IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28249

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,
Plaintiff /Appellant,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,
Defendants, Third-Party Plaintiffs/Appellees,

vs.

YANKTON COUNTY, SOUTH DAKOTA,
Third-Party Defendant/Appellee.

Appeal from the Circuit Court
First Judicial Circuit
Yankton County, South Dakota

The Honorable John Pekas

BRIEF OF APPELLANT

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Notice of Appeal filed October 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes **Page(s)**

PRELIMINARY STATEMENT

Plaintiff/Appellant, Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta, will be referred to as "Robinson"; Defendants/Third-Party Plaintiffs/Appellee, Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox, will be referred to as "Fox"; Third-Party Defendant/Appellee, Yankton County, South Dakota, will be referred to as "Yankton County." References to pleadings and other documents in the underlying record, *Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta vs. Harmelink, Fox & Ravnsborg, et. al.*, Yankton County Civil File No. 16-0079, will be supported by a citation to the settled record ("SR"). The transcript of the July 17th, 2017, Motions Hearing - Motion to File Amended Answer, will be referred to as ("MHT") followed by page and line number(s). The transcript of the September 20th, 2017, Summary Judgment Hearing will be referred to as "SJT" followed by page and line number(s).

JURISDICTIONAL STATEMENT

Robinson appeals from the order granting Defendants/Third-Party Plaintiffs' motion for leave to file amended answer entered by the trial court on September 20, 2017, the trial court's oral order granting Defendants/Third-Party Plaintiffs' motion for summary judgment issued on September 20, 2017 and subsequent Judgment of Dismissal entered by the trial court on September 25, 2017. (SJT, 14:10-21), (SR-271). Defendants/Third-Part Plaintiffs' noticed entry of the Judgment of Dismissal on September 25, 2017. (SR-273). Robinson filed her Notice of Appeal on October 24, 2017. (SR-277). The Court has jurisdiction pursuant to SDCL §§ 15-26A-3(4); 15-26A-4; 15-26A-6.

STATEMENT OF THE LEGAL ISSUES

(1) Whether Robinson was prejudiced by the trial court allowing defendants/third-party plaintiffs to amend their answer to include a previously unpled affirmative defense?

The trial court held that there would be no prejudice to Robinson and allowed defendants/third-party plaintiffs to amend their answer to include the affirmative defense of statute of repose.

Most relevant cases and authority:
SDCL § 15-6-15(a)
McDowell v. Citicorp Inc., 2008 S.D. 50
Prairie Lakes Health Care Sys. v. Wookey, 1998 S.D. 99

(2) Whether this Court's ruling in *Pitt-Hart* overrules thirty years of legal malpractice jurisprudence holding that SDCL § 15-2-14.2 is a statute of limitation subject to the continuing representation doctrine?

The trial court held that the *Pitt-Hart* decision eliminated the continuing representation doctrine (adopted in 1988) and prohibits any circumstances that will delay or toll the commencement or running of SDCL § 15-2-14.2.

Most relevant cases and authority:
SDCL § 15-2-14.2
Pitt-Hart v. Sanford USD Med. Ctr., 2016 S.D. 33
Williams v. Maulis, 2003 S.D. 138
Schoenrock v. Tappe, 419 N.W.2d 197 (S.D. 1988)

STATEMENT OF THE CASE AND FACTS

Robinson commenced the underlying legal malpractice action on January 27, 2016 when Fox's counsel returned Admissions of Service related to the Summons and Complaint. (SR-172, ¶ 1), (SR-10), (SR-11). Robinson's Complaint alleged professional negligence against Fox for failing to properly serve all defendants in order to preserve all legal claims held by her; failing to possess the knowledge and skill ordinarily possessed by attorneys in good standing engaged in handling personal injury claims in South Dakota; failing to use the care and skill ordinarily exercised under similar circumstances

by attorneys in good standing handling personal injury claims in South Dakota; failing to identify and locate all appropriate defendants in a timely and appropriate manner; failing to advise their client that handling her claim may require knowledge, skill, and expertise beyond that possessed by the Fox; failing to initiate a legal claim against all appropriate defendants within the statute of limitations; subordinating their client's interests to the conflicting interests of the jointly represented bankruptcy trustee and estate; failing to refer their client to an attorney possessing the special knowledge, skill, and expertise required to handle her personal injury claim; failing to be diligent in an effort to accomplish the purposes for which they were employed; failing to properly preserve all of their client's claims; failing to keep their client reasonably apprised of the status of her claim; failing to make reasonable efforts to settle their client's claim; failing to inform the bankruptcy trustee of a potential legal malpractice claim against Fox resulting from their failure to serve a defendant before the statute of limitations ran on the underlying personal injury action resulting from an April 28, 2007 motor vehicle accident. (SR-2, ¶ 32.)

Fox provided Yankton County with the Summons and Complaint for service on the named defendants on April 23, 2010. (SR-2, ¶ 15.) April 23 was a Friday and only six days before the statute of limitations on the underlying personal injury action expired. (SR-2, ¶ 16.) However, Fox thought that the sixty (60) day extension provided by SDCL § 15-2-31 for service of the summons and complaint applied because she placed the documents in the hands of the Sheriff's Department in the county where the defendants resided. (Deposition of Wanda Howey-Fox, 40: 7-14.) If SDCL § 15-2-31 applied, the statute of limitation would not expire until June 29, 2010. (SR-172, ¶ 5.)

Yankton County was able to serve Michelle Mitchell on April 24, 2010 but was unable to locate Chelsey Ewalt because she had moved to Codington County and no longer lived in Yankton County. (SR-2, ¶ 17-18.) The Codington County Sheriff's Department eventually served Ewalt on May 25, 2010 in Watertown, South Dakota, after the statute of limitations had expired. (SR-2, ¶ 19.) The trial court granted summary judgment in favor of Ewalt on February 17, 2011 based on invalid service before expiration of the statute of limitations. On February 28, 2011, Fox filed a petition for discretionary appeal with the Clerk for the South Dakota Supreme Court. This Court issued an Order granting Fox's petition for discretionary appeal on March 31, 2011. (Appeal #25912.)

This Court considered the case on briefs on October 3, 2011 and issued an opinion on January 4, 2012. The opinion remanded the case back to the trial court for a jury trial to determine the county where Ewalt "usually or last resided" as that issue would control the application of SDCL 15-2-31 and the sixty-day extension period, which would determine whether the statute of limitations barred Robinson's claim. *Jill Robinson formerly known as Jill Robinson-Kutcha v. Michelle M. Mitchell and Chelsey A. Ewalt*, 2012 S.D. 1, ¶ 15.

A jury trial took place on February 11, 2013 and returned a verdict that determined Ewalt "usually or last resided" in Codington County not Yankton County. (SR-177, Ex. J), (SR-172, P.3 ¶ 2.) The trial court granted summary judgment in Ewalt's favor and issued a judgment of dismissal on April 5, 2013. (SR-177, Ex. M at P. 4.)

Robinson commenced the underlying legal malpractice action on January 27,

2016. The original Answer, to Robinson's Complaint, filed by Fox contained four defenses but failed to raise any affirmative defenses including the statute of limitations. (SR-12, ¶ 6-8.) Robinson and Fox filed motions for leave of court to amend their complaint and answer. (SR-59), (SR-50.) Robinson sought to amend her complaint to include a claim of professional negligence against Fox for loaning a current client (Robinson) money and taking her diamond anniversary ring as collateral, which was worth far more than the $3,800 Fox had loaned Robinson. (SR-103, ¶ 32 (m).) Fox sought to amend their answer to include the affirmative defense of statute of repose. (SR-50.) The Court granted both parties' motions to amend and issued an order on September 9, 2017. (SR-267.)

Fox filed a motion for summary judgment on August 22, 2017 and a hearing on that summary judgment motion was held on September 20, 2017. (SR-113), (SJT, 1:10-11.) The trial court issued an oral bench ruling granting Defendants/Third-Party Plaintiffs' motion for summary judgment. (SJT, 14:10-21.)

STANDARD OF REVIEW

In reviewing a grant or a denial of summary judgment under *SDCL 15-6-56(c)*, this Court must determine whether the moving party has demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. This Court's task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. *Keegan v. First Bank*, 519

N.W.2d 607, 610-11 (S.D. 1994).

It is well settled that "summary judgment is proper on statute of limitations issues only when application of the law is in question, and not when there are remaining issues of material fact." *Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 S.D. 16, ¶ 6, 575 N.W.2d 457, 459 (citing *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111, 113 (S.D. 1990)). Generally, statute of limitations questions are left for the jury. *Id*. Summary judgment is therefore improper where there is a *dispute of material fact* which would affect the application of the statute of limitations. *Schoenrock v. Tappe*, 419 N.W.2d 197 (S.D. 1988) (*emphasis added*).

ARGUMENT

I. *The trial court erred when it ruled that Robinson would not be prejudiced by allowing the defendants/third-party plaintiffs to amend their answer to include the affirmative defense of statute of repose.*

The most important consideration in in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment. *McDowell v. Citicorp Inc*., 2008 S.D. 50, ¶16. The court should focus its inquiry on "whether the nonmoving party has a fair opportunity to litigate the new issue and to offer additional evidence if the case will be tried on a different point." *Id.*

A defendant ordinarily has a duty to plead any affirmative defenses and failure to do so will result in the defense being waived and barred. *Prairie Lakes Health Care Sys. v. Wookey*, 1998 S.D. 99, ¶ 29. This Court has long recognized that SDCL § 15-2-14.2 is a statute of limitation and an affirmative defense. See, *Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 S.D. 16; *Keegan v. First Bank*, 519 N.W.2d 607, (S.D. 1994); *Cooper v. James*, 2001 S.D. 59. The original Answer filed by Fox does not raise the

statute of limitations or any other affirmative defense. (SR-12, ¶ 6-8). According to counsel for Fox, they intentionally did not raise the statute of limitations as an affirmative defense at the time of filing their Answer, because it did not apply according to the continuing representation doctrine. (MHT 4:19-21).

The claimed change in law relied upon by Fox to support their motion to amend was handed down by this Court on April 13, 2016, less than two months after the Answer was filed in our case. However, Fox waited almost fifteen months after the holding in *Pitt-Hart* was issued before they filed their motion to amend. (SR-50.) Fox did not request leave of court to change a previously pled statute of limitations affirmative defense to that of a statute of repose but instead sought to amend their Answer to assert an entirely new affirmative defense, statute of repose. (SR-291, P. 2), (SR-53).

Allowing Fox to wait almost fifteen months to amend their Answer to include the affirmative defense of statute of repose based on a claimed change or clarification in law that occurred only two months after filing their original Answer, was unduly prejudicial to Robinson as evidenced by the trial court's subsequent ruling granting Fox's motion for summary judgment based on the statute of repose. Fox's attempted reliance and offered application of *Pitt-Hart* to our case is not the form of "justice" the legislature intended when it passed SDCL § 15-6-15(a).

II. *Pitt-Hart's application to legal malpractice claims should avoid manifest injustice.*

"[T]he analysis of our previous malpractice cases remains largely undisturbed." *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 26. The ramifications of the trial court's findings are substantial and make this Court's statement immediately above

untrue. Ceasing application of the continuing representation rule abrogates thirty years of prior legal malpractice precedent. See, *Schoenrock v. Tappe*, 419 N.W.2d 197, 200 (S.D. 1988) (holding "that the continuous treatment doctrine applies not only to medical malpractice actions but is also extended to legal malpractice actions"). The trial court's failure to effectively analyze the case under the continuing tort doctrine sets the stage for future injustice against the public by attorneys. If the trial court's findings are affirmed, legal malpractice suits must be filed prior to maturation and validity, resulting in a flood of unnecessary legal malpractice litigation.

A. The Continuing Representation Doctrine Saves Robinson's Claim

In 1988, this Court was confronted with whether the continuing representation doctrine should be applied to prevent the "statute of limitations" from running in a legal malpractice case.[1] *Schoenrock*, 419 N.W.2d at 199-200. The Court held that the "continuous treatment doctrine" applies not only to medical malpractice actions, but also extends to "legal malpractice actions." *Id*. at 200. The *Schoenrock* Court analyzed SDCL § 15-2-14.2, identical in 2018 as it then existed in 1988, and concluded it was an "occurrence rule" holding that the continuing representation doctrine could apply to prevent it from running until legal representation ceases. *Id*. (citing *Wells v. Billars*, 391 N.W.2d 668 (S.D. 1986)).

Thirteen years later, this Court reiterated its adoption of the "continuing treatment doctrine" in determining the applicable limitation period in a legal malpractice action. *Cooper v. James*, 2001 S.D. 59, ¶ 9 (citing *Shoenrock*, 419 N.W.2d at 200). The *Cooper*

1 It must be noted that the Court in *Pitt-Hart* clearly articulates that the medical malpractice statute is a "statute of repose." *Pitt-Hart*, 2016 S.D. 33 at ¶ 21.

Court relied upon the rule set forth in *Green v. Morgan, Theeler, Cogley & Petersen.*, 1998 S.D. 16, ¶ 13. The Court held that the continuous representation doctrine in a legal malpractice action applies when:

> Clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney. This relationship is one which is not sporadic but developing and involves a continuity of the professional services from which the alleged malpractice stems. Furthermore, the application of this doctrine should only be applied where the professional's involvement after the alleged malpractice is for the performance of the *same or related services* and is not merely continuity of a general professional relationship.

Green v. Morgan, Theeler, Cogley & Petersen, 1998 S.D. 16 at ¶ 16 (citing *Keegan v. First Bank*, 519 N.W.2d 607, 613 (S.D. 1994)).

"To affirm the grant of summary judgment, we must be convinced that no genuine issue of material fact exists that the professional service had been terminated or that no services were rendered that stemmed from the alleged malpractice." *Cooper*, 2001 S.D. 59 at ¶ 10. The continuing representation doctrine applies favorably to Robinson's claim. If the Court extends application of the Continuous Representation Doctrine to this claim, it must survive.

On April 28, 2007, Robinson was involved in an automobile accident. Defendant Fox was retained to represent Robinson. At the time, Defendant Fox was a Partner of the Harmelink, Fox & Ravnsborg Law Firm. On Robinson's behalf, Defendant Fox demanded $250,000 in damages in the Complaint filed against Defendant Ewalt. "The three-year statute of limitations for Robinson's personal injury action ran on April 29, 2010." *Robinson v. Mitchell*, 2012 S.D. 1, ¶ 13 (citing SDCL 15-6-6(a)). Defendant Fox failed to serve the proper Defendant "within the statute of limitations." *Robinson*, 2012 S.D. 1 at ¶ 13. This Court, however, remanded the case because the determination of

where the Defendant "usually or last resided" was a jury question, which controlled the application of SDCL§ 15-2-31. *Robinson*, 2012 S.D. 1 at ¶ 15.

On February 11, 2013, the jury determined the issue of Defendant Ewalt's residence unfavorable to Robinson. (SR-177, Ex. J.) Robinson did not get the benefit of SDCL § 15-2-31 or its sixty-day time extension, and she forever lost her claim against the proper party due to Defendant Fox's failure to timely file her claim and serve the proper party or parties in the statutory prescribed fashion. Defendant Fox's negligence was not determinable until the jury verdict issued on February 11, 2013. At a minimum, all representation of Robinson by Defendant Fox, until February 11, 2013, stemmed from her professional negligence. Worthy of note, Defendant Fox represented Robinson until February 12, 2015, the date Judge Eng signed an *Order Granting Motion to Withdraw as Attorney for Plaintiff* in Yankton County Civil File No. 10-242. (SR-177, Ex. J.)

Robinson filed suit against Defendant Fox on January 27, 2016, within three years of the date that Fox's negligence was determined to have occurred. Robinson alleges that Defendant Fox's professional negligence caused her injury, namely she has been forever barred from bringing her personal injury suit and recovering her damages sustained due to Defendant Fox's malpractice, i.e. failing to file suit in timely manner.

The trial court's ruling is confusing, but it expressly grants Fox's argument that Plaintiff's claims against Defendant Fox are time-barred. The court did not produce Findings of Fact and Conclusions of Law, a Memorandum Decision, nor any other memoranda articulating its rationale. The trial court found, via an oral finding in Court, "I agree with the argument of Mr. Fuller that the occurrence was properly articulated in his brief and in his argument to the Court. I'm going to grant judgment at this time for

both the Defendant Howey-Fox, et al, and the Yankton County." SJT 15: 18-22. Mr. Fuller, argues that the professional negligence action must have been brought by Robinson on April 29, 2013. (SR-117, P. 6, ¶ 1.) If this Court finds that the statute ran on April 29, 2013, as argued by Fox, precedent will be set requiring potential plaintiffs to file suit before, or shortly after, a claim is even viable. Defense counsel will attack these suits with motions to dismiss alleging the claim is not ripe because the elements of the underlying cause of action are not satisfied.

The trial court in adopting Fox's argument(s), is convinced that the *Pitt-Hart* decision forever prohibits the application of the continuing representation doctrine in a professional negligence case under any circumstances. However, the *Pitt-Hart* Court does apply the facts of the case to the continuous-treatment rule:

> Even if the [continuous-treatment] rule did apply, it is undisputed that ***Pitt-Hart*** received treatment from two providers unaffiliated with Sanford - let alone the same physician or clinic -- after his discharge from Sanford on November 13, 2009. Therefore, the continuous treatment rule *cannot* toll SDCL 15-2-14.1's two-year period of repose, nor should it under the facts of this case.

Pitt-Hart, 2016 S.D. 33 at ¶ 24. Although application of the continuing-treatment rule in *Pitt-Hart* resulted in not tolling SDCL §15-2-14.1, the fact that this Court undertook its analysis bolsters Robinson's argument, i.e. the continuing representation doctrine is not forever foreclosed from application. In this case, engaging in similar analysis can only yield a result that tolls SDCL § 15-2-14.2.

Fox, and trial court in adopting Fox's arguments, put a lot of stock in the fact 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." (SR-117, P. 4, ¶ 1.) (citing *Pitt-Hart*, 2016 S.D. 33 at ¶ 19). Dating back to 1988, when this Court first adopted the continuing

representation doctrine, the Court also found that SDCL § 15-2-14.2 was an "occurrence rule". See, *Schoenrock*, 419 N.W.2d at 199-200. None the less, for the past 30 years this Court has consistently applied the continuous representation doctrine when analyzing whether a legal malpractice case is time-barred.[2] Robinson's case presents a set of facts demonstrating a "clear indicia of an ongoing, continuous, developing, and dependent relationship between the client and the attorney ..." *Schoenrock*, 419 N.W.2d at 201. Robinson's case also meets the requirements of the continuous representation doctrine as further qualified in *Bosse v. Quam*, 357 N.W.2d 8 (S.D. 1995).

B. The Trial Court's Failure to Apply the Continuing Tort Doctrine Promotes Future Injustice to the Public by Attorneys

In the event the Court decides to foreclose application of the continuing representation doctrine, the continuous tort doctrine still applies to save Robinson's cause of action. If the facts of this case do not delay the statute from commencing or toll its running, attorneys are provided with a roadmap to commit malpractice and avoid liability at the expense of their clients. "While the continuous-treatment rule does not apply to a statute of repose, the continuing-tort doctrine does." *Pitt-Hart*, 2016 S.D. 33 at ¶ 26. One of the torts alleged by Robinson was not completed, at the earliest, until February 11, 2013, the date the jury decided Defendant Fox failed to comply with SDCL § 15-2-31. "When the cumulative result of continued negligence is the cause of the injury, the statute of repose cannot start to run until the last date of negligent [representation]." *Id.* (citing *Cunningham v. Huffman*, 609 N.E.2d 321, 325 (Ill. 1993); *Wells v. Billars*, 391 N.W.2d

[2] *Williams v. Maulis*, 2003 SD 138; *Cooper v. James*, 2001 SD 59; *Green v. Morgan, Theeler, Cogley & Petersen*, 1998 SD 16; *Keegan v. First Bank*, 519 N.W.2d 607 (S.D. 1994); *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111 (S.D. 1990); and *Schoenrock v. Tappe*, 419 N.W.2d 197 (S.D. 1988).

668, 672 n.1 (S.D. 1986)).

In *Schmiedt v. Loewen*, this Court articulated in a medical malpractice case, that if the negligence involves a continuing tort involving a continuing injury, the statute of limitations does not begin to run until the wrong terminates. 2010 S.D. 76, ¶ 11 (citing *Alberts v. Giebink*, 299 N.W.2d 454, 456 (S.D. 1980)). "In *Beckel*, we stated that the continuing tort theory is 'one exception,' under which the statute of limitations does not begin to run until the wrong terminates." *Schmiedt*, 2010 S.D. 76 at ¶ 13 (citing *Beckel v. Gerber*, 1998 S.D. 48, ¶ 10).

In our case, the wrong did not terminate and the occurrence did not exist until February 11, 2013, i.e. the date the jury decided Defendant Fox failed to comply with SDCL § 15-2-31. From this date, Plaintiff had three years to commence her cause of action, which she complied with. How can our legal system require Robinson to pursue a legal malpractice case before the door to her personal injury claim was legally shut? Moreover, how can our legal system require Robinson to pursue a legal malpractice case, much less find a lawyer willing to take the case before the claim was even viable. Prior to the jury determination, Robinson was unable to prove the four elements requisite to prevail on a legal malpractice claim.[3]

Unlike medical malpractice, legal malpractice is not as immediately apparent. An

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[3] To establish legal malpractice, the plaintiff must prove:

> 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 breach 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.

Grand State Prop., Inc. v. Woods, 1996 SD 139, ¶ 15 (citing *Haberer v. Rice*, 511 N.W.2d 279, 284 (SD 1994)).

untrained layperson can readily identify injury caused to them by medical malpractice. The injury could result from an operation on the wrong body part, a hospital fall, failure to completely suture a wound resulting in injury or death, etc. Conversely, an untrained layperson is unable to recognize the precise moment their attorney acted negligently. How can we expect the public to recognize that a legal malpractice claim *potentially* exists, while the issue giving rise to the *potential* claim is still being litigated - before the claim is even viable? Just like leaving a foreign object in the medical malpractice sense triggers the continuing tort doctrine, so to should ensuing litigation, appeals, and trials caused by an attorney's negligence trigger its application in the legal malpractice context. See, *Schmiedt*, 2010 S.D. 76, at ¶ 16 (considering whether a hemoclip was a foreign object triggering the continuing tort doctrine).

The fact Defendant Fox was under a legal duty to try to a local jury whether she complied with SDCL § 15-2-31 is continued negligence and only required as a result of her past negligence.

> The next decision, *Schoenrock, supra*, is important because it notes that the act or omission begins the running whether the act could have been later cured or not. Of course, ***an attorney is under a duty to correct the act because he or she is continuing to represent the client on the same matter then the statute of limitations is tolled***.

Kurylas, Inc. v. Bradsky, 452 N.W.2d 111, 115 (S.D. 1990) (emphasis added). The date Defendant Fox's representation stemming from the malpractice ended is the date the statute of repose commences, which is February 11, 2013 at the earliest.

C. If the Trial Court's Ruling is Affirmed, the Ramifications to Current Jurisprudence will be Wide Sweeping.

The trial court's decision, if affirmed, will result in wide sweeping change to professional negligence law, as well as the duties and obligations of an attorney to their

client. Recall, this Court stated, "the analysis of our previous malpractice cases remains largely undisturbed." *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 26. If true, this Court should reverse the lower court's ruling as the failure to do so will largely disturb long standing prior malpractice jurisprudence.[4]

If the lower court is affirmed, South Dakota attorneys will now be obligated to counsel their clients to file malpractice cases before the cause of action even exists. If Fox's argument(s) are accepted, Robinson would have been compelled to file her malpractice case largely before she could even satisfy the elements required for a professional negligence claim. Specifically, Robinson would have been unable to prove elements 2, 3, and 4 of her malpractice case had she filed suit on or before April 29, 2013 as proposed by Fox. (SR-117, P. 6, ¶ 1.); see also, *Grand State Prop., Inc. v. Woods*, 1996 S.D. 139, ¶ 15. Of course, this matter becomes even more complicated when analyzing whether an attorney can lawfully (much less practically) file a malpractice case against a fellow professional when unable to satisfy the required cause of action elements without reliance on future speculation.

Affirmation of the trial court's ruling will result in a floodgate of litigation, or alternatively, the public's loss of a legal remedy for wrongs forced upon them that are worthy of a legal recourse. As demonstrated by the facts of this case, Robinson apparently should have been counseled by Defendant Fox to seek outside malpractice representation on or about April 29, 2010. This being the date that Fox alleges she

[4] The continuous representation doctrine was first recognized in the area of medical malpractice. The continuing treatment rule in the medical malpractice area was accepted in *Alberts v. Giebink, supra*, and more fully developed in *Wells v. Billars*, 391 N.W.2d 668 (S.D. 1986). *Schoenrock, supra*, was the case which adopted the medical continuing treatment doctrine and extended it to legal malpractice actions. *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111, 115 (S.D. 1990).

engaged in "the last culpable act or omission." If the lower court is affirmed, Robinson would have been required to file her malpractice suit against Fox by April 29, 2013. (SR-117, P. 6, ¶ 1.) Recall that the jury did not determine that Fox failed to comply with SDCL § 15-2-31 until February 11, 2013. According to the trial court, Robinson had 77 days to file her malpractice suit (time between February 11, 2013 to April 29, 2013) from the date the claim became viable, i.e. February 11, 2013. In any event, this case certainly demonstrates it is not beyond the realm of plausibility that prospective malpractice litigants will have to file suit before their claim is viable.

Robinson's case further demonstrates, going forward, that attorneys will need to counsel clients to investigate malpractice lawsuits against them prior to viability. Whenever there is an unfavorable ruling for an attorney's client, regardless of access to future courts to effectuate/request redress, are we placing an affirmative duty on attorneys to advise clients to seek malpractice counsel? Would competent malpractice counsel consider taking the case if it is not currently viable? Would competent malpractice counsel file and preserve a malpractice case if unable to prove the required elements without speculating as to future occurrence(s)? If a malpractice attorney agrees to take the case pre-viability, would the original attorney (maybe negligent) still be required to represent the client in an effort to obtain a future favorable ruling/judgment/order that kills the case? Would litigants, like Robinson, lose access to meaningful justice because the facts entitling her to legally justified relief were delayed due exclusively to the actions of their legal counsel, like attorney Howey-Fox? Affirmation of the trial court's ruling results in wide scale interruption of long standing professional negligence jurisprudence. Robinson presents this Court with a set of facts which easily demonstrate the irrational

results which will ensue if the trial court is affirmed.

CONCLUSION

The statute of limitations or repose, whether tolled or delayed, did not begin to run, or commence until at least February 11, 2013. Long standing legal precedent unanimously confirms that Robinson should be given her day in court. The devastating effects that affirmation of the trial court's ruling will have are overwhelming, far reaching, and detrimental to the interests of the public. Either the continuous representation doctrine or the continuing tort doctrine provide this Court with the rationale necessary to save Robinson's cause of action and reverse the trial court's ruling.

Respectfully submitted this 6th day of April 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Brief of Appellant Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta has been produced in Microsoft Word using a 12 point proportionally spaced typeface for the text of the Brief; that the Brief contains 4,736 words and (17) pages, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated this 6th day of April 2018.

CHRISTOPHERSON, ANDERSON,
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April 2018, pursuant to SDCL §15-26C-4, I mailed the original Brief, Appendix, and attachments with two (2) copies to the Supreme Court and emailed a Word version of the same to the Supreme Court. I also electronically served Appellees the above Brief, Appendix, and attachments by transmitting electronic copies to them at the following email addresses:

William P. Fuller
Fuller & Williamson, LLP.
bfuller@fullerandwilliamson.com

Douglas M. Deibert
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Dated this 6th day of April, 2018.

CHRISTOPHERSON, ANDERSON,
PAULSON & FIDELER, LLP

/s/Casey W. Fideler

Casey W. Fideler

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

FILED
SEP 22 2017
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

66 CIV. 16-000079

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

vs.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

ORDER GRANTING DEFENDANTS'/THIRD-PARTY PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDED ANSWER AND PLAINTIFF'S MOTION TO AMEND COMPLAINT

A hearing on Defendants'/Third-Party Plaintiffs' Motion for Leave to File Amended Answer, as well as a hearing on Plaintiff's Motion to Amend Complaint took place on July 17, 2017, at 3:30 p.m., at the Minnehaha County Courthouse, the Honorable John R. Pekas presiding. All parties appeared through their respective counsel of record.

The Court has reviewed the parties' filings and submissions, heard arguments of counsel, and for good cause appearing it is hereby

ORDERED that:

1. Defendants'/Third-Party Plaintiffs' Motion for Leave to File Amended Answer is **GRANTED**.

2. Plaintiff's Motion to Amend Complaint is **GRANTED**.

Dated: 9/20/17

BY THE COURT:

The Honorable John R. Pekas
Circuit Court Judge

ATTEST: Angelia Gries, Clerk

By: _____
Deputy

FILED
SEP 25 2017
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

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66 CIV. 16-000079

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

vs.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

JUDGMENT OF DISMISSAL OF DEFENDANTS/THIRD-PARTY PLAINTIFFS AND THIRD-PARTY DEFENDANT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

A hearing on Defendants/Third-Party Plaintiffs', Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox, Motion for Summary Judgment, with Joinder by Third-Party Defendant, Yankton County, South Dakota, was held on Wednesday, September 20, 2017, at 2:30 p.m. at the Minnehaha County Courthouse in Sioux Falls, South Dakota, the Honorable John Pekas presiding. Plantiff appeared through counsel of record, Casey Fideler, Defendants/Third-Party Plaintiffs appeared through counsel of record, William Fuller, and Third-Party Defendant appeared through counsel of record, Douglas Deibert. The Court, having reviewed the parties filings and submissions, having heard arguments of counsel, and for good cause appearing, it is hereby

ORDERED, ADJUDGED, and DECREED that Defendants/Third-Party Plaintiffs' Motion for Summary Judgment, with Joinder by Third-Party Defendant, is GRANTED on the merits, and with prejudice, with each party to bear their own costs.

Dated: 9/22/, 2017.

BY THE COURT:

The Honorable John Pekas
Circuit Court Judge

ATTEST: Angella Gries, Clerk

By: Deputy

Page 1

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA

Plaintiff,

-vs-

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

-vs-

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

* *

DEPOSITION OF

Wanda Howey-Fox

* *

APPEARANCES:

Christopherson, Anderson, Paulson & Fideler, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Casey W. Fideler,

for the Plaintiff;

Fuller & Williamson, Attorneys at Law, Sioux Falls, South Dakota, by Mr. William P. Fuller,

for the Defendants and Third Party Plaintiffs;

Page 2

Cadwell, Sanford, Deibert & Garry, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Douglas M. Deibert,

for the Third-Party Defendant.

Page 3

INDEX OF EXAMINATION

INDEX OF EXHIBITS

Page 4

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Wanda Howey-Fox may be taken at this time and place, that is, at the James Law Offices, Yankton, South Dakota, on the 2nd day of May, 2017, commencing at the hour of 2:05 o'clock p.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

WANDA HOWEY-FOX,

called as a witness, being first duly sworn, deposed and said as follows:

EXAMINATION BY MR. DEIBERT:

Q You are Wanda Howey-Fox, the Defendant and Third-Party Plaintiff in this case?

A Yes, sir.

Q What year were you admitted to practice, first admitted?

Page 37

typo. Child custody, comma, child custody, comma, visitation and property settlement agreement filed July 7, 2000, it looks like, '8, in Jill Robinson-Kuchta versus Randall R. Kuchta.
Q You said that was July 2008?
A Well, I can't tell, it's stamped over so -- no, it's 2009. The signature page says 2009.
Q Okay. Is that date after the bankruptcy petition was filed?
A Well, yeah, the bankruptcy petition was filed on August 8 -- or on August -- in August of 2008. I think it was the 3rd, but I'm not sure.
Q So Jill wouldn't get any proceeds from the settlement of any --
A It depends on how much it was settled for, or if it settled at all.
Q Wouldn't have it all went to the bankruptcy trustee?
A No, back at that time the trustee's policy, if you will, was one-third to the debtor, one-third to the debtor's attorney, and one-third to the trustee. The trustee has now changed that position. Now it's a percentage to the attorney who handles the claim, and all the rest goes to the estate, and unless you file a claim of exemptions and exempt out a portion of those proceeds, in which case you use up your exemptions when you don't know if

Page 38

you're going to get anything or not.
MR. FIDELER: Can we mark a couple more, Wayne.
(Deposition Exhibits Number 16 through 19 were marked for identification by the court reporter).
Q I'm handing you Deposition Exhibit 17. Do you know what that is?
A It looks to be a very tiny printed bill, statement of account, from --
Q Dunes Anesthesia?
A Dunes Anesthesia, PC.
Q Whose handwriting is that at the top, to the right up there?
A I don't know. I think it's Jill's, but I don't know that for a hundred percent. I just know it's not mine.
Q And is there something -- a little sticky or something in the middle of that?
A There's a sticky down further.
Q What does that say?
A Jill Kuchta med.
Q Is this -- well, I'll take that back. I handed you Exhibit 18, correct?
A Yes, sir.
Q Does that appear to be the exact same document but without the sticky?

Page 39

A It appears to be the same document in bigger than point O-four print.
Q Exhibit 16, do you recognize that?
A Yup.
Q And that is what?
A This is a copy of an email from somebody.
Q Binger?
A It says Steve Binger, but I don't know that to be him but, okay, to me, and it says subject, lawsuit versus Chelsey Ewalt.
Q And what's -- is there some handwriting in the upper right-hand corner?
A Yup.
Q And what does that say?
A It's dated May 12 of 2010, and I'm not sure why Steve Binger is contacting me but, okay.
Q A med pay subro.
A I'm sorry? Oh, a med pay?
Q Yeah.
A Yeah, there's handwriting. Do we have a problem? And it was in the hands of the sheriff before the deadline and the statute of limitations and that would extend the service date, is my handwriting. Do you want to see this?
MR. DEIBERT: What number is it, 16?

Page 40

A Sixteen.
Q According to that note --
MR. DEIBERT: I would like to see it.
(At which time the witness hands document to Mr. Deibert).
Q -- you believed that the 60-day extension statute applied at that time?
A Yes, because I believed she lived in Yankton County.
Q But the statute doesn't say anything about where we, Plaintiffs' lawyers, believe the Defendant resides, correct?
A True. But all the information that I had indicated that she lived in Yankton County.
Q Right. And you said you reviewed the accident report, correct?
A True.
Q And did a Google search?
A I didn't say that I did a Google search.
Q Internet search, excuse me.
A And I believe, and I don't know why I think this, but I believe I checked with driver's licensing for her address.
Q I'll have to pull the affidavit from the file, but I don't believe it says that in there. And how long had

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

JILL ROBINSON-PODOLL,) CIV. 16-0079
)
Plaintiff,)
) MOTIONS HEARING
vs.)
)
HARMELINK, FOX & RAVNSBORG)
LAW OFFICE AND WANDA HOWEY FOX)
& YANKTON COUNTY, SOUTH DAKOTA)
Defendant.)

BEFORE: THE HONORABLE JOHN PEKAS, Circuit Judge, at Sioux Falls, South Dakota, on the 20th of September, 2017.

APPEARANCES: Casey W. Fideler
Christopher, Anderson, Paulson, & Fideler
Sioux Falls, South Dakota

Appearing on behalf of the plaintiff;

Bill Fuller
Fuller & Williamson
Sioux Falls, South Dakota

Appearing on behalf of the defendant,

Douglas M. Deibert
Cadwell, Sanford, Deibert, & Garry
Sioux Falls, South Dakota

Appearing on behalf of the defendant.

Even Ms. Howey-Fox believed that she was still representing the plaintiff on the underlying action up until she filed the motion to withdraw as a attorney for the plaintiff on -- oh, I forget, February something of 2015, which would extend the statute until 2018 making the plaintiff's claim well within the statute of limitations and timely. For those reasons, Your Honor, the plaintiff would request that the Court deny the defendant's motion for summary judgment.

THE COURT: Thank you, Mr. Fideler. I'm going to dispense with the reply, Mr. Fuller, under 104. I'm going to go ahead and I have to view this in the light most favorable to the nonmoving party, which, of course, is Ms. Jill Robinson. And, um, viewing all the facts in the light most favorable to her, the Court unfortunately fails to find that there are facts presented that would prevent the entry of summary judgment at this time. I'm going to grant summary judgment. This is one of those unfortunate circumstances where the lack of clarity in the cases does unfortunately obscure what the Supreme Court recently clarified. And that in the *Pitt-Hart* decision, the change is important and it is effective for cases that are currently on the dockets across South Dakota and that's that we have moved from what would be considered the known circumstances where we at one time looked for discovery

versus occurrence and now we are going to the occurrence time on the statute of repose.

The statutes related to legal malpractice and the only stumbling block the Court really has between whether or not to extend this from what would be considered a medical malpractice statute to a legal malpractice statute, however, the way it was crafted by the legislature is consistent with the argument that was presented by Mr. Fuller. And that in this particular instance, viewing it in the light most favorable to the nonmoving party, even related to both claims for, of course, the underlying personal injury claim, as well as the alleged malpractice related to loaning a client money, using the ring as collateral, is bound by, once again, that *Pitt-Hart* decision which clarified and provided guidance to the Court and attorneys across the state as to what is the statute of repose related to the occurrence.

And I do agree with the argument of Mr. Fuller that the occurrence was properly articulated in his brief and in his argument to the Court. I'm going to grant judgment at this time for both the defendant Howey-Fox, et al, and the Yankton County. And so, Mr. Fuller, I'll allow to prepare a judgment to that effect and to serve a copy on Mr. Fideler.

If, you know, Mr. Fideler obviously you have your right of appeal and you can take it up and maybe this Court's

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL DISTRICT

* *

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA, Plaintiff, v. HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX, Defendant/Third-Party Plaintiffs, YANKTON COUNTY, SOUTH DAKOTA, Third-Party Defendant.	CIV 16-0079 **MOTION TO AMEND**

* *

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

PROCEEDINGS: The above-entitled proceeding commenced at 3:30 p.m. on the 17th day of July, 2017, in Courtroom 4A at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

MR. FULLER: Thank you, Your Honor. Is it permissible with you if I remain seated?

THE COURT: I want you guys to be totally comfortable. You guys can be seated, whatever you want.

MR. FULLER: Your Honor, I think the first thing to keep in mind in reference to our motion to amend is this is not a Motion for Summary Judgment. This is simply a Motion to Amend our answer. And as we cited to the Court, Motions to Amend are freely given concerning affirmative defenses as well as other matters. And some of the case authority we cite actually allows amendments to the answer during trial. And in this particular case there's not a trial date set. There is no scheduling order. There's no discovery deadline. So there certainly is ample time for the plaintiff to deal with the amendment.

One of the arguments that the plaintiff has made is that we apparently should have raised the statute of limitations in our initial answer. We intentionally did not do that because it did not have application under the continuing representation doctrine. And when we did answer, Your Honor, *Pitt-Hart* was not in existence. There was really no case authority under South Dakota, and certainly the South Dakota Supreme Court, recognizing the legal statute of limitations or medical

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28249

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff-Appellant,

v.

HARMELINK, FOX & RAVNSBORG LAW OFFICE
and WANDA L. HOWEY-FOX,

Defendants and Third-Party Plaintiffs-Appellees,

v.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant-Appellee

Appeal from the First Judicial Circuit
Yankton County, South Dakota
The Honorable John Pekas, Circuit Court Judge

BRIEF OF APPELLEES HARMELINK, FOX AND RAVNSBORG LAW OFFICE AND WANDA L. HOWEY-FOX

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Notice of Appeal Filed: October 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Cases:

Other Cases:

Statutes:

PRELIMINARY STATEMENT

Appellant Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta will be referred to as "Robinson." Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox will be collectively referred to as "Howey-Fox." Appellee Yankton County, South Dakota, will be referred to as "Yankton County." References to the Clerk's Register of Actions in the underlying action, *Jill Robinson–Podoll f/k/a Jill Robinson-Kuchta v. Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox v. Yankton County, South Dakota*, 66 CIV. 16-000079, will be referred to as "RA" with the applicable page number. References to the hearing transcript on Plaintiff's Motion to Amend Complaint and on Defendants'/Third-Party Plaintiffs' Motion for Leave to File Amended Answer will be referred to as "MA HT" with the applicable page number. References to the hearing transcript on Defendants'/Third-Party Plaintiffs' Motion for Summary Judgment will be referred to as "MSJ HT" with the applicable page number. References to Appellant's Brief will be referred to as "Appellant Brief" with the applicable page number. References to Appellant's Appendix will be referred to by the applicable bates-number listed. References to Appellees' Appendix will be referred to as "App." with the applicable page number.

STATEMENT OF JURISDICTION

Robinson appeals from the Judgment of Dismissal of Howey-Fox and Yankton County. (RA 271-272; App. 3-4.) Notice of Appeal was timely filed by Robinson. (RA 277-278.) This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

REQUEST FOR ORAL ARGUMENT

Howey-Fox respectfully requests oral argument on each of the issues before this Honorable Court.

STATEMENT OF THE ISSUES

I. Whether the circuit court properly granted Howey-Fox's Motion for Summary Judgment.

Robinson argues that the circuit court erred by granting Howey-Fox's Motion for Summary Judgment. The circuit court properly granted Howey-Fox's Motion for Summary Judgment because no disputes of material fact remained. In addition, the circuit court, in applying this Court's guidance and analysis in *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406 and the plain language of SDCL § 15-2-14.2, correctly determined that SDCL § 15-2-14.2 is a statute of repose.

