IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 31381

LESLEY RUSSELL, as PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL E. DULING,

Plaintiff/Appellant

vs.

GOOSMANN LAW FIRM, P.L.C.; and JEFFREY T. MYERS

Defendants/Appellees

**APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
GREGORY COUNTY, SOUTH DAKOTA**

**HONORABLE CHRISTIE KLINGER
PRESIDING CIRCUIT COURT JUDGE**

APPELLANTS' BRIEF

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**Amended Notice of Appeal
Filed February 16, 2026**

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JURISDICTIONAL STATEMENT

Date and form of judgment or order sought to be reviewed: Order Granting Defendants' Motion for Summary Judgment dated January 26, 2026, entered by the Honorable Christie Klinger, Circuit Court Judge, Sixth Judicial Circuit, Gregory County, South Dakota. The Order granted summary judgment on the grounds that Plaintiff's claims are outside the statute of repose provided under SDCL § 15-2-14.2, and dismissed the action on the merits, and with prejudice. R. at 819.

Date when notice of appeal filed: Amended Notice of Appeal filed February 16, 2026. R. at 829.

STATEMENT OF THE LEGAL ISSUES

1. Whether the Circuit Court Erred by Determining, as a Matter of Law, that the "Last Culpable Act or Omission" Under SDCL § 15-2-14.2 Occurred on December 16, 2019, Where Defendants' Own Discovery Responses and Motion Practice Established That Legal Representation and Related Omissions Continued Through at Least May 2021.

Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office, 2020 S.D. 5, 939 N.W.2d 32

Pitt-Hart v. Sanford USD Med. Ctr., 2016 S.D. 33, 878 N.W.2d 406

Greene v. Morgan, Theeler, Cogley & Petersen, 1998 S.D. 16, 575 N.W.2d 457

SDCL § 15-2-14.2

2. Whether Genuine Issues of Material Fact Precluded Summary Judgment Where the Record Supported Findings That Defendants Engaged in a Continuous and Unbroken Course of Representation and Failed to Disclose Known Errors and Conflicts of Interest During Ongoing Representation.

Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office, 2020 S.D. 5, 939 N.W.2d 32

Pitt-Hart v. Sanford USD Med. Ctr., 2016 S.D. 33, 878 N.W.2d 406

Leonard v. Dorsey & Whitney LLP, 553 F.3d 609 (8th Cir. 2009)

3. Whether the Circuit Court Erred by *Sua Sponte* Adopting a December 16, 2019, Occurrence Date That Neither Party Briefed as Controlling Under SDCL § 15-2-14.2, Thereby Bypassing Unresolved Disputes Concerning Continuing Omissions and Tolling.

Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office, 2020 S.D. 5, 939 N.W.2d 32

Keegan v. First Bank of Sioux Falls, 519 N.W.2d 607 (S.D. 1994)

STATEMENT OF THE CASE AND FACTS

This appeal concerns whether the circuit court correctly identified the operative occurrence date under SDCL § 15-2-14.2. Plaintiff alleges Defendants failed to accomplish the transfer of voting control they were retained to secure, continued representing overlapping and conflicting interests after facts revealed the defect, and failed to disclose or correct those deficiencies during ongoing representation. The circuit court entered summary judgment after selecting December 16, 2019, as the occurrence date, despite the parties litigating timeliness based on substantially later conduct.

A. Background

Dan retained Myers in September 2019 in connection with an escalating shareholder dispute involving Duling Sons, Inc., a closely held family corporation operated by Dan and his brother, Joseph Duling ("Joe"). Compl. ¶¶ 5–10, R. at 2–3. As of October 2013, Dan held 125,000 shares of Duling Sons (25%), and Joe held 375,000 shares (75%). Compl. ¶ 7, R. at 3.

Before undertaking the transactions at issue, Myers claims to have reviewed Duling Sons' governing documents and confirmed that all authorized Class A voting shares had already been issued. Myers Dep. 35:24–36:18, R. at 679–680; Myers Dep. 40:7–11, R. at 684. Despite that knowledge, Myers proceeded with transactions intended to place voting control in Dan's hands without amending the corporate structure or advising Dan that the intended result had not been achieved.

B. December 16, 2019, Meeting

At a meeting on December 16, 2019, Joe resigned in writing as director, officer, and registered agent of the Corporation, and Dan was unanimously elected as sole officer and director. Joe surrendered day-to-day control over the Corporation to Dan, but Joe did not give up or transfer his shares. Compl. ¶¶ 14–15, R. at 3.

Defendants drafted the minutes from the December 16, 2019, meeting. The minutes reflect that Joe and Dan voted and agreed to have the Corporation issue 251,000 shares of stock to Dan as payment for money the Corporation owed Dan. Def.'s Statement of Material Facts ("SUMF") ¶ 9, R. at 357–358. Because all authorized Class A voting shares were already outstanding, the 251,000 shares issued to Dan could not confer voting control absent an amendment of the AOI. Compl. ¶ 26, R. at 4.

Despite claiming to have reviewed the AOI and confirming that all 500,000 authorized Class A voting shares were already outstanding, Myers proceeded with stock transfer intended to place voting control in Dan's hands without amending the corporate structure to authorize additional Class A voting shares, and without advising Dan that this stock transfer failed to accomplish the intended result. Myers Dep. 60:1–25, R. at 704. Myers admitted to reviewing the AOI for the number of available shares but never considered or discussed whether Dan was receiving Class A or Class B shares at any point during his representation. Compl. ¶ 22, R. at 4.

C. The Dual Representation And Metlife Agreement

In April 2020, Myers entered into a separate engagement agreement to represent Duling Sons, Inc. in connection with foreclosure litigation filed by Metropolitan Life Insurance Company, dated April 2, 2020. Myers Dep. 64:14–16, R. at 708. Myers did not obtain a conflict waiver from Daniel Duling when he undertook that representation. Myers Dep. 70:18–25, R. at 714. Myers also did not send Dan a letter advising that his individual representation had ceased. Myers Dep. 71:7–10, R. at 715.

On May 21, 2020, Myers negotiated a Repayment Agreement with MetLife on behalf of Duling Sons, pursuant to which Dan personally paid $400,000 and executed a $1,000,000 personal guaranty. Myers Dep. 72:9–15, R. at 716. When asked who represented Dan individually with respect to his agreement to pay $400,000, Myers testified: “He was representing himself.” Myers Dep. 73:12, R. at 717. When asked the same question regarding the $1,000,000 guaranty, Myers again testified: “He was representing himself.” Myers Dep. 73:22, R. at 717. Myers’ own handwritten notes reflect: “Would not have paid $400,000, if not majority shareholder,” and Myers confirmed in deposition that Dan’s agreement to pay $400,000 “is based on his belief that he was the majority shareholder of Duling Sons, Inc.” Myers Dep. 77:17–25, R. at 721. The record would permit a factfinder to conclude that Myers did not disclose that Dan lacked voting control, did not correct the governance defect, and did not advise Dan to obtain independent counsel before assuming substantial personal exposure in a transaction benefiting Duling Sons. *See* Compl. ¶¶ 22–25, R. at 4.

D. The Ongoing Representation And Its Termination

From January 2020 until December 29, 2020, Dan was the sole director and officer of Duling Sons. In late 2020, Joe called a shareholders' meeting based on his position that he held the majority of voting shares, at which Joe reinstated himself as President and took back control of day-to-day operations. Compl. ¶¶ 20, 27, R. at 4–5. In the resulting state court litigation (Case No. 26CIV20-000064), the trial court determined that Joe was the owner of the majority of voting shares in Duling Sons, Inc., and that the attempted revocation of Joe's shares in April 2020 was void and invalid. Compl. ¶ 21, R. at 4.

Myers represented Duling Sons, Inc. through trial on March 1, 2021, in Case No. 26CIV20-000064, and the state court issued its oral ruling on March 2, 2021. R. at 787; R. at 303 (Hoskins Decl. Ex. C). In sworn interrogatory responses, Goosmann stated that its representation of Duling Sons, Inc. ended after Judge Rank's rulings from the bench on March 2, 2021; that legal services were provided after that date until the judgment became final; that no services were billed after May 22, 2021; and that after May 22, 2021, Goosmann continued to communicate with Daniel Duling and his new attorneys. R. at 140 (Hoskins Decl. Ex. A at 6). The state court entered written Findings of Fact and Conclusions of Law on May 7, 2021. R. at 788. A Substitution of Counsel replacing Goosmann Law Firm with Ogborn Mihm Quaintance was executed on May 13–14, 2021. R. at 788.

E. The Tolling Agreements

Defendants entered into a Tolling Agreement with the Personal Representative effective December 1, 2022, suspending all limitations defenses through December 1, 2023. R. at 336 (Hoskins Decl. Ex. D).

The scope of a subsequent extension is in dispute. On November 14, 2023, Plaintiff's counsel sent an email requesting an extension, stating: "I am hopeful this action will be resolved within the next 6 months but would ask for 9 just to be sure." R. at 635 (Ogborn Decl. Ex. A). On November 16, 2023, Alice M. Sherren, counsel for Defendants' insurer, responded: "Thanks, Mike. I have discussed with our Insureds and we agree to extend the toll. Please let me know what else you need. Thank you!" R. at 635 (Ogborn Decl. Ex. A). Plaintiff's counsel understood that email to constitute agreement to a nine-month extension through September 1, 2024, and calendared the deadline accordingly. R. at 631–632 (Ogborn Decl. ¶¶ 9–11).

Defendants contend the parties executed an Amended Tolling Agreement extending the tolling period through August 1, 2024, retroactive to December 1, 2022. R. at 340–341 (Hoskins Decl. Ex. D). The Amended Tolling Agreement contains no signature from Plaintiff's counsel—the Lesley Russell signature block is blank. R. at 342 (Hoskins Decl. Ex. D). Prior to Defendants filing their Motion for Summary Judgment, Plaintiff's counsel had no knowledge of any written tolling agreement reflecting an August 1, 2024, termination date. R. at 632 (Ogborn Decl. ¶ 13).

On October 16, 2024, Heidi V. Strigenz of Fraser Stryker PC LLO, counsel for Defendants' insurer, proposed a Second Amended Tolling Agreement tolling the statute of limitations for 30 days, effective October 18, 2024, through November 18, 2024. R. at 637 (Ogborn Decl. Ex. B). On October 17, 2024, Plaintiff's counsel confirmed acceptance of the proposed extension, providing 31 days of additional tolling. R. at 637 (Ogborn Decl. Ex. B); R. at 783–784.

F. The Summary Judgment Proceedings

On December 31, 2025, Defendants filed their Motion for Summary Judgment, seeking dismissal on the grounds that Plaintiff's claims are barred by the statute of repose under SDCL § 15-2-14.2. R. at 132. In their Brief in Support, Defendants acknowledged that the parties agreed to "1 year and 244 days" of tolling. Defs.' Br. at 4, R. at 350. In their Reply Brief, Defendants acknowledged that "[t]he latest, or most recent, date of alleged malpractice by the Defendants according to the Plaintiff was on May 21, 2020," and that under Defendants' own calculations this extended the filing deadline to January 22, 2025. R. at 798–800.

The hearing was held via live video conference on January 23, 2026, before the Honorable Christie Klinger, Sixth Judicial Circuit. Tr. 1. At the hearing, the Court ruled from the bench that "it's clear to this Court that if there was any professional negligence or malpractice on the part of Mr. Myers, that the occurrence was on or about December 16 of 2019," and that "even if we apply the 640 days…the plaintiffs still did not provide service within the three years allowed." Tr. 36. On January 26, 2026, the Court entered its Order Granting Defendants' Motion for Summary Judgment, dismissing Plaintiff's claims on the merits and with prejudice, and dismissing the Third-Party Complaint as moot. R. at 819. Plaintiff filed an Amended Notice of Appeal on February 16, 2026. R. at 829.

ARGUMENT

This appeal arises from a fundamental error in the circuit court's application of SDCL § 15-2-14.2. Rather than measuring the statute of repose from the "last culpable act or omission," the court selected the earliest conceivable date in the record—December 16, 2019—even though Defendants themselves identified substantially later acts, omissions, and representation periods extending into 2021. That ruling allowed the court to bypass unresolved disputes concerning continuing omissions, nondisclosure, and tolling. Because the record presents genuine disputes concerning when Defendants' alleged malpractice terminated, summary judgment was improper.

