

Defendants also committed legal malpractice. But "the same transaction may give rise to two causes of action having different statutes of limitation." *Masloskie v. Century 21 American Real Estate, Inc.*, 2012 S.D. 58, ¶ 12, 818 N.W.2d at 802, quoting *Morgan v. Baldwin*, 450 N.W.2d 783, 786 (S.D. 1980).

In *Masloskie*, plaintiffs sued a real estate agent and his firm for several causes of action, including fraud. Defendants argued that the three-year statute of limitations for malpractice by real estate agents and firms applied. Plaintiffs argued that the six-year statute of limitations for fraud applied. This Court ruled that plaintiff's fraud cause of action "was premised on one transaction involving allegations of fraudulent misrepresentations that if proven, could establish actual fraud as well as negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of good faith and fair dealing. Therefore, the gravamen of Masloskies' claims is based in fraud as much as in negligence, breach of contract, or breach of fiduciary duty." 2012 S.D. 58, ¶ 14, 818 N.W.2d at 803.

The allegations in *Masloskie* required the statute of limitations for fraud and deceit to apply. "In such cases, the doubt regarding the applicable statute of limitations is resolved in favor of the longer period. We conclude that SDCL 15-2-13(6) [the statute of limitations for fraud] governs Masloskies' cause of action for fraud." *Masloskie, id.* This is in accordance with "the rule of *Morgan* [*Morgan v. Baldwin*, 450 N.W.2d 783, 786 (S.D. 1990)] and its progeny allowing a plaintiff the longer period of limitation when more than one cause of action arises from one transaction." *Masloskie*, *supra*, 2012 S.D. 58, ¶ 14 n.4, 818 N.W.2d at 803.

This rule applies here, giving Slota the benefit of the longer period of limitations for fraud and deceit for his allegations of fraud and deceit.

F. The evidence must be viewed in the light most favorable to Slota, and questions of fraud and deceit are for the jury

1. The evidence is viewed in the light most favorable to Slota

The evidence is viewed in the light most favorable to Slota. *Federal Land Bank v. Houck*, 4 N.W.2d 213, 218 ("The Bank next asserts that the evidence will not support an inference of fraudulent intent. When the evidence is viewed in the light most favorable to Houck, the inference of such an intent is warranted.") In *Federal Land Bank v. Houck*, "A reasonable mind acting reasonably would be justified in

viewing the conduct of the [opposing party] as all of a piece." *Id.* [citation omitted]. The same is true here.

The same rule, stated in general terms, is found in *Weiszhaar Farms, Inc. v. Tobin*, 522 N.W.2d 484, 492 (S.D. 1994): "In reviewing [a] contention that the trial court erred in failing to grant a directed verdict, we view the evidence in a light that is most favorable to the non-moving party and give that party the benefit of all reasonable inferences that fairly can be drawn from the evidence. When viewed in this light, if there is any substantial evidence to sustain the cause of action or defense, it must be submitted to the finder of fact. If sufficient evidence exists so that reasonable minds could differ, a directed verdict is not appropriate." (internal citations and quotation omitted)

Viewing the evidence in the light most favorable to Slota, reasonable minds could differ, so judgment on the pleadings was not appropriate.

2. Questions of fraud and deceit are for the jury

Whether fraud or deceit occurred is a jury question. "Questions of fraud and deceit are generally questions of fact and as such are to be determined by the jury." *Laber v. Koch*, 383 N.W.2d 490, 492 (S.D. 1986), quoting *Commercial Credit Equipment Corp. v. Johnson*, 209 N.W.2d 538, 551 (S.D. 1973). The jury tests the

witnesses' credibility. *Sporleder v. Van Liere,* 1997 S.D. 110, ¶ 14, 569 N.W.2d 8, 12 ("It is also the jury's duty to test the credibility of the witnesses.") The jury may conclude that a party "never intended to keep his promise." *Id.*

All the fact questions, including all inferences and credibility determinations, are for the jury. Substantial evidence exists that would allow a jury to find fraud and deceit, so summary judgment should not have been granted against Slota.

Conclusion

Fred Slota, an innocent man, was convicted of a ghastly crime and sentenced to 30 years, ultimately serving only three because his conviction was overturned in habeas corpus. Three of his lawyers committed fraud and deceit, by actions and inactions far beyond the pale allowed to attorneys in the "highly fiduciary" attorney-client relationship. The statute of limitations has not run on his claims for fraud and deceit.

Slota respectfully requests that this Court overturn the dismissal of his fraud and deceit claims and remand the case for further proceedings.

Dated: February 15, 2018

Respectfully submitted,

/s/ James D. Leach
James D. Leach
Attorney for Fred Slota

Certificate of Service

On February 15, 2018, I served this brief on appellees by e-mailing it to defendants' attorneys, tjwelk@boycelaw.com, jrsutton@boycelaw.com, mwohara@boycelaw.com, and bfuller@fullerandwilliamson.com.

/s/ James D. Leach
James D. Leach

Certificate of Compliance

This brief was prepared in Palatino Linotype 13 for Word Perfect. It contains 4,530 words.

/s/ James D. Leach
James D. Leach

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

FRED SLOTA, Plaintiff, vs. **IMHOFF AND ASSOCIATES, P.C., a California Professional Corporation; HENRY EVANS; SHANNON DORVALL; AND MANUEL de CASTRO,** Defendants.	CIV. 17-1878 **MEMORANDUM OPINION AND ORDER**

This matter came before the Court for hearing on December 1, 2017 on Defendants' Motions for Judgment on the Pleadings and Motions for Judicial Notice. Attorney James Leach appeared on behalf of Plaintiff Fred Slota. Attorney William Fuller appeared on behalf of Defendant Manuel de Castro. Defendant Henry Evans appeared personally and with Attorneys Thomas Welk and Jason Sutton who also appeared on behalf of Defendants Imhoff and Associates, PC and Shannon Dorvall. Defendant Shannon Dorvall and a representative of Imhoff and Associates, PC listened to the proceedings telephonically.

After considering the parties' written submissions and reviewing the applicable authorities, the court issues its decisions on the pending motions in this Memorandum Opinion and Order.

FACTUAL BACKGROUND

On February 13, 2013, Plaintiff Fred Slota (Plaintiff or Slota) was indicted in Brown County on charges of First Degree Rape and Sexual Contact with a Child Under the Age of Sixteen. *See* 06CRI13000173. The alleged victim was A.K., age seven at the time of the alleged incidents (age eight at the time of trial), who was living in Plaintiff's home as a foster child.

According to Plaintiff's Complaint, his wife found Defendant Imhoff and Associates, P.C. (Imhoff) on the internet. He states in his Complaint that Imhoff is a firm located in Los Angeles, California, which advertises itself as a specialist in criminal law and offers representation all over the United States. Imhoff hired a South Dakota lawyer, Defendant Henry Evans (Evans), to defend Plaintiff on the charges. Defendant Manuel de Castro (de Castro) noticed his appearance on May 14, 2013 to assist in the representation of Plaintiff. Imhoff also assigned Attorney Shannon Dorvall (Dorvall) to assist with the case. Dorvall is a licensed California staff attorney for Imhoff. She was admitted as a non-resident attorney to participate in the defense of Plaintiff.

Following a jury trial in Brown County, Plaintiff was convicted on March 26, 2014 of one count of First Degree Rape and one count of Sexual Contact with a Child Under the Age of Sixteen. Defendant de Castro did not appear at trial as he was scheduled for oral argument before the South Dakota Supreme Court.

After trial, Attorney Ellery Grey (Grey) noticed his appearance on behalf of Plaintiff on April 21, 2014. Grey was independently retained by Plaintiff and was not associated with Defendants Imhoff, Evans, Dorvall, or de Castro. Evans filed a Motion to Strike Sexual Contact Conviction on May 9, 2014. Grey filed a Motion for New Trial on May 12, 2014. Grey argued the grounds for the new trial of improper courtroom closure and juror misconduct. Evans also filed a Motion for New Trial (Amended), offering substantially the same arguments made by Grey.

Judge Portra held a hearing on the motions on May 30, 2014. Judge Portra granted the Motion to Strike and denied the motions for new trial. On the same day, Judge Portra proceeded to sentencing with Grey, Evans, and Dorvall appearing with Plaintiff. Plaintiff was sentenced to thirty years in the South Dakota State Penitentiary. The written Judgment of Conviction was filed June 2, 2014. Defendant de Castro sent a closing letter on June 19, 2014, which stated:

> This letter is to confirm my understanding that Mr. Grey has been retained in the above-entitled matter to represent Mr. Slota. With that understanding, I have closed my file and my assistance in this matter has ended. If there are any questions, please let me know.

The letter was sent on Imhoff stationary and was addressed and sent to both Grey and Slota.

On June 23, 2014, Grey filed a Notice of Appeal to the South Dakota Supreme Court. Grey filed an Amended Notice of Appeal on July 8, 2014. On July 30, 2014, the trial court filed written Findings of Fact, Conclusions of Law and Order denying

both Grey and Evan's motions for a new trial. On October 27, 2014, Evans sent a closing letter on Imhoff stationary. The letter stated:

> This confirms that Imhoff and Associates stopped representing you at the sentencing. Please contact me with any questions.

The South Dakota Supreme Court affirmed Plaintiff's conviction in State v. Slota, 2015 S.D. 15, 862 N.W.2d 113. Grey is identified as counsel for Plaintiff on the direct appeal.

Plaintiff sought post-conviction habeas relief. *See* 06CIV15000406. Grey filed a habeas petition on behalf of Plaintiff on September 9, 2015, raising claims of ineffective assistance of counsel. An evidentiary hearing was held on April 17, 2016. On May 30, 2017, the habeas judge, Judge Flemmer, filed a Memorandum Decision granting habeas relief. Judge Flemmer found that under the totality of the circumstances Evan's representation fell short of the prevailing professional standard and that Plaintiff was prejudiced by Evan's cumulative errors. On June 7, 2017, the habeas court entered a Judgment and Writ of Habeas Corpus granting habeas relief and vacating Plaintiff's conviction for First Degree Rape. Plaintiff was remanded back into the custody of the Brown County Sheriff and conditions of bond were set in the underlying criminal file. The State did not file an appeal of the habeas decision. The underlying criminal charges remain pending against Plaintiff.

According to the parties' briefs, Evan was served with Plaintiff's Summons and Complaint in this matter on July 7, 2017. Imhoff was served on July 10, 2017 and Dorvall admitted service on July 14, 2017. Defendant de Castro acknowledges

being served in July 2017, but the exact date is not clear from the record. Other than the Admission of Service from Dorvall, there does not appear to be any proof of service in the court file.

Defendants Imhoff, Evans, Dorvall, and de Castro all move for judgment on the pleadings arguing that Plaintiff's claims are time barred by SDCL 15-2-14.2. Additionally, Defendants filed a Motion for Judicial Notice, asking this Court to take judicial notice of Plaintiff's criminal and habeas court files. The Motion for Judicial Notice is not objected to by Plaintiff, so that Motion is granted.

LAW AND ANALYSIS

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." Jensen v. Kasik, 2008 SD 113, ¶ 4, 758 N.W.2d 87, 88 (quoting Loesch v. City of Huron, 2006 SD 93, ¶ 3, 723 N.W.2d 694, 696). "The purpose of a statute of limitations is speedy and fair adjudication of the respective rights of the parties." Jensen, 2008 S.D. 113, ¶4, 758 N.W.2d at 88 (quoting Minnesota v. Doese, 501 N.W.2d 366, 370 (S.D. 1993)). The construction and application of a statute of limitations presents a legal question and is reviewed de novo. Jensen, 2008 S.D. 113, ¶4, 758 N.W.2d at 88 (citing Stratmeyer v. Stratmeyer, 1997 SD 97, ¶ 11, 567 N.W.2d 220, 222).

Defendants all move for judgment on the pleadings arguing that Plaintiff's claims are time barred by SDCL 15-2-14.2. They assert that the last possible day of the occurrence of any alleged legal malpractice was May 30, 2014, the date of

sentencing. From that date forward, Plaintiff was represented by Grey alone. Plaintiff did not commence this action until July 2017, more than three years later.

SDCL 15-2-14.2 provides:

> An action against a licensed attorney, his agent or employee, for malpractice, error, mistake, or omission, whether based upon contract or tort, can be commenced only ***within three years after the alleged malpractice, error, mistake, or omission shall have occurred.*** This section shall be prospective in application.

Emphasis added.

Plaintiff argues that his cause of action for legal malpractice accrued on May 26, 2017 when the habeas court vacated Plaintiff's conviction upon a finding of ineffective assistance of counsel. While acknowledging that the South Dakota Supreme Court has not addressed the question, Plaintiff argues that the majority of jurisdictions hold that proof of exoneration or innocence is required to bring a criminal legal malpractice claim. Plaintiff urges this Court to take the position that a cause of action for criminal legal malpractice does not "accrue" for purposes of SDCL 15-2-14.2 until post-conviction relief is obtained.

However, Defendants assert that SDCL 15-2-14.2 is a statute of repose, not a statute of limitations. At the hearing, counsel for Plaintiff in fact agreed that it is a statute of repose. For purposes of the SDCL 15-2-14.2, a cause of action arises upon the *occurrence* of the alleged malpractice, error, mistake or omission, not when the cause of action *accrued*. Defendants rely on Pitt-Hart v. Sanford USD Medical

Center, 2016 SD 33, 878 N.W.2d 406, which examined SDCL 15-2-14.1 as to the time for bringing medical malpractice actions.

> "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" CTS Corp. v. Waldburger, —— U.S. ——, ——, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014) (quoting Black's Law Dictionary 1546 (9th ed.2009)); Peterson, 2001 SD 126, ¶ 41, 635 N.W.2d at 570. "A statute of repose, on the other hand, ... is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." CTS Corp., —— U.S. at ——, 134 S.Ct. at 2182. The two-year period expressed in SDCL 15–2–14.1 does not begin when a cause of action accrues; it begins when the "alleged malpractice, error, mistake, or failure to cure shall have occurred[.]" SDCL 15–2–14.1.

Pitt-Hart, 2016 SD 33, ¶ 18, 878 N.W.2d at 413. There is a distinction between a statute of limitations, which creates a time for suing based on when the claim "accrues" and a statute of repose, which puts an outer limit on the right to bring an action. CTS Corp., 134 S.Ct. at 2182. The relevant language of SDCL 15-2-14.1 and 15-2-14.2 is identical in structure. SDCL 15-2-14.1 provides:

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

provided, a counterclaim may be pleaded as a defense to any action for services brought by a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts after the limitation herein prescribed, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim was sued or originated, but no judgment thereon except for costs can be rendered in favor of the party so pleading it.

This section shall be prospective in application only.

Emphasis added.

"We have consistently held that [SDCL 15–2–14.1] is an occurrence rule, which begins to run when the alleged negligent act occurs, not when it is discovered." Beckel v. Gerber, 1998 SD 48, ¶ 9, 578 N.W.2d 574, 576. The reason SDCL 15–2–14.1 is an occurrence rule, however, is simply because it is a statute of repose, which by definition begins running upon the occurrence of a specified event rather than the discovery of a cause of action.

Pitt-Hart, 2016 SD 33, ¶ 19, 878 N.W.2d at 413.

This Court agrees that SDCL 15-2-14.2 is a statute of repose. As a statute of repose, SDCL 15-2-14.2 is an occurrence rule so any claim for legal malpractice must be commenced within three years after the alleged malpractice occurred, not when the claim accrues by successful post-conviction relief as argued by Plaintiff.

While inartfully referencing a "statute of limitations,"[1] the South Dakota Supreme Court has previously stated that SDCL 15-2-14.2 is an occurrence rule.

> SDCL 15-2-14.2 governs the time for bringing legal malpractice actions. South Dakota follows the occurrence rule. Under the occurrence rule as expressed by our statute, the statute of limitations on a claim of attorney malpractice begins to run at the time of the alleged negligence and not from the time when the negligence is discovered or the consequential damages are exposed. Kurylas, Inc. v. Bradsky, 452 N.W.2d 111 (S.D. 1990); Schoenrock v. Tappe, 419 N.W.2d 197 (S.D. 1988); Hoffman v. Johnson, 374 N.W.2d 117, 122 (S.D. 1985); Annot. 18 A.L.R.3d 978, 986-987 (1968).

Haberer v. Rice, 511 N.W.2d 279, 287 (S.D. 1994) (other internal citations omitted).

> [T]he "critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling[.]" CTS Corp., —— U.S. at ——, 134 S.Ct. at 2183 (emphasis added). Likewise, fraudulent concealment does not toll a period of repose. First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989), cert. denied, 493 U.S. 1070, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990). "[A]fter the legislatively determined period of time, ... liability will no longer exist and will not be tolled for any reason." 54 C.J.S. Limitations of Actions § 7 (2015) (emphasis added).

[1] In Pitt-Hart, the South Dakota Supreme Court acknowledged that it had not been consistent in maintaining the term of statute of repose, rather than limitation, although it was consistent it its application of the occurrence rule. Id. at ¶¶17, 19, 878 N.W.2d at 413.

> The reason for this critical distinction lies in the different policy objectives underlying both types of statutes. "Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" CTS Corp., —— U.S. at ——, 134 S.Ct. at 2183 (quoting Black's Law Dictionary 1546 (9th ed.2009)). "[W]hen an 'extraordinary circumstance prevents [a plaintiff] from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." Id. (quoting Lozano v. Montoya Alvarez, —— U.S. ——, ——, 134 S.Ct. 1224, 1231–32, 188 L.Ed.2d 200 (2014)). In contrast, "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" Id. (quoting 54 C.J.S. Limitations of Actions § 7 (2010)). "[They] are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." First United Methodist Church, 882 F.2d at 866. Thus, while tolling a period of limitation or estopping a party from asserting it as a defense may be proper, tolling a period of repose or estopping a party from raising it as a defense subverts this legislative objective. Therefore, principles of estoppel and tolling are inapplicable to a period of repose.

Pitt-Hart, 2016 SD 33, ¶¶ 20-21, 878 N.W.2d at 413–14.

In reviewing the law review article cited by Plaintiff, it acknowledges that many jurisdictions require proof of exoneration or innocence as a necessary element of criminal legal malpractice. Duncan, Criminal Malpractice: A Lawyer's Holiday, 37 Ga.L.Rev. 1251, 1266 (2003). However, it acknowledges that in some jurisdictions, the statute of limitations may expire before a plaintiff can bring suit for criminal malpractice.

> Some jurisdictions have determined that the applicable statute of limitations in a criminal malpractice action begins to accrue upon the earlier of the claimant's actual discovery of the alleged malpractice or the termination of the claimant's legal representation by the offending attorney. Other jurisdictions have determined that the statute of limitations begins to accrue upon acquisition of final appellate or other postconviction relief. The problem is complex in that these determinations wrestle with competing concerns. On the one hand, too often statutes of limitations run prior to the criminal malpractice plaintiff obtaining postconviction relief, an element required to bring the malpractice action. The acquisition of postconviction relief often takes so long that the statute runs and the claimant is unable to prevent it from doing so. On the other hand, if the rule is that the statute of limitations does not begin to run until a malpractice plaintiff obtains postconviction relief, the statute becomes an indefinite and uncertain period of time for criminal defense attorneys. The argument is that allowing this uncertainty permits criminal defendants to subvert the purposes of statutes of

> limitations, resulting in unfairness to criminal defense attorneys. Potential defendants in criminal malpractice actions should not be subjected to the prospect of unlimited and unending liability, the uncertainty of which is dependent on the often long process of a criminal defendant obtaining postconviction relief. One of the purposes served by statutes of limitations is to enable potential defendants to close a client's case after a period of time without running the risk that, at some time in the distant future, he or she may be sued for malpractice.

Id. Defendants, and the law review article cited by Plaintiff, suggest a two-track approach. "[T]he best solution is to require a criminal malpractice plaintiff to file his lawsuit upon discovery of the wrong or within the applicable statute of limitations following the termination of the representation, even if post-conviction proceedings are still ongoing. The court would then require-not merely suggest or encourage-that the malpractice claim be held in abeyance until the postconviction matter has been resolved. It would be an abuse of discretion for the trial court not to stay the malpractice proceeding." Id. This is actually the approach that appears to be endorsed in some of the states cited by Plaintiff.

Plaintiff cites to Loesch v. City of Huron, 2006 SD 93, 723 N.W.2d 694, as support for the argument that there is no criminal legal malpractice claim until the underlying criminal conviction is overturned or vacated. In Loesch, the South Dakota Supreme Court examined SDCL § 9-24-5, which was found to be a statute of repose. Id. at ¶4, 723 N.W.2d at 695-96. The South Dakota Supreme Court held

that the time for Loesch to bring suit against the City began to run when he was injured. Id. at ¶5, 723 N.W.2d at 696. However, SDCL § 3-21-6 and SDCL § 3-21-2 prohibited him from maintaining a lawsuit against the City for a period of time. Id. at ¶¶ 5-6, 723 N.W.2d at 696. The South Dakota Supreme Court concluded that by enacting SDCL § 3-21-6 and § 3-21-2, the Legislature intended to toll the two-year period for commencing suit under SDCL § 9-24-5 and that SDCL § 15-2-25 would also apply.[2] Id. at ¶¶ 8-9, 723 N.W.2d at 697. The Loesch case is distinguishable from this case because there is no countervailing statute in the legal malpractice context that prohibits a litigant from filing suit prior to obtaining post-conviction relief. As urged by Defendants, plaintiffs must commence suit within the applicable time limit—which in this case is three years from the last occurrence of legal malpractice.

As to Defendant de Castro, Plaintiff's legal malpractice claim would be time barred under SDCL 15-2-14.2. There is no dispute that Defendant de Castro's involvement in the case ended at the trial in May 2014. In fact, de Castro did not even appear at trial. Defendant de Castro sent Plaintiff and Grey a closing letter on June 19, 2014. This action was not commenced until July 2014, more than three years later. Plaintiff's other claim against de Castro is identified as "intentional abandonment." That alleged cause of action is merely a restatement of the legal

[2] SDCL § 15-2-25 provides:

> When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

malpractice claim and is also time barred. Plaintiff's counsel agreed at the hearing that there are no claims for fraud or deceit made against de Castro. Therefore, Defendant de Castro is entitled to judgment on the pleadings.

As to Defendants Imhoff, Evans, and Dorvall, it is undisputed that they had no further representation of Plaintiff after the sentencing on May 30, 2014. Evans sent a closing letter on October 27, 2014 confirming that Defendants' representation of Plaintiff stopped at the sentencing. Again, this action was commenced in July 2017, more than three years after the sentencing. Plaintiff's legal malpractice claims are time barred as to Defendants Imhoff, Evans, and Dorvall, and they are entitled to judgment on the pleadings as to those claims.

Plaintiff has alleged claims of fraud and deceit against Defendants Imhoff, Evans, and Dorvall. Plaintiff argues that he is entitled to application of the six year statute of limitations as to those claims. However, Defendants Imhoff, Evans, and Dorvall argue that those claims are manufactured claims of fraud and deceit and that they are, in reality, veiled legal malpractice claims. Defendants argue that Plaintiff's fraud and deceit claims revolve around Evan's effectiveness as an attorney and that Imhoff hired an ineffective attorney to represent Plaintiff. Defendants argue that reliance is part of fraud and deceit and Plaintiff has not pled reliance. Further, Defendants assert that many of the allegations are either puffery, which is not actionable as fraud, or represent future promises that Plaintiff failed to plead that Defendants had no intent to perform at the time of the future promise.

The parties primarily cite to Bruske v. Hille, 1997 SD 108, 567 N.W.2d 872 and Masloski v. Century 21 Am. Real Estate Inc., 2012 SD 58, 818 N.W.2d 798. In Bruske, the South Dakota Supreme Court stated that medical malpractice claims characterized as fraud and deceit would not sanction a shift to a more beneficial statute of limitations. In Masloski, the South Dakota Supreme Court acknowledged that the same transactions may give rise to two causes of action having different statutes of limitations. Id. at ¶12, 818 N.W.2d at 802. "[W]hen one of two statutes of limitations may be applicable, such application should always be tested by the nature of the allegations in the complaint, and if there is any doubt as to which statute applies, such doubt [shall] be resolved in favor of the longer limitation period." Id. at ¶ 12, 818 N.W.2d 798, 802 (quoting Morgan v. Baldwin, 450 N.W.2d 783, 786 (S.D. 1990)). "South Dakota does . . . separately consider allegations of negligence and fraud, as well as the different aspects of the professional relationship to determine the gravamen of the cause of action." Masloskie, 2012 S.D. 58, ¶ 11, 818 N.W.2d at 801–02.

Plaintiff's allegations of fraud and deceit are set forth in Paragraph 27(a)-(w) of the Amended Complaint. In reviewing Plaintiff's Amended Complaint, his claims against Evans and Dorvall represent a reassertion of his claims for legal malpractice, specifically Evans' failure to utilize the victim's prior inconsistent statements (see ¶ 27(g) of Plaintiff's Amended Complaint); Evan's failure to utilize an expert (see ¶ 27(h)); Dorvall's failure to take an active role in pretrial and trial activities (see ¶ 27(i)); Evan's claims that de Castro's non-appearance at trial was

"unimportant" (see ¶27(j)); Evan's failure to properly prepare Plaintiff and his wife as witnesses (see ¶27(k)); and Evan's failure to have Plaintiff prepared by a lawyer other than Evans (see ¶27(l)). The gravamen of those claims lie in legal malpractice, rather than fraud and deceit.