- SDCL § 15-2-14.2
- *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406
- *Hagemann ex rel. Estate of Hagemann v. NJS Engineering, Inc.*, 2001 S.D. 102, 632 N.W.2d 840

II. Whether the circuit court properly granted Howey-Fox's Motion for Leave to File Amended Answer.

Robinson also argues that the circuit court erred in granting Howey-Fox's Motion for Leave to File Amended Answer. The circuit court was within its discretion in granting Howey-Fox's motion because: (1) Robinson was not prejudiced by the amendment; and (2) justice required leave be freely given in light of *Pitt-Hart*, which was issued after Howey-Fox filed her initial Answer and which triggered the applicability of the statute of repose affirmative defense to Robinson's claims against Howey-Fox.

- SDCL § 15-6-15(a)
- *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406
- *Beyer v. Cordell*, 420 N.W.2d 767 (S.D. 1988)

STATEMENT OF THE CASE

On January 27, 2016, Howey-Fox was served via Admissions of Service with Robinson's Summons and Complaint. (RA 1, 2-9, 10, 11.) The Complaint alleged professional negligence against Howey-Fox arising from Howey-Fox's failure to serve a defendant before the statute of limitations ran in an underlying personal injury action, titled *Jill Robinson formerly known as Jill Robinson-Kuchta v. Michelle M. Mitchell and Chelsey A. Ewalt*, 66 CIV. 10-000242, arising from an April 28, 2007 motor vehicle accident. (RA 2-9.) On February 25, 2016, Howey-Fox filed her Answer denying negligence. (RA 12-14.)

Yankton County was served with a Third-Party Summons and Complaint on March 2, 2016. (RA 15-16, 17-21.) The Third-Party Complaint alleged negligence against Yankton County, and sought indemnification and contribution in the event Howey-Fox was held liable to Robinson. (RA 17-21.) On April 6, 2016, Yankton County filed an Answer to the Third-Party Complaint denying negligence. (RA 24-27.)

On May 17, 2017, counsel for Howey-Fox sent counsel for Robinson a Stipulation to Amend Answer, as well as the proposed Amended Answer. (App. 5-13.) The correspondence provided that the only change Howey-Fox made to the Answer was the addition of the statute of repose affirmative defense. (*Id*. at 5.) The correspondence ended requesting that Robinson's counsel sign the stipulation and return it, or, alternatively, stating that Howey-Fox would bring a motion to amend for the circuit

court's consideration. (*Id.*) On May 24, 2017, Robinson's counsel responded providing that he would not stipulate to the amendment of Howey-Fox's Answer. (App. 14.)

On June 30, 2017, Howey-Fox filed a Motion for Leave to File Amended Answer and Demand for Jury Trial asking the circuit court to allow Howey-Fox to amend her Answer to assert the affirmative defense of the statute of repose in light of the recent South Dakota Supreme Court decision, *Pitt-Hart*, which was issued after Howey-Fox filed her initial Answer. (RA 50-52.) Also on June 30, 2017, Robinson filed a Motion to Amend Complaint to include professional negligence allegations against Howey-Fox related to a loan transaction between Howey-Fox and Robinson. (RA 59-66.) A hearing on the parties' motions was held on July 17, 2017. (*See, generally,* MA HT.) At the close of hearing, the circuit court granted both motions. (MA HT 18-19; RA 267-268.)

After the motions to amend were granted, Howey-Fox was served, via Admission of Service (RA 97), with Robinson's Amended Summons and Amended Complaint on July 26, 2017. (RA 102, 103-112.) Howey-Fox filed and served an Answer to Robinson's Amended Complaint on July 27, 2017, denying Robinson's allegations and asserting the affirmative defense that Robinson's claims were barred by the statute of repose. (RA 98-101.)

On August 22, 2017, Howey-Fox filed and served a Motion for Summary Judgment. (RA 113-116.) Yankton County joined in Howey-Fox's Motion for Summary Judgment on September 8, 2017. (RA 169-171.) A hearing on the Motion for Summary Judgment was held on September 20, 2017. (*See, generally*, MSJ HT.) At the close of hearing, the circuit court granted judgment in favor of Howey-Fox and Yankton County.

(MSJ HT 14; RA 271-272; App. 1-2.) The Judgment was signed by the circuit court on September 22, 2017, and filed with the Yankton County Clerk of Courts on September 25, 2017. (RA 271-272; App. 3-4.) Notice of Entry was served on September 25, 2017. (RA 273-276.) Robinson filed the Order for Transcripts on October 24, 2017. (RA 287-290.) Robinson's Notice of Appeal was timely filed on October 24, 2017. (RA 277-278.)

STATEMENT OF THE FACTS

Howey-Fox represented Robinson in an underlying personal injury action arising from an April 28, 2007 motor vehicle accident. The statute of limitations on the underlying personal injury action (66 CIV. 10-000242) ran on April 29, 2010. Howey-Fox failed to serve one of the defendants before the expiration of the statute of limitations. (RA 2-9.)

Howey-Fox was served, through Admissions of Service, with Robinson's Summons and Complaint on January 27, 2016. (RA 1, 2-9, 10, 11.) Robinson's Complaint alleged professional negligence against Howey-Fox resulting from the failure to serve a defendant before the expiration of the statute of limitations. (RA 2-9.) Howey-Fox answered Robinson's Complaint, denying the allegations. (RA 12-14.)

Yankton County was served with a Third-Party Summons and Complaint on March 2, 2016. (RA 15-16, 17-21.) The Third-Party Complaint alleged negligence against Yankton County, and sought indemnification and contribution in the event Howey-Fox was held liable to Robinson. (*Id.*) On April 6, 2016, Yankton County filed an Answer to the Third-Party Complaint denying negligence. (RA 24-27.)

On May 17, 2017, counsel for Howey-Fox sent counsel for Robinson a Stipulation to Amend Answer, as well as the proposed Amended Answer. (App. 5-13.) The correspondence provided that the only change Howey-Fox made to the Answer was the addition of the statute of repose affirmative defense. (*Id*. at 5.) The correspondence ended requesting that Robinson's counsel sign the stipulation and return it, or, alternatively, stating that Howey-Fox would bring a motion to amend for the circuit court's consideration. (*Id*.) On May 24, 2017, Robinson's counsel responded providing that he would not stipulate to the amendment of Howey-Fox's Answer. (App. 14.)

On June 30, 2017, Howey-Fox filed a Motion for Leave to File Amended Answer and Demand for Jury Trial asking the circuit court to allow Howey-Fox to amend her Answer to assert the affirmative defense of statute of repose in light of *Pitt-Hart*, which was issued after Howey-Fox filed her initial Answer. (RA 50-52.) Also on June 30, 2017, Robinson filed a Motion to Amend Complaint to include professional negligence allegations against Howey-Fox related to a loan transaction between Robinson and Howey-Fox. (RA 59-66.) The circuit court granted both motions after a hearing on the same. (MA HT 18-19; RA 267-268.)

Howey-Fox was served, through an Admission of Service, with Robinson's Amended Summons and Amended Complaint on July 26, 2017. (RA 97, 102, 103-112.) Robinson's Amended Complaint included a new allegation of professional negligence against Howey-Fox resulting from Howey-Fox "loaning a current client money and taking her diamond anniversary ring as collateral, which was worth far more than the amount of money [loaned to Robinson]." (RA 103-112.) Robinson sought the damages

she sustained "as a result of [] Howey-Fox procuring [Robinson's] diamond anniversary ring" at a price allegedly below fair market value. (*Id*.)

Howey-Fox filed and served her Answer to Robinson's Amended Complaint on July 27, 2017, denying Robinson's allegations and asserting the affirmative defense that Robinson's claims were barred by the statute of repose. (RA 98-101.)

On August 22, 2017, Howey-Fox filed and served a Motion for Summary Judgment. (RA 113-116.) Yankton County joined in Howey-Fox's Motion for Summary Judgment on September 8, 2017. (RA 169-171.) A hearing on the Motion was held on September 20, 2017. (*See, generally,* MSJ HT.) At the close of hearing, the circuit court granted judgment in favor of Howey-Fox and Yankton County. (MSJ HT 14; RA 271-272; App. 1-2.) The Judgment was signed by the circuit court on September 22, 2017, and filed with the Yankton County Clerk of Courts on September 25, 2017. (RA 271-272.) Notice of Entry was served on September 25, 2017. (RA 273-276.)

Robinson now appeals from the circuit court's grant of Howey-Fox's Motion for Leave to File Amended Answer and Howey-Fox's and Yankton County's Motion for Summary Judgment.

STANDARD OF REVIEW

The grant of a motion for summary judgment is reviewed under the de novo standard of review. *Harvey v. Regional Health Network, Inc.*, 2018 S.D. 3, ¶ 26, 906 N.W.2d 382, 390 (citation omitted). A circuit court's grant of a motion for summary judgment will be affirmed "when no genuine issues of material fact exist, and the legal questions have been correctly decided." *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908

N.W.2d 170, 174 (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). It is the moving party's burden to "clearly demonstrat[e] an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *McKie Ford Lincoln, Inc. v. Hanna*, 2018 S.D. 14, ¶ 8, 907 N.W.2d 795, 798 (citation omitted). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Id.* (citation omitted). If there are no genuine issues of material fact, this Court's review "is limited to determining whether the [circuit] court correctly applied the law." *Harvey*, 2018 S.D. 3, ¶ 26, 906 N.W.2d at 390 (citation omitted) (alteration included).

Issues regarding statutory interpretation and application are questions of law reviewed de novo. *McKie Ford*, 2018 S.D. 14, ¶ 10, 907 N.W.2d at 798 (citation omitted).

The grant of a motion for leave to amend pleadings pursuant to SDCL § 15-6-15(a) is reviewed for clear abuse of discretion, with deference given to the sound discretion of the circuit court. *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 13, 769 N.W.2d 440, 446 (citation omitted). Accordingly, the circuit court's determination will not be disturbed on appeal "absent a clear abuse of discretion which results in prejudice to the non-moving party." *Hein v. Zoss*, 2016 S.D. 73, ¶ 24, 887 N.W.2d 62, 70 (quoting *Isakson v. Parris*, 526 N.W.2d 733, 736 (S.D. 1995)).

ARGUMENT

I. The circuit court correctly concluded that SDCL § 15-2-14.2 is a statute of repose based on this Court's decision in *Pitt-Hart.*

This Court's decision in *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406, was issued on April 13, 2016 – after Howey-Fox filed her initial Answer. (RA 12-14.) In *Pitt-Hart*, this Court resolved years of inconsistent treatment of the medical malpractice statute of repose, SDCL § 15-2-14.1. Before *Pitt-Hart*, SDCL § 15-2-14.1 was often treated as a statute of limitations. *Id*. at ¶ 17 (citing cases). But this Court clarified that SDCL § 15-2-14.1 is properly considered a statute of repose – not a statute of limitations. *Id*. at ¶ 18. Being a statute of repose, the plaintiff only had two years after the alleged malpractice occurred to bring his medical malpractice claims against the defendant. *Id*. at ¶ 27. Because the plaintiff failed to commence his action until almost three years after the alleged malpractice occurred, his claims were time-barred. *Id*. at ¶ 26. The circuit court, in applying this Court's reasoning and analysis in *Pitt-Hart* to the plain language of SDCL § 15-2-14.2, correctly concluded that SDCL § 15-2-14.2 is also a statute of repose.

A. SDCL § 15-2-14.2 is a statute of repose.

When interpreting statutes, the "paramount consideration" is the language expressed in the statute. *Clark County v. Sioux Equip. Corp.*, 2008 S.D. 60, ¶ 28, 753 N.W.2d 406, 417 (citation omitted). "[I]f the words and phrases in the statute have plain meaning and effect, [the Court] should simply declare their meaning and not resort to statutory construction." *Id*. The intent must be derived from "what the legislature said,

rather than what [the] [C]ourt thinks the legislature should have said, and this determination must be confined to the plain, ordinary meaning of the language used by the legislature." *Id.* (alteration added).

Although the substance of the legal malpractice statute, SDCL § 15-2-14.2, is found *verbatim* within the medical malpractice statute, SDCL § 15-2-14.1, it has been consistently treated as a statute of limitations. *Compare* SDCL § 15-2-14.1, which provides, in pertinent part:

> 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[.]***

(emphasis added) *with* SDCL § 15-2-14.2:

> 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.***

(emphasis added). But this differential treatment of nearly identical statutes, save for the identification of the class of defendants, cannot be reconciled. This Court should decline Robinson's requests to endorse and maintain this discrepancy. If SDCL § 15-2-14.1 is a statute of repose, SDCL § 15-2-14.2 must be, as well.

This Court explained the difference between statutes of limitations and statutes of repose in *Pitt-Hart*. "[A] statute of limitations creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *Pitt-Hart*, 2016 S.D. 33, ¶ 18, 878 N.W.2d at 413 (quoting *CTS Corp. v. Waldburger*, – U.S. –, –, 134 S. Ct. 2175, 2182

(2014)). Conversely, a statute of repose "is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* This Court then illustrated the differences between the two types of limitations periods by comparing the personal injury statute of limitations, SDCL § 15-2-14(3), with the medical malpractice statute, SDCL § 15-2-14.1:

> *Compare* SDCL 15-2-14.1 ("An action . . . can be commenced only within two years after the alleged malpractice, error, mistake, or failure to cure shall have occurred . . . ."), *with* "[An action for personal injury] can be commenced only within three years after the cause of action shall have accrued. . . .").

Id. With this proper understanding of the differences between statutes of limitations and statutes of repose, this Court held that SDCL § 15-2-14.1 was properly considered a statute of repose – not a statute of limitations. *Id.*

As the circuit court correctly found, the same is true for the legal malpractice statute, SDCL § 15-2-14.2. Like SDCL § 15-2-14.1, SDCL § 15-2-14.2 unambiguously provides, "An action . . . can be commenced only within three years after the alleged malpractice, error, mistake, or omission shall have occurred[.]" The plain meaning and effect of this language specifically chosen by the Legislature establishes that the Legislature intended SDCL § 15-2-14.2 to be a statute of repose, and not a statute of limitations as Robinson suggests. Accordingly, SDCL § 15-2-14.2, like SDCL § 15-2-14.1, "is an occurrence rule, which begins to run when the alleged negligent act occurs, not when it is discovered." *Pitt-Hart*, 2016 S.D. 33, ¶ 19, 878 N.W.2d at 413 (internal citations and quotations omitted). The commencement of suit must begin "from the date of the last culpable act or omission of the defendant." *Id.* at ¶ 18 (internal citations and

quotations omitted), and not from the date on which the claim accrues or the date on which the claim is discovered or appreciated as Robinson argues.

Robinson is correct in noting that the application of statutes of repose may occasionally result in the barring of a claim before a plaintiff has suffered or discovers the resulting injury. (Appellant Brief 11, 13.) But this is a known and appreciated possibility when dealing with statutes of repose. As the United States Supreme Court recognized in *CTS Corp. v. Waldburger*:

> A statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted [. . .] *even if this period ends before the plaintiff has suffered a resulting injury*." [. . .] The statute of repose limit is "not related to the accrual of any cause of action; *the injury need not have occurred, much less have been discovered*."

134 S. Ct. at 2182-83 (citations omitted) (emphasis added). *See also Peterson ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 41, 635 N.W.2d 556, 570 (quoting *Zacher v. Budd Co.*, 396 N.W.2d 122, 129, n.5 (S.D. 1986)) ("a statute of repose may bar the filing of a lawsuit *even though the cause of action did not even arise until after it was barred*[.]") (emphasis added). The well-established recognition and understanding of this possibility forecloses all of Robinson's "ramification" and "manifest injustice" arguments. (Appellant Brief 7-16.) Statutes of repose are equivalent to "a cutoff" and "in essence an 'absolute . . . bar' on a defendant's temporal liability." *CTS Corp.*, 134 S. Ct. at 2183 (citation omitted). This is true even when an injury has not occurred or has not been discovered before the cutoff date. And it is not this Court's duty "to revise or amend statutes, or to 'liberally construe a statute to avoid a seemingly harsh result where such action would do violence to the plain meaning of the statute under construction."

Hagemann ex rel. Estate of Hagemann v. NJS Engineering, Inc., 2001 S.D. 102, ¶ 8, n.7, 632 N.W.2d 840, 845 (citation omitted).

The distinct purpose and policy underlying statutes of repose is the legislative judgment that "a defendant should 'be free from liability after the legislatively determined period of time.'" *Pitt-Hart*, 2016 S.D. 33, ¶ 21, 878 N.W.2d at 414 (quoting *Lozano v. Montoya Alvarez*, – U.S. –, –, 134 S. Ct. 1224, 1231-32 (2014)). Statutes of repose "'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.'" *Id*. Thirty years of legal malpractice caselaw notwithstanding, the purpose and policy of the Legislature is clear – SDCL § 15-2-14.2 is a statute of repose. If this result appears to be harsh or unfair, any change must come from the Legislature. *See id*. at ¶ 27 ("If the policy [of the Legislature] is to be changed, the Legislature, not this Court, should make the change.") (citation omitted); *see also Hagemann*, 2001 S.D. 102, ¶ 8, n.7, 632 N.W.2d at 845 ("If the result appears to be harsh or unfair, the Legislature is the proper venue to amend the statutes, not the courts.").

B. Robinson's claims against Howey-Fox are time-barred.

An application of the legal malpractice statute of repose proves Robinson's claims time-barred. Robinson alleges that Howey-Fox committed legal malpractice from two occurrences: (1) failing to timely serve a defendant in an underlying personal injury action by the time the statute of limitations expired; and (2) loaning a current client money and taking a ring as collateral. Although Robinson lists other allegations in her

Amended Complaint, all stem from and are mere ill effects of the above two occurrences. Even Robinson agrees that "all representation of Robinson by Defendant Fox, until February 11, 2013, stemmed from her professional negligence" of "failing to timely file [Robinson's] claim and serve the proper party or parties in the statutory prescribed fashion." (Appellant Brief 10.) Likewise, Robinson testified during her deposition that she would not have brought suit against Howey-Fox had the defendant in the underlying personal injury action been served within the statute of limitations. (App. 15-16.)

With regard to Robinson's claims that Howey-Fox failed to timely commence suit in the underlying personal injury action, the date of Howey-Fox's "last culpable act or omission" is April 29, 2010, which is the date the statute of limitations in the personal injury action ran. Despite Robinson's claims, Robinson does not get the benefit of the February 11, 2013 date, when the jury determined the issue of the defendant's residence in the underlying personal injury suit, as the date for when the tort occurred. This is because such an outcome would be likened to an accrual-based rule for statutes of limitations, and not an occurrence-based rule with statutes of repose. Additionally, the tort was already complete well before the February 11, 2013 jury verdict, when the statute of limitations in the personal injury action ran on April 29, 2010. When applying the three-year legal malpractice statute of repose set forth in SDCL § 15-2-14.2, Robinson was required to bring a malpractice action related to this allegation by April 30, 2013. Robinson did not commence suit until January 27, 2016, nearly three years after the statute of repose ran.

With regard to Robinson's claim of negligence related to the loan transaction

involving the ring, the date of Howey-Fox's "last culpable act or omission" related to the transaction is July 6, 2012, when the transaction itself occurred. Thus, when applying the three-year legal malpractice statute of repose set forth in SDCL § 15-2-14.2, Robinson was required to bring a malpractice action related to the claim by July 7, 2015. Again, Robinson did not. Robinson failed to commence the legal malpractice action against Howey-Fox until January 27, 2016. Because Robinson failed to commence suit within the allowable three-year time period under SDCL § 15-2-14.2, Robinson's claims are time-barred.

Robinson has made numerous attempts to evade the application of this Court's decision in *Pitt-Hart* and the plain language of SDCL § 15-2-14.2 in a last-ditch effort to save her claim. But none of Robinson's theories and arguments apply. The circuit court's grant of summary judgment in Howey-Fox's and Yankton County's favor should be affirmed.

C. The continuous representation doctrine does not apply to statutes of repose.

Robinson first attempts to avoid *Pitt-Hart* and its application to the plain language of SDCL § 15-2-14.2 by claiming that the continuing representation doctrine "saves" Robinson's claim. (Appellant Brief 8.) Robinson then wholly ignores this Court's clear directive in *Pitt-Hart* that the continuous treatment doctrine does *not* apply to statutes of repose by incredibly claiming that the continuous treatment doctrine applies to both legal and medical malpractice actions alike. (Appellant Brief 8.) Robinson's attempts to disregard this Court's instruction and shake the firm foundation on which statutes of

repose rest must be prohibited.

It is settled that "a repose period is fixed and its expiration *will not be delayed by estoppel or tolling*." *Pitt-Hart*, 2016 S.D. 33, ¶ 20, 878 N.W.2d at 413 (internal citations and quotations omitted) (emphasis in the original).[1] This is true, "even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp.*, 134 S. Ct. at 2183. Tolling of repose, whether through estoppel or continuous treatment/representation, subverts the clear legislative objective of a statute of repose that the time for bringing suit is fixed. As this Court recognizes, "[A]fter the legislatively determined period of time, . . . liability will no longer exist and will not be tolled *for any reason*." *Pitt-Hart*, 2016 S.D. 33, ¶ 20, 878 N.W.2d at 413 (citation omitted) (emphasis in the original). Accordingly, the continuous treatment doctrine does not apply to statutes of repose. *Id*. at ¶¶ 20, 21. The continuous representation doctrine is the legal equivalent of the medical continuous treatment doctrine. *See Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 S.D. 16, 10, 575 N.W.2d 457, 460 (recognizing that the continuous representation doctrine was adopted from the continuous treatment doctrine). Therefore, the continuous representation doctrine does not apply to statutes of repose for the same reasons that the continuous treatment doctrine does not apply. Robinson's arguments concerning the continuous representation doctrine are in direct contradiction to *Pitt-Hart* and have no merit.

[1] This is based on the underlying public policy that statutes of repose are based on the belief that "a defendant should 'be free from liability after the legislatively determined period of time.'" *Pitt-Hart*, 2016 S.D. 33, ¶ 21, 878 N.W.2d at 414 (internal citations and quotations omitted).

D. There is no continuing tort to trigger the continuing tort doctrine.

Robinson next attempts to escape *Pitt-Hart* and its application to the plain language of SDCL § 15-2-14.2 by arguing that the circuit court erred in failing to apply the continuing tort doctrine. (Appellant Brief 12.) Robinson's argument is nothing more than a masked attempt at arguing the application of the continuous representation doctrine under the cloak and title of the continuing tort doctrine. In fact, even the caselaw Robinson cites in support of her continuing tort doctrine argument is addressing the continuous treatment/continuous representation doctrine – not the continuing tort doctrine. *See Cunningham v. Huffman*, 609 N.E.2d 321 (Ill. 1993) (discussing the continuous treatment doctrine and rejecting its application to the matter); *see also Wells v. Billars*, 391 N.W.2d 668, 673 (S.D. 1986) (discussing and applying the continuous treatment doctrine).

This matter does not involve a continuing tort. As this Court has recognized, the continuing tort doctrine only applies when there is a "discrete occurrence in continually wrongful conduct." *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 11, 827 N.W.2d 871, 875. The doctrine does not apply when the specific negligent event that is the "principal cause of damage" is readily identifiable. *Id*. *See also Pitt-Hart*, 2016 S.D. 33, ¶ 25, 878 N.W.2d at 415 (recognizing that the continuing tort doctrine does not apply when the specific negligent event that caused the damage is readily identifiable).

The continuing tort doctrine did not apply in *Brandt* because the specific negligent event that caused the damage was a one-time road repair. *Brandt*, 2013 S.D. 22, ¶ 14, 827 N.W.2d at 875. The continuing tort doctrine was inapplicable in *Pitt-Hart* because

the specific negligent event that caused the patient's injury was the single, identifiable event of being dropped. *Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415. Like these cases, Robinson's allegations of injury arose from two separate and specific, identifiable events that occurred on two specific dates – (1) failing to commence suit within the statute of limitations in the underlying personal injury action, which failure occurred as of April 29, 2010, and (2) loaning money to a client and taking a ring as collateral in doing so, which occurred on July 6, 2012. As previously mentioned supra, Robinson's brief admits that "all representation of Robinson by Defendant Fox, until February 11, 2013, stemmed from her professional negligence" of the single, identifiable occurrence of "failing to timely file [Robinson's] claim and serve the proper party or parties in the statutory prescribed fashion." (Appellant Brief 10.) And Robinson herself testified that she would not have brought suit if Howey-Fox had commenced the underlying personal injury lawsuit within the statute of limitations. (App. 15-16.) Both of these admissions acknowledge and support the conclusion that Robinson's claims of damage stem from two specific, identifiable occurrences. Although Robinson may have suffered continuing ill effects from these two distinct occurrences, continuing ill effects are *not* continuing torts. *See Brandt*, 2013 S.D. 22, ¶ 11, 827 N.W.2d at 875 ("[A] continual consequence from a solitary unlawful act is not a continuing tort."); *see also Shippen v. Parrott*, 506 N.W.2d 82, 85 (S.D. 1993) ("Alleged continual ill effects are not actionable under a continuing tort theory.") (overruled on other grounds).[2]

[2] Robinson likens these facts to a physician's multiple failures to remove a foreign object from a patient's body despite the physician's knowledge of the foreign object, as was the case in *Schmiedt v. Loewen*, 2010 S.D. 76, 789 N.W.2d 312. (Appellant Brief 14.) The two are not one

in the same. There was only one expiration of the statute of limitations in the underlying personal injury action and there was only one loan. Robinson confuses continuing ill effects from a single tort with multiple, continued tortious acts. The continuing tort doctrine does not apply.

Lastly, Robinson argues "[u]nlike medical malpractice, legal malpractice is not as immediately apparent." (Appellant Brief 13.) This argument presumes that legal malpractice is an accrual-based rule and not an occurrence-based rule as the plain language of SDCL § 15-2-14.2 directs. Despite Robinson's attempts to distinguish the medical malpractice statute of repose, SDCL § 15-2-14.1, from the legal malpractice statute, SDCL § 15-2-14.2, the Legislature has made the medical malpractice and legal malpractice statutes identical. And, again, any change must come from the Legislature.

Robinson's attempts at making continuous representation doctrine arguments under the cloak and title of the continuing tort doctrine should be rejected. There were no continuing torts. SDCL § 15-2-14.2 is a statute of repose and Robinson failed to commence suit within three years of the two identifiable occurrences. The circuit court's grant of Howey-Fox's Motion for Summary Judgment is properly affirmed.

II. The circuit court did not abuse its discretion in granting Howey-Fox's Motion for Leave to File Amended Answer.

Not only does Robinson ignore *Pitt-Hart* in claiming the circuit court erred in granting summary judgment, but she also argues that Howey-Fox should not have been able to amend her initial Answer to assert the affirmative defense of the statute of repose in the first place. This is true even though *Pitt-Hart*, which held that the *exact language* found in SDCL § 15-2-14.2 creates a statute of repose and not a statute of limitations, was not issued until after Howey-Fox served her initial Answer. Justice required the amendment and Robinson was not prejudiced by the same. Robinson's continued attempts to elude *Pitt-Hart*'s application by arguing that the circuit court abused its

discretion by granting Howey-Fox's motion to amend should be foreclosed.

South Dakota law provides, in relevant part:

> [A] party may amend his pleading [] by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

SDCL § 15-6-15(a). So long as there is no prejudice to the non-moving party as a result of the amendment, circuit courts are specifically permitted to, and when justice requires instructed to, allow amendment of the pleadings "before, during, and after trial without the adverse party's consent." *Dakota Cheese, Inc. v. Ford*, 1999 S.D. 147, 24, 603 N.W.2d 73, 78 (internal citations and quotations omitted). The circuit court was well within its discretion in granting Howey-Fox's Motion for Leave to File Amended Answer both because there was no prejudice to Robinson and justice required this result. **A. The affirmative defense of statute of repose was never waived.**

Robinson argues that the failure to plead an affirmative defense results in the defense being "waived and barred." (Appellant Brief 6.) Robinson's argument wholly ignores this Court's repeated direction to the contrary: "An affirmative defense is *not* waived if the pleadings are properly amended to include the [previously] unpled defense." *Beyer v. Cordell*, 420 N.W.2d 767, 769 (S.D. 1988) (citation omitted) (emphasis added); *Dakota Cheese*, 1999 S.D. 147, 25, 603 N.W.2d at 78 (same). This is true in situations where the affirmative defense could have been asserted at the onset, but was not. *See Beyer*, 420 N.W.2d at 770 (upholding the trial court's grant of a motion to amend an

answer to assert a previously unpled affirmative defense); *Dakota Cheese*, 1999 S.D. 147, 26, 603 N.W.2d at 78-79 (same); *see also Isakson v. Parris*, 526 N.W.2d 733, 738 (S.D. 1995) (holding the trial court's failure to allow the defendant's motion to amend to assert a previously unpled affirmative defense an abuse of discretion). And this is especially true where, as here, the affirmative defense *could not* have been asserted at the onset because an April 13, 2016 change in caselaw under *Pitt-Hart* triggered application of the affirmative defense after Howey-Fox's initial Answer was filed on February 25, 2016. Howey-Fox's affirmative defense of statute of repose was not – and has never been – waived.

B. Robinson was not prejudiced by Howey-Fox's amendment.

i. The eventual grant of summary judgment is not indicative of prejudice.

Without referencing or analyzing caselaw in support of her position, Robinson claims that she was prejudiced by Howey-Fox's amendment of her Answer to include the affirmative defense of statute of repose. (Appellant Brief 6-7.) Specifically, Robinson alleges that her prejudice stems from the fifteen months that passed between the *Pitt-Hart* decision and the filing of Howey-Fox's motion to amend. (Appellant Brief 7.)[3] Even so, the time period alone is not indicative of prejudice. Robinson must show *how* the time period prejudiced her. And Robinson's sole argument of *how* this time period purportedly prejudiced her is the eventual grant of summary judgment in Howey-Fox's

[3] Robinson fails to inform the Court that Robinson was put on notice of Howey-Fox's intent to assert the statute of repose affirmative defense in accordance with *Pitt-Hart* on May 17, 2017 – six weeks before Howey-Fox filed her motion to amend.

favor. (*See* Appellant Brief 7.) (Arguing that the delay in asserting the affirmative defense "was unduly prejudicial to Robinson *as evidenced by the trial court's subsequent ruling* granting Fox's motion for summary judgment based on the statute of repose.") (emphasis added.) Robinson's argument holds no water. The eventual grant of summary judgment, even in conjunction with a delay in asserting an affirmative defense, does not support a finding of prejudice. Prejudice is not measured by Howey-Fox's ability to successfully assert an affirmative defense.

As previously addressed, this Court has upheld amendments of answers to assert previously unpled affirmative defenses. *See Beyer*, 420 N.W.2d at 770 (upholding the trial court's grant of a motion to amend an answer to assert contributory negligence); *Dakota Cheese*, 1999 S.D. 147, 26, 603 N.W.2d at 78-79 (upholding the trial court's grant of a motion to amend an answer to assert affirmative defenses, including unclean hands and collateral estoppel); *see also Isakson*, 526 N.W.2d at 738 (holding the trial court's failure to allow the defendant's motion to amend to assert the affirmative defense that the plaintiff failed to comply with the notice statute was an abuse of discretion). In those cases, the decision that there was no prejudice was not qualified by stating "so long as this amendment does not result in summary judgment to the amending party." Of course it was not. Robinson may not like the outcome, but the grant of summary judgment is certainly not evidence of undue prejudice.

The grant of summary judgment in conjunction with a months-long delay does not bolster Robinson's argument. The length of time between the *Pitt-Hart* decision and Howey-Fox's motion to amend had no bearing whatsoever on the circuit court's grant of

summary judgment. The question of law as to whether *Pitt-Hart* triggered the applicability of the statute of repose to SDCL § 15-2-14.2 did not morph over time. And the relevant facts to the circuit court's analysis, i.e.; (1) when the occurrence happened and (2) when the lawsuit was commenced, were set in stone and did not change over time. Thus, Howey-Fox's Motion for Summary Judgment based on the question of law of whether SDCL § 15-2-14.2 is properly considered a statute of repose in light of *Pitt-Hart* would have been granted whether the amendment was made one month, six months, or two years after the *Pitt-Hart* decision. Robinson has not met her burden of showing prejudice to warrant reversal of the circuit court's grant of Howey-Fox's motion to amend.

ii. Robinson cannot satisfy the recognized concerns of prejudice.

This Court has recognized very limited and specific situations signifying prejudice to an opposing party by another party's amendment of pleadings: (1) when the opposing party did not have a fair opportunity to litigate the issue, *Isakson*, 526 N.W.2d at 735; (2) when the opposing party could have offered additional evidence if the case had been tried on the different issue, *id.*; or (3) when an opposing party is surprised and unprepared to meet the contents of the proposed amendment, *Hein*, 2016 S.D. 73, ¶ 24, 887 N.W.2d at 70. Application of this narrow and restrictive list to the present facts proves Robinson's claim of prejudice without merit. None of the recognized concerns of prejudice are present here.

Robinson has made no argument or showing that she was precluded from offering certain evidence. Nor can she. There was no scheduling order in place at the time

Howey-Fox notified Robinson of her planned amendment to include the statute of repose affirmative defense or any time thereafter. Discovery was still open. Robinson was free to seek discovery regarding the statute of repose. She chose not to. In fact, the circuit court specifically provided Robinson the opportunity to conduct additional discovery in order to defend against Howey-Fox's affirmative defense of statute of repose. (MA HT 18.) In addition, SDCL § 15-6-56(f) allows for a party to request a stay of a motion for summary judgment to conduct discovery. Despite having these options available to her, Robinson never requested a stay of the motion for summary judgment and never conducted additional discovery. Any purported inability to offer certain evidence is through no fault but her own.

Likewise, Robinson has made no argument or showing that she did not have a fair opportunity to litigate the applicability of the statute of repose. Nor can she. Robinson was aware of Howey-Fox's intent to assert the affirmative defense of statute of repose on May 17, 2017. (App. 5-13.) The circuit court granted Howey-Fox's Motion for Summary Judgment on September 20, 2017. (MSJ HT 4.) Robinson had over four months to defend the claim. This Court has found no prejudice in cases where the opposing party had much less time to prepare or defend against claims asserted in amended pleadings than the four months Robinson was given. *See Americana Healthcare Center v. Randall*, 513 N.W.2d 566, 571 (S.D. 1994) (finding two months to prepare the defense of a newly asserted claim to be "sufficient time" and no demonstration of undue prejudice as a result); *see also Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 423 (S.D. 1994) (finding no prejudice where the

circuit court granted the plaintiff's motion to amend her complaint to include a new cause of action just one day before the trial was scheduled to begin). Robinson was fully provided the opportunity to – and did – present her arguments on the applicability and effect of the statute of repose. None of the limited and specific concerns of prejudice that this Court has recognized are present under these facts. Robinson was simply not prejudiced by Howey-Fox's amendment.

iii. Howey-Fox would have been permitted to assert the affirmative defense of statute of repose as a matter of course with or without the circuit court's allowance.

Robinson's lack of prejudice is further evidenced by the fact that Howey-Fox would have been permitted to raise the affirmative defense of statute of repose in response to Robinson's Amended Complaint as a matter of course with or without the circuit court's grant of Howey-Fox's motion to amend. At the same time that Howey-Fox sought leave of court to amend her initial Answer, Robinson, too, sought leave of court to amend her initial Complaint. (RA 50-52, 59-66.) Robinson's motion to amend was granted. (RA 267-268.) Robinson's Amended Complaint added a new claim and theory of recovery. (RA 103-112.) This new claim and theory of recovery alleged that, while representing Robinson, Howey-Fox loaned Robinson money and took her "diamond anniversary ring as collateral, which was worth far more than the amount of money [loaned Robinson]." (RA 103-112.) With her Amended Complaint, Robinson sought the damages she sustained "as a result of [] Howey-Fox procuring [Robinson's] diamond anniversary ring" at a price allegedly below fair market value. (*Id.*) That amendment expanded the scope of the case on which Robinson had been proceeding – that Howey-

Fox committed malpractice as a result of her failure to commence the personal injury action within the statute of limitations.

This Court has not previously addressed the issue of whether a party may amend their pleadings as a matter of right, and without seeking leave of court, in response to another party's amended pleading. Of the courts that have addressed this issue, the large majority have adopted an equitable rule that "when a plaintiff files an amended complaint which changes the theory or scope of the case, the defendant is allowed to plead anew as though it were the original complaint filed by the [p]laintiff." *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 832 (N.D. Iowa 1997), *aff'd*, 2000 WL 84400 (8th Cir. January 21, 2000); *Hydro Engineering, Inc. v. Petter Investments, Inc.*, 2013 WL 1194732 (D. Utah March 22, 2013) (holding that a defendant may assert new affirmative defenses without leave of court when "a plaintiff files an amended complaint which changes the theory or scope of the case.").[4] Robinson's Amended Complaint expanded the scope of the case and Howey-Fox would have been permitted to raise the affirmative defense of statute of repose even without a motion for leave to amend. Again, this is especially true where, as here, the affirmative defense could not have been asserted in

[4] *See also, e.g.*, *Port-A-Pour, Inc. v. Peak Innovations, Inc.*, 2016 WL 1258552, * 3 (D. Colo. March 31, 2016) (holding that a defendant may, without seeking leave of court, assert new counterclaims and affirmative defenses when a plaintiff files an amended complaint which changes the theory or scope of the case); *Uniroyal Chem. Co., Inc. v. Syngenta Crop Protection, Inc.*, 2005 WL 677806 (D. Conn. March 23, 2005) (holding that a defendant is entitled to plead anew when a plaintiff adds new theories that expand the scope of the case); *Brown v. E.F. Hutton & Co., Inc.*, 610 F. Supp. 76, 78 (S.D. Fla. 1985) (same); *Buffalo Wild Wings, Inc. v. Buffalo Wings & Rings, LLC*, 2011 WL 2261298, *4 (D. Minn. March 21, 2011) (adopting the moderate approach and recognizing the equitable consideration that "if one party expands its case by adding new theories and claims, the other party may do likewise.").

response to the original Complaint because the law did not support such an assertion at that time. The circuit court's grant of Howey-Fox's Motion for Leave to Amend is properly affirmed.

CONCLUSION

The circuit court correctly held that SDCL § 15-2-14.2 is a statute of repose. There remained no disputes of material fact that Robinson failed to bring her claims within three years of the time the alleged malpractice occurred and her claims are, therefore, time-barred. Robinson's numerous attempts at avoiding the application of this Court's decision in *Pitt-Hart v. Sanford USD Medical Center* should be denied. The continuous representation doctrine does not apply to statutes of repose. And there were no continuing torts to trigger the continuing tort doctrine.

The circuit court did not abuse its discretion in granting Howey-Fox's Motion for Leave to File Amended Answer because Robinson was not prejudiced by the amendment. For these reasons, Howey-Fox respectfully requests this Court to affirm the circuit court in all respects.

Dated: June 8th, 2018.

FULLER & WILLIAMSON, LLP

/s/ William P. Fuller

William P. Fuller
Molly K. Beck
7521 South Louise Avenue
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bfuller@fullerandwilliamson.com
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Attorneys for Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox

CERTIFICATE OF SERVICE

I certify that on June 8th, 2018, I e-filed with the South Dakota Supreme Court's office, and served via electronic mail, a true and correct copy of Appellees' Brief, on:

Casey W. Fideler
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Robert J. Rohl
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/s/ William P. Fuller
One of the Attorneys for Appellees
Harmelink, Fox & Ravnsborg Law Office
and Wanda L. Howey-Fox

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Word PerfectX6 and contains 6,862 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ William P. Fuller
One of the Attorneys for Appellees
Harmelink, Fox & Ravnsborg Law Office
and Wanda L. Howey-Fox

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF YANKTON	)	FIRST JUDICIAL CIRCUIT

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66 CIV. 16-000079

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

vs.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

NOTICE OF ENTRY OF JUDGMENT OF DISMISSAL

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PLEASE TAKE NOTICE that a Judgment of Dismissal of Defendants/Third-Party Plaintiffs and Third-Party Defendant was signed by the Honorable John Pekas on September 22, 2017, and filed with the Yankton County Clerk of Court on September 25, 2017. A true and correct copy of the Judgment of Dismissal of Defendants/Third-Party Plaintiffs and Third-Party Defendant is attached to this Notice.

Filed: 9/25/2017 2:38:05 PM CST Yankton County, South Dakota 66CIV16-000079

Dated: September 25, 2017.

FULLER & WILLIAMSON, LLP

/s/ William Fuller
William Fuller
Molly K. Beck
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Certificate of Service

I certify that on September 25, 2017, I e-filed and served via Odyssey File & Serve, a true and correct copy of the foregoing Notice of Entry of Judgment of Dismissal, upon:

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Attorney for Plaintiff

Douglas M. Deibert
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/s/ William Fuller
One of the Attorneys for Defendants/
Third-Party Plaintiffs

STATE OF SOUTH DAKOTA) : SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

66 CIV. 16-000079

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

vs.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

JUDGMENT OF DISMISSAL OF DEFENDANTS/THIRD-PARTY PLAINTIFFS AND THIRD-PARTY DEFENDANT

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A hearing on Defendants/Third-Party Plaintiffs', Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox, Motion for Summary Judgment, with Joinder by Third-Party Defendant, Yankton County, South Dakota, was held on Wednesday, September 20, 2017, at 2:30 p.m. at the Minnehaha County Courthouse in Sioux Falls, South Dakota, the Honorable John Pekas presiding. Plantiff appeared through counsel of record, Casey Fideler, Defendants/Third-Party Plaintiffs appeared through counsel of record, William Fuller, and Third-Party Defendant appeared through counsel of record, Douglas Deibert. The Court, having reviewed the parties filings and submissions, having heard arguments of counsel, and for good cause appearing, it is hereby

ORDERED, ADJUDGED, and DECREED that Defendants/Third-Party Plaintiffs' Motion for Summary Judgment, with Joinder by Third-Party Defendant, is GRANTED on the merits, and with prejudice, with each party to bear their own costs.