G. Standard of Review

This appeal arises from the circuit court's Order Granting Defendants' Motion for Summary Judgment under SDCL § 15-6-56(c). "Summary judgment is only appropriate when the court determines that the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits of the parties, reveal that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Betty Jean Strom Trust v. SCS Carbon Transport, LLC*, 2024 S.D. 48, ¶ 21, 11 N.W.3d 71, 82 (citation omitted). "It is well-settled that '[w]e view the evidence most favorably to the nonmoving party and resolve reasonable doubts against the moving party.'" *Id.* (citation omitted). This Court reviews grants of summary judgment de novo. *Id.*

Questions involving statutes of repose are generally inappropriate for summary judgment where disputes of material fact remain concerning the timing or nature of the alleged wrongful conduct: "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. "Summary judgment is therefore improper where there is a dispute of material fact which would affect the application of the statute of limitations." *Keegan v. First Bank of Sioux Falls*, 519 N.W.2d 607, 611 (S.D. 1994).

Questions of law—including statutory interpretation and application of a statute of repose—are reviewed de novo. *Sherman v. Sherman*, 2000 SD 117, ¶ 8, 616 N.W.2d

393, 394. "We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶ 13, 939 N.W.2d 32, 38.

H. The Circuit Court Erred in Selecting December 16, 2019, as the Occurrence Date Under SDCL § 15-2-14.2

The circuit court's summary judgment ruling rests on a fundamental legal error: rather than measuring the statute of repose from the "last culpable act or omission," the court selected the earliest conceivable date in the record—December 16, 2019. That ruling cannot be reconciled with either the governing law or the factual record presented by the parties.

Under SDCL § 15-2-14.2, an action against a licensed attorney "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." The South Dakota Supreme Court has held that SDCL § 15-2-14.2 operates as a "statute of repose," clarifying that "[a] statute of limitations creates a time limit for suing in a civil case, based on the date when the claim accrued. A statute of repose, on the other hand…is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Robinson-Podoll*, 2020 S.D. 5, ¶ 21, 939 N.W.2d at 40 (quoting *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 18, 878 N.W.2d 406, 413).

The record, viewed in the light most favorable to Plaintiff, supports findings that Defendants continued representing related interests long after December 2019, continued failing to correct the corporate-control defect underlying Plaintiff's claims, and continued failing to disclose known errors and conflicts during ongoing representation. The circuit court therefore erred in concluding, as a matter of law, that the repose period began in December 2019.

1. Defendants' Alleged Malpractice Did Not End When the December 2019 Meeting Minutes Were Drafted

Defendants' summary judgment theory—and the circuit court's ruling—treat Plaintiff's claims as though the alleged malpractice was complete once the December 16, 2019, meeting concluded and the meeting minutes memorializing what was agreed to in that meeting were drafted. But that framing does not match either Plaintiff's claims or the governing legal standard.

SDCL § 15-2-14.2 provides that an action against an attorney for "malpractice, error, mistake *or omission*" may be commenced within three years after the alleged malpractice, error, mistake, or omission occurred. (Emphasis added.) The statutory text contemplates that malpractice may arise not only from affirmative acts, but also from continuing omissions.

Plaintiff's malpractice theory is not that Defendants merely documented the December 2019 meeting incorrectly. The record shows that Defendants were retained specifically to secure voting control of Duling Sons for Dan, that Myers understood that objective, and that Myers claims to have reviewed governing documents confirming that all authorized Class A voting shares had already been issued. *See* Myers Dep. 60:22–25, R. at 704 (confirming that Myers, Dan, and Joe "discussed…Dan having the controlling interest in the corporation" at the December 2019 meeting); *id.* 35:24–36:18, R. at 679–680 (testifying that he had reviewed the AOI before the meeting and confirmed it established two classes of stock); *id.* 40:7–11, R. at 684 (confirming all 500,000 authorized Class A voting shares were already issued and outstanding). The Complaint alleges that Defendants nevertheless failed to take the steps necessary to accomplish the intended transfer of control. *See* Compl. ¶ 23, R. at 4. Viewed in Plaintiff's favor, that omission did not necessarily end when the meeting minutes were drafted.

The South Dakota Supreme Court has recognized that where malpractice consists of a continuing course of negligent representation, the repose period does not begin until that representation ends, provided the conduct was "so related as to constitute one continuing wrong." *Robinson-Podoll*, 2020 S.D. 5, ¶ 44, 939 N.W.2d at 46–47 (quoting *Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415). The question, therefore, is not whether an error first became possible in December 2019; the question is whether Defendants' alleged malpractice remained ongoing through continuing omissions and representation.

Plaintiff alleges Defendants never amended the Articles of Incorporation or otherwise took action to implement a legally effective transfer of voting control, even while Dan remained sole officer and director through December 2020. *See* Compl. ¶ 23, R. at 4. Plaintiff further alleges Defendants never disclosed that additional action remained necessary to accomplish Dan's objective and never advised Dan that Defendants' simultaneous representation of both Dan and Duling Sons created a conflict requiring Dan to seek independent legal advice regarding transactions affecting his personal financial exposure. *See* Compl. ¶¶ 23–24, R. at 4; *id.* ¶ 51, R. at 8; *see also* Myers Dep. 71:7–10, R. at 715 (Myers admitting that he never sent Dan a letter advising that he was no longer representing Dan's individual interests). A factfinder could reasonably infer that had those disclosures occurred, Dan would not have contributed $400,000 of personal funds or executed a $1,000,000 guaranty without first obtaining independent advice regarding whether his control of Duling Sons had been secured.

Likewise, viewed favorably to Plaintiff, the record would permit an inference that corrective action remained available well after December 2019. Joe had already resigned as officer and director, and Dan remained sole officer and director until late 2020. *See* Compl. ¶ 20, R. at 4; Defs.' SUMF ¶¶ 7, 23, R. at 357, 361. At minimum, the record does not establish, as a matter of law, that disclosure or corrective action became impossible at any before Joe resumed asserting shareholder control in December 2020.

Accordingly, summary judgment was improper. If a factfinder concluded that Defendants' omissions continued through December 2020—or any point after June 22, 2020—then under Defendants' own tolling calculations Plaintiff's claims would be timely even without reaching Plaintiff's additional tolling arguments.

2. Defendants Identified May 21, 2020, as the Earliest Possible Date of the Last Alleged Culpable Act or Omission

The circuit court's selection of December 16, 2019, as the operative occurrence date cannot be reconciled with either the record or Defendants' own motion practice. In their Reply Brief, Defendants expressly acknowledged that "[t]he latest, or most recent, date of alleged malpractice by the Defendants according to the Plaintiff was on May 21, 2020." Defs.' Reply Br. at 6, R. at 798. Yet the circuit court bypassed that date entirely and instead adopted December 16, 2019—the earliest conceivable date in the record—as the triggering event under SDCL § 15-2-14.2.

That ruling misapplied South Dakota's statute of repose framework. Under SDCL § 15-2-14.2, the repose period is measured from the defendant's "last culpable act or omission," not the first possible moment an error could have occurred. *See Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415; *Robinson-Podoll*, 2020 S.D. 5, ¶ 21, 939 N.W.2d at 40. Even under Defendants' own framing of Plaintiff's claims, the alleged malpractice necessarily extended beyond December 2019.

Plaintiff's claims do not arise from an imprecise drafting event in December 2019. They arise from Defendants' failure—during continuing representation—to accomplish the transfer of voting control they were retained to secure, and their subsequent failure to disclose or correct that deficiency.

Myers reviewed the Articles of Incorporation in or around September 2019 and confirmed that the AOI establishes two classes of stock—Class A voting stock and Class B non-voting stock—and that the total authorized shares consisted of 500,000 Class A and 500,000 Class B shares. Myers Dep. 35:24–36:18, R. at 679–680. He also reviewed the Written Consent to Action dated October 21, 2013, confirming that Dan held 125,000 shares (25%) and Joe held 375,000 shares (75%), meaning all 500,000 authorized Class A voting shares were already issued and outstanding. Myers Dep. 40:7–11, R. at 684. Despite that knowledge, Myers proceeded with transactions intended to place voting control in Dan's hands without ever amending the corporate structure to authorize additional voting shares, and without ever advising Dan that the transactions failed to accomplish the intended result. *See* Myers Dep. 60:1–25, R. at 704.

Plaintiff's Complaint alleges that "Myers did not amend the AOI of Duling Sons nor did he take any action to try to ensure the shares transferred to Dan were a legitimate transfer throughout the time Dan remained the sole officer and Director of Duling Sons." Compl. ¶ 23, R. at 4. Plaintiff further alleged that Myers could have cured this deficiency at any time during ongoing representation by amending the AOI to authorize additional

Class A voting shares at any point during which Dan remained the sole officer and Director of Duling Sons, but he never did. *See* Compl. ¶ 25, R. at 4.

Perhaps more significantly, from April 2, 2020, through May 2021, Myers represented both Dan Duling individually and Duling Sons, Inc. without disclosing the potential conflict or seeking a waiver. Myers entered into a separate engagement agreement to represent Duling Sons, Inc. dated April 2, 2020. Myers Dep. 64:14–16, R. at 708. When asked at deposition whether the "call and waiver" referred to in his April 2, 2020, time entry was a conflict waiver, Myers confirmed it was not—it was "a calling waiver of notice of the special meeting." Myers Dep. 70:18–25, R. at 714. Myers further confirmed he did not send Dan a letter advising that his individual representation had ceased. Myers Dep. 71:7–10, R. at 715.

During that ongoing dual representation, Myers negotiated the May 21, 2020, Repayment Agreement with MetLife, pursuant to which Dan personally paid $400,000 and executed a $1,000,000 guaranty, based on his understanding that he controlled the corporation. Myers Dep. 77:17–25, R. at 721. When asked who represented Dan individually with respect to each of those personal obligations, Myers testified: "He was representing himself." Myers Dep. 73:12, 73:22, R. at 717. The picture that emerges is not one where Myers's corporate representation cleanly ended and Dan stood alone—it is one where Myers remained functionally in the middle, negotiating on behalf of Duling Sons while Dan bore personal financial exposure that Myers neither disclosed nor advised him to obtain independent counsel about.

Plaintiff specifically alleged that Myers "had until May 21, 2020, to correct any deficiencies in the corporate record of Duling Sons or amend the AOI to allow for the share transfer he facilitated" and "took no action." Compl. ¶ 25, R. at 4. This language frames May 21, 2020, as the *last* opportunity Myers had to cure—not the moment malpractice crystallized. Goosmann's representation of Duling Sons continued through at least the date of the March 2, 2021, ruling by Judge Rank, and billing and communications continued through May 22, 2021. R. at 140 (Hoskins Decl. Ex. A at 6); R. at 787.

Defendants' theory assumes the alleged malpractice was complete once the transaction documents were drafted. Plaintiff's theory is different. Plaintiff alleges Defendants were retained to secure voting control—not merely document a transaction—and that Defendants continued representing Dan after learning facts that revealed that objective had not been accomplished. Under Plaintiff's theory, the relevant question is not when the documents were signed, but when Defendants' obligation to accomplish, disclose, or correct the alleged error ended. The ongoing representation and continuing failure to disclose or correct the alleged deficiency permit competing inferences regarding the date of Defendants' last culpable act or omission.

At minimum, the record establishes genuine disputes concerning whether Defendants' alleged malpractice extended through May 21, 2020, or later. The circuit court erred in resolving that issue as a matter of law based on December 16, 2019.

3. The Record Supports a Finding That Defendants' Continuing Omissions and Failure to Disclose Extended Well Beyond May 21, 2020

Defendants correctly note that continuous representation does not toll the statute of repose. But *Robinson-Podoll* recognized a separate principle: continuing omissions and nondisclosure may delay the occurrence date itself.

Robinson-Podoll held that "[g]enerally, when a tort involves a continuing injury, the cause of action accrues and the statute of limitations commences when the wrong terminates." *Robinson-Podoll*, 2020 S.D. 5, ¶ 44, 939 N.W.2d at 46 (quoting *Alberts v. Giebink*, 299 N.W.2d 454, 456 (S.D. 1980)). The court further explained that the occurrence date under the continuing tort doctrine is delayed when the plaintiff shows "(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." *Robinson-Podoll*, 2020 S.D. 5, ¶ 44, 939 N.W.2d at 46–47 (quoting *Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, ¶ 26, 878 N.W.2d 406, 415).