As to Plaintiff's fraud and deceit claims against Imhoff, Plaintiff's allegations refer to representations that Imhoff made on his website about his ability to represent defendants "vigorously" and "provide high-quality" legal representation. See ¶¶ 27(o)-(w). The court agrees with Defendants that those claims represent puffery, rather than actionable fraud or deceit. Plaintiff also alleges that Defendant Imhoff represented himself as a specialist in defending many types of crimes when in fact he hired other inexperienced attorneys who were licensed to practice in the particular jurisdiction. See ¶27(a). Also, he alleges that Defendant Imhoff represented that he would hire "good lawyers", but in fact Plaintiff alleges that de Castro abandoned him, Evans was ineffective, and Dorvall "virtually did nothing at trial[.]" See ¶27(b). He alleges that Defendant Imhoff did not disclose Evans and Dorvall's lack of experience. See ¶¶ 27(c)-(f). Ultimately those allegations all come back to the effectiveness of the representation Plaintiff received from Defendants. The gravamen of those claims is legal malpractice. Artful pleading cannot change those claims to benefit from a longer statute of limitations. As such, the three years statute of repose of SDCL § 15-2-14.2 bars those claims.

SDCL 15-2-14.2 is a statute of repose and an action for legal malpractice must be commenced within three years of the last occurrence. This action was commenced more than three years after Defendants ceased representing Plaintiff. Plaintiff's fraud and deceit claims are really legal malpractice claims and thus are subject to SDCL 15-2-14.2. Defendants' Motions for Judgment on the Pleadings is granted.

ORDER

Based upon the foregoing, it is hereby ordered:

1) that Defendants' Motions for Judicial Notice are GRANTED;

2) that Plaintiff's claims against Defendant de Castro of Legal Malpractice and Intentional Abandonment are time barred by SDCL 15-2-14.2; therefore Defendant de Castro's Motion for Judgment on the Pleadings is GRANTED;

3) that Plaintiff's claims of Legal Malpractice against Defendants Imhoff, Evans and Dorvall are time barred by SDCL 15-2-14.2; therefore Defendants' Motion for Judgment on the Pleadings is GRANTED as to those claims; and

4) that Plaintiff's claims of Fraud and Deceit against Defendants Imhoff, Evans and Dorvall have their gravamen in legal malpractice and as such are time barred by SDCL 15-2-14.2; therefore Defendants' Motion for Judgment on the Pleadings is GRANTED as to those claims.

Dated this 8th day of December, 2017

BY THE COURT:

s/Rodney J. Steele

Rodney J. Steele
Circuit Judge

Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

FILED
MAY 30 2017
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
6TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BROWN	FIFTH JUDICIAL CIRCUIT

FREDERICK BLAIR SLOTA, Petitioner, v. DARIN YOUNG, Warden, South Dakota State Penitentiary, Respondent.	**CIV. 15-406** **MEMORANDUM DECISION**

An evidentiary hearing on a Habeas Corpus petition was held on April 17, 2016 in the above entitled matter. Petitioner, Frederick Blair Slota, appeared personally and with counsel, Ellery Grey, while Respondent appeared through counsel, Christopher White of the Brown County State's Attorney Office. Petitioner asserts trial counsel on the underlying charges[1] provided ineffective assistance of counsel, necessitating a vacation of Petitioner's conviction and granting of a new trial on the charge of First Degree Rape before the trial court. At the conclusion of the hearing, the Court reserved ruling on the petition until after the parties submitted written briefs. All briefs were submitted to the Court by September 12, 2016. This Memorandum Decision constitutes the Court's ruling on Petitioner's Habeas Corpus petition.

BACKGROUND

Petitioner was tried on charges of first-degree rape and sexual contact with a child under the age of sixteen. The case was prosecuted by the Brown County State's Attorney. The victim, A.K., was seven years old at the time of the incident and eight years old at the time of the jury

[1] Brown County Criminal File Number 13-173.

trial. Petitioner and his wife Nina Slota were A.K.'s foster parents between September 2012 and December 2012.

The incident was disclosed on December 6, 2012, when A.K. made a statement in music class that she had sex with her father. A.K.'s teacher immediately reported the incident to Erin Zachow, A.K.'s school counselor. On the same day, Zachow talked with A.K. about the incident. A.K. stated that she was lying in bed with Petitioner but denied any sexual touching had occurred. Zachow wrote down the statement in a school report and orally reported this incident to the Department of Social Services ("DSS"), the legal guardian of A.K. at that time. After school, DSS case worker Kayleigh Hofmeyr interviewed A.K. Hofmeyr used a diagram drawing of a female body to have A.K. identify the body parts. A.K. denied that anyone had touched her private parts except Mrs. Slota when she was helping A.K. put on pants for school. A.K. was subsequently removed from the Slotas' home.

On December 12, 2012, A.K. was referred to Child's Voice[2] in Sioux Falls, South Dakota for a forensic examination. At Child's Voice, Dr. Nancy Free conducted a medical examination on A.K.'s body and found everything was normal except for a known hearing impairment. Colleen Brazil, a forensic interviewer at Child Voice, conducted an interview of A.K. Brazil used a drawing of a female body to have A.K. identify body parts. A.K. initially denied any sexual touching had occurred, but later claimed that it did. She also provided sensory details such as what the alleged abuse felt like, what she was allegedly supposed to touch, and whether the alleged touching was over or under the clothes. The interview was recorded and the recorded video was admitted into evidence at trial.

[2] Child's Voice is a child advocacy center. It provides medical evaluations for children who are possible victims of abuse and neglect.

As a result of these investigations, Petitioner was interviewed by Detective Tanner Jondahl of the Aberdeen Police Department on December 13, 2012. At that time, Detective Jondahl disclosed to Petitioner the results of the forensic interview. Petitioner denied A.K.'s allegations.

On January 23, 2013, during an ongoing counseling session with Ellen Washenberger, a Lutheran Social Services worker, A.K. showed confusion about why she was removed from the Slotas' home. She stated that no one touched her, and someone told her that Petitioner had sex with her, but he did not. Washengerger reported this conversation to DSS workers Hofmeyr and Jaime Mogen. Hofmeyr documented this information in a report.

In the early stages of the case, Henry Evans, a licensed South Dakota attorney, was assigned as Petitioner's lead counsel through Imhoff & Associates (Imhoff), a California law firm. Imhoff also assigned Shannon Dorval, a licensed California attorney, and Manuel de Castro, a licensed South Dakota attorney to assist Mr. Evans with preparation of the trial. Mr. Evans had been practicing law since 1995 with his primary focus on criminal defense and immigration. However, Mr. Evans had never conducted a criminal defense jury trial prior to representation of Petitioner.

Several months before the jury trial, the defense team prepared an outline assigning different portions of the trial work to each defense attorney. According to the drafted outline, de Castro would conduct the opening and closing arguments; Mr. Evans would cross-examine the State's expert witness Colleen Brazil. De Castro or Dorval would cross-examine A.K. The defense team also sought to retain an expert witness for Petitioner. However, since Petitioner requested an expedited proceeding, trial counsel decided not to call the expert witness to testify at trial. Due to a time conflict, de Castro did not attend the trial. Dorval attended the trial but did

not assist with cross-examination or arguments before the jury. Mr. Evans ended up doing almost all of the trial work.

With the assistance of Jeff Larson, an experienced criminal defense attorney in Sioux Falls, Mr. Evans conducted criminal discovery. Through discovery proceedings, Mr. Evans obtained the above mentioned exculpatory statements that A.K. made to Zachow, Hofmeyr, and Washenberger, respectively. According to Mr. Evans's habeas hearing testimony, the defense's initial trial strategy was to use these three statements to impeach A.K. However, Mr. Evans did not subpoena Zachow, Hofmeyr, or Mogen, who would be able to introduce these exculpatory statements into evidence. Mr. Evans learned that Hofmeyr had left DSS and was residing in Montana but her exact whereabouts remained unknown.

At trial, the defense called the DSS worker, Tracy Steele, the Slotas and Washenberger. None of the three exculpatory statements was admitted into evidence at trial. The State offered the testimony of A.K., Dr. Free, Brazil, and Detective Jondahl. The trial court, on its own initiative and without a pre-closure hearing, closed the courtroom during A.K.'s testimony. Neither party objected to the courtroom closure. The State requested and the trial court granted that Brazil be allowed to remain in the courtroom during A.K.'s testimony.

At trial, A.K. testified:

Q [The State's Attorney]. Do you remember telling Colleen [Brazil] that Fred did naughty things to you?
A [A.K.]. Yes.
Q. What naughty things did Fred do to you?
A. He was in my bed and he was touching my private part.
Q. What do you call your private part Allie?
A. A pookie.
Q. A pookie?
A. Yes.
Q. And you said Fred touched your pookie?
A. Yes.
Q. What did he -- what did Fred use to touch your pookie?

A. Both parts.
Q. What did he use -- did he touch you with his hand when he touched your pookie?
A. Yes.
Q. And did he touch on the inside, the outside or both?
A. Both.
...
Q [Mr. Evans]. And you testified earlier that this was a picture of you and Fred reading on the bed [referring to a picture A.K. drew during her visit with Ms. Washenberger]?
A [A.K.]. Yes.
Q. And did you testify that Fred just read to you that night, nothing more?
A. Yes.
Q. That he didn't do any bad touch?
A. Yes.
Q. That was your testimony earlier?
A. Wait. No.

Dr. Free testified that the medical exam neither supported nor refuted sexual abuse. Brazil commented on both A.K.'s interview at Child's Voice and trial testimony, and concluded that A.K. was not suggestible. Brazil further commented on the prosecutor and defense attorney's performance in questioning A.K.

The jury found Petitioner guilty of both charges. As a result of post-trial motions, the conviction for Sexual Contact With a Child Under the Age of Sixteen contained in Count Two of the verdict Form was struck. Petitioner was sentenced to thirty years in the South Dakota State Penitentiary on the charge of First Degree Rape. Petitioner directly appealed his conviction on the ground that the trial court improperly closed the courtroom during A.K.'s testimony and demanded a new trial. The Supreme Court affirmed the conviction, holding a new trial was not warranted because the trial court's error was remedied by a post-trial hearing regarding the courtroom closure. Petitioner now seeks habeas corpus relief, arguing ineffective assistance of counsel.

ANALYSIS AND DECISION

I. Legal Standard

Habeas corpus, the relief sought by Petitioner, is "a collateral attack on a final judgment and therefore [the Court's] review is limited." *Stark v. Weber*, 2016 S.D. 38, ¶ 10, 879 N.W.2d 103, 106 (quoting *Legrand v. Weber*, 2014 S.D. 71, ¶ 10, 855 N.W.2d 121, 126 (quoting *Davis v. Weber*, 2013 S.D. 88, ¶ 9, 841 N.W.2d 244, 246)). This limited form of judicial review is confined to three questions. *See id.* (citations omitted). First, the Court can review whether the sentencing court had jurisdiction over the crime and defendant. *Id.* (citation omitted). Second, the Court can review whether the sentence imposed by the sentencing court was authorized by law. *Id.* (citations omitted). Third, the Court can review whether the defendant, now incarcerated, was deprived of any basic constitutional rights. *Id.* (citations omitted).

Petitioner proceeds under the final question, asserting he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). In order to prevail on his claim, Petitioner "must 'prov[e] he is entitled to relief by a preponderance of the evidence.'" *McDonough v. Weber*, 2015 S.D. 1, ¶ 15, 859 N.W.2d 26, 34 (alteration in original) (quoting *Vanden Hoek v. Weber*, 2006 S.D. 102, ¶ 8, 724 N.W.2d 858, 861-62). The two-part test announced by the Supreme Court of the United States in *Strickland, supra*, is used to determine whether a petitioner received ineffective assistance of counsel on the underlying charges. *McDonough*, 2015 S.D. 1, ¶ 21, 859 N.W.2d at 36-37. Under the *Strickland* test, a petitioner must "prove that his . . . attorney performed deficiently and that he . . . was prejudiced by the deficient performance." *Id.* ¶ 21, 859 N.W.2d at 37 (citations omitted).

"The first prong requires that a [petitioner] establish that counsel's representation fell below an objective standard of reasonableness." *Kleinsasser v. Weber*, 2016 S.D. 16, ¶ 17, 877 N.W.2d 86, 92 (citing *Strickland*, 466 U.S. at 688). This means that "[t]he question is whether counsel's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Stark*, 2016 S.D. 38, ¶ 11, 879 N.W.2d at 106-07 (citations omitted). A strong presumption exists "that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kleinsasser*, 2016 S.D. 16, ¶ 17, 877 N.W.2d at 92 (citations omitted). It is incumbent upon the petitioner to "rebut the strong presumption that . . . counsel's performance was competent." *Stark*, 2016 S.D. 38, ¶ 11, 879 N.W.2d at 107 (citation omitted). While a trial counsel's performance does not need to be ideal and counsel's strategic decisions will be respected, these considerations must be balanced and a court must insure that counsel's performance was within the realm of professional competence. *Randall v. Weber*, 2002 S.D. 149, ¶ 7, 655 N.W.2d 92, 96 (quoting *Roden v. Solem*, 431 N.W.2d 665, 667 n. 1 (S.D.1988)).

The second prong requires a petitioner to establish prejudice as a result of counsel's deficient performance. *McDonough*, 2015 S.D. 1, ¶ 23, 859 N.W.2d at 37. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* (quoting *Strickland*, 466 U.S. at 691). Consequently, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kleinsasser*, 2016 S.D. 16, ¶ 17, 877 N.W.2d at 92 (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The right to effective

assistance of counsel... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986).

II. Whether Trial Counsel's Representation Was Deficient.

A. Failure to utilize A.K.'s prior inconsistent statements

It is undisputed that the three inconsistent statements discovered well before the trial could have been admissible at trial. The issue is whether trial counsel's failure to admit and utilize these inconsistent statements amounts to ineffective assistance of counsel.

1. Trial counsel's failure to impeach A.K. fell below an objective standard of reasonableness.

While impeachment on a minor issue is a matter of trial strategy, *Davi v. Class*, 2000 S.D. 30, ¶ 48, 609 N.W.2d 107, 117, impeachment of a key witness is not. *See, Dillon v. Weber*, 2007 S.D. 81, ¶ 17, 737 N.W.2d 420, 427. In *Dillon*, a case involving charges of rape and criminal pedophilia, the victims' mother testified that her children were healthy and normal prior to Dillon's alleged sexual assault. *Id.* The mother's testimony was contradicted by the victims' medical records that revealed an extensive history, including more than 50 emergency room visits. *Id.* The trial attorney, however, made no effort to use these medical records to impeach the mother's testimony. *Id.* The Supreme Court found, among other things, that the trial counsel was ineffective for failing to impeach the mother's testimony. *Id.* Similarly, the United States Court of Appeals for the Eleventh Circuit held an attorney's failure to impeach a star witness with a prior inconsistent statement was incompetent. *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989). There, the decedent's wife testified at another trial that another person shot her husband and that she never saw the defendant with a gun. *Id.* Yet at the defendant's trial, the wife

identified the defendant as the man who killed her husband and testified he had a gun. *Id.* The trial attorney failed to follow up on his cross-examination of the wife by confronting her with her prior inconsistent testimony. *Id.* The court found the trial attorney's failure to impeach the prosecution's star witness inexcusable. *Id.*

Here, trial counsel made the same fatal errors. At trial, Mr. Evans failed to use the three inconsistent and exculpatory statements to impeach A.K., the State's key witness. The first two exculpatory statements were made on the same day A.K. disclosed that Petitioner had sex with her. The significance of the first two exculpatory statements is that they were made well before any third party could taint A.K.'s testimony. The implication of the second exculpatory statement is even more significant in that A.K. denied any sexual touching occurred when she was shown a diagram of the human body and asked about specific body parts. The third exculpatory statement was made after the forensic interview at Child's Voice. In that statement, A.K. indicated she was told by someone to incriminate Petitioner.

The timing, form, content, and parties documenting the statements all showed the value of these exculpatory statements. Given that the victim was the key witness presented by the State, and that her credibility and suggestibility were of genuine concerns, no reasonable counsel would forgo these statements. Furthermore, the State, during closing remarks, argued that A.K. had been consistent throughout the proceedings. There is no better evidence than these three statements to rebut the State's inaccurate assertions. Michael Butler, an experienced criminal defense attorney from Sioux Falls, testified during the habeas hearing that impeachment of A.K. was the core of the defense and that the three exculpatory statements were invaluable for this defense. Reasonable counsel would not have any hesitation to use these statements at trial.

Therefore, trial counsel's failure to get the three exculpatory statements into evidence falls short of the prevailing professional standard.

2. Trial counsel's change of trial strategy is contradicted by records.

The State argues that Mr. Evans' decision not to impeach A.K. was sound trial strategy. The State claimed that Mr. Evans changed the trial strategy after cross examination of A.K. Mr. Evans acknowledged the value of the three exculpatory statements, and admitted that his defense strategy was to impeach A.K. with these statements. However, it is troublesome that Mr. Evans did not even attempt to subpoena the witnesses who would be able to get the three exculpatory statements into evidence. Mr. Evans did not subpoena Zachow, the author of the school report, and Hofmeyr, the author of the two DSS reports that contained two exculpatory statements. When Mr. Evans learned that Hofmeyr was unavailable, he failed to make any formal notice of intent to offer her statement as residual hearsay. SDCL 19-19-807. Therefore, trial counsel's alleged last-minute change of trial strategy *after cross-examining* A.K. was contradicted by his failure to take the necessary action *before trial* to be prepared to get the three statements admitted into evidence at trial.

The State also argues that admission of the three inconsistent statements would open the gate for more consistent statements. Mr. Evans' change of strategy for fear of additional consistent statements was tenuous at best. If Mr. Evans's fear was real, he should have changed his trial strategy after the State threatened to use additional consistent statements to rehabilitate A.K. because the risk of admitting additional consistent statements existed from the time the defense plan to impeach A.K. was formulated. Those additional consistent statements, if admitted, would only be cumulative. Furthermore, any change of strategy, even if it was real, was forced by trial counsel's failure to be prepared to introduce the three inconsistent statements

into evidence in the first place. The fact that the attorney was forced into such a situation indicates his ineffectiveness. *Nixon*, 888 F.2d at 116.

The State further argues that A.K. might explain away her inconsistent statements if she was confronted. The records show A.K. unequivocally testified that Petitioner touched her private part, both on direct-examination and cross-examination. However, when impeachment of the sole eyewitness is the only available trial strategy, failure to do so based on the feeling that the eyewitness would rehabilitate her inconsistent statements was unreasonable under prevailing professional norms and was not sound strategy. *Blackburn v. Foltz*, 828 F.2d 1177, 1184 (6th Cir. 1987). Mr. Evans's decision to forgo impeachment of A.K., the only eyewitness in this case, based on his impression that A.K. would rehabilitate herself was not sound trial strategy.

While this Court does not second guess trial counsel's trial strategy or the change thereof, Mr. Evans's logic for the change of strategy was contradicted by his own actions at trial.

B. Failure to object to the State's expert testimony

Petitioner argues that Brazil's testimony amounted to improper bolstering of A.K.'s credibility. The State, however, counters that Brazil merely addressed whether A.K.'s perception or memories are her own. Both parties cite *Washington v. Schriver* 255 F.3d 45 (2d Cir. 2001)[3], and *State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 449, to support their arguments. In *Buchholtz*, the Supreme Court held a qualified expert may inform the jury of characteristics in sexually abused children and describe the characteristics the child exhibits. *State v. Buchholtz*, 2013 S.D. 96, ¶ 29, 841 N.W.2d 449, 459. One of the factors a trial court considers in determining the

[3] Petitioner apparently misreads the court's reasoning in denying the petitioner's habeas corpus in *Washington*. In *Washington*, the court recognized the distinction between credibility and suggestibility, finding an "emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses," and "an expert testimony on these subjects is admissible." *Washington*, 255 F.3d at 57. Nevertheless, the court denied the petitioner's writ of habeas corpus because the admission of the expert testimony would not have created a reasonable doubt about the petitioner's guilt. *Id.* at 60.

competency of a child's testimony is "the child's susceptibility to suggestion and the integrity of the situation under which the statement was obtained" *Id.* ¶ 19 (quoting *State v. Cates*, 2001 S.D. 99, ¶ 11, 632 N.W.2d 28, 34). The Supreme Court has allowed forensic interviewers to testify at trial. See, e.g., *State v. Reyes*, 2005 S.D. 46, ¶ 24, 695 N.W.2d 245, 254; *L.S. v. C.T.*, 2009 S.D. 2, ¶ 19, 760 N.W.2d 145, 150; *Thompson v. Weber*, 2013 S.D. 87, ¶ 29, 841 N.W.2d 3, 9. Mr. Evans was aware of the cases where Brazil or other experts had been allowed to testify on their forensic interviews. Prior to trial, the trial court also had determined Brazil would be able to testify on A.K.'s suggestibility, but not on her credibility. At trial, Brazil analyzed what she observed of A.K.'s behavior during the forensic interview and trial testimony and concluded that A.K. was not suggestible or coached. Decisions to make motions and objections are generally within the discretion of trial counsel. *Roden v. Solem*, 431 N.W.2d 665, 667 (S.D. 1988). Mr. Evans' decision not to object to Brazil's testimony based on the trial court's prior ruling was not unreasonable.

C. Failure to object to forensic interviewer being permitted to remain in the courtroom during A.K.'s testimony

Courts do not give trial counsel the same deference if trial counsel's decisions in making motions or objections "cannot reasonably relate to any strategic decision and are clearly contrary to the actions of competent counsel in similar circumstances." *Roden v. Solem*, 431 N.W.2d 665, 667 (S.D. 1988). On direct appeal, the Supreme Court has addressed the trial court's *sua sponte* courtroom closure during A.K.'s testimony. *State v. Slota*, 2015 S.D. 15, ¶¶ 7, 26, 862 N.W.2d 113, 117, 122. The issue here is whether trial counsel should have raised an objection to the State's expert remaining in the courtroom based on SDCL 23A-24-6, a special statute regarding courtroom closure when a child is testifying on sexual offenses. SDCL 23A-24-6 provides:

> Any portion of criminal proceedings, with the exception of grand jury proceedings, at which a minor is required to testify concerning rape of a child, sexual contact with a child, child abuse involving sexual abuse, or any other sexual offense involving a child may be closed to all persons except the parties' attorneys, the victim or witness assistant, the victim's parents or guardian, and officers of the court and authorized representatives of the news media, unless the court, after proper hearing, determines that the minor's testimony should be closed to the news media or the victim's parents or guardian in the best interest of the minor.

In the event of courtroom closure, according to the statute, *all persons* are excluded from the courtroom except the enumerated parties. A trial court certainly has the discretion to determine whether the courtroom should be closed to the public. However, if the court chooses to do so, it has limited discretion in allowing which parties remain in the courtroom under the plain reading of the statute. According to the statute, the court may choose to further exclude parties from the courtroom, such as news media, parents or guardians of a victim for the best interest of the minor. But the court cannot do the opposite—expanding the list of parties who are allowed to remain in the courtroom. This plain interpretation is also consistent with the legal maxim *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another." *In re Estate of Flaws*, 2012 S.D. 3, ¶ 19, 811 N.W.2d 749, 753. Mr. Evans admitted that he was aware of the statute, and that allowing the expert witness to remain in the courtroom did not benefit Petitioner. Mr. Evans' failure to object to the State's request cannot reasonably relate to any strategic decision. A competent counsel in similar circumstances should have objected to Brazil remaining in the courtroom during A.K.'s testimony.

D. Failure to object to the State's closing argument

During the State's rebuttal closing argument, the State made the following remarks:

> Would Allie go through all of this just to make it up, is the number one question. And you've got to understand what she went through. She makes a disclosure at school. She talks to her school counselor. They want you to believe she's still making it up at this point. Then she goes and gets interviewed by the DSS worker

> the same night she makes the allegations, they want you to believe she's still making it up.

The State further argued that "[A.K.] got cross-examined by Mr. Evans and she still told a consistent story. Nothing changed." The State clearly misstated the facts in front of the jury. In arguing A.K. did not change her testimony, the State indicated A.K. made consistent statements at school, to her school counselor and DSS workers. The State went beyond arguing the permissible inferences from the evidence when A.K's statements to the school counselor and DSS worker were inconsistent with her initial disclosure in class. Contrary to the State's position that a closing argument is merely an argument, the prosecutor must refrain from injecting unfounded or prejudicial remarks into the proceedings, and must not appeal to the prejudices of the jury. *State v. Janis*, 2016 S.D. 43, ¶ 22, 880 N.W.2d 76, 82. (quotation omitted). Trial counsel should have objected to the State's improper closing argument.

E. Totality of the circumstances

In light of all the circumstances, trial counsel's representation falls short of the prevailing professional standard. The defense's theory was that either A.K. made it up or a third party committed the offenses. Because of the lack of alibi evidence, impeachment of A.K. became the only defense. Mr. Evans attempted but failed to follow through on this theory. His failure to use A.K.'s inconsistent statements alone constitutes deficient representation. His ineffectiveness was compounded by other cumulative errors, such as failure to object to the State's expert witness remaining in the courtroom and his failure to object to the State's improper closing argument. While the latter errors standing alone do not amount to ineffective assistance of counsel, they show trial counsel's lack of experience in defending child abuse cases.

III. Whether Petitioner Was Prejudiced By Trial Counsel's Representation

Assessed under the ultimate fairness of trial, trial counsel's cumulative errors clearly prejudiced Petitioner. A review of the trial record shows the evidence against Petitioner was far from overwhelming. Dr. Free testified that there was no physical evidence supporting or refuting sexual abuse. Because of the lack of physical evidence, the entire case turned on the credibility of A.K. As such, trial counsel only needed to inject reasonable doubt in the minds of the jurors as to A.K.'s credibility or suggestibility.