Dated: 9/22/, 2017.

BY THE COURT:

The Honorable John Pekas
Circuit Court Judge

ATTEST: ~~Angella Gries, Clerk~~

By: _____
Deputy

Attorneys at Law

Fuller & Williamson, LLP

7521 South Louise Avenue
Sioux Falls, South Dakota, 57108
P: (605) 333-0003 | F: (605) 333-0007
www.fullerandwilliamson.com

‡ Also licensed to practice in Minnesota.
◦ Also licensed to practice in Iowa.

William P. Fuller ‡
Hilary L. Williamson ‡
Derek A. Nelsen ‡
Eric T. Preheim ◦
Molly K. Beck

bfuller@fullerandwilliamson.com

COPY

May 17, 2017

Casey W. Fideler
Christopherson, Anderson, Paulson & Fideler
509 South Dakota Avenue
Sioux Falls, SD 57104-6809

Re: Jill Robinson-Podoll, f/k/a Jill Robinson-Kuchta v. Harmelink, Fox & Ravensborg Law Office and Wanda L. Howey-Fox vs. Yankton County, South Dakota - Civ. 16-79

Dear Casey:

I have enclosed a Stipulation to Amend the Answer as well as the proposed amended answer. The only change that I am making to the answer is adding the statute of repose as a defense under the third defense. If acceptable, please sign the stipulation and return it to me. Otherwise, we can bring it before the court. Thank you.

Yours truly,

William Fuller

Enclosure

cc/enc: Douglas M. Deibert

STATE OF SOUTH DAKOTA : SS COUNTY OF YANKTON	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

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66 CIV. 16-000079

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA, Plaintiff, vs. HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX, Defendants/Third-Party Plaintiffs, vs. YANKTON COUNTY, SOUTH DAKOTA, Third-Party Defendant.	:	STIPULATION TO AMEND ANSWER

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The above-named parties, through counsel of record, hereby stipulate and agree that Defendants/Third-Party Plaintiffs may amend their Answer to Plaintiff's Complaint. Attached as Exhibit A is a copy of the proposed Amended Answer to Plaintiff's Complaint.

Dated this ____ day of May, 2017.

FULLER & WILLIAMSON, LLP

_____

William Fuller
7521 S. Louise Avenue
Sioux Falls, SD 57108
Phone 605-333-0003
Fax 605-333-0007
Email bfuller@fullerandwilliamson.com
Attorneys for Defendants

Dated this _____ day of May, 2017.

CHRISTOPHERSON, ANDERSON,
PAULSON & FIDELER

_____

Casey W. Fideler
509 S. Dakota Avenue
Sioux Falls, SD 57104-6809
Phone 605-336-1030
Fax 605-336-1027
Email casey@capflaw.com
Attorneys for Plaintiff

Dated this ____ day of May, 2017.

CADWELL, SANFORD, DEIBERT & GARRY

_____

Douglas M. Deibert
P.O. Box 2498
Sioux Falls, SD 57101
Phone 605-336-0828
Fax 605-336-6036
Email ddeibert@cadlaw.com
Attorneys for Third-Party Defendant

STATE OF SOUTH DAKOTA : SS COUNTY OF YANKTON	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

66 CIV. 16-000079

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA, Plaintiff, vs. HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX, Defendants.	:	DEFENDANTS' AMENDED ANSWER AND DEMAND FOR JURY TRIAL

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COMES NOW Defendants Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox (collectively "Defendants"), by and through their counsel of record, and for their Amended Answer to Plaintiff's Complaint, state and allege as follows:

First Defense

1. Plaintiff's Complaint fails to state a claim or a cause of action against Defendants upon which relief can be granted.

2. Plaintiff is not the real party in interest.

Second Defense

3. Defendants deny each and every allegation, matter, and thing contained in said Complaint except such as are hereinafter specifically admitted or qualified

4. Defendants admit paragraphs 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 28.

4. Defendants admit that a motor vehicle accident occurred on April 28, 2007, in which the vehicle driven by Chelsea Ewalt pushed the vehicle operated by Michelle Mitchell into the rear bumper of the vehicle being operated by the Plaintiff herein.

5. Plaintiff's allegations in paragraphs 29, 30, and 31 are legal conclusions to which no response is required.

Third Defense

6. Plaintiff was contributorily negligent barring her recovery herein.

7. Plaintiff's purported cause of action is barred by the doctrine of estoppel and in pari delecto.

8. Plaintiff failed to mitigate her damages.

9. Plaintiff's purported cause of action is barred by the statute of repose.

Fourth Defense

9. Plaintiff's claim for punitive damages violates Defendants' due process rights guaranteed by the Fourteenth Amendment to the United States Constitution and Article VI Section 2 of the South Dakota Constitution.

Prayer for Relief

Defendants pray that Plaintiff's Complaint be dismissed upon the merits and that Defendants have and recover their costs and disbursements herein.

Request for Jury Trial

Defendants request a trial by jury on all issues of fact.

Dated this ____ day of May, 2017.

FULLER & WILLIAMSON, LLP

/s/ William Fuller

William Fuller
7521 South Louise Avenue
Sioux Falls, SD 57108
Phone:(605) 333-0003
Fax: (605) 333-0007
Email: bfuller@fullerandwilliamson.com
Attorney for Defendants

Certificate of Service

I certify that on the ____ day of May, 2017, I served via Odyssey File & Serve, a true and correct copy of the foregoing Defendants' Amended Answer and Demand for Jury Trial, upon:

Casey W. Fideler
CHRISTOPHERSON, ANDERSON,
PAULSON & FIDELER, LLP
509 S. Dakota Avenue
Sioux Falls, SD 57104-6809
Attorney for Plaintiff

/s/ William Fuller
One of the Attorneys for Defendants

Sara Heller

From: Bill Fuller
Sent: Wednesday, May 24, 2017 3:01 PM
To: Casey W. Fideler
Cc: Douglas Deibert
Subject: RE: Robinson v Fox

We can set it for hearing for both motions. Bill

From: Casey W. Fideler [mailto:casey@capflaw.com]
Sent: Wednesday, May 24, 2017 2:02 PM
To: Bill Fuller <bfuller@fullerandwilliamson.com>
Cc: Casey W. Fideler <casey@capflaw.com>; Douglas Deibert <ddeibert@cadlaw.com>
Subject: Re: Robinson v Fox

Bill,

I apologize for the delay in responding to your request that I stipulate to allowing you to amend the answer to the complaint but I am up against the SOL on another matter so my attention has been directed to that file recently. I cannot sign the stipulation as doing so would be adverse to my client's interests and I also feel that your request is untimely and would be prejudicial to my client because we just completed depositions.

I have also attached an email chain dated January 18, 2017 whereby I ask you to stipulate to me amending the complaint to include Jill's damages as a result of the sale of her ring to Wanda. Mr. Deibert responded taking no position on my request. However, you never responded to my request.

We can set a hearing date on both motions and kill two birds with one stone, can't we? Please let me know what you think. Thank you.

Respectfully,
Casey
Casey W. Fideler, LL.M
Christopherson, Anderson, Paulson & Fideler, LLP
509 South Dakota Avenue
Sioux Falls, SD 57104-6809
Phone: (605) 336-1030
Fax: (605) 336-1027
Email: Casey@capflaw.com

On May 24, 2017, at 12:04 PM, Bill Fuller <bfuller@fullerandwilliamson.com> wrote:

Casey I sent you a stipulation to amend the answer last week. Doug has already signed it. Are you going to sign? Bill

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA
Plaintiff,
-vs-
HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,
Defendants/Third-Party Plaintiffs,
-vs-
YANKTON COUNTY, SOUTH DAKOTA,
Third-Party Defendant.

66 CIV. 16-000079

* *

DEPOSITION OF

Jill Robinson-Podoll

* *

APPEARANCES:

Christopherson, Anderson, Paulson & Fideler, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Casey W. Fideler, for the Plaintiff;

Fuller & Williamson, Attorneys at Law, Sioux Falls, South Dakota, by Mr. William P. Fuller, for the Defendants and Third Party Plaintiffs;

Cadwell, Sanford, Deibert & Garry, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Douglas M. Deibert, for the Third-Party Defendant.

ALSO PRESENT: Wanda Howey-Fox

INDEX OF EXAMINATION

INDEX OF EXHIBITS

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Jill Robinson-Podoll may be taken at this time and place, that is, at the James Law Offices, Yankton, South Dakota, on the 2nd day of May, 2017, commencing at the hour of 8:30 o'clock a.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

JILL ROBINSON-PODOLL,

called as a witness, being first duly sworn, deposed and said as follows:

EXAMINATION BY MR. FULLER:

Q Would you state your name, please?

A Jill Robinson-Podoll.

Q Jill, my name is Bill Fuller and I'm representing Wanda Howey-Fox, and I'm going to talk to you a little bit

Page 61

Q Were you working at Wells Fargo at that time?
A Yes, I was.
Q Were you aware that Chelsey Ewalt's parents banked at Wells Fargo?
A I was not.
Q Okay. So you don't recall any discussions with Wanda Howey-Fox about the residence of Chelsey Ewalt?
A I know a couple times I may have mentioned I know her mother worked at Walmart and I knew her mother was from, like, the Gayville-Volin area. I did not know that her mom and dad were divorced.
Q So when did you first learn that the Summons and Complaint was not served in time?
A Probably a week before the jury trial, maybe two weeks.
Q So, roughly, three years later. What happened within those three years from 2010 to 2013?
A I assumed, because I had been dropping off bills and signing papers, that this was in the process. You know, I don't know why I would be dropping off bills if nothing was in pursuit.
Q Did you know that Miss Ewalt's lawyer initially got the lawsuit dismissed?
A I did not.
Q Did you know that dismissal was appealed by Wanda to the South Dakota Supreme Court?

Page 62

A You know, now that you say that, I do remember something about that.
Q You remember something about your case being in front of the South Dakota Supreme Court?
A Right.
Q And did you know that the South Dakota Supreme Court sent the case back to have that trial in front of the jury?
A I was not aware that was the procedure.
Q Did you ever ask Wanda, why are we having this jury trial?
A I guess I never did. I had my trust and faith in her. She was one of my friends. I assumed she was doing what was best -- in the best of my interest.
Q But is that the first jury trial you've been in?
A Yes.
Q And weren't you curious as to why we're having this trial in front of a jury?
A You know, I had so many things going on in my life and, like I stated, Wanda was my friend, I never doubted what she was doing. I assumed she had been doing this all the time, and I never questioned her.
Q Well, when you found out that Miss Ewalt was not served in time, were you surprised to hear that?
A I was shocked.

Page 63

Q And had she been served in time, then you would have had the lawsuit against Ewalt, correct?
A I believe so.
Q And we wouldn't be here today with a lawsuit against Wanda, correct?
A Correct.
Q Do you remember any conversations you had with Wanda concerning the attorney fee agreement?
A No, I do not.
Q So from your perspective, in your opinion when did this attorney-client relationship begin between you and Wanda in reference to the car accident?
MR. FIDELER: Again, an objection on the record, Wayne. Legal conclusion.
MR. FULLER: You can answer.
A The day when I called her about getting that check from De Smet.
Q And why do you say that?
A Because at that time she advised me not to sign any papers, to start bringing her the paperwork, any bills, names of doctors that I had seen. I assumed that was because of an client-attorney situation and not just because we were friends. None of my other friends asked for any of that.
(Deposition Exhibit Number 10 was marked for

Page 64

identification by the court reporter).
Q I'll show you what's been marked as Deposition Exhibit 10, which is an appraisal of a ring that was provided to me by your attorney. That is a ring that you owned?
A Correct.
Q And when did you purchase that ring?
A I do not recall the date.
Q Do you remember how much you paid for the ring?
A I believe it was under $5,000.
Q Pardon me?
A I believe it was under $5,000.
Q Okay. And you purchased it from whom?
A A friend, a jeweler of Wanda's.
Q Here in Yankton?
A Yes.
Q And did you ultimately end up selling that ring to Wanda?
A I gave her that ring and she gave me some money, and at the time I had asked her, do you think that, you know, that case will be settled by then? I was thinking September, I don't know why that date sticks in my mind, so I thought, if I wasn't able to come up with the money on my own that this trial would have been over and I could have paid her off that way also.
Q Why didn't you just sell the ring to somebody else or

IN THE SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

Appeal No. 28249

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff/Appellant,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants, and Third-Party Plaintiffs/Appellees,

vs.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant/Appellee

BRIEF OF APPELLEE YANKTON COUNTY, SOUTH DAKOTA

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

HONORABLE JOHN PEKAS, presiding
Circuit Court Judge

Attorneys for Plaintiff/Appellant:

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Attorneys for Third-Party Defendant/Appellee Yankton County, South Dakota

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Notice of Appeal filed October 24, 2017

TABLE OF CONTENTS

Page(s)

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes:

Cases:

PRELIMINARY STATEMENT

Consistent with the naming of parties contained in the Preliminary Statement of Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox, the following will be references to parties in this Brief:

Plaintiff/Appellant Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta will be referred to as "Robinson."

Defendant and Third-Party Plaintiffs/Appellee Harmelink, Fox & Ravnsborg Law Office Office and Wanda L. Howey-Fox will be referred to as "Howey-Fox."

Third-Party Defendant/Appellee Yankton County, South Dakota will be referred to as "Yankton County."

STATEMENT OF JURISDICTION

Yankton County agrees with the Statement of Jurisdiction made by Howey-Fox. Yankton County agrees the Notice of Appeal was timely filed.

STATEMENT OF THE ISSUES

Yankton County agrees with the Statement of the Issues advanced by Howey-Fox; and re-states those issues as follows:

I. Whether the circuit court properly granted Howey-Fox's Motion for Summary Judgment.

Robinson argues that the circuit court erred by granting Howey-Fox's Motion for Summary Judgment. The circuit court properly granted Howey-Fox's Motion for Summary Judgment because no disputes of material fact remained. In addition, the circuit court, in applying this Court's guidance and analysis in *Pitt-Hart v. Sanford USD*

Medical Center, 2016 S.D. 33, 878 N.W.2d 406 and the plain language of SDCL § 15-2-14.2, correctly determined that SDCL § 15-2-14.2 is a statute of repose.

- SDCL § 15-2-14.2
- *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406
- *Hagemann ex rel. Estate of Hagemann v. NIS Engineering, Inc.*. 2001 S.D. 102, 632 N.W. 2d 840

II. Whether the circuit court properly granted Howey-Fox's Motion for Leave to File Amended Answer.

Robinson argues that the circuit court erred in granting Howey-Fox's Motion for Leave to File Amended Answer. (The circuit court was within its discretion in granting Howey-Fox's Motion both because: (1) Robinson was not prejudiced by the amendment; and (2) justice required leave be freely given in light of a *Pitt-Hart*, which was issued after Howey-Fox filed her initial Answer and which triggered the applicability of the statute of repose affirmative defense to Robinson's claims against Howey-Fox.

- SDCL § 15-6-15(a)
- *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406
- *Beyer v. Cordell*, 420 N.W.2d 767 (S.D. 1988)

STATEMENT OF THE CASE

Yankton County agrees with Howey-Fox' Statement of the Case. Significantly, the claimed act of malpractice Robinson claims against Howey-Fox occurred no later than April 29, 2010, which was three years from the date of the motor vehicle accident involving Robinson, Mitchell, and Ewalt. Howey-Fox represented Robinson in bringing the lawsuit against those Defendants. Howey-Fox failed to ensure that Ewalt was served on or before April 28, 2010, at which time the the three-year statute of limitations expired on that claim.

Howey-Fox was served with the Summons and Complaint in this case on January 27, 2016, nearly six years after the occurrence of the motor vehicle accident in which Howey-Fox represented Robinson.

In a bench ruling of September 20, 2017, the Trial Court granted Howey-Fox' Motion for Summary Judgment. This appeal follows.

ARGUMENT[1]

I. The circuit court correctly concluded that SDCL § 15-2-14.2 is a statute of repose based on this Court's decision in *Pitt-Hart v. Sanford USD Medical Center*.

Of course, this is a question of law. It is undisputed that the three-year statute of limitations set forth in SDCL § 15-2-14 began running April 28, 2007, the date of the motor vehicle accident involving Robinson and two other parties. The statute of limitations would have run April 29, 2010, on that accident claim. Howey-Fox failed to ensure that Robinson's lawsuit was served on or before that date.

It is likewise undisputed Howey-Fox was served with the Summons and Complaint in this legal malpractice action against her, on January 27, 2016. From April 29, 2010, the date on which the limitations period began running on Robinson's potential claim against Howey-Fox, the three-year limitation mandated by SDCL 15-2-14.2 expired April 30, 2013. Thus, Robinson's Complaint in this action was served on Howey-Fox

---

[1] In this section, Yankton County will refer to the arguments made by Howey-Fox in the section headed "Argument," which appears at pages 9-27 of Howey-Fox' Brief. Yankton County will attempt to limit or at least eliminate unnecessary repetition in citing authority, or making arguments.

two years, nine months after the claim expired under SDCL 15-2-14.2. Clearly the three-year statute was exceeded.

A. SDCL § 15-2-14.2 is a statute of repose.

There is little or nothing to add to the well written, well reasoned argument Howey-Fox makes at pages 9-13 of her Brief. Probably the only issue worth noting is Howey-Fox' comparison of SDCL § 15-2-14.1, with SDCL § 15-2-14.2, which appears at pages 9-10 of Howey-Fox' Brief. Each quoted portion of the statute ends with the four words "shall have occurred." The medical malpractice limiting statute, SDCL §15-2-14.1, lists the potential acts subject to professional negligence as "malpractice, error, mistake, or failure to cure, ..." Those terms are used twice in the statute.

Similarly, and virtually identically, the legal malpractice limiting statute, SDCL § 15-2-14.2 lists "malpractice, error, mistake, or omission, ..." The only difference is that the medical malpractice statute uses the phrase "failure to cure," while the legal malpractice statute substitutes the word "omission" in place of "failure to cure." Of course, lawyers' professional actions do not involve "curing" anything or anyone. Thus, for purposes of realistic comparison, the two statutes are identical in the most important sense.

As to any argument Robinson makes regarding a client-potential plaintiff's recognition of the malpractice claimed, this Court has previously dealt with a similar issue involving a claim of attorney malpractice.[2] See *Green v. Siegel, Barnett & Shutz,*

---

[2] The statute of repose issue argument was not made in that case, perhaps because *Pitt-*

557 N.W.2d 396 (S.D. 1996). In that case, Defendant law firm did legal work for a client in November of 1976. That work involved trusts for three minor children and potential tax advantages, had the document work been done differently. Grantor Mayme Green died June 27, 1993. The legal malpractice claim was commenced April 19, 1995. Obviously that was outside both the six-year statute of limitations under a statute regarding legal malpractice actions arising prior to 1977; and a three-year limitations period for such actions after 1977.

The Trial Court granted summary judgment in favor of plaintiff on the statute of limitations issue. The South Dakota Supreme Court reversed, rejecting arguments of "open courts" and constitutionality. Further, in holding that the limitation period began running in November of 1976, at the time the documents were prepared, this Court noted other decisions indicating sympathy for those who find a statute unjust. However, this Court deferred to the Legislature, to correct any such claimed injustices. Thus, *Green* provides strong authority against any argument claiming discovery of the alleged malpractice act is to be considered, rather than the date of occurrence.

B. Robinson's claims against Howey-Fox are time barred.

Yankton County adopts the arguments and authorities set forth in Howey-Fox' Brief, No. 1, B. No other argument is necessary.

C. The continuous representation doctrine does not apply to statutes of repose.

Yankton County adopts the arguments and authorities set forth in Howey-Fox'

Hart, 2016 S.D. 33, 878 N.W.2d 406, was not decided until 2016.

Brief, No. 1, C.

In her argument regarding the continuous representation doctrine, at page 10 of her Brief, Robinson makes the following statement:

> The trial court's ruling is confusing, but it expressly grants Defendants' argument that Plaintiff's claims against Defendant Fox are time-barred. The Court did not produce Findings of Fact and Conclusions of Law, a Memorandum Decision, nor any other memoranda articulating its rationale.

It is hard to understand how the Trial Court's ruling could be considered confusing. Very plainly and clearly, the Trial Court granted Howey-Fox' Motion for Summary Judgment on the statute of repose issue.

As for the argument that failure to enter Findings of Fact and Conclusions of Law somehow affect the issue involved in this appeal, it is well settled that Findings of Fact and Conclusions of Law are unnecessary in Motions for Summary Judgment; this Court has previously held they are improper and unnecessary. See *Bergin v. Bistodeau*, 645 N.W.2d 252 (2002) and *City of Belle Fourche v. Dittman*, 325 N.W.2d 309 (1982).

Nor is a Memorandum Decision or any other memoranda necessary. Thus, that argument made at page 10 is without substance or merit.

D. There is no continuing tort to trigger the continuing tort doctrine.

As with other arguments, Yankton County adopts and agrees with Howey-Fox' argument and authorities on this issue. If a Plaintiff were able to rely on the continuing tort theory, it would seem virtually every statute of limitations or repose defense would be defeated, a result that would effectively destroy this valid defense.

II. The circuit court did not abuse its discretion in granting Howey-Fox's Motion for Leave to File Amended Answer.

Not only does Robinson ignore *Pitt-Hart* in claiming the circuit court erred in granting summary judgment, she also argues Howey-Fox should not have been able to amend her answer to assert the affirmative defense of the statute of repose in the first place. This is true even though *Pitt-Hart*, which held that the exact language found in SDCL § 15-2-14.2 creates a statute of repose and not a statute of limitations, was not decided until after Howey-Fox served her original answer. Justice required the amendment for this reason, and Robinson was not prejudiced by the same. Robinson's continued attempts to elude *Pitt-Hart*'s application by arguing that the circuit court abused its discretion by granting Howey-Fox's motion to amend should also be rejected. South Dakota law provides, in relevant part:

> [A] party may amend his pleading [] by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. SDCL § 15-6-15(a)

So long as there is no prejudice to the non-moving party as a result of the amendment, circuit courts are specifically permitted to, and when justice requires instructed to, allow amendment of the pleadings "before, during, and after trial without the adverse party's consent." *Dakota Cheese, Inc. v. Ford*, 1999 S.D. 147, ¶ 24, 603 N.W.2d 73, 78 (internal citations and quotations omitted). The circuit court was well within its discretion in granting Howey-Fox's Motion for Leave to File Amended Answer both because there was no prejudice to Robinson and because justice required this result.

A. The affirmative defense of statute of repose was never waived.

Howey-Fox' argument at pages 20-21 of her Brief could not be argued any more

effectively. It is undisputed Howey-Fox' initial Answer was filed February 25, 2016. *Pitt-Hart* was not decided until April 13, 2016, several weeks after the Answer was filed. Thus, Howey-Fox could have made the Motion for the amendment any time after the *Pitt-Hart* decision.

B. Robinson was not prejudiced by Howey-Fox's amendment.

i. The eventual grant of summary judgment is not indicative of prejudice.

Robinson's attempt to show prejudice is weak at best; wholly unsupported at worst. In addition to the arguments made by Howey-Fox at pages 21-22 of her Brief, it should be noted that, up to the time the Motion for Summary Judgment was made, no Scheduling Order had been entered. There was no deadline for the filing of any motions. No discovery deadline had ever been set. No trial date had been set. It is likely other discovery and trial depositions would have been necessary prior to trial, since in effect, Robinson would have needed to prove her damages in the car accident case, if she could negotiate the hurdle of avoiding dismissal of the legal malpractice claim. The significant point to be made is that, at the time Howey-Fox made her Motion to amend her Answer, there is no question any trial would have been months away. Responding to the Motion for Summary Judgment, whether made at the time it was made, or if it had been made earlier, involved the same time and effort to oppose the Motion. Consequently, the issue of prejudice totally fails.

ii. Robinson cannot satisfy the recognized concerns of prejudice.

Yankton County has no additional argument on this issue, other than that made in

paragraph II. i. above**;** and Howey-Fox' argument on the issue, at pages 23-27 of her Brief.

iii. Howey-Fox would have been permitted to assert the affirmative defense of statute of repose as a matter of course with or without the circuit court's allowance.

Again on this issue, Howey-Fox is spot-on with her argument. Once Robinson's Motion to Amend her Complaint was granted, Howey-Fox had 30 days after service of that amended pleading, to serve and file her Answer to the Amended Complaint. In effect, it was a new ball game regarding the Answer. Howey-Fox was entitled to plead any defense, whether previously pleaded or not. Thus, Robinson's argument on that issue is painfully weak, and should be rejected.

III. Robinson's claims that devasting effects will occur to the judicial system if the summary judgment ruling is affirmed, are overstated, and not supported by any fact or evidence.

Briefly addressing the argument made by Robinson in Section I, C. at page 14 of her Brief, that argument abandons any effort at objective analysis, or citation of statutes or case authority. Instead, the very bold print in section C predicting that "the Ramifications to Current Jurisprudence Will be Wide Sweeping" begins the rhetoric-filled prophecy, and in general, gloom-and-doom effects on the legal system. The "floodgates of litigation" prediction made at page 15 of the Brief falls in the same category. Any disgruntled, disappointed party who finds themself in the position of Robinson, attempting to obtain a reversal on an adverse ruling to her, can use these and other types of arguments. They are nothing but that: arguments. They are unsupported in fact, law or evidence, and may be the stuff of a last-ditch, desperate attempt to salvage her

case.

These terms and arguments are very similar to the numerous attempts to utilize the "open courts" doctrine, in attempts to divert attention from the real issues involved in the case. See, for example, *Green v. Siegel Barnett, supra*, 557 N.W.2d at 399-404, involving the identical type of cause of action here, legal malpractice; *Wegleitner*, 1990 SD 88, 582 N.W.2d 688, a case attempting to convince this Court to negate the dram shop law; *Cleveland, et al v. BDL Enterprises, Inc., et al*, 203 SD 54, 663 N.W.2d 212, rejecting the "open courts" argument on the construction deficiency statute of repose; and *Novotny v. Sacred Heart Health Services*, 2016 75, 887 N.W.2d 83, a case involving construction and applicability of the peer review privilege.

Arguments such as Robinson makes in her Brief, mentioned above, along with the statement relating to "the public's loss of a remedy to wrongs that deserve it," page 5 of the Brief, fall in the same category as the "open courts" arguments that have been rejected some number of times, including in the two cases cited above.

This very matter was discussed in *Green v. Siegel Barnett, supra*, at 557 N.W.2d, P. 400. That decision discussed the "open courts" argument and issue in some detail. The case noted:

> It (the open courts doctrine) does not create rights of action. Citations omitted. We have held that reasonable conditions on a cause of action are not unconstitutional. Citations omitted.

Thus, while Robinson does not argue the "open courts" doctrine, her brief and dramatic arguments advanced, fall in the same category as the "open courts" argument. Those arguments should be rejected.

Here, a question of law is involved, no more, no less. Neither Howey-Fox nor Yankton County attempt to shore up a difficult position, not that there is one, with the type of dramatic, gloom-and-doom language Robinson's brief contains. The facts are undisputed, and overwhelming case law supports the Trial Court's decision to dismiss this case based on the statute of repose issue.

SUMMARY AND CONCLUSION

Consistent with this Court's ruling in *Pitt v. Hart,* SDCL §15-14-2.2, like SDCL § 15-14-2.1, is a statute of repose, not a statute of limitations. The key wording in both statutes is identical. Consequently, the statute of repose on the legal malpractice claim expired April 30, 2013.

Neither the argument of continuous representation nor continuing tort alter the analysis. Those doctrines simply do not apply here.

Likewise, the Trial Court's ruling on Howey-Fox' Motion to Amend her Answer was correct. At the time her original Answer was served and filed, *Pitt-Hart* had not yet been decided. Consequently, it could not have been pleaded with the original Answer. There was no deadline of any kind affecting Howey-Fox from moving to amend her Answer. The substantial case law on the issue of freely permitting amendments to pleadings dictates that granting the Motion to Amend the Answer was correct in all respects.

Further, since Robinson was granted the right to amend her Complaint on the same date as Howey-Fox' Motion to Amend was granted, Howey-Fox then had 30 days in which to answer the Amended Complaint, following service of that pleading. Thus,

the Amended Complaint negated any necessity of determining the Answer amendment issue.

Finally, there was absolutely no prejudice to Robinson. No Scheduling Order was in effect. There were no deadlines of any kind, in particular a motions deadline. Furthermore, the case had not been set for trial. Substantial additional discovery would have been necessary, had the case been allowed to go forward. Consequently, the issue of prejudice should likewise be rejected.

For all these reasons, consistent with statute and well settled case law, we urge this Court to affirm the Trial Court's ruling on Howey-Fox' Motion for Summary Judgment, and the Order and Judgment which followed.

Dated at Sioux Falls, South Dakota, this ____ day of June, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL § 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 3,170 words and 16,935 characters.

_____
Douglas M. Deibert

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed Brief of Appellee Yankton County, South Dakota with the Clerk of Court at SCClerkBriefs@ujs.state.sd.us pursuant to Rule 13-11 and served by e-mail to the following:

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The undersigned further certifies that the original and two (2) copies of the foregoing Brief of Appellee Yankton County, South Dakota were mailed to:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28249

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,
Plaintiff /Appellant,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,
Defendants, Third-Party Plaintiffs/Appellees,

vs.

YANKTON COUNTY, SOUTH DAKOTA,
Third-Party Defendant/Appellee.

Appeal from the Circuit Court
First Judicial Circuit
Yankton County, South Dakota

The Honorable John Pekas

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Notice of Appeal filed October 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

1. The Court's obligation is to interpret the law in a manner avoiding absurd results

If the trial court is affirmed, this Court is placing contradictory rules, duties, and responsibilities on attorneys. Defendant Howey-Fox had a legal duty to attempt to cure her negligent acts, i.e. missing the statute of limitations. *Keegan v. First Bank of Sioux Falls*, 519 N.W.2d 607, 614 (S.D. 1994); *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111, 115 (S.D. 1990). Assuming arguendo that the Court finds for Defendants, Defendant Howey-Fox's legal duty to correct the wrong is in direct conflict with her client's best interests.

The Court has an obligation to interpret law in a manner avoiding "absurd results." *Murray v. Mansheim*, 2010 SD 18, ¶ 6, 779 N.W.2d 379. Defendants' argument(s) implies that Defendant Howey-Fox, or similarly situated attorneys, should here forward abandon all efforts at correcting malpractice and advise clients to immediately seek substitute counsel to pursue claim(s) against them. Failure to abandon efforts at correcting the malpractice can and will result in a limitations problem, as clearly demonstrated by this case. Surely Defendants agree that while representing a client an attorney must not do anything that is contrary to the best interest of their client; this is "fundamental law." *In re Discipline of Mattson*, 2002 S.D. 112, ¶ 44, 651 N.W. 2d 278, 286 (citing *Speckels v. Baldwin*, 512 N.W.2d 171, 176 (S.D. 1994)).

The risk that Plaintiff unknowingly assumed by allowing Defendant Howey-Fox to comply with her legal duty to cure the malpractice is senseless. Why risk losing a client's claim if the underlying negligence can be litigated in a malpractice case without worry about a limitations argument? Meaningful recovery is still available because of attorney malpractice insurance requirements.

All Defendant Howey-Fox's time spent complying with her legal duty, attempting to remedy the situation, only caused Plaintiff further injury. If the trial court is affirmed, Defendants are asking this Court to impose contradictory rules, duties, and responsibilities on attorneys. However, finding that Defendant Howey-Fox's last culpable act or omission did not occur until the date her representation ceased would easily resolve this dilemma. Perhaps the last culpable act of Defendant Howey-Fox was failing to advise Plaintiff of the fact she should pursue a malpractice claim?

2. *Pitt-Hart does not foreclose Plaintiff's Claims*

A statute of repose does not begin when a cause of action accrues; it begins when the "alleged malpractice, error, mistake, ***or ommission*** **[...]** occurred" (emphasis added) *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, ¶ 18, 878 N.W.2d 406, 413 (citing SDCL 15-2-14.1). February 11, 2013 is the date of the last culpable act or omission of the Defendant. *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182 (2014). On February 11, 2013, Defendant Howey-Fox failed to cure her mistake and failed to disclose, as required, that her conduct gave rise to a substantial malpractice claim.1[2] Restatement (Third) of the Law Governing Lawyers § 20 cmt. c (2000).

SD Rule of Professional Conduct 1.4 (a)(3) states that an attorney shall "keep the client reasonably informed about the status of the matter." Rule 1.4(b) requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." These general ethical duties impart an obligation to all attorneys in South Dakota to fully and promptly inform client(s) of significant developments and "[t]he guiding principle is that the lawyer

1. Recall, Defendant Howey-Fox demanded $250,000.00 in the Complaint.

should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests [.]" SD Rule of Professional Conduct 1.4 cmt. 5. In addition, "[a] lawyer may not withhold information to serve the lawyer's own interest [...]" SD Rule of Professional Conduct 1.4 cmt. 7.

In this case, withholding the information, as Defendant Howey-Fox did when she failed to inform plaintiff of plaintiff's potential malpractice claim, can only be said to serve Defendant Howey-Fox's interests at the expense of Plaintiff.

> Professional errors exist along a spectrum. At one end are errors that *will likely prejudice a client's right or claim. Examples of these kinds of errors are the loss of a claim for failure to file it within a statutory limitations period* or a failure to serve a notice of claim within a statutory time period. The lawyer must promptly inform the client of an error of this kind, if a disinterested lawyer would conclude there was an ethical duty to do so, because the client must decide whether to appeal the dismissal of the claim or pursue a legal malpractice action.

Colo. Op. 113, pg. 3, ¶ 2, Ethical Duty of Attorney to Disclose Errors to Client (*emphasis added*); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 481, pg. 3, ¶¶s 1-3, A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error (April 17, 2018). "An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 481, pg. 4, ¶ 4, A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error (April 17, 2018).

> A lawyer must notify a current client or a material error promptly under the circumstances. Whether notification is prompt will be a case- and fact-specific inquiry. *Greater urgency is required where the client could be harmed by any delay in notification*. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's

> professional liability insurer before informing the client of the material error. Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 481, pg. 5, ¶ 1, A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error (April 17, 2018) (emphasis added). Defendant Howey-Fox completely failed to advise Plaintiff, in any way, of the material error she committed. The omission of this duty last occurred on the date representation was terminated.

3. ***Plaintiff's injury resulted from a continuing course of negligent treatment***

For the reasons provided in Section 2 of this *Reply Brief*, Defendant Howey-Fox engaged in a negligent pattern of representation which continued up until the last day of her representation of Plaintiff, which was February 11, 2013 at the earliest. The *Pitt-Hart* Court explained that the Appellant/Plaintiff needed to demonstrate the following for the claim to survive: "(1) that there was a continuous and unbroken course of negligent treatment, and (2) that the treatment was so related as to constitute one continuing wrong." *Pitt-Hart*, 2016 S.D. 33 ¶ 26, 878 N.W.2d 406, 415. The Court further stated that that the period may be delayed from commencing if a Plaintiff can demonstrate that her claim satisfied the two-prong test enumerated above. *Id.* Plaintiff has demonstrated satisfaction of the requisite standard and, more so, this is the type of case where equity demands justice be served by preserving the plaintiff's claim.

Defendant Howey-Fox volitionally undertook all responsibilities, duties, and

obligations owed by attorneys to their clients, specifically the Plaintiff in this case. (Howey-Fox Dep. 7:7-9, May 2, 2017). In choosing to prosecute the Plaintiff's case, Defendant Howey-Fox represented to Plaintiff that she was competent to handle the case and would, to the best of her ability, pursue the cause of action and represent Plaintiff's best interests. Defendant Howey-Fox failed in this regard. She missed the statute of limitations. Instead of counseling her client, the Plaintiff, and providing prompt notification and information allowing the Plaintiff to make an informed and meaningful decision, Defendant Howey-Fox attempted to remedy the situation. (Howey-Fox Dep. 15:24-16:1). Any attorney would understand, under circumstances such as these, that delay in notification to her client, the Plaintiff, could (and ultimately did) result in the harshest harm which can result to a claimant—the loss of their claim, which in this case is substantial. Defendant Howey-Fox willfully, or grossly negligent, failed to disclose any meaningful information to the Plaintiff which would have enabled her to make an informed decision. The continuous and unbroken representation of Defendant Howey-Fox was so related as to constitute one continuing wrong. (Howey-Fox Dep. 89:4-93:3)

Defendants should have real hesitancy representing to this Court that barring Plaintiff's claim does not constitute manifest injustice. South Dakota can and should hold its attorneys to high standards. We are tasked with handling the most important affairs of the public. For good reason, we are especially entrusted and obligated to maintain a high level of responsibility, and when we fail, to make it right, whatever that means, even when it is against the attorney's interest. Defendant Howey-Fox failed, as all lawyers can and do, but the refusal to acknowledge that failure cannot be tolerated. Statutory law, case law, and the statutorily incorporated SD Rules of Professional Conduct prohibit

Defendant Howey-Fox's failure and argument. Her continuing negligent representation did not cease until July 2013. (Howey-Fox Dep. 89:7-9). Based on Ms. Howey-Fox's continued, negligent representation, Plaintiff properly and timely initiated her malpractice suit.

CONCLUSION

The statute of limitations or repose, whether tolled or delayed, did not begin to run, or commence until at least February 11, 2013. Long standing legal precedent unanimously confirms that Robinson should be given her day in court. The devastating effects that affirmation of the trial court's ruling will have are overwhelming, far reaching, and detrimental to the interests of the public. Both the continuous representation doctrine and the continuing tort doctrine provide this Court with the rationale necessary to save Robinson's cause of action and reverse the trial court's ruling.

Respectfully submitted this 25th day of June, 2018.

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I hereby certify that the above Reply Brief of Appellant Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta has been produced in Microsoft Word using a 12 point proportionally spaced typeface for the text of the Reply Brief; that the Reply Brief contains 1,696 words and (6) pages, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated this 25th day of June 2018.

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I hereby certify that on the 25th day of June 2018, pursuant to SDCL §15-26C-4, I mailed the Reply Brief, Appendix, and attachments with two (2) copies to the Supreme Court and emailed a Word version of the same to the Supreme Court. I also electronically served Appellees the above Reply Brief, Appendix, and attachments by transmitting electronic copies to them at the following email addresses:

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REPLY BRIEF APPENDIX TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 481 **April 17, 2018**

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.[1] Recognizing that errors

[1] A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); RFF Family P'ship, LP v. Burns & Levinson, LP, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re* Tallon, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, Fla. Bar v. Morse, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re* Hoffman, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C., 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178, 2009 WL 3270875, at *4 (2009) [hereinafter Cal. Eth. Op. 2009-178] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); Colo. Bar Ass'n, Ethics Comm., Formal Op. 113, at 3 (2005) [hereinafter Colo. Op. 113] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); Minn. Lawyers Prof'l Responsibility Bd. Op. 21, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.[2] Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

[2] MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." More broadly, the "guiding principle" undergirding Model Rule 1.4 is that "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[3] A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.[4]

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers' duty to disclose errors to clients.[5] For example, in discussing the spectrum of errors that may arise in clients' representations, the North Carolina State Bar observed that "material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs."[6] At the other end of the spectrum are "nonsubstantive typographical errors" or "missing a deadline that causes nothing more than delay."[7] "Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests."[8] With respect to the middle ground:

> Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.[9]

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[3] *Id.* cmt. 5.
[4] *Id.* cmt. 7.
[5] *See supra* note 1 (listing authorities).
[6] 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*

Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those "that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."[10] Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."[11] On the other hand, "potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute."[12] Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is "material," which further "depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim."[13]

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

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[10] Colo. Op. 113, *supra* note 1, at 3.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1, 3.

APPENDIX A. APPENDIX TO CHAPTER 16-18

SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP.

COUNSELOR.

ADVOCATE.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS.

APPENDIX A. APPENDIX TO CHAPTER 16-18

SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP.

1.0. Terminology.
1.1. Competence.
1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.
1.3. Diligence.
1.4. Communication.
1.5. Fees.
1.6. Confidentiality of Information.
1.7. Conflict of Interest: Current Clients.
1.8. Conflict of Interest: Current Clients, Specific Rules.
1.9. Duties to Former Clients.
1.10. Imputation of Conflicts of Interest General Rule.
1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.
1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.
1.13. Organization as Client.
1.14. Client With Diminished Capacity.
1.15. Safekeeping Property.
1.16. Declining or Terminating Representation.
1.17. Sale of Law Practice.
1.18. Duties to Prospective Client.

COUNSELOR.

2.1. Advisor.
2.2. Reserved.
2.3. Evaluation for Use by Third Persons.
2.4. Lawyer Serving as Third-Party Neutral.

ADVOCATE.

3.1. Meritorious Claims and Contentions.
3.2. Expediting Litigation.
3.3. Candor Toward the Tribunal.
3.4. Fairness to Opposing Party and Counsel.
3.5. Impartiality and Decorum of the Tribunal.
3.6. Trial Publicity.
3.7. Lawyer as Witness.
3.8. Special Responsibilities of a Prosecutor.
3.9. Advocate in Nonadjudicative Proceedings.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS.