Defendants argued below that no independent claim may arise merely from an alleged violation of the Rules of Professional Conduct. *See Behrens v. Wedmore*, 2005 S.D. 79, ¶ 52, 698 N.W.2d 555, 576. But South Dakota law is equally clear that "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." *Robinson-Podoll*, 2020 S.D. 5, ¶ 33, 939 N.W.2d at 44.

More importantly, *Robinson-Podoll* recognized that an attorney's obligations do not end once an error occurs: "a lawyer has a professional duty of care in South Dakota to notify a client of an act, error, or omission that is reasonably expected to be the basis of a malpractice claim." *Robinson-Podoll*, 2020 S.D. 5, ¶ 41, 939 N.W.2d at 46. That duty extends further: when a potential malpractice claim creates a conflict of interest disqualifying the lawyer from continued representation, it implicates the fiduciary duty of loyalty as well as the professional standard of care. *Am. Zurich Ins. Co. v. Palmer*, 529 F.Supp.3d 1023, 1030 (D.S.D. 2021) (predicting that the South Dakota Supreme Court would recognize that "an attorney can be held liable for breach of fiduciary duty for failure to disclose a possible malpractice claim if the potential claim creates a conflict of interest that would disqualify the lawyer from representing the client"); *see also Robinson-Podoll*, 939 N.W.2d at 44 (stating that "a lawyer's duty to disclose an error ... may implicate both a fiduciary duty and the professional standard of care owed by an attorney to a client").

The standard for when that fiduciary duty of disclosure is triggered is met here. A fiduciary duty of disclosure arises "[w]hen the lawyer's interest in nondisclosure conflicts with the client's interest in the representation." *Am. Zurich*, 529 F.Supp.3d at 1030 (quoting *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009)). More specifically, "the lawyer must know that there is a non-frivolous malpractice claim against him such that 'there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by' his own interest in avoiding malpractice liability." *Id.* (quoting *Robinson-Podoll*, 939 N.W.2d at 45). Under that standard, it is the untimeliness of disclosure—not merely its absence—that can constitute a breach: an "untimely disclosure of potential malpractice would plausibly create a substantial risk of a conflict of interest between attorney and client." *Id.* at 1031.

Viewed in the light most favorable to Plaintiff, the record would permit a factfinder to conclude that standard was satisfied. By no later than May 2020, when Myers negotiated the Repayment Agreement placing $1,400,000 in personal exposure on Dan premised on Dan's belief that he held majority voting control, Myers possessed actual knowledge of a non-frivolous malpractice claim against himself: that the December 2019 share transactions had not accomplished the voting-control transfer he had been retained to secure and that Dan had now incurred significant personal expense based on a mistaken belief that it had. Myers's own handwritten notes confirm this—"Would not have paid $400,000, if not majority shareholder"—and Myers confirmed in deposition that Dan's agreement to assume those obligations was based on that very belief. Myers Dep. 77:17–25, R. at 721. Yet Myers's interest in avoiding that malpractice exposure conflicted directly with Dan's interest in knowing that the corporate structure was defective and that his financial exposure was premised on a false foundation. That conflict continued throughout Defendants' ongoing representation of both Dan and Duling Sons. "Imposing a legal duty to disclose such an act, error, or omission serves the purpose of ensuring that a client is able to make an informed decision about how best to proceed under such circumstances." *Robinson-Podoll*, 2020 S.D. 5, ¶ 41, 939 N.W.2d at 46.

That duty was never satisfied. Defendants' representation of Duling Sons continued through at least March 2, 2021, when Judge Rank issued her rulings, and billing and communications continued thereafter into May 2021. R. at 140 (Hoskins Decl. Ex. A at 6); R. at 787–788. Throughout this period, Myers continued to represent the entity whose corporate deficiency he had failed to identify, correct, or disclose, while never informing Dan that the share transfer had not accomplished its intended purpose, that Dan lacked the voting control he believed he possessed, or that Dan's personal financial exposure under the MetLife agreement was premised on a false foundation.

Under *Robinson-Podoll* and *Am. Zurich v. Palmer*, Myers's continuous and unbroken failure to disclose constitutes a separate course of ongoing tortious conduct, the last act of which occurred no earlier than the termination of Defendants' representation in

March 2021. Three years from that date—March 2024—plus the 640 days of tolling Plaintiff contends applies, Tr. 24, extends the filing deadline well past February 21, 2025.

Viewed in the light most favorable to Plaintiff, the record supports a finding that Defendants' alleged wrongdoing did not end in December 2019—or even necessarily in May 2020—but instead continued through ongoing representation and repeated failures to disclose or correct known deficiencies. At minimum, those issues presented factual questions that could not properly be resolved on summary judgment. The trial court's ruling never engaged with the continuing tort doctrine or the duty-to-disclose framework recognized in *Robinson-Podoll*—a case Defendants themselves cited as controlling authority. This was reversible error.

I. The Circuit Court's Occurrence-Date Error Was Outcome Determinative Because It Prevented Consideration of Plaintiff's Alternative Timeliness Arguments

The circuit court's selection of December 16, 2019, as the operative occurrence date was not harmless. That ruling eliminated the need to consider whether Plaintiff's claims remained timely under later occurrence dates and rendered irrelevant unresolved disputes concerning the parties' tolling agreements.

Defendants acknowledged below that, under Plaintiff's theory of the case, the latest alleged malpractice occurred on May 21, 2020, and that the parties agreed to at least "1 year and 244 days" of tolling. Defs.' Br. at 4, R. at 350. Under Defendants' own calculations, that produced a repose deadline of January 22, 2025—approximately thirty days before this action was commenced. Defs.' Reply Br. at 8, R. at 800.

Plaintiff argued below that additional tolling applied under two independent theories: first, that the parties agreed to a longer nine-month extension of the second tolling period than Defendants later recognized, R. at 631–632 (Ogborn Decl. ¶¶ 7–15);

and second, that the parties entered an additional 31-day extension in October 2024. R. at 637 (Ogborn Decl. Ex. B); R. at 783. Plaintiff's position was that, if credited, those extensions rendered the February 21, 2025, commencement timely.

South Dakota courts have consistently recognized that "[s]tatute of limitations questions are normally for the jury" and that summary judgment is proper on the issue only "when application of the law is in question." *Keegan v. First Bank of Sioux Falls*, 519 N.W.2d 607, 611 (S.D. 1994). "Summary judgment is therefore improper where there is a dispute of material fact which would affect the application of the statute of limitations." *Id.*

The circuit court never reached those questions. Instead, the court concluded that the statute of repose began running on December 16, 2019, and expressly determined that the tolling issues therefore did not matter because the claims remained untimely even under Plaintiff's calculations for agreed upon tolling. Tr. 36. As a result, the court made no findings regarding the existence, scope, enforceability, or effect of the disputed tolling periods.

If this Court concludes that the occurrence date cannot be fixed at December 16, 2019 as a matter of law, the tolling issues become material and should be addressed by the circuit court in the first instance.

J. The Circuit Court's Ruling Rested on an Occurrence Date Neither Party Presented as Dispositive

Independent of the substantive error discussed above, reversal is warranted because the circuit court granted summary judgment based on a legal theory that neither party presented as dispositive.

Defendants' Motion for Summary Judgment did not ask the circuit court to determine that December 16, 2019, constituted the operative occurrence date under SDCL § 15-2-14.2. To the contrary, Defendants acknowledged below that the latest alleged malpractice occurred on May 21, 2020, and framed their timeliness arguments accordingly. Defs.' Reply Br. at 8, R. at 800. Plaintiff's opposition likewise addressed timeliness using the occurrence dates advanced by Defendants and argued that later acts, omissions, and tolling rendered the action timely. R. at 619–629.

The circuit court adopted neither party's framework. During oral argument, the court raised December 16, 2019, as the operative date and ultimately ruled from the bench that "if there was any professional negligence or malpractice," it occurred "on or about December 16 of 2019." Tr. 36. That determination became dispositive of the motion and rendered the parties' disputes regarding continuing omissions and tolling immaterial.

South Dakota law is clear that a circuit court errs when it grants summary judgment on a legal theory not raised or briefed by the parties, without giving the non-moving party adequate notice and a meaningful opportunity to respond. *Brown v. Hanson*, 2007 S.D. 134, ¶ 19, 743 N.W.2d 677, 682 ("[s]ua sponte orders of summary judgment will be upheld only when the party against whom judgment will be entered was given sufficient notice and an adequate opportunity to demonstrate why summary judgment should not be granted") (citation omitted); *Betty Jean Strom Trust v. SCS Carbon Transport, LLC*, 2024 S.D. 48, ¶ 39, 11 N.W.3d 71, 87 (same, citing *Brown v. Hanson*).

In *Leonhardt v. Leonhardt*, 2012 S.D. 71, 822 N.W.2d 714, the circuit court heard a motion for summary judgment on the ground that an oral lease violated a twenty-year statutory maximum, but during the hearing the court raised the statute of frauds—an issue neither party had briefed on the motion. The court granted summary judgment on the statute of frauds ground. This Court reversed, noting: "there is a greater possibility for error when the party opposing the summary judgment motion may be able to show that a genuine issue exists but has not done so because the facts relating to the particular legal principles were not in issue." *Leonhardt*, 2012 S.D. 71, ¶ 12, 822 N.W.2d at 717 (citation omitted). "[A] court should notify the parties when it intends to rely on a legal doctrine or precedents other than those briefed and argued by the litigants." *Id.* (citation omitted); *see also Heisler v. Metro. Council*, 339 F.3d 622, 631 (8th Cir. 2003) (holding that "[i]t is fundamentally unfair to the nonmoving party to require her to address issues not addressed by the moving party in anticipation that the district court might rely on some unidentified issue to grant the motion").

Critically, *Leonhardt* confirms that a sua sponte ruling on an unargued theory can be excused only if the error was harmless, meaning the record was "fully developed" and the non-moving party "suffered no procedural prejudice." *Leonhardt*, 2012 S.D. 71, ¶ 14, 822 N.W.2d at 718 (citation omitted). Procedural prejudice exists where the non-moving party "may possess evidence [it] did not have a meaningful opportunity to present" to the circuit court. *Id.* ¶ 16, 822 N.W.2d at 718–719.

That prejudice is concrete. Because neither party litigated December 16, 2019, as the operative occurrence date, Plaintiff had no reason to develop alternative arguments tailored to that theory, including whether later omissions independently delayed the occurrence date and whether additional tolling rendered the action timely. The court's ruling therefore short-circuited factual and legal disputes that otherwise remained material.

Plaintiff does not contend the circuit court lacked authority to question the parties' proposed occurrence dates. But once the court settled on an entirely different date as the basis for dismissal, fairness required adequate notice and an opportunity to respond. Because Plaintiff received neither—and because December 16, 2019, is unsupported as the occurrence date under the governing statute of repose—the Order granting summary judgment should be reversed.

CONCLUSION

The circuit court selected December 16, 2019, as the occurrence date under SDCL § 15-2-14.2 even though the parties litigated timeliness based on substantially later conduct. Viewed in the light most favorable to Plaintiff, the record supports competing inferences concerning Defendants' last culpable act or omission and the timeliness of Plaintiff's claims. Plaintiff respectfully requests reversal and remand for further proceedings under the correct occurrence-date framework.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

Respectfully submitted this 1st day of June 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned attorney certifies that this Appellant's Brief was prepared using a proportionally spaced typeface, and complies with the type volume limitations of SDCL § 15-26A-66(b)(2). The brief contains 6,416 words / 34,224 characters, as counted by the word-processing system used to prepare the brief, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel.

Dated this 1st day of June 2026.

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CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that on this 1st day of June 2026, **APPELLANT'S BRIEF** was filed with the Clerk of the Supreme Court of the State of South Dakota via the Odyssey File and Serve System, Supreme Court Case No. 31381, in accordance with the applicable rules of appellate procedure.

Dated this 1st day of June 2026.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

LESLEY RUSSELL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL E. DULING,

Plaintiff/Appellant,

vs.

GOOSMANN LAW FIRM, P.L.C.; AND JEFFREY T. MYERS,

Defendants/Appellees.