However, Mr. Evans' cumulative errors deprived Petitioner of such opportunities. First, Petitioner lost the opportunity to impeach A.K. due to Mr. Evans' failure to admit three prior inconsistent statements into evidence. The failure to impeach A.K. left the jury with an incorrect impression that A.K.'s testimony was consistent throughout the investigation and trial. The State's improper closing argument that A.K. was telling a consistent story further influenced the jury's impression about A.K.'s credibility. Second, Petitioner lost the opportunity to effectively cross-examine the State's expert who testified that A.K. was not suggestible. Given A.K.'s initial denial of any inappropriate touching and later change of testimony, the defense could have offered these inconsistent statements to undermine the expert's opinion that A.K. was not suggestible. The State's expert's testimony would be further weakened if the expert was prevented from observing A.K.'s trial testimony. In sum, had the jury heard A.K.'s inconsistent statements and argument that A.K. was coached by third parties, the jury may well have had reasonable doubt as to whether A.K. was credible or reliable, thus undermining the confidence of the outcome. This Court concludes, but for trial counsel's unprofessional errors, the result of the trial would have been different.

CONCLUSION

Petitioner has met his burden of proving that his trial counsel's representation was ineffective based on the totality of circumstances and that the deficient representation prejudiced him. Accordingly, the Petition for Habeas Corpus is hereby granted. The appropriate remedy for trial counsel's ineffective assistance of counsel is a new trial. Petitioner's conviction for First Degree Rape is hereby vacated due to ineffective assistance of trial counsel. This Court hereby orders that this matter be remanded back to the trial court for a new trial and further proceedings.

Counsel for Petitioner shall draft an appropriate Order to effectuate this Memorandum Decision, incorporating this Memorandum Decision by reference. Unless waived by Respondent, Counsel for Petitioner shall also prepare Findings of Fact and Conclusions of Law incorporating this Decision by reference.

DATED this 16th day of May, 2017 at Webster, South Dakota.

BY THE COURT:

Jon S. Flemmer
Circuit Judge

ATTEST:
Marla R. Zastrow, Clerk of Courts
By: Deputy Clerk

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
Fred Slota, Plaintiff, v. Imhoff and Associates P.C. a California Professional Corporation, Henry Evans, Shannon Dorvall, Manuel de Castro, Jr., Defendants.	)	No. 49CIV17-001878

Amended Complaint and Demand for Jury Trial

Facts

1. An innocent man, Fred Slota ("Slota"), was convicted of the horrific crime of First Degree Rape of a child, and sentenced to 30 years in prison, due to defendants' legal negligence, fraud and deceit, and intentional abandonment. After Slota served three years in prison, his conviction was overturned because of defendants' ineffective assistance of counsel. He seeks compensatory damages for his own losses, and punitive damages to punish defendants, and to deter them from

continuing to employ their same fraud, deceit, and abandonment against other people accused of crimes.

2. Slota was falsely charged with First Degree Rape of a child in Brown County.

3. Slota was innocent of the charge.

4. Because of defendants' legal malpractice, fraud and deceit, as set forth below, Slota was falsely convicted.

5. Slota was sentenced to 30 years' imprisonment and served 3 years before his conviction was set aside because of defendants' ineffective assistance of counsel.

6. Slota resides in Brown County, South Dakota; Imhoff and Associates P.C. a California Professional Corporation ("Imhoff"), whose principal is Vincent Michael Imhoff, resides in Los Angeles County, California; Henry Evans is a lawyer who resides in Minnehaha County, South Dakota; Shannon Dorvall is a lawyer who resides in Los Angeles County, California, and works for Imhoff; Manuel de Castro is a lawyer who resides in Lake County, South Dakota.

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Count 1—Legal malpractice

7. All facts above are incorporated herein by reference.

8. Defendants' actions, set forth below, constitute legal malpractice.

9. As set forth below, defendants "(1) had an attorney-client relationship giving rise to a duty, (2) by acting or failing to act, breached that duty, (3) the breach of duty proximately caused injury to the client, and (4) Slota sustained actual damage. *Hamilton v. Sommers*, 855 N.W.2d 855, 2014 S.D. 76, ¶ 21.

10. When Slota was informed that he was suspected of child rape, Slota's wife, Dr. Nina Slota ("Dr. Slota") went on the internet and found Imhoff, located in Los Angeles, California, which advertises itself as specialists in criminal law, and seeks to represent people accused of all kinds of crimes all over the United States.

11. Imhoff claims expertise in defending people accused of crimes, including drug crimes, military crimes, weapons crimes, violent crimes, DUI/DWI, "Pre-File Cases," Property Crimes, Sex Crimes, and White Collar Crimes.

12. Vincent Imhoff, the principal of Imhoff and Associates, P.C., is not licensed in the vast majority of jurisdictions in the United States, including South Dakota.

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13. Imhoff's business model is to solicit business by advertising, obtain a substantial amount of money from the accused person, then hire lawyers who are admitted in the state where the defendant is charged, and pay the lawyers a fraction of the money that Imhoff has already collected.

14. The fraction of the money that Imhoff pays the lawyer or lawyers whom he hires to defend the case is insufficient to allow a reasonable competent lawyer to defend the case competently, and was insufficient in this case.

15. Imhoff defended Slota incompetently by—after having taken on the obligation to represent him or have other competent lawyers represent him competently—hired lawyers who represented him incompetently.

16. In light of the facts set forth below about the lawyers that Imhoff hired to defend Slota, it was foreseeable that these lawyers would defend Slota incompetently.

17. Imhoff hired Henry Evans, a Sioux Falls attorney who had little experience in criminal law, had never defended a rape case, and had never tried a jury trial.

18. Imhoff eventually assigned Shannon Dorvall, and Manuel de Castro, Jr., to assist Evans in the defense of the case.

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19. Evans, Dorvall, and de Castro all agreed to defend Slota.

20. Dorvall attended Slota's trial but did very little in it.

21. de Castro intentionally abandoned Slota and did not even attend the trial.

22. de Castro told Slota that he had a South Dakota Supreme Court argument that had been scheduled that would preclude him from defending Slota at the trial.

23. On information and belief, if de Castro's representation was true, de Castro intentionally abandoned Slota by failing to:

a. Inform the Supreme Court of the conflict and seek to have the argument rescheduled; or

b. Find another lawyer to argue the case before the Supreme Court; or

c. Inform the trial judge of the problem and seek a continuance; or

d. Complete preparation for Slota's trial and arrange to be gone from trial only during the time it would take to argue the Supreme Court case; or

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e. Complete preparation for Slota's trial and seek a delay in the trial only during the time it would take to argue the Supreme Court case; or

f. Take some other action that would allow the Supreme Court case to be argued and for him not to abandon Slota.

24. Evans and Dorvall incompetently defended Slota in many respects, including but not limited to the following, all of which were described by the circuit court in granting Slota's habeas petition:

a. Failing to use A.K.'s (the alleged victim's) three prior inconsistent and exculpatory prior statements to impeach her.

b. Failing to subpoena the witnesses to whom A.K. had given the prior inconsistent and exculpatory statements to trial, so that the statements could be admitted into evidence.

c. Subpoenaing the wrong witness to lay foundation for admission of the prior inconsistent and exculpatory statements to trial, resulting in the State's hearsay objection to the statements being sustained.

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d. The first prior exculpatory statement was made well before any third party could taint A.K.'s testimony.

e. In the second exculpatory statement, A.K. denied any sexual touching occurred when she was shown a diagram of the human body and asked about specific body parts.

f. The third exculpatory statement was made after a forensic interview, in which A.K. said she was told by someone to incriminate Slota.

g. The statements supported Slota's innocence by their timing, form, content, and the parties who documented them, all of which increased their value to the defense.

h. Given that A.K. was the key witness presented by the State, and that her credibility and suggestibility were of genuine concern, no reasonable counsel would forego using these statements.

i. Furthermore, the State, during closing remarks, argued falsely that A.K. had been consistent throughout the proceedings.

j. The prior inconsistent statements rebut the State's false argument.

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k. The impeachment of A.K. was the core of the defense and the three exculpatory statements would have been invaluable for this purpose.

l. After failing to subpoena the witnesses he needed to get these invaluable statements into evidence, Evans failed to make any formal notice of intent to offer her statement as residual hearsay per SDCL 19-19-807.

m. As the circuit court judge explained in granting habeas relief, Evans' claim that his actions were "trial strategy" was false.

n. As the circuit court judge found, Evans' claimed logic for the change of strategy was contradicted by his own actions at trial.

o. Evans failed to object to allowing the State's expert witness to remain in the courtroom during A.K.'s testimony, which benefitted the State and was incompetent.

p. Evans admitted he was unaware of the statute which required that if the courtroom were closed during testimony, *all persons* were to be excluded.

q. The circuit court found Evans' failure to object was incompetent.

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r. The State's closing argument was improper, according to the circuit court judge, because "The State clearly misstated the facts in front of the jury"; "The State went beyond arguing the permissible inferences from the evidence when A.K.'s statements to the school counselor and DSS worker were inconsistent with her initial disclosure in class"; the prosecutor "inject[ed] unfounded or prejudicial remarks into the proceedings," and "appeal[ed] to the prejudices of the jury"; yet Evans improperly and incompetently failed to object to any of this.

s. The circuit court found that trial counsel's representation "falls short of the prevailing professional standard," that impeachment of A.K. was the only defense; that Evans "attempted but failed to follow through on this theory"; that his failure to use A.K.'s inconsistent statement alone constituted deficient representation; and that "[h]is ineffectiveness was compounded by other cumulative errors, such as failure to object to the State's expert witness remaining in the courtroom and his failure to object to the State's improper closing argument."

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t. Trial counsel's cumulative errors clearly prejudiced Slota.

u. The evidence against Slota was far from overwhelming.

v. There was no physical evidence supporting or refuting sexual abuse.

w. The entire case turned on the credibility of A.K.

x. Defense counsel's cumulative errors deprived Slota of the possibility that the jurors would find reasonable doubt in the State's case.

y. The habeas court found that "but for trial counsel's unprofessional errors, the result of the trial would have been different."

Count 2 - Fraud and Deceit

25. All facts above are incorporated herein by reference.

26. All defendants owed Slota a fiduciary duty, because they were his lawyers.

27. Defendants committed deceit against Slota in many respects, including but not limited to the following:

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a. Imhoff represented himself as a specialist in defending many types of crimes, including sex crimes, whereas in fact his practice and business model, in this case and others, was to hire the least expensive attorney or attorneys he could find who were licensed in the jurisdiction in which the accused was charged, without regard to whether the attorney or attorneys were specialists in the crime charged, and without regard to whether in this case the attorney or attorneys were specialists in sex crimes;

b. Imhoff represented that he would hire good lawyers who specialized in sex cases to represent Slota, but in fact hired a lawyer who abandoned Slota (de Castro); a lawyer who did virtually nothing at trial (Dorvall); and a lawyer (Evans) who was (in the words of the circuit court) "unprofessional," had never tried a case, did not know how to subpoena the right witness to get critical witness statements into evidence, and was so incompetent at trial, as detailed by the circuit court judge who heard the habeas proceeding and as recounted above, that Slota was convicted when—according to the circuit court—but for Evans' unprofessional errors Slota would have been acquitted.

c. Imhoff suppressed everything he knew about Evans' lack of experience, even though his fiduciary duty required him to disclose it; and he

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disclosed other facts about Evans that were likely to mislead Slota, and did mislead Slota, because of the fact that Imhoff failed to disclose.

d. Imhoff suppressed the fact that his true purpose was to make as much money as possible by hiring the least expensive lawyers he could get to do the work, regardless of their abilities.

e. Imhoff promised that he would see that Slota received quality legal services by specialists in sex crimes, a promise he had no intention of performing and utterly failed to perform.

f. Imhoff falsely represented Shannon Dorvall as an expert in defending sex crimes; but while the jury was deliberating, she admitted to Dr. Slota that she did not consider herself an expert in defending sex crimes, and her total failure to see that Slota received competent representation confirms this fact.

g. Evans represented to Slota during the trial that he could get the alleged victim's prior statements into evidence, but he had no reasonable ground to believe this was true.

h. Evans represented to Slota that he would use Imhoff's experts, but in fact largely prepared for and conducted the trial on his own, resulting in Slota's conviction.

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i. Dorvall represented to Slota that she would take an active role in pre-trial and trial, but in fact did virtually nothing.

j. Evans claimed that de Castro's non-appearance at trial was unimportant, a fact he knew was untrue.

k. Evans claimed he would carefully and extensively prepare Slota and his wife to testify, yet knowingly failed to do so, and they testified with virtually no preparation.

l. Evans told Slota that he would be prepared by a lawyer other than Evans, for a separate and additional fee, because that would be best, but Evans had no intention of performing this promise, made no attempt or effort to perform it, and failed to perform it.

m. Dr. Slota located a person named Lawrence W. Daly, who had extensive experience in helping defend sex crimes; he agreed to work with Slota; Imhoff said he would work with Daly but never had any intention of doing so, because Imhoff wanted to keep control of the case for himself, and Imhoff refused to work with Daly.

n. Imhoff promised to arrange for Slota to take an independent polygraph test, to attempt to convince the prosecution not to proceed, but failed to

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arrange such a test; Imhoff never had any intention of paying for an independent polygraph test; instead Imhoff sent Slota to the Aberdeen police department for a polygraph test by a police officer, with predictable results.

o. Imhoff falsely claimed on his web site that "we have well-versed knowledge regarding laws in each state," whereas in fact the lawyers he hired to represent Slota were, in the habeas judge's words, "unprofessional" and "incompetent."

p. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

q. Imhoff falsely claimed on his web site that "you can rest assured in knowing we will do everything in our power to secure the most favorable outcome possible."

r. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

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s. Imhoff falsely claimed on his web site that "Our firm can vigorously defend your rights, liberties, and reputation against child molestation charges."

t. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

u. Imhoff falsely claimed on his web site that its attorneys "provide high-quality legal representation in 48 states."

v. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

w. Imhoff is a small firm that falsely represented itself to Slota's wife, before Slota hired them, as a large firm.

Count 3 - Intentional Abandonment

28. All facts above are incorporated herein by reference.

29. As described above, Manuel de Castro intentionally abandoned Slota.

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WHEREFORE plaintiff demands judgment against defendants:

1. For compensatory and punitive damages according to proof, including special damages of money wasted on incompetent legal services; loss of income while incarcerated; and loss of earning capacity in the future because the stigma of being a convicted child rapist will never leave Slota, and will reduce his earning capacity in the future, and many people will always believe he was actually guilty even though his conviction was set aside;

2. For treble damages against defendants Imhoff and Associates P.C., a California Professional Corporation, Henry Evans, and Shannon Dorvall, under SDCL 16-19-34;

3. For the costs of this action; and

4. For such other and further relief as the court may deem just.

Dated: October 24, 2017

/s/ James D. Leach
James D. Leach
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Trial by Jury Is Hereby Demanded

/s/ James D. Leach
James D. Leach

Certificate of Service

I certify that on this 24th day of October, 2017, I served this document on defendants by filing it electronically on Odyssey, thereby causing automatic electronic service to be made on all defense counsel of record.

/s/ James D. Leach

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

FRED SLOTA, Plaintiff, v. IMHOFF AND ASSOCIATES, P.C., a California Professional Corporation, Henry Evans, Shannon Dorvall, Manuel de Castro, Jr., Defendants.	49CIV. 17-001878 **JUDGMENT**

Defendants Imhoff and Associates, Henry Evans, Shannon Dorvall, and Manuel de Castro, Jr. (collectively "the Defendants"), moved for judgment on the pleadings. A hearing was held with regard to the Defendants' motions on December 1, 2017, before the Honorable Rodney Steele. On December 8, 2017, this Court entered a Memorandum Opinion and Order that granted the Defendants' Motion for Judicial Notice and granted the Defendants' Motions for Judgment on the Pleadings as to all of Plaintiff Fred Slota's ("Plaintiff") claims of legal malpractice, fraud/deceit, and intentional abandonment found in Plaintiff's First Amended Complaint ("Court's Memorandum Opinion"). Based on the Court's Memorandum Opinion it is

ORDERED, ADJUDGED, AND DECREED the Court's Memorandum Opinion is incorporated by reference in this Judgment; it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the First Amended Complaint of Plaintiff against the Defendants is dismissed, on the merits, with prejudice; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, as the prevailing parties, are entitled to disbursements pursuant to SDCL 15-17-37. The Clerk of the Courts shall enter the amounts below in accordance with SDCL 15-6-54(d).

(a) Disbursements and costs awarded to Defendants Imhoff and Associates, Henry Evans, Shannon Dorvall in the amount of $_____.

(b) Disbursements and costs awarded to Defendant Manuel de Castro Jr. in the amount of $_____.

Dated December 15, 2017

BY THE COURT

Honorable Rodney Steele
Circuit Court Judge

ATTEST:

Angelia Gries, Clerk

By _____
Deputy

FILED
DEC 19 2017
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 28496

FRED SLOTA,

Plaintiff-Appellant,

v.

IMHOFF AND ASSOCIATES P.C., A CALIFORNIA PROFESSIONAL CORPORATION, HENRY EVANS, SHANNON DORVALL, AND MANUEL DE CASTRO, JR.,

Defendants-Appellees.

Appeal from the Circuit Court, Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Rodney J. Steele
Circuit Court Judge

APPELLEES' BRIEF

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NOTICE OF APPEAL FILED JANUARY 2, 2018

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JURISDICTIONAL STATEMENT

Appellees Imhoff & Associates, P.C., Shannon Dorvall, and Henry Evans (collectively "Lawyer Defendants") agree with Appellant Fred Slota's jurisdictional statement.

STATEMENT OF ISSUES

I. Whether the Circuit Court Erred in Determining that Slota's Amended Complaint Was Barred by the Three-Year Statute of Repose Governing Claims Against Attorneys?

The Circuit Court entered judgment on the pleadings dismissing the amended complaint based upon expiration of the three-year statute of repose for claims against lawyers.

SDCL 15-2-14.2
Pitt-Hart v. Sanford USD Medical Center, 2016 SD 33, 878 N.W.2d 413
Bruske v. Hille, 1997 SD 108, 567 N.W.2d 872
Masloskie v. Century 21 Am. Real Estate, Inc., 2012 SD 58, 818 N.W.2d 798
Two Denver Highlands Ltd. Liab. Ltd. P'ship v. Stanley Structures, Inc., 12 P.3d 819 (Colo. App. 2000).

STATEMENT OF THE CASE

Attorneys Henry Evans, Shannon Dorvall, and Manuel de Castro, Jr., along with the law firm of Imhoff & Associates, P.C. ("Imhoff Firm"), represented Slota in a criminal rape case in Brown County, South Dakota. Following a jury trial, Slota was convicted. SR 107, 135.[1] Slota's conviction was later vacated through post-conviction relief based upon the ineffective assistance of counsel. Slota then brought a civil lawsuit against Evans, Dorvall, de Castro, and the Imhoff Firm asserting three causes of action in the complaint: (1) legal malpractice; (2) fraud/deceit; and (3) intentional abandonment.

[1] Citations to the settled record are cited "SR" with reference to the appropriate page. Citations to the Lawyer Defendants' appendix are cited "Def-Appx" with reference to the appropriate page. Citations to the motions hearing transcript on December 1, 2017, are cited "Tr." with reference to the appropriate page.

SR 1-16. All defendants answered the lawsuit and moved for judgment on the pleadings based upon the applicable statute of repose. SR 79-80, 405-06. Slota amended his complaint to change the prayer for relief seeking treble damages but did not amend the factual allegations in the complaint. *Compare* SR 1-16 *to* Def-Appx 1-17. The defendants renewed their motion for judgment on the pleadings. SR 493-94, 520-21. The Circuit Court, Honorable Retired Judge Rodney Steele presiding, granted the motion for judgment on the pleadings, dismissed the amended complaint, and entered a judgment in favor of all defendants. Def-Appx 18-37. Slota appeals the dismissal of the fraud/deceit claim asserted against Evans, Dorvall, and the Imhoff Firm.[2]

STATEMENT OF FACTS

A. The Lawyer Defendants' Representation of Slota And His Conviction In the Underlying Criminal Proceeding

On February 13, 2013, Slota was indicted for first degree rape and sexual contact with a child under the age of 16 in Brown County, South Dakota. SR 136. Slota was charged with raping his seven-year old foster child. SR 234.

Slota's wife contacted the law firm of Imhoff & Associates, P.C. Amended Complaint at ¶ 10.[3] The Imhoff Firm assigned attorney Henry Evans to defend Slota. Amended Complaint at ¶ 17. Evans accepted the case assignment and noticed his appearance on behalf of Slota on February 15, 2013. SR 103. The Imhoff Firm also hired attorney Manuel de Castro to defend Slota. Amended Complaint at ¶ 18. Attorney de Castro noticed his appearance on behalf of Slota on May 14, 2013. SR 104-105.

[2] Attorney de Castro is not a party to this appeal, and all claims against him were dismissed after this appeal was filed.

[3] The Amended Complaint is found in the Lawyer Defendants' appendix at Def-Appx 1-17.

Additionally, a California attorney Shannon Dorvall associated with the Imhoff Firm was admitted *pro hac vice* to assist in representing Slota. SR 106.

On March 26, 2014, a jury convicted Slota of one count of sexual contact with a minor under the age of 16 and one count of first degree rape. SR 107. Attorney de Castro did not appear at the trial because he had a Supreme Court oral argument during the trial. Amended Complaint at ¶¶ 21-22. Attorneys Evans and Dorvall represented Slota at the jury trial. Amended Complaint at ¶ 24; SR 300-01.

Following trial, on April 21, 2014, attorney Ellery Grey noticed his appearance as counsel for Slota in the criminal proceeding. SR 108, 110. Both attorneys Grey and Evans filed post-trial motions seeking a new trial and to set aside the conviction. SR 111-134. The Circuit Court, Judge Portra presiding, heard those motions in the criminal proceeding on May 30, 2014. SR 140-267. Attorneys Evans, Dorvall, and Grey all appeared at this hearing. SR 142. The Circuit Court denied some motions, granted others, and proceeded to sentencing of Slota. SR 210, 221-222. This May 30, 2014, hearing is the last time attorneys Evans, Dorvall, or the Imhoff Firm represented Slota. Following the hearing, on June 2, 2014, Judge Portra entered a judgment of conviction sentencing Slota to 30 years of incarceration in the South Dakota Penitentiary. SR 136-137.

As Slota's only attorney, attorney Grey filed a notice of appeal on June 23, 2014, seeking to appeal the judgment and sentence imposed in the criminal proceeding. SR 138-139. Before the filing of that notice of appeal, Attorney de Castro sent a closing letter on Imhoff & Associates Stationary dated June 19, 2014, stating that his file is being closed due to attorney Grey's hiring. Def-Appx 62. A closing letter from attorney Evans

further confirmed that neither Evans, Dorvall, or the Imhoff Firm represented Slota after sentencing. Def-Appx 63.

The South Dakota Supreme Court issued a decision on March 18, 2015, affirming the conviction. SR 268-283. None of the Lawyer Defendants represented Slota during the appeal. In fact, this Court's opinion noted that "[Slota's] appellate counsel did not represent him at trial." SR 271.

B. Slota Obtains Post-Conviction Relief in the Circuit Court

On September 9, 2015, Slota sought post-conviction relief through a writ of habeas corpus. SR 296-297. Attorney Grey continued to represent Slota in his application for post-conviction relief.

On April 17, 2016, the Circuit Court, Honorable Judge Flemmer presiding, held an evidentiary hearing on Slota's petition for post-conviction relief. SR 298. In a memorandum decision dated May 26, 2017, Judge Flemmer granted habeas relief based upon ineffective assistance of counsel. SR 298-313. Judge Flemmer did not determine that Slota was innocent of the charges. *Id.* Then, on June 7, 2017, Judge Flemmer issued a writ of habeas corpus, ordered a new trial in the criminal proceeding, vacated Slota's criminal conviction, and remanded the matter back to Judge Portra is who presiding over the underlying criminal proceeding. SR 336-337. Following post-conviction relief, the criminal charges against Slota remain pending yet today. Slota is currently scheduled to be retried in his criminal case on October 2, 2018.

C. Slota Brings This Civil Action Against the Lawyer Defendants Based Upon Their Representation of Him in the Criminal Proceeding

Following Judge Flemmer's decision, Slota commenced a civil action against the Imhoff Firm and the individual attorneys Henry Evans, Shannon Dorvall, and Manuel de

Castro. SR 1-16. Slota served each of the defendants in July of 2017.[4] Def-Appx. 30-31; SR 18-47; Tr. 5, 8, 15.

In his amended complaint, Slota asserts three claims. *See generally* Amended Complaint. In Counts I and III of the amended complaint, Slota asserts claims for legal malpractice against all defendants.[5] In Count II of the amended complaint, Slota asserts claims against the Imhoff Firm along with attorneys Evans and Dorvall for fraud and deceit.

Specific to the fraud and deceit claims, Slota's claims against Evans relate to the general contention that Evans did not adequately defend Slota at the rape trial.[6] (Amended Complaint at ¶¶ 27(g), (h), (j), (k), and (l)). Essentially, Slota alleges Evans made various "misrepresentations" when he told Slota what he *would do* as part of the trial defense strategy, and when attorney Evans opined it did not matter that attorney de Castro did not attend the trial. As it relates to Dorval, the fraud claim against her is similarly based upon the allegation that she failed to properly defend Slota when she did not take an active enough role in the rape trial. (Amended Complaint at ¶ 27(i)). Finally, as it relates to the Imhoff Firm, the alleged misrepresentations all generally relate to allegations that the Imhoff Firm did not hire good enough attorneys to defend Slota.

[4] The court file does not contain documents establishing the actual date of service for all of the defendants. It is undisputed, however, that the defendants were served in July of 2017. The complaint and summons are both dated on July 6, 2017, which means that none of the defendants could have been served before those dates. SR 1-17. Slota states that he served all the defendants by July 14, 2017. (Appellant's Opening Brief ("Slota's Brief") at p.2).