4.1. Truthfulness in Statements to Others.
4.2. Communication with Person Represented by Counsel.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:

(1) "This lawyer is not covered by professional liability insurance;" or

(2) "This firm is not covered by professional liability insurance."

(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

(e) This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable amount for fees or expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA 66 CIV. 16-000079

Plaintiff,

-vs-

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

-vs-

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

* *

D E P O S I T I O N O F

Wanda Howey-Fox

* *

APPEARANCES:

Christopherson, Anderson, Paulson & Fideler, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Casey W. Fideler,

for the Plaintiff;

Fuller & Williamson, Attorneys at Law, Sioux Falls, South Dakota, by Mr. William P. Fuller,

for the Defendants and Third Party Plaintiffs;

Cadwell, Sanford, Deibert & Garry, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Douglas M. Deibert,

for the Third-Party Defendant.

INDEX OF EXAMINATION

INDEX OF EXHIBITS

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Wanda Howey-Fox may be taken at this time and place, that is, at the James Law Offices, Yankton, South Dakota, on the 2nd day of May, 2017, commencing at the hour of 2:05 o'clock p.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

WANDA HOWEY-FOX,

called as a witness, being first duly sworn, deposed and said as follows:

EXAMINATION BY MR. DEIBERT:

Q You are Wanda Howey-Fox, the Defendant and Third-Party Plaintiff in this case?

A Yes, sir.

Q What year were you admitted to practice, first admitted?

Page 5

A October 9, 1984.
Q Let's say in the last two or three years, what percentage of your practice is family law, personal injury, wills, can you give me an estimate of what you do?
A I would estimate that I do probably the majority of custody and divorce litigation, and a lesser percent of personal injury work, and a small portion of wills. I mean, actual percentagewise I wouldn't have any idea.
Q When did you first meet Jill? I'll just -- I'm not sure of the names here. When did you first meet Jill, the Plaintiff in this action?
A I believe that I first met her, I would guess, somewhere in the 1992-'94 range when the Reiners moved back from Washington state.
Q The significance of that?
A Well, because prior to that I didn't know Jill. I lived in Yankton starting at April 1 of 1987, and worked and spent time with my family, and went to church, and didn't have a lot of outside friends, and then when Deb and Kevin Reiner moved back from Washington, I knew Deb from when her husband and my former -- her former husband and my former husband went to law school together, and then when she moved back to town she called up, and that's -- and then she and the people

Page 6

that the Reiners ran around with were all members of Hillcrest Country Club, but we were not, and Deb liked to entertain, so she liked to have folks over, and that's how I came to meet Jill and Randy.
Q So, let's say, the early '90s until 2007, when this car accident happened, how would you describe your relationship? Were you close friends?
A No.
Q How often would you see her or socially engage with her, once a month?
A Maybe once a month. There was one time in -- from whenever I met her until 2007 when a whole group of us went to Las Vegas together but --
Q Girls only or --
A No, couples all went. But I would say probably once a month. But I didn't hang out with Jill, if that's the question.
Q When did the incident occur that led to the lawsuit against Casey's, do you know what year?
A I know it was -- it happened on Thanksgiving Day. I know that because I always had Thanksgiving at my house, and Jill called me on Thanksgiving Day to tell me that she had found a live spider in her bottle of water that she purchased at Casey's. I would have to look at the Complaint to ascertain what year it was.

Page 7

Q It was before the '07 car accident happened?
A It was before the car accident, yes.
Q That case ultimately settled, that is, the Casey's case?
A I call it the spider case, yeah. The spider case settled ultimately the week before trial, in November of 2011.
Q When did you consider yourself Jill's lawyer regarding the April 2007 car accident?
A When she came in and signed a fee agreement, ultimately.
Q Not till April 20th of, I believe, 2010?
A No, I had represented her in her divorce, I had represented her on the Casey's issue. She had, she being Jill, had indicated to me -- and I only found out about the car accident because somebody mentioned to me in passing, did you know Jill was in a fender-bender? No, I didn't know that. She had told me, because she mentioned earlier today, that some person from an insurance company was trying to get her to sign off on something, and she called me, and I told her that, you know, sign it if you want to or don't sign it, but I wasn't representing her at the time. I was representing her in the spider case.
Q I've been led to believe that the De Smet check business, to use that term, occurred in the summer or fall of '07. Do you know if that's correct?

Page 8

A No idea.
Q When did you first begin accepting or asking for information from Jill, specifically medical records, regarding the April '07 car accident?
A Specifically relative to the car accident would probably have been after she signed the fee agreement, because I had a lot of her medical records from the spider case, because when -- once the spider case started Jim Redmond, who was the attorney for Casey's, would send out interrogatories, and they would ask what doctors have you seen, who have you treated with, and that's how I became privy to her medical records.
Q It's my understanding that you personally delivered the suit papers in the case of Jill versus the two young women --
A Chelsey Ewalt and Michelle Mary Mitchell.
Q Right. You personally delivered those suit papers to the sheriff's office; is that true?
A That is true.
Q And I believe that was on April 23rd of 2010?
A I took them to the clerk's office, filed them, got file stamped copies, and took them down to the sheriff's office personally.
Q All right. And was that April 23?
A It's whatever day it was filed. If it was April 23 it

Page 13

was going to come in to the Yankton County Sheriff's Office to pick up the papers?
A. When I called the sheriff's office. I don't know the exact date.
Q. Do you know if it was before or after April 29th?
A. I still believe it was before.
Q. And why is that?
A. Because I was checking, because there was a deadline, and I just wanted to make sure. I feel better when papers are served.
Q. Maybe this question is unnecessary but -- since I didn't know the answer to it in an earlier question, but do you claim the Yankton County Sheriff's Office should have read the suit papers to determine on their own what the statute of limitations was?
A. No, I think that my telling them that we had a time crunch was adequate.
Q. Did you expect the Yankton County Sheriff's Office to know that if Ewalt was not a resident of Yankton County that the statute of limitations would run on April 29th if the papers were not delivered to her county of residence?
A. No, I --
MR. FULLER: I'm objecting to the form of the question. It's compound, but you evidently

Page 14

understand it, so go ahead and answer, Wanda.
A. Now I'm not sure I remember. Did I expect that the Yankton County Sheriff's Office was what?
Q. Did you expect them to know that if Ewalt was not a resident of Yankton County that the statute of limitations would run April 29th if they weren't, that is, the papers, were not delivered to her county of residence?
A. No, I actually expected them to serve the papers. But I can see, from looking at Exhibit 4, that they knew on April 24th that she didn't live there.
Q. And why do you say that?
A. Because I'm looking at Exhibit 4 where it says on 4-24-10 at 7:56 regular time or 1956 military time, that the residents haven't lived there for two years.
Q. Is that the way you read that document?
A. That's how I read it.
Q. And I forgot the answer to this, did you provide the Yankton County Sheriff's Office with Ewalt's place of residence as you knew it then?
A. Yes.
Q. All right. If my dates were correct, that would mean that the 24th was a Saturday and the 25th a Sunday and the 29th, the day the statute ran, would have been a Thursday. Let's assume for these questions that that's

Page 15

correct.
A. Okay.
Q. How many times after delivering the papers on April 23 up until April 29 did you check with the Yankton County Sheriff's Office as to the status of service?
A. I know I called at least once, and I asked my assistant at the time to call. I assume that she called. I don't know that she called.
Q. Your assistant's name is?
A. Chris.
Q. Is she still there?
A. Yup.
Q. You've never asked her if she called?
A. I've asked her and she says she doesn't remember.
Q. But to your best recollection you called once in that five- or six-day time frame; is that right?
A. Yes. I didn't call on Saturday and Sunday because there's nobody there to answer the phone.
Q. Did you follow up your phone call that you referred to with any sort of communication, be it a fax, an email, a letter, or anything else?
A. No, sadly.
Q. After summary judgment was entered in favor of Ewalt on the statute of limitations defense you appealed to the South Dakota Supreme Court, correct?

Page 16

A. Correct.
Q. As I read that case the term used, several times in quotes and italics once, is that the issue, quote, usually and last resided, was significant; is that right?
A. Yes.
Q. Did you know before that decision that that was such important language?
A. Well, all statutory language is important.
Q. Well, but to the extent that it was going to determine the statute of limitations issue?
A. I guess I don't know how to answer that. It was important language but --
Q. Take a look at Paragraph 7 of the Third-Party Complaint. When do you believe the Yankton County Sheriff's Office found out or knew that Ewalt was not a resident of Yankton County but was a resident of Codington County?
A. I would say on April 24, 2010.
Q. And that's based on what?
A. Deposition Exhibit 4, the notations at the bottom of the page. And I don't know what date the telephonic conversation between the sheriff's office and Chelsey Ewalt was wherein she claimed -- she said she was going to come in and pick up the papers, I don't know that

Page 89

or anybody who works in the United States Trustee's Office. I'm not understanding why this is difficult.
Q You were actively -- you had signed a fee agreement saying you were representing Jill on 4-20.
A Yup. And that is not my pleading.
Q You did not get approval -- all I'm asking is, the court approval for you to be the trustee -- or the attorney for the trustee, the bankruptcy estate, was not approved until July 15th -- 16th.
A The trustee didn't send out a motion until then. It's her motion. I had nothing to do with that motion. Or application, I guess.
Q But you had everything to do with the fee agreement.
A Yeah.
Q Okay. As far as the claim against the Yankton County Sheriff's Department goes, after you filed that 180 day notice did you do anything else?
A I'm sorry?
Q Did you do anything else, file anything else, seek any other legal action on that claim?
A I believe I filed a motion to substitute Yankton County Sheriff's Office for Defendant Ewalt based on their real or perceived negligence in failing to file -- I'm sorry, to serve Chelsey Ewalt, or once they knew that she didn't live in Yankton and lived in Codington, send it

Page 90

up there immediately.
Q Right. And --
A Other than that, no.
Q And the judge told you that he could find no support for your position, and you agreed with him and you did not file -- ever file a brief to --
A Did I file a brief? No.
Q And that just kind of went into the air?
A Well, no. You had the opportunity to go after the sheriff's department after you undertook representing Jill Kuchta in this proceeding because I believe I sent you an email that said, just so you know, I'm not going to do anything more and you should do whatever you think needs to be done. I'm pretty sure I sent that.
Q Well, I'm not denying that, and I said I want no part of that but --
A I'm just saying I'm pretty sure I did it.
Q Did you not email Trustee Pierce that you informed the judge you were going to be filing a separate action against the Yankton County Sheriff's Department?
A No, I believe when I sent her notice I believe I told her that we had the opportunity, a potential cause of action against that, and she didn't seem to think that there was a lot of -- if I recall correctly, that she didn't seem to think there was a lot of rationale to

Page 91

continue.
Q There was an email exchange -- she said, in an email you told me you were supposed to be providing the judge with a brief within a week -- no, this week's time --
A I'm sorry?
Q -- what's the status on that? And your response was, I couldn't find no authority, I am not filing a brief. I informed the judge I'd be filing a separate action against the Yankton County Sheriff's Department, and he agreed that would be the best option.
A Okay.
Q I'll find it.
A No, I'll agree with you. If that's what it says I'm okay with that.
Q Did you ever cause a Summons and Complaint to be drafted on that?
A Nope.
Q Where is the -- this is how I find everything. And I believe in one of those requests for admissions I asked if you were paid anything by the trustee.
A Okay. Ever, or relative to this case?
Q This case.
A Okay.
Q Request number two as related to Defendant's response to Plaintiff's requests for admissions, first set, number

Page 92

five, admit that Miss Howey-Fox was paid by the trustee administrating the Kuchtas' bankruptcy case as attorney for debtor Jill Kuchta. Is that right?
A Kuchta.
Q Kuchta. Your response is?
A Response number two, deny.
Q I'm showing you a cash receipt and distribution record -- or disbursement record.
A From the spider case? Yup, from the spider case. Casey's. Jill Robinson-Kuchta now --
Q Is my question limited to that? I don't believe so.
A Well, that's what I believed it to be. So I guess I can amend my answer to indicate, deny anything on the car accident case, admit on the spider case.
Q Right now I'm simply following up with, you said you didn't represent them -- Jill in the bankruptcy, that Jason did, and I just wanted to verify that you did get paid by the bankruptcy trustee.
A For my representation of Jill Robinson-Kuchta now known as Jill Robinson, versus Casey's General Stores, also known as the spider case, yes, I did, because I was employed specifically to handle the spider case.
Q By the bankruptcy trustee?
A Yeah.
Q Does $2,761.14 sound right?

Page 93

A If that's what it says. I would have no reason to disbelieve that. It went on forever, probably four or five years.
Q In question number seven I asked you, per the South Dakota Rules of Professional Conduct, 1.8, a lawyer shall not enter into a business transaction with a client unless there are extensive written precautions taken to ensure the client is fully aware of the ramifications of entering into such agreement. You said deny.
A Okay.
Q So is it your position here today that --
A I was never in a business relationship with her, other than when I was representing her on the spider case and ultimately thereafter in the car accident case and the DUI case and the divorce case.
Q It says enter into a business transaction.
A Yeah, I wasn't in a business transaction.
Q That ring was not a business transaction?
A No. She sold it to me. I guess I didn't look at it that way. I can have Mr. Fuller -- although it's not relevant, I can have him amend my answers to interrogatories to reflect that. I still don't believe it was a business transaction.
Q Do you still deny that it's improper for a client to

Page 94

sell, pawn or otherwise dispose of any potential estate assets during the pendency --
A I'm sorry?
Q Do you still feel that it is not improper for a client to sell, pawn or otherwise dispose of estate assets during the pendency of a bankruptcy proceeding?
A It would depend on what assets she owned at the time she filed, whether she claimed them as exempt. I mean, that's such a vague question it's really very difficult to answer with any degree of particularity. Any person, any debtor?
Q You just denied.
A Okay.
Q I'm asking you if you still feel that way today?
A Well, if my choices are admit or deny, I guess I'd have to deny, if those are my only two choices.
Q Do you believe it is a conflict of interest to do a joint representation of a client in a bankruptcy proceeding and in a personal injury action?
A No. That was approved by the Court.
Q But you had entered into the transaction prior to --
A Still, no.
Q Did you ever inform Jill that any proceeds she would get would not go to her --
A Yes.

Page 95

Q -- but would go to satisfy --
A Her creditors, yes. And she knew that from the spider case. She knew that the only way that she would get any money, any recovery out of that car accident case, was if the trustee was paid, the attorney's fees were paid, and all of their, I want to say, $300,000 worth of creditors were paid.
Q It wouldn't happen.
A I'm sorry?
Q It wasn't happening, is what you're saying?
A Yeah. Unless everything was paid she wasn't getting anything. She knew that. Well, she was told that. Whether she absorbed it or not, I guess I don't know.
Q Okay. She told Bill this morning she was shocked to find out she wasn't getting any of the settlement proceeds.
A Yeah, well -- go ahead.
MR. FULLER: There's no question. You don't have to -- there's no question that was being asked.
A Well, I think it was a misstatement of the record anyway so --
Q I hope I didn't but if it was, I apologize. In response I say, a copy of the record of any kind related to the underlying incidents and claim contained in the claim

Page 96

file. The claim file was established after contact by Plaintiff's counsel. The claim file was created in anticipation of litigation and protected by the work product and attorney-client privilege.
A That's Mr. Fuller's claim file, you mean? Is that what we're talking about?
Q No, the insurer's claim file. I don't -- it would depend on -- did you ever put them on notice?
A Who are they?
Q Your malpractice carrier.
A Yes. Consequently they are here.
Q When?
A Right away.
Q After I contacted Jim DeLucia?
A I'm sorry? After you contacted whom?
Q Jim DeLucia.
A I don't know who Jim DeLucia is, offhand.
Q He's a big dog out of New York.
A I contacted them right away, because that's what you're supposed to do.
Q So as far as -- that's the claim file I was --
A I have no access to that. That would be between Mr. Fuller and the insurance company, and I couldn't provide it even if I wanted to.
Q But we did go over that attorney-client privilege, and

Page 89

or anybody who works in the United States Trustee's Office. I'm not understanding why this is difficult.
Q You were actively -- you had signed a fee agreement saying you were representing Jill on 4-20.
A Yup. And that is not my pleading.
Q You did not get approval -- all I'm asking is, the court approval for you to be the trustee -- or the attorney for the trustee, the bankruptcy estate, was not approved until July 15th -- 16th.
A The trustee didn't send out a motion until then. It's her motion. I had nothing to do with that motion. Or application, I guess.
Q But you had everything to do with the fee agreement.
A Yeah.
Q Okay. As far as the claim against the Yankton County Sheriff's Department goes, after you filed that 180 day notice did you do anything else?
A I'm sorry?
Q Did you do anything else, file anything else, seek any other legal action on that claim?
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Page 90

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Page 91

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Page 92

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Restatement (Third) of Law Governing Law. § 122 (2000)

1. Restatement (Third) of The Law Governing Lawyers

Current through September 2004

Chapter 8. Conflicts Of Interest

Topic 1. Conflicts Of Interest--In General

§ 122. Client Consent To A Conflict Of Interest

Link to Case Citations

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.

(2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;

(b) one client will assert a claim against the other in the same litigation; or

(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Comment:

a. Scope and cross-references. Pursuant to this § 122, informed consent of affected clients is effective with respect to most conflicts of interest defined in § 121 and imputations of conflicts to affiliated lawyers in § 123. Inasmuch as § 125 and §§ 128-135 are specific applications of a99 § 121, the principles of this Section govern consent to the conflicts identified in those Sections as well. More stringent consent rules stated in §§ 126-127 apply to client-lawyer business transactions and gifts, because the risk of lawyer overreaching in such matters is significantly greater. In addition, special aspects of the manifestation of client consent are addressed in §§ 131

113

ETHICAL DUTY OF ATTORNEY TO DISCLOSE ERRORS TO CLIENT

Adopted November 19, 2005. Modified July 18, 2015 solely to reflect January 1, 2008 changes in the Rules of Professional Conduct.

Syllabus

As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, Colo. RPC 1.4. including those developments resulting from the lawyer's own errors. As part of this broad duty to report, a lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material. A material error is one that will likely result in prejudice to a client's right or claim. In these circumstances, the lawyer should inform the client that it may be advisable for the client to consult with independent counsel regarding the error, which may include advice regarding the statute of limitations on a claim for legal malpractice. Colo. RPC 1.4(b).The lawyer need not and should not inform the client that a legal malpractice claim against the lawyer actually exists or has merit, or of the desirability of terminating the lawyer's representation. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer may continue to represent the client in these circumstances only in compliance with Colo. RPC 1.7(a) and (b). In many, if not most, circumstances, the interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation. Continued representation may not be permissible if the lawyer might be influenced to pursue a strategy that would avoid liability for the lawyer at the expense of the success of the representation, or if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest. Finally, the lawyer may not obtain a release of liability except in compliance with Colo. RPC 1.8(h).

This opinion addresses the lawyer's ethical duty to advise the client of relevant developments resulting from the lawyer's own errors. This opinion does not address whether the failure to disclose an error itself gives rise to a cause of action against the lawyer. See Colo. RPC, Scope, ("Violation of a Rule should not in and of itself give rise to a cause of action nor should it create a presumption that a legal duty has been breached.").

and 133, dealing respectively with entity representation and conflicts of a former government lawyer. See also § 62 on client consent to disclosure of confidential information.

b. Rationale. The prohibition against lawyer conflicts of interest is intended to assure clients that a lawyer's work will be characterized by loyalty, vigor, and confidentiality (see § 121, Comment *b*). The conflict rules are subject to waiver through informed consent by a client who elects less than the full measure of protection that the law otherwise provides. For example, a client in a multiple representation might wish to avoid the added costs that separate representation often entails. Similarly, a client might consent to a conflict where that is necessary in order to obtain the services of a particular law firm.

Other considerations, however, limit the scope of a client's power to consent to a conflicted representation. A client's consent will not be effective if it is based on an inadequate understanding of the nature and severity of the lawyer's conflict (Comment *c* hereto), violates law (Comment *g(i)*), or if the client lacks capacity to consent (Comment *c*). Client consent must also, of course, be free of coercion. Consent will also be insufficient to permit conflicted representation if it is not reasonably likely that the lawyer will be able to provide adequate representation to the affected clients, or when a lawyer undertakes to represent clients who oppose each other in the same litigation (Comment *g(iii)*).

In effect, the consent requirement means that each affected client or former client has the power to preclude the representation by withholding consent. When a client withholds consent, a lawyer's power to withdraw from representation of that client and proceed with the representation of the other client is determined under § 121, Comment *e*.

While a lawyer may elect to proceed with a conflicted representation after effective client consent as stated in this Section, a lawyer is not required to do so (compare § 14, Comment *g* (required representation by order of court)). A lawyer might be unwilling to accept the risk that a consenting client will later become disappointed with the representation and contend that the consent was defective, or the lawyer might conclude for other reasons that the lawyer's own interests do not warrant proceeding. In such an instance, the lawyer also may elect to withdraw if grounds permitting withdrawal are present under § 32. After withdrawal, a lawyer's ability to represent other clients is as described in § 121, Comment *e*.

c(i). The requirement of informed consent--adequate information. Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.

Information relevant to particular kinds of conflicts is considered in several of the Sections hereafter. In a multiple-client situation, the information normally should address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily

another arrow in the quiver of tactics employed in legal malpractice cases.[8] Whether a particular error gives rise to an ethical duty to disclose depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error. The failure to disclose an error does not (and should not), in and of itself, give rise to a cause of action against the lawyer, nor does it (or should it) create a presumption that a legal duty has been breached.

Professional errors exist along a spectrum. At one end are errors that, as stated above, will likely prejudice a client's right or claim. Examples of these kinds of errors are the loss of a claim for failure to file it within a statutory limitations period or a failure to serve a notice of claim within a statutory time period. The lawyer must promptly inform the client of an error of this kind, if a disinterested lawyer would conclude there was an ethical duty to do so, because the client must decide whether to appeal the dismissal of the claim or pursue a legal malpractice action.[9] Another example is the loss of a right of appeal for failure to file a timely notice of appeal. However, as discussed more fully below, the lawyer should be given an opportunity to remedy the error before disclosing it to the client.

At the other end of the spectrum are errors and possible errors that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice. For example, missing a nonjurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may, upon discovery, prompt regretful frustration, but not an ethical duty to disclose to the client. As one commentator remarked regarding similar circumstances, "Unless there are steps that can be taken now to avoid the possibility of future harm, there is probably no immediate duty to disclose the mere possibility of lawyer error or omission."[10] Lawyers should be given the opportunity to remedy any error before disclosing the error to the client. The later assertion of a legal malpractice claim does not mean that the allegedly negligent lawyer breached a duty to disclose the error to the client. Nor should the failure to disclose the error be construed as an independent claim against the lawyer.[11] Whether a lawyer has an ethical duty to disclose depends on the facts and circumstances known to the lawyer once he or she has realized the error, not those that appear only through the prism of hindsight.

In between these two ends of the spectrum are innumerable errors that do not fall neatly into either end of the spectrum and must be analyzed on an individual basis. For example, it is ordinarily not necessary to disclose questions of professional judgment where the law was unsettled on an issue or the attorney "made a tactical decision from among equally viable alternatives."[12] Under the doctrine of "judgmental immunity," these types of decisions are not, as a matter of law, considered errors, below the applicable standard of care, or negligent conduct. When reasonable lawyers may disagree about whether the state of the law was unsettled or the available alternatives were equally viable, however, the lawyer should err on the side of discussing the available alternatives with the client before pursuing a course of action.[13] The lawyer's choice between equally viable alternatives should not be considered an error as defined in this opinion. Examples of potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute. The Committee agrees with the New York State Bar Association that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 481 **April 17, 2018**

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.[1] Recognizing that errors

[1] A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); RFF Family P'ship, LP v. Burns & Levinson, LP, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re* Tallon, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, Fla. Bar v. Morse, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re* Hoffman, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C., 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178, 2009 WL 3270875, at *4 (2009) [hereinafter Cal. Eth. Op. 2009-178] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); Colo. Bar Ass'n, Ethics Comm., Formal Op. 113, at 3 (2005) [hereinafter Colo. Op. 113] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); Minn. Lawyers Prof'l Responsibility Bd. Op. 21, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.[2] Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

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interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

[2] MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." More broadly, the "guiding principle" undergirding Model Rule 1.4 is that "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[3] A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.[4]

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers' duty to disclose errors to clients.[5] For example, in discussing the spectrum of errors that may arise in clients' representations, the North Carolina State Bar observed that "material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs."[6] At the other end of the spectrum are "nonsubstantive typographical errors" or "missing a deadline that causes nothing more than delay."[7] "Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests."[8] With respect to the middle ground:

> Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.[9]

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[3] *Id.* cmt. 5.
[4] *Id.* cmt. 7.
[5] *See supra* note 1 (listing authorities).
[6] 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*

Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those "that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."[10] Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."[11] On the other hand, "potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute."[12] Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is "material," which further "depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim."[13]

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

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[10] Colo. Op. 113, *supra* note 1, at 3.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1, 3.

A lawyer must notify a current client of a material error promptly under the circumstances.[14] Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.[15] Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

When a Current Client Becomes a Former Client

As indicated earlier, whether a lawyer must reveal a material error depends on whether the affected person or entity is a current or former client. Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded.[16] Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter);[17] (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation;[18] or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the

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[14] *See* N.J. Eth. Op. 684, *supra* note 1, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); Tex. Eth. Op. 593, *supra* note 1, 2010 WL 1026287, at *1 (requiring disclosure "as promptly as reasonably possible").

[15] *See* MODEL RULES R. 1.6(b)(4) (2018) (permitting a lawyer to reveal information related to a client's representation "to secure legal advice about the lawyer's compliance with these Rules").

[16] United States v. Williams, 720 F.3d 674, 686 (8th Cir. 2013); Rozmus v. West, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000); *see also* MODEL RULES Scope cmt. 17 (2018) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

[17] *See* Artromick Int'l, Inc. v. Drustar Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991) (observing that "the simplest way for either the attorney or client to end the relationship is by expressly saying so"); *see also, e.g.*, Rusk v. Harstad, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

[18] A client may discharge a lawyer at any time for any reason, or for no reason. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 689 (7th Cir. 2011); Nabi v. Sells, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES R. 1.16 cmt. 4; *see also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 77 (11th ed. 2018) ("Clients, it is said, may fire their lawyers for any reason or no reason.") (citations omitted).

relationship has ended.[19] If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.

Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other.[20] In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.[21] In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*,[22] suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.[23]

For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter.[24] With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise.[25] In the third category, where a lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.[26]

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such

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[19] *See, e.g.*, Artromick Int'l, Inc., 134 F.R.D. at 230–31 (determining that a man was a former client because he refused to pay the lawyer's bill and then retained other lawyers to replace the first lawyer); Waterbury Garment Corp. v. Strata Prods., 554 F. Supp. 63, 66 (S.D.N.Y. 1982) (concluding that a person was a former client because the law firm represented him only in discrete transactions that had concluded and the person had subsequently retained different counsel).

[20] Artromick Int'l, Inc., 134 F.R.D. at 229.

[21] *Id.* at 229–30.

[22] No. 00-1225, 2002 WL 31068413 (Mass. Super. Ct. Sept. 12, 2002).

[23] *Id.* at *4.

[24] *Id.*; *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (stating that unless the relationship is terminated under Model Rule 1.16, the lawyer "should carry through to conclusion all matters undertaken for a client").

[25] *See* Berry v. McFarland, 278 P.3d 407, 411 (Idaho 2012) (explaining that "[i]f the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship"); *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (advising that "[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal").

[26] Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990); Berry, 278 P.3d at 411; *see also* Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 389–90 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); Thayer v. Fuller & Henry Ltd., 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the underlying action has concluded or when the attorney has exhausted all remedies and declined to provide additional legal services); MODEL RULES R. 1.16 cmt. 1 ("Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.").

instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation.[27] If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded.[28] Whether an episodic client is a current or former client will thus depend on the facts of the case.

The Former Client Analysis Under the Model Rules

As explained above, a lawyer must inform a current client of a material error under Model Rule 1.4. Rule 1.4 imposes no similar duty to former clients.

Four of the five subparts in Model Rule 1.4(a) expressly refer to "the client" and the one that does not—Model Rule 1.4(a), governing lawyers' duty to respond to reasonable requests for information—is aimed at responding to requests from a current client. Model Rule 1.4(b) refers to "the client" when describing a lawyer's obligations. Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients.[29] Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest.[30]

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[27] *See, e.g.*, Parallel Iron, LLC v. Adobe Sys. Inc., C.A. No. 12-874-RGA, 2013 WL 789207, at *2–3 (D. Del. Mar. 4, 2013) (concluding that Adobe was a current client in July 2012 when the law firm was doing no work for it; the firm had served as patent counsel to Adobe intermittently between 2006 and February 2012, and had not made clear to Adobe that its representation was terminated); Jones v. Rabanco, Ltd., No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (reasoning that the law firm's inclusion as a contact under a contract, the law firm's work for the client after the contract was finalized, and the fact that the client matter was still open in the law firm's files all indicated an existing attorney-client relationship); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 78-79 (11th ed. 2018) ("Lawyers might believe that a client is no longer a client if they are doing no work for it at the moment and haven't for a while. . . . [A] firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs her.").

[28] *See, e.g.*, Calamar Enters., Inc. v. Blue Forest Land Grp., Inc., 222 F. Supp. 3d 257, 264–65 (W.D.N.Y. 2016) (rejecting the client's claim of an attorney-client relationship where the relationship between the law firm and the client had been dormant for three years; despite the fact that the attorney-client relationship had not been formally terminated, it ended when the purpose of the parties' retainer agreement had been completed).

[29] AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, 71–78 (Arthur H. Garwin ed., 2013).

[30] *Compare* MODEL RULES R. 1.7 (2018) (addressing current client conflicts of interest), *with* MODEL RULES R. 1.9 (2018) (governing former client conflicts of interest).

Because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients,[31] it is no basis for requiring lawyers to disclose material errors to former clients.

The California State Bar's Committee on Professional Responsibility and Conduct reached a similar conclusion with respect to California Rule of Professional Conduct 3-500, which states that "[a] member [of the State Bar of California] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." In concluding that a lawyer had no duty to keep a former client informed of significant developments in the representation, and specifically the former client's possible malpractice claim against the lawyer, the Committee focused on the fact that the lawyer and the former client had "terminated their attorney-client relationship" and on Rule 3-500's reference to a "client," meaning a current client.[32]

Finally, in terms of possible sources of an obligation to disclose material errors to former clients, Model Rule 1.16(d) provides in pertinent part that, upon termination of a representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee[s] or expense[s] that has not been earned or incurred." This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation.

Conclusion

The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer

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[31] *See* Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Adv. Op. 2010-2, 2010 WL 1541844, at *2 (2010) (explaining that Rule 1.4 "applies to ethical duties regarding communication *during a representation*" (emphasis added)); Va. State Bar Comm. on Legal Ethics Eth. Op. 1789, 2004 WL 436386, at *1 (2004) (stating that "*[d]uring the course of the representation*, an attorney's duty to provide information to his client is governed by Rule 1.4(a)") (emphasis added)).

[32] Cal. Eth. Op. 2009-178, *supra* note 1, 2009 WL 3270875, at *6.

must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28429

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,
Plaintiff /Appellant,

vs.

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,
Defendants, Third-Party Plaintiffs/Appellees,

vs.

YANKTON COUNTY, SOUTH DAKOTA,
Third-Party Defendant/Appellee.

Appeal from the Circuit Court
First Judicial Circuit
Yankton County, South Dakota

The Honorable John Pekas

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Notice of Appeal filed October 24, 2017

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Statutes **Page(s)**

Rules of Professional Conduct **Page(s)**

Secondary Sources **Page(s)**

ARGUMENT

I. When there is an alleged act of malpractice in a continuing attorney-client relationship, does an attorney owe any professional or legal duties to disclose the nature and consequences of the alleged act of malpractice to the client?

The American Bar Association's Standing Committee on Ethics and Professional Responsibility addressed this question on April 17, 2018 with Formal Opinion 481. This Opinion contains nationwide case law, disciplinary decisions, ethics opinions, and State Bar Commission Opinions on the issue. The unanimous answer to this question is "yes".[1]

[1.] *See following:*

CASE LAW

Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 662 A.2d 509, 514 (N.J. 1995) (stating under New Jersey Rules 1.4 and 1.7, an attorney "has an ethical obligation to advise a client that he or she might have a claim against that attorney, even if such advice flies in the face of that attorney's own interests"), *abrogated on other grounds* by *Olds v. Donnelly*, 696 A.2d 663, (N.J. 1997); *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009) (concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that his representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability"); *Beal Bank, SSB v. Arter & Hadden, LLP*, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); *RFF Family P'ship, LP v. Burns & Levinson, LP*, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news");

DISCIPLINARY DECISIONS

In re Tallon, 447 N.Y.S.2d 50, 51 (App.Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him"); *Fla. Bar v. Morse*, 587 So. 2d 1120, 1120-21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re Hoffman*, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b), holding that public reprimand was appropriate discipline for attorney's misconduct in failing to adequately explain to clients the effect of court's dismissal of personal injury claim and in continuing to represent clients after it became apparent that the representation could be materially limited by attorney's own interests); *Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C.*, 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy

An attorney has an ethical duty to disclose to a current client material malpractice/error committed during representation. The Committee decided as follows:

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was "against public policy, since it may operate to limit an attorney's disclosure of his potential malpractice to his clients")

ETHICS OPINIONS

Cal State Bar Comm. on Prof'l Resposibility & Conduct Op. 2009-178, 2009 WL 3270875, at *4 (2009) ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation .... Where the lawyer believes that he or she has committed legal malpactice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the laywer to the client, because it is a 'significant development.'"; *Colo. Bar Ass'n, Ethics Comm.*, Formal Op. 113, at 3 (2005) ("Whether a particular error gives rise to an ethical duty to disclose (under Rule 1.4) depends on whether a disinterest lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); *Minn. Lawyers Prof'l Responsibility Bd. Op.* 21, 2009 WL 8396588, at 1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's interests"); 2015 *N.C. State Bar Formal Op*. 4, 2015 WL 5927498, at *2 (2015) (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"); *N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op*. 684, 1998 WL 35985928 at *1 (1998) (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); *N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op.* 734, 2000 WL 33347720, at *3 (2000) (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); *Sup. Ct. of Prof'l Ethic Comm. Op*. 593, 2010 WL 1026287, at *1 (2010) (opining that the lawyer must also terminate the representation, applying Texas Rules 1.15(d), 2.01 and 8.04(a)(3)).

SECONDARY SOURCES

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20, cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer");

RONAL E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 24:5 (ThomsonWest 2008) ("The potential of a legal malpractice claim may create a concern of conflicting interests in an ongoing representation [...] when the lawyer's interest in nondisclosure conflicts with the client's interest in the representation, then a fiduciary duty of disclosure is implicated."); BENJAMIN COOPER, 61 Baylor Law Review 174, 195 (2009), *Self-Reporting Malpractice* (stating "if a lawyer fails to file his client's complaint in time to meet the statute of limitations, few would argue that the lawyer should not report this mistake to the client")

> The Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.
>
> A lawyer must notify a current client of a material error promptly under the circumstances. Whether notification is prompt will be a case-and-fact-specific inquiry. *Greater urgency is required where the client could be harmed by any delay in notification.* The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error. Such consultation should also be prompt.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481, pp. 4-5, (April 17, 2018) (a lawyer's duty to inform a current or former client of the lawyer's material error) (emphasis added).

Whether a lawyer must inform a current client of malpractice depends only on whether the error is material. "Malpractice errors exist along a continuum." *Id*., at 3, ¶ 2. In that continuum, missing a statute of limitations has been ruled at the far end of material because it prejudices the client's rights or claims. *Id*. at 3, ¶ 3 (citing 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2).

> Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' *duty* of disclosure. In doing so, it identified errors ranging from those *plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal)* to those 'that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice.'

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481, p. 4, ¶ 1 (April 17, 2018) (a lawyer's duty to inform a current or former client of the lawyer's material error) (citing Colo. Op. 113, p. 3, ¶ 2 (ethical duty of attorney to disclose errors to client))

(emphasis added).

Defendant Howey-Fox never notified, informed, communicated, and/or advised Robinson that she committed material error throughout the underlying representation. To date, Defendant Howey-Fox has failed to acknowledge any potential culpability for her actions, and inactions, resulting in Robinson's loss of claim:

> Q Did you ever advise Miss Robinson that there was a potential legal malpractice claim stemming from the improper service?
>
> A Nope. I told her she had a potential claim against the county for their failure to serve or, at the very least, failure to tell me when they knew she wasn't living in Yankton County to give those papers back, or at least let me know so I could get her served.

(A-1, Deposition of Wanda Howey-Fox, 55:11-18). Defendant Howey-Fox was advised by other attorneys in August of 2010, in writing, that she likely committed malpractice. (SR-177, Ex. F). Attorney Steve Binger, subrogation attorney for Safeco, advised Defendant Howey-Fox of the following in an email, "[Larry Von Wald and I] are pretty confident that both your case for personal injury and my case for subrogation were served beyond the statute of limitations." (SR-177, Ex. F). This makes the nondisclosure more egregious, Defendant Howey-Fox cannot feign ignorance. One act that constitutes deceit as set forth in SDCL § 20-10-2(3) is "[t]he suppression of a fact by one who is bound to disclose it [...]".

As discussed by the ABA Ethic's Commission, Model Rule 1.4(b) places an obligation on attorneys to "explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." *See also*, SD Rule of Professional Conduct 1.4(b). ABA Rule 1.4 is identical to South Dakota Rule of Professional Conduct 1.4. Defendant Howey-Fox had a professional and ethical

obligation and duty to inform her client, Robinson, of the material error and potential consequences. Defendant Howey-Fox abused her position, as Robinson's attorney and fiduciary, to improperly influence Robinson into unknowingly assuming needless risk through her actions in withholding essential information. Robinson's ability to pursue a viable cause of action and meaningful recovery was placed in an inferior position to that of Defendant Howey-Fox's personal interest in avoiding malpractice. *See also,* SD Rule of Professional Conduct 1.7(2).

II. If this Court determines that SDCL 15-2-14.2 is a statute of repose under *Pitt-Hart v. Sanford USD Medical Center:*

a. Must this Court reverse its prior decisions applying the doctrines of continuing representation and fraudulent concealment to the statute?

This case provides the Court ample justification to continue application of the continuing representation and fraudulent concealment doctrines to legal malpractice. *See Schoenrock v. Tappe*, 419 N.W.2d 197, 197 (S.D. 1988) (reiterating that the statute of limitations is an occurrence rule, extending the continuous treatment doctrine to legal malpractice actions). Candidly, it will be hard to legally distinguish between the suggested occurrence rule statute of limitations and the *Pitt-Hart* holding finding that SDCL 15-2-14.1 is a statute of repose. If the Court finds that SDCL 15-2-14.2 is a statute of repose, then the legal malpractice decisions and related law established by this Court over the last thirty years must be reversed. The Court is also placed in the position of explaining and clarifying its statement in *Pitt-Hart* that "the analysis of our previous

malpractice cases remains largely undisturbed." *Pitt-Hart*, at ¶ 27 (explaining malpractice analysis remains largely undisturbed by finding SDCL§ 15-2-14.1 is a period of repose).[2]

However, a decision that SDCL § 15-2-14.2 is a statute of repose, and the reversal of prior legal malpractice jurisprudence, is not outcome determinative in this case. The outcome will fall squarely on the Court's application of the continuing tort doctrine to the facts of this case. *See Pitt-Hart*, at ¶¶ 26-27.

Unlike the Complaint in *Pitt-Hart*, which failed to allege injuries stemming from

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[2.] In support of Ms. Robinson's position that malpractice jurisprudence will be largely disturbed by a holding that SDCL 15-2-14.2 is a statute of repose, please see the following: *Glad v. Gunderson, Farrar, Aldrich and DeMersseman*, 378 N.W.2d 680, 682-83 (S.D. 1985) (stating that if a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence, by the one under that duty, constitutes fraudulent concealment and thus tolls the applicable statute of limitations); *Schoenrock v. Tappe*, 419N.W.2d 197, 197 (S.D. 1988) ("reiterating that the statute of limitations is an occurrence rule, extending the continuous treatment doctrine to legal malpractice actions"); *Kurylas, Inc. v. Bradsky*, 452 N.W.2d 111, 117 (S.D. 1990) (applying continuing representation doctrine and fraudulent concealment doctrine and determining statute does not toll under facts presented); *Keegan v. First Bank of Sioux Falls*, 519 N.W.2d 607, 615 (S.D. 1994) (reversing grant of summary judgment and finding that a issue of fact exists as to whether the statute of limitations was tolled by a continuing attorney-client relationship); *Bosse v. Quam*, 537 N.W.2d 8, 11 (S.D. 1995) (concluding that the continuous relationship exception applies to the statute of limitations for accountant liability); *Green v. Siegel, Barnett & Schutz*, 557 N.W.2d 396, 399 (S.D. 1996) (finding no allegation of fraudulent concealment or continuous representation to toll the statutory limitations period); *Green v. Morgan, Theeler, Cogley & Petersen*, 1998 S.D. 16, ¶¶s 9-10 (stating that under "occurrence rule" for legal malpractice actions, three year statute will be tolled until cause of action is discovered or might have been discovered); *Beckel v. Gerber*, 1998 S.D. 48, ¶ 10 (stating two exceptions apply to toll medical malpractice statute of limitations, continuing tort and continuing treatment); *Cooper v. James*, 2001 S.D. 59, ¶ 9 (stating we have adopted the "continuing treatment doctrine" in determining the applicable limitation period in legal malpractice actions, cause of action will be tolled until representation ceases); *Peterson, ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 45 (recognizing medical malpractice statute of limitation does not begin to run when there is continuing treatment or fraudulent concealment); *Williams v. Maulis*, 2003 S.D. 138, ¶ 11 (finding that the continuous representation doctrine can toll the statute of limitations for legal malpractice); *Scmiedt v. Loewen*, 2010 S.D. 76, 14 (discussing applicable of continuing treatment rule and continuing tort to statute of limitations)

a "continuing course of negligent treatment", Robinson alleges in her Amended Complaint that "Wanda L. Howey-Fox and Harmelink, Fox & Ravnsborg Law Office continually represented and provided professional legal services to Plaintiff related to her injury claims resulting from the April 28, 2007 [crash] until approximately January 19, 2015." (Compare *Pitt-Hart*, at ¶ 26 to SR-103, Pl's. Am. Compl. ¶ 27). Robinson further alleged in her Amended Complaint that Defendant "fail[ed] to keep [Robinson] apprised of the status of her claim." (SR-103, Pl's. Am. Compl., ¶ 32, (j)). Robinson's Amended Complaint was filed well before the ABA Formal Opinion 481 was ever published and released to the public.