Appeal No. 31381

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

The Honorable Christie Klinger
Presiding Circuit Court Judge

Amended Notice of Appeal filed on February 16, 2026

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Preliminary Statement

Appellees Goosmann Law Firm, P.L.C. and Jeffrey T. Myers are collectively referred to as "Goosmann," and may also be referred to as "Goosmann law firm" and "Attorney Myers." The Appellant, Lesley Russell, as Personal Representative of the Estate of Daniel Duling, is referred to as "the Estate." Daniel Duling may be referred to as "Dan." Joseph Duling may be referred to as "Joe." Citations to the settled record are designated as "SR" followed by the page number(s). Citations to the transcript from the summary judgment hearing appears as "HT" with the referenced page number(s).

Goosmann law firm and Attorney Myers respectfully maintain that the issues on appeal can be decided through an application of well-settled principles of South Dakota substantive law based on the undisputed material facts established at the summary-judgment stage, and oral argument is neither necessary, nor beneficial. If, however, this Court determines that oral argument would be helpful, Goosmann and its attorneys would be pleased to appear and respectfully request the opportunity to participate.

Jurisdictional Statement

Goosmann agrees with the Estate's Jurisdictional Statement. Jurisdiction is not contested.

Statement of Issues Presented

1. Whether the circuit court erred in determining that the Estate's claims were untimely under SDCL § 15-2-4.2.

Consistent with the undisputed material facts, the trial court held that Goosmann's alleged malpractice occurred on December 16, 2019, and the Estate's attempted claims were barred by the statute of repose under SDCL § 15-2-4.2.

SDCL § 15-2-4.2

Paulsen v. McKennan, 2025 S.D. 37, 24 N.W.3d 522.

Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office, 2020 S.D. 5, 939 N.W.2d 32.

Statement of the Case

This appeal represents what is hopefully the final chapter of years of contentious litigation involving Joseph Duling, Daniel Duling, and the ownership and control of a closely held family corporation called Duling Sons, Inc. Joe, Dan, and the corporation have been parties to several state court lawsuits as well as a still-pending federal bankruptcy proceeding. The legal battles involving the "dueling" Duling brothers continued even after Dan's unexpected passing in 2022, with his sister, Leslie Russell, representing his Estate in the bankruptcy and attempting to bring this legal malpractice action against Goosmann law firm and Attorney Myers. After Dan's passing, the Estate notified Goosmann of its intent to pursue a malpractice claim, but because of the pending bankruptcy it proposed a tolling agreement. The Estate's rationale was that the existence, and amount, of any damages could be impacted (or eliminated) by the outcome of the bankruptcy.

Written tolling agreements were executed, although there was later a disagreement regarding the collective duration, or extent, of the stipulated tolling. Regardless, Goosmann law firm and Attorney Myers never admitted negligence related to the tolling agreements, and they did not perceive a credible threat of actual litigation based on the facts.

The Estate attempted to commence this legal malpractice action on February 21, 2025, through personal service on both Goosmann law firm and Attorney Myers. SR 1-15. The Complaint asserted three claims: (1) professional negligence, or legal malpractice; (2) breach of fiduciary duty; and (3) breach of contract. SR 2-9. Goosmann law firm and Attorney Myers timely answered and affirmatively asserted that the Estate's claims were time-barred under SDCL §15-2-4.2. SR 16-25. With their Answer they included third-party claims against other attorneys who had represented Dan and the Estate, including the Estate's attorneys. SR 16-25; 26-59; 72-73. The Estate's attorneys moved for dismissal of the third-party Complaint through retained counsel, but did not withdraw from the case. SR 91-130.

On December 31, 2025, Goosmann moved for summary judgment on the grounds that the Estate's claims were barred by the statute of repose under SDCL §15-2-4.2. SR 132-366. A hearing was held on January 23, 2026. SR 603; HT 1-38. The attorneys for Goosmann law firm and Attorney Myers appeared in person, together with the attorney defending opposing counsel on the third-party Complaint. HT 1-38; SR 819-820. Attorneys for the Estate participated via live video. HT 1-38; SR 819-820. At the conclusion of the hearing, the Honorable Christie Klinger, Sixth Judicial Circuit, granted Goosmann's summary judgment motion and dismissed the attempted legal malpractice claims on the merits, with prejudice. HT 33-38. The motion to dismiss Goosmann's third-party Complaint was denied as moot. SR 819-820. The formal order was entered on January 26, 2026. SR 821. The Estate timely filed a notice of appeal on February 16, 2026. SR 826-831.

Statement of the Facts

The material facts are set forth in the Statement of Undisputed Material Facts filed by Goosmann in moving for summary judgment. SR 356-365. The record reflects that the Estate either admitted the statements of fact advanced by Goosmann, or it simply objected without offering citations to evidence in the record. SR 630-789.

Dan hired Goosmann law firm and Attorney Myers to represent him personally and individually in a shareholder dispute with his brother Joe concerning Duling Sons, Inc. SR 357. The written retention agreement between Dan and Goosmann is dated September 10, 2019. SR 357. At the time, Joe did not have legal counsel, nor did the corporation. SR 357. Joe and Dan agreed to a shareholder meeting on

December 16, 2019. SR 357. Before the meeting, Dan presented Joe with a draft complaint of a lawsuit he planned to file if the matter could not be informally resolved. SR 357.

At the December 16, 2019 meeting, Joe resigned in writing as director, officer, and registered agent for the corporation; Dan was unanimously elected as an officer and director. SR 357. Joe voluntarily surrendered day-to-day control over the corporation to Dan, but Joe did not give up or transfer his shares. SR 358. At the time of the meeting, the corporation had 500,000 shares of voting stock and 500,00 shares of non-voting stock, as reflected in the Articles of Incorporation and Bylaws. SR 358. The Articles of Incorporation and Bylaws do not assign different dollar or par values to voting versus non-voting stock. SR 358. At the time of the December 16, 2019 meeting, the voting stock in the corporation had all been issued, with Joe owning 375,000 shares and Dan owning 125,000 shares. SR 358. The 500,000 shares of non-voting stock was still held by the corporation, and was unissued. SR 358.

Goosmann drafted the Minutes from the December 16, 2019 meeting as directed by Dan. The Minutes are accurate and complete, and they reflect that Joe and Dan voted and agreed to have the corporation issue 251,000 shares of stock to Dan as payment for money owed to him by the corporation. SR 358. There is no evidence that Joe ever intended or agreed to relinquish, forfeit, or transfer his shares in Duling Sons, Inc. SR 358. There is also no evidence that Joe and Dan, individually or collectively, ever intended or agreed to amend the Articles of Incorporation or Bylaws. SR 358.

Based on the actions taken at the December 16, 2019 meeting, Joe had 375,000 shares of voting stock and 0 shares of non-voting stock. SR 358. Dan had 125,000 shares of voting stock and 251,000 shares of non-voting stock. SR 358. Although Dan held a minority of the voting shares, he was the majority owner of the Corporation itself, with Joe owning a total of 375,000 shares and Dan owning a total of 376,000 shares. SR 358. There is no evidence that Joe and Dan agreed that the 251,000 shares issued to Dan at the December 16, 2019, meeting were to be voting shares. SR 358. Indeed, on December 16, 2019, the corporation had no voting shares to issue; only non-voting shares could have been issued to Dan. SR 358.

After the December 16, 2019, meeting, Dan was in charge of day-to-day operations and the finances of the corporation. SR 359. In March or April of 2020, Dan discovered that Joe and his wife had defaulted on a loan to MetLife, which involved a substantial sum of money secured by real estate owned by the corporation, and that MetLife had commenced a foreclosure action. SR 359. On or about April 2, 2020, Dan hired Goosmann law firm and attorney Myers to represent the corporation in MetLife's foreclosure. SR 359.

As President of Duling Sons, Inc., Dan noticed a shareholder meeting to take place on April 17, 2020. SR 359. At the time of this meeting, the Goosmann law firm and Attorney Myers were already providing legal services to the corporation. SR 359. Joe did not attend the meeting. SR 359. At this meeting, the corporation temporarily revoked or terminated Joe's shares for alleged breaches of his fiduciary duties during the time that he had been in charge. SR 359. The corporation also formally approved the retention of Goosmann to defend the corporation in the foreclose and to pursue additional claims against Joe, including an action to evict Joe and his wife from the property. SR 359. A state court judge later ruled that the temporary revocation or termination of Joe's shares was void, and legally ineffective. SR 361.

Goosmann appeared in the foreclosure as counsel for Duling Sons, Inc. and filed an Answer. SR 360. It also coordinated the initiation of civil lawsuits by Duling Sons, Inc., against Joe and his wife, one of which included Dan as a party, personally and individually, seeking damages for alleged conversion. SR 360. Dan communicated with MetLife and its attorneys and negotiated a repayment agreement on behalf of the corporation to suspend the foreclosure and avoid application of the default interest rate. SR 360. Dan also executed a limited personal guaranty to be personally liable up to $1 million if the property were to sell at foreclosure and the proceeds proved to be insufficient to cover the full amount owed to MetLife with interest, penalties, and attorney fees. SR 360. At the time Dan executed the limited personal guaranty, the value of the real property of the Corporation exceeded by several million dollars the amounts allegedly owed to MetLife and any other potential creditors. SR 360.

Goosmann law firm and Attorney Myers were involved in the communications between Dan, as President of Duling Sons, Inc., and MetLife and its attorneys regarding the repayment agreement and Dan's personal guaranty. SR 360. After becoming President of the corporation, Dan had also entered into a contract with Advantage Land Company to auction all of its real estate assets. SR 360. Goosmann was involved in those communications and with Dan's execution of the contract on behalf of the corporation with Advantage Land Company. SR 360.

In late 2020, Joe noticed a meeting of the corporation based on his position that he still held a majority of voting shares. SR 360. Dan objected, but attended the meeting through attorney Rachelle Norberg, who had been separately retained to represent the corporation in the tangential state court eviction and related proceedings. SR 360. Ms. Norberg participated via telephone. SR 361. At this meeting, Joe reinstated himself as President and took back control of the day-to-day operations of the corporation. SR 361. Superficially, this created uncertainty over who was in charge of the corporation. SR 361.

Through the state court litigation, the disputed ownership and control over Duling Sons, Inc. was resolved. SR 361. On March 21, 2021, the trial court determined that Joe was the owner of the majority of voting shares in Duling Sons, Inc., but that Dan was the overall majority owner of the corporation. SR 361. The trial court further determined that the attempted revocation of Joe's shares in April of 2020 was void and invalid. SR 361. Joe regained control over the day-to-day operations of the Corporation. SR 361.

Once the state court issued its ruling on March 21, 2021 that Joe was the majority voting shareholder, Goosmann law firm and Attorney Myers were, as a practical matter, terminated as legal counsel for Duling Sons, Inc. SR 361. Joe's attorneys assumed representation of the corporation. SR 361. Dan initially moved for reconsideration of the state court rulings through Ms. Norberg, but later withdrew his objections and elected not to appeal. SR 361.

After Joe regained control over the corporation, he canceled the auction with Advantage Land Company. SR 362. This prompted Advantage to file a state court civil lawsuit against Duling Sons, Inc. for breach of contract. SR 362. Duling Sons, Inc., in turn, filed a third-party complaint against Dan for entering into the listing agreement while he was President. SR 362.

On or about May 11, 2021, Dan e-mailed Goosmann and advised that, because of the third-party claims against him in the Advantage lawsuit, Attorney Myers may be a witness. SR 362. Consequently, Dan hired his present attorney to represent him in that lawsuit. SR 362. Throughout the tangential state court litigation, the MetLife foreclosure remained pending. SR 362. MetLife moved for summary judgment. SR 362. The corporation did not timely respond, and the trial court notified the litigants that she intended to enter summary judgment in favor of MetLife. SR 362. Just before the trial court could enter a formal order or judgment, Duling Sons, Inc., filed for bankruptcy. *See In re: Duling Sons, Inc.*, U.S. Bankr. D.S.D., No. 21-30026; SR 362.

In its bankruptcy petition, Duling Sons, Inc., listed as assets potential causes of action against Joe Duling and Dan Duling for improper actions and admissions while they were each in charge of the corporation. SR 362. Through the bankruptcy, all adversarial claims and causes of action by and between the corporation, involving third-parties, and by and between Joe and Dan, personally and individually, were fully and finally resolved and releases of liability were executed. SR 362. The settlement and releases were approved by the bankruptcy court. SR 362.