[5] Count III is a claim for "intentional abandonment." Slota admits that intentional abandonment is a claim for legal malpractice. (Slota's Brief at p.2).

[6] Slota has abandoned all claims except for the claim for fraud/deceit in this appeal. (*See generally* Slota's Brief.)

(Amended Complaint at ¶¶ 27(a), (b), (c), (d), (e), (f), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), and (w)).

After answering, the Lawyer Defendants and attorney de Castro both: (1) moved for judgment on the pleadings based upon the statute of limitations; and (2) moved to take judicial notice of the court files in both the criminal proceeding and habeas action. SR 79, 98. Slota did not oppose the motion for judicial notice, which was granted. Tr. 4, SR 579. Slota did oppose the motion for judgment on the pleadings, and he argued that none of the claims were barred by the applicable statute of repose. During the motions hearing, Slota conceded that SDCL 15-2-14.2 governing the time limitations for claims against attorneys is a statute of repose. Tr. 25.

Rejecting Slota's arguments, the Circuit Court, Honorable Judge Rodney Steele presiding, issued a memorandum decision on December 12, 2017, granting the judgment on the pleadings. Def-Appx 18-35. Regarding the legal malpractice claims asserted in Counts I and III of the amended complaint, the Circuit Court found that these claims were barred by the three-year statute of repose contained in SDCL 15-2-14.2. Def-Appx 30-31. Regarding the fraud claims in Count II, the Circuit Court held that the fraud claims all related to the representation of Slota in the criminal proceeding, and "[t]he gravamen of those claims is legal malpractice." Def-Appx 33. The Circuit Court ruled that Slota cannot rely on artful pleading to obtain a longer limitations period, and the fraud claims were also barred by the three-year statute of repose contained in SDCL 15-2-14.2. *Id.*

Slota appeals to this Court. During this appeal, Slota conceded the Circuit Court properly dismissed the malpractice claims based upon the statute of repose. (Slota's

Brief at pp.2-3). Instead, Slota only argues that the Circuit Court erred in dismissing the deceit and fraud claims.

ARGUMENT

In the amended complaint, Slota alleges that the Lawyer Defendants committed legal malpractice in defending him. Because the applicable statute of repose bars his claims, Slota attempts to recast his malpractice claim as a "fraud/deceit" claim to circumvent the applicable statute of repose. The Honorable Judge Steele saw through this legal misdirection and properly granted the Lawyer Defendants motion for judgment on the pleadings. This Court should affirm.

I. Standard of Review

The Circuit Court granted the Lawyer Defendants motion for judgment on the pleadings. In reviewing a judgment on the pleadings, this Court engages in the same analysis as the Circuit Court and reviews the decision *de novo*. *See Loesch v. City of Huron,* 2006 SD 93, ¶ 3, 723 N.W.2d 694, 695. "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." SDCL 15-6-12(c). "Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *M.S. v. Dinkytown Day Care Center, Inc.,* 485 N.W.2d 587, 588 (S.D. 1992).

Judgment on the pleadings is a procedurally appropriate mechanism to evaluate whether Slota's claims are time-barred. *Id.* (affirming trial court's granting of defendant's judgment on the pleadings because the plaintiff's claims were time-barred). *See also* 54 C.J.S. Limitations of Actions § 405 ("A limitations defense may be asserted by a motion for a judgment on the pleadings…."). In assessing a motion for judgment on

the pleadings, the court "may consider materials that are necessarily embraced by the pleadings" and "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Bird Hotel Corp. v. Super 8 Motels, Inc*., 245 F.R.D. 644, 645 (D.S.D. 2007) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir.1999); *Piper Jaffray Cos. v. National Union Fire Ins. Co*., 967 F. Supp. 1148, 1152 (D. Minn.1997)); 5A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299 (1990).

II. All Claims in the Amended Complaint Are Barred by SDCL 15-2-14.2, Which is The Three-Year Statute of Repose for Claims Against Attorneys

A. Under its Plain Language, SDCL 15-2-14.2 Applies to Slota's Claims Against the Lawyer Defendants

In the amended complaint, Slota asserts two claims against the Lawyer Defendants: legal malpractice and fraud/deceit.[7] Both of these tort claims are barred by the applicable statute of repose governing claims against attorneys.

The South Dakota Legislature has adopted a specific statute of repose for claims against attorneys:

> An action against a licensed attorney, his agent or employee, *for malpractice, error, mistake, or omission, whether based upon contract or tort*, can be commenced only within three years after the alleged malpractice, error, mistake, or omission shall have occurred. This section shall be prospective in application.

SDCL 15-2-14.2 (emphasis added).[8]

SDCL 15-2-14.2 is not merely a statute of limitations. Instead, it is a statute of repose. *See Pitt-Hart v. Sanford USD Medical Center*, 2016 SD 33, ¶ 18, 878 N.W.2d

[7] Count III for "intentional abandonment" is only asserted against attorney de Castro.
[8] Incredibly, Slota's brief does not even cite to SDCL 15-2-14.2, which is the statute of repose relied upon by the Circuit Court in granting the judgment on the pleadings.

406, 413 (holding that corollary statute SDCL 15-2-14.1 governing claims against physicians and hospitals is a statute of repose rather than a statute of limitations). Indeed, Slota conceded at the hearing on the motion for judgment on the pleadings that SDCL 15-2-14.2 is a statute of repose. Tr. 25. "[S]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Pitt-Hart*, at ¶ 21, 878 N.W.2d at 414.

According to its plain language, SDCL 15-2-14.2 applies to any claim against a licensed attorney for legal malpractice, including Slota's claims for legal malpractice in this case. Faced with this Court's interpretation of a nearly identical statute in *Pitt-Hart*, Slota has abandoned his legal malpractice claim in this appeal. SDCL 15-2-14.2's statute of repose is *not* limited, however, to legal malpractice claims. To interpret SDCL 15-2-14.2 to be limited to a claim for legal malpractice ignores that the Legislature used the language "malpractice, error, mistake, or omission." If SDCL 15-2-14.2 only applied to legal malpractice, then there is no reason to use the words "error, mistake, or omission" in the statute. As a result, this Court should not construe SDCL 15-2-14.2 as being limited to claims for legal malpractice *See Pitt-Hart*, at ¶ 13, 878 N.W.2d at 411-12 (stating this Court "assume[s] that the Legislature intended that no part of its statutory scheme be rendered mere surplusage").

SDCL 15-2-14.2 applies to any claim against an attorney for an "error, mistake, or omission" whether the claim is "based upon contract or tort." Fraud is a tort claim, and thus, Slota's fraud claims against the Lawyer Defendants fit within the language of SDCL 15-2-14.2 if Slota's claims are based upon an "error, mistake, or omission."

Like his legal malpractice claim, Slota's fraud/deceit claims are subject to SDCL 15-2-14.2's statute of repose because they are really claims for errors or omissions made by attorneys Evans and Dorvall in representing Slota at the criminal trial. (Amended Complaint at ¶ 27). Specific to attorney Dorvall, there is only one allegation of fraud. She is alleged to have not done enough during the pretrial proceedings and at the trial despite saying that she should "would take an active role" in the proceedings. (Amended Complaint at ¶ 27(i)). Dorvall's failure to "do enough" is a classic omission that sounds in legal malpractice rather than fraud.

Turning to attorney Evans, the factual allegations supposedly supporting the fraud claim also relate to deficiencies in preparing for and trying the rape trial:

- Attorney Evans allegedly said he would get the victim's prior statements into evidence but failed to do so (Amended Complaint at ¶ 27(g));
- Attorney Evans allegedly said he would use Imhoff's experts to prepare for trial but instead prepared on his own (Amended Complaint at ¶ 27(h));
- Attorney Evans allegedly stated that de Castro's non-appearance at the trial was not important (Amended Complaint at ¶ 27(j));
- Attorney Evans allegedly said that he would properly prepare Slota and his wife as witnesses but allegedly failed to provide sufficient witness preparation for them (Amended Complaint at ¶ 27(k)); and
- Attorney Evans allegedly told Slota that another attorney would prepare Slota to testify but instead Attorney Evans prepared Slota to testify (Amended Complaint at ¶ 27(l)).

Like Dorvall, the allegations against attorney Evans are classic "errors" or "omissions" in defending Slota. At its core, Slota is claiming that Evans told him that Evans would do a proper job defending him, and Evans later made mistakes in defending the case. These claims against Dorvall and Evans properly sound in malpractice, and SDCL 15-2-14.2 applies.

The factual allegations against the Imhoff Firm are slightly different but also sound in legal malpractice. Although Slota points to several alleged misstatements on the Imhoff Firm website, the essence of Slota's claims against the Imhoff Firm are that the Imhoff Firm stated that it would hire competent counsel to defend Slota, and it failed to do so. (See generally Complaint at ¶ 27.) Once again, these claims sound in legal malpractice based upon Evans' and Dorvall's errors, mistakes or omissions. As a result, SDCL 15-2-14.2's statute of repose applies to all of Slota's claims, including the fraud claim.

If a plaintiff, like Slota here, can circumvent SDCL 15-2-14.2's statute of repose by recasting a basic malpractice claim as a "fraud claim," then the statute of repose will become meaningless because every creative plaintiff will use allegations of fraud to improperly extend the repose period. This should not be allowed to occur because the South Dakota Legislature has made a policy determination that when an attorney or law firm makes a mistake (or fails to do a good enough job) in representing a client, then the client's civil claim is barred three-years after the mistake occurred pursuant to SDCL 15-2-14.2's three-year statute of repose. *See Pitt-Hart,* at ¶ 21, 878 N.W.2d at 414 (stating that statutes of repose are based upon legislative policy determination that a defendant

should be free from liability after the repose period). This Court should not adopt an interpretation of SDCL 15-2-14.2 that eviscerates that legislative policy decision.

Admittedly, SDCL 15-2-14.2 does not apply to all claims against an attorney. The proper interpretation on SDCL 15-2-14.2 focuses on the source of the duty owed by the attorney-defendant. When the claims are based upon the attorney-defendant's deficient representation of his or her client, the claim really sounds in legal malpractice, and SDCL 15-2-14.2 applies regardless of the specific tort invoked to support the claim. When an attorney is acting in some capacity *other than as a lawyer*, then SDCL 15-2-14.2 does not apply. *See Morgan v. Baldwin*, 450 N.W.2d 783, 786-87 (S.D. 1990) (applying the statute of limitations for a contract rather than the legal malpractice statute of limitations when the attorney allegedly breached a partnership agreement between that attorney and his client regarding their mutual ownership of a campground). In this case, all the claims against the Lawyer Defendants here are based upon their representation of Slota in the criminal proceeding. As a result, SDCL 15-2-14.2 applies to all of the claims.

B. The Gravamen of the Amended Complaint Sounds in Legal Malpractice, And as a Result, the All Claims Are Subject to SDCL 15-2-14.2's Statue of Repose

For the first time during this appeal, Slota abandoned his legal malpractice claims and instead claims he is only suing the Lawyer Defendants for "fraud." (*Compare* Tr. 25-30 *with* Slota's Brief at pp.2-3). This legal misdirection cannot salvage Slota's claims because the gravamen of Slota's allegations in the amended complaint sound in negligence/legal malpractice.

Slota essentially argues that because he supposedly asserted a claim for fraud in the amended complaint, he automatically gets the advantage of the applicable six-year statute of limitations applicable to fraud claims. As noted above, however, SDCL 15-2-

14.2 is a *statute of repose* that applies to all tort claims against the Lawyer Defendants arising out of their allegedly deficient representation of their client, including Slota's fraud claim. Assuming for argument sake only, however, that SDCL 15-2-14.2 does not apply to a fraud claim against an attorney, then the issue is whether SDCL 15-2-14.2's three-year statute of repose or the six-year limitations period in SDCL 15-2-13(6) applies to Slota's claims.

Mere assertion of fraud claim in the amended complaint does not give Slota the benefit of the six-year fraud statute of limitations. Instead, determining whether the three-year legal malpractice statute of repose or the six-year fraud statute of limitations governs Slota's claims requires a deeper analysis. To determine the proper limitations period governing Slota's claims against the Lawyer Defendants, this Court must determine whether Slota's claims primarily sound in fraud or legal malpractice, which in turn requires an examination into the true nature of Slota's claims. *See Bruske v. Hille*, 1997 SD 108, ¶ 7, 567 N.W.2d 872, 875; *see also Fender v. Deaton*, 571 S.E.2d 1, 3 (N.C. Ct. App. 2002).

In *Bruske*, a patient sued her oral surgeon for fraud and deceit, alleging that the surgeon suppressed facts that he was bound to disclose about the danger associated with a jaw implant. *Id*. at ¶ 7. The patient had a surgery involving the placement of a jaw implant that was made with Teflon and was vulnerable to shattering once implanted. *Id*. at ¶ 4. The patient's fraud and deceit claims asserted that her surgeon intentionally failed to disclose information about the dangerous jaw implant. *Id*. at ¶ 9.

In asserting these claims, the patient argued that the six-year fraud and deceit statute of limitations applied rather than the shorter, two-year medical malpractice statute

of limitations. *Id*. at ¶ 10. This Court recognized that it was required to view the patient's fraud claims, as the non-moving party, in a light most favorable to her. *Id*. at ¶ 12. Regardless, when "closely examined," this Court found that the patient's claims "sound in negligence." *Id*. In making this determination, this Court stated that the surgeon's "failure to timely notify [the patient] of the danger of the implants is the gravamen of [the patient's] cause of action." *Id*. Furthermore, this Court found that surgeon's actions involved a breach of the standard of care, and thus, the patient's cause of action was subject to the medical malpractice statute of limitations found in SDCL 15-2-14.1. *Id*.

In affirming dismissal in *Bruske,* this Court explicitly stated that "[m]edical malpractice characterized as fraud and deceit will not sanction a shift to a more beneficial statute of limitations." *Id*. at ¶ 13. Emphasizing the requirement that the appropriate statute of limitations is determined by examining the essence of a plaintiff's claims, the court stated that "[a] plaintiff may not evade the appropriate limitations period by artful drafting." *Id*. (citing *MacDonald v. Barbarotto*, 411 N.W.2d 747, 751 (Mich . Ct. App. 1987)). Ultimately, the *Bruske* holding stands for the proposition that the substance of a plaintiff's claim is determinative of the applicable statute of limitations. Furthermore, where a plaintiff's claim sounds in malpractice, the applicable malpractice statute of limitation applies despite that plaintiff's assertion of fraud and deceit claims.

Like in *Bruske*, this gravamen of Slota's claims here sound in legal malpractice rather than fraud. The allegations of misrepresentation for fraud/deceit are all contained in paragraph 27 of the amended complaint. All of these allegations relate to the claim that the Lawyer Defendants failed to properly defend Slota at the rape trial. Because

Slota's claims against the Lawyer Defendants are all for allegedly deficient work performed in representing him, the fraud/deceit claim fits with the classic definition of legal malpractice. *See Haberer v. Rice*, 511 N.W.2d 279, 284 (S.D. 1994) (defining elements of legal malpractice); *cf. Cortes v. Lynch*, 846 So. 2d 945, 950 (La. Ct. App. 2003) (holding alleged wrongful conduct by lawyers in representing clients, including allegations of overcharging, were malpractice not fraud because "[f]raud cannot be predicated on mistake or negligence, no matter how gross); *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923-24 (Tex. Ct. App. 2002) (stating that "focus of a legal malpractice claim is whether an attorney adequately represented a client").

The fraud allegations in this case are analytically similar to the case of *Gullatte v. Rion*, 763 N.E.2d 1215, 1217 (Ohio Ct. App. 2000). In *Gullatte*, attorneys represented a criminal defendant against a charge of murder. *Id.* The defendant pled guilty to voluntary manslaughter because his attorneys told him that he would be eligible for "shock probation" and could be released from prison in four years. *Id.* After four years of imprisonment, the defendant's attorneys filed for "shock probation," but the requested probation was denied as the defendant was not eligible because his offense involved a firearm. *Id.* The defendant filed a motion for post-conviction relief claiming that he only pled guilty because he believed he was eligible for "shock probation." *Id.* at 1217. This motion was granted with the defendant's plea and sentence being vacated. *Id.* The defendant then filed suit against the attorneys asserting fraud and legal malpractice, however, his lawsuit was dismissed as untimely as it was filed outside the applicable statute of limitations for attorney malpractice actions. *Id.* at 1217-18. The defendant

appealed, arguing that his claim of fraud subjected his lawsuit to a longer statute of limitations. *Id.*

The Ohio Court of Appeals affirmed dismissal of the fraud claim. In reaching this decision, the court concluded that defendant's fraud claims arose out of acts committed by the attorneys in the course of their legal representation, and that the defendant's alleged claim of fraud "did not alter the fact that the gist of [the defendant's] claims relates to the alleged inappropriateness of legal advice given and that the label given to the cause of action is immaterial." *Id.* at 1219. As a result, the attorney-malpractice statute of limitations applied. The trial court's dismissal of the defendant's lawsuit was therefore affirmed.

Like in *Gullatte* and *Bruske*, the essence of Slota's fraud claims in this case are that the Lawyer Defendants did a poor job representing him. This claim sounds in malpractice rather than fraud. As such, the gravamen of the amended complaint is a claim for legal malpractice, and SDCL 15-2-14.2 bars all of Slota's claims in the amended complaint.

C. Slota's Case Law Cannot Breathe Life Back Into His Claims, Which Are All Barred By the Three-Year Statute of Repose

Slota relies on three cases to argue his fraud claim should be not subject to the three-year statute of repose governing claims against attorneys. (Slota's Brief at pp.10-11).[9] The first two cases are *Himrich v. Carpenter,* 1997 SD 116, 569 N.W.2d 568, and

[9] Slota spends much of his brief arguing the fiduciary nature of the attorney-client relationship somehow means that any alleged breach of fiduciary duty by an attorney also supports a fraud claim. (Slota's Brief at pp.9-21). Slota's argument impermissibly conflates the claims for breach of fiduciary duty and fraud. Compare *Grand State Property, Inc. v. Woods, Fuller, Shultz, & Smith P.C.,* 1996 SD 139, ¶ 15, 566 N.W.2d 84, 88 with *Guthmiller v. Deloitte & Touche, L.P.*, 2005 SD 77, ¶ 12, 699 N.W.2d 493,

City of Aberdeen v. Rich, 2001 SD 55, 625 N.W.2d 582. Neither of these cases, however, addressed the issue of whether a fraud allegation can be used to extend the repose period for a professional negligence claim.

The third case is *Masloskie v. Century 21 Am. Real Estate, Inc.*, 2012 SD 58, 818 N.W.2d 798. *Masloskie* does not support applying a fraud limitations period in this case for two reasons. First, *Masloskie* cannot be used to extend the period for filing a claim because, as recognized by this Court in *Pitt-Hart*, SDCL 15-2-14.2 is a statute of repose rather than a mere statute of limitations. The distinction between a statute of repose and statute of limitations is important because of its impact on the analytical underpinnings of the *Masloskie* decision.

In *Masloskie*, this Court described the limitations period provided in SDCL 15-2-14.7 for the claim against the realtor as a "statute of limitations." *See Masloskie*, at ¶¶ 6-13. The Court in *Masloskie* then recognized the general rule in South Dakota law that when there is doubt about which of two *statutes of limitations* apply, doubt should be resolved in application of the longer limitations period. *Id.* at ¶ 12. Based thereon, the Court concluded that the six-year limitations period for fraud, rather than shorter real estate agent malpractice limitations period, applied because the complaint sounded as much in fraud as in malpractice. *Id.* at ¶ 14.

Masloskie should be read, however, in light of this Court's subsequent decision in *Pitt-Hart v. Sanford USD Medical Center*, 2016 SD 33, 878 N.W.2d 406. As recognized

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498. This Court does not need to address this issue, however, because this argument misapprehends the issue. The issue before this Court is not whether Slota's amended complaint somehow stated a claim for fraud, but rather, whether the gravamen of the complaint sounds in legal malpractice such that the entire complaint is subject to SDCL

in *Pitt-Hart*, SDCL 15-2-14.1 governing malpractice claims against physicians is a not a statute of limitations but instead is a statute of repose. *Pitt-Hart*, at ¶ 18. Because of its similar language, SDCL 15-2-14.2 governing claims against attorneys is also a statute of repose. In fact, Slota conceded SDCL 15-2-14.2 is a statute of repose. Tr. 25.

Unlike in *Masloskie*, the Court in this case is thus not dealing with two competing statutes of limitations. Instead, this case involves a conflict between a statute of repose and statute of limitations. The distinction between a statute of limitations and statute of repose is critical because they serve different policy considerations.

Statutes of limitations require plaintiffs to diligently prosecute their claims. *Pitt-Hart*, at ¶ 21. In doing so, statutes of limitations protect defendants from stale claims where evidence may be old and unreliable. *Morgan v. Baldwin*, 450 N.W.2d 783, 787 (S.D. 1980). When there are competing limitations periods, this Court applies the longer limitations period because it balances the "'legislative intent of protecting defendants from stale claims, yet provides an approach to liberality which affords a plaintiff party-litigant maximum free access to the court system.'" *Id.* (quoting *Williams v. Lee Way Motor Freight*, 688 P.2d 1294 (Okla. 1984)).

Statutes of repose, on the other hand, serve a different policy consideration. Rather than focusing on fairness and timely prosecution of claims, "'[s]tatutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.'" *Pitt-Hart*, at ¶ 21 (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014)). A statute of repose creates a substantive right to be free from suit after the repose period. *Clark Cty. v. Sioux Equip. Corp.*, 2008

15-2-14.2. If so, then all claims are barred even if the amended complaint states a fraud

S.D. 60, ¶ 27, 753 N.W.2d 406, 416. "'Thus, with the expiration of the period of repose, the putative cause of action evanesces; life cannot be breathed back into it.'" *Id.* (quoting *Burlington N. & Santa Fe Ry. Co. v. Poole Chemical Co., Inc.*, 419 F.3d 355, 364 (5th Cir. 2005)). Because a statute of repose is a substantive right to be free from suit, the principal of applying the longer of two potential *statutes of limitations* cannot be used to extend a *statute of repose*. *See Two Denver Highlands Ltd. Liab. Ltd. P'ship v. Stanley Structures, Inc.*, 12 P.3d 819, 823 (Colo. App. 2000).

In *Two Denver Highlands Limited Partnership*, the plaintiff sued the manufacturer of precast concrete. The defendant argued that the claim was barred by the six-year statute of repose governing construction defects, which repose period started at the completion of construction. The plaintiff argued it was asserting a products liability claim subject to a two-year statute of limitations that accrued upon discovery of the alleged defect. Because the claim would have been timely under the two-year statute of limitations for product liability cases, the plaintiff relied on the general tenant that "when two limitations periods may be applied in an action, the longer period should be given precedence." *Id.* at 823. The Colorado Court of Appeals disagreed because the general rule that the longer limitations period applies does not apply when comparing a statute of limitations with a statute of repose. *Id.* Similarly, in this case, Slota cannot rely on a statute of limitations for fraud in this case to extend SDCL 15-2-14.2's statute of repose.

Ultimately, a shift in the law occurred when this Court in *Pitt-Hart* recognized that these malpractice statutes are actually statutes of repose. After *Pitt-Hart*, SDCL 15-2-14.2 is properly understood to be a statue of repose, and as a result, the general legal

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claim. *Bruske*, at ¶ 13.

principle that courts apply the longer of the two possible statutes of limitations does not apply. In turn, *Masloskie*, which relied upon this general legal principle, does not save Slota's claims in this case. Instead, the Circuit Court properly ruled SDCL 15-2-14.2 bars all of Slota's claims.

Even if the law had not shifted, however, *Masloskie* would not apply to this case because it is factually distinguishable. In *Masloskie*, clients sued their real estate agent and the real estate agency asserting separate causes of action for fraud and deceit, negligent misrepresentation, breach of fiduciary duty, breach of contract, and breach of good faith and fair dealing. 2012 SD 58, 818 N.W.2d 798. The clients were shown a property by a real estate agent of Century 21 and the agent was asked by the clients how electricity would be supplied to the property. *Id*. at ¶ 2. The real estate agent stated that the clients would be able to connect to a power-pole, which was located a few hundred feet away on property owned by the United States Forest Service. *Id*. The agent stated that he had spoken with the electric cooperative which is how he learned about the electrical access. *Id*. In reliance on these statements, the clients bought the property, began building a home, and discovered that they would not be able to connect to the power-pole. *Id*. at ¶ 3. The real estate agent ultimately admitted that he had not contacted the Forest Service to determine whether the client could connect to their power pole, and the electric cooperative denied ever speaking with the real estate agent. *Id*. Consequently, the clients brought suit.

The trial court granted summary judgment and determined that the clients' claims were barred by the statute of limitations for malpractice by realtors. *Id*. at ¶ 5 (citing SDCL 15-2-14.6 to -14.7). This Court reversed holding that the circuit court erred in

applying the malpractice statute of limitation to the clients' claim of fraud. *Id*. Following the same analysis as *Bruske*, this Court noted that it would examine all aspects of plaintiff's asserted claims to determine the gravamen of the cause of action. *Id*. at ¶ 11 (citations omitted). It is the "nature of the cause of action or the right sued upon (and not the form of the action)" that "determines what statute of limitations applies." *Id*. at ¶ 12. When more than one statute of limitations may be applicable, the court determines the appropriate statute of limitations by testing "the nature of the allegations in the complaint…." *Id*. In determining the gravamen of the clients' action, the court determined that the clients "did not merely categorize a malpractice action as one for fraud and deceit," and the clients' claim was "based in fraud as much as in negligence, breach of contract, or breach of fiduciary duty." *Id*. at ¶ 14. Because the gravamen of the complaint was as much fraud as negligence, the court applied the longer of the two limitations periods. *Id.*

In *Masloskie*, the very essence of the clients' claims stemmed from an interaction in which the real estate agent blatantly lied to the clients about their ability to hook-up power to a home in order to induce the clients to buy the property. This was not a case where a real estate agent was merely negligent, but instead, where a real estate agent engaged in making deliberate falsehoods in order to sell a piece of property. This is distinct from the case-at-hand where Slota's claims all originate from alleged facts that demonstrate attorney ineffectiveness. Unlike the scenario in *Masloskie*, Slota's claims of fraud and deceit are not only ancillary but are simply added on to avoid the attorney-malpractice statute of limitations. (Amended Complaint at ¶ 27).