It can be inferred from *Pitt-Hart* that the Court did not forever and permanently repeal the continuing representation doctrine as a valid exception to the statute of limitation and statute of repose defense(s). *Pitt-Hart*, at ¶¶ 23-24 (applying the continuing treatment doctrine to the facts and determining that the standard could not be met by Plaintiff/Appellant). The Court acknowledged the rule applies only when the plaintiff receives "continuous treatment ... by the same physician or clinic." *Id*. at ¶ 23 (citing *Liffengren v. Bendt*, 2000 S.D. 91, ¶ 17). The rationale behind the rule is to prevent refusal to seek or administer care due to pending litigation as well as to encourage treatment providers an opportunity to correct the error. *Pitt-Hart*, at ¶ 23 (citing *Bosse v. Quam*, 537 N.W.2d 8, 10 (S.D. 1995); *Wells v. Billars*, 391 N.W.2d 668, 672 n. 1 (S.D. 1986) (quoting 1 David W. Louisell & Harold Williams, *Medical Malpractice* § 13.08 (1981)). Should the Court engage in a continuing representation doctrine analysis in this case, as it did in *Pitt-Hart*, the result is different. All the underlying requirements to support application of the continuing representation doctrine

are present.

b. *Can the "occurrence" of an alleged act of attorney malpractice under the statute be delayed by the continuing tort doctrine if there is continuous representation by the attorney on the same subject matter, and a showing that the attorney has failed to disclose to the client the nature and consequences of the alleged act of malpractice?*

The continuing-tort doctrine applies to delay the commencement of a statute of repose. *Pitt-Hart*, at ¶ 26. "When the cumulative result of continued negligence is the cause of the injury, the statute of repose cannot start to run until the last date of negligent treatment." *Id.* If the Court extends its *Pitt-Hart* holding to legal malpractice cases, the continuing tort doctrine should similarly apply. *Id*. Because of the continuing tort doctrine, SDCL § 15-2-14.2 should be delayed from commencing until disclosure of the material malpractice by the attorney or until termination of the malpractice related legal representation, whichever is sooner.

In this case, Robinson amply demonstrates that Attorney Howey-Fox continuously represented her on the same subject matter, i.e. personal injury claim, and that Attorney Howey-Fox failed to disclose the nature and consequences of the material malpractice. Attorney Howey-Fox made affirmative misrepresentations to Robinson and instilled a false sense of hope that her claim was still viable.

Q Did you ever advise Miss Robinson that there was a potential legal malpractice claim stemming from the improper service?

A *Nope.* I told her she had a potential claim against the county for their failure to serve or, at the very least, failure to tell me when they knew she wasn't living in Yankton County to give those papers back, or at least let me know so I could get her served.

(A-1, Howey-Fox Depo, 55:11-18) (emphasis added). The statute did not commence or begin to run until the date Defendant Howey-Fox ceased representation of Robinson on

her personal injury case. Furthermore, Defendant Howey-Fox's answer cited above showcases exactly how attorneys are uniquely capable of taking advantage of the public to their benefit if the trial court's decision is affirmed. Is Defendant Howey-Fox's answer the type of response which would inspire a non-law trained member of the public to suspect they possess a legal malpractice claim against their own attorney while they were still receiving legal counsel and representation?

The "occurrence" of Defendant Howey-Fox's malpractice is delayed from commencing until termination of the malpractice related legal services. Because Defendant Howey-Fox owed Robinson a duty to disclose the material malpractice error and failed to do so, all representation stemming from or related to Robinson's personal injury claim constitutes one continuous and unbroken course of negligent representation constituting one continuing wrong.

> Thus, although a period of repose will not be tolled for any reason *once commenced* [...] such a period may be *delayed from commencing* if a plaintiff demonstrates: (1) there was a continuous and unbroken course of negligent [representation], and (2) that the [representation] was so related as to constitute one continuing wrong.

Pitt-Hart, at ¶ 26 (citing *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014); *Cunningham v. Huffman*, 609 N.E.2d 321, 325 (Ill. 1993)); see also *Wells*, 391 N.W.2d at 672 n. 1.

In *Brude v. Breen*, 2017 S.D. 46, ¶ 8, this Court reiterated the rule set forth in *Pitt-Hart* which states that "[a] statute of repose ... 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." Defendant Howey-Fox had an ethical duty to disclose her material malpractice to her client. Defendant Howey-Fox further breached her duty of loyalty by withholding information from her client that directly conflicted with Defendant Howey-

Fox's personal interests in avoiding malpractice liability. Since Defendant Howey-Fox continuously breached her ethical disclosure duty, all representation relating to the personal injury claim constitutes a continuous and unbroken course of negligent representation. The last culpable act *or omission* of Defendant Howey-Fox would be the last day she provided legal representation relating to the personal injury claim.

The first act of professional negligence occurred when Defendant Howey-Fox failed to timely file and effectuate proper service relating to Robinson's personal injury case. However, Defendant Howey-Fox continued to represent Robinson on her personal injury case until February 12, 2015, when she filed a motion to withdraw as Robinson's counsel and the Court granted her Motion. (SR-177, Ex. O).

Alternatively, the earliest possible determination of Defendant's last personal injury-related representation is February 11, 2013, when the jury determined that Chelsey Ewalt's usual place of residence on April 29, 2010, was Codington County. (SR-177, Ex. J). Whichever date the Court is inclined to utilize, Plaintiff Robinson timely initiated suit against Defendant Howey-Fox due to the continuous and unbroken course of negligent representation that she provided to Plaintiff Robinson which was so related as to constitute one continuing wrong.

Defendant's failure to disclose the material malpractice perpetuated the negligence up and until the last date of legal representation. The continuing tort doctrine delayed the commencement of SDCL 15-2-14.2 until, at least, February 11, 2013. Plaintiff Robinson timely served Defendant Howey-Fox. Further, the Amended Complaint sufficiently and satisfactorily alleges that Ms. Robinson's injury resulted from a continuous and unbroken course of negligent conduct. Had Defendant Howey-Fox complied with her mandatory

disclosure obligation, the statute would have commenced on such date of disclosure. Allowing an attorney to withhold material information which directly conflicts with their client's interests should not be encouraged, permitted, or repeated without consequence.

c. Can the relationship described in (b) give rise to a separate tort for breach of a fiduciary duty?

Yes, the facts and relationship described in (b) can give rise to a separate tort for breach of fiduciary duty. Addressing professional rules violations, the Court has opined as follows:

> Unlike the disciplinary rules regarding negligent conduct, the ethics rules concerning the fiduciary obligations commonly are cited by the courts in civil damage actions regarding the propriety of the attorney's conduct. One reason for this difference in usage is that the disciplinary rules concerning the fiduciary obligations often are reasonably accurate statements of the commons law....

Behrens v. Wedmore, 2005 S.D. 79, ¶ 51 (citing 2 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 14.5 at 551 (5th ed. 2000)).

This Court has held that both legal malpractice and breach of fiduciary duty can be separate causes of action in the same case against an attorney. *See Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, ¶ 1 (concluding that there are material questions of fact on whether the lawyer (1) represented the corporation he created and did so negligently, (2) improperly obtained some of the money and property misappropriated by his client, and (3) knowingly assisted his client in breaching a fiduciary duty [...]). A fiduciary relationship arises from the attorney-client relationship. *Id.*, at ¶ 36 (citing *Himrich v. Carpenter*, 1997 S.D. 116, ¶ 13).

> The relationship between attorney and client is highly fiduciary. It consists of a very delicate, exacting and confidential character. It requires the highest level of fidelity and good faith. It is a purely personal relationship, involving the highest personal trust and confidence. By

> virtue of his fiduciary duties to his client, an attorney is forbidden from using his official position for private gain.

Himrich, at ¶ 13 (citing *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 264 (S.D. 1988); 7AmJur2d *Attorneys at Law* § 119; *Speckels v. Baldwin*, 512 N.W.2d 171, 176 (S.D. 1994)).

Behrens, 2005 S.D. at ¶¶ 51-52, provides the most guidance on South Dakota law regarding the issue the Court has presented:

> Thus, as is explained below, fiduciary rules such as Rule 1.6 regarding confidentiality, Rule 1.7 and 1.8 regarding conflicts of interest, and Rule 1.9 regarding adverse representation may establish a breach of fiduciary duty.
>
> A breach of fiduciary duty in the attorney-client relationship arises from the representation of a client and involves the fundamental aspects of an attorney-client relationship. The fiduciary obligations are twofold: (1) confidentiality; and (2) undivided loyalty. Thus, the phrase fiduciary breach requires a breach of confidence, a breach of loyalty, or both. Therefore, although the attorney functions in a fiduciary relationship, a wrong by an attorney does not thereby become a fiduciary breach. The courts have recognized that claims of negligence [breach of duty], which do not implicate a duty of confidentiality or loyalty, do not support a cause of action for fiduciary breach.

(Citing 2 Ronal E. Mallen & Jeffrey M. Smith, Legal Malpractice § 14.2 at 535-537; 14.5-14.7 (5th ed. 2000)). Defendant Howey-Fox breached her duty of undivided loyalty by withholding material information from her client. The basis for withholding the information can only be intent to avoid liability; there is no other rational explanation.

As part of an attorney's general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, including those developments resulting from the lawyer's own errors. (SD Rule of Professional Conduct 1.4(b)) SD Rule of Professional Conduct 1.4(a) applies where a lawyer may have erred in the course of a current client's representation.

For example, Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to keep a client reasonably informed about the status of a matter. Additionally, Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

> More broadly, the 'guiding principle' undergirding Model Rule 1.4 is that 'the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.' A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 481, p. 3, (April 17, 2018) (a lawyer's duty to inform a current or former client of the lawyer's material error).

A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience. (Model Rules of Prof'l Conduct R. 1.4 cmt. 7; SD Rules of Prof'l Conduct R. 1.4 cmt. 5 (stating "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued")). SD Rule 1.7 forbids attorneys from representing a client if the representation involves a concurrent conflict of interest. Rule 1.7(a)(2) specifically prohibits representation when "there is a significant risk that the representation of one or more clients will be materially limited by [...] a personal interest of the lawyer." The Colorado Bar Association's Ethics Committee has spoken directly to this point: "[c]ontinued representation may not be permissible if the lawyer might be influenced to pursue a strategy that would avoid liability for the lawyer at the expense of

the success of the representation, or if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest." (Colo. Op. 113, p. 1, ¶ 2 (ethical duty of attorney to disclose errors to client)).

In demonstrating the Rule 1.7 conflict of interest, the Colorado Bar Association's Ethics Committee put forth an example which immediately demonstrates Plaintiff's point:

> In other situations, a client cannot give informed consent, confirmed in writing, within the meaning of Colo. RPC 1.7(b)(4), because the lawyers own interest in avoiding liability may materially limit the lawyer's representation of the client, within the meaning of Colo. RPC 1.7(a)(2), by influencing the lawyer's strategy. For example, in a personal injury case arising from an automobile accident involving a Regional Transportation District bus, the plaintiff's lawyer fails to give RTD timely notice of a potential claim against it as required by the Colorado Governmental Immunity Act. The plaintiff's lawyer files an action against another driver, who is uninsured. The uninsured driver files a notice of nonparty at fault, identifying RTD. The judgment against the uninsured driver is uncollectible, and the plaintiff's lawyer's liability to his client is limited to 25% of the total damages. Another lawyer representing the plaintiff might have emphasized the evidence against RTD or proceeded directly to an action against the plaintiff's lawyer for malpractice.
>
> The plaintiff's lawyer thus violated Colo. RPC 1.7(a)(2). His interest in limiting his liability to the client in a future legal malpractice claim caused him to adopt a litigation strategy that emphasized evidence that increased the fault attributable to the uninsured driver, thereby reducing the lawyer's liability exposure to the client and increasing the uncollectible portion of the judgment. Another lawyer representing the plaintiff would have emphasized evidence that decreased the fault attributable to the uninsured driver, thereby increasing the lawyer's liability exposure to the client and decreasing the uncollectible portion of the judgment. Under the circumstances, the plaintiff's consent to the conflict was not validly obtained.

(Colo. Op. 113, pp. 5-6 (ethical duty of attorney to disclose errors to client)).Worthy of note, in the above example the client waived, *in writing*, the conflict of interest and the Commission found the waiver "not validly obtained." Colo. Op. 113 (ethical duty of attorney to disclose errors to client); see also, SD Rule of Professional Conduct 1.8(h)(1)

(emphasis added). A written waiver at least implies that the attorney in the example above somewhat advised the client that a conflict of interest existed. But, even that did not happen in this case.[3]

Robinson should be entitled to pursue a cause of action against Defendant Howey-Fox for breach of fiduciary duty. Defendant's continuing wrong is her intentional withholding of material information, specifically information as to the conflict of interest she knew existed between herself and her client. Unlike the litigant in *Behrens*, Robinson is able to establish that the failure to disclose malpractice involves a breach of a fiduciary duty, i.e. one involving loyalty. *Behrens*, at ¶ 53.

Defendant Howey-Fox's personal interest in attempting to limit malpractice liability caused her to adopt a litigation strategy that conflicted with her client's best interests. Robinson's loss of her legal claim and resultant harm was reasonably foreseeable. Instead of disclosing the material malpractice and advising her client to seek outside counsel, Defendant Howey-Fox adopted a litigation strategy which conveyed unwarranted appellate and trial risk upon her client. Defendant Howey-Fox also mentioned filing a suit "against the county" in supplementary efforts to mask Robinson from uncovering Defendant's own malpractice.[4] (A-1, Howey-Fox Depo, 55:11-18).

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[3] "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client *See* Rule 1.0(e)(informed consent). The information required depends on the nature of the conflict on the nature of the conflict and the nature of the risks involved. *See* SD Rules of Professional Conduct 1.7, cmt. 18.

[4] Counsel for Ms. Robinson is unaware of any authority, statutory or case law, in which a litigant successfully recovered against a public entity, like a county, on a theory of negligence for failing to timely serve a lawsuit on a prospective Defendant (who was subsequently determined by a jury to reside in a different county).

Ironically enough, Defendant Howey-Fox's legal defense to Robinson's case became the exhaustion of time that she spent on the needless appellate and trial risk. The trial court rewarded Attorney Howey-Fox for her prolonged and continued breach of undivided loyalty to her client, Robinson.

This is an important case. The continuing tort doctrine must apply to establish precedent which forbids and discourages similar future attorney misconduct.

Discussion of the pros and cons realized by each party under "Fox's representation strategy" compared to "independent counsel strategy" makes apparent the fiduciary breach. First, Robinson will provide analysis relating to Defendant Howey-Fox's actual employed representation strategy in this case. Accordingly, Defendant's best-case scenario was that the appeal and/or jury trial would result favorably and she could continue to represent Robinson on her substantial personal injury claim. The worst-case scenario for Attorney Howey-Fox, pursuant to the "Fox representation strategy", was that upon the eventual expiration of needless appeal and jury trial, Attorney Howey-Fox was rewarded because the majority of time to initiate suit had been calculated by the trial court to have ran its course.

Defendant Howey-Fox, and future similarly situated attorneys, will be incentivized to put their own interests in a superior position to that of the client. It was reasonably foreseeable to a law-trained professional, under the "Fox representation strategy", that Robinson would suffer the ultimate prejudice, loss of her legal claim.

Contrasting the pros and cons realized by each party under the "independent counsel strategy" reveals that sans Defendant's ethical breach, Robinson would still have her claim. Assuming the "independent counsel strategy", independent counsel would

have immediately disclosed the potential for malpractice and advised Robinson to seek outside representation - hopefully the independent counsel would even refer a recognized malpractice attorney by name to remain steadfast in their undivided loyalty duty despite the consequences. In this scenario, one which assumes no ethical violation, many different strategies could have been employed but none of them result in Robinson's loss of claim. Perhaps Robinson would have been so grateful for her attorney's honesty that she would have authorized Defendant Howey-Fox to attempt to cure the malpractice. Only difference is, standby malpractice counsel would have immediately preserved Robinson's malpractice case for failure to properly and timely serve the responsible party. Or, perhaps, new counsel would have proceeded immediately with the malpractice action against Attorney Howey-Fox. Regardless of how you look at it, worst case scenario for Robinson, assuming "independent counsel strategy", still allows for recovery. The second example shows how Robinson's best interests and the achievement of Robinson's best outcome through legal proceedings was clearly placed in an inferior position to that of Attorney Howey-Fox's interest in avoiding liability. "We note that numerous courts have discussed breach of fiduciary duty when an attorney embezzles, engages in conflicts of interest, or violates obligations of loyalty, thus violating the common-law duty of a fiduciary." *Behrens,* at ¶53 (citations omitted).

It is necessary for the Court to implement a jurisprudential standard that does not reward attorneys for putting their own interests before that of their clients. It is also necessary for the Court to issue a decision which does not publicize "how to get away with malpractice - deceive your client." We should inspire and be deserving of the public's trust and confidence, not implement a standard that rewards attorney deception as

a means to foreclose an otherwise viable remedy against the deceiving attorney. "The preservation of trust in the legal professional is essential." *In re Discipline of Ortner*, 2005 S.D. 83, ¶ 27 (citing *Petition of Pier*, 1997 S.D. 23, ¶ 8). "Only by providing high quality lawyering can the integrity of the legal profession remain inveterate and the confidence of the public and the Bar remain strong." *In re Discipline of Ortner*, 2005 S.D. at ¶ 27.

The only solution to addressing similar attorney misconduct is to uphold the mandate of disclosure. An attorney must be mandated to disclose material malpractice, or else the fiduciary breach is incentivized.

A jurisprudential option for the Court, one which is supported by case law, is to find that the continuing tort doctrine in this case applies to SDCL 15-2-14.2. The Court should then find that the commencement of the statute did not begin until the date of Defendant Howey-Fox's last culpable act or omission. In this case, Defendant Howey-Fox's continued culpable act or omission was the failure to disclose the material error, which also constitutes a fiduciary breach of undivided loyalty. Therefore, the last day Attorney Howey-Fox represented Robinson on her personal injury case is when the statute should commence. Had Defendant Howey-Fox disclosed, even the potential of malpractice, the statute would have commenced at said time and there would be no fiduciary breach of undivided loyalty claim. However, Defendant Howey-Fox failed in her duties as an attorney which led to the ultimate prejudice, her client's loss of a substantial personal injury claim. Attorney Howey-Fox failed to timely serve the party who injured Robinson. Defendant Howey-Fox further perpetuated the professional negligence by failing to abide by the ethical duty of undivided loyalty. These failures

constitute a continuous and unbroken course of negligent representation and are so related as to constitute one continuing wrong.

d. Can a theory of equitable tolling apply to a statute of repose?

No, a statute of repose is an occurrence rule, which begins to run when the alleged negligent act occurs, not when it is discovered. *Pitt-Hart*, at ¶ 19 (citing *Beckel v. Gerber*, 1998 S.D. 48, ¶ 9). "[T]olling 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*, at ¶ 21.

> Thus, although a period of repose will not be tolled for any reason *once commenced*, such a period may be *delayed from commencing* if a plaintiff 'demonstrate[s]: (1) that there was a continuous and unbroken course of negligent treatment, and (2) that the treatment was so related as to constitute one continuing wrong.'

Id. at ¶ 26 (citing *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182-83 (2014); *Cunningham v. Huffman*, 609 N.W.2d 321, 325 (Ill. 1993))(emphasis added).

e. When did the statute begin to run in this case?

The statute began to run, i.e. commenced, on the date Defendant Howey-Fox last represented Robinson on her personal injury case, February 12th, 2015. (SR-177, Ex. O). This is the last date of Attorney Howey-Fox's culpable act or omission i.e. the failure to disclose the material error to her client and breaching her fiduciary duties. Perhaps it is a question of fact as to the precise date Defendant Howey-Fox discontinued rendering legal advice relative to the personal injury claim of Robinson, but that date would at least be some time on or after February 11, 2013, i.e. the date the jury determined that Chelsey Ewalt's usual place of residence on April 29, 2010, was Codington County. (SR-177, Ex. J).

CONCLUSION

Defendant Howey- Fox owed a professional and legal duty to disclose the malpractice she committed. Continuous and unbroken representation was provided by Defendant Howey-Fox to Robinson until February 12th, 2015 (the date Court granted Defendant's Motion to withdraw as legal counsel). During the period of representation, Defendant Howey-Fox owed fiduciary duties to her client, including that of undivided loyalty. Defendant Howey-Fox breached her duty of undivided loyalty by placing her interest in avoiding malpractice to a superior position to that of her client, Robinson. The continuing tort doctrine delayed the statute from commencing until February 12th, 2015. Therefore, Appellant Robinson respectfully requests this Court reverse the lower court's granting of summary judgment and remand the case for a jury trial on the merits.

Respectfully submitted this 29th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the above Supplemental Brief of Appellant Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta has been produced in Microsoft Word using a 12 point proportionally spaced typeface for the text of the Supplemental Brief; that the Supplemental Brief contains (20) pages, and that this complies with the Court's Order for Supplemental Briefing.

Dated this 29th day of October 2018.

CHRISTOPHERSON, ANDERSON,
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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October 2018, I mailed the Supplemental Brief, Appendix, and attachments with two (2) copies to the Supreme Court and emailed a Word version and a PDF version of the same to the Supreme Court. I also electronically served Appellees the above Supplemental Brief, Appendix, and attachments by transmitting electronic copies to them at the following email addresses:

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Dated this 29th day of October 2018.

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PAULSON & FIDELER, LLP

/s/Casey W. Fideler

Casey W. Fideler

APPENDIX TO SUPPLEMENTAL BRIEF OF APPELLANT

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA
Plaintiff,
-vs-
HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,
Defendants/Third-Party Plaintiffs,
-vs-
YANKTON COUNTY, SOUTH DAKOTA,
Third-Party Defendant.

66 CIV. 16-000079

* *

D E P O S I T I O N O F

Wanda Howey-Fox

* *

APPEARANCES:

Christopherson, Anderson, Paulson & Fideler, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Casey W. Fideler, for the Plaintiff;

Fuller & Williamson, Attorneys at Law, Sioux Falls, South Dakota, by Mr. William P. Fuller, for the Defendants and Third Party Plaintiffs;

Cadwell, Sanford, Deibert & Garry, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Douglas M. Deibert, for the Third-Party Defendant.

INDEX OF EXAMINATION

INDEX OF EXHIBITS

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Wanda Howey-Fox may be taken at this time and place, that is, at the James Law Offices, Yankton, South Dakota, on the 2nd day of May, 2017, commencing at the hour of 2:05 o'clock p.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

WANDA HOWEY-FOX,

called as a witness, being first duly sworn, deposed and said as follows:

EXAMINATION BY MR. DEIBERT:

Q You are Wanda Howey-Fox, the Defendant and Third-Party Plaintiff in this case?

A Yes, sir.

Q What year were you admitted to practice, first admitted?

Page 53

Q To prevail on a legal malpractice.
A It says that the Plaintiff must prove the existence of an attorney-client relationship, that the attorney acted or failed to act, breached the duty and proximately caused injury, and he or she sustained actual injury. I don't see where it says that I have to have in writing saying I'm not representing you.
Q But it does not say that a signed fee agreement is required before an attorney-client relationship exists?
A True. It says that the Plaintiff has to prove the existence of an attorney-client relationship, giving rise to a duty.
MR. FIDELER: Where is that text -- I gave that to you, Bill, or did I keep it? Can you mark this.
(Deposition Exhibit Number 23 was marked for identification by the court reporter).
Q That's Exhibit 23. Do you recognize that?
A Do I recognize it? It has Wanda, it has my phone number at the top.
Q What's the substance of the conversation you're having with Jill there?
A I guess I don't know what the stuff was preceding it, so I'm not sure.
Q What do you say?

Page 54

A I'm sorry?
Q What do you say on there?
A Oh, what do I say? I'm guessing I'm the white one and she's the blue one, I'm guessing that, and it says, only 60 days -- I guess I don't know what the question is before that, that I'm answering.
Q Right.
A But it says, only 60 days if in the hands of the sheriff in the county where she lives. And I said, that was the point -- well, it says if and it should be of, of the entire jury trial. This is the trial to determine where Chelsey lives.
Q What did Jill say?
A How does it look with Mitchell?
Q And then what's your --
A Who knows? She was in the second car. Because it was Chelsey that hit Michelle, who bumped Jill.
MR. FULLER: Should we mark that so --
THE WITNESS: This one?
MR. FULLER: Well --
THE WITNESS: This is marked as 23.
MR. FULLER: Okay. All right.
MR. FIDELER: And I just got that, Bill, so --

Page 55

MR. FULLER: Okay.
THE WITNESS: Do you want this (indicating) marked, too?
MR. FULLER: No, that's fine.
THE WITNESS: Okay. Just asking.
Q Does that text kind of align with what -- you sat in on Jill's deposition, of what she said as far as she had no idea what was going on at that time, because you put that that was the point of the entire jury trial?
A No.
Q Did you ever advise Miss Robinson that there was a potential legal malpractice claim stemming from the improper service?
A Nope. I told her she had a potential claim against the county for their failure to serve or, at the very least, failure to tell me when they knew she wasn't living in Yankton County to give those papers back, or at least let me know so I could get her served.
Q I need to figure out where this comes from. In the request for production of documents, first set, I must have asked you for documents related to the sale of the anniversary ring.
A Okay.
Q Read Paragraph 11 for me, will you, please. Those are my interrogatories, Plaintiff's interrogatories, first

Page 56

set.
MR. FULLER: These are your interrogatories?
Q Yes, sir. Number 11.
A Okay.
Q Would you please read that?
A I read it.
Q To me aloud, sorry.
A Well, the whole thing? I mean, the document speaks for itself but --
Q What's it asking you generally?
A Number 11, in response to Defendant's responses to Plaintiff's requests for admission, first set, number seven, which states that there are no documents surrounding the sale of the ring by Ms. Robinson to Ms. Howey-Fox, is Exhibit A1, attached, not a document relating to the sale of the ring, question mark. Answer -- objection and answer. Defendants, apparently I'm plural, Defendants object to this interrogatory as vague and ambiguous. Plaintiff's requests for admissions, first set, number seven, does not relate to the sale of the ring. It is further objected to as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, Exhibit A1

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28429

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff-Appellant,

v.

HARMELINK, FOX & RAVNSBORG LAW OFFICE
and WANDA L. HOWEY-FOX,

Defendants and Third-Party Plaintiffs-Appellees,

v.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant-Appellee

Appeal from the First Judicial Circuit
Yankton County, South Dakota
The Honorable John Pekas, Circuit Court Judge

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Notice of Appeal Filed: October 24, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Cases:

Other Cases:

Statutes:

Other Authorities:

STATEMENT OF THE FACTS

A brief recitation of facts is necessary for purposes of the issues to which this Court requested supplemental briefing. Appellee Wanda Howey-Fox (and her firm, Harmelink, Fox & Ravnsborg Law Firm (collectively "Howey-Fox")) represented Appellant Jill Robinson-Podoll f/k/a Jill Robinson-Kuchta ("Robinson") in a personal injury action titled *Jill Robinson f/k/a Jill Robinson-Kuchta v. Michelle M. Mitchell and Chelsey A. Ewalt*, 66 CIV. 10-000242, stemming from an April 28, 2007 motor vehicle accident. As part of that representation, Howey-Fox delivered copies of a summons and complaint to the Yankton County Sheriff's Office ("YCSO") on April 23, 2010, for service on the defendants, Mitchell and Ewalt. (App. 22-23, ¶ 3; App. 24.)[1] When a copy of a summons and complaint comes into the hands of the YCSO, they, as a matter of procedure, search for possible addresses for the person to be served. (App. 47, p. 24:11-16.) After the summons and complaint were delivered to the YCSO, defendant Mitchell was served on April 24, 2010. (App. 22-23, ¶ 4.) Also on April 24, 2010, a deputy with the YCSO attempted service on Ewalt at the address provided by Howey-Fox. (App. 42, lines 7-16.) During that attempt, the deputy was informed that Ewalt no longer lived at that address. (App. 22-23, ¶ 7; App. 24; App. 42, lines 7-16; App. 48, p. 15:20-16:2.) The YCSO never informed Howey-Fox of the same. (App. 19-20, ¶¶ 8, 9, 12.)

After the first attempted service, the YCSO called Ewalt and she told the YCSO that she would personally stop by the sheriff's office to pick up the summons and complaint. (App. 22-23, ¶¶ 5, 6.) The statute of limitations ran on April 29, 2010. On

[1] Refers to Appellees' Appendix attached to this Supplemental Brief.

May 14, 2010, another deputy with the YCSO called Ewalt, at which time Ewalt stated that she lived in Watertown. (App. 22-23, ¶ 7; App. 24; App. 43, lines 16-20; App. 48, p. 16:10-17:8.) The YCSO then faxed the summons and complaint to the Codington County Sheriff's Office. (App. 22-23, ¶ 9; App. 24.) Ewalt was served on May 25, 2010. (App. 27-34, ¶ 5.) Thereafter, Ewalt answered and moved for summary judgment, arguing that the statute of limitations barred Robinson's claims against her. (App. 27-34, ¶ 6.) The circuit court granted Ewalt's motion. (App. 25-26; App. 27-34, ¶ 6.)

Howey-Fox, on behalf of Robinson, appealed the circuit court's grant of summary judgment in Ewalt's favor, arguing that Ewalt "usually resided" in Yankton County because she lived with her parents in Yankton County during the statutory period and used a Yankton County address for purposes of her driver's license, tax filings, and bank documents. (*See* App. 1-17; App. 27-34, ¶ 8.) Accordingly, Howey-Fox argued that Robinson was entitled to the benefit of the sixty-day extension under SDCL § 15-2-31 because Robinson delivered the summons and complaint to the YCSO, the sheriff's office of the county where Ewalt "usually or last resided," before the statute of limitations expired. (App. 27-34, ¶ 8.) Ewalt argued that the sixty-day extension under SDCL § 15-2-31 did not apply because she "usually and last resided" in Codington County, rather than Yankton County. (App. 27-34, ¶ 9.) This Court, in an opinion dated January 12, 2012, reversed the circuit court's grant of summary judgment in Ewalt's favor, holding that a material question of fact remained as to Ewalt's usual or last place of residence, and remanded for a jury trial on that issue. (App. 27-34.)

A jury trial was held on February 11, 2013. (App. 18.) Robinson was present for the entirety of the jury trial. The sole issue for the jury to determine was Ewalt's "usual

place of residence" on April 29, 2010. (App. 18.) At the close of trial, the jury returned a verdict finding Codington County to be Ewalt's usual place of residence on April 29, 2010. (*Id.*)

On April 23, 2013, Howey-Fox served Yankton County with notice of a potential claim and moved to substitute Yankton County as a defendant in the personal injury action. (App. 19-24; App. 35-40.) The circuit court denied that motion.

ARGUMENT

I. When there is an alleged act of malpractice in a continuing attorney-client relationship, does an attorney owe any professional or legal duties to disclose the nature and consequences of the alleged act of malpractice to the client?

Under limited situations, an attorney in a continuing attorney-client relationship has a legal duty to disclose an alleged act of malpractice to a client; however, Howey-Fox was not subject to a legal duty of disclosure under these undisputed facts.

The South Dakota Rules of Professional Conduct do not include an express ethical or professional obligation that attorneys must disclose an alleged act of malpractice to a client. However, the American Bar Association, on April 17, 2018, issued a formal opinion providing that attorneys have an ethical/professional obligation to "inform a current client of a material error committed by the lawyer in the representation." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 481 (2018). This April 2018 opinion was issued *years* after the conduct at issue occurred and, therefore, the opinion is not applicable to the attorney-client relationship between Howey-Fox and Robinson.

But even if the Court determines some ethical/professional obligation of disclosure applied to Howey-Fox and Robinson's relationship, ethical and professional

obligations are distinct and distinguishable from legal duties, both in their application and weight. As discussed herein, Howey-Fox had no *legal* duty to disclose an alleged act of malpractice to Robinson because there was not a conflict of interest between Howey-Fox and Robinson that would trigger such a duty.

The issue of whether an attorney has a legal duty to disclose an alleged act of malpractice to a client has not been directly addressed in South Dakota. But the Eighth Circuit Court of Appeals answered this exact question in *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009). In that case, attorneys from the Dorsey & Whitney law firm gave a client erroneous and faulty legal advice, which eventually caused the client to lose money and be sued. *Id*. at 614-16. After learning that the legal advice previously given was erroneous and faulty, the attorneys continued to represent the client – never disclosing that they may have committed malpractice. *Id*. at 615-16. The client later filed for bankruptcy. *Id*. at 616.

As part of the bankruptcy action, the bankruptcy trustee, on behalf of the client, filed a complaint against the law firm alleging breaches of fiduciary duty related, in part, to the failure to disclose the firm's alleged act of malpractice. *Id*. at 616-17. The bankruptcy court found that the attorneys breached a duty to disclose that they may have committed malpractice. *Id*. at 617. The firm appealed the bankruptcy court's judgment. *Id*.

On appeal, the United States District Court for the District of Minnesota affirmed the bankruptcy court's holding that the attorneys' failure to disclose the alleged act of malpractice was a breach of fiduciary duty. *Id*. at 618. The firm, again, appealed. *Id*.

After generally recognizing an attorney's "common-law duty to confess a potential malpractice claim to his client," the Eighth Circuit first discussed the distinction between an attorney's ethical/professional obligations and an attorney's legal duties. *Id.* at 629. And the Eighth Circuit found that the lower courts placed too much emphasis and weight on ethical/professional obligations, which, in and of themselves, do *not* trigger the existence of a cause of action: "Demonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a *legal duty* has been breached." *Id.* at 628 (emphasis added). "There is a distinction between a disclosure of an ethical concern and the existence of a cause of action." *Id.* (quoting Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 24:5 at 543 (2008 ed.)).

With this proper understanding of the difference between ethical/professional obligations and legal duties established and explained, the Eighth Circuit limited the application of an attorney's duty to disclose an alleged act of malpractice in a continuing attorney-client relationship to situations where a conflict of interest would disqualify the attorney from continuing to represent the client: "When the lawyer's interest in nondisclosure conflicts with the client's interest in the representation, *then* a fiduciary duty of disclosure is implicated." *Id.* at 629. Stated differently, for a fiduciary duty to be implicated:

> [T]he lawyer's own interests in avoiding liability must conflict with those of the client. [However,] [a] lawyer may act in the client's interests to prevent the error from harming the client without breaching a fiduciary duty.

Id. at 630. The Eighth Circuit then found that an attorney will only be held liable for failure to disclose an alleged act of malpractice in situations where a conflict of interest arose. *Id*.

After applying the law to the facts of the case, the Eighth Circuit reversed the district court's decision that the law firm breached fiduciary duties owed to the client. *Id*. Reversal was necessary because the Eighth Circuit found that the law firm's continued representation of the client did *not* create a conflict of interest between the attorneys and the client. Specifically, the Eighth Circuit reasoned that the firm's continued representation of the client "was part of its legitimate efforts to prevent its possible error in judgment from harming" the client, and "there was not a substantial risk that [the firm's] interests were adverse to those of [the client]." *Id*. Accordingly, both the firm's and the client's interests were aligned, creating no conflict of interest. *Id*. Thus, the duty to disclose an alleged act of malpractice was not triggered. *Id*. And there was no breach of that duty as a result. *Id*. at 630-31. The Eighth Circuit then remanded with instructions that the client's lawsuit against the firm be dismissed. *Id*. at 631.

This case is analogous to *Leonard*. Howey-Fox's duty to disclose an alleged act of malpractice was not triggered because there was not a conflict of interest that arose during her representation of Robinson. Robinson's and Howey-Fox's interests were aligned. Howey-Fox placed the summons and complaint in the hands of the YCSO for service on Ewalt. When it was determined that the YCSO was unsuccessful in serving Ewalt within the statute of limitations, Howey-Fox zealously advocated on Robinson's behalf to prevent harm to Robinson. Howey-Fox argued in Robinson's best interests that Ewalt's "usual" place of residence was Yankton County at the summary judgment stage,

on appeal to this Court, and on remand in front of a jury. At trial, it was discovered that the YCSO was aware that Ewalt no longer resided in Yankton County before the statute of limitations ran. (App. 19-24, ¶ 8; App. 35-40.) And the YCSO failed to relay this information to Howey-Fox so that she could find an alternate address to ensure that Ewalt was properly served before the limitations period expired. (App. 19-20, ¶¶ 8, 9, 12.) The YCSO also failed to, themselves, find an alternate address for Ewalt to ensure that she was properly served before the limitations period expired. (App. 19-20, ¶¶ 8, 9, 12; App. 47, p. 24:16-22.) Accordingly, Howey-Fox, on behalf of Robinson, and in Robinson's best interests, notified Yankton County of Robinson's claim against it, moved to substitute Yankton County as a defendant in the Mitchell/Ewalt action (App. 19-24), and continued to pursue a claim against Yankton County on Robinson's behalf. All of Howey-Fox's work on this matter was "part of [her] legitimate efforts to prevent . . . harm[]" to Robinson. *See Leonard*, 553 F.3d at 630 (recognizing that a firm's continued representation of a client, even after the client filed for bankruptcy, was "part of its legitimate efforts to prevent its possible error in judgment from harming" the client). During Howey-Fox's representation of Robinson, there was not a "substantial risk" that Howey-Fox's interests were adverse to Robinson's. Like the attorneys and client in *Leonard*, Howey-Fox's and Robinson's interests were aligned. Thus, Howey-Fox's duty to disclose an alleged act of malpractice was not triggered. Where there is no duty, there can be no breach.

Robinson, like the lower courts in *Leonard*, places great weight on ethical/professional obligations. (*See* Appellant Suppl. Brief, [2] 1-5 (citing disciplinary

[2] Refers to Supplemental Brief of Appellant, dated October 29, 2018.

decisions, ethical and professional rules, ethics opinions, and secondary sources discussing professional and ethical obligations); *see also* Appellant Suppl. Brief, 12-14 (citing ethical and professional rules).) However, the Eighth Circuit explicitly rejected the lower courts' reliance on ethical/professional obligations, finding such reliance misplaced. Robinson's reliance on ethical/professional obligations is similarly misplaced. And once all reference and argument of ethical and professional obligations is removed from Robinson's Supplemental Brief, it lacks any discussion, whatsoever, on an attorney's *legal* duty of disclosure and the limited circumstances where that duty arises save for a single footnote which makes passing reference to the same. (Appellant Suppl. Brief, 1, n.1.) Even this authority, cited by Robinson, recognizes that an attorney's legal duty to disclose an alleged act of malpractice is *only* triggered once a conflict of interest has arisen between the attorney and the client.[3] There was not a conflict of interest that arose between Howey-Fox and Robinson and thus, no legal duty of disclosure triggered as a matter of law. Robinson's failure to address this Court's question as it pertains to a *legal* duty is telling.

Notwithstanding that Howey-Fox's duty of disclosure was not triggered, Robinson did not properly raise the issue of whether Howey-Fox breached a duty to disclose an alleged act of malpractice. This issue was not argued, briefed, or considered by the circuit court. Robinson conceded this much in her Brief in Opposition to

[3] *See* Appellant Suppl. Brief, 1, n.1 (citing *Leonard*, 553 F.3d at 629 (holding that an attorney's legal duty to disclose an alleged act of malpractice to a client is not implicated until a conflict of interest arises between the attorney and client); *see also id.* (citing Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 24:5 (2008) (recognizing that an attorney's duty of disclosure of an alleged act of malpractice is only implicated when a conflict of interest arises)).

Appellees' Motion to Strike Appellant's Reply Brief. (*See* Appellant Brief in Opposition,[4] 4 ("Appellant agrees that no argument was made concerning Ms. Fox's duty to inform her client of the material breach[.]").)[5] The argument is, therefore, not properly before this Court. This Court has, on countless occasions, held that arguments raised for the first time on appeal are waived and will not be addressed or considered. *See, e.g.*,

And moreover, the statute of repose commenced on April 29, 2013, as addressed herein. Robinson's claims remain time-barred.

II. If this Court determines that SDCL § 15-2-14.2 is a statute of repose under *Pitt-Hart*:

A. Must this Court reverse its prior decisions applying the doctrines of continuing representation and fraudulent concealment to the statute?

Using *Pitt-Hart* as a guide, yes.