Developments in the bankruptcy case rendered Dan's personal guaranty moot, as MetLife was ultimately paid in full. SR 363. Dan was also reimbursed the $400,000 that he advanced from his personal funds related to the repayment agreement and aforementioned personal guaranty related to the events occurring in April and May of 2020. SR 363.

The bankruptcy is still pending as of the date of this filing. The Estate's attorneys in this case are also representing it in the bankruptcy, and represented Dan personally and individually prior to his passing in 2022. SR 362.

Goosmann law firm and Attorney Myers entered into two tolling agreements with the Personal Representative of the Estate for purposes of a threatened legal malpractice action. SR 363. The first tolling agreement suspended the statute of limitations from December 1, 2022, through December 1, 2023. SR 363. The second tolling agreement extended the tolling period through August 1, 2024, retroactive to December 1, 2022. SR 363. The two tolling agreements extend the applicable statute of limitations by a total of 1 year and 8 months, or 1 year and 244 days. SR 363.

The Estate attempted to commence this action on February 21, 2025. On December 31, 2025, Goosmann filed for summary judgment on the grounds that the Estate's claims were untimely and barred by the statute of repose under SDCL § 15-2-4.2. SR 347-355. Goosmann in no way admitted negligence in moving for summary judgment, instead focusing on the dates of the events referenced within the Complaint. SR 347-355. In its motion, Goosmann made several alternative arguments. SR 347-355. Initially, and to narrow the issues, Goosmann noted that it had been retained by, and provided legal services to, three separate and distinct clients: (1) Dan Duling, personally and individually; (2) Duling Sons, Inc., and (3) Duling Land & Cattle, Inc. SR 347-355. Goosmann argued that the malpractice lawsuit was limited to only legal services provided to Dan, personally and individually. SR 347-355. Goosmann noted that the Complaint did not allege negligence in legal services provided to Duling Land & Cattle, Inc., and argued that the Estate lacked standing to pursue claims on behalf of the corporation, which could only be asserted by the bankruptcy trustee. SR 347-355. The Estate did not respond to any of these arguments at the trial court level, nor does it argue on appeal that it can assert claims for legal services Goosmann provided to the corporation or to Duling Land & Cattle, Inc. SR 347-355.

As for the Complaint, Goosmann denied negligence but noted that the allegations of negligence involved three general events and distinct time periods: first, the December 19, 2020, meeting where Joe resigned as an Officer or Director and the corporation issued 251,000 shares of stock to Dan as payment for what the corporation owed him for past distributions or income; second, an April 17, 2020, meeting where the corporation revoked, or suspended, Joe's shares for alleged misconduct pending further investigation; and, finally, the May 21, 2020 repayment agreement related to the MetLife loan and foreclosure, where Dan paid

$400,000 to suspend the foreclosure and executed a limited personal guaranty. SR 347-355.

The Estate resisted summary judgment, primarily on the same grounds it argues on appeal, none of which are legally persuasive. In this appeal, the Court should look closely at Goosmann's Statement of Undisputed Material Facts and the Estate's responses thereto. SR 356-365; 630-789. Goosmann's undisputed facts were, for the most part, undisputed. SR 630-789. On the rare occasion the Estate did object, it failed to cite competent, competing, or contradictory evidence in the record sufficient to generate a genuine issue of material fact requiring resolution at trial. SR 630-789. Consequently, this Court should accept as established and true the version of facts submitted by Goosmann and Attorney Myers in moving for summary judgment.

Standard of Review

The summary judgment standard is well settled. Summary judgment "is properly regarded not as a disfavored procedural shortcut," but as an integral part of the rules of procedure "[...] which are designed to secure the just, speedy and inexpensive determination of every action." *Horne v. Crozier*, 1997 S.D. 65, 565 N.W.2d 50, 52 (quoting, *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). A party defending a claim "may, at any time, move with or without supporting affidavits for a summary judgment" in its favor. SDCL § 15-6-56(b). The Court must render the judgment forthwith, if the record evidence shows "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). The question is whether, viewing the evidence in a light most favorably to the non-moving party, the movant has shown "entitlement to judgment on the merits as a matter of law." *Advanced Recycling Sys., LLC v. Southeast Props., L.P.*, 2010 S.D. 70, ¶10, 787 N.W.2d 778, 783.

Goosmann and Attorney Myers moved for summary judgment based on the statute of repose under SDCL §15-2-14.2. Summary judgment is properly entered in favor of a defendant based on a statute of repose when the material facts are undisputed and establish as a matter of law that a claim is untimely. When a defendant has presumptively established the defense by showing the case was brought beyond the statutory period, the burden shifts to the plaintiff to establish the existence of material facts in avoidance of the statute of limitations. *Openhowski v. Mahone*, 2000 S.D. 76, 612 N.W.2d 579 (citing *Wissink v. Van De Stroet*, 1999 S.D. 92, 598 N.W.2d 213).

Statutes of repose serve as a vital function, and are designed to eliminate fraudulent and stale claims. A statute of repose defense should not be regarded with disfavor, and should instead be treated like any other defense. *Openhowski* at 580-581.

Argument

The trial court entered summary judgment in favor of Goosmann and Attorney Myers after finding the alleged negligence or malpractice occurred on December 16, 2019, making the attempted lawsuit untimely under SDCL §15-2-14.2. SR 819-820; HT 1-38. The trial court's ruling was consistent with the undisputed material facts and controlling South Dakota substantive law, and should in all respects be affirmed.

A. Goosmann law firm and Attorney Myers met their initial burden in moving for summary judgment based on the statute of repose.

Under South Dakota law, a motion for summary judgment based on the statute of repose involves two steps. *Healy v. Osborne*, 934 N.W.2d 557, 562 (S.D. 2019). First, the moving party moving must establish that the claims are superficially untimely. *Id.* At the summary judgment hearing, the Estate argued that Goosmann law firm and Attorney Myers failed to meet their initial burden in moving for summary judgment because they failed to show that the action had not been timely commenced. SR 14. The Estate's argument, however, strains the bounds of ordinary logic and was not supported with any citations to supporting law.

According to the Estate, Goosmann and Attorney Myers failed to clearly identify a date for when the alleged malpractice occurred because they denied negligence in their Answer. SR 14. In other words, the Estate argued that Goosmann failed to make an initial showing that the action was not timely commenced because they contested negligence. This argument was not a correct reflection of South Dakota law. This Court has never required that a party moving for summary judgment or dismissal based on a statute of repose must first admit negligence.

In spite of this bizarre argument to the trial court, on appeal the Estate does not persuasively argue (or even argue at all) that Goosmann and Attorney Myers failed to meet their initial burden of establishing the action was not timely commenced. Indeed, the record clearly reflects that Goosmann and Attorney Myers met their initial burden in moving for summary judgment.

The narrow issue before this Court is whether the Estate established, factually and legally, that their claims were timely commenced. The undisputed material facts prove that the Estate clearly failed to meet this burden, and the trial court's entry of summary judgment should be affirmed.

B. The trial court correctly determined that the alleged malpractice occurred on December 16, 2019, rendering the attempted lawsuit untimely.

In determining the appropriate statute of limitations, this Court does not blindly accept the labels that the Estate assigns to its various claims or counts within the Complaint. *See Rehm v. Lenz*, 1996 S.D. 51, 547 N.W.2d 560, 565;

Morgan v. Baldwin, 450 N.W.2d 783, 785 (S.D. 1990). Instead, it looks to the substance of the allegations. *Id.*

The Estate's Complaint asserted three causes of action: (1) professional negligence, or legal malpractice; (2) breach of fiduciary duty; and (3) breach of contract. SR 2-9. Each of these claims arise under SDCL §15-2-14.2, which provides a three-year limitations period for claims brought against an attorney or law firm for tort or breach of contract. *See In re Elizabeth A. Briggs Revocable Living Trust,* 2017 S.D. 40, 898 N.W.2d 465 (citing *O Toole v. Bd. of Trs. of S.D. Ret. Sys.*, 2002 S.D. 77, 648 N.W.2d 342, 347 ("[T]his court has long recognized a breach of fiduciary duty as a tort")); *see also Morgan*, 450 N.W.2d 783 ("In determining the applicable statute of limitations, it is the gravamen of the claim which governs and not the form in which it is pleaded."). Notably, the Estate has never disputed that its claims are governed by the three-year statute of repose set forth in SDCL §15-2-14.2.

The outcome of this appeal turns on the straightforward application of SDCL § 15-2-14.2, which provides:

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

Although colloquially referred to as a "statute of limitations," this Court has held that SDCL §15-2-14.2 operates as a "statute of repose." *See Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, 939 N.W.2d 32, 39; *Slota v. Imhoff & Assocs., P.C.*, 2020 S.D. 55, 949 N.W.2d 869, 873. The distinction between a statute of limitations, and statute of repose, is substantively significant and, in this case, dispositive.

A statute of limitations establishes a time limit for commencing an action after a claim accrues, whereas a statute of repose imposes a time limit for commencing an action after the occurrence of the allegedly negligent act or omission. *Id.*; *Green v. Siegel, Barnett & Schutz*, 1996 S.D. 146, 557 N.W.2d 396, 404; *Haberer v. Rice*, 511 N.W.2d 279, 287 (S.D. 1994). In addition, and especially pertinent to the case at hand, neither the continuous representation doctrine, nor equitable principles like tolling and estoppel, suspend or prolong the time within which an action must be commenced under SDCL §15-2-14.2. *Paulsen v. McKennan*, 2025 S.D. 37, 24 N.W.3d 522, 528.

In deciding whether SDCL § 15-2-14.2 bars the instant action, the trial court was required to determine when the alleged malpractice or negligence "occurred." The Estate's arguments seeking reversal fixate on this Court's cases (in both legal malpractice and medical malpractice cases) holding that the statute of repose is measured from a defendant's "last culpable act or omission." Estate's Appellate

Brief at 15; SR 619-629. The phrase "last culpable act or omission" is repeated throughout the Estate's appeal brief, as if it were some magical mantra that, if repeated enough, will have the talismanic effect of triggering reversal. The Estate's contrived game of *Rumpelstiltskin* is insufficient to generate a reversal.

The Estate's fixation on the "last culpable act or omission" is inconsistent with the clear language of SDCL §15-2-14.2 and is contrary to this Court's decisions interpreting and applying the statute of repose. *See Paulsen v. McKennan*, 24 N.W.3d 522 at 524. This Court's decisions in both legal and medical malpractice cases reflect that the date of the "last culpable act or omission" only becomes material when a plaintiff is unable to objectively identify specific negligent actions or omissions that caused the alleged injury. *See Robinson-Podoll*, 939 N.W.2d at 39; *Paulsen*, 24 N.W.3d at 524. The injury must be culmination of a series of actions or omissions, all of which were negligent. *See id.* Simply stated, the date of the "last culpable act or omission" is only material in cases that involve a *continuing tort*. *Id.* But when, like in this case, the trial court can identify a specific act or omission that caused the alleged injury, the continuing tort doctrine *does not apply*. *Id.*

The Complaint in this case does not allege, and for purposes of resisting summary judgment the Estate did not establish, that the alleged injury was the result of a continuing tort. To make that showing, the Estate had to prove (1) a continuous and unbroken course of negligence in the legal services provided by Goosmann law firm and Attorney Myers, and (2) that the services provided over the period of time in question were so closely related that they constituted one continuing wrong. *See Paulsen v. McKennan*, 2025 S.D. 37, ¶ 1, 24 N.W.3d 522, 524. As a matter of substantive law, for the continuing tort doctrine to extend the statute of repose, there must be *more than* ongoing representation. *Id.* The continuous representation doctrine also does not save an action from dismissal unless the underlying events, actions, or omissions were allegedly negligent. *See Robinson-Podoll*, 2020 S.D. 5, ¶ 44; *see also Pitt-Hart v. Sanford USD Med. Ctr.*, 2016 S.D. 33, 878 N.W.2d 406, 415.