D. The Factual Allegations in the Amended Complaint Do Not Support a Fraud Claim Which Indicate the Gravamen of Slota's Claims Really Sounds in Legal Malpractice Rather than Fraud.

Slota's fraud and deceit allegations are all contained in paragraph 27 of the amended complaint. The actual allegations stated in the Amended Complaint do not, however, state a cognizable claim for fraud/deceit.

To state a claim for fraud, Slota must plead, with particularity, the facts establishing his fraud or deceit claim. SDCL 15-6-9(b); *Sisney v. Best, Inc.*, 2008 SD 70, ¶ 17, 754 N.W.2d 804, 812. The essential elements of a claim for fraud or deceit are:

> A representation made as a statement of fact, which is untrue and intentionally or recklessly made
>
> 1. With intent to deceive for the purpose of inducing the other party to act upon it;
>
> 2. Reliance upon the untrue statement of fact;
>
> 3. Resulting in injury or damage.

Guthmiller v. Deloitte & Touche, L.P., 2005 SD 77, ¶ 12, 699 N.W.2d 493, 498 (internal quotation omitted). In this case, like in *Bruske*, Slota's fraud and deceit claims are conclusory, lack specificity, and simply fail to state a claim for a plethora of reasons.

First, a majority of Slota's fraud and deceit claims relate to opinions made by the Imhoff Firm. Amended Complaint at ¶¶ 27(a), (b), (e), (o), (p), (q), (r), (s), (t), (u), (v) and (w). Also, attorney Evans was alleged to have committed fraud when he expressed his opinion about the impact of attorney de Castro's absence from the trial. Amended Complaint at ¶ 27(j). Such opinions are not statements of fact and are not actionable claims. *See Sabhari v. Sapari,* 1998 SD 35, 17, ¶ 17, 576 N.W.2d 886, 892 (citing *Brandriet v. Norwest Bank*, 499 N.W.2d 613, 616 (S.D.1993)) (emphasis added) ("At its

core, fraud requires a 'representation made as a statement of fact, which was untrue by the party making it, or else recklessly made.'"); *Aschoff v. Mobil Oil Corp.*, 261 N.W.2d 120, 124 (S.D. 1977) ("[t]he mere expression of an opinion would not be a representation of a material fact."). *See also Taggart v. Ford Motor Credit Co*., 462 N.W.2d 493, 503 (S.D. 1990) ("opinions simply cannot form the basis for fraud").

Second, several of Slota's alleged fraud and deceit claims relating to future promises made by the Lawyer Defendants, but he has often failed to allege that these Lawyer Defendants made such promises without any intention of performing. *See* Plaintiff's Complaint at ¶¶ 27(g), (h), (i) and (k). Indeed, other than attorney Evans' opinion about the importance of attorney de Castro's absence from trial, all of the other allegations of fraud against attorneys Evans and Dorvall relate to statements that the attorneys allegedly made about steps the attorney *would*, in the future, take in defending Slota. Statements about future events or facts are not generally actionable, however, as fraud. *Bayer v. PAL Newcomb Partners*, 2002 SD 40, ¶ 11, 643 N.W.2d 409, 412.

Third, Slota has failed to allege that he relied on any of the specific, alleged misrepresentations. *Id.* at ¶ 27. Reliance is an essential element of a fraud/deceit claim. *Guthmiller*, at ¶ 12, 699 N.W.2d at 498.

Finally, the remainder of Slota's and deceit claims are simply conclusory and overly vague. Amended Complaint at ¶¶ 27(c), (d), (f), (j), (l), (m), and (n). Because Slota's fraud allegations are conclusory, overly vague, or fail to state a cognizable fraud claim, the gravamen of the amended complaint is for legal malpractice rather than fraud. *See Bruske*, at ¶¶ 11-13. In turn, Slota cannot rely on his fraud claim to extend the three-year statute of repose found in SDCL 15-2-14.2.

III. It is Undisputed that Slota Commenced this Action Against the Lawyer Defendants After the Three-Year Repose Period Imposed by SDCL 15-2-14.2 Expired.

When applied, the Circuit Court properly concluded that SDCL 15-2-14.2's three-year statute of repose bars Slota's claims in this case. It is undisputed that the Lawyer Defendants did *not* represent Slota after May 30, 2014. Def-Appx 31, 62-63. Thus, any mistake, omission, or error made by the Lawyer Defendants must have occurred on or before May 30, 2014. The three-year statute of repose thus expired, at the latest, on May 30, 2017. None of the Lawyer Defendants were served in this case until July of 2017. Def-Appx 30-31; SR 18-47; Tr. 5, 8, 15. As a result, the applicable statute of repose expired before the action was commenced against any of the Lawyer Defendants. *See* SDCL 15-2-30 (stating that an action is commenced through service of a summons and complaint). In turn, the Circuit Court properly granted the motion for judgment on the pleadings, and this Court should affirm.

CONCLUSION

Stripped to its bare essentials, Slota's claims are all for failure to properly defend him in the criminal trial which claims sound in legal malpractice. Because SDCL 15-2-14.2's statute of repose bars Slota's claims, the Circuit Court's judgment on the pleadings should be affirmed.

Dated this 25th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 6,701 words as counted by Microsoft Word.

/s/ Jason R. Sutton

Jason R. Sutton

CERTIFICATE OF SERVICE

I, Jason R. Sutton, hereby certify that I am a member of the law firm of Boyce Law Firm, L.L.P., and that on the 25th day of April, Appellees' Brief and this Certificate of Service were electronically served upon the following individuals:

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT
Fred Slota, Plaintiff, v. Imhoff and Associates P.C. a California Professional Corporation, Henry Evans, Shannon Dorvall, Manuel de Castro, Jr., Defendants.	)	No. 49CIV17-001878

Amended Complaint and Demand for Jury Trial

Facts

1. An innocent man, Fred Slota ("Slota"), was convicted of the horrific crime of First Degree Rape of a child, and sentenced to 30 years in prison, due to defendants' legal negligence, fraud and deceit, and intentional abandonment. After Slota served three years in prison, his conviction was overturned because of defendants' ineffective assistance of counsel. He seeks compensatory damages for his own losses, and punitive damages to punish defendants, and to deter them from

continuing to employ their same fraud, deceit, and abandonment against other people accused of crimes.

2. Slota was falsely charged with First Degree Rape of a child in Brown County.

3. Slota was innocent of the charge.

4. Because of defendants' legal malpractice, fraud and deceit, as set forth below, Slota was falsely convicted.

5. Slota was sentenced to 30 years' imprisonment and served 3 years before his conviction was set aside because of defendants' ineffective assistance of counsel.

6. Slota resides in Brown County, South Dakota; Imhoff and Associates P.C. a California Professional Corporation ("Imhoff"), whose principal is Vincent Michael Imhoff, resides in Los Angeles County, California; Henry Evans is a lawyer who resides in Minnehaha County, South Dakota; Shannon Dorvall is a lawyer who resides in Los Angeles County, California, and works for Imhoff; Manuel de Castro is a lawyer who resides in Lake County, South Dakota.

Count 1—Legal malpractice

7. All facts above are incorporated herein by reference.

8. Defendants' actions, set forth below, constitute legal malpractice.

9. As set forth below, defendants "(1) had an attorney-client relationship giving rise to a duty, (2) by acting or failing to act, breached that duty, (3) the breach of duty proximately caused injury to the client, and (4) Slota sustained actual damage. *Hamilton v. Sommers*, 855 N.W.2d 855, 2014 S.D. 76, ¶ 21.

10. When Slota was informed that he was suspected of child rape, Slota's wife, Dr. Nina Slota ("Dr. Slota") went on the internet and found Imhoff, located in Los Angeles, California, which advertises itself as specialists in criminal law, and seeks to represent people accused of all kinds of crimes all over the United States.

11. Imhoff claims expertise in defending people accused of crimes, including drug crimes, military crimes, weapons crimes, violent crimes, DUI/DWI, "Pre-File Cases," Property Crimes, Sex Crimes, and White Collar Crimes.

12. Vincent Imhoff, the principal of Imhoff and Associates, P.C., is not licensed in the vast majority of jurisdictions in the United States, including South Dakota.

13. Imhoff's business model is to solicit business by advertising, obtain a substantial amount of money from the accused person, then hire lawyers who are admitted in the state where the defendant is charged, and pay the lawyers a fraction of the money that Imhoff has already collected.

14. The fraction of the money that Imhoff pays the lawyer or lawyers whom he hires to defend the case is insufficient to allow a reasonable competent lawyer to defend the case competently, and was insufficient in this case.

15. Imhoff defended Slota incompetently by—after having taken on the obligation to represent him or have other competent lawyers represent him competently—hired lawyers who represented him incompetently.

16. In light of the facts set forth below about the lawyers that Imhoff hired to defend Slota, it was foreseeable that these lawyers would defend Slota incompetently.

17. Imhoff hired Henry Evans, a Sioux Falls attorney who had little experience in criminal law, had never defended a rape case, and had never tried a jury trial.

18. Imhoff eventually assigned Shannon Dorvall, and Manuel de Castro, Jr., to assist Evans in the defense of the case.

19. Evans, Dorvall, and de Castro all agreed to defend Slota.

20. Dorvall attended Slota's trial but did very little in it.

21. de Castro intentionally abandoned Slota and did not even attend the trial.

22. de Castro told Slota that he had a South Dakota Supreme Court argument that had been scheduled that would preclude him from defending Slota at the trial.

23. On information and belief, if de Castro's representation was true, de Castro intentionally abandoned Slota by failing to:

a. Inform the Supreme Court of the conflict and seek to have the argument rescheduled; or

b. Find another lawyer to argue the case before the Supreme Court; or

c. Inform the trial judge of the problem and seek a continuance; or

d. Complete preparation for Slota's trial and arrange to be gone from trial only during the time it would take to argue the Supreme Court case; or

e. Complete preparation for Slota's trial and seek a delay in the trial only during the time it would take to argue the Supreme Court case; or

f. Take some other action that would allow the Supreme Court case to be argued and for him not to abandon Slota.

24. Evans and Dorvall incompetently defended Slota in many respects, including but not limited to the following, all of which were described by the circuit court in granting Slota's habeas petition:

a. Failing to use A.K.'s (the alleged victim's) three prior inconsistent and exculpatory prior statements to impeach her.

b. Failing to subpoena the witnesses to whom A.K. had given the prior inconsistent and exculpatory statements to trial, so that the statements could be admitted into evidence.

c. Subpoenaing the wrong witness to lay foundation for admission of the prior inconsistent and exculpatory statements to trial, resulting in the State's hearsay objection to the statements being sustained.

d. The first prior exculpatory statement was made well before any third party could taint A.K.'s testimony.

e. In the second exculpatory statement, A.K. denied any sexual touching occurred when she was shown a diagram of the human body and asked about specific body parts.

f. The third exculpatory statement was made after a forensic interview, in which A.K. said she was told by someone to incriminate Slota.

g. The statements supported Slota's innocence by their timing, form, content, and the parties who documented them, all of which increased their value to the defense.

h. Given that A.K. was the key witness presented by the State, and that her credibility and suggestibility were of genuine concern, no reasonable counsel would forego using these statements.

i. Furthermore, the State, during closing remarks, argued falsely that A.K. had been consistent throughout the proceedings.

j. The prior inconsistent statements rebut the State's false argument.

k. The impeachment of A.K. was the core of the defense and the three exculpatory statements would have been invaluable for this purpose.

l. After failing to subpoena the witnesses he needed to get these invaluable statements into evidence, Evans failed to make any formal notice of intent to offer her statement as residual hearsay per SDCL 19-19-807.

m. As the circuit court judge explained in granting habeas relief, Evans' claim that his actions were "trial strategy" was false.

n. As the circuit court judge found, Evans' claimed logic for the change of strategy was contradicted by his own actions at trial.

o. Evans failed to object to allowing the State's expert witness to remain in the courtroom during A.K.'s testimony, which benefitted the State and was incompetent.

p. Evans admitted he was unaware of the statute which required that if the courtroom were closed during testimony, *all persons* were to be excluded.

q. The circuit court found Evans' failure to object was incompetent.

r. The State's closing argument was improper, according to the circuit court judge, because "The State clearly misstated the facts in front of the jury"; "The State went beyond arguing the permissible inferences from the evidence when A.K.'s statements to the school counselor and DSS worker were inconsistent with her initial disclosure in class"; the prosecutor "inject[ed] unfounded or prejudicial remarks into the proceedings," and "appeal[ed] to the prejudices of the jury"; yet Evans improperly and incompetently failed to object to any of this.

s. The circuit court found that trial counsel's representation "falls short of the prevailing professional standard," that impeachment of A.K. was the only defense; that Evans "attempted but failed to follow through on this theory"; that his failure to use A.K.'s inconsistent statement alone constituted deficient representation; and that "[h]is ineffectiveness was compounded by other cumulative errors, such as failure to object to the State's expert witness remaining in the courtroom and his failure to object to the State's improper closing argument."

t. Trial counsel's cumulative errors clearly prejudiced Slota.

u. The evidence against Slota was far from overwhelming.

v. There was no physical evidence supporting or refuting sexual abuse.

w. The entire case turned on the credibility of A.K.

x. Defense counsel's cumulative errors deprived Slota of the possibility that the jurors would find reasonable doubt in the State's case.

y. The habeas court found that "but for trial counsel's unprofessional errors, the result of the trial would have been different."

Count 2 - Fraud and Deceit

25. All facts above are incorporated herein by reference.

26. All defendants owed Slota a fiduciary duty, because they were his lawyers.

27. Defendants committed deceit against Slota in many respects, including but not limited to the following:

a. Imhoff represented himself as a specialist in defending many types of crimes, including sex crimes, whereas in fact his practice and business model, in this case and others, was to hire the least expensive attorney or attorneys he could find who were licensed in the jurisdiction in which the accused was charged, without regard to whether the attorney or attorneys were specialists in the crime charged, and without regard to whether in this case the attorney or attorneys were specialists in sex crimes;

b. Imhoff represented that he would hire good lawyers who specialized in sex cases to represent Slota, but in fact hired a lawyer who abandoned Slota (de Castro); a lawyer who did virtually nothing at trial (Dorvall); and a lawyer (Evans) who was (in the words of the circuit court) "unprofessional," had never tried a case, did not know how to subpoena the right witness to get critical witness statements into evidence, and was so incompetent at trial, as detailed by the circuit court judge who heard the habeas proceeding and as recounted above, that Slota was convicted when—according to the circuit court—but for Evans' unprofessional errors Slota would have been acquitted.

c. Imhoff suppressed everything he knew about Evans' lack of experience, even though his fiduciary duty required him to disclose it; and he

disclosed other facts about Evans that were likely to mislead Slota, and did mislead Slota, because of the fact that Imhoff failed to disclose.

d. Imhoff suppressed the fact that his true purpose was to make as much money as possible by hiring the least expensive lawyers he could get to do the work, regardless of their abilities.

e. Imhoff promised that he would see that Slota received quality legal services by specialists in sex crimes, a promise he had no intention of performing and utterly failed to perform.

f. Imhoff falsely represented Shannon Dorvall as an expert in defending sex crimes; but while the jury was deliberating, she admitted to Dr. Slota that she did not consider herself an expert in defending sex crimes, and her total failure to see that Slota received competent representation confirms this fact.

g. Evans represented to Slota during the trial that he could get the alleged victim's prior statements into evidence, but he had no reasonable ground to believe this was true.

h. Evans represented to Slota that he would use Imhoff's experts, but in fact largely prepared for and conducted the trial on his own, resulting in Slota's conviction.

i. Dorvall represented to Slota that she would take an active role in pre-trial and trial, but in fact did virtually nothing.

j. Evans claimed that de Castro's non-appearance at trial was unimportant, a fact he knew was untrue.

k. Evans claimed he would carefully and extensively prepare Slota and his wife to testify, yet knowingly failed to do so, and they testified with virtually no preparation.

l. Evans told Slota that he would be prepared by a lawyer other than Evans, for a separate and additional fee, because that would be best, but Evans had no intention of performing this promise, made no attempt or effort to perform it, and failed to perform it.

m. Dr. Slota located a person named Lawrence W. Daly, who had extensive experience in helping defend sex crimes; he agreed to work with Slota; Imhoff said he would work with Daly but never had any intention of doing so, because Imhoff wanted to keep control of the case for himself, and Imhoff refused to work with Daly.

n. Imhoff promised to arrange for Slota to take an independent polygraph test, to attempt to convince the prosecution not to proceed, but failed to

arrange such a test; Imhoff never had any intention of paying for an independent polygraph test; instead Imhoff sent Slota to the Aberdeen police department for a polygraph test by a police officer, with predictable results.

o. Imhoff falsely claimed on his web site that "we have well-versed knowledge regarding laws in each state," whereas in fact the lawyers he hired to represent Slota were, in the habeas judge's words, "unprofessional" and "incompetent."

p. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

q. Imhoff falsely claimed on his web site that "you can rest assured in knowing we will do everything in our power to secure the most favorable outcome possible."

r. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

s. Imhoff falsely claimed on his web site that "Our firm can vigorously defend your rights, liberties, and reputation against child molestation charges."

t. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

u. Imhoff falsely claimed on his web site that its attorneys "provide high-quality legal representation in 48 states."

v. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

w. Imhoff is a small firm that falsely represented itself to Slota's wife, before Slota hired them, as a large firm.

Count 3 - Intentional Abandonment

28. All facts above are incorporated herein by reference.

29. As described above, Manuel de Castro intentionally abandoned Slota.

WHEREFORE plaintiff demands judgment against defendants:

1. For compensatory and punitive damages according to proof, including special damages of money wasted on incompetent legal services; loss of income while incarcerated; and loss of earning capacity in the future because the stigma of being a convicted child rapist will never leave Slota, and will reduce his earning capacity in the future, and many people will always believe he was actually guilty even though his conviction was set aside;

2. For treble damages against defendants Imhoff and Associates P.C., a California Professional Corporation, Henry Evans, and Shannon Dorvall, under SDCL 16-19-34;

3. For the costs of this action; and

4. For such other and further relief as the court may deem just.

Dated: October 24, 2017

/s/ James D. Leach
James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
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Attorney for Plaintiff

Trial by Jury Is Hereby Demanded

/s/ James D. Leach
James D. Leach

Certificate of Service

I certify that on this 24th day of October, 2017, I served this document on defendants by filing it electronically on Odyssey, thereby causing automatic electronic service to be made on all defense counsel of record.

/s/ James D. Leach

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

FRED SLOTA, Plaintiff, vs. **IMHOFF AND ASSOCIATES, P.C., a California Professional Corporation; HENRY EVANS; SHANNON DORVALL; AND MANUEL de CASTRO,** Defendants.	CIV. 17-1878 **MEMORANDUM OPINION AND ORDER**

This matter came before the Court for hearing on December 1, 2017 on Defendants' Motions for Judgment on the Pleadings and Motions for Judicial Notice. Attorney James Leach appeared on behalf of Plaintiff Fred Slota. Attorney William Fuller appeared on behalf of Defendant Manuel de Castro. Defendant Henry Evans appeared personally and with Attorneys Thomas Welk and Jason Sutton who also appeared on behalf of Defendants Imhoff and Associates, PC and Shannon Dorvall. Defendant Shannon Dorvall and a representative of Imhoff and Associates, PC listened to the proceedings telephonically.

After considering the parties' written submissions and reviewing the applicable authorities, the court issues its decisions on the pending motions in this Memorandum Opinion and Order.

FACTUAL BACKGROUND

On February 13, 2013, Plaintiff Fred Slota (Plaintiff or Slota) was indicted in Brown County on charges of First Degree Rape and Sexual Contact with a Child Under the Age of Sixteen. *See* 06CRI13000173. The alleged victim was A.K., age seven at the time of the alleged incidents (age eight at the time of trial), who was living in Plaintiff's home as a foster child.

According to Plaintiff's Complaint, his wife found Defendant Imhoff and Associates, P.C. (Imhoff) on the internet. He states in his Complaint that Imhoff is a firm located in Los Angeles, California, which advertises itself as a specialist in criminal law and offers representation all over the United States. Imhoff hired a South Dakota lawyer, Defendant Henry Evans (Evans), to defend Plaintiff on the charges. Defendant Manuel de Castro (de Castro) noticed his appearance on May 14, 2013 to assist in the representation of Plaintiff. Imhoff also assigned Attorney Shannon Dorvall (Dorvall) to assist with the case. Dorvall is a licensed California staff attorney for Imhoff. She was admitted as a non-resident attorney to participate in the defense of Plaintiff.

Following a jury trial in Brown County, Plaintiff was convicted on March 26, 2014 of one count of First Degree Rape and one count of Sexual Contact with a Child Under the Age of Sixteen. Defendant de Castro did not appear at trial as he was scheduled for oral argument before the South Dakota Supreme Court.

After trial, Attorney Ellery Grey (Grey) noticed his appearance on behalf of Plaintiff on April 21, 2014. Grey was independently retained by Plaintiff and was not associated with Defendants Imhoff, Evans, Dorvall, or de Castro. Evans filed a Motion to Strike Sexual Contact Conviction on May 9, 2014. Grey filed a Motion for New Trial on May 12, 2014. Grey argued the grounds for the new trial of improper courtroom closure and juror misconduct. Evans also filed a Motion for New Trial (Amended), offering substantially the same arguments made by Grey.

Judge Portra held a hearing on the motions on May 30, 2014. Judge Portra granted the Motion to Strike and denied the motions for new trial. On the same day, Judge Portra proceeded to sentencing with Grey, Evans, and Dorvall appearing with Plaintiff. Plaintiff was sentenced to thirty years in the South Dakota State Penitentiary. The written Judgment of Conviction was filed June 2, 2014. Defendant de Castro sent a closing letter on June 19, 2014, which stated:

> This letter is to confirm my understanding that Mr. Grey has been retained in the above-entitled matter to represent Mr. Slota. With that understanding, I have closed my file and my assistance in this matter has ended. If there are any questions, please let me know.

The letter was sent on Imhoff stationary and was addressed and sent to both Grey and Slota.

On June 23, 2014, Grey filed a Notice of Appeal to the South Dakota Supreme Court. Grey filed an Amended Notice of Appeal on July 8, 2014. On July 30, 2014, the trial court filed written Findings of Fact, Conclusions of Law and Order denying

both Grey and Evan's motions for a new trial. On October 27, 2014, Evans sent a closing letter on Imhoff stationary. The letter stated:

> This confirms that Imhoff and Associates stopped representing you at the sentencing. Please contact me with any questions.

The South Dakota Supreme Court affirmed Plaintiff's conviction in State v. Slota, 2015 S.D. 15, 862 N.W.2d 113. Grey is identified as counsel for Plaintiff on the direct appeal.

Plaintiff sought post-conviction habeas relief. *See* 06CIV15000406. Grey filed a habeas petition on behalf of Plaintiff on September 9, 2015, raising claims of ineffective assistance of counsel. An evidentiary hearing was held on April 17, 2016. On May 30, 2017, the habeas judge, Judge Flemmer, filed a Memorandum Decision granting habeas relief. Judge Flemmer found that under the totality of the circumstances Evan's representation fell short of the prevailing professional standard and that Plaintiff was prejudiced by Evan's cumulative errors. On June 7, 2017, the habeas court entered a Judgment and Writ of Habeas Corpus granting habeas relief and vacating Plaintiff's conviction for First Degree Rape. Plaintiff was remanded back into the custody of the Brown County Sheriff and conditions of bond were set in the underlying criminal file. The State did not file an appeal of the habeas decision. The underlying criminal charges remain pending against Plaintiff.

According to the parties' briefs, Evan was served with Plaintiff's Summons and Complaint in this matter on July 7, 2017. Imhoff was served on July 10, 2017 and Dorvall admitted service on July 14, 2017. Defendant de Castro acknowledges

being served in July 2017, but the exact date is not clear from the record. Other than the Admission of Service from Dorvall, there does not appear to be any proof of service in the court file.

Defendants Imhoff, Evans, Dorvall, and de Castro all move for judgment on the pleadings arguing that Plaintiff's claims are time barred by SDCL 15-2-14.2. Additionally, Defendants filed a Motion for Judicial Notice, asking this Court to take judicial notice of Plaintiff's criminal and habeas court files. The Motion for Judicial Notice is not objected to by Plaintiff, so that Motion is granted.

LAW AND ANALYSIS

"Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." Jensen v. Kasik, 2008 SD 113, ¶ 4, 758 N.W.2d 87, 88 (quoting Loesch v. City of Huron, 2006 SD 93, ¶ 3, 723 N.W.2d 694, 696). "The purpose of a statute of limitations is speedy and fair adjudication of the respective rights of the parties." Jensen, 2008 S.D. 113, ¶4, 758 N.W.2d at 88 (quoting Minnesota v. Doese, 501 N.W.2d 366, 370 (S.D. 1993)). The construction and application of a statute of limitations presents a legal question and is reviewed de novo. Jensen, 2008 S.D. 113, ¶4, 758 N.W.2d at 88 (citing Stratmeyer v. Stratmeyer, 1997 SD 97, ¶ 11, 567 N.W.2d 220, 222).