In *Pitt-Hart*, this Court recognized that statutes of repose are not tolled by the fraudulent concealment or continuous treatment/continuous representation doctrines. *See Pitt-Hart*, 2016 S.D. 33, ¶ 24, 878 N.W.2d at 415 (recognizing that the continuous treatment/continuous representation rule "*cannot*" toll statutes of repose) (emphasis in the original); *see also id.* at ¶ 20 ("[F]raudulent concealment does not toll a period of

[4] Refers to Appellant's Brief in Opposition to Appellees' Motion to Strike Appellant's Reply Brief and Appellant's Supplemental Brief Pursuant to SDCL 15-26A-73, dated July 25, 2018.

[5] To the extent Robinson again argues, as she did in her Brief in Opposition to Appellees' Motion to Strike Appellant's Reply Brief, that she was unable to raise this legal theory to the circuit court because it "did not yet exist," *Leonard* was in existence years before Robinson commenced her action against Howey-Fox.

[6] *See also* ("We have consistently stated that we will not address issues raised for the first time on appeal not raised before the lower court."); ("We have repeatedly stated that we will not address for the first time on appeal issues not raised below."); ("An issue not raised at the trial court level cannot be raised for the first time on appeal."); (stating that where a party "failed to develop the record" on an issue "we deem that issue abandoned.").

repose."). Therefore, this Court held that the medical malpractice statute of repose was not tolled by the fraudulent concealment doctrine or the continuous treatment/continuous representation doctrine. *Id.*[7] The effect of this Court's holding in *Pitt-Hart* overruled and reversed its prior decisions that applied the doctrine of fraudulent concealment to toll the medical malpractice statute. *See, e.g.*, *Bruske v. Hille*, 1997 S.D. 108, ¶ 19, 567 N.W.2d 872, 879 ("Fraudulently concealing a cause of action will also toll the limitations period for medical malpractice.") (citations and quotations omitted)). Similarly, a holding that SDCL § 15-2-14.2 is a statute of repose would – and should – overrule and reverse this Court's prior decisions that applied the doctrine of fraudulent concealment and the doctrine of continuous representation to the legal malpractice statute.

B. Can the "occurrence" of an alleged act of attorney malpractice under the statute be delayed by the continuing tort doctrine if there is continuous representation by the attorney on the same subject matter, and a showing that the attorney has failed to disclose to the client the nature and consequences of the alleged act of malpractice?

As this Court addressed in *Pitt-Hart*, the continuing tort doctrine applies to delay the *commencement* of statutes of repose in the medical malpractice realm only if the plaintiff satisfies his/her burden of proving: "(1) that there was a continuous and

[7] Robinson argues that "[i]t can be inferred" that this Court did not forever and permanently repeal the continuous treatment/continuous representation doctrine's application to statutes of repose in *Pitt-Hart*. (Appellant Suppl. Brief, 7.) This argument is surprising and insincere when considering that this Court clearly and expressly stated in *Pitt-Hart* that the continuous treatment/continuous representation doctrine does *not* apply to periods of repose: "The arguments against applying equitable tolling, estoppel, and fraudulent concealment to a period of repose *apply with equal force* to the tolling that would result from the application of the continuous-treatment rule. . . . Thus, while the rule applies to a period of limitation, it does *not* apply to a period of repose." 2016 S.D. 33, ¶ 24, 878 N.W.2d at 415 (emphasis added). This Court continued in its explanation that although some courts across jurisdictions apply the continuous treatment/continuous representation doctrine to statutes of repose, the version utilized by these courts is simply a "mislabeled application of the continuing-tort doctrine." *Id.* at ¶ 25. It remains that the continuous treatment/continuous representation doctrine does not apply to statutes of repose.

unbroken course of negligent treatment, and (2) that the treatment was so related as to constitute one continuing wrong." 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415. However, the continuing tort doctrine's application is limited. It will never toll a repose period that has *already commenced*. *See id.* ("[A] period of repose will not be tolled for any reason *once commenced*[.]").

Howey-Fox demonstrated in her Appellee Brief that Robinson has not, and cannot as a matter of law, establish her burden of proving that the continuing tort doctrine applied to delay the commencement of the period of repose at issue here. (*See* Appellee Brief, 17-18.)[8] The continuing tort doctrine does not apply when the specific negligent event that is the "principal cause of damage" is readily identifiable. *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 11, 827 N.W.2d 871, 875; *see also Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415 (recognizing that the continuing tort doctrine does not apply when the specific negligent event that caused the damage is readily identifiable). Robinson's allegations of injury arose from the failure to commence suit within the statute of limitations in the underlying personal injury action, which failure occurred as of April 29, 2010. Robinson's Appellant Brief admits that "all representation of Robinson by Defendant Fox, until February 11, 2013, stemmed from her professional negligence" of the single, identifiable occurrence of "failing to timely file [Robinson's] claim and serve the proper party or parties in the statutory prescribed fashion." (Appellant Brief, 10.)[9] Even if Robinson experienced continuing ill effects from that failure to commence

[8] Refers to Brief of Appellees Harmelink, Fox and Ravnsborg Law Office and Wanda L. Howey-Fox, dated June 8, 2018.

[9] Refers to Brief of Appellant, dated April 6, 2018.

suit against Ewalt, continuing ill effects are *not* continuing torts. *See Brandt*, 2013 S.D. 22, ¶ 11, 827 N.W.2d at 875 ("[A] continual consequence from a solitary unlawful act is not a continuing tort."); *see also Shippen v. Parrott*, 506 N.W.2d 82, 85 (S.D. 1993) ("Alleged continual ill effects are not actionable under a continuing tort theory.") (overruled on other grounds). The repose period had already commenced on April 29, 2010. The continuing tort doctrine did not delay its commencement.

Moreover, and importantly, as the Eighth Circuit held in *Leonard*, an attorney's duty to disclose an alleged act of malpractice to a client is not triggered until a conflict of interest arises between the attorney and client. *Leonard*, 553 F.3d at 630. The statute of limitations on Robinson's underlying personal injury claim ran on April 29, 2010. Thereafter, Howey-Fox's duty to disclose an alleged act of malpractice to Robinson was not triggered because Howey-Fox's interests were aligned with Robinson's. A conflict of interest did not arise between the two. And Howey-Fox zealously advocated on Robinson's behalf in an attempt to avoid harm to Robinson. Even if it is assumed, purely for argument's sake, that a conflict of interest arose at some point following the jury trial, which is denied, the continuing tort doctrine would still not apply to toll the repose period because the period had *already commenced* on April 29, 2010. The continuing tort doctrine only applies to delay the commencement of a repose period. It does not apply to toll a repose period, for any reason, after the period has already commenced. *See Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415 ("[A] period of repose will not be tolled for any reason *once commenced*[.]" (emphasis added)).

Robinson argues that the continuing tort doctrine applies to delay the commencement of the statute of repose to either February 11, 2013, the date of the jury

verdict holding Ewalt resided in Codington County, or February 12, 2015, because Howey-Fox's representation of Robinson was a "continuous and unbroken course of negligent representation[.]" (Appellant Suppl. Brief, 8-10). Robinson's arguments are flawed.

Regarding the February 11, 2013 date, it cannot be said that Howey-Fox's representation from the date when the statute of limitations ran, April 29, 2010, to February 11, 2013, was a "continuous and unbroken course of negligent representation" because Ewalt's usual place of residence had not yet been determined. It certainly was not negligent for Howey-Fox to advocate on Robinson's behalf that Ewalt's usual place of residence was Yankton County at the summary judgment stage, on appeal to this Court, and in front of the jury. This is especially true when considering that Ewalt used a Yankton County address on her driver's license, for purposes of tax filings, and for other financial documents. (*See* App. 4-17; App. 27-34, ¶ 8.) In fact, it would have been negligent for Howey-Fox not to advocate on Robinson's behalf in light of these facts. And if the jury would have determined Ewalt's usual place of residence was Yankton County, the case would have moved forward against Ewalt. The continuing tort doctrine did not apply to delay the commencement of the period of repose to February 11, 2013.

Regarding the February 12, 2015 date, Robinson similarly has not addressed how Howey-Fox's representation of Robinson from February 11, 2013, to February 12, 2015, was a "continuous and unbroken course of negligent representation." Regardless, this is a non-issue. Again, the continuing tort doctrine does not apply to toll repose periods that have already commenced. *See Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415 ("[A] period of repose will not be tolled for any reason *once commenced*[.]"). And, as

addressed above, there was no continuous and unbroken course of negligent conduct from April 29, 2010, to February 11, 2013. Thus, the repose period commenced on April 29, 2010. And any purported tortious conduct that occurred from February 11, 2013, to February 12, 2015, which is, again, denied, would not apply to toll the repose period because it had already commenced. The continuing tort doctrine remains inapplicable as a matter of law under these undisputed facts.

C. Can the relationship described in (B) give rise to a separate tort for breach of a fiduciary duty?

The failure of an attorney to disclose an alleged act of malpractice to a client in a continuing attorney-client relationship can give rise to a separate tort for breach of a fiduciary duty if, and only if, a conflict of interest arose between the attorney and client, triggering the duty to disclose. *Leonard*, 553 F.3d at 630. When, as here, there is no conflict of interest between the attorney and client, the duty to disclose is not triggered and a cause of action for breach of fiduciary duty is unwarranted.

Robinson asserts policy considerations in an attempt to have this Court adopt a legal duty of disclosure, regardless of knowledge or conflict of interest. Robinson's request is properly denied for two important reasons. First, Robinson's emotional arguments ignore established legal precedent limiting the legal duty to certain specific situations where the attorney has both knowledge of the alleged act of malpractice and a conflict of interest that arises between the attorney and the client. Second, Robinson is preaching to the wrong choir. "Public policy safeguards 'that which the community wants' and not 'that which an ideal community ought to want.'" *Richardson v. Richardson*, 2017 S.D. 92, ¶ 16, 906 N.W.2d 369, 374. Although this Court has the power to declare public policy, "exertions of judicial rulemaking based on public policy

must be mindful of the Legislature's public policy determinations and avoid overreach." *Id*. The South Dakota Legislature "is closest to and best represents the people." *Id*. And the Legislature has established the very policy considerations underlying statutes of repose, including SDCL § 15-2-14.2: "a defendant should 'be free from liability after the legislatively determined period of time.'" *Pitt-Hart*, 2016 S.D. 33, ¶ 21, 878 N.W.2d at 414 (quoting *Lozano v. Montoya Alvarez*, – U.S. –, –, 134 S. Ct. 1224, 1231-32 (2014)). The mere fact that statutes of repose may occasionally result in the barring of a claim before a plaintiff has suffered or discovered the resulting injury is a known and appreciated possibility when dealing with periods of repose. As addressed in Howey-Fox's Appellee Brief:

> As the United States Supreme Court recognized in *CTS Corp. v. Waldburger*:
>
> > A statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted [. . .] *even if this period ends before the plaintiff has suffered a resulting injury*." [. . .] The statute of repose limit is "not related to the accrual of any cause of action; *the injury need not have occurred, much less have been discovered*."
>
> 134 S. Ct. at 2182-83 (citations omitted) (emphasis added). *See also Peterson ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 41, 635 N.W.2d 556, 570 (quoting *Zacher v. Budd Co.*, 396 N.W.2d 122, 129, n.5 (S.D. 1986)) ("a statute of repose may bar the filing of a lawsuit *even though the cause of action did not even arise until after it was barred*[.]") (emphasis added).

(Appellee Brief, 12.) The well-established recognition and understanding of this possibility continues to foreclose all of Robinson's manifest injustice arguments. Robinson's emotional pleas are contrary to the recognized Legislative judgment underlying statutes of repose.

Robinson states in her Supplemental Brief that under South Dakota law, both legal malpractice and breach of fiduciary duty can be separate causes of action in the

same lawsuit against an attorney. (Appellant Suppl. Brief, 11 (citing *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, 652 N.W.2d 756).) Robinson then asserts that she "should be entitled to pursue a cause of action against Defendant Howey-Fox for breach of fiduciary duty." (Appellant Suppl. Brief, 15.) Respectfully, Robinson is mistaken. She has waived such entitlement. And this Court must preclude Robinson from her attempts to correct this waiver now. It bears repeating that the issue of whether Howey-Fox breached a fiduciary duty owed to Robinson by failing to disclose an alleged act of malpractice was not properly raised by Robinson, which Robinson conceded in her Brief in Opposition to Appellees' Motion to Strike Appellant's Reply Brief. (*See* Appellant Brief in Opposition, 4 ("Appellant agrees that no argument was made concerning Ms. Fox's duty to inform her client of the material breach[.]").) Robinson never asserted a breach of fiduciary duty cause of action against Howey-Fox. Nor did she argue that Howey-Fox had a duty to disclose an alleged act of malpractice. Because Robinson failed to raise these issues, they are now waived and must not be considered on appeal. *See Legrand*, 2014 S.D. 71, ¶ 26, 855 N.W.2d at 129 ("This Court will not address arguments that are raised for the first time on appeal."); *Stanley*, 2017 S.D. 32, ¶ 26, 896 N.W.2d at 678 (same).[10]

D. Can a theory of equitable tolling apply to a statute of repose?

[10] *See also Kreisers Inc.*, 2014 S.D. 56, ¶ 46, 852 N.W.2d at 425 ("We have consistently stated that we will not address issues raised for the first time on appeal not raised before the lower court."); *Hall*, 2006 S.D. 24, ¶ 12, 712 N.W.2d at 26-27 ("We have repeatedly stated that we will not address for the first time on appeal issues not raised below."); *Action Mech., Inc.*, 2002 S.D. 121, ¶ 50, 652 N.W.2d at 755 ("An issue not raised at the trial court level cannot be raised for the first time on appeal."); *Sedlacek*, 437 N.W.2d at 868 (stating that where a party "failed to develop the record" on an issue "we deem that issue abandoned").

It is settled that with statutes of repose, "[a]fter the legislatively determined period of time, . . . liability will no longer exist and will not be tolled *for any reason*." *Pitt-Hart*, 2016 S.D. 33, ¶ 20, 878 N.W.2d at 413-414 (citing 54 C.J.S. *Limitations of Actions* § 7 (2015)) (emphasis in original). The reasoning behind this rule are the public policy objectives considered by the Legislature when drafting statutes of repose: "[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*, 2016 S.D. 33, ¶ 21, 878 N.W.2d at 414 (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." *Id.* As a result, a theory of equitable tolling does not apply to periods of repose. *Id.* The parties agree on this issue. (*See* Appellant Suppl. Brief, 19 (recognizing that a theory of equitable tolling does not apply to statutes of repose).)

E. When did the statute of repose begin to run in this case?

The repose period began to run on April 29, 2010 – the date the statute of limitations in the personal injury action ran. There was no continuing tort. The doctrine does not apply when the specific negligent event that is the "principal cause of damage" is readily identifiable. *Brandt*, 2013 S.D. 22, ¶ 11, 827 N.W.2d at 875; *see also Pitt-Hart*, 2016 S.D. 33, ¶ 25, 878 N.W.2d at 415. Robinson's allegations of injury arose from the specific and identifiable event of the failure to commence an action before the statute of limitations ran. In addition, Robinson has not, and cannot as a matter of law,

establish that Howey-Fox's representation of her constituted a continuous and unbroken course of negligent representation.

Robinson, again, argues that the repose period began to run either from February 11, 2013, or February 12, 2015. Howey-Fox addressed why neither of Robinson's conflicting proposals are applicable in Section II(B), above. That reasoning is repeated and adopted here, as though fully set forth herein.

CONCLUSION

Howey-Fox had no duty to disclose an alleged act of malpractice to Robinson. In addition, Robinson never raised these issues below and they are, therefore, waived.

The South Dakota legal malpractice statute, SDCL § 15-2-14.2, directs a period of repose. Equitable tolling, the fraudulent concealment doctrine, and the continuous representation doctrine do not apply to periods of repose. And the South Dakota Legislature has established clear public policy considerations underlying these determinations.

The continuing tort doctrine did not apply to delay the commencement of the repose period, which began on April 29, 2010. Robinson had from April 29, 2010, until April 29, 2013, to commence a lawsuit against Howey-Fox alleging legal malpractice claims. Robinson failed to commence suit against Howey-Fox until January 27, 2016, nearly three years after the repose period ran. The circuit court correctly held that Robinson's claims against Howey-Fox are time-barred.

For these reasons, Howey-Fox respectfully requests this Court to affirm the circuit court's decision in all respects.

Dated: November 19, 2018.

FULLER & WILLIAMSON, LLP

/s/ William P. Fuller

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Molly K. Beck
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CERTIFICATE OF SERVICE

I certify that on November 19, 2018, I e-filed with the South Dakota Supreme Court's office, and served via electronic mail, a true and correct copy of Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox's Supplemental Brief, on:

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/s/ William P. Fuller
One of the Attorneys for Appellees
Harmelink, Fox & Ravnsborg Law Office
and Wanda L. Howey-Fox

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Supplemental Brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Office Word 2013 and contains 5,741 words from the Statement of the Facts through the Conclusion. I have relied on the word count of a word-processing program to prepare this Certificate.

/s/ William P. Fuller
One of the Attorneys for Appellees
Harmelink, Fox & Ravnsborg Law Office
and Wanda L. Howey-Fox

APPENDIX

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

JILL ROBINSON formerly known as JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT,

Defendants.

CIV. #10-242

PLAINTIFF'S STATEMENT OF DISPUTED MATERIAL FACTS

****

COMES NOW the Plaintiff, Jill Robinson formerly known as Jill Robinson-Kuchta, by and through her attorney, Wanda Howey-Fox, and sets forth the following list of disputed material facts:

1. Plaintiff disputes Defendant's proposed Statement of Undisputed Fact #6, in that, the Defendant claims that she has usually resided outside Yankton County, South Dakota, from December, 2009, up to the present time.

2. Plaintiff disputes that the Plaintiff typically and/or ***usually*** resides in Watertown, Codington County, South Dakota.

3. In the Affidavit of Chelsey A. Ewalt states that she has moved from her parents' residence (¶3) to Sioux Falls (¶4) to Volin (¶5) to Sioux City, IA (¶6) to Watertown (¶6).

4. Plaintiff disputes that the Defendant has listed Watertown or Sioux City as her residence on official documents.

5. Defendant Ewalt only recently changed her address on "official documents" to an address in Watertown on September 9, 2010, some five (5) months after she was served with a photocopy of the Summons and Complaint. (See, attached Exhibit #1).

6. Defendant has served Requests for Production of Documents upon the Defendant via her counsel asking for documentation which would reflect where the Defendant has listed as her address.

7. Defendant Ewalt responded to those Requests for Production and provided documentation of her reported addresses which are typically in Volin, South Dakota, or Gayville, South Dakota, which are her parents' addresses. (See, attached Exhibits 2 – 9).

8. Defendant Chelsey Ewalt continues to utilize her parents' address on

official documents. (See, attached Exhibits #2 – 9).

9. The fact that the Defendant lists her parents' address as her official address would not be unusual in light of the fact that Defendant Ewalt is a student and only twenty (20) years of age.

10. Furthermore, Defendant Ewalt's South Dakota driver's license reflects that Defendant Ewalt listed her parent's Gayville, South Dakorta. (See, attached Exhibit 10).

11. When the Summons and Complaint were placed in the hands of the Yankton County Sheriff, the only information that the Plaintiff had available to her at that time was that Defendant Ewalt was living at her parents' residence.

12. Plaintiff relied upon information that was available to her via the interent as well as information from young people of approximately the same age as Defendant Ewalt when the documents were placed with the Yankton County Sheriff.

13. Plaintiff disputes Defendant's proposed Statement of Undisputed Fact #7, in that, the Defendant claims that "(o)n May 14, 2010, the Summons and Complaint were returned to the Plaintiff's attorney as unservable". (See, attached Exhibit 1).

14. The Yankton County Sheriff's Office was in contact with Defendant Ewalt and Defendant Ewalt was advised that the Yankton County Sheriff's Office had papers to serve on her.

15. Defendant Ewalt advised the Yankton County Sheriff's Office that she "would stop by their office and pick up the papers" and did not do so. (See, Affidavit of Jerry Jarvis).

16. Ultimately, when Defendant Ewalt did not stop by the Yankton County Sheriff's Office, Jerry Jarvis of the Yankton County Sheriff's Office faxed the Summons and Complaint to the Codington County Sheriff's Office for service upon Defendant Ewalt.

17. A review of the Sheriff's Return of Service reflects that copies of the Summons and Complaint were returned to Plaintiff's counsel on May 17, 2010; not May 14, 2010, as reflected in the Defendant's Statement of Undisputed Facts.

18. It is apparent from Defendant Ewalt's Affidavit that she would move a-round and would ultimately return to the Volin and/or Gayville, Yankton County, South Dakota, area.

19. Defendant, Chelsey Ewalt, used her parents' Volin, South Dakota, address as her "home" address. (See, Exhibits 1 – 10).

20. Although the Defendant may have moved about and lived on a temporary basis at various locations in order to attend school, upon information and belief, the Defendant, Chelsey Ewalt, would return to her parents' home in Volin, South Dakota, to live.

Defendant, Chelsey Ewalt, would return to her parents' home in Volin, South Dakota, to live.

21. In speaking with the Plaintiff, since receiving the Defendant's Motion for Summary Judgment and the Affidavit of Pamela Hojer, the Plaintiff acknowledges that she did, in fact, receive $1,000.00 for the personal property damage and had executed a Release of All Property Claims.

Dated this 26th day of January, 2011.

HARMELINK, FOX & RAVNSBORG
LAW OFFICE

Wanda Howey-Fox
Attorney at Law
P.O. Box 18
Yankton, SD 57078
(605) 665 - 1001

CERTIFICATE OF SERVICE

This is to certify that a true and correct copies of the Plaintiff's Statement of Disputed Material Facts were served upon the following by depositing said copies in the United States Post Office at Yankton, South Dakota, in envelopes with first class postage prepaid, addressed to the following persons at their given addresses on the 26th day of January, 2011.

Larry Von Wald **
Attorney at Law
P.O. Box 9579
Rapid City, SD 57709
lvonwald@blackhillslaw.com

** also via internet

Jill Robinson

Wanda Howey-Fox

STATE OF SOUTH DAKOTA
DEPARTMENT OF PUBLIC SAFETY
ABSTRACT OF OPERATING RECORD

IN COMPLIANCE WITH SDCL 32-12-61, 32-35-101 AND THE PROVISIONS OF THE FEDERAL DRIVER PRIVACY PROTECTION ACT, THE FOLLOWING TRUE ABSTRACT OF THE DRIVING RECORD FOR THE INDIVIDUAL NAMED IS PROVIDED BY THE SOUTH DAKOTA DEPARTMENT OF PUBLIC SAFETY.

PRINT DATE: 01-25-2011

CHELSEY ANN EWALT
1520 3RD AVE SW #11
WATERTOWN SD 572013453

DATE OF BIRTH: 05-05-1990
SEX: FEMALE
ISSUE DATE: 09-09-2010
EXPIRATION DATE: 06-04-2011

LICENSE CLASS: 1 - CAR/TRUCK
LICENSE TYPE: D - DRIVER LICENSE

---------- LICENSE ENDORSEMENTS ----------
NO ENDORSEMENTS

---------- LICENSE RESTRICTIONS ----------
NO RESTRICTIONS

---------- LICENSE STATUSES ----------
DRIVER LICENSE STATUS: ACTIVE/ELIGIBLE

---------- DRIVER PERMITS ----------
NO ACTIVE PERMITS FOUND

---------- DRIVER ACCIDENTS AND CONVICTIONS ----------
NO REPORTABLE HISTORY FOUND

PAGE: 001

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota
DEPARTMENT OF PUBLIC SAFETY
1-25-11 Date By ..... Officer or Employee

EXHIBIT
tabbies
1

Department of the Treasury—Internal Revenue Service

Form **1040EZ**

Income Tax Return for Single and Joint Filers With No Dependents (99) 2009

OCT 13 2010

OMB No. 1545-0074

Label (See page 9.) Use the IRS label. Otherwise, please print or type.

	Your first name and initial	Last name	Your social security number
	Chelsey A	Ewalt	[redacted]
	If a joint return, spouse's first name and initial	Last name	Spouse's social security number
	Home address (number and street). If you have a P.O. box, see page 9.	Apt. no.	You must enter your SSN(s) above.
	45130 Bluff Rd		
	City, town or post office, state, and ZIP code. If you have a foreign address, see page 9.		Checking a box below will not change your tax or refund.
	Volin, South Dakota 57072		

Presidential Election Campaign (see page 9) ▶ Check here if you, or your spouse if a joint return, want $3 to go to this fund . . ▶ ☐ You ☐ Spouse

Income

Attach Form(s) W-2 here. Enclose, but do not attach, any payment.

1	Wages, salaries, and tips. This should be shown in box 1 of your Form(s) W-2. Attach your Form(s) W-2.	1	[redacted]
2	Taxable interest. If the total is over $1,500, you cannot use Form 1040EZ.	2	
3	Unemployment compensation in excess of $2,400 per recipient and Alaska Permanent Fund dividends (see page 11).	3	
4	Add lines 1, 2, and 3. This is your adjusted gross income.	4	[redacted]
5	If someone can claim you (or your spouse if a joint return) as a dependent, check the applicable box(es) below and enter the amount from the worksheet on back. ☐ You ☐ Spouse. If no one can claim you (or your spouse if a joint return), enter $9,350 if single; $18,700 if married filing jointly. See back for explanation.	5	
6	Subtract line 5 from line 4. If line 5 is larger than line 4, enter -0-. This is your taxable income. ▶	6	[redacted]

You may benefit from filing Form 1040A or 1040. See Before You Begin on page 4.

Payments, Credits, and Tax

7	Federal income tax withheld from Form(s) W-2 and 1099.	7	
8	Making work pay credit (see worksheet on back).	8	
9a	Earned income credit (EIC) (see page 13).	9a	
b	Nontaxable combat pay election. 9b		
10	Add lines 7, 8, and 9a. These are your total payments and credits. ▶	10	
11	Tax. Use the amount on line 6 above to find your tax in the tax table on pages 27 through 35 of the instructions. Then, enter the tax from the table on this line.	11	[redacted]

Refund

Have it directly deposited! See page 18 and fill in 12b, 12c, and 12d or Form 8888.

12a	If line 10 is larger than line 11, subtract line 11 from line 10. This is your refund. If Form 8888 is attached, check here ▶ ☐	12a	[redacted]
▶ b	Routing number	▶ c Type: ☐ Checking ☐ Savings	
▶ d	Account number		

Amount you owe

13	If line 11 is larger than line 10, subtract line 10 from line 11. This is the amount you owe. For details on how to pay, see page 19. ▶	13	

Third party designee

Do you want to allow another person to discuss this return with the IRS (see page 20)? ☐ Yes. Complete the following. ☐ No

Designee's name ▶ Phone no. ▶ Personal identification number (PIN) ▶

Sign here

Joint return? See page 6. Keep a copy for your records.

Under penalties of perjury, I declare that I have examined this return, and to the best of my knowledge and belief, it is true, correct, and accurately lists all amounts and sources of income I received during the tax year. Declaration of preparer (other than the taxpayer) is based on all information of which the preparer has any knowledge.

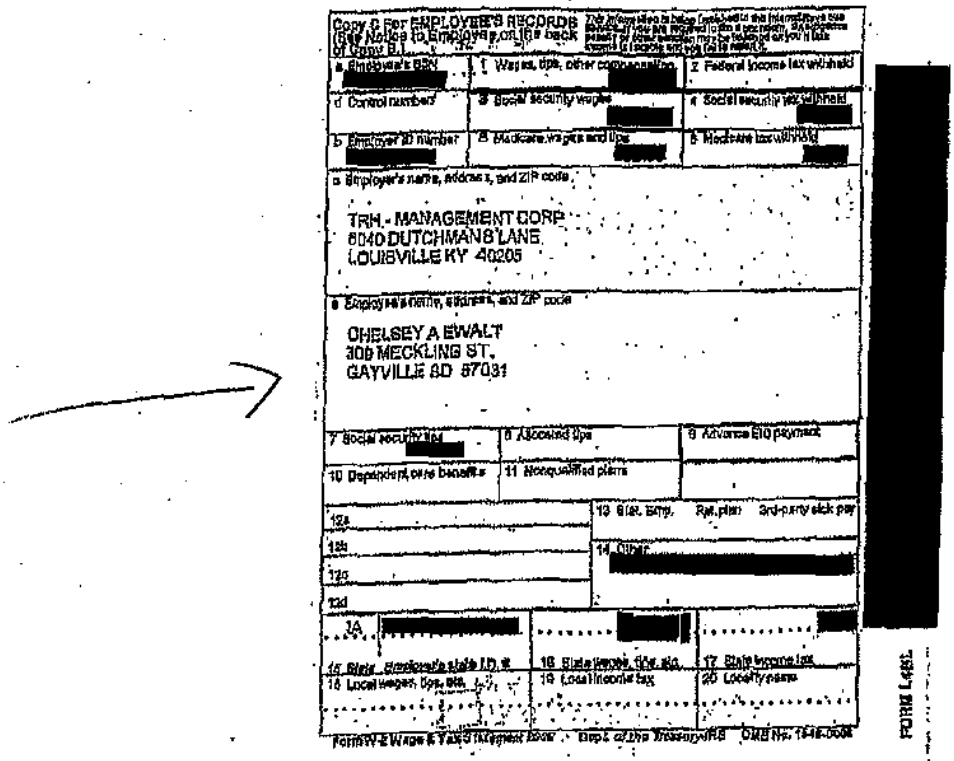
	Your signature	Date	Your occupation	Daytime phone number
	Chelsey A Ewalt			
	Spouse's signature. If a joint return, both must sign.	Date	Spouse's occupation	

Paid preparer's use only

Preparer's signature ▶	Date	Check if self-employed ☐	Preparer's SSN or PTIN
Firm's name (or yours if self-employed), address, and ZIP code ▶		EIN	
		Phone no.	

EXHIBIT 2 tabbies

DEF PROD 002



Copy C For EMPLOYEE'S RECORDS (See Notice to Employee on the back of Copy B.)

a Employee's SSN [redacted] | 1 Wages, tips, other compensation [redacted] | 2 Federal income tax withheld

d Control number | 3 Social security wages [redacted] | 4 Social security tax withheld

b Employer ID number [redacted] | 5 Medicare wages and tips [redacted] | 6 Medicare tax withheld [redacted]

c Employer's name, address, and ZIP code

TRH - MANAGEMENT CORP
6040 DUTCHMAN'S LANE
LOUISVILLE KY 40205

e Employee's name, address, and ZIP code

CHELSEY A EWALT
309 MECKLING ST.
GAYVILLE SD 57031

7 Social security tips [redacted] | 8 Allocated tips | 9 Advance EIC payment

10 Dependent care benefits | 11 Nonqualified plans

12a | 13 Stat. Emp. Ret. plan 3rd-party sick pay

12b | 14 Other [redacted]

12c

12d

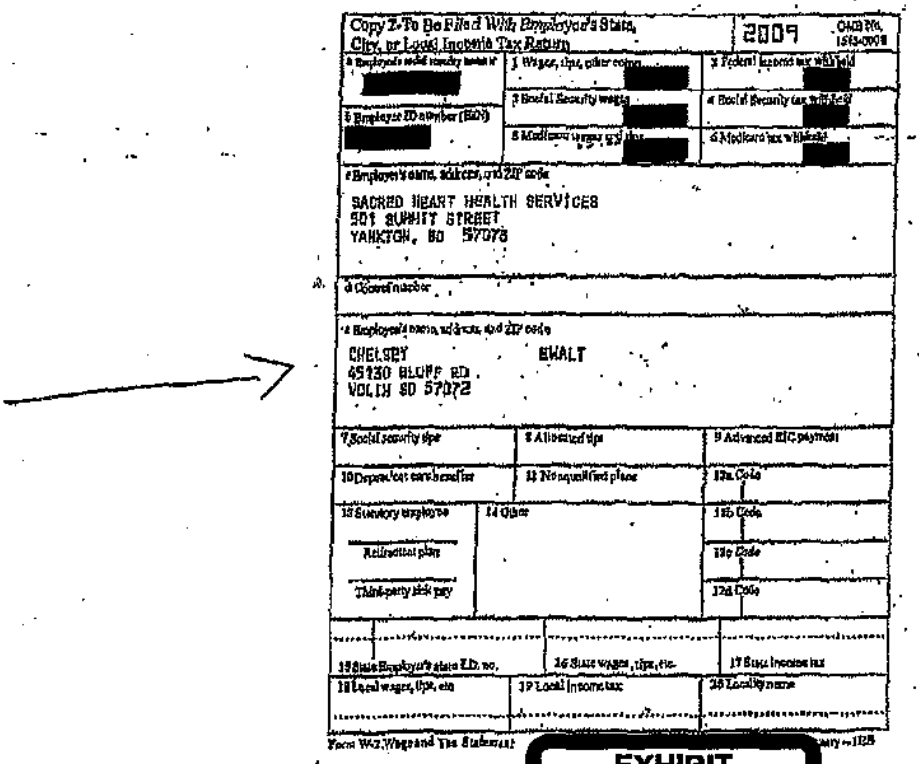
1A [redacted]

15 State Employer's state I.D. # | 16 State wages, tips, etc. | 17 State income tax

18 Local wages, tips, etc. | 19 Local income tax | 20 Locality name

Form W-2 Wage & Tax Statement | Dept. of the Treasury—IRS | OMB No. 1545-0008

FORM L481



Copy 2-To Be Filed With Employee's State, City, or Local Income Tax Return | 2009 | OMB No. 1545-0008

a Employee's social security number [redacted] | 1 Wages, tips, other comp. [redacted] | 2 Federal income tax withheld [redacted]

3 Social security wages [redacted] | 4 Social security tax withheld [redacted]

b Employer ID number (EIN) [redacted] | 5 Medicare wages and tips [redacted] | 6 Medicare tax withheld [redacted]

c Employer's name, address, and ZIP code

SACRED HEART HEALTH SERVICES
501 SUMMIT STREET
YANKTON, SD 57078

d Control number

e Employee's name, address, and ZIP code

CHELSEY EWALT
45130 BLUFF RD.
VOLIN SD 57072

7 Social security tips | 8 Allocated tips | 9 Advanced EIC payment

10 Dependent care benefits | 11 Nonqualified plans | 12a Code

13 Statutory employee | 14 Other | 12b Code

Retirement plan | 12c Code

Third-party sick pay | 12d Code

15 State Employer's state I.D. no. | 16 State wages, tips, etc. | 17 State income tax

18 Local wages, tips, etc. | 19 Local income tax | 20 Locality name

Form W-2 Wage and Tax Statement | ...ury—IRS

EXHIBIT
3

DEF PROD 006

Wells Fargo College Checking ®

Account number: [redacted] ■ February 22, 2010 - March 4, 2010 ■ Page 1 of 3

[redacted]

CHELSEY EWALT
45130 BLUFF RD
VOLIN SD 57072-6130

Questions?

Available by phone 24 hours a day, 7 days a week
1-800-TO-WELLS (1-800-869-3557)

TTY: 1-800-877-4833
En español: 1-877-727-2932 TTY: 1-888-355-8052
1-800-288-2288 *(8 AM to 7 PM PT, M-F)*

Online: wellsfargo.com

Write: Wells Fargo Bank, N.A. (093)
PO Box 5168
Sioux Falls, SD 57117-5168

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Online Bill Pay	☐	Overdraft Protection	☐
Online Statements	☑	Rewards Program	☐
Mobile Banking	☐	Auto Transfer/Payment	☐
My Spending Report	☑		

Activity summary

Beginning balance on 2/22	[redacted]
Deposits/Additions	[redacted]
Withdrawals/Subtractions	[redacted]
Ending balance on 3/4	[redacted]

Account number: [redacted]
CHELSEY EWALT
Bank Options account terms and conditions apply
For Direct Deposit and Automatic Payments use
Routing Number (RTN): 091400048

(SI)
Sheet Seq = 0001048
Sheet 00001 of 00003

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DEF PROD 008

Wells Fargo College Checking ®

Account number: [redacted] ✱ March 6, 2010 - April 6, 2010 ✱ Page 1 of 6

[redacted]

CHELSEY EWALT
45130 BLUFF RD
VOLIN SD 57072-5130

Questions?

Available by phone 24 hours a day, 7 days a week:
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TTY: 1-800-877-4833
En español: 1-877-727-2932 TTY: 1-866-605-5052

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Online Bill Pay	☐	Overdraft Protection	☐
Online Statements	☑	Rewards Program	☐
Mobile Banking	☐	Auto Transfer/Payment	☐
My Spending Report	☑		

Activity summary

Beginning balance on 3/6	[redacted]
Deposits/Additions	[redacted]
Withdrawals/Subtractions	[redacted]
Ending balance on 4/6	[redacted]

Account number: [redacted]
CHELSEY EWALT
South Dakota account terms and conditions apply
For Direct Deposit and Automatic Payments use
Routing Number (RTN): 091400645

[33]
Sheet Seq = 0008572
Sheet 00001 of 00006

EXHIBIT
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5

DEF PROD 009

Wells Fargo College Checking ®

Account number: [redacted] ■ April 7, 2010 - May 6, 2010 ■ Page 1 of 6

[redacted]

CHELSEY EWALT
45130 BLUFF RD
VOLIN SD 57072-6130

Questions?

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En español: 1-877-727-2932 TTY: 1-888-888-6058
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Write: Wells Fargo Bank, N.A. (0005)
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Activity summary

Beginning balance on 4/7	[redacted]
Deposits/Additions	[redacted]
Withdrawals/Subtractions	[redacted]
Ending balance on 5/6	[redacted]

Account number: [redacted]
CHELSEY EWALT

Some Options account terms and conditions apply

For Direct Deposit and Automatic Payments use
Routing Number (RTN): 091400046

(45) Im at
Sheet Seq n 0022800
Sheet 00001 of 00006

EXHIBIT
tabbies
6

DEF PROD 0010

Wells Fargo College Checking ®

Account number: [redacted] ■ February 22, 2010 - March 4, 2010 ■ Page 1 of 3

[redacted]

CHELSEY EWALT
45130 BLUFF RD
VOLIN SD 57072-6130

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1-800-288-2288 *(8 am to 7 pm PT, M-F)*

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Online Bill Pay	☐	Overdraft Protection	☐
Online Statements	☑	Rewards Program	☐
Mobile Banking	☐	Auto Transfer/Payment	☐
My Spending Report	☑		

Activity summary

Beginning balance on 2/22	[redacted]
Deposits/additions	[redacted]
Withdrawals/subtractions	[redacted]
Ending balance on 3/4	[redacted]

Account number: [redacted]
CHELSEY EWALT
Some Dakota account terms and conditions apply
For Direct Deposit and Automatic Payments use
Routing Number (RTN): 091400048

[83]
Shipping = 0021009
Sheet Counts of 000003

EXHIBIT
tabbies
7

DEF PROD 008

Wells Fargo College Checking ®

Account number: [redacted] ■ March 6, 2010 - April 6, 2010 ■ Page 1 of 5

CHELSEY EWALT
45130 BLUFF RD
VOLIN SD 57072-6130

Questions?

Available by phone 24 hours a day, 7 days a week:
1-800-TO-WELLS (1-800-869-3557)

TTY: 1-800-877-4833
En español: 1-877-727-2932 *TTY:* 1-888-355-6052
華語 1-800-288-2288 *(6 am to 7 pm PT, M-F)*

Online: wellsfargo.com

Write: Wells Fargo Bank, N.A. (063)
PO Box 5128
Sioux Falls, SD 57117-5128

You and Wells Fargo

Sign up for free* Account Alerts. Get timely notifications sent right to your email or wireless device when your balance is above or below a specified amount, a withdrawal or deposit posts to your account, your daily ATM withdrawals and debit card purchases exceed an amount you choose. Sign up or log on to Online Banking and click the Account Services tab, Messages & Alerts section to get started.

*Your mobile carrier's text messaging and Web access charges may apply.

Account options

A check mark in the box indicates you have these convenient services with your account. Go to wellsfargo.com or call the number above if you have questions or if you would like to add new services.

Online Banking	☑	Direct Deposit	☐
Online Bill Pay	☐	Overdraft Protection	☐
Online Statements	☑	Rewards Program	☐
Mobile Banking	☐	Auto Transfer/Payment	☐
My Spending Report	☑		

Activity summary

Beginning balance on 3/6	[redacted]
Deposits/Additions	[redacted]
Withdrawals/Subtractions	[redacted]
Ending balance on 4/6	[redacted]

Account number: [redacted]
CHELSEY EWALT
South Dakota account terms and conditions apply
For Direct Deposit and Automatic Payments use Routing Number (RTN): 091400046

(091)
Sheet Seq = 0032172
Sheet 00001 of 00005

EXHIBIT
8

DEF PROD 009

Wells Fargo College Checking ®

Account number: [redacted] ■ April 7, 2010 - May 6, 2010 ■ Page 1 of 6

CHELSEY EWALT
45130 BLUFF RD
VOLIN SD 57072-6130

Questions?

Available by phone 24 hours a day, 7 days a week:
1-800-TO-WELLS (1-800-869-3557)

TTY: 1-800-877-4833
En español: 1-877-727-2932 TTY: 1-888-888-6002
1-800-288-2288 *(8 am to 7 pm PT, M-F)*

Online: wellsfargo.com

Write: Wells Fargo Bank, N.A. (033)
PO Box 5126
Sioux Falls, SD 57117-5126

You and Wells Fargo

Many employers offer employees the option to automatically deposit your paycheck into your checking account via Direct Deposit service. With Direct Deposit, your check will never be lost or stolen. Also enjoy direct deposit of your social security, retirement, disability, periodic interest payments, and financial aid. Talk to your employer/provider or visit a banker and see how easy it is to set up Direct Deposit.