The date when the attorney-client relationship ends is not relevant to the determination of whether an action is timely under SDCL § 15-2-14.2. *Id.* Furthermore, and pertinent to the case at hand, SDCL §20-9-1.1 provides that in negligence cases, causation cannot be premised on the theory or doctrine of "loss of chance." Although SDCL § 20-9-1.1 was adopted by the Legislature in response to the Supreme Court's decision in a medical malpractice case (*Jorgenson v. Vener*, 2000 S.D. 87, 616 N.W.2d 366), the plain language of the statute extends to "those actions founded upon an alleged want of 'ordinary care or skill [....]'" which clearly encompasses the Estate's attempted claim for legal malpractice. *See id.*

In moving for summary judgment, Goosmann and Attorney Myers focused on the allegations in the Complaint in arguing that the state of repose required dismissal on the merits. SR 347-355. This approach was consistent with this Court's decisions where it has considered, and even rejected, an application of the continuing tort doctrine to breathe life into an otherwise legally expired cause of action. *See Robinson-Podoll*, 2020 S.D. 5, ¶ 44; *see also Pitt-Hart*, 878 N.W.2d at 415.

The Complaint identified three general events of malpractice: the December 16, 2019 meeting; the April 17, 2020; and the May 21, 2020 Repayment Agreement. Because the Estate's Complaint identified specific events or instances of alleged malpractice, the trial court correctly focused on the dates of these events rather than the date of the allegedly last culpable act or omission. *See Robinson-Podoll*, 2020 S.D. 5, ¶ 44; *see also Pitt-Hart*, 2016 S.D. 33, ¶ 26, 878 N.W.2d at 415. But even if the Court had treated the allegations as asserting a continuing tort, based on the undisputed material facts, the last culpable act or omission for purposes of the relationship between Dan and the Goosmann law firm and Attorney Myers would have been on December 16, 2019. That is because the events that occurred in April and May of 2020 would not be considered "culpable," because they were not legally actionable by the Estate. The Estate has never established, or even argued, otherwise. Regardless, even if the events in

April and May of 2020 were "culpable" and legally actionable by the Estate, the statute of repose still bars recovery.

Looking first at the April 2020 events, that is when the corporation attempted to temporarily cancel or revoke Joe's voting shares using the services of the Goosmann law firm and Attorney Myers. SR 361. The legal services in question were provided to the corporation, and not to Dan personally and individually. SR 359. Dan does not have standing to pursue a malpractice claim on behalf of the corporation, and he fails to identify how he was personally and individually harmed by the events in April of 2020. "The majority rule is that an action to redress injuries to a corporation cannot be maintained by a shareholder on an individual basis but must be brought derivatively." *Landstrom v. Shaver*, 1997 S.D. 25, 561 N.W.2d 1, 12. In addition, once Duling Sons, Inc., filed for bankruptcy, any potential claims for legal malpractice arising out of the Defendants' pre-petition services to the Corporation became part of the bankruptcy estate, and could only be asserted by the Trustee. *See* 11 U.S.C. § 541(a)(1); *Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1002 (8th Cir. 2007). As a matter of law, Dan lacks standing to pursue claims for legal malpractice arising out of the April 17, 2020 meeting (or the execution of the Repayment Agreement, loan, and execution of the guaranty on May 21, 2020). *Id.* Regardless, Dan was directing

Goosmann and Attorney Myers as President of the corporation, not as an individual.[1] SR 358-360.

The events in May of 2020 were similarly not "culpable" because they did not prove grounds for a claim of legal malpractice. The record reflects that Goosmann and Attorney Myers did not provide legal services to Dan, personally and individually, in May of 2020. SR 360. The legal services being challenged as negligent were all provided to Duling Sons, Inc. SR 360. But even overlooking the Plaintiff's lack of standing to bring claims on behalf of the corporation, the Estate's suit was still not timely commenced. In moving for summary judgment, the Goosmann law firm and Attorney Myers focused on the events in May 2020 because it was the last, or most recent, event for purposes of the statute of repose. SR 347-355. Contrary to the Estate's arguments on appeal, however, that did not mean they were somehow waiving any arguments concerning the legal services provided in December of 2019 and April of 2020. The Goosmann law firm and Attorney Myers simply focused on the May of 2020 date to simplify the issues and expedite a dismissal on the merits.

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[1] As an aside, that also means that Dan was clearly aware in April of 2020 that Joe's voting shares had not been transferred or canceled as result of the meeting that happened on December 16, 2019. SR 364. Based on the record, and contrary to the Estate's arguments, there is no actionable claim based on an alleged failure to disclose because Dan had actual knowledge of the issues and facts.

Turning to the alleged events in May of 2020, as Goosmann and Attorney Myers argued below, Dan's loan of $400,000 to the corporation, and execution of the personal guaranty to stall the pending state court foreclosure action, did not cause him any injury or harm based on the outcome of the bankruptcy, wherein the Estate settled all claims involving Joe and Duling Sons, Inc. SR 361-362. Through the bankruptcy, and the settlement within the bankruptcy, Dan's personal guaranty was superfluous, never enforced, and ultimately extinguished and released. SR 362. Dan was also reimbursed the $400,000 he advanced or loaned to the corporation to delay the foreclosure. SR 362. Although Dan was never paid interest, the filings in the bankruptcy case reflect that his attorneys never sought interest. SR 362. Regardless, the undisputed material facts confirm the absence of injury or harm to Dan, personally and individually, from the events in May of 2020. Without underlying liability, there was no "culpable" action or omission that could support a claim for legal malpractice. SR 362.

In resisting summary judgment, the Estate never explained how, or why, the events in April and May of 2020 involved legal services being provided to Dan, personally and individually. Nor did the Estate establish that actions or omissions of Goosmann and Attorney Myers caused injury to Dan, which is essential to asserting a prima facie case of negligence. *See Peterson v. Issenhuth*, 2014 S.D. 1,, 842 N.W.2d 351, 356; *Barr v. Cole*, 2023 S.D. 60, 998 N.W.2d 343, 349. "The primary reason for a legal malpractice suit is to provide a remedy to clients who were harmed by their attorney's missteps. Requiring plaintiffs to prove that the underlying claim would have been successful is logical and proper. If the underlying claim would not have resulted in a favorable outcome for the clients, then there would have been no injury to remedy." *Id.* at 60; 998 N.W.2d at 349.

Causation is also unique because the alleged negligence of Goosmann and Attorney Myers involves transactional matters. The substance of the Estate's arguments is that different terms and conditions could have, or should have, been negotiated or attempted at the events in December of 2019 and in April and May of 2020. But this record does not support an inference that Joe would have agreed to forfeit or transfer his voting shares in the corporation, nor does it support the inference that he would have agreed to Dan having majority voting control. The absence of this necessary evidence, which is elemental to the Estate meeting its burden of proof, requires dismissal on the merits and further prevents the events from constituting "culpable" acts or omissions that would allow for an extension of the statute of repose based on the presence of a continuing tort. *See, e.g.*, *Gulfport OB-GYN, P.A. v. Dukes, Dukes, Keating, & Faneca, P.A.*, 283 So.3d 676, 678 (Miss. 2019) (affirming the trial court's entry of summary judgment in favor of defendants in legal malpractice case alleging negligence in drafting a noncompete because there was no evidence the opposing party in the underlying matter would have agreed to the terms and conditions that were allegedly improperly omitted); and *see Nail v. Husch Blackwell Sanders, LLP*, 436 S.W.3d 556, 565 (Mo. 2014) (explaining that a transactional malpractice plaintiff "must prove that [the other contracting party] would have agreed to the relevant provisions" and that "but for the negligent drafting [of the subject contract] the result would have been more favorable.")

Regardless, assuming for sake of argument only that Goosmann and Attorney Myers were negligent on May 21, 2020 (the latest, or most recent, alleged negligence), Dan (and his Estate) had three years to commence a civil legal malpractice lawsuit. The filing deadline was May 21, 2023. Even with the version of tolling advanced by the Estate, the attempted action was untimely and properly dismissed.

The Estate seeks reversal of the trial court's decision by urging the Court to ignore the specific allegations of negligence within the Complaint and, instead, adopt a broader and more expansive view that takes into account the alleged reason or purpose behind Dan retaining the services of Goosmann law firm and Attorney Myers. But during the summary judgment hearing, the Estate's attorney admitted that the malpractice claim focused on, and arose out of, the December 16, 2019 meeting, and the fact that the Minutes did not state that the shares issued to Dan by the corporation were "voting." The Estate's own attorney acknowledged that its strained theory of recovery involved the events of December 16, 2019, which supports the trial court's decision to treat that as the occurrence date of the alleged malpractice for purposed of applying SDCL §15-2-14.2.

The Estate's analytical approach on appeal is inconsistent with the plain language of SDCL §15-2-14.2, which requires a focus on when the alleged negligence occurred. Adopting the Estate's tortured interpretation of SDCL § 15-2-14.2 would lead to abroad results. *See Klein v. Sanford*, 2015 S.D. 95, 872 N.W.2d 802, 806 (citations omitted). In substance, following the Estate's flawed analysis would lead this Court down the perilous path of recognizing the continuous representation doctrine as an exception under SDCL §15-2-14.2, something it has rejected. *See Robinson-Podoll*, 2020 S.D. 5, ¶ 44; *see also Pitt-Hart*, 878 N.W.2d at 415. Under the Estate's approach, the repose period under SDCL §15-2-14.2 would be improperly extended, if not indefinitely tolled, based on the simple allegation, and mere speculation, that corrective action might have been taken.

Based on the undisputed material facts, the trial court correctly determined that the only legal services that could support an actionable, or "culpable," claim for legal malpractice by the Estate would have occurred at or around the time of the December 16, 2019 meeting, where Joe voluntarily relinquished control of the day-to-day operations of the corporation, Dan assumed control, and the corporation issued Dan additional shares for satisfaction of a preexisting debt which had the result of making Dan the majority owner of the corporation, but still left Joe as the majority owner of all voting shares.

The Estate argues that the negligence of Goosmann and Attorney Myers continued beyond the December 16, 2019 meeting up until the time that Joe took back control of the corporation in December of 2020. According to the Estate, Goosmann and Attorney Myers were negligent in failing to take the steps to transfer voting control from Joe to Dan. What the Estate glosses over, however, and fails to explain, is how Goosmann and Attorney Myers could have reasonably accomplished this objective. The Estate has never explained or identified what specific steps or actions could actually have been taken to effectuate the alleged transfer of voting control from Joe to Dan. Indeed, the undisputed material facts establish this was impossible under the circumstances. Based on the record, the only way voting control could have been transferred from Joe to Dan was voluntarily. It is undisputed that Joe voluntarily relinquished pushed control over the day-to-day operations of the corporation, but never forfeited his voting shares. SR 358. It is also undisputed that at the time of the meeting, the only shares the corporation could issue were non-voting, and that all voting shares had already been issued. SR 358. As a matter of fact, law, and ordinary logic, there is nothing that Goosmann and Attorney Myers could have done in December of 2019 to transfer voting control of the corporation to Dan without the involvement and consent of Joe. Clearly, Joe would not have consented, as confirmed by the extensive state court litigation.

The crux of the Estate's claim is that Goosmann and Attorney Myers should have provided within the Minutes, or otherwise taken additional, magical, unidentified steps, to render the issuance of additional voting shares to Dan, giving him control. On appeal, the Estate makes the related argument that Goosmann and Attorney Myers were negligent in failing to amend the amend the Articles and Bylaws or "otherwise take action" to implement a legally effective transfer of voting control. The flaw in the Estate's arguments is that there is no evidence that there ever was as agreement between Joe and Dan to transfer voting control. SR 358-365. Moreover, the Estate fails to establish that steps or actions short of litigation were available to transfer voting control without Joe's involvement and consent.

The state court litigation over who held voting control over the corporation was ultimately decided in favor of Joe, and against Dan. SR 360-361. The outcome of the state court litigation confirms that there is nothing that Goosmann and Attorney Myers could have unilaterally done on Dan's behalf to wrest voting control away from Joe. The trial court in that case held, among other things, that Dan's attempt to have the corporation revoke or suspend Joe's voting shares in

April of 2020 was void and legally ineffective. Notably, the Estate has never argued that the state court erred in ruling that Joe was the majority shareholder while Dan remained the majority owner, and it (actually, Dan) elected not to appeal that decision.

Contrary to the Estate's arguments on appeal, and its unsupported speculation that the outcome could have been different, the undisputed material facts confirm that Dan's alleged objective was impossible to obtain under the circumstances. There is nothing that Goosmann and Attorney Myers could have unilaterally done after the December 16, 2019 meeting to make Dan the controlling voting shareholder. We know that because Dan and the corporation tried to unilaterally suspend Joe's shares in April of 2020, but that was held to be void and invalid. The Estate claims that Goosmann and Attorney Myers could have modified or amended the article of organization or bylaws, but it has never shown, factually or legally, that Dan could have accomplished that unilaterally as the minority shareholder over Joe's objections.