Defendants all move for judgment on the pleadings arguing that Plaintiff's claims are time barred by SDCL 15-2-14.2. They assert that the last possible day of the occurrence of any alleged legal malpractice was May 30, 2014, the date of

sentencing. From that date forward, Plaintiff was represented by Grey alone. Plaintiff did not commence this action until July 2017, more than three years later.

SDCL 15-2-14.2 provides:

> An action against a licensed attorney, his agent or employee, for malpractice, error, mistake, or omission, whether based upon contract or tort, can be commenced only ***within three years after the alleged malpractice, error, mistake, or omission shall have occurred.*** This section shall be prospective in application.

Emphasis added.

Plaintiff argues that his cause of action for legal malpractice accrued on May 26, 2017 when the habeas court vacated Plaintiff's conviction upon a finding of ineffective assistance of counsel. While acknowledging that the South Dakota Supreme Court has not addressed the question, Plaintiff argues that the majority of jurisdictions hold that proof of exoneration or innocence is required to bring a criminal legal malpractice claim. Plaintiff urges this Court to take the position that a cause of action for criminal legal malpractice does not "accrue" for purposes of SDCL 15-2-14.2 until post-conviction relief is obtained.

However, Defendants assert that SDCL 15-2-14.2 is a statute of repose, not a statute of limitations. At the hearing, counsel for Plaintiff in fact agreed that it is a statute of repose. For purposes of the SDCL 15-2-14.2, a cause of action arises upon the *occurrence* of the alleged malpractice, error, mistake or omission, not when the cause of action *accrued*. Defendants rely on Pitt-Hart v. Sanford USD Medical

Center, 2016 SD 33, 878 N.W.2d 406, which examined SDCL 15-2-14.1 as to the time for bringing medical malpractice actions.

> "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" CTS Corp. v. Waldburger, —— U.S. ——, ——, 134 S.Ct. 2175, 2182, 189 L.Ed.2d 62 (2014) (quoting Black's Law Dictionary 1546 (9th ed.2009)); Peterson, 2001 SD 126, ¶ 41, 635 N.W.2d at 570. "A statute of repose, on the other hand, ... is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." CTS Corp., —— U.S. at ——, 134 S.Ct. at 2182. The two-year period expressed in SDCL 15–2–14.1 does not begin when a cause of action accrues; it begins when the "alleged malpractice, error, mistake, or failure to cure shall have occurred[.]" SDCL 15–2–14.1.

Pitt-Hart, 2016 SD 33, ¶ 18, 878 N.W.2d at 413. There is a distinction between a statute of limitations, which creates a time for suing based on when the claim "accrues" and a statute of repose, which puts an outer limit on the right to bring an action. CTS Corp., 134 S.Ct. at 2182. The relevant language of SDCL 15-2-14.1 and 15-2-14.2 is identical in structure. SDCL 15-2-14.1 provides:

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

> provided, a counterclaim may be pleaded as a defense to any action for services brought by a physician, surgeon, dentist, hospital, sanitarium, registered nurse, licensed practical nurse, chiropractor, or other practitioner of the healing arts after the limitation herein prescribed, notwithstanding it is barred by the provisions of this chapter, if it was the property of the party pleading it at the time it became barred and was not barred at the time the claim was sued or originated, but no judgment thereon except for costs can be rendered in favor of the party so pleading it.
>
> This section shall be prospective in application only.

Emphasis added.

> "We have consistently held that [SDCL 15–2–14.1] is an occurrence rule, which begins to run when the alleged negligent act occurs, not when it is discovered." Beckel v. Gerber, 1998 SD 48, ¶ 9, 578 N.W.2d 574, 576. The reason SDCL 15–2–14.1 is an occurrence rule, however, is simply because it is a statute of repose, which by definition begins running upon the occurrence of a specified event rather than the discovery of a cause of action.

Pitt-Hart, 2016 SD 33, ¶ 19, 878 N.W.2d at 413.

This Court agrees that SDCL 15-2-14.2 is a statute of repose. As a statute of repose, SDCL 15-2-14.2 is an occurrence rule so any claim for legal malpractice must be commenced within three years after the alleged malpractice occurred, not when the claim accrues by successful post-conviction relief as argued by Plaintiff.

While inartfully referencing a "statute of limitations,"[1] the South Dakota Supreme Court has previously stated that SDCL 15-2-14.2 is an occurrence rule.

> SDCL 15-2-14.2 governs the time for bringing legal malpractice actions. South Dakota follows the occurrence rule. Under the occurrence rule as expressed by our statute, the statute of limitations on a claim of attorney malpractice begins to run at the time of the alleged negligence and not from the time when the negligence is discovered or the consequential damages are exposed. Kurylas, Inc. v. Bradsky, 452 N.W.2d 111 (S.D. 1990); Schoenrock v. Tappe, 419 N.W.2d 197 (S.D. 1988); Hoffman v. Johnson, 374 N.W.2d 117, 122 (S.D. 1985); Annot. 18 A.L.R.3d 978, 986-987 (1968).

Haberer v. Rice, 511 N.W.2d 279, 287 (S.D. 1994) (other internal citations omitted).

> [T]he "critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling[.]" CTS Corp., —— U.S. at ——, 134 S.Ct. at 2183 (emphasis added). Likewise, fraudulent concealment does not toll a period of repose. First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989), cert. denied, 493 U.S. 1070, 110 S.Ct. 1113, 107 L.Ed.2d 1020 (1990). "[A]fter the legislatively determined period of time, ... liability will no longer exist and will not be tolled for any reason." 54 C.J.S. Limitations of Actions § 7 (2015) (emphasis added).

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[1] In Pitt-Hart, the South Dakota Supreme Court acknowledged that it had not been consistent in maintaining the term of statute of repose, rather than limitation, although it was consistent it its application of the occurrence rule. Id. at ¶¶17, 19, 873 N.W.2d at 413.

> The reason for this critical distinction lies in the different policy objectives underlying both types of statutes. "Statutes of limitations require plaintiffs to pursue 'diligent prosecution of known claims.'" CTS Corp., —— U.S. at ——, 134 S.Ct. at 2183 (quoting Black's Law Dictionary 1546 (9th ed.2009)). "[W]hen an 'extraordinary circumstance prevents [a plaintiff] from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." Id. (quoting Lozano v. Montoya Alvarez, —— U.S. ——, ——, 134 S.Ct. 1224, 1231–32, 188 L.Ed.2d 200 (2014)). In contrast, "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" Id. (quoting 54 C.J.S. Limitations of Actions § 7 (2010)). "[They] are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists." First United Methodist Church, 882 F.2d at 866. Thus, while tolling a period of limitation or estopping a party from asserting it as a defense may be proper, tolling a period of repose or estopping a party from raising it as a defense subverts this legislative objective. Therefore, principles of estoppel and tolling are inapplicable to a period of repose.

Pitt-Hart, 2016 SD 33, ¶¶ 20-21, 878 N.W.2d at 413–14.

In reviewing the law review article cited by Plaintiff, it acknowledges that many jurisdictions require proof of exoneration or innocence as a necessary element of criminal legal malpractice. Duncan, Criminal Malpractice: A Lawyer's Holiday, 37 Ga.L.Rev. 1251, 1266 (2003). However, it acknowledges that in some jurisdictions, the statute of limitations may expire before a plaintiff can bring suit for criminal malpractice.

> Some jurisdictions have determined that the applicable statute of limitations in a criminal malpractice action begins to accrue upon the earlier of the claimant's actual discovery of the alleged malpractice or the termination of the claimant's legal representation by the offending attorney. Other jurisdictions have determined that the statute of limitations begins to accrue upon acquisition of final appellate or other postconviction relief. The problem is complex in that these determinations wrestle with competing concerns. On the one hand, too often statutes of limitations run prior to the criminal malpractice plaintiff obtaining postconviction relief, an element required to bring the malpractice action. The acquisition of postconviction relief often takes so long that the statute runs and the claimant is unable to prevent it from doing so. On the other hand, if the rule is that the statute of limitations does not begin to run until a malpractice plaintiff obtains postconviction relief, the statute becomes an indefinite and uncertain period of time for criminal defense attorneys. The argument is that allowing this uncertainty permits criminal defendants to subvert the purposes of statutes of

> limitations, resulting in unfairness to criminal defense attorneys. Potential defendants in criminal malpractice actions should not be subjected to the prospect of unlimited and unending liability, the uncertainty of which is dependent on the often long process of a criminal defendant obtaining postconviction relief. One of the purposes served by statutes of limitations is to enable potential defendants to close a client's case after a period of time without running the risk that, at some time in the distant future, he or she may be sued for malpractice.

Id. Defendants, and the law review article cited by Plaintiff, suggest a two-track approach. "[T]he best solution is to require a criminal malpractice plaintiff to file his lawsuit upon discovery of the wrong or within the applicable statute of limitations following the termination of the representation, even if post-conviction proceedings are still ongoing. The court would then require-not merely suggest or encourage-that the malpractice claim be held in abeyance until the postconviction matter has been resolved. It would be an abuse of discretion for the trial court not to stay the malpractice proceeding." Id. This is actually the approach that appears to be endorsed in some of the states cited by Plaintiff.

Plaintiff cites to Loesch v. City of Huron, 2006 SD 93, 723 N.W.2d 694, as support for the argument that there is no criminal legal malpractice claim until the underlying criminal conviction is overturned or vacated. In Loesch, the South Dakota Supreme Court examined SDCL § 9-24-5, which was found to be a statute of repose. Id. at ¶4, 723 N.W.2d at 695-96. The South Dakota Supreme Court held

that the time for Loesch to bring suit against the City began to run when he was injured. Id. at ¶5, 723 N.W.2d at 696. However, SDCL § 3-21-6 and SDCL § 3-21-2 prohibited him from maintaining a lawsuit against the City for a period of time. Id. at ¶¶ 5-6, 723 N.W.2d at 696. The South Dakota Supreme Court concluded that by enacting SDCL § 3-21-6 and § 3-21-2, the Legislature intended to toll the two-year period for commencing suit under SDCL § 9-24-5 and that SDCL § 15-2-25 would also apply.[2] Id. at ¶¶ 8-9, 723 N.W.2d at 697. The Loesch case is distinguishable from this case because there is no countervailing statute in the legal malpractice context that prohibits a litigant from filing suit prior to obtaining post-conviction relief. As urged by Defendants, plaintiffs must commence suit within the applicable time limit—which in this case is three years from the last occurrence of legal malpractice.

As to Defendant de Castro, Plaintiff's legal malpractice claim would be time barred under SDCL 15-2-14.2. There is no dispute that Defendant de Castro's involvement in the case ended at the trial in May 2014. In fact, de Castro did not even appear at trial. Defendant de Castro sent Plaintiff and Grey a closing letter on June 19, 2014. This action was not commenced until July 2014, more than three years later. Plaintiff's other claim against de Castro is identified as "intentional abandonment." That alleged cause of action is merely a restatement of the legal

[2] SDCL § 15-2-25 provides:

> When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

malpractice claim and is also time barred. Plaintiff's counsel agreed at the hearing that there are no claims for fraud or deceit made against de Castro. Therefore, Defendant de Castro is entitled to judgment on the pleadings.

As to Defendants Imhoff, Evans, and Dorvall, it is undisputed that they had no further representation of Plaintiff after the sentencing on May 30, 2014. Evans sent a closing letter on October 27, 2014 confirming that Defendants' representation of Plaintiff stopped at the sentencing. Again, this action was commenced in July 2017, more than three years after the sentencing. Plaintiff's legal malpractice claims are time barred as to Defendants Imhoff, Evans, and Dorvall, and they are entitled to judgment on the pleadings as to those claims.

Plaintiff has alleged claims of fraud and deceit against Defendants Imhoff, Evans, and Dorvall. Plaintiff argues that he is entitled to application of the six year statute of limitations as to those claims. However, Defendants Imhoff, Evans, and Dorvall argue that those claims are manufactured claims of fraud and deceit and that they are, in reality, veiled legal malpractice claims. Defendants argue that Plaintiff's fraud and deceit claims revolve around Evan's effectiveness as an attorney and that Imhoff hired an ineffective attorney to represent Plaintiff. Defendants argue that reliance is part of fraud and deceit and Plaintiff has not pled reliance. Further, Defendants assert that many of the allegations are either puffery, which is not actionable as fraud, or represent future promises that Plaintiff failed to plead that Defendants had no intent to perform at the time of the future promise.

The parties primarily cite to Bruske v. Hille, 1997 SD 108, 567 N.W.2d 872 and Masloski v. Century 21 Am. Real Estate Inc., 2012 SD 58, 818 N.W.2d 798. In Bruske, the South Dakota Supreme Court stated that medical malpractice claims characterized as fraud and deceit would not sanction a shift to a more beneficial statute of limitations. In Masloski, the South Dakota Supreme Court acknowledged that the same transactions may give rise to two causes of action having different statutes of limitations. Id. at ¶12, 818 N.W.2d at 802. "[W]hen one of two statutes of limitations may be applicable, such application should always be tested by the nature of the allegations in the complaint, and if there is any doubt as to which statute applies, such doubt [shall] be resolved in favor of the longer limitation period." Id. at ¶ 12, 818 N.W.2d 798, 802 (quoting Morgan v. Baldwin, 450 N.W.2d 783, 786 (S.D. 1990)). "South Dakota does . . . separately consider allegations of negligence and fraud, as well as the different aspects of the professional relationship to determine the gravamen of the cause of action." Masloskie, 2012 S.D. 58, ¶ 11, 818 N.W.2d at 801–02.

Plaintiff's allegations of fraud and deceit are set forth in Paragraph 27(a)-(w) of the Amended Complaint. In reviewing Plaintiff's Amended Complaint, his claims against Evans and Dorvall represent a reassertion of his claims for legal malpractice, specifically Evans' failure to utilize the victim's prior inconsistent statements (see ¶ 27(g) of Plaintiff's Amended Complaint); Evan's failure to utilize an expert (see ¶ 27(h)); Dorvall's failure to take an active role in pretrial and trial activities (see ¶ 27(i)); Evan's claims that de Castro's non-appearance at trial was

"unimportant" (see ¶27(j)); Evan's failure to properly prepare Plaintiff and his wife as witnesses (see ¶27(k)); and Evan's failure to have Plaintiff prepared by a lawyer other than Evans (see ¶27(l)). The gravamen of those claims lie in legal malpractice, rather than fraud and deceit.

As to Plaintiff's fraud and deceit claims against Imhoff, Plaintiff's allegations refer to representations that Imhoff made on his website about his ability to represent defendants "vigorously" and "provide high-quality" legal representation. See ¶¶ 27(o)-(w). The court agrees with Defendants that those claims represent puffery, rather than actionable fraud or deceit. Plaintiff also alleges that Defendant Imhoff represented himself as a specialist in defending many types of crimes when in fact he hired other inexperienced attorneys who were licensed to practice in the particular jurisdiction. See ¶27(a). Also, he alleges that Defendant Imhoff represented that he would hire "good lawyers", but in fact Plaintiff alleges that de Castro abandoned him, Evans was ineffective, and Dorvall "virtually did nothing at trial[.]" See ¶27(b). He alleges that Defendant Imhoff did not disclose Evans and Dorvall's lack of experience. See ¶¶ 27(c)-(f). Ultimately those allegations all come back to the effectiveness of the representation Plaintiff received from Defendants. The gravamen of those claims is legal malpractice. Artful pleading cannot change those claims to benefit from a longer statute of limitations. As such, the three years statute of repose of SDCL § 15-2-14.2 bars those claims.

SDCL 15-2-14.2 is a statute of repose and an action for legal malpractice must be commenced within three years of the last occurrence. This action was commenced more than three years after Defendants ceased representing Plaintiff. Plaintiff's fraud and deceit claims are really legal malpractice claims and thus are subject to SDCL 15-2-14.2. Defendants' Motions for Judgment on the Pleadings is granted.

ORDER

Based upon the foregoing, it is hereby ordered:

1) that Defendants' Motions for Judicial Notice are GRANTED;

2) that Plaintiff's claims against Defendant de Castro of Legal Malpractice and Intentional Abandonment are time barred by SDCL 15-2-14.2; therefore Defendant de Castro's Motion for Judgment on the Pleadings is GRANTED;

3) that Plaintiff's claims of Legal Malpractice against Defendants Imhoff, Evans and Dorvall are time barred by SDCL 15-2-14.2; therefore Defendants' Motion for Judgment on the Pleadings is GRANTED as to those claims; and

4) that Plaintiff's claims of Fraud and Deceit against Defendants Imhoff, Evans and Dorvall have their gravamen in legal malpractice and as such are time barred by SDCL 15-2-14.2; therefore Defendants' Motion for Judgment on the Pleadings is GRANTED as to those claims.

Dated this 8th day of December, 2017

BY THE COURT:

Rodney Steele
Circuit Court Judge

ATTEST:
Angelia M. Griese, Clerk of Court

By _____ Deputy

FILED
DEC 12 2017
Minnehaha County, S.D.
Clerk Circuit Court

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

FRED SLOTA, Plaintiff, v. IMHOFF AND ASSOCIATES, P.C., a California Professional Corporation, Henry Evans, Shannon Dorvall, Manuel de Castro, Jr., Defendants.	49CIV. 17-001878 **JUDGMENT**

Defendants Imhoff and Associates, Henry Evans, Shannon Dorvall, and Manuel de Castro, Jr. (collectively "the Defendants"), moved for judgment on the pleadings. A hearing was held with regard to the Defendants' motions on December 1, 2017, before the Honorable Rodney Steele. On December 8, 2017, this Court entered a Memorandum Opinion and Order that granted the Defendants' Motion for Judicial Notice and granted the Defendants' Motions for Judgment on the Pleadings as to all of Plaintiff Fred Slota's ("Plaintiff") claims of legal malpractice, fraud/deceit, and intentional abandonment found in Plaintiff's First Amended Complaint ("Court's Memorandum Opinion"). Based on the Court's Memorandum Opinion it is

ORDERED, ADJUDGED, AND DECREED the Court's Memorandum Opinion is incorporated by reference in this Judgment; it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the First Amended Complaint of Plaintiff against the Defendants is dismissed, on the merits, with prejudice; and it is

FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, as the prevailing parties, are entitled to disbursements pursuant to SDCL 15-17-37. The Clerk of the Courts shall enter the amounts below in accordance with SDCL 15-6-54(d).

(a) Disbursements and costs awarded to Defendants Imhoff and Associates, Henry Evans, Shannon Dorvall in the amount of $_____.

(b) Disbursements and costs awarded to Defendant Manuel de Castro Jr. in the amount of $_____.

Dated December 15, 2017

BY THE COURT

Honorable Rodney Steele
Circuit Court Judge

ATTEST:

Angelia Gries, Clerk

By _____
Deputy

FILED
DEC 19 2017
Minnehaha County, S.D.
Clerk Circuit Court

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

FRED SLOTA, Plaintiff, v. IMHOFF AND ASSOCIATES, P.C., a California Professional Corporation, Henry Evans, Shannon Dorvall, Manuel de Castro, Jr., Defendants.	49CIV. 17-001878 **DEFENDANTS IMHOFF AND ASSOCIATES, P.C., HENRY EVANS, AND SHANNON DORVALL'S ANSWER TO PLAINTIFF'S COMPLAINT**

Defendants Imhoff and Associates, P.C. ("Imhoff"), Henry Evans ("Evans"), and Shannon Dorvall ("Dorvall") (collectively "these Defendants"), by and through their undersigned counsel, answer Plaintiff Fred Slota's ("Plaintiff") Complaint dated July 6, 2017 ("the Complaint") as follows:

ANSWER

1. These Defendants deny each and every matter, allegation, and thing, in the Complaint except those matters, allegations, and things specifically admitted in this Answer and remit Plaintiff to his strict proof thereof

2. Paragraphs 2, 3, and 4 of the Complaint are denied.

3. In answering the allegations set forth in Paragraphs 1 & 5 of the Complaint, these Defendants deny all allegations except these Defendants admit that Plaintiff was convicted on March 26, 2014 of the offense of one count of Sexual Contact with a Child under the Age of Sixteen and one count of first degree rape in the action entitled *State of South Dakota v. Frederick Blair Slota* in Docket No. 06 CRI. 13-173 ("Underlying Criminal Action"). These

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Defendants admit the Court ultimately struck Plaintiff's guilty verdict on the count of Sexual Contact with a Child under the Age of Sixteen as a result of a post-trial motion in the Underlying Criminal Action. These Defendants further admit that the Plaintiff filed a petition for writ of habeas corpus to vacate the criminal conviction on the grounds of ineffective assistance of counsel and that his conviction was vacated by order of the circuit court on June 7, 2017, which incorporated a memorandum decision dated May 26, 2017 (the "Habeas Corpus Proceeding"), and that no appeal was taken, but the circuit court ordered that Plaintiff be retried in the Underlying Criminal Action and Plaintiff is currently scheduled for an initial appearance on October 2, 2017.

4. In answering the allegations set forth in Paragraph 6 of the Complaint, these Defendants lack sufficient information to admit or deny the residence of Plaintiff and Manuel de Castro ("Castro") at this time, so Defendants deny the same and remit Plaintiff to strict proof thereof. The remaining allegations set forth in Paragraph 6 of the Complaint are admitted.

5. Paragraph 7 of the Complaint is denied and these Defendants incorporate its answers to Paragraphs 1-6 of the Complaint above by reference as if set forth fully herein.

6. Paragraph 8 of the Complaint is denied.

7. In answering the allegations set forth in Paragraph 9 of the Complaint, these Defendants deny all allegations except they admit that they had an attorney-client relationship with Plaintiff, which terminated on May 30, 2014.

8. In answering the allegations set forth in Paragraph 10 of the Complaint, these Defendants lack sufficient information to admit or deny the allegations, so Defendants deny the same and remit Plaintiff to strict proof thereof.

9. Paragraph 11 of the Complaint is denied.

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10. In answering Paragraph 12 of the Complaint, these Defendants admit Vincent Imhoff is licensed to practice law in Illinois, California, and Pennsylvania.

11. Paragraphs 13, 14, 15, and 16 are denied.

12. In answering the allegations set forth in Paragraph 17 of the Complaint, these Defendants deny that Evans had "little experience in criminal law" and deny that Evans had never tried a jury trial. These Defendants admit that Evans had never defended a criminal rape case, but that Plaintiff had knowledge of such throughout the duration of Evans' representation.

13. Paragraphs 18 and 19 of the Complaint are admitted only insofar that Dorvall was an employee of Imhoff, while Evans was an independent contractor and that Dorvall and Evans did agree to represent the Plaintiff in the Underlying Criminal Action. Defendants also admit that Castro had an independent contractor agreement with Imhoff, which is dated May 10, 2013, and was assigned and had agreed to represent Plaintiff.

14. Paragraph 20 of the Complaint is denied.

15. Paragraph 21 of the Complaint is denied. These allegations relate to Castro, who will be filing a separate answer in response hereto.

16. In answering the allegations set forth in Paragraph 22 of the Complaint, these Defendants lack sufficient information to admit or deny the allegations, so Defendants deny the same and remit Plaintiff to strict proof thereof. Furthermore, these allegations relate to Castro, who will be filing a separate answer in response hereto.

17. Paragraph 23 of the Complaint is denied. These allegations relate to Castro, who will be filing a separate answer in response hereto.

18. Paragraph 24 of the Complaint is denied. Attached as **Exhibit A and B** to this Answer is a true and correct copy of the Circuit Court's Memorandum Decision and the Circuit

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Court's Order incorporating said memorandum decision in Plaintiff's Habeas Corpus Proceeding. In answering the specific allegations in the sub-paragraphs of Paragraph 24 of the Complaint, the Circuit Court's Memorandum Decision speaks for itself. Defendants deny that any of the Circuit Court's findings constitute legal malpractice.

19. Paragraph 25 of the Complaint is denied and these Defendants incorporate its answers to Paragraphs 1-24 above by reference as if set forth fully herein.

20. Paragraph 26 of the Complaint sets forth legal conclusions and questions of law which no response is required, and to the extent one is required, these Defendants admit that they owed Plaintiff a fiduciary duty as attorneys.

21. Paragraph 27 of the Complaint is denied.

22. Paragraph 28 of the Complaint is denied and these Defendants incorporate its answers to Paragraphs 1-27 of the Complaint above by reference as if set forth fully herein

23. Paragraph 29 of the Complaint is denied. These allegations relate to Castro who will be filing a separate answer in response hereto.

DEFENSES

24. Plaintiff's claims as alleged in the Complaint are barred by the statute of limitations. An action against an attorney for malpractice, error, mistake, or omission can be commenced only within three years after the alleged malpractice, error, mistake, or omission shall have occurred. SDCL 15-2-14.2. Plaintiff's malpractice action accrued upon these Defendants' termination of representation. These Defendants did not make any filings or appearances after May 30, 2014, in the Underlying Criminal Action. Plaintiff had retained new counsel, Ellery Grey, who solely represented Plaintiff in the Underlying Criminal Action after the May 30, 2014 sentencing hearing. Moreover, both Evans and Castro sent closing letters to

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Plaintiff demonstrating that Defendants' representation had been terminated after the May 30, 2014 sentencing hearing in the Underlying Criminal Action. Attached to this Answer as **Exhibit C and D** are true and correct copies of these letters. As such, Plaintiff had three years from May 30, 2014, to bring his legal malpractice claims. However, Plaintiff commenced this civil action on July 7, 2017, outside the prescribed three-year period. As such, Plaintiff's claims are barred by the applicable statute of limitations.