Account options

A check mark in the box indicates you have these convenient services with your account. Go to wellsfargo.com or call the number above if you have questions or if you would like to add new services.

Online Banking	☑	Direct Deposit	☐
Online Bill Pay	☐	Overdraft Protection	☑
Online Statements	☑	Rewards Program	☐
Mobile Banking	☐	Auto Transfer/Payment	☐
My Spending Report	☑		

With you when *you're rewarded for all your hard work.*

During our Small Business Appreciation Celebration, May 1st through June 30th, you can save hundreds of dollars by taking advantage of exclusive Wells Fargo discounts. Talk with us, visit wellsfargo.com/biz or call 1-800-35 WELLS to learn more.

Activity summary

Beginning balance on 4/7	[redacted]
Deposits/Additions	[redacted]
Withdrawals/Subtractions	[redacted]
Ending balance on 5/6	[redacted]

Account number: [redacted]
CHELSEY EWALT
South Dakota account terms and conditions apply
For Direct Deposit and Automatic Payments use
Routing number (RTN): 091400066

[49] Ins wl
Sheet Seq = 0004007
Sheet 00001 of 00006

EXHIBIT 9 tabbies

DEF PROD 0010

DL# 01129481

ISS 11/13/08

CPD: 10/09/09

OCT 2009
RECEIVED
Driver
Licensing

South Dakota
OPERATOR LICENSE

CLASS
ISSUE DATE
11/13/2008
EXPIRE DATE
06/05/2011
HEIGHT
5/05
WEIGHT
130
EYE
HZL
SEX
F
RESTRICTIONS
ENDORSEMENTS
BIRTH DATE
05/05/1990
UNDER 21
LICENSE NUMBER
01129481
DONOR

EWALT, CHELSEY ANN
309 MECKLING ST
GAYVILLE, SD 57031

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota.
DEPARTMENT OF PUBLIC SAFETY
01-26-11 By

DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE PROGRAM
SOUTH DAKOTA

EXHIBIT
10

SOUTH DAKOTA DRIVER LICENSE / I.D. CARD APPLICATION

(Print In Black Ink)

DRIVER LICENSE NUMBER 01129481 SOCIAL SECURITY NUMBER Redacted-Confidential

NAME Ewalt Chelsey Ann (Last, First, Middle) Circle One: Jr. Sr II III IV DATE OF BIRTH 05/07/90 Sex F

RESIDENTIAL ADDRESS 309 Mockingbird St (Apt #) CITY Yankton STATE SD ZIP CODE 57078

MAILING ADDRESS P.O. Box 1001 (If different than above) CITY Yankton STATE SD ZIP CODE 57078

HEIGHT 5'07" WEIGHT 130 EYE COLOR Hzl COUNTY Yankton DAYTIME PHONE NUMBER 605-661-3525

I AM APPLYING FOR: X DRIVER LICENSE ___ INSTRUCTION PERMIT ___ NON-DRIVER ID CARD

CLASS: X Class 1: (Car/Light Truck/Moped) ___ Class 2: (Car/Light Truck/Moped/Motorcycle) ___ Class 3: (Motorcycle Only)

COMMERCIAL DRIVER LICENSE APPLICANTS ONLY:

I am applying for: ___ CLASS A (Combination Vehicle) ___ CLASS B: (Heavy Straight Vehicle) ___ CLASS C (Commercial Vehicle under 26,001 lbs, with applicable endorsements)

COMMERCIAL ENDORSEMENTS: ___ PASSENGER (P) ___ DOUBLE/TRIPLE TRAILER (T) ___ HAZARDOUS MATERIALS (H) ___ SEASONAL CDL (W)

___ SCHOOL BUS (S) ___ TANK VEHICLES (N) ___ COMBINATION TANK/HAZARDOUS MATERIALS(X) ___ MOTORCYCLE (3)

1. YES___ NO___ I will be operating a vehicle equipped with air brakes.
2. YES___ NO___ I am required to carry a medical card and I am subject to 49 CFR PART 391 (Interstate Commerce). If yes, you must present a valid DOT medical card.
3. YES___ NO___ SCHOOL BUS APPLICANTS: Have you been convicted of DUI within the past three years, or have you ever been convicted of any offense involving moral turpitude?

X In the event of my death, I would like to be an organ/tissue donor. (If checked, complete Organ Donation Certification on back of application)

1. YES___ NO X Do you have a Living Will and want it to be indicated on your license?
2. YES___ NO X Do you have Durable Power of Attorney for Health and want it to be indicated on your license?
3. YES___ NO X Are you currently behind in child support payments of $1,000 or more?
4. YES X NO___ Are you currently licensed to drive? If YES, WHERE? Yankton LICENSE # 01129481
5. YES___ NO X Do you currently have an Identification Card issued in any other state? If YES, STATE ___ ID # ___
6. YES___ NO X Do you currently, or have you ever had your right to drive suspended, revoked, canceled, disqualified or denied? If YES, When ___ Which State? ___ Reason? ___
7. YES___ NO X Have you, in the past twelve months, experienced any epileptic or narcoleptic episodes or other convulsions, seizures, or blackouts? If YES, the date of the last episode. ___
8. YES___ NO X Are you currently on active duty in the U.S. Armed Forces? (Must show ID)
9. YES___ NO X Are you a dependent of a person currently on active duty in the U.S. Armed Forces? (Must show ID)
10. YES___ NO X Have you ever been known by any other name? If YES, what name(s) ___
11. YES X NO___ Are you a United States citizen? (If no, you must show documents proving lawful status.)
12. List all states, provinces or countries in which you have held a license over the last 10 years SD

I UNDERSTAND that I, as an operator of a motor vehicle in this State, have consented to the withdrawal of my blood or other bodily substance in accordance with SDCL 32-23-10, which requires me to submit to the withdrawal of my blood or other bodily substances subsequent to being arrested for a violation of SDCL 32-23-1. I declare and affirm under the penalties of perjury that this application has been examined by me, and to the best of my knowledge and belief, is in all things true and correct. Any false statement or concealment of any material facts subjects any license issued to immediate cancellation. I consent to the release of my driving record information.

I certify that, if required by law, I have already registered with the Selective Service, or if I have not registered I am consenting to registration as required by Federal law. I authorize the Department of Public Safety to forward my personal information required for such registration to the U.S. Selective Service System pursuant to SDCL 32-12-17.12 and SDCL 32-12A-7.1.

DL #01129481 *01129481*

NOV 13 2008

VOTER REGISTRATION

YES X NO___ Do you want to register to vote or change a name, address or party affiliation? (If you are registering to vote, information provided on this application will be forwarded to the Secretary of State.)

If residence address is a post office box, rural box, or general delivery, you must give the location of your residence: ___

Please register me as a member of the Independent Party.

I declare, under penalty of perjury (5 years imprisonment and $5,000 fine), that:

- I am a citizen of the United States;
- I maintain my home at the above address;
- I will be 18 on or before the next election;
- I have not been judged mentally incompetent;
- I am not currently serving a sentence for a felony conviction which included imprisonment, served or suspended, in an adult penal institution system;
- I authorize cancellation of my previous registration as written below.

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota.

DEPARTMENT OF PUBLIC SAFETY

01-26-11 (Date) By Keri Bergeron (Officer or Employee)

DEPARTMENT OF PUBLIC SAFETY DRIVER LICENSE PROGRAM SOUTH DAKOTA

I wish to be registered as shown above. I was last registered with the following name and address which will be cancelled:

Last Ewalt First Chelsey Middle Ann Circle One: Jr. Sr II III IV

Previous Address City/Town State Zip

County

The deadline for registration is 15 days before any election. NOV 13 2008

Within 15 days you will receive a notice of your registration. If you do not, contact your county auditor.

SIGNATURE: Chelsey Ewalt DATE OF APPLICATION 11/13/08

ORGAN DONATION CERTIFICATION

☒ In the event of my death, I would like to be an organ/tissue donor.

I acknowledge that I have reviewed the following statements regarding donation.

[signature] 11/13/08
Signature Date

Organ, tissue, and eye transplantation are successful, routine procedures that save or improve the lives of thousands of people each year. Unfortunately, there are many more people waiting for transplants than there are organs and tissues available. The cure to this crisis is an increased commitment to donation. One organ and tissue donor can save or improve the lives of up to 50 people.

Organs and tissues that can be donated include heart, lungs, liver, kidneys, pancreas, intestines, cornea, skin, heart valves, bone, and connective tissue.

Once a donor is identified, donation coordinators obtain a medical/social history from the next-of-kin and conduct thorough tests to determine medical suitability of the organs. Additional tissue testing is conducted in order to place the organs with the most appropriate match.

Recovery of organs and tissue is a surgical procedure. Donors are treated with great care and dignity. The donation process does not preclude an open casket funeral.

All costs related to donation are recovered by the procurement organization which passes those costs along to the transplanting facility. No charges related to the donation are incurred by the donor or the donor's family.

For more information about donation, please call 1-888-8-DONATE.

In South Dakota when you indicate on your license or identification card that you wish to give the precious gift of life by being an organ and tissue donor, you are relieving your loved ones of the burden of making that decision for you at the time of your death.

If at some future time, you decide to amend or revoke your gift of life, you may do so by removing the organ donor designation from your driver license or non-driver identification card. For more information regarding amending or revoking your gift of donation, please refer to South Dakota Codified Law Chapter 34-26.

PARENTAL CONSENT MUST BE FILLED OUT AND SIGNED BEFORE A NOTARY PUBLIC OR DRIVER EXAMINER

I certify that I am a Parent/Guardian of (print name) _____

and I hereby grant permission for him/her to:
(Check all that apply)

___ Apply for a South Dakota driver license or permit under the requirements of South Dakota law
___ Apply for a South Dakota non-driver identification card under the requirements of South Dakota law
___ Have the organ donor indicator placed on the driver license, permit, or non-driver identification card.

Parent/Guardian Signature _____ Print Name _____

Present Address _____ City, State, & Zip Code _____

Subscribed and sworn to before me on this ____ day of _____, 20____

My Commission Expires

_____
Notary Public or Driver Examiner
State of South Dakota

EXAMINER USE ONLY

RESTRICTIONS (circle) O F G V X R M E Z B J K W

VISUAL ACUITY DOT Card Exp _____

LEFT EYE	BOTH EYES	RIGHT EYE
20/ 40	20/ 40	20/ 40

X W/O CORR LENS ___ WITH CORR LENS

NEW ___ RENEWAL X DUP ___

TRANSFER ___ DATA CHANGE ___

OK ___
CV ___
AB ___
DT ___
TK ___
HZ ___
PV ___
SB ___

ODS LICENSE SURRENDERED? SO LICENSE CLASS 1

3RD PARTY CDL ___ COMPLETION DATE _____

DRIVERS ED ___ COMPLETION DATE _____

MC SAFETY ___ COMPLETION DATE _____

COMPUTER CHECKS: ODIS X PDPS X

TEST REQUIRED: VISION X WRITTEN ___ SKILL ___

WRITTEN TEST ___ ___ ___

SKILLS TEST ___ ___ ___

FEE COLLECTED 6 Q X Q ___ EXAMINER ID 189

Documents Verified: _____

Notes: _____

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota.

DEPARTMENT OF PUBLIC SAFETY

01-26-11 By Colene Bergeson
Date Officer or Employee

DEPARTMENT OF PUBLIC SAFETY
DRIVER LICENSE PROGRAM
SOUTH DAKOTA

08-07

(Please Print in Black Ink)

SOUTH DAKOTA LICENSE / I.D. CARD APPLICATION

DRIVER LICENSE NUMBER _____ SOCIAL SECURITY NUMBER Redacted-Confidential

NAME Ewalt (LAST) Chelsey (FIRST) Ann (MIDDLE) DATE OF BIRTH 5 (Month) / 5 (Day) / 90 (Year) Sex F

RESIDENTIAL ADDRESS 309 meckling CITY Canistle STATE SD ZIP CODE 57031

MAILING ADDRESS PO Box 201 CITY Canistle STATE SD ZIP CODE 57031

HEIGHT 5'5 WEIGHT 125 EYE COLOR Hazel COUNTY Yankton DAYTIME PHONE NUMBER 605-263-3114

I AM APPLYING FOR: ___ DRIVER LICENSE ✓ INSTRUCTION PERMIT ___ NON-DRIVER ID CARD

CLASS: ✓ Class 1: (Car/Light Truck/Moped) ___ Class 2: (Car/Light Truck/Moped/Motorcycle) ___ Class 3: (Motorcycle Only)

___ CLASS A (Combination Vehicle) ___ CLASS B: (Heavy Straight Vehicle) ___ CLASS C (Commercial Vehicle under 26,001 lbs. with applicable endorsements)

COMMERCIAL ENDORSEMENTS: ___ PASSENGER (P) ___ DOUBLE/TRIPLE TRAILER (T) ___ HAZARDOUS MATERIALS (H) ___ SEASONAL CDL (W)

___ SCHOOL BUS (S) ___ TANK VEHICLES (N) ___ COMBINATION TANK/HAZARDOUS MATERIALS(X) ___ MOTORCYCLE (3)

☐ In the event of my death, I would like to be an organ/tissue donor. (If box is checked, complete Organ Donation Certification on back of application)

1. YES___ NO✓ Do you wish to use your Social Security number for your driver license number?
2. YES___ NO✓ Do you have a Living Will and want it to be indicated on your license?
3. YES___ NO✓ Do you have Durable Power of Attorney for Health and want it to be indicated on your license?
4. YES___ NO✓ Are you currently behind in child support payments of $1,000 or more?
5. YES___ NO✓ Are you currently licensed, or have you previously been licensed (within the last 10 years) in any other state, province or country?
   If YES, WHERE?_____ LICENSE # _____
6. YES___ NO✓ Do you currently have an Identification Card issued in any other state? If YES, STATE _____ ID # _____
7. YES___ NO✓ Do you currently, or have you ever had your right to drive suspended, revoked, canceled, disqualified or denied?
   If YES, When _____ Which State?_____ Reason? _____
8. YES___ NO✓ Have you, in the past twelve months, experienced any epileptic or narcoleptic episodes or other convulsions, seizures, or blackouts? If YES, the date of the last episode. _____
9. YES___ NO✓ Are you currently on active duty in the U.S. Armed Forces? (Not including National Guard or Reserves.)
10. YES___ NO✓ Are you a dependent of a person currently on active duty in the U.S Armed Forces? (Not including National Guard or Reserves.)
11. YES___ NO✓ Have you ever been licensed or known by any other name? If YES, list other name(s) _____
12. YES✓ NO___ Are you a United States citizen?
13. YES___ NO✓ Are you required to carry immigration documents?

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota.
DEPARTMENT OF PUBLIC SAFETY
01-26-11 Date By Officer or Employee

DEPARTMENT OF PUBLIC SAFETY DRIVER LICENSE PROGRAM SOUTH DAKOTA

COMMERCIAL DRIVER LICENSE APPLICANTS ONLY:

1. YES___ NO___ I will be operating a vehicle equipped with air brakes.
2. YES___ NO___ I am required to carry a medical card and I am subject to 49 CFR PART 391 (Interstate Commerce). If yes, you must present a valid DOT medical card.
3. YES___ NO___ SCHOOL BUS APPLICANTS: Have you been convicted of DUI within the past three years, or have you ever been convicted of any offense involving moral turpitude?

I UNDERSTAND that if I am arrested for driving or being in actual physical control of a vehicle while under the influence of alcohol, marijuana, or any controlled drug or substance, I must submit to a chemical test of my breath, blood, or other bodily substance or my license will be subject to revocation for one year as provided in SDCL 32-23-10, and, I declare and affirm under the penalties of perjury that this application has been examined by me, and to the best of my knowledge and belief, is in all things true and correct. Any false statement or concealment of any material facts subjects any license issued to immediate cancellation. I consent to the release of my driving record information.

DL # 01129481
01129481

I certify that I have already registered with the Selective Service; or if I have not registered I am consenting to registration as required by Federal law. I authorize the Department of Public Safety to forward my personal information required for such registration to the U.S. Selective Service System pursuant to SDCL 32-12-17.12 and SDCL 32-12A-7.1.

JUN 23 2005

SIGNATURE: Chelsey Ewalt DATE OF APPLICATION 6-23-05

ORGAN DONATION CERTIFICATION

☒ In the event of my death, I would like to be an organ/tissue donor.

I acknowledge that I have reviewed the following statements regarding donation.

Chelsey Ewalt — Signature

6-23-05 — Date

Organ, tissue, and eye transplantation are successful, routine procedures that save or improve the lives of thousands of people each year. Unfortunately, there are many more people waiting for transplants than there are organs and tissues available. The cure to this crisis is an increased commitment to donation. One organ and tissue donor can save the lives of up to eight people and enhance the lives of more than 40 others.

Organs and tissues that can be donated include heart, lungs, liver, kidneys, pancreas, intestines, corneas, skin, heart valves, bone, and connective tissue.

Once a donor is identified, donation coordinators obtain a medical/social history from the next-of-kin and conduct thorough tests to determine medical suitability of the organs. Additional tissue testing is conducted in order to place the organs with the most appropriate match.

Recovery of organs and tissue takes place in the hospital operating room. As with any surgery, donors are treated with great care and dignity. The donation process does not preclude an open casket funeral.

All costs related to donation are recovered by the procurement organization which passes those costs along to the transplanting facility. No charges related to the donation are incurred by the donor or the donor's family.

For more information about donation, please call 1-888-5-DONATE.

In South Dakota when you indicate on your license or identification card that you wish to give the precious gift of life by being an organ and tissue donor, you are relieving your loved ones of the burden of making that decision for you at the time of your death.

If at some future time, you decide to amend or revoke your gift of life, you may do so by:

- Removing the organ donor designation from your driver license or non-driver identification card.
- Making an oral statement to two witnesses in the presence of each other or to an attorney or an attorney-in-fact.
- Any communication made by you as a donor during a terminal illness to a physician or surgeon.
- A signed card or document found on your person or in your effects.

PARENTAL CONSENT MUST BE FILLED OUT AND SIGNED BEFORE A NOTARY PUBLIC OR DRIVER EXAMINER

I certify that I am a Parent/Guardian of (print name) Chelsey Ann Ewalt

and I hereby grant permission for him/her to:
(Check all that apply)

- ☒ Apply for a South Dakota driver license or permit under the requirements of South Dakota law;
- ☐ Apply for a South Dakota non-driver identification card under the requirements of South Dakota law;
- ☒ Have the organ donor indicator placed on the driver license, permit, or non-driver identification card.

Parent/Guardian Signature Teresa Ewalt — Print Name Teresa Ewalt

Present Address PO Box 149 — City, State, & Zip Code Colome SD 57531

Subscribed and sworn to before me on this 23 day of June, 2005

Notary Public or Driver Examiner
State of South Dakota

My Commission Expires:

EXAMINER USE ONLY

RESTRICTIONS (circle) O F G V X R M E Z B J K W

VISUAL ACUITY DOT Card Exp _____

LEFT EYE 20/ 40 BOTH EYES 20/ 70 RIGHT EYE 20/ 40

☒ W/O CORR LENS ☐ WITH CORR LENS

NEW ☒ RENEWAL ☐ DUP/DC ☐

GK ____ CV ____ AB ____ OT ____ TK ____ HZ ____ PV ____ SB ____

OOS LICENSE SURRENDERED? _____ LICENSE CLASS _____

3RD PARTY CDL _____

DRIVERS ED 999 20050602

MC SAFETY ____

COMPUTER CHECKS: CDLIS ☒ PDPS ☒

TEST REQUIRED: VISION ____ WRITTEN ☒ SKILL ☒

WRITTEN TEST ____ ____ ____

SKILLS TEST ____ ____ ____

FEE COLLECTED 8 ☐ ☒ C ☐ EXAMINER ID 198

Notes IRS Tax Form 1040A 2004 - SSN matches.
SDBC 140900 03726

I hereby certify that the record to which this is affixed is a true photographic copy of the original on file in the Department of Public Safety, Pierre, South Dakota.

DEPARTMENT OF PUBLIC SAFETY

6-24-11 ..... By Tina Bergeson
Date — Officer or Employee

DEPARTMENT OF PUBLIC SAFETY — DRIVER LICENSE PROGRAM — SOUTH DAKOTA

/ 3-03

STATE OF SOUTH DAKOTA :SS
COUNTY OF YANKTON

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

JILL ROBINSON formerly known as JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT,

Defendants.

Civ. 10-242

FILED
FEB 11 2013
Judy L Johnson
YANKTON COUNTY CLERK OF COURTS

VERDICT FORM

We, the jury, duly impaneled in the above-entitled action and duly sworn to try the issues herein, find as follows:

Chelsey Ewalt's usual place of residence on April 29, 2010 was (**check only one**):

__X__ Codington County

_____ Yankton County

Dated this __11__ day of February, 2013.

Foreperson

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

FILED
APR 22 2013
Judy L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

JILL ROBINSON formerly Known as JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT

Defendant.

CIV. #10-212

PLAINTIFF'S MOTION FOR LEAVE OF COURT TO SUBSTITUTIE THE YANKTON COUNTY SHERIFF'S OFFICE AS A PARTY DEFENDANT

COMES NOW the Plaintiff, Jill Robinson, by and through her attorney, Wanda Howey-Fox, and moves the Court for leave to substitute the Yankton County Sheriff's Office as a party Defendant in place of Chelsey Ewalt on the grounds and for the following reasons as follows:

1. The Summons and Complaint in this matter were filed on April 23, 2010.

2. The Summons and Complaint were delivered to the Yankton County Sheriff's Office on April 23, 2010.

3. Representatives of the Yankton County Sheriff's Office then attempted to serve Defendant Chelsey Ewalt.

4. Initially, representatives of the Yankton County Sheriff's Office stated that they were not able to serve Defendant Ewalt as she stated that she would be coming in to pick up the papers.

5. Representatives of the Yankton County Sheriff's Office then stated that they spoke with Defendant Ewalt and she then informed them that she was in Codington County, South Dakota.

6. The paperwork was then faxed to Codington County on May 20, 2010, and Defendant Ewalt was served on May 25, 2010.

7. On February 11, 2013, a jury trial was held in Yankton County to determine the limited issue of the residence of Defendant Chelsey Ewalt in April 2010.

8. At the trial, for the first time, the Yankton County Sheriff's office revealed that when

they initially made contact with Ms. Ewalt's family they were advised that she was living in Codington County.

9. The Yankton County Sheriff's Office did not return the photocopies of the pleadings to the undersigned immediately which would have allowed timely service of Chelsey Ewalt in Codington County, South Dakota.

10. This testimony directly contradicted the earlier affidavit of the same representative of the Yankton County Sheriff's Department. (See, attached Exhibit #1).

11. At trial, a representative of the Yankton County Sheriff's Office provided documentation from their file reflecting their knowledge of Defendant Chelsey Ewalt as of April 24, 2010, at 7:56 p.m. (See, attached Exhibit #2).

12. If the Yankton County Sheriff's Department would have either 1) immediately sent the Summons and Complaint to the Codington County Sheriff's Department or 2) notified the Plaintiff's counsel that the Defendant was claiming to live in Codington County then Defendant Ewalt could have been served within the statute of limitations period.

13. The negligence of the Yankton County Sheriff's Department and/or its agents resulted in Defendant Ewalt not being timely served within the statute of limitations period.

14. The Yankton County Sheriff's Office should be substituted for Defendant Ewalt as a result of their negligence.

WHEREFORE, the Plaintiff prays as follows:

1. The Court grant the Plaintiff's Motion to Substitute the Yankton County Sheriff's Office as a Party Defendant;

2. The Court allow the Plaintiff to amend her Complaint to include the Yankton County Sherriff's Office;

3. The Court allow the Yankton County Sheriff's Office thirty (30) days within which to answer or otherwise plead;

4. The Court grant such other relief as it deems just and equitable.

Dated this 22nd day of April, 2013.

HARMELINK, FOX & RAVNSBORG
LAW OFFICE

Wanda Howey-Fox
Attorney at Law
721 Douglas, Suite 101
Yankton, SD 57078
(605) 665-1001

CERTIFICATE OF SERVICE

I hereby certify that a true and correct photocopy of the Plaintiff's Motion for Leave of Court to Substitute the Yankton County Sheriff's Office as a Party Defendant, was served upon the following individuals by placing a photocopy in an envelope and depositing the same with the United States Post Office in Yankton, South Dakota, with postage first class thereon to the following persons on the 22nd day of April, 2013.

Anthony Hohn
Attorney at Law
P.O. Box 1030
Sioux Falls, SD 57101

Jill Robinson

Jessica Larson
Attorney at Law
P.O. Box 9579
Rapid City, SD 57709-9579

Rob Klimisch
Yankton County States Attorney
410 Walnut Street #100
Yankton, SD 57078

Wanda Howey-Fox

FILED
APR 22 2013
Jody L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dakota

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

JILL ROBINSON formerly known as JILL ROBINSON-KUCHTA,

CIV. #10-242

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT,

Defendants.

AFFIDAVIT OF JERRY JARVIS IN RESPONSE TO DEFENDANT EWALT MOTION FOR SUMMARY JUDGMENT

FILED
JAN 27 2011
Jody L Johnson
YANKTON COUNTY CLERK OF COURTS

****

STATE OF SOUTH DAKOTA)
):ss
COUNTY OF YANKTON)

Jerry Jarvis, being first duly sworn upon his oath, deposes and states as follows:

1. Your affiant is an employee of the Yankton County Sheriff's Office.

2. Your affiant is the person with whom documents are dropped off for purposes of service of process.

3. Your affiant states that he recalls the pleadings being dropped off by employees of Harmelink, Fox & Ravnsborg Law Office on April 23, 2010, for purposes of service upon Michelle Mitchell and Chelsey Ewalt.

4. Your affiant states that Defendant Mitchell was served by the Yankton County Sheriff's Office on April 24, 2010.

5. Your affiant specifically remembers speaking with Defendant Ewalt on the telephone.

6. Your affiant further states that further recalls Defendant Ewalt stated that she would come to the Yankton County Sheriff's Office and pick up the papers.

7. Your affiant states that when Defendant Ewalt did not come to the Yankton County Sheriff's Office with the week; your affiant spoke with Defendant Ewalt who indicated that she was in Watertown.

8. Your affiant states that prior to that time, your affiant was unaware that Defendant Ewalt was living in Watertown, South Dakota.

9. Your affiant states that he personally faxed a copy of the Summons and

FILED
APR 22 2013
Jody L Johnson
Yankton County Clerk of Courts
Judicial Circuit Court of South Dakota

EXHIBIT
Exhibit
1

Complaint to the Codington County Sheriff's Office for service upon Defendant Ewalt.

10. Your affiant states that prior to May 10, 2010, your affiant verily believed that Defendant Ewalt was living in Yankton County.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Jerry Jarvis

Subscribed and sworn to before me by Jerry Jarvis on this 26 day of January, 2011.

Notary Public
My commission expires: 05-04-2015

KRISTIN CHRISTIANSEN
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

CERTIFICATE OF SERVICE

This is to certify that a true and correct copies of the Affidavit of Jerry Jarvis in Response to Defendant Ewalt's Motion for Summary Judgment were served upon the following by depositing said copies in the United States Post Office at Yankton, South Dakota, in envelopes with first class postage prepaid, addressed to the following persons at their given addresses on the 27th day of January, 2011.

Larry Von Wald
Attorney at Law
P.O. Box 9579
Rapid City, SD 57709

Jill Robinson

Wanda Howey-Fox
Attorney at Law
P.O. Box 18
Yankton, SD 57078
(605) 665 - 1001

FILED
JAN 27 2011
Jody L Johnson
YANKTON COUNTY CLERK OF COURTS

~~309 Meckling St YKT~~ ~~tele - 0995~~
600 E 13TH GAYVILLE??

Jill Robinson formerly known as Jill Robinson-Kuchta
Plaintiff,
- vs -
Michelle Mitchell; Chelsey Ann Ewalt
Defendants

tele - 3525
CIVIL WORKSHEET
C201001270

5-5-90
01129481
3031950 25

I hereby certify that on the **23rd day of April, 2010, a SUMMONS & COMPLAINT,** in the above entitled action, came into my hand for service on **Chelsey Ann Ewalt**

That I served personally by delivering a true copy therof with:

__ _____ at_____.

substituted service at his/her dwelling, in the presence of and with a memeber of his/her family over the age of fourteen years, to-wit:

__ _____ at_____.

returned unserved for the following reason:

X LIVES & GOES TO SCHOOL IN WATERTOWN.

In Yankton County, State of South Dakota, on 5.14.10

Account	Description		Amount
		Total Owed	**$0.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$0.00**

Invoice # 201001492
Received From Harmelink, Fox & Ravnsborg
P.O. Box 18, Yankton, SD 57078
Expires 5/23/10

Miles Traveled _____

Signed _____ **Date** 5.14.10
~~416 Walnut St, Suite 104~~ Yankton, SD 57078
605-668-3567

Civil Notes 4-24-10 @ 1956 - RESIDENT HAVE LIVED ~~OVER-HERE~~ 2 YEARS, TJ
5/14/10 - lives in Watertown & goes to School there. TJK
5-14-10 - Faxed to Codington Co. for Service JJ

FILED
APR 22 2013
Jodi L Johnson
Yankton County Clerk of Courts
1st Judicial Circuit Court of South Dako

EXHIBIT
2

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

FILED
FEB 17 2011
Jody L Johnson
YANKTON COUNTY CLERK OF COURTS

JILL ROBINSON formerly known as JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT,

Defendants.

Civ. No. 10-242

ORDER GRANTING SUMMARY JUDGMENT

Defendant Chelsey A. Ewalt, having filed a Motion for Summary Judgment, the matter having come on for hearing on Monday, January 31, 2011, at 10:30 a.m. (CST), the parties having been represented by their respective attorneys of record and the Court having considered the written and oral submissions made on behalf of the parties and having determined there is no genuine issue as to any material fact and that Defendant Ewalt is entitled to judgment as a matter of law, it is hereby

ORDERED, that Defendant Chelsey A. Ewalt's Motion for Summary Judgment is GRANTED and Judgment in accordance with such Order shall be entered forthwith.

Dated this 17th day of February, 2011.

BY THE COURT:

Glen W. Eng

GLEN ENG
Circuit Court Judge

ATTEST:

JODY JOHNSON, Clerk

By: Jody Johnson
Deputy
T Chambers

#25912-rev & rem-DG

2012 S.D. 1

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

JILL ROBINSON formerly known as JILL ROBINSON-KUCHTA, — Plaintiff and Appellant,

v.

MICHELLE M. MITCHELL, — Defendant,

and

CHELSEY A. EWALT, — Defendant and Appellee.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

* * * *

THE HONORABLE GLEN W. ENG
Judge

* * * *

WANDA HOWEY-FOX of
Harmelink, Fox
& Ravnsborg Law Office
Yankton, South Dakota — Attorneys for plaintiff and appellant.

LARRY M. VON WALD of
Beardsley, Jensen and
Von Wald, Prof LLC
Rapid City, South Dakota — Attorneys for defendant and appellee.

* * * *

CONSIDERED ON BRIEFS
ON OCTOBER 3, 2011

OPINION FILED **01/04/12**

#25912

GILBERTSON, Chief Justice

[¶1.] Jill Robinson and Chelsey Ewalt were involved in a car accident. Robinson sued Ewalt and attempted service of process a few days before the three-year statute of limitations expired, but Ewalt could not be located. Ewalt was eventually served almost one month after the statute of limitations had expired. Ewalt moved for summary judgment, and the circuit court granted Ewalt's motion. We reverse and remand.

FACTS

[¶2.] On April 28, 2007, Robinson, Ewalt, and Michelle Mitchell were involved in a three-car accident in Yankton, South Dakota. Ewalt rear-ended Mitchell, who then rear-ended Robinson.

[¶3.] At the time of the accident, Ewalt was a seventeen-year-old high school student living in Gayville, South Dakota with her mother. Gayville is located in Yankton County. After graduating from high school in May 2008, Ewalt moved several times. Ewalt moved to Sioux Falls, South Dakota in June 2008 to work. Next, in September 2008, Ewalt moved to Volin, South Dakota and lived with her father. Volin is also located in Yankton County. In August 2009, Ewalt moved to Sioux City, Iowa to attend school. Finally, in December 2009, Ewalt moved to Watertown, South Dakota to attend a different school.[1] Ewalt has lived in Watertown since December 2009, which is located in Codington County.

1. When Ewalt first moved to Watertown, Ewalt stayed with her sister. A few months later, however, Ewalt obtained her own apartment.

[¶4.] On April 23, 2010, just a few days before the three-year statute of limitations expired, Robinson sued both Mitchell and Ewalt. Robinson delivered the summons and complaint to the Yankton County Sheriff for service of process. Mitchell was served on April 24, 2010.

[¶5.] The Yankton County Sheriff unsuccessfully attempted to serve Ewalt in Yankton County. At some point, Ewalt and the Yankton County Sheriff's office communicated, and Ewalt stated that she would personally pick up the papers. However, Ewalt never retrieved the summons and complaint, so the Yankton County Sheriff's office contacted Ewalt to follow up. Ewalt indicated that she lived in Watertown. The Yankton County Sheriff's office then faxed the summons and complaint to the Codington County Sheriff's office. Ewalt was finally served by the Codington County Sheriff on May 25, 2010.

[¶6.] Ewalt answered and moved for summary judgment arguing that the statute of limitations barred Robinson's claim. The circuit court held a hearing and granted Ewalt's summary judgment motion. Robinson appeals. We address whether the circuit court erred in granting summary judgment.[2]

STANDARD OF REVIEW

[¶7.] This Court reviews summary judgment proceedings under the following standard of review:

> We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The

2. We do not address Robinson's argument that Ewalt is equitably estopped from raising the statute of limitations defense because we reverse the circuit court on the summary judgment issue.

> evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Murray v. Mansheim, 2010 S.D. 18, ¶ 4, 779 N.W.2d 379, 381-82. Furthermore, where a statute of limitations defense is raised in a summary judgment proceeding,

> The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. When faced with "'a summary judgment motion where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden shifts to the [nonmoving party] to establish the existence of material facts in avoidance of the statute of limitations[.]'" It is well settled that "'[s]ummary judgment is proper on statute of limitations issues only when application of the law is in question, and not when there are remaining issues of material fact.'" Generally, a statute of limitations question is left for the jury; however, deciding what constitutes accrual of a cause of action is a question of law and reviewed de novo.

Id. ¶ 5 (citations omitted).

ANALYSIS

[¶8.] Robinson contends that the circuit court erred in granting Ewalt's summary judgment motion. Robinson argues that Ewalt "usually resided" in Yankton County because Ewalt lived with her parents in Yankton County during portions of the statutory period. Robinson also argues that Ewalt used a Yankton County address as her "home address" for her driver's license, tax filings, and

banking documents.[3] Thus, Robinson argues that the sixty-day extension for service of process provided by SDCL 15-2-31 applies in this case because Robinson delivered the summons to the Yankton County Sheriff, the sheriff of the county where Ewalt "usually or last resided," before the statute of limitations expired.

[¶9.] Ewalt responds that she "usually *and* last resided" in Codington County rather than Yankton County. Ewalt argues that an address and a residence are two separate concepts and what address she used is not indicative of where she "usually or last resided." Ewalt contends that the standard for determining an individual's voting residence provides guidance to this issue. Ewalt further notes that she had not lived in Yankton County for eight months when Robinson delivered the summons to the Yankton County Sheriff. Thus, Ewalt argues that the circuit court correctly held that the sixty-day extension for service of process does not apply in this case because Robinson delivered the summons to a sheriff in the wrong county. Ewalt concludes that without the sixty-day extension, Robinson failed to serve Ewalt within the statute of limitations and for that reason, the circuit court did not err in granting Ewalt's summary judgment motion.

[¶10.] Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

---

3. Robinson notes that Ewalt applied for a new driver's license in September 2010 and used a Codington County address at that time. Robinson emphasizes that Ewalt's original license with a Yankton County address was not to expire until 2011. Robinson contends that Ewalt's early application for a new license shortly after service of process was an attempt to establish a Codington County residence solely for purposes of a favorable ruling on Ewalt's summary judgment motion. Ewalt responds that she renewed her license at that time because it had been revoked in January 2010.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). "A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that a 'reasonable jury could return a verdict for the nonmoving party.'" *Gul v. Ctr. for Family Med.*, 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 633 (quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 17, 714 N.W.2d 884, 891). Statute of limitations questions are generally for a jury to decide. *Murray*, 2010 S.D. 18, ¶ 5, 779 N.W.2d at 382. Therefore, "summary judgment is proper on statute of limitations issues only when the application of the law is in question, and not when there are remaining issues of material fact." *Id.* "All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Danielson v. Hess*, 2011 S.D. 82, ¶ 8, __ N.W.2d __, __ (quoting *Gail M. Benson Living Trust v. Physicians Office Bldg., Inc.*, 2011 S.D. 30, ¶ 9, 800 N.W.2d 340, 342-43).

[¶11.] Personal injury actions must be commenced within the applicable three-year statute of limitations. SDCL 15-2-1, -14. An action is commenced when a plaintiff serves a defendant with a summons. SDCL 15-2-30. "The summons may be served by the sheriff . . . where the defendant may be found[.]" SDCL 15-6-4(c).

[¶12.] South Dakota law provides a sixty-day extension for accomplishing service of process under certain circumstances. *See* SDCL 15-2-31. "An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff . . . of the county in which the defendants or one of them, *usually or last resided*[.]"

Id. (emphasis added). "Such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days." *Id.*

[¶13.] In this case, the accident occurred on April 28, 2007 and the three-year statute of limitations for Robinson's personal injury action ran on April 29, 2010. *See* SDCL 15-6-6(a) (providing that the day of the event is not included when computing the statute of limitations period). Ewalt was served on May 25, 2010. Therefore, Ewalt was not served within the statute of limitations.

[¶14.] However, a question of fact remains regarding whether Ewalt "usually or last resided" in Codington County or Yankton County. Ewalt moved several times throughout the three-year period. As the record indicates, Ewalt lived with her mother in Gayville for the first year, worked in Sioux Falls for about four months, then lived with her father in Volin for just under a year, attended school in Sioux City for four months, and attended school in Watertown for the remaining portion of the statutory period. In addition, Robinson notes Ewalt's use of a Yankton County address for banking, tax, and other documents. Thus, although the parties do not dispute the facts in this case, the parties dispute the inferences drawn from the facts.

[¶15.] A jury's determination regarding the county where Ewalt "usually or last resided" would control the applicability of SDCL 15-2-31 and the sixty-day extension period, which would determine whether the statute of limitations barred Robinson's claim. Thus, the factual question of Ewalt's residence is material because it would affect the outcome of the litigation. Therefore, because a material question of fact remains, the circuit court's granting of summary judgment in this

case was improper. We reverse and remand this case for a trial on the question of Ewalt's usual place of residence.

[¶16.] Reversed and remanded.

[¶17.] KONENKAMP, ZINTER, SEVERSON, and WILBUR, Justices, concur.

HARMELINK, FOX & RAVNSBORG LAW OFFICE
721 DOUGLAS – SUITE 101
YANKTON, SD 57078

Wanda Howey-Fox
Licensed in SD and NE
Jason Ravnsborg
Licensed in SD and IA

TELEPHONE
(605) 665 – 1001
FAX
(605) 665 – 6781

John Harmelink *

* Retired

April 22, 2013

Paula Jones
Yankton County Auditor
c/o Yankton County Government Center
321 W. 3rd Street
Yankton, SD 57078

Robert Klimisch
Yankton County States Attorney
410 Walnut Street
Suite #100
Yankton, SD 57078

Re: Jill Robinson f/k/a Jill Robinson-Kuchta

Dear Ms. Jones and Mr. Klimisch:

Pursuant to SDCL 3-21-2, enclosed please find a Notice as required by statute. This is intended to comply with the statutory notice requirements of SDCL 3-21-2.

Sincerely,

HARMELINK, FOX & RAVNSBORG
LAW OFFICE

Wanda Howey-Fox

WHF:us
Enclosure

Cc: Jill Robinson

NOTICE – SDCL 3-21-2

CERTIFIED MAIL – RETURN RECEIPT REQUESTED & ALSO HAND DELIVERY

TO: **Paula Jones**
Yankton County Auditor
c/o Yankton County Government Center
321 W. 3rd Street
Yankton, SD 57078

TO: **Robert Klimisch**
Yankton County States Attorney
410 Walnut Street
Suite #100
Yankton, SD 57078

Notice is hereby given pursuant to SDCL 3-21-2 that Jill Robinson formerly known as Jill Robinson-Kuchta makes claim against the County of Yankton, Yankton County Sheriff's Department as a result of the negligence of the Yankton County Sheriff's Office to timely serve pleadings upon a named Defendant Chelsey Ewalt, when those pleadings were dropped off with the Yankton County Sheriff's Office on April 23, 2010, and the Yankton County Sheriff's deputy was advised that the named Defendant Chelsey Ewalt no longer lived in Yankton County, South Dakota, but had moved to Watertown, Codington County, South Dakota, and the Sheriff's Office failed and neglected to either 1) forward those pleadings on to the Codington County Sheriff's Office for service in a timely fashion or 2) immediately return them to the undersigned for timely service of process. Consequently, Jill Robinson is seeking to substitute the Yankton County Sheriff's Office as the named defendant in place of defendant Chelsey Ewalt for purposes of seeking damages against the County's errors and omissions policy for the physical injury and damages that Jill Robinson incurred as a result of the motor vehicle accident which occurred on April 29, 2007, and which was caused by Defendant Chelsey Ewalt.