Although this Court must resolve factual disputes in favor of the nonmoving party, the inferences the nonmoving party seeks to rely upon must be reasonable. *Koenig v. London,* 2021 S.D. 69, 968 N.W.2d 646, 657-58. The inferences the Estate asks this Court to make in reversing the trial court's decision are not just unreasonable, they are legally and logically impossible and contradict the undisputed material facts established at the summary judgment stage. The undisputed material facts do not support the inference that Joe would have cooperated to such an outcome, in fact it establishes the exact opposite, as reflected in Joe's successful litigation of this issue in the prior state court proceeding. A party resisting summary judgment cannot create a fact issue based upon "inferences that require 'speculation, conjecture, or fantasy.'" *Godbe v. City of Rapid City*, 2022 S.D. 1, 969 N. W.2d 208, 215. Ultimately that is all the Estate offers in this appeal, and that offering is a woefully insufficient basis for reversal.

The Estate makes a few additional arguments in pursuing reversal of the trial court's entry of summary judgment, all of which are meritless, and none of which warrant more than brief discussion.

First, the Estate argues that there was an ongoing conflict of interest by virtue of Goosmann and Attorney Myers also representing the corporation. Presumably, the Estate is referring to the April and May of 2020 events outlined within the Complaint, because no other events are mentioned. At the outset, the argument seems disingenuous and inequitable, because the evidence shows that Dan was handling the day-to-day operation of the corporation at the time, and was directing the actions or steps being taken by Goosmann and Attorney Myers for the corporation. Regardless, and as was argued at the trial court level, the Estate's argument overlooks that there is no private cause of action for an alleged violation of the Rules of Professional Conduct or Code of Ethics governing attorneys. *See Behrens v. Wedmore*, 2005 S.D. 79, ¶ 58, 698 N.W.2d 555, 578. With respect to certain rules, the South Dakota Supreme Court has explained: "[v]iolation of a Rule [of Professional Conduct] should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." *Id.* at 575-76 (citation omitted). The Estate cannot avoid summary judgment through vague and conclusory allegations of a conflict of interest on the part of the Goosmann law firm and Attorney Myers. Moreover, and more importantly, the Estate still does not explain, let alone establish factually, that it was injured by the alleged conflict. As previously explained, the undisputed material facts reflect that Dan was not harmed by executing the personal guaranty or by paying the $400,000 to delay the state court foreclosure, because full redress was obtained through the bankruptcy and related settlement involving Joe, the corporation, and any creditors. SR 363.

Next, in addition to arguing a continuing conflict of interest, the Estate contends that Goosmann and Attorney Myers failed to disclose information to Dan to Dan's detriment, which is characterized as ongoing or continuing malpractice. Again, the Estate fails to explain what information was not disclosed, nor does it identify facts within the record that would satisfy the elements needed for it to advance a viable, or legally "culpable," claim for legal malpractice. This Court should not reverse the trial court's decision based on Estate's purely speculative, and factually unsupported, contentions about a so-called non-disclosure.

Finally, the Estate improperly attempts to interject constitutional considerations into the case. The record leaves no room for this argument. The Estate claims the trial court's entry of summary judgment was based on a legal theory that was never presented or discussed by either of the parties, which in its view violated fundamental principles of procedural and substantive due process requiring reversal. This argument, however, was never made at the summary judgment hearing. The Estate's argument is also contradicted by the settled record. In moving for summary judgment, Goosmann and Attorney Myers argued that the Complaint set forth three general instances or events that were allegedly negligent, which occurred in December of 2019 and in April and May of 2020. The briefs clearly set forth their position that the only identifiable potentially actionable event for purposes of the statute of repose occurred in December of 2019 because the April and May of 2020 services involved their representation of the corporation, and what happened in May of 2020 did not cause Dan any injury, an essential element for a prima facie claim of negligence. Regardless, Goosmann and Attorney Myers explained that even if the Estate had standing related to the

April and May of 2020 events, the statute of repose still required dismissal of the action on the merits and with prejudice. SR 347-355.

The Court should reject the Estate's argument that it was somehow denied due process, because the record clearly reflects it had notice and an opportunity to respond to all of these arguments. Goosmann and Attorney Myers clearly argued that the December of 2019 events could not be pursued under a theory of legal malpractice based on the controlling statue of repose. The events in April and May of 2020 were also not actionable by the Estate, but, more importantly, were clearly time barred.

It should also be emphasized that procedurally, and substantively, to avoid summary judgment, it was *the Estate's burden* to establish that its attempted action was commenced within the statute of repose. *See Openhowski*, 2000 S.D. 76, 612 N.W.2d 579 (citing *Wissink v. Van De Stroet*, 1999 S.D. 92, 598 N.W.2d 213). Goosmann and Attorney Myers clearly argued that the December of 2019 events could not be pursued under a theory of legal malpractice based on the controlling statue of repose. At the end of the day, the Estate simply failed to meet its burden of proving that the action was timely commenced, or that it even had a viable cause of action. No amount of additional notice would have changed the outcome of the summary judgment hearing in this case, because the facts and law required that summary judgment be entered.

Conclusion

This entire lawsuit is premised on the Estate's subjective, and completely unreasonable, view that Goosmann and Attorney Myers were negligent in failing to meet Dan's unrealistic goal of unilaterally assuming voting control over the corporation, something which was legally and factually impossible according to the record. The unfairly speculative nature of the Estate's claims is evident in its inability to explain how and when voting control could have been transferred without Joe's involvement and approval. The state trial court's decision that invalidated the attempted unilateral revocation or suspension of Joe's voting shares only confirms there was nothing more, or different, that Goosmann and Attorney Myers could have done that might have changed the outcome.

The statue of repose provides the most effective mechanism for this Court to dispose of the Estate's fabricated, contrived, and legally- and factually-deficient lawsuit. The undisputed material facts not only establish that the attempted action is untimely and beyond the statute of repose, but more fundamentally confirm that there is no viable claim for legal malpractice as a matter of law. Contrary to the Estate's position, the mere fact Dan did not fulfill his personal goal or objective does not support an inference that Goosmann and Attorney Myers were negligent. For the Court to adopt such an expansive and vague approach to determining when alleged negligence occurs for purposes of applying the statute of repose would render SDCL §15-2-14.2 meaningless. All a plaintiff would have to do is claim that he was not personally satisfied with the ultimate outcome of the case, which is inconsistent with South Dakota legal principles applying to claims of professional negligence.

For the foregoing reasons, Goosmann and Attorney Myers respectfully request the trial court's entry of summary judgment be affirmed in all respects, and in the process, provide closure and put to rest the acrimony and legal machinations related to the "dueling" Dulings. The Estate's attempted legal malpractice claim is barred under SDCL §15-2-14.2. This Court can and should affirm the trial court's decision without considering the arguments at the trial court level involving the tolling agreements because, even under the Estate's misguided views on the subject, the statute of repose still requires dismissal. The trial court made the right decision, for the rights reasons, and should be affirmed.

Respectfully submitted this 14th day of July, 2026.

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Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4), Appellants' counsel states that the foregoing brief is typed in proportionally spaced typeface in Equity A Tab 13 point. The word processor used to prepare this brief indicated that there are a total of 8,572 words in the body of the brief.

/s/ Sarah Baron Houy
Sarah Baron Houy

Certificate of Service

The undersigned hereby certifies that July 14, 2026, the foregoing *Appellees' Brief* was filed electronically with the South Dakota Supreme Court and that the original of the same was filed by mailing the same to:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 31381

LESLEY RUSSELL, as PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL E. DULING,

Plaintiff/Appellant

vs.

GOOSMANN LAW FIRM, P.L.C.; and JEFFREY T. MYERS

Defendants/Appellees

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

HONORABLE CHRISTIE KLINGER
PRESIDING CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Amended Notice of Appeal
Filed February 16, 2026

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Appellees' brief confirms that the circuit court resolved disputed inferences against Plaintiff. Appellees acknowledge that the Complaint and summary-judgment record referenced December 2019, April 2020, and May 2020 conduct, but they ask this Court to treat the December 16, 2019 transaction as the only legally "culpable" event under SDCL § 15-2-14.2. Appellees' Brief at 21-28. Their argument depends on deciding, as a matter of law, that all later omissions were non-actionable because of standing, damages, causation, the scope of representation, and asserted impossibility. Appellees' Brief at 22-35.

That is not a proper summary-judgment inquiry. Plaintiff does not contend that Myers' continued representation tolled an already-running repose period. Plaintiff contends that Defendants committed later culpable omissions, including failing to disclose the alleged December error while continuing to participate in matters in which Dan personally acted on the belief that the December transaction had given him the control position Myers knew he desired. *See* SR 704, 716-17, 721. The record, viewed favorably to Plaintiff, permits that inference.

I. *Robinson-Podoll* controls the occurrence-date analysis; *Paulsen* confirms that later conduct must be concrete, not speculative.

Appellees' argument conflates a prohibited tolling theory with the continuing-tort theory recognized in South Dakota repose cases. *Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*, 2020 S.D. 5, ¶¶ 21, 31, 939 N.W.2d 32, 41-42, held that SDCL § 15-2-14.2 is a statute of repose and that continuing representation and fraudulent nondisclosure do not toll it. But the Court did not hold that the first negligent act is always the only possible occurrence date. To the contrary, *Robinson-Podoll* recognized that a lawyer has a professional duty to notify a client of an act, error, or omission reasonably expected to be the basis of a malpractice claim, and held that factual questions remained as to whether the lawyer's later ongoing failure to disclose supported a separate malpractice claim occurring less than three years before suit. *Id.* ¶¶ 46-47, 939 N.W.2d at 46-47.

That distinction controls this appeal. Plaintiff does not rely on representation alone. The later conduct matters because the record permits a finding that Myers failed to disclose the alleged voting-control defect while Dan personally paid $400,000 and signed a $1,000,000 guaranty based on his belief that he held majority control. SR 716-17, 721.

Appellees' theory also conflicts with the repose framework confirmed in *Pitt-Hart* and *Paulsen*. *Pitt-Hart v. Sanford USD Medical Center*, 2016 S.D. 33, ¶ 18, 878 N.W.2d 406, 413, explains that a statute of repose is measured from the "last culpable act or omission of the defendant," not from claim accrual or discovery. Although repose periods are not tolled, *Pitt-Hart* holds that commencement may be delayed where the plaintiff shows a continuous and unbroken course of negligent conduct so related as to constitute one continuing wrong. *Id.* ¶ 26, 878 N.W.2d at 414-15.

Paulsen v. Avera McKennan, 2025 S.D. 37, ¶¶ 12-13, 24 N.W.3d 522, 525-26, confirms rather than undermines Plaintiff's position. There, the continuing-tort theory failed because the plaintiff's claims were premised on one completed hysterectomy and the asserted later tort theory was speculative. Here, Plaintiff has identified concrete later conduct: the new April 2020 corporate engagement, SR 708; the absence of any termination letter, file-closing letter, or conflict waiver, SR 714-15; the May 21, 2020 repayment agreement imposing personal obligations on Dan, SR 716; Myers' testimony that Dan had no individual representation and was "representing himself" as to those obligations, SR 717; and Myers' contemporaneous note and testimony tying Dan's $400,000 payment to Dan's belief that he was the majority shareholder, SR 721.

The distinction between continuing tort and continuing professional relationship also matters. *Schmiedt v. Loewen*, 2010 S.D. 76, ¶ 14, 789 N.W.2d 312, 316, makes clear that continuing tort and continuing treatment are not interchangeable doctrines. The inquiry turns on the continuing wrong, not merely the duration of the professional relationship. *Id.* ¶¶ 14-15, 789 N.W.2d at 316. Likewise here, Plaintiff does not argue that representation alone delayed repose. Plaintiff argues that Defendants' alleged failure to disclose or correct the control defect continued into May 2020, when Dan personally assumed substantial obligations while allegedly uninformed. SR 716-17, 721.