25. Plaintiff's claims as alleged in the Complaint are barred, in whole or in part, as Plaintiff cannot prove "actual innocence" as to the underlying criminal charges.

26. Plaintiff's claims as alleged in the Complaint are barred, in whole or in part, by Plaintiff's contributory negligence.

27. Plaintiff's claims as alleged in the Complaint are barred, in whole or in part, by Plaintiff's assumption of the risk.

28. Plaintiff's claims as alleged in the Complaint are barred, in whole or in part, by the doctrine of waiver.

29. Plaintiff's fraud and deceit claims as alleged in the Complaint are not set out with sufficient particularity and are therefore barred in whole or in part.

30. Plaintiff's fraud and deceit claims as alleged in the Complaint are based on opinions and not on representations of existing facts and are therefore barred in whole or in part.

31. In the event further investigation or discovery reveals the applicability of any such defenses, Defendants reserve the right to seek leave of the court to amend this Answer to more specifically assert any such defense.

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WHEREFORE, these Defendants pray for entry of a judgment by the Court granting the following relief:

1. Dismissing Plaintiff's Complaint with prejudice;

2. Awarding these Defendants their costs and disbursements; and

3. Granting such additional relief deemed just and equitable by the Court.

JURY DEMAND

These Defendants request a jury trial on all issues so triable.

Dated this 4th day of August, 2017.

/s/ Thomas J. Welk
Thomas J. Welk
Jason R. Sutton
Mitchell W. O'Hara
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Attorney for Defendants

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CERTIFICATE OF SERVICE

I, Thomas J. Welk, hereby certify that I am a member of Boyce Law Firm, L.L.P., and that on the 4th day of August, 2017, a true and correct copy of the foregoing was electronically filed and served through Odyssey File and Serve System on:

James D. Leach
1617 Sheridan Lake Rd.
Rapid City, SD 57702
jim@southdakotajustice.com
Attorney for Plaintiff

William P. Fuller
Fuller & Williamson
7521 S. Louise Avenue
Sioux Falls, SD 57108
bfuller@fullerandwilliamson.com
Attorney for Manuel de Castro, Jr.

/s/ Thomas J. Welk
Thomas J. Welk

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FILED
MAY 30 2017
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT
By

STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF BROWN	FIFTH JUDICIAL CIRCUIT
FREDERICK BLAIR SLOTA, Petitioner, v. DARIN YOUNG, Warden, South Dakota State Penitentiary, Respondent.	**CIV. 15-406** **MEMORANDUM DECISION**

An evidentiary hearing on a Habeas Corpus petition was held on April 17, 2016 in the above entitled matter. Petitioner, Frederick Blair Slota, appeared personally and with counsel, Ellery Grey, while Respondent appeared through counsel, Christopher White of the Brown County State's Attorney Office. Petitioner asserts trial counsel on the underlying charges[1] provided ineffective assistance of counsel, necessitating a vacation of Petitioner's conviction and granting of a new trial on the charge of First Degree Rape before the trial court. At the conclusion of the hearing, the Court reserved ruling on the petition until after the parties submitted written briefs. All briefs were submitted to the Court by September 12, 2016. This Memorandum Decision constitutes the Court's ruling on Petitioner's Habeas Corpus petition.

BACKGROUND

Petitioner was tried on charges of first-degree rape and sexual contact with a child under the age of sixteen. The case was prosecuted by the Brown County State's Attorney. The victim, A.K., was seven years old at the time of the incident and eight years old at the time of the jury

[1] Brown County Criminal File Number 13-173.

EXHIBIT
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trial. Petitioner and his wife Nina Slota were A.K.'s foster parents between September 2012 and December 2012.

The incident was disclosed on December 6, 2012, when A.K. made a statement in music class that she had sex with her father. A.K.'s teacher immediately reported the incident to Erin Zachow, A.K.'s school counselor. On the same day, Zachow talked with A.K. about the incident. A.K. stated that she was lying in bed with Petitioner but denied any sexual touching had occurred. Zachow wrote down the statement in a school report and orally reported this incident to the Department of Social Services ("DSS"), the legal guardian of A.K. at that time. After school, DSS case worker Kayleigh Hofmeyr interviewed A.K. Hofmeyr used a diagram drawing of a female body to have A.K. identify the body parts. A.K. denied that anyone had touched her private parts except Mrs. Slota when she was helping A.K. put on pants for school. A.K. was subsequently removed from the Slotas' home.

On December 12, 2012, A.K. was referred to Child's Voice[2] in Sioux Falls, South Dakota for a forensic examination. At Child's Voice, Dr. Nancy Free conducted a medical examination on A.K.'s body and found everything was normal except for a known hearing impairment. Colleen Brazil, a forensic interviewer at Child Voice, conducted an interview of A.K. Brazil used a drawing of a female body to have A.K. identify body parts. A.K. initially denied any sexual touching had occurred, but later claimed that it did. She also provided sensory details such as what the alleged abuse felt like, what she was allegedly supposed to touch, and whether the alleged touching was over or under the clothes. The interview was recorded and the recorded video was admitted into evidence at trial.

[2] Child's Voice is a child advocacy center. It provides medical evaluations for children who are possible victims of abuse and neglect.

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As a result of these investigations, Petitioner was interviewed by Detective Tanner Jondahl of the Aberdeen Police Department on December 13, 2012. At that time, Detective Jondahl disclosed to Petitioner the results of the forensic interview. Petitioner denied A.K.'s allegations.

On January 23, 2013, during an ongoing counseling session with Ellen Washenberger, a Lutheran Social Services worker, A.K. showed confusion about why she was removed from the Slotas' home. She stated that no one touched her, and someone told her that Petitioner had sex with her, but he did not. Washengerger reported this conversation to DSS workers Hofmeyr and Jaime Mogen. Hofmeyr documented this information in a report.

In the early stages of the case, Henry Evans, a licensed South Dakota attorney, was assigned as Petitioner's lead counsel through Imhoff & Associates (Imhoff), a California law firm. Imhoff also assigned Shannon Dorval, a licensed California attorney, and Manuel de Castro, a licensed South Dakota attorney to assist Mr. Evans with preparation of the trial. Mr. Evans had been practicing law since 1995 with his primary focus on criminal defense and immigration. However, Mr. Evans had never conducted a criminal defense jury trial prior to representation of Petitioner.

Several months before the jury trial, the defense team prepared an outline assigning different portions of the trial work to each defense attorney. According to the drafted outline, de Castro would conduct the opening and closing arguments; Mr. Evans would cross-examine the State's expert witness Colleen Brazil. De Castro or Dorval would cross-examine A.K. The defense team also sought to retain an expert witness for Petitioner. However, since Petitioner requested an expedited proceeding, trial counsel decided not to call the expert witness to testify at trial. Due to a time conflict, de Castro did not attend the trial. Dorval attended the trial but did

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not assist with cross-examination or arguments before the jury. Mr. Evans ended up doing almost all of the trial work.

With the assistance of Jeff Larson, an experienced criminal defense attorney in Sioux Falls, Mr. Evans conducted criminal discovery. Through discovery proceedings, Mr. Evans obtained the above mentioned exculpatory statements that A.K. made to Zachow, Hofmeyr, and Washenberger, respectively. According to Mr. Evans's habeas hearing testimony, the defense's initial trial strategy was to use these three statements to impeach A.K. However, Mr. Evans did not subpoena Zachow, Hofmeyr, or Mogen, who would be able to introduce these exculpatory statements into evidence. Mr. Evans learned that Hofmeyr had left DSS and was residing in Montana but her exact whereabouts remained unknown.

At trial, the defense called the DSS worker, Tracy Steele, the Slotas and Washenberger. None of the three exculpatory statements was admitted into evidence at trial. The State offered the testimony of A.K., Dr. Free, Brazil, and Detective Jondahl. The trial court, on its own initiative and without a pre-closure hearing, closed the courtroom during A.K.'s testimony. Neither party objected to the courtroom closure. The State requested and the trial court granted that Brazil be allowed to remain in the courtroom during A.K.'s testimony.

At trial, A.K. testified:

Q [The State's Attorney]. Do you remember telling Colleen [Brazil] that Fred did naughty things to you?
A [A.K.]. Yes.
Q. What naughty things did Fred do to you?
A. He was in my bed and he was touching my private part.
Q. What do you call your private part Allie?
A. A pookie.
Q. A pookie?
A. Yes.
Q. And you said Fred touched your pookie?
A. Yes.
Q. What did he -- what did Fred use to touch your pookie?

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A. Both parts.
Q. What did he use -- did he touch you with his hand when he touched your pookie?
A. Yes.
Q. And did he touch on the inside, the outside or both?
A. Both.
...
Q [Mr. Evans]. And you testified earlier that this was a picture of you and Fred reading on the bed [referring to a picture A.K. drew during her visit with Ms. Washenberger]?
A [A.K.]. Yes.
Q. And did you testify that Fred just read to you that night, nothing more?
A. Yes.
Q. That he didn't do any bad touch?
A. Yes.
Q. That was your testimony earlier?
A. Wait. No.

Dr. Free testified that the medical exam neither supported nor refuted sexual abuse. Brazil commented on both A.K.'s interview at Child's Voice and trial testimony, and concluded that A.K. was not suggestible. Brazil further commented on the prosecutor and defense attorney's performance in questioning A.K.

The jury found Petitioner guilty of both charges. As a result of post-trial motions, the conviction for Sexual Contact With a Child Under the Age of Sixteen contained in Count Two of the verdict Form was struck. Petitioner was sentenced to thirty years in the South Dakota State Penitentiary on the charge of First Degree Rape. Petitioner directly appealed his conviction on the ground that the trial court improperly closed the courtroom during A.K.'s testimony and demanded a new trial. The Supreme Court affirmed the conviction, holding a new trial was not warranted because the trial court's error was remedied by a post-trial hearing regarding the courtroom closure. Petitioner now seeks habeas corpus relief, arguing ineffective assistance of counsel.

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ANALYSIS AND DECISION

I. Legal Standard

Habeas corpus, the relief sought by Petitioner, is "a collateral attack on a final judgment and therefore [the Court's] review is limited." *Stark v. Weber*, 2016 S.D. 38, ¶ 10, 879 N.W.2d 103, 106 (quoting *Legrand v. Weber*, 2014 S.D. 71, ¶ 10, 855 N.W.2d 121, 126 (quoting *Davis v. Weber*, 2013 S.D. 88, ¶ 9, 841 N.W.2d 244, 246)). This limited form of judicial review is confined to three questions. *See id.* (citations omitted). First, the Court can review whether the sentencing court had jurisdiction over the crime and defendant. *Id.* (citation omitted). Second, the Court can review whether the sentence imposed by the sentencing court was authorized by law. *Id.* (citations omitted). Third, the Court can review whether the defendant, now incarcerated, was deprived of any basic constitutional rights. *Id.* (citations omitted).

Petitioner proceeds under the final question, asserting he was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). In order to prevail on his claim, Petitioner "must 'prov[e] he is entitled to relief by a preponderance of the evidence.'" *McDonough v. Weber*, 2015 S.D. 1, ¶ 15, 859 N.W.2d 26, 34 (alteration in original) (quoting *Vanden Hoek v. Weber*, 2006 S.D. 102, ¶ 8, 724 N.W.2d 858, 861-62). The two-part test announced by the Supreme Court of the United States in *Strickland, supra*, is used to determine whether a petitioner received ineffective assistance of counsel on the underlying charges. *McDonough*, 2015 S.D. 1, ¶ 21, 859 N.W.2d at 36-37. Under the *Strickland* test, a petitioner must "prove that his . . . attorney performed deficiently and that he . . . was prejudiced by the deficient performance." *Id.* ¶ 21, 859 N.W.2d at 37 (citations omitted).

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"The first prong requires that a [petitioner] establish that counsel's representation fell below an objective standard of reasonableness." *Kleinsasser v. Weber*, 2016 S.D. 16, ¶ 17, 877 N.W.2d 86, 92 (citing *Strickland*, 466 U.S. at 688). This means that "[t]he question is whether counsel's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Stark*, 2016 S.D. 38, ¶ 11, 879 N.W.2d at 106-07 (citations omitted). A strong presumption exists "that counsel's performance falls within the wide range of professional assistance and the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kleinsasser*, 2016 S.D. 16, ¶ 17, 877 N.W.2d at 92 (citations omitted). It is incumbent upon the petitioner to "rebut the strong presumption that . . . counsel's performance was competent." *Stark*, 2016 S.D. 38, ¶ 11, 879 N.W.2d at 107 (citation omitted). While a trial counsel's performance does not need to be ideal and counsel's strategic decisions will be respected, these considerations must be balanced and a court must insure that counsel's performance was within the realm of professional competence. *Randall v. Weber*, 2002 S.D. 149, ¶ 7, 655 N.W.2d 92, 96 (quoting *Roden v. Solem*, 431 N.W.2d 665, 667 n. 1 (S.D.1988)).

The second prong requires a petitioner to establish prejudice as a result of counsel's deficient performance. *McDonough*, 2015 S.D. 1, ¶ 23, 859 N.W.2d at 37. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* (quoting *Strickland*, 466 U.S. at 691). Consequently, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kleinsasser*, 2016 S.D. 16, ¶ 17, 877 N.W.2d at 92 (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The right to effective

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assistance of counsel... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986).

II. Whether Trial Counsel's Representation Was Deficient.

A. Failure to utilize A.K.'s prior inconsistent statements

It is undisputed that the three inconsistent statements discovered well before the trial could have been admissible at trial. The issue is whether trial counsel's failure to admit and utilize these inconsistent statements amounts to ineffective assistance of counsel.

1. Trial counsel's failure to impeach A.K. fell below an objective standard of reasonableness.

While impeachment on a minor issue is a matter of trial strategy, *Davi v. Class*, 2000 S.D. 30, ¶ 48, 609 N.W.2d 107, 117, impeachment of a key witness is not. *See, Dillon v. Weber*, 2007 S.D. 81, ¶ 17, 737 N.W.2d 420, 427. In *Dillon*, a case involving charges of rape and criminal pedophilia, the victims' mother testified that her children were healthy and normal prior to Dillon's alleged sexual assault. *Id.* The mother's testimony was contradicted by the victims' medical records that revealed an extensive history, including more than 50 emergency room visits. *Id.* The trial attorney, however, made no effort to use these medical records to impeach the mother's testimony. *Id.* The Supreme Court found, among other things, that the trial counsel was ineffective for failing to impeach the mother's testimony. *Id.* Similarly, the United States Court of Appeals for the Eleventh Circuit held an attorney's failure to impeach a star witness with a prior inconsistent statement was incompetent. *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989). There, the decedent's wife testified at another trial that another person shot her husband and that she never saw the defendant with a gun. *Id.* Yet at the defendant's trial, the wife

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identified the defendant as the man who killed her husband and testified he had a gun. *Id.* The trial attorney failed to follow up on his cross-examination of the wife by confronting her with her prior inconsistent testimony. *Id.* The court found the trial attorney's failure to impeach the prosecution's star witness inexcusable. *Id.*

Here, trial counsel made the same fatal errors. At trial, Mr. Evans failed to use the three inconsistent and exculpatory statements to impeach A.K., the State's key witness. The first two exculpatory statements were made on the same day A.K. disclosed that Petitioner had sex with her. The significance of the first two exculpatory statements is that they were made well before any third party could taint A.K.'s testimony. The implication of the second exculpatory statement is even more significant in that A.K. denied any sexual touching occurred when she was shown a diagram of the human body and asked about specific body parts. The third exculpatory statement was made after the forensic interview at Child's Voice. In that statement, A.K. indicated she was told by someone to incriminate Petitioner.

The timing, form, content, and parties documenting the statements all showed the value of these exculpatory statements. Given that the victim was the key witness presented by the State, and that her credibility and suggestibility were of genuine concerns, no reasonable counsel would forgo these statements. Furthermore, the State, during closing remarks, argued that A.K. had been consistent throughout the proceedings. There is no better evidence than these three statements to rebut the State's inaccurate assertions. Michael Butler, an experienced criminal defense attorney from Sioux Falls, testified during the habeas hearing that impeachment of A.K. was the core of the defense and that the three exculpatory statements were invaluable for this defense. Reasonable counsel would not have any hesitation to use these statements at trial.

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Therefore, trial counsel's failure to get the three exculpatory statements into evidence falls short of the prevailing professional standard.

2. Trial counsel's change of trial strategy is contradicted by records.

The State argues that Mr. Evans' decision not to impeach A.K. was sound trial strategy. The State claimed that Mr. Evans changed the trial strategy after cross examination of A.K. Mr. Evans acknowledged the value of the three exculpatory statements, and admitted that his defense strategy was to impeach A.K. with these statements. However, it is troublesome that Mr. Evans did not even attempt to subpoena the witnesses who would be able to get the three exculpatory statements into evidence. Mr. Evans did not subpoena Zachow, the author of the school report, and Hofmeyr, the author of the two DSS reports that contained two exculpatory statements. When Mr. Evans learned that Hofmeyr was unavailable, he failed to make any formal notice of intent to offer her statement as residual hearsay. SDCL 19-19-807. Therefore, trial counsel's alleged last-minute change of trial strategy *after cross-examining* A.K. was contradicted by his failure to take the necessary action *before trial* to be prepared to get the three statements admitted into evidence at trial.

The State also argues that admission of the three inconsistent statements would open the gate for more consistent statements. Mr. Evans' change of strategy for fear of additional consistent statements was tenuous at best. If Mr. Evans's fear was real, he should have changed his trial strategy after the State threatened to use additional consistent statements to rehabilitate A.K. because the risk of admitting additional consistent statements existed from the time the defense plan to impeach A.K. was formulated. Those additional consistent statements, if admitted, would only be cumulative. Furthermore, any change of strategy, even if it was real, was forced by trial counsel's failure to be prepared to introduce the three inconsistent statements

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into evidence in the first place. The fact that the attorney was forced into such a situation indicates his ineffectiveness. *Nixon*, 888 F.2d at 116.

The State further argues that A.K. might explain away her inconsistent statements if she was confronted. The records show A.K. unequivocally testified that Petitioner touched her private part, both on direct-examination and cross-examination. However, when impeachment of the sole eyewitness is the only available trial strategy, failure to do so based on the feeling that the eyewitness would rehabilitate her inconsistent statements was unreasonable under prevailing professional norms and was not sound strategy. *Blackburn v. Foltz*, 828 F.2d 1177, 1184 (6th Cir. 1987). Mr. Evans's decision to forgo impeachment of A.K., the only eyewitness in this case, based on his impression that A.K. would rehabilitate herself was not sound trial strategy.

While this Court does not second guess trial counsel's trial strategy or the change thereof, Mr. Evans's logic for the change of strategy was contradicted by his own actions at trial.

B. Failure to object to the State's expert testimony

Petitioner argues that Brazil's testimony amounted to improper bolstering of A.K.'s credibility. The State, however, counters that Brazil merely addressed whether A.K.'s perception or memories are her own. Both parties cite *Washington v. Schriver* 255 F.3d 45 (2d Cir. 2001)[3], and *State v. Buchholtz*, 2013 S.D. 96, 841 N.W.2d 449, to support their arguments. In *Buchholtz*, the Supreme Court held a qualified expert may inform the jury of characteristics in sexually abused children and describe the characteristics the child exhibits. *State v. Buchholtz*, 2013 S.D. 96, ¶ 29, 841 N.W.2d 449, 459. One of the factors a trial court considers in determining the

[3] Petitioner apparently misreads the court's reasoning in denying the petitioner's habeas corpus in *Washington*. In *Washington*, the court recognized the distinction between credibility and suggestibility, finding an "emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses," and "an expert testimony on these subjects is admissible." *Washington*, 255 F.3d at 57. Nevertheless, the court denied the petitioner's writ of habeas corpus because the admission of the expert testimony would not have created a reasonable doubt about the petitioner's guilt. *Id.* at 60.

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competency of a child's testimony is "the child's susceptibility to suggestion and the integrity of the situation under which the statement was obtained" *Id.* ¶ 19 (quoting *State v. Cates*, 2001 S.D. 99, ¶ 11, 632 N.W.2d 28, 34). The Supreme Court has allowed forensic interviewers to testify at trial. See, e.g., *State v. Reyes*, 2005 S.D. 46, ¶ 24, 695 N.W.2d 245, 254; *L.S. v. C.T.*, 2009 S.D. 2, ¶ 19, 760 N.W.2d 145, 150; *Thompson v. Weber*, 2013 S.D. 87, ¶ 29, 841 N.W.2d 3, 9. Mr. Evans was aware of the cases where Brazil or other experts had been allowed to testify on their forensic interviews. Prior to trial, the trial court also had determined Brazil would be able to testify on A.K.'s suggestibility, but not on her credibility. At trial, Brazil analyzed what she observed of A.K.'s behavior during the forensic interview and trial testimony and concluded that A.K. was not suggestible or coached. Decisions to make motions and objections are generally within the discretion of trial counsel. *Roden v. Solem*, 431 N.W.2d 665, 667 (S.D. 1988). Mr. Evans' decision not to object to Brazil's testimony based on the trial court's prior ruling was not unreasonable.

C. Failure to object to forensic interviewer being permitted to remain in the courtroom during A.K.'s testimony

Courts do not give trial counsel the same deference if trial counsel's decisions in making motions or objections "cannot reasonably relate to any strategic decision and are clearly contrary to the actions of competent counsel in similar circumstances." *Roden v. Solem*, 431 N.W.2d 665, 667 (S.D. 1988). On direct appeal, the Supreme Court has addressed the trial court's *sua sponte* courtroom closure during A.K.'s testimony. *State v. Slota*, 2015 S.D. 15, ¶¶ 7, 26, 862 N.W.2d 113, 117, 122. The issue here is whether trial counsel should have raised an objection to the State's expert remaining in the courtroom based on SDCL 23A-24-6, a special statute regarding courtroom closure when a child is testifying on sexual offenses. SDCL 23A-24-6 provides:

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> Any portion of criminal proceedings, with the exception of grand jury proceedings, at which a minor is required to testify concerning rape of a child, sexual contact with a child, child abuse involving sexual abuse, or any other sexual offense involving a child may be closed to all persons except the parties' attorneys, the victim or witness assistant, the victim's parents or guardian, and officers of the court and authorized representatives of the news media, unless the court, after proper hearing, determines that the minor's testimony should be closed to the news media or the victim's parents or guardian in the best interest of the minor.

In the event of courtroom closure, according to the statute, *all persons* are excluded from the courtroom except the enumerated parties. A trial court certainly has the discretion to determine whether the courtroom should be closed to the public. However, if the court chooses to do so, it has limited discretion in allowing which parties remain in the courtroom under the plain reading of the statute. According to the statute, the court may choose to further exclude parties from the courtroom, such as news media, parents or guardians of a victim for the best interest of the minor. But the court cannot do the opposite—expanding the list of parties who are allowed to remain in the courtroom. This plain interpretation is also consistent with the legal maxim *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another." *In re Estate of Flaws*, 2012 S.D. 3, ¶ 19, 811 N.W.2d 749, 753. Mr. Evans admitted that he was aware of the statute, and that allowing the expert witness to remain in the courtroom did not benefit Petitioner. Mr. Evans' failure to object to the State's request cannot reasonably relate to any strategic decision. A competent counsel in similar circumstances should have objected to Brazil remaining in the courtroom during A.K.'s testimony.

D. Failure to object to the State's closing argument

During the State's rebuttal closing argument, the State made the following remarks:

> Would Allie go through all of this just to make it up, is the number one question. And you've got to understand what she went through. She makes a disclosure at school. She talks to her school counselor. They want you to believe she's still making it up at this point. Then she goes and gets interviewed by the DSS worker

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> the same night she makes the allegations, they want you to believe she's still making it up.

The State further argued that "[A.K.] got cross-examined by Mr. Evans and she still told a consistent story. Nothing changed." The State clearly misstated the facts in front of the jury. In arguing A.K. did not change her testimony, the State indicated A.K. made consistent statements at school, to her school counselor and DSS workers. The State went beyond arguing the permissible inferences from the evidence when A.K's statements to the school counselor and DSS worker were inconsistent with her initial disclosure in class. Contrary to the State's position that a closing argument is merely an argument, the prosecutor must refrain from injecting unfounded or prejudicial remarks into the proceedings, and must not appeal to the prejudices of the jury. *State v. Janis*, 2016 S.D. 43, ¶ 22, 880 N.W.2d 76, 82. (quotation omitted). Trial counsel should have objected to the State's improper closing argument.

E. Totality of the circumstances

In light of all the circumstances, trial counsel's representation fails short of the prevailing professional standard. The defense's theory was that either A.K. made it up or a third party committed the offenses. Because of the lack of alibi evidence, impeachment of A.K. became the only defense. Mr. Evans attempted but failed to follow through on this theory. His failure to use A.K.'s inconsistent statements alone constitutes deficient representation. His ineffectiveness was compounded by other cumulative errors, such as failure to object to the State's expert witness remaining in the courtroom and his failure to object to the State's improper closing argument. While the latter errors standing alone do not amount to ineffective assistance of counsel, they show trial counsel's lack of experience in defending child abuse cases.

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III. Whether Petitioner Was Prejudiced By Trial Counsel's Representation

Assessed under the ultimate fairness of trial, trial counsel's cumulative errors clearly prejudiced Petitioner. A review of the trial record shows the evidence against Petitioner was far from overwhelming. Dr. Free testified that there was no physical evidence supporting or refuting sexual abuse. Because of the lack of physical evidence, the entire case turned on the credibility of A.K. As such, trial counsel only needed to inject reasonable doubt in the minds of the jurors as to A.K.'s credibility or suggestibility.