It was only on February 11, 2013, that an agent of the Yankton County Sheriff's Office agent testified in open Court that their office knew that the Defendant Chelsey Ewalt had moved from Yankton County, South Dakota, to Codington County, South Dakota, on April 28, 2013. (See, attached Exhibit #1). Prior to that date, the Yankton County Sheriff's Office had advised that they were advised that she lived in Yankton County, South Dakota. (See, attached Exhibit #2).

Dated this 22nd day of April, 2013.

~~HARMELINK~~ FOX & RAVNSBORG
LAW OFFICE

Wanda Howey-Fox

Attorney at Law
721 Douglas Ave., Suite 101
721 Douglas – Suite #101
Yankton, SD 57078
(605) 665-1001

~~309 Meckling St YKT~~ ~~total - 0995~~
GAYVILLE??

600 E 13TH
total - 3525

5-5-90
01129481
303195025

Jill Robinson formerly known as Jill Robinson-Kuchta
Plaintiff,
- vs -
Michelle Mitchell; Chelsey Ann Ewalt
Defendants

CIVIL WORKSHEET
C201001270

I hereby certify that on the **23rd day of April, 2010, a SUMMONS & COMPLAINT,** in the above entitled action, came into my hand for service on **Chelsey Ann Ewalt**

That I served personally by delivering a true copy therof with:

___ _____ at_____.

substituted service at his/her dwelling, in the presence of and with a memeber of his/her family over the age of fourteen years, to-wit:

___ _____ at_____.

returned unserved for the following reason:

X LIVES & GOES TO SCHOOL IN WATERTOWN.

In Yankton County, State of South Dakota, on 5-14-10

Account	Description		Amount
		Total Owed	**$0.00**
		Total Paid	**$0.00**
		Uncollectible	**$0.00**
		Remaining	**$0.00**

Invoice # 201001492
Received From Harmelink, Fox & Ravnsborg
P.O. Box 18, Yankton, SD 57078
Expires 5/23/10

Miles Traveled _____

Signed _____ **Date** 5.14.10

~~410 Walnut St, Suite 104~~ Yankton, SD 57078
605-668-3567

Civil Notes 4-24-10 @ 1956 - RESIDENT KNOWS LIVED ~~ELSEWHERE~~ 2 YEARS, TJS
5/14/10 - lives in watertown & goes to school there. TJK
5-14-10 - Faxed to Codington Co. for Service JJ

EXHIBIT
tabbies
1

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

FILED
JAN 27 2011
Jody L Johnson
YANKTON COUNTY CLERK OF COURTS

JILL ROBINSON formerly known as JILL ROBINSON-KUCHTA,

CIV. #10-242

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT,

Defendants.

AFFIDAVIT OF JERRY JARVIS IN RESPONSE TO DEFENDANT EWALT MOTION FOR SUMMARY JUDGMENT

****

STATE OF SOUTH DAKOTA)
):ss
COUNTY OF YANKTON)

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7. Your affiant states that when Defendant Ewalt did not come to the Yankton County Sheriff's Office with the week; your affiant spoke with Defendant Ewalt who indicated that she was in Watertown.

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EXHIBIT
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Complaint to the Codington County Sheriff's Office for service upon Defendant Ewalt.

10. Your affiant states that prior to May 10, 2010, your affiant verily believed that Defendant Ewalt was living in Yankton County.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Jerry Jarvis

Subscribed and sworn to before me by Jerry Jarvis on this 26 day of January, 2011.

Kristin Christiansen
Notary Public
My commission expires: 05-04-2015

KRISTIN CHRISTIANSEN
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

CERTIFICATE OF SERVICE

This is to certify that a true and correct copies of the Affidavit of Jerry Jarvis in Response to Defendant Ewalt's Motion for Summary Judgment were served upon the following by depositing said copies in the United States Post Office at Yankton, South Dakota, in envelopes with first class postage prepaid, addressed to the following persons at their given addresses on the 27th day of January, 2011.

Larry Von Wald
Attorney at Law
P.O. Box 9579
Rapid City, SD 57709

Jill Robinson

Wanda Howey-Fox
Attorney at Law
P.O. Box 18
Yankton, SD 57078
(605) 665 - 1001

FILED
JAN 27 2011
Jody L Johnson
YANKTON COUNTY CLERK OF COURTS

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF YANKTON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

****

JILL ROBINSON, formerly known as JILL ROBINSON-KUCHTA,

Plaintiff,

vs.

MICHELLE M. MITCHELL and CHELSEY A. EWALT,

Defendant.

JURY TRIAL

(partial transcript)

CIV. 10-242

****

BEFORE: THE HONORABLE GLEN W. ENG,
Circuit Court Judge in and for the
First Judicial Circuit, State of
South Dakota, Yankton, South Dakota.

APPEARANCES: Ms. Wanda Howey-Fox
Attorney at Law
721 Douglas - Suite 101
Yankton, South Dakota 57078

Attorney for the Plaintiff;

Ms. Jessica Larson
Attorney at Law
P. O. Box 9579
Rapid City, South Dakota 57701-9579

Attorney for the Defendant.

PROCEEDINGS: The above-entitled matter commenced at 9 o'clock a. m. on the 11 day of February, 2014, at the Yankton County Courthouse, Yankton, South Dakota.

Dean Schaefer
Official Court Reporter
Yankton, South Dakota

A I just -- myself and another civil secretary, we check them in.

Q Okay. And were you -- were you able to serve those documents on Chelsey?

A They were not served at -- when they first were attempted.

Q Tell us about that first attempt?

A They went out for service and we just -- we log each -- each attempt that we go out to the address and -- at the given address by the -- by the party and we just try it. I mean, all we can do is try several times.

Q Okay. And what happened in this case?

A We were unable to get her served. And --

Q And do you know why?

A They said she didn't live here.

Q They said she didn't live here or she wasn't home?

A She wasn't home, didn't live here.

Q Okay. Do you know who said she wasn't home?

A I do not. It's not -- just that's what was told by the deputy that went out for service.

Q That's reflected in your affidavit that you spoke with a female person?

A Correct.

Q And do you know whether it was Chelsey Ewalt?

A I do not.

Q When you -- did you call the address or the mom's phone number?

A We called the phone -- we called the phone and said that she was living in Codington County and she would be home and she would have her stop and pick papers up.

Q Okay. And they said when she was home, that she would pick up those papers?

A Yes.

Q Okay. And did that happen?

A It did not.

Q Now, when was the first time that you were advised that she was in Codington County according to your records?

A It was -- I first learned it was like May, first part of May, May 14. I guess that's -- that's what the deputy wrote on the papers saying: Goes to school -- lives and goes to school in Watertown, South Dakota.

MS. HOWEY-FOX: Thank you. Nothing further.

THE COURT: Ms. Larson?

BY MS. LARSON:

Q Good morning. Who delivered the papers to you?

A Harmelink & Fox.

Q And did you speak with the person who delivered the papers?

A Yes, we talk to them when they come in.

Q What instructions were you given?

A They just -- they bring in papers with addresses and once we go on that, we just check them in and that's the address we're given and the deputy goes out and attempts those.

Q What address were you given?

A We were given 309 Meckling Street in Gayville.

THE COURT: Can you make sure your microphone is on, Ms. Larson?

MS. LARSON: Oh, there it is.

THE COURT: Thank you.

BY MS. LARSON:

Q Do you know if service was attempted at 309 Meckling Street in Gayville?

A Yes, it was noted on 4-24 of '10, at 1956.

Q Was it noted that no one in the Ewalt or Hofer family lived at the Gayville address anymore?

A It says residents have lived here for two years. Yeah, have lived here for two years.

Q So were you made aware that the Gayville address was no longer the correct address for Chelsey Ewalt?

A That's when the deputy -- at the top of our notes,

it's crossed out, so then we were given a new address of 600 East 13.

Q Did you attempt service at that address?

A I believe they did. That's when we got -- got it back and said lives in Watertown and goes -- goes to school there.

MS. LARSON: Thank you. I have no further questions.

THE COURT: Okay. Anything further, Ms. Howey-Fox?

MS. HOWEY-FOX: No.

THE COURT: You may step down. Is he released from his subpoena?

MS. HOWEY-FOX: Yes.

THE COURT: Thank you.

(Witness leaves the stand)

(End of requested partial transcript)

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF YANKTON) FIRST JUDICIAL CIRCUIT

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA
66 CIV. 16-000079

Plaintiff,

-vs-

HARMELINK, FOX & RAVNSBORG LAW OFFICE and WANDA L. HOWEY-FOX,

Defendants/Third-Party Plaintiffs,

-vs-

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant.

* *

DEPOSITION OF

Jerry Jarvis

* *

APPEARANCES:

Christopherson, Anderson, Paulson & Fideler, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Casey W. Fideler, for the Plaintiff;

Fuller & Williamson, Attorneys at Law, Sioux Falls, South Dakota, by Mr. William P. Fuller, for the Defendants and Third Party Plaintiffs;

Cadwell, Sanford, Deibert & Garry, Attorneys at Law, Sioux Falls, South Dakota, by Mr. Douglas M. Deibert, for the Third-Party Defendant.

ALSO PRESENT: Wanda Howey-Fox

INDEX OF EXAMINATION

INDEX OF EXHIBITS

STIPULATION

It is stipulated and agreed by and between the above-named parties, through their attorneys of record, whose appearances have been hereinabove noted, that the deposition of Jerry Jarvis may be taken at this time and place, that is, at the James Law Offices, Yankton, South Dakota, on the 2nd day of May, 2017, commencing at the hour of 10:00 o'clock a.m.; said deposition taken before Wayne K. Swenson, a Notary Public within and for the State of South Dakota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes, and said deposition may be used for all purposes contemplated under the applicable Rules of Civil Procedure as if taken pursuant to written notice. Insofar as counsel are concerned, the objections, except as to the form of the question, may be reserved until the time of trial.

JERRY JARVIS,

called as a witness, being first duly sworn, deposed and said as follows:

EXAMINATION BY MR. FULLER:

Q Would you state your name, please?
A Jerry Jarvis.
Q And, Jerry, what's your employment?
A I work at Truxedo.

Page 21

that she didn't live here, or don't you recall?
A Going back to Exhibit 4, May 14th is when I learned that she lived in Watertown.
Q If a law firm brings in a Summons and Complaint and tells you it has to be served right away because of the statute of limitations, is there anything special in writing that is entered on the form, Exhibit 4, or otherwise, that would tell the deputy you have to get this served right away?
A I don't know. I do know we'd get papers from the clerk, there would be a due date on that, the deputy would write -- we'd write it up in the top corner when to try and get it served by.
MR. FULLER: I'm about done. I just want to talk to Wanda a second.
(At which time a recess was taken).
Q Jerry, when you say that you check in the system for serving the papers, do you also pull up the driver's license of the person to be served?
A No. Can I explain?
Q Sure.
A I didn't do that. Again, we check them in, they would go to Deputy Woodmancy, being the civil deputy. He would do follow-up research, he would come out and go to the Teletype NCIC machine next to me, and then that's

Page 22

when he would try and find information on them. So he did more research on trying to find individuals.
Q The NCI Teletype machine, what's that?
A It's a computerized system throughout the state, so it's basically the communication to law enforcement. Warrants come across, we used it to -- we would use it to verify -- if we were holding somebody, we would send a Teletype saying, do you want this person held? It's just a way to communicate to different law enforcement agencies.
Q All right. And would he have access to public information -- I guess semi-public information about the driver's license?
A Yes.
Q All right. And that's one of the sources or resources that he can look to as far as serving the papers?
A Yes.
MR. FULLER: Okay. I think that's all the questions I have.
MR. FIDELER: I do have just a couple.
EXAMINATION BY MR. FIDELER:
Q When a lawyer normally or ordinarily delivers papers for process, do they give you an enclosure letter saying he was last known to reside at this address, please forward

Page 23

the certificate of service and your invoice upon the -- serving the Defendant, something to that effect?
A Yes, there would be letters that would come in with papers. The attorneys would try and provide the most information on where that individual is staying so, I mean, we would attempt that address first.
Q But they don't rely on you to research the Defendant's address?
A No.
Q Is it common to get -- well, strike that.
If a lawyer were concerned about a statute of limitations issue or asks for your timely attention to do the service, is that something that's normally part of that enclosure letter?
MR. FULLER: I'm sorry, I didn't hear the question. Can you just ask it again, or have it read back? I didn't hear the last part.
Q When an attorney provides a letter with the paperwork for a service process and there is a time-is-of-the-essence issue or, you know, is asking for you guys to put this at the top of the list, do they mention that in a letter, like, hey, the statute of limitations falls on this date or real close, you know?
A I don't remember. I mean, it's possible, but I don't remember.

Page 24

Q Not this letter, I'm saying generally?
A I don't know. I haven't read one forever. But, again, usually it's just addressed to the sheriff what papers need to be served, who needs to be served, and when the court date is. And, again, that court date would generally be put on our civil worksheet, Exhibit 4, to, you know, alert the deputy that, hey, we need to try and get this served by this day.
Q And you're talking about custody matters or divorce, because there's end dates that that person has to be served so they know to be there on that date?
A Yes.
MR. FIDELER: That's it. That's all I've got.
EXAMINATION BY MR. FULLER:
Q When you get the papers and the lawyer's office gives you an address of the person to be served, as a matter of procedure Mr. Woodmancy also resorts to his resources with the NCI and the Teletype, correct?
A Yes.
Q As a matter of procedure?
A That was procedure, yes.
MR. FULLER: That's all the questions I have.
MR. DEIBERT: Would you waive the

Page 13

are being served. That's all we enter.
Q All right. I understand that's all you enter, but --
A The only information I need to know to --
MR. DEIBERT: Let him finish his question.
Q My question was, do you do anything beyond that, as far as reading the papers and learning what the papers are about?
A No.
Q And so when the papers -- how did the Summons and Complaint come into the sheriff's department?
A They were dropped off.
Q Okay. Did -- were they dropped off with you or dropped off with somebody else?
A I don't remember.
Q But, in any event, somehow they got there, right?
A Yes.
Q And did you talk to anybody in the sheriff's department as to who brought the papers in and what the instructions were?
A I don't know. We get lots of papers in during the day. Attorneys, clerk of courts, state's attorney are coming in every day bringing in papers so --
Q So what you're telling me is you don't remember talking to anybody from Wanda Fox's office about the papers, but

Page 14

somebody else in the department could have talked to somebody?
A Yes.
Q And then in Paragraph 7 of your affidavit, Exhibit 5, you state that, when Defendant Ewalt did not come to the Yankton County Sheriff's Office with the week, your affiant spoke with Defendant Ewalt, who indicated that she was in Watertown, correct?
A Yes.
Q And so did you call her or did she call you or what?
A I remember talking to either her mom or dad who said she was living in Watertown, and that's when I -- I learned on the 14th, when it was stated on the civil worksheet, that she was living in Watertown, possibly going to school.
Q So up until May 14 -- you said the 14th. We're talking about May 14?
A May 14th, 2010.
Q So up to May 14 you didn't know she was living in Watertown?
A No.
Q Did you assume she was living in Yankton County?
A Yes.
Q Did you actually attempt the service of the papers?
A No.

Page 15

Q Who did?
A It looks like Deputy 71J and 71K. I don't recall who the Deputy 71J was at the time.
Q So looking at Exhibit 4, the worksheet, what do you -- did you enter any information into Deposition Exhibit 4, the civil worksheet?
A I put 5-14-2010 faxed to Codington County for service.
Q And this is under civil notes, correct?
A Yes.
Q And the first entry is 4-24-10, correct?
A Yes.
Q At 1956. That's what time?
A I don't know military time. 9:56? I don't know.
MR. DEIBERT: Add 12.
A Add 12?.
MR. DEIBERT: Twenty-one.
A Oh.
Q So that's when the papers came in, or that's when he went out and tried to serve them?
A That's when the deputy attempted service.
Q Okay. And could you read the rest of that line?
A Residents have, boy, lived, maybe, two years, seven-one J.
Q And so what does that mean?
A That the deputy attempted it, and whoever lived there

Page 16

has lived there for two years and it wasn't, it wasn't Chelsea Ewalt, is what I gather from it.
Q Okay. Did you ever talk to this deputy about what he did and what this line meant?
A No.
Q And right now you don't know who that is?
A No.
Q But the sheriff's department would know, right?
A Yes.
Q And so the second line is 5-14-10, lives in Watertown and goes to school there, and what's that number after that?
A That's seven-one K.
Q That's the same deputy as --
A That's a new deputy. That's Deputy Klimisch, I believe.
Q All right. And the previous line, that's seven-one what?
A Seven-one J.
Q Okay. And so Deputy Klimisch, on 5-14-2010, apparently spoke to somebody?
A Yes.
Q Who did he speak to, to your knowledge?
A I don't know.
Q Okay. And so how did it come to your attention, causing you to write the next line?

Page 17

A I remember talking to Chelsey, I don't know where the number come from, I don't know if the 661-3525 is her number, but somehow I got ahold of Chelsey and she said she was going to school in Watertown, so I called the Codington County Sheriff, asked them if they would serve papers for us, I faxed them up there, and that's all I did, I -- after we fax it, it goes to that county for service.

Q So the papers come in, at least according to Exhibit 4, on April 24. Do you or the department do anything to track this? In other words, okay, come in on the 24th. On the 25th or the 26th do you check to see if the papers are served or they aren't served or what's going on?

A Sergeant Woodmancy took care of that. He was always following up civil papers.

Q All right. And that's his job, or part of his job?

A I believe, yes.

Q Do you know if there was any follow-up on these papers from April 24 until May 14?

A I do not.

Q And in the upper part of Exhibit 4 there is a heading, returned unserved for the following reason, and then, lives and goes to school in Watertown. Who wrote that?

A Sergeant Woodmancy, Scot Woodmancy.

Page 18

Q All right. You know, if an attorney's office brings in a Summons and Complaint and tells your people, you know, this has to be served by a certain date because of the statute of limitations, how do you handle that?

MR. DEIBERT: Object to the form of the question. Calls for speculation, conjecture. You can answer. Do you want to have the question read back?

A Yes, please.

(At which time the question referred to was read back by the court reporter).

A Again, they're checked in, and then myself or, I believe, him -- or if it was just me it was just me, then -- it was just me. I would check them in, and then I would hand this to Sergeant Woodmancy, or one of the other deputies, so they could go out and attempt service.

Q And whether you handed it to Deputy Woodmancy, or another deputy, to serve, I mean, would you explain to them, we're dealing with a statute of limitations here and we've got to get it served within a certain period of time?

A I would say this just needs to be served right away, as soon as we can. I mean --

Q Do you know whether you did that in this instance?

A I don't know.

Page 19

Q So after you realized that she was going to school in Watertown, learning that on May 14, did you have any contact with Wanda Howey-Fox's office or Wanda herself?

A I -- the most I would have done is said that she was going to schooling in Watertown, and we faxed them up there.

Q So you did have contact with her?

A I would say yes, because that's generally the procedure. If we get a paper, we just call and say -- if they call and ask for an update we just say, so and so was served, so and so was not served, or the outcome of the civil paper.

Q Do you remember that, or are you saying that's the general procedure?

A I don't remember. But general procedure, I don't recall it being in the book. This is generally the -- what the attorney or the clerk of courts get back as -- instead of the civil paper it's the return of service.

MR. DEIBERT: Let the record show the witness was referring to Exhibit, what is it, 5?

A Exhibit 4. Yeah, it would say return of service, and then the box marked was returned unserved for the following reason.

Q I'm going to show this to you, Mr. Jarvis, but I wanted to read -- I'm looking at the transcript of your

Page 20

testimony at trial and --

MR. FULLER: Do you have an extra copy, Doug? Or I can give him one.

MR. DEIBERT: I think mine's marked up.

MR. FIDELER: What do you want, Bill?

MR. DEIBERT: Mr. Jarvis's trial testimony.

(Deposition Exhibit Number 6 was marked for identification by the court reporter).

Q I'll show you Exhibit 6, which is a copy of your trial testimony. That's something you reviewed in preparation for your deposition, right?

A Yes.

Q Turning to Page 4, you were -- starting at Line 13, you were asked the question, and what happened in this case? Answer, we were unable to get her served. And -- question, and do you know why? Answer, they said she didn't live here. Question, they said she didn't live here or she wasn't home? Answer, she wasn't home, didn't live here. Question, do you know who said she wasn't home? Answer, I do not. It's not -- just that's what was told by the deputy that went out for service. When did you learn that apparently the deputy was told

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28429

JILL ROBINSON-PODOLL f/k/a JILL ROBINSON-KUCHTA,

Plaintiff-Appellant,

v.

HARMELINK, FOX & RAVNSBORG LAW OFFICE
and WANDA L. HOWEY-FOX,

Defendants and Third-Party Plaintiffs-Appellees,

v.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant-Appellee

Appeal from the First Judicial Circuit
Yankton County, South Dakota
The Honorable John Pekas, Circuit Court Judge

Affidavit of William P. Fuller

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Notice of Appeal Filed: October 24, 2017

STATE OF SOUTH DAKOTA)
:ss
COUNTY OF LINCOLN)

William P. Fuller, being first duly sworn states:

1. I am one of the attorneys for Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox.

2. Appellees' Supplemental Brief included a typographical error on page 9. Specifically, page 9 of the Supplemental Brief provides, in pertinent part, "And moreover, the statute of repose commenced on April 29, 2013, as addressed herein." This statement should actually read, "And moreover, the statute of repose commenced on April 29, 2010, as addressed herein." Correct reference to April 29, 2010, as the date the statute of repose commenced is included numerous times throughout Appellees' Supplemental Brief. (*See* Appellees' Supplemental Brf. 12, 13, 14, 18, 19.)

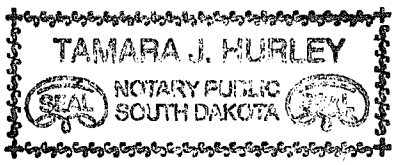
Dated: December 3rd, 2018.

William P. Fuller

Subscribed and sworn before me
this 3 day of December, 2018.

Notary Public - South Dakota
My commission expires: 02-22-22

(SEAL)



CERTIFICATE OF SERVICE

I certify that on December 3, 2018, I e-filed with the South Dakota Supreme Court's office, and filed one original and two copies via U.S. mail, postage prepaid, and served via electronic mail, a true and correct copy of the Affidavit of William P. Fuller, on:

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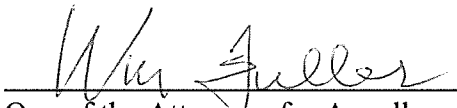

One of the Attorneys for Appellees
Harmelink, Fox & Ravnsborg Law Office
and Wanda L. Howey-Fox

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28429

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Plaintiff/Appellant,

vs.

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Defendants, and Third-Party Plaintiffs/Appellees,

vs.

YANKTON COUNTY, SOUTH DAKOTA,

Third-Party Defendant/Appellee

APPELLEE YANKTON COUNTY, SOUTH DAKOTA'S JOINDER IN APPELLEES HARMELINK, FOX & RAVNSBORG LAW OFFICE AND WANDA L. HOWEY-FOX'S SUPPLEMENTAL BRIEF

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
YANKTON COUNTY, SOUTH DAKOTA

HONORABLE JOHN PEKAS, presiding
Circuit Court Judge

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Notice of Appeal filed October 24, 2017

Appellee Yankton County, by counsel of record, joins in the Supplemental Brief submitted by Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox for all the reasons and authorities set forth therein. Excepted from this joinder is anything relating to claims that the Yankton County Sheriff's office was in any way negligent in its handling of the Summons and Complaint, and attempted service thereof. This includes but is not limited to the comments made in the Statement of the Facts, first full paragraph, starting at the bottom of page 1 of Appellee Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox's Supplemental Brief, and continuing at page 2. YCSO does not waive the right to oppose such claimed facts, should there be a trial of this action.

The same applies to the argument at page 6 of the referenced Supplemental Brief, including but not limited to the argument beginning at the second paragraph of page 6, and continuing on page 7 of the Supplemental Brief.

Dated at Sioux Falls, South Dakota, this 19 day of November, 2018.

CADWELL SANFORD DEIBERT & GARRY LLP

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Appellee Yankton County, South Dakota's Joinder in Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox's Supplemental Brief with the Clerk of Court at SCClerkBriefs@ujs.state.sd.us pursuant to Rule 13-11 and served by e-mail to the following:

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this 19 day of November, 2018.

The undersigned further certifies that the original and two (2) copies of the foregoing Appellee Yankton County, South Dakota's Joinder in Appellees Harmelink, Fox & Ravnsborg Law Office and Wanda L. Howey-Fox's Supplemental Brief were mailed to:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

by U.S. Mail, postage prepaid, this 19 day of November, 2018.

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IN THE SUPREME COURT
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Third-Party Defendant/Appellee.

Appeal from the Circuit Court
First Judicial Circuit
Yankton County, South Dakota

The Honorable John Pekas

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---

Notice of Appeal filed October 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. Allowing Defendant Howey-Fox to prohibit Robinson from using ABA Formal Opinion 481 because it did not exist at the time of the alleged negligent conduct would be unjust, prejudicial, and defeat the judicial machinery, because Defendant Howey-Fox advanced the exact same argument in the lower court, which was ultimately judicially accepted, adopted, and utilized as the basis for the court granting the Defendant's Motion For Summary Judgment.

Defendant Howey-Fox claims that Robinson cannot avail herself of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, Formal Opinion 481, issued on April 17, 2018 because "[this] April 2018 opinion was issued *years* after the conduct at issue occurred and, therefore, the opinion is not applicable to the attorney-client relationship between Howey-Fox and Robinson." *See*, Appellee's Supplemental Brief, P.3.

Defendant Howey-Fox's brief in support of her motion for summary judgment in the lower court asserted that this Court's holding in *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, 878 N.W.2d 406, decided on April 13, 2016 was applicable and outcome determinative in our case. (S.R. 53) However, this case was filed on January 27, 2016, which is almost three months before this Court handed down the *Pitt-Hart* decision.

However, Defendant Howey-Fox waited fifteen months until depositions were completed before serving her motion to file an amended answer asserting the affirmative defense of "statute of repose." (S.R. 50). During that hearing, Defendant Howey-Fox's counsel admitted that he purposely did not plead the statute of limitations as an affirmative defense because at the time of filing his answer, the continuous representation doctrine applied and tolled the statute rendering the defense inapplicable to the case.

Now, when the new law offered by Robinson is unfavorable to her position, Defendant Howey-Fox claims that because the law did not exist during the time period complained of it is not applicable or relevant to the underlying attorney-client relationship.

Defendant Howey-Fox's then claims that the three-year legal malpractice statute of limitation set forth in SDCL § 15-2-14.2 mandated that Robinson was required to bring her malpractice action by April 29, 2013. According to Defendant Howey-Fox's testimony and admissions, she took the legal position that the statute of limitations ran on June 29, 2010, which is inconsistent with the position that she is currently trying to advance before this Court.

II. Defendant Howey-Fox had a duty to disclose her material error because her personal interests in avoiding a potential malpractice suit tainted her ability to perform the fiduciary duties owed to Robinson in pursuing and protecting her best interests.

An attorney has an ethical duty to disclose to a current client material malpractice/error committed during representation. Whether a lawyer must inform a current client of malpractice depends only on whether the error is material. "Malpractice errors exist along a continuum. "ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 481, *A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error* (April 17, 2018). In that continuum, missing a statute of limitations has been ruled at the far end of materiality because it prejudices the client's rights or claims. *Id*. at 3, ¶ 3 (citing 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2).

ABA Ethic's Commission, Model Rule 1.4(b) places an obligation on attorneys to "explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." SD Rule of Professional Conduct 1.4(b) places the same obligation on attorneys. Defendant Howey-Fox had a professional and

ethical obligation along with legal duties to inform her client, Robinson, of the material error and potential consequences. Defendant Howey-Fox abused her position, as Robinson's attorney and fiduciary, to improperly influence Robinson into unknowingly assuming needless risk through her actions in withholding essential information. Robinson's ability to pursue a viable cause of action and meaningful recovery was placed in an inferior position to that of Defendant Howey-Fox's personal interest in avoiding malpractice.

SD Rule of Professional Conduct 1.7(2). Conflict of Interest: Current Clients (a) Except as provided by paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited… by a *personal interest of the lawyer*. (emphasis added).

Negligent conduct of a lawyer in her representation of a client can give rise to a separate tort claim for breach of fiduciary duty. How breach of fiduciary duty claims coincide with violations of professional conduct rules was described by this Court as:

> Unlike the disciplinary rules regarding negligent conduct, the ethics rules concerning the fiduciary obligations commonly are cited by the courts in civil damage actions regarding the propriety of the attorney's conduct. One reason for this difference in usage is that the disciplinary rules concerning the fiduciary obligations often are reasonably accurate statements of the commons law.... *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 51.

This Court has held that both legal malpractice and breach of fiduciary duty claims can be brought as separate causes of action in a single legal malpractice suit and stem from the same negligent attorney conduct. A fiduciary relationship arises from the attorney-client relationship. *Chem-Age Industries, Inc. v. Glover*, 2002 S.D. 122, ¶ 36 (citing *Himrich v. Carpenter*, 1997 S.D. 116, ¶ 13). Defendant Howey-Fox breached her

duty of undivided loyalty by withholding material information that Robinson required before she could validly obtain informed to her proposed litigation strategy. As part of a lawyer's legal/fiduciary duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, including those developments resulting from the lawyer's own errors. (SD Rule of Professional Conduct 1.4(b)).

SD Rule of Professional Conduct 1.4(a) applies where a lawyer may have erred in the course of a current client's representation. The Rule requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience. SD Rule of Professional Conduct 1.4 cmt. 5 (stating "the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued").

Robinson satisfies every element required to establish a breach of fiduciary duty claim against Defendant Howey-Fox and should be afforded her day in court to seek legal redress for the wrongs commit against her. Defendant Howey-Fox's continued negligent representation was directly intertwined with her intentional withholding of information material to her representation of Robinson and inability to maintain an absolute duty of

loyalty to her client by protecting Robinson's best interests. Defendant Howey-Fox never informed Robinson about the benefits, risks, and consequences of pursuing an appeal and trial on residency at the expense of sacrificing any potential legal malpractice claim Robinson had against Defendant Howey-Fox in the process.

Defendant Howey-Fox knew or reasonably should have known, that at this point, her and Robinson's interests divested as she had an inseparable personal interest in ensuring that Robinson did not file a legal malpractice suit against her, which is an obvious conflict of interest Defendant Howey-Fox's personal interest in attempting to limit malpractice liability tainted her judgment and caused her to unilaterally adopt a litigation strategy that was beneficial to one person, attorney Howey-Fox. it is hard to digest the allegation that sacrificing Robinson's malpractice claim was Defendant Howey-Fox's attempt to protect Robinson's best interests.

However, instead of disclosing the material malpractice and advising Robinson that it would be in her best interests to seek an opinion from outside counsel, Defendant Howey-Fox individually decided which litigation strategy she would advance with zero input from Robinson. This exposed Robinson to unnecessary hazards of litigation without her ever receiving any explanation about the risks and benefits of the litigation strategy chosen by Defendant Howey-Fox. Robinson needed this information before she was able to give informed consent to proceed down the legal turnpike chosen exclusively by Defendant Howey-Fox. Defendant Howey-Fox also spins her attempts to shift the legal liability for Robinson's loss onto the Yankton County Sheriff's Department by substituting them for Ewalt, as further evidence of ingenious legal work and zealous advocacy by Defendant Howey-Fox on Robinson's behalf.

Defendant Howey-Fox's final efforts to conceal her material error and prevent Robinson from discovering that Defendant Howey-Fox's true intentions in choosing this litigation strategy were not pure, genuine, or client driven but personally motivated by Defendant Howey-Fox's desire to come up with a scheme to conceal her material malpractice error long enough for the statute of limitations to expire on any underlying legal malpractice claim.

Once that happened, Defendant Howey-Fox would drop the case like yesterday's mail and coincidentally that is exactly how things ended for Robinson. Defendant Howey-Fox believed that she had successfully defeated Robinson's right to bring a malpractice claim against her by eating up the statutory limitations period during the appeal, subsequent jury trial, motion to substitute parties, and lastly instilling a false sense of hope in Robinson by claiming that she was filing a suit against the county.

III. The *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009) case thoroughly briefed and cited in Defendant Howey-Fox's Supplemental Brief is distinguishable from the current case.

Leonard v. Dorsey & Whitney LLP was a case that originated in Minnesota and the 8th Circuit Court of Appeals applied Minnesota law to the facts of the case. The case did not involve attorney neglect rising anywhere near the drastic and material error when a lawyer fails to serve a defendant with the statutory limitations period. Rather, the case involved an attorney error by processing a loan transaction without first obtaining approval from the client. *Id.* at 630. The 8th Circuit also looked at the participation agreement and interpreted its language ultimately holding that "the language of the participation agreement effectively negated the plaintiff's justifiable reliance on Dorsey's representations. Under Minnesota law, negligent legal advice does not give rise to a

claim for legal malpractice until the client suffers damages as a result. *Leonard*, 553 F.3d at 630. The Court ultimately determined that the client could only be damaged if they defaulted on the loans and the documents proved to be unenforceable. Since neither of these two occurrences ever happened the client was not damaged and there was no substantial risk that the law firm's interests were adverse to those of the client in subsequent litigation. *Id.*

Defendant Howey-Fox's supplemental brief fails to mention that two paragraphs earlier in the *Leonard v. Dorsey & Whitney LLP* opinion the Court states:

> A classic example of a duty to advise a client of potential malpractice is a lawyer who fails to file a lawsuit for a client within the limitations period. *See* Restatement (Third) of The Law Governing Lawyers §20, cmt. c (2000). The Restatement classifies this duty as part of the duty to keep the client reasonably informed but mentions "the resulting conflict of interest that *may require the lawyer to withdraw*." *Id.* at 629. (emphasis added).

According to the *Leonard v. Dorsey & Whitney LLP*, Court, the underlying facts of our case where an attorney fails to file a lawsuit within the limitations period is a "classic example" of when an attorney has a duty to advise a client of her potential malpractice. Robinson also respectfully disagrees with Defendant Howey-Fox's claim that once Attorney Fox let the statute of limitations expire on Robinson's claim "Robinson's and Howey-Fox's interests were aligned." *See*, Appellee's Supplemental Brief, P.7. According to the Restatement, jurisdictional precedent, and other legal authority, this is the point where the lawyer's interests and the client's interests divest to such a degree that mandatory disclosure is required by the offending attorney.

IV. Because this Court denied Appellees' Motion to Strike Appellant's Reply Brief and Motion For Permission to File Brief in Response any references or cites to the related documents should be stricken as they are not part of the record.

Defendant Howey-Fox's Supplemental Brief cites and quotes portions of text from the Motion to Strike Appellant's Reply Brief filed by the Appellees and corresponding briefs, which was denied by this Court. There are quotes in the body of the brief and also in some footnotes.[1] In footnote 5, Defendant Howey-Fox cites to Appellant's Brief in Opposition to Appellees' Motion to Strike Appellant's Reply Brief claiming that Robinson argues she was unable to raise the issue or advance the legal theory to the circuit court because the authority "did not yet exist" but *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir. 2009) "was in existence for years before Robinson commenced her action against Howey-Fox."

Robinson agrees that the *Leonard* case has existed since 2009 but does not see how a Minnesota case, applying Minnesota law, that eventually made it to the 8th Circuit Court of Appeals would be authoritative or hold any precedential weight to bind a South Dakota Circuit Court. But if Robinson's counsel should have known about the *Leonard* case does the same not go for Attorney Howey-Fox as the case existed when she allowed the statute of limitations to expire and the case specifically holds that such a material error commit by an attorney requires disclosure of the malpractice to the client.[2]

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[1] Upon receiving this Court's Order denying the Appellee's Motions, Counsel for Robinson called the SDSC Clerk's office and asked if there was anything that he needed to file or do to ensure that the brief attached as an exhibit to the Appellee's Motion For Permission to Reply to Appellant's Brief in Opposition was not part of the record. Counsel for Robinson was informed that because the Motions were denied nothing filed related to those motions was part of the record and I need not do anything.

[2] In the last paragraph of every section in Defendant Howey-Fox's Supplemental Brief she takes the position that "[t]he argument is, therefore, not properly before this Court. This Court has, on countless occasions, held that arguments raised for the first time on appeal are waived and will not be addressed or considered. Robinson is not going to respond to those allegations other than to say when the South Dakota Supreme Court tells an attorney to brief seven issues, he briefs those seven issues.

V. Defendant Howey-Fox Admits in Her Supplemental Brief That the Statute of Repose Commenced on April 29, 2013.

On page nine (9) of Appellees' Supplemental Brief she states "[a]nd moreover, the statute of repose commenced on April 29, 2013, as addressed herein. Robinson's claims remain time-barred." Accepting Defendant Howey-Fox's admission or concession, establishes that Robinson's claims are *timely* not time-barred. Robinson filed her Complaint on Jan 27, 2016, which would make it timely filed with two months remaining on the statute of repose.

CONCLUSION

Accepting the trial court's decision equates to Attorney Howey-Fox receiving a professional achievement award for her willful, wrongful, and repeated violations of the very delicate, exacting, purely personal, and confidential character at the foundation of the attorney client relationship, which mandates the highest level of fidelity and utmost good faith.

This is a pivotal case in determining the future landscape of legal malpractice precedent and ideal opportunity for this Court to put South Dakota at the tip of the spear in protecting its citizens through concentrated efforts in policing our own. An opinion cautioning practicing attorneys that if they chose to engage in conduct such as that engaged in by Defendant Howey-Fox, they do so at their own peril, because allowing attorneys to take advantage of their clients for personal gain will never be tolerated, let alone adopted as the applicable standard of care in legal malpractice actions.

Accepting the standard advanced by Defendant Howey-Fox, would not only be condoning but promoting attorney conduct intended to fraudulently conceal their material errors commit while representing a client, just long enough for the statute to expire. This

Court should seize this opportunity to establish a standard that forbids and discourages practicing attorneys from engaging in similar future attorney misconduct.

Analyzing the risks and benefits that each party is exposed to under the "Howey-Fox representation strategy" compared to the "independent counsel strategy" clearly identifies the conflict of interest and undisputable breach of fiduciary duty. Defendant Howey-Fox, and future similarly situated attorneys, will be incentivized to put their own personal interests or gain ahead of their loyalties and duty of utmost good faith owed to their client. It was not only foreseeable but inevitable that Robinson would suffer the ultimate prejudice and loss of her legal claim employing the "Howey-Fox representation strategy."

It is necessary for the Court to implement a jurisprudential standard that does not reward attorneys for putting their own interests before that of their clients. It is also necessary for the Court to issue a decision that does not provides slippery attorneys with a roadmap on "how to get away with malpractice - deceive your client." South Dakota lawyers should take pride in being judged against a standard that is client centered and strive to exceed that standard daily to restore the public's trust and confidence in our profession. Implementing a standard that rewards attorney deception and misconduct to conceal and foreclose a person's only opportunity in receiving legal recourse against a deceiving attorney does not advance this Court's statement that "preservation of trust in the legal professional is essential." *In re Discipline of Ortner*, 2005 S.D. 83, ¶ 27. "Only by providing high quality lawyering can the integrity of the legal profession remain inveterate and the confidence of the public and the Bar remain strong." *Id.* The best option to prevent and discourage attorney's from engaging in similar misconduct in the

future is to mandate and promote a lawyer's duty of disclosure when they commit a material error.

Defendant Howey-Fox breached her fiduciary and legal duties owed Robinson by willfully concealing her alleged error and failing to disclose the material error to her client. Defendant Howey-Fox owed fiduciary duties to her client, including that of utmost good faith and undivided loyalty in protecting Robinson's best interests. Defendant Howey-Fox breached her duty of undivided loyalty by subordinating Robinson's interests to her personal interests in avoiding a potential malpractice suit. Appellant Robinson respectfully requests this Court reverse the lower court's granting Defendant Howey-Fox's motion for summary judgment and remand the case for a jury trial on the merits.

Respectfully submitted this 30th day of November 2018.

CHRISTOPHERSON, ANDERSON,
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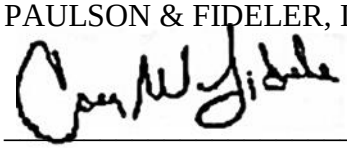

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's Supplemental Reply Brief above has been produced in Microsoft Word using a 12 point proportionally spaced typeface for the text of the Supplemental Brief; that the Supplemental Brief contains eleven (11) pages, and that this complies with the Court's Order for Supplemental Briefing.

Dated this 30th day of November 2018.

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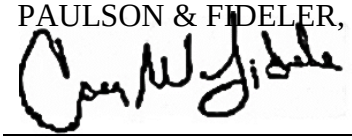

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November 2018, I mailed the Appellant's Supplemental Reply Brief, Certificate of Compliance, and Certificate of Service with two (2) copies to the Supreme Court and emailed a Word version and a PDF version of the same to the Supreme Court. I also electronically served Appellees the above referenced documents by transmitting electronic copies to them at the following email addresses along with copying them on the email to the Supreme Court with the documents attached:

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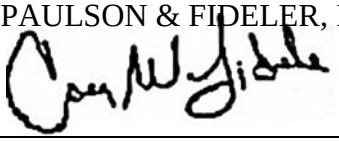

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