II. The record permits a finding that Defendants' later nondisclosure became independently culpable by May 21, 2020.

The December 2019 evidence does not establish Appellees' impossibility theory as a matter of law. It supports Plaintiff's inference that the parties' conduct was consistent with Dan obtaining control, or at least with Joe's willingness to proceed with corrective action had Myers identified the problem. At the December 16, 2019 meeting, Joe resigned as director, officer, and registered agent, Dan was elected sole director and officer, and the corporation authorized issuance of 251,000 shares to Dan. SR 357-58. Myers testified that the Articles distinguished Class A voting stock from Class B non-voting stock, but no one discussed before the December meeting what class of shares would be issued to Dan, and "[a]ll that was discussed was Dan having the controlling interest in the corporation." SR 679-80, 684, 704.

Appellees ask the Court to infer that corrective action was impossible because Joe would not have cooperated. Appellees' Brief at 28-35. The record does not compel that inference. A factfinder could reasonably infer from Joe's December conduct, including his resignation from all corporate positions and participation in a transaction discussed in terms of Dan having control, that Joe may have agreed to corrective action had Myers identified the voting/non-voting problem when the parties were still cooperating. SR 357-58, 704. Plaintiff need not prove that inference conclusively at summary judgment. It is enough that Appellees' contrary inference is not the only reasonable one.

The point is not that Myers could have unilaterally provided Dan voting control, or that Plaintiff must now identify the precise corporate mechanism that would have been used. The point is narrower and stronger: Myers did not identify any voting-control defect that needed to be corrected, despite knowing that Dan desired control and was proceeding under the belief that control had been achieved. SR 704, 721. That omission is what made the later nondisclosure theory material.

The May 21, 2020 repayment agreement then made the nondisclosure issue concrete. The repayment agreement required Dan personally to pay MetLife $400,000 and execute a $1,000,000 guaranty, and Dan testified that he personally made the $400,000 payment from his stock portfolio and checking accounts. SR 716. Myers testified that he negotiated the repayment agreement for Duling Sons, that Dan had no individual representation concerning the agreement, and that Dan was "representing himself" individually as to both the $400,000 payment and the $1,000,000 guaranty. SR 716-17.

That evidence matters because Defendants had not clearly ended the individual representation or clearly disclosed the change in Myers' role before Dan personally assumed obligations. Defendants began by representing Dan personally in the shareholder dispute, the September 10, 2019 engagement agreement identified Daniel Duling as the client, and Defendants admitted they were initially retained to represent Dan personally and individually. SR 357; *see also* SR 679-80. The April 2, 2020 agreement then opened a separate corporate matter for Duling Sons in the MetLife foreclosure. SR 708. But Myers admitted he did not obtain a conflict waiver, did not send Dan a letter saying he could no longer represent Dan personally, did not send a file-closing letter, and never officially closed Dan's individual matter. SR 714-15.

Those facts do not matter because a closing letter is a formal prerequisite to ending every attorney-client relationship. They matter because the parties' course of dealing created a factual dispute over what Dan reasonably understood Myers' role to be when Dan later undertook personal obligations. Nothing in the record establishes, as a matter of law, that Dan was clearly told the prior individual representation had ended or that Myers would no longer advise him personally when his individual interests diverged from Duling Sons' interests. SR 714-17.

That distinction is critical because the May agreement did not involve only corporate consequences. It required Dan personally to pay $400,000 and execute a $1,000,000 guaranty. SR 716. Myers testified that Dan had no individual representation as to those obligations and was "representing himself." SR 717. A factfinder could reasonably conclude that, before Dan personally exposed his assets, Defendants had to clearly disclose that Myers was not representing him individually and that the December transaction had not provided the voting control Dan believed he had obtained.

The handwritten note further supports the inference of later nondisclosure. Myers confirmed his handwritten note stated, "Would not have paid $400,000, if not majority shareholder," and testified that Dan's agreement to pay $400,000 was based on Dan's belief that he was the majority shareholder. SR 721. When asked whether he meant majority voting shareholder, Myers clarified that he meant majority of issued shares and that no distinction had been drawn between voting and non-voting. SR 721. That clarification supports Plaintiff, not Appellees. The problem is that majority ownership and majority voting control were blurred.

Appellees argue Dan already knew in April 2020 that Joe's voting shares had not been transferred. Appellees' Brief at 23 n.1. That does not resolve the issue. Knowledge that Joe still owned shares is not the same as knowledge that Dan's 251,000 newly issued shares were Class B non-voting shares, or knowledge that the December transaction had failed to confer voting control. Myers' testimony that no voting/non-voting distinction had been drawn supports the opposite inference. SR 704, 721.

III. Appellees' standing, damages, and professional-conduct arguments do not eliminate the later personal nondisclosure claim.

Appellees attempt to convert disputed merits issues into occurrence-date determinations. Their argument is circular: because they contend Plaintiff cannot prove standing, damages, causation, or an independent tort duty, they label all later conduct "nonculpable," and then use that label to sustain the December 2019 repose date. Appellees' Brief at 21-35. Summary judgment cannot rest on that approach.

First, the May 2020 theory is not limited to a derivative corporate malpractice claim. The May transaction matters primarily because it establishes when Myers' duty to disclose the alleged December error became concrete, not because Plaintiff seeks to assert Duling Sons' corporate claim. The repayment agreement imposed personal obligations on Dan, and Myers testified Dan represented himself individually as to those obligations. SR 716-17. Plaintiff's theory is that Dan personally was entitled to know, before risking his own assets, that the December transaction had not given him the voting control he believed he had.

That framing also distinguishes Appellees' transactional-causation authorities. Appellees' Brief at 25-26. For the May nondisclosure claim, the causal counterfactual is not that Joe would have approved an amendment. It is that Dan would have known before risking personal assets that he lacked the voting control he believed he possessed. That decision was Dan's, not Joe's. SR 716-17, 721.

Second, Appellees' damages argument does not establish December 2019 as the last culpable act. Subsequent reimbursement may affect the amount or nature of recoverable damages, but it does not establish that no potentially actionable injury existed when Dan parted with $400,000 or exposed himself to a $1,000,000 guaranty. SR 716-17; Appellees' Brief at 24. *Robinson-Podoll* recognizes that the attorney's disclosure duty generally arises when actual injury has occurred or the likelihood of injury is readily apparent. 2020 S.D. 5, ¶ 46, 939 N.W.2d at 46. Plaintiff need not prove the final measure of damages as a matter of law to show that Defendants' alleged nondisclosure could have been culpable in May 2020.

Third, Appellees' reliance on *Behrens* and the Rules of Professional Conduct does not eliminate the later nondisclosure claim. Appellees' Brief at 32. Plaintiff does not seek civil liability merely because Myers allegedly violated a disciplinary rule. But that does not make the conflict evidence irrelevant. *Robinson-Podoll* recognizes that an attorney's duty to disclose an error reasonably expected to support a malpractice claim is an independent professional duty. 2020 S.D. 5, ¶ 46, 939 N.W.2d at 46. It also recognizes that professional-conduct principles may inform the standard of conduct, even if a rule violation does not itself create a standalone private cause of action. *Id.* ¶ 33, 939 N.W.2d at 44. The conflict evidence is therefore relevant to duty, breach, the scope of representation, Dan's entitlement to disclosure, and whether Defendants' later omissions were culpable. SR 714-17.

Finally, Appellees' alternative-ground doctrine does not authorize affirmance by resolving disputed evidence. The Supreme Court may affirm on a legal basis supported by the record, but not by drawing negative inferences against the nonmovant. *Mahmoudi v. City of Spearfish*, 2025 S.D. 49, ¶¶ 20-24, 25 N.W.3d 517, 525-26, confirms that summary judgment is improper when the movant's position depends on an unfavorable inference and the record supports a genuine factual dispute. Appellees' theories depend on such inferences: that no proof Joe would cooperate means he would not; that no written correction means correction was impossible; that later reimbursement means no relevant injury ever existed; and that the corporate engagement necessarily ended all individual duties to Dan. Appellees' Brief at 22-35. Those inferences cannot be drawn against Plaintiff at summary judgment.

IV. The circuit court's December-only ruling bypassed material disputes, and the procedural error was not harmless.

The circuit court selected December 16, 2019 as the occurrence date and treated tolling as immaterial. At the summary-judgment hearing, the court ruled that "if there was any professional negligence or malpractice," it occurred "on or about December 16 of 2019," and concluded that even applying 640 days of tolling, Plaintiff did not timely serve the action. HT 36. The written order granted summary judgment under SDCL § 15-2-14.2 and dismissed the action with prejudice. SR 819-21.

That ruling bypassed the disputes described above: whether Defendants' duty to disclose continued after December 2019; whether the December transaction reflected an objective of placing Dan in control; whether Joe may have agreed to corrective action had the voting/non-voting issue been identified while the parties were cooperating; whether Dan knew the newly issued shares were non-voting; whether Dan was clearly told Myers no longer represented him individually; whether the May payment and guaranty triggered a personal disclosure duty; and whether the additional tolling periods made the action timely if the occurrence date was May 21, 2020 or later. SR 357-58, 704, 714-17, 721, 798-800.

The notice problem reinforces the need for reversal. Appellees now argue that Plaintiff had adequate notice because Defendants' summary-judgment briefing characterized December 2019 as the only actionable event. Appellees' Brief at 33-34. But Defendants also calculated timeliness using May 21, 2020 as Plaintiff's latest alleged malpractice date. SR 798-800. The circuit court then selected December 2019 as dispositive without resolving the factual and legal disputes that made the May 2020 nondisclosure theory material. HT 36; SR 819-21.

Leonhardt v. Leonhardt, 2012 S.D. 71, ¶¶ 12-15, 822 N.W.2d 714, 717-19, holds that a court should notify the parties when it intends to rely on a legal doctrine or theory not briefed and argued, and that summary judgment entered without adequate notice must be reversed when the party lacked a meaningful opportunity to develop and present relevant evidence. Appellees' harmless-error answer fails under the same framework. *Estate of Johnson ex rel. Johnson v. Weber*, 2017 S.D. 36, ¶¶ 36-37, 898 N.W.2d 718, 732-33, explains that inadequate notice may be harmless where the record was fully developed and the party cannot identify evidence it otherwise would have presented. This case is different.

Appellant has identified the specific factual and legal matters implicated by the unbriefed December-only theory, including the parties' contemporaneous intent concerning control, Dan's knowledge of the voting/non-voting distinction, the availability of corrective action while the parties were cooperating, and the later nondisclosure theory recognized in *Robinson-Podoll*. Those issues were not abstract. They went directly to whether December 16, 2019 was the only possible occurrence date, or whether Defendants' later omissions could constitute a later culpable act or omission under SDCL § 15-2-14.2. SR 357-58, 704, 714-17, 721.

The error was not harmless. Under Defendants' own calculations, a May 21, 2020 occurrence date plus agreed tolling produced a January 22, 2025 deadline, approximately thirty days before commencement. SR 798-800. Plaintiff argued that additional tolling applied based on a disputed nine-month extension and a separate 31-day October 2024 extension. SR 631-32, 635, 637, 783-84. The circuit court never reached those tolling issues because it concluded that tolling did not matter under its December 2019 occurrence date. HT 36. If the occurrence date is May 21, 2020 or later, those issues become material.

CONCLUSION

Appellees' affirmance theory requires resolving disputed facts and inferences in their favor. The record supports Plaintiff's position that Defendants' alleged omissions and disclosure failures continued after December 2019 and became independently culpable by May 21, 2020, when Dan personally paid $400,000 and undertook a $1,000,000 guaranty without allegedly knowing that the December transaction had not given him voting control. SR 716-17, 721. Defendants opened a corporate representation without clearly ending Dan's individual representation, obtaining a conflict waiver, or advising Dan individually before he assumed those personal obligations. SR 708, 714-17.

The circuit court therefore erred by fixing December 16, 2019 as the occurrence date as a matter of law. Plaintiff respectfully requests reversal of the Order Granting Defendants' Motion for Summary Judgment and remand for further proceedings under the correct occurrence-date framework.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

Respectfully submitted this 14th day of August 2026.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned attorney certifies that this Appellant's Reply Brief was prepared using a proportionally spaced typeface, and complies with the type volume limitations of SDCL § 15-26A-66(b)(2). The brief contains 2,874 words / 19,197 characters, as counted by the word-processing system used to prepare the brief, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel.

Dated this 14th day of August 2026.

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CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that on this 14th day of August 2026, **APPELLANT'S REPLY BRIEF** was filed with the Clerk of the Supreme Court of the State of South Dakota via the Odyssey File and Serve System, Supreme Court Case No. 31381, in accordance with the applicable rules of appellate procedure.

Dated this 13th day of August 2026.

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