However, Mr. Evans' cumulative errors deprived Petitioner of such opportunities. First, Petitioner lost the opportunity to impeach A.K. due to Mr. Evans' failure to admit three prior inconsistent statements into evidence. The failure to impeach A.K. left the jury with an incorrect impression that A.K.'s testimony was consistent throughout the investigation and trial. The State's improper closing argument that A.K. was telling a consistent story further influenced the jury's impression about A.K.'s credibility. Second, Petitioner lost the opportunity to effectively cross-examine the State's expert who testified that A.K. was not suggestible. Given A.K.'s initial denial of any inappropriate touching and later change of testimony, the defense could have offered these inconsistent statements to undermine the expert's opinion that A.K. was not suggestible. The State's expert's testimony would be further weakened if the expert was prevented from observing A.K.'s trial testimony. In sum, had the jury heard A.K.'s inconsistent statements and argument that A.K. was coached by third parties, the jury may well have had reasonable doubt as to whether A.K. was credible or reliable, thus undermining the confidence of the outcome. This Court concludes, but for trial counsel's unprofessional errors, the result of the trial would have been different.

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CONCLUSION

Petitioner has met his burden of proving that his trial counsel's representation was ineffective based on the totality of circumstances and that the deficient representation prejudiced him. Accordingly, the Petition for Habeas Corpus is hereby granted. The appropriate remedy for trial counsel's ineffective assistance of counsel is a new trial. Petitioner's conviction for First Degree Rape is hereby vacated due to ineffective assistance of trial counsel. This Court hereby orders that this matter be remanded back to the trial court for a new trial and further proceedings.

Counsel for Petitioner shall draft an appropriate Order to effectuate this Memorandum Decision, incorporating this Memorandum Decision by reference. Unless waived by Respondent, Counsel for Petitioner shall also prepare Findings of Fact and Conclusions of Law incorporating this Decision by reference.

DATED this 4th day of May, 2017 at Webster, South Dakota.

BY THE COURT:

Jon S. Flemmer
Circuit Judge

ATTEST:
Marla R. Zastrow, Clerk of Courts
By: Deputy Clerk

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FILED
JUN- 7 2017
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)
COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

FREDERICK BLAIR SLOTA,) CIVIL FILE NO. 15-406
)
Petitioner,)
)
v.) JUDGMENT AND
) WRIT OF HABEAS CORPUS
DARIN YOUNG, Warden of the)
South Dakota State Penitentiary,)
)
Respondent.)

The Court, having issued a Memorandum following a hearing in the above-captioned matter, and being fully advised of the legal issues,

It is hereby ORDERED as follows:

1. The Petition for a Writ of Habeas Corpus is GRANTED;
2. Judgment is GRANTED in favor of the petitioner; and
3. The underlying conviction of Frederick Blair Slota is hereby VACATED.

Dated this 7th day of June, 2017.

BY THE COURT:

Jon S. Flemmer

The Honorable Jon S. Flemmer
Circuit Court Judge

ATTEST:

Clerk of Courts

By: Deputy

SEAL

EXHIBIT
B

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IMHOFF & ASSOCIATES, PC
CRIMINAL DEFENSE ATTORNEYS
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June 19, 2014

Mr. Ellery Grey
Grey Law, Prof. LLC
909 St. Joseph St. #555
Rapid City, South Dakota 57701

Frederick Slota
South Dakota State Penitentiary
PO Box 5911
Sioux Falls, SD 57117-5911

Re: State of South Dakota v. Frederick Slota, Brown County

Gentleman:

This letter is to confirm my understanding that Mr. Grey has been retained in the above-entitled matter to represent Mr. Slota. With that understanding, I have closed my file and my assistance in this matter has ended. If there are any questions, please let me know.

Best Regards,

Manuel J. de Castro, Jr.
Attorney at Law

EXHIBIT
C

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October 27, 2014

Mr. Fred Slota
SD DOC 37258
PO BOX 5911
Sioux Falls, SD 57117

RE: Case closing letter

Dear Fred:

This confirms that Imhoff and Associates stopped representing you at the sentencing.

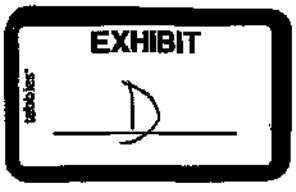
Please contact me with any questions.

Cordially,

Imhoff & Associates, PC

By: Henry K. Evans

CC: Ellery Grey



In the Supreme Court
of the
State of South Dakota

Fred Slota, Plaintiff-Appellant, v. Imhoff and Associates P.C. a California Professional Corporation, Henry Evans, and Shannon Dorvall, Defendants-Appellees.	)	No. 28496

Appeal from the Circuit Court of Minnehaha County
Honorable Rodney J. Steele, Judge

REPLY BRIEF FOR APPELLANT FRED SLOTA

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Notice of Appeal filed January 2, 2018

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ARGUMENT

I. The gravamen of Slota's fraud and deceit claims is fraud and deceit, not legal malpractice

A. Slota's claims against the remaining defendants are fraud and deceit

The circuit court ruled, and the remaining defendants argue, that Slota has no claims for fraud and deceit, because those claims are merely "artful pleading" of Slota's legal negligence claims. But as Slota will show below, the circuit court and defendants are wrong, particularly in light of the stringent fiduciary relationship that lawyers owe their clients.

1. Slota pled deceit against the remaining defendants

A comparison of the statutory definition of deceit with the allegations against the three remaining defendants shows that Slota pled deceit against each of them.

SDCL 20-10-2 defines deceit as:

> "(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

"(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

"(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

"(4) A promise made without any intention of performing."

Applying this statute to the facts, paragraph 27 of the Amended Complaint, which is presumed true for purposes of this appeal, makes the following allegations that fall within the statutory definition of deceit:

"(1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true."

Paragraph 27 alleges:

"a. Imhoff represented himself as a specialist in defending many types of crimes, including sex crimes, whereas in fact his practice and business model, in this case and others, was to hire the

least expensive attorney or attorneys he could find who were licensed in the jurisdiction in which the accused was charged, without regard to whether the attorney or attorneys were specialists in the crime charged, and without regard to whether in this case the attorney or attorneys were specialists in sex crimes;

"b. Imhoff represented that he would hire good lawyers who specialized in sex cases to represent Slota, but in fact hired a lawyer who abandoned Slota (de Castro); a lawyer who did virtually nothing at trial (Dorvall); and a lawyer (Evans) who was (in the words of the circuit court) "unprofessional," had never tried a case, did not know how to subpoena the right witness to get critical witness statements into evidence, and was so incompetent at trial, as detailed by the circuit court judge who heard the habeas proceeding and

as recounted above, that Slota was convicted when—according to the circuit court—but for Evans' unprofessional errors Slota would have been acquitted.

"f. Imhoff falsely represented Shannon Dorvall as an expert in defending sex crimes; but while the jury was deliberating, she admitted to Dr. Slota that she did not consider herself an expert in defending sex crimes, and her total failure to see that Slota received competent representation confirms this fact.

"j. Evans claimed that de Castro's non-appearance at trial was unimportant, a fact he knew was untrue.

"m. Dr. Slota [Fred Slota's wife] located a person named Lawrence W. Daly, who had extensive experience in helping defend sex crimes; he agreed to work with Slota; Imhoff said he would work with Daly but never had any intention of

doing so, because Imhoff wanted to keep control of the case for himself, and Imhoff refused to work with Daly.

"o. Imhoff falsely claimed on his web site that "we have well-versed knowledge regarding laws in each state," whereas in fact the lawyers he hired to represent Slota were, in the habeas judge's words, "unprofessional" and "incompetent."

"p. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

"q. Imhoff falsely claimed on his web site that "you can rest assured in knowing we will do everything in our power to secure the most favorable outcome possible."

"r. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

"s. Imhoff falsely claimed on his web site that "Our firm can vigorously defend your rights, liberties, and reputation against child molestation charges."

"t. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

"u. Imhoff falsely claimed on his web site that its attorneys "provide high-quality legal representation in 48 states."

"v. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

"w. Imhoff is a small firm that falsely represented itself to Slota's wife, before Slota hired them, as a large firm."

"(2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."

Paragraph 27 alleges:

"a. Imhoff represented himself as a specialist in defending many types of crimes, including sex crimes, whereas in fact his practice and business model, in this case and others, was to hire the least expensive attorney or attorneys he could find who were licensed in the jurisdiction in

which the accused was charged, without regard to whether the attorney or attorneys were specialists in the crime charged, and without regard to whether in this case the attorney or attorneys were specialists in sex crimes;

"b. Imhoff represented that he would hire good lawyers who specialized in sex cases to represent Slota, but in fact hired a lawyer who abandoned Slota (de Castro); a lawyer who did virtually nothing at trial (Dorvall); and a lawyer (Evans) who was (in the words of the circuit court) "unprofessional," had never tried a case, did not know how to subpoena the right witness to get critical witness statements into evidence, and was so incompetent at trial, as detailed by the circuit court judge who heard the habeas proceeding and as recounted above, that Slota was convicted when—according to the circuit court—but for

Evans' unprofessional errors Slota would have been acquitted.

"o. Imhoff falsely claimed on his web site that "we have well-versed knowledge regarding laws in each state," whereas in fact the lawyers he hired to represent Slota were, in the habeas judge's words, "unprofessional" and "incompetent."

"p. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

"q. Imhoff falsely claimed on his web site that "you can rest assured in knowing we will do everything in our power to secure the most favorable outcome possible."

"r. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no

reasonable ground to believe it to be true; his actions as detailed above prove it was false and he knew it was false.

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"u. Imhoff falsely claimed on his web site that its attorneys "provide high-quality legal representation in 48 states."

"v. Imhoff knew this false claim was untrue, and he did not believe it to be true, and he had no reasonable ground to believe it to be true; his

actions as detailed above prove it was false and he knew it was false.

"w. Imhoff is a small firm that falsely represented itself to Slota's wife, before Slota hired them, as a large firm."

"(3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

Paragraph 27 alleges:

"c. Imhoff suppressed everything he knew about Evans' lack of experience, even though his fiduciary duty required him to disclose it; and he disclosed other facts about Evans that were likely to mislead Slota, and did mislead Slota, because of the fact[s] that Imhoff failed to disclose.

"d. Imhoff suppressed the fact that his true purpose was to make as much money as possible by hiring

the least expensive lawyers he could get to do the work, regardless of their abilities."

"(4) A promise made without any intention of performing."

Paragraph 27 alleges:

"e. Imhoff promised that he would see that Slota received quality legal services by specialists in sex crimes, a promise he had no intention of performing and utterly failed to perform.

"g. Evans represented to Slota during the trial that he could get the alleged victim's prior statements into evidence, but he had no reasonable ground to believe this was true.

"i. Dorvall represented to Slota that she would take an active role in pre-trial and trial, but in fact did virtually nothing.

"l. Evans told Slota that he would be prepared by a lawyer other than Evans, for a separate and additional fee, because that would be best, but

Evans had no intention of performing this promise, made no attempt or effort to perform it, and failed to perform it.

"m. Dr. Slota located a person named Lawrence W. Daly, who had extensive experience in helping defend sex crimes; he agreed to work with Slota; Imhoff said he would work with Daly but never had any intention of doing so, because Imhoff wanted to keep control of the case for himself, and Imhoff refused to work with Daly.

"n. Imhoff promised to arrange for Slota to take an independent polygraph test, to attempt to convince the prosecution not to proceed, but failed to arrange such a test; Imhoff never had any intention of paying for an independent polygraph test; instead Imhoff sent Slota to the Aberdeen police department for a polygraph test by a police officer, with predictable results."

In summary, comparison of the statutory elements of deceit with the allegations of the Amended Complaint shows that Slota pled facts constituting deceit.

2. Slota pled fraud against the remaining defendants

Fraud is defined as: "[T]hat a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage." *Masloskie v. Century 21 Am. Real Estate, Inc.*, 2012 S.D. 58, ¶ 14 n.3, 818 N.W.2d 798, 803, quoting *North American Truck & Trailer, Inc. v. M.C.I. Commun. Servs., Inc.*, 2008 S.D. 45, ¶ 8, 751 N.W.2d 710, 713.

Paragraph 27 of the Amended Complaint, subparagraphs a, b, e, f, g, i, j, l, m, n, o, p, q, r, s, t, u, v, and w, all quoted above, allege facts that meet the elements of fraud. Because plaintiff has just quoted those subparagraphs, he will not re-quote them here, in accordance with the rule of SDCL 15-26A-60(6) that "[n]eedless repetition shall be avoided."

3. Breach of an attorney's fiduciary duty to a client can constitute fraud and deceit

In a footnote at page 16 of their brief, defendants attempt to rebut twelve pages of Slota's brief (page 9 to 21) showing that breach of fiduciary duty can constitute fraud and deceit. Defendants' footnote is contrary to explicit South Dakota law that breach of fiduciary duty constitutes fraud and deceit. Brief for Appellant Fred Slota page 10 to 11.

Defendants' footnote erroneously concludes that "all claims are barred even if the amended complaint states a fraud claim"—a conclusion inconsistent with the six-year statute of limitations for fraud and deceit.

B. The entire transaction teems with fraud and deceit

Defendants' argument seems to be, in part, that no single part of paragraph 27 of the Amended Complaint states a complete claim for fraud or deceit. While plaintiff disagrees, the issue is different. Fiduciaries, such as the defendants in this case, must "exercise and maintain the utmost good faith, honesty, integrity, fairness, and fidelity." *In re Mattson*, 2002 S.D. 112, ¶ 44, 651 N.W.2d, 278, 287, quoting 7A CJS, Attorney & Client § 234 (1980). A fiduciary may not balkanize each separate fact to escape

liability for breaching its fiduciary duty. The entire transaction shows fraud and deceit sufficient to nauseate an honest lawyer.

C. Defendants' case citations are unpersuasive

Defendants assert that *Bruske v. Hille*, 1997 S.D. 108, 567 N.W.2d 872, requires that Slota's claims be closely examined to determine their true nature. Slota agrees. He has closely examined those claims above in sections I. A. and shown that their true nature is deceit and fraud.

Defendants argue that *Haberer v. Rice*, 511 N.W.2d 279, 284 (S.D. 1994), in setting out the elements of legal malpractice, shows that Slota's fraud and deceit claims are consistent with "the classic definition of legal malpractice," which is:

> "1. the existence of an attorney-client relationship giving rise to a duty;
>
> "2. that the attorney, either by an act or a failure to act, violated or breached that duty;
>
> "3. that the attorney's breach of duty proximately caused injury to the client; and
>
> "4. that the client sustained actual injury, loss or damage."

But defendants are wrong, because Slota accuses them of multiple acts of deceit and fraud that are not encompassed anywhere in the *Haberer v. Rice* definition of legal malpractice. So the *Haberer v. Rice* definition of legal malpractice, compared with defendants' acts and omissions set out above, supports Slota, not defendants. Defendants' error is the same as the circuit court's error: the conclusion that because defendants' conduct constitutes legal malpractice, it cannot also constitute fraud and deceit. Fortney & Johnson, *Legal Malpractice Law* (West 2d. ed. 2008) at 25 and 26, quoted in the Brief for Appellant Fred Slota, pages 9 to 10 and 11 to 12.

Defendants rely on *Gullatte v. Rion*, 763 N.E.2d 1215, 1219 (Ohio App. 2000), which rejected a fraud claim against an attorney on the ground that "the gist of the plaintiffs' claims relate[s] to the alleged inappropriateness of the legal advice given and that the label given to the cause of action is immaterial." [brackets in original, internal quotations omitted] "The gist of the plaintiffs' claims" here is deceit and fraud, as shown above.

Masloskie v. Century 21 Am. Real Estate, Inc., 2012 S.D. 58, ¶ 14, 818 N.W.2d 798, 803, held that where the gravamen of plaintiffs' claim is based in fraud as much as in negligence, breach of contract, or breach of fiduciary

duty, doubt regarding the statute of limitations is resolved in favor of the longer period. (Slota's opening brief has a typographical error: it says "lower" period not "longer" period.)

Defendants attempt to escape from this rule by arguing that it has been modified by *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406, which held that the two-year medical malpractice bar is a statute of repose, not a statute of limitations. As Slota agreed in the circuit court, the three-year statute for legal malpractice claims of SDCL 15-2-14.2 is so similar to the medical malpractice statute that under *Pitt-Hart*, the legal malpractice statute is also a statute of repose.

But this has nothing to do with the issue before this Court, which is whether Slota's fraud and deceit claims are subject to the six-year fraud and deceit statute of limitations, or whether they are subject to the three-year legal negligence statute of repose. Defendants frame the issue as which of two potential statutes of limitations apply, but the real issue is which of two potential *time limits* apply. *Pitt-Hart v. Sanford USD Medical Center* says absolutely nothing on this subject.

Defendants assert that "Because a statute of repose is a substantive right to be free from suit, the principal [sic] of applying the longer of two potential *statutes of limitations* cannot be used to extend a *statute of repose*." Appellees' Brief p. 19 [emphasis in original]. They are correct. A statute of limitations cannot extend a statute of repose. But Slota does not seek to extend the three-year legal malpractice statute of repose. He seeks only to apply the six-year statute of limitations to his fraud and deceit claims. And under *Masloskie v. Century 21 Am. Real Estate, Inc.*, where his claim is based on fraud and deceit, not legal malpractice, the fraud and deceit statute applies.

Defendants signal their inability to find any real supporting authority by placing a "*See*" signal in front of their only case on this subject, *Two Denver Highlands Ltd. Liab. Ltd. Pshp. v. Stanley Structures, Inc.*, 12 P.3d 819 (Colo. App. 2000). *Two Denver Highlands* does not say anything that helps defendants. It does not say that a fraud and deceit claim is erased because a related negligence claim is beyond a statute of repose. *Two Denver Highlands* stands for the same rule as many other cases: that to determine what statute of limitations applies, a court must look to the true

nature of the action. In *Two Denver Highlands*, the true nature of the action was a construction dispute, so the construction statute of repose applied.

Slota pursued a legal negligence claim, and a separate claim for fraud and deceit. The legal negligence claim is time-barred by the legal negligence statute of repose. The claims for fraud and deceit rest on the facts of paragraph 27 of the Amended Complaint, which are different from and in addition to the legal negligence facts. The claims for fraud and deceit meet the statutory requirements for those claims, as shown above. So *Two Denver Highlands* is irrelevant. The statute of limitations for fraud and deceit applies to Slota's claims because his claims now are solely for fraud and deceit.

Defendants' fallback argument is that even if *Pitt-Hart* has nothing to do with *Masloskie*, Slota's claim still is barred because the true nature of his claim is legal negligence, not fraud and deceit. Slota addressed this claim above in his discussion of *Haberer v. Rice* in section I. C. The true nature of his claims now are fraud and deceit. Those claims, contrary to what defendants say, do not "originate from alleged facts that demonstrate attorney ineffectiveness." Appellee's Brief p. 21. They originate from facts

that are presumed true in this appeal, and that demonstrate fraud and deceit.

D. Defendants' four final arguments lack merit

Defendants make four final arguments, all of which lack merit.

First, defendants allege that paragraphs 27 (a), (b), (e), (o), (p), (q), (r), (s), (t), (u), (v), and (w) are non-actionable statements of opinion. Defendants are wrong. Paragraphs 27(a), (b), (o), (p), (q), (r), (s), (t), (u), (v), and (w) are representations of fact that were untrue, made by one who did not believe them to be true, and assertions as a fact of that which was not true, by one who had no reasonable ground for believing them to be true, which constitutes deceit under SDCL 20-10-2(1) and (2). Paragraph (e) is a promise made without any intention of performing, which is deceit under SDCL 20-10-2(4).

Second, defendants argue that paragraphs 27(g), (h), (i), and (k) allege future promises but lack any allegation that the promissors did not intend to perform. Defendants are wrong as to two of the four paragraphs: paragraphs 27(g) and (i) allege a promise made without any intention of performing, which is deceit under SDCL 20-10-2(4).

Third, defendants assert, accurately, that Slota did not explicitly allege reliance. For multiple reasons, this does not justify affirming the circuit court.

- Slota's reliance on defendants' deceit and fraud is implicit in the allegations of his Amended Complaint. It is difficult to read paragraph 27 and not understand that included within those allegations is the implicit assertion that Slota relied on them.
- Defendants did not brief this issue to the circuit court, they only argued it, and the circuit court did not dismiss the case based on this ground. This Court may affirm the circuit court if there is a legal basis for upholding the circuit court's ruling, but this rule does not apply here, because the circuit court had the right to allow Slota to amend his complaint to explicitly allege reliance if it deemed it necessary. And "leave [to amend] shall be freely given when justice so requires." SDCL 15-6-15(a). So whether Slota needed to amend to explicitly allege

what is implicit in the Amended Complaint, and if so whether leave to do so should be granted in light of the "freely given" standard, is for the circuit court to decide in the first instance.

- Reliance is not an element of deceit. SDCL 20-10-1 makes deceit actionable, and 20-10-2 defines deceit, but neither includes reliance as an element. This court has stated that reliance is an element of deceit. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 12, 699 N.W.2d 493, 498. But the Legislature has the right to define the elements of deceit, and it has done so without including reliance.
- Reliance cannot be an element of every tort of fraud and deceit, because "[f]raud and deceit include not only affirmative acts, but also acts of omission." *City of Aberdeen v. Rich*, 2001 S.D. 55, ¶ 20, 625 N.W.2d 582, 587, and reliance is not required to prove fraud based on an omission. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 50 (1977)

(reliance not element of failure to disclose claim in securities fraud case); *Comer v. Pers. Auto Sales, Inc.*, 368 F. Supp. 2d 478, 486 (M.D.N.C. 2005) (reliance not element of failure to disclose fraud claim); *Robertson v. White*, 633 F. Supp. 954, 969 (W. D. Ark. 1986) ("where the fiduciary failed to disclose important facts . . . reliance is inferred rather than proved.") This makes sense, because a plaintiff cannot rely on what a defendant does not disclose. And in the present case, defendants' omissions are part of their fraud and deceit. Amended Complaint paragraphs 27(c) and (d) and SDCL 20-10-2(3).

Fourth, defendants claim that paragraphs 27(c), (d), (f), (j), (l), (m), and (n) are "simply conclusory and overly vague." Again, defendants are wrong:

- paragraphs 27(c) and (d) allege the suppression of a fact by one who is bound to disclose it, and who gives information of other facts that were likely to mislead for

lack of communication of that fact, which is deceit under SDCL 20-10-2(3);

- paragraphs 27(f) and (j) allege the suggestion, as a fact, of that which was not true, by one who did not believe it to be true, which is deceit under SDCL 20-10-2(1); and
- paragraphs 27(l), (m), and (n) allege a promise made with no intention of performing, which is deceit under SDCL 20-10-2(4).

II. Defendants' argument that SDCL 15-2-14.2 establishes a three-year statute of repose for Slota's fraud and deceit claims is contrary to their position in circuit court, and is wrong

A. Defendants' argument is contrary to their position in circuit court

In the circuit court, defendants admitted the obvious: that the statute of limitations for fraud and deceit is six years. Motions Hearing Oral Argument p. 9, lines 2-4 (Mr. Welk: "the statute of limitations for fraud and deceit is, as the Court knows, is [sic] six years from the accrual based upon SDCL 15-2-13.") (Although the transcript is not listed in the current alphabetical index, the Supreme Court Clerk's Office informed plaintiff's

counsel on April 26 that the transcript is in the Supreme Court record. This is required by SDCL 15-26A-53, which makes the transcript part of the record on appeal.)

Despite this admission in circuit court, defendants assert on appeal that Slota's fraud and deceit claims are barred by the three-year statute of repose of SDCL 15-2-14.2. Appellee's Brief p. 8.

It is elementary that a party may not take one position in the court below and the opposite position on appeal. To preserve an issue for appeal, a party must raise it below. *Veith v. O'Brien*, 2007 S.D. 88, ¶ 35, 739 N.W.2d 15, 26. Far from raising the issue below, defendants conceded it. They may not reverse field now.

B. Defendants' argument is wrong

Defendants' argument is that the "plain language" of SDCL 15-2-14.2 chosen by the Legislature applies not just to "malpractice," but also to "error, mistake, or omission," and those three words include fraud and deceit. Appellee's Brief p. 9. But fraud and deceit are based on intentional acts, or at least—for fraud and deceit under SDCL 20-10-2(2)—reckless acts. "Error, mistake, or omission" require neither intention nor

recklessness. And fraud and deceit have their own statute of limitations. As defendants accurately informed the circuit court, it is found in SDCL 15-2-13, and it is six years.

This Court uses the "usual and ordinary understanding of the English language" to "avoid creating absurdities," and to "avoid rendering other text meaningless." *Argus Leader Media v. Hogstad*, 2017 SD 57, ¶ 28, 902 N.W.2d 778, 787. The Legislature is presumed competent in the English language. If it had ever wanted to include lawyer fraud and deceit in the three-year statute of repose for lawyer negligence, it would have done so.

Conclusion

Fred Slota's attorneys violated their fiduciary relationship with him by committing multiple acts of fraud and deceit. The cause of action on those claims is six years. The circuit court erroneously ruled that Slota's fraud and deceit claims were merely legal negligence claims disguised by "artful pleading." Slota's claims for fraud and deceit are claims for fraud and deceit, because they are within the definitions of fraud and deceit. The six-year statute of limitations has not run on those claims.

Slota respectfully requests that this Court reverse the dismissal of his fraud and deceit claims against the three remaining defendants, and remand the case for further proceedings.

Dated: May 2, 2018 Respectfully submitted,

/s/ James D. Leach
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Certificate of Service

On May 2, 2018, I served this brief on appellees by e-mailing it to defendants' attorneys, tjwelk@boycelaw.com, jrsutton@boycelaw.com, and mwohara@boycelaw.com.

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Certificate of Compliance

This brief was prepared in Palatino Linotype 13 for Word Perfect. It contains 4,491 words.

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