IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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Appeal No. 28652

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**CHRISTINA BLANCHARD,**

Plaintiff/Appellant,

vs.

**MID-CENTURY INSURANCE COMPANY,** also known as **FARMERS INSURANCE,**

Defendant/Appellee

**MID-CENTURY INSURANCE COMPANY,**

Third-Party Plaintiff/Appellee

vs.

**ERIC C. BLOMFELT,** and **ERIC BLOMFELT & ASSOCIATES, P.C.,**

Third-Party Defendants/Appellee

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**APPEAL FROM THE CIRCUIT COURT**
**SECOND JUDICIAL CIRCUIT**
**MINNEHAHA COUNTY, SOUTH DAKOTA**
The Honorable Mark Salter
Circuit Court Judge

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Notice of Appeal filed

July 3, 2018

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# APPELLANT'S BRIEF

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## JURISDICTIONAL STATEMENT

The trial court signed its Memorandum Opinion and Order Re: Second Motion for Summary Judgment and Motion in Limine to Exclude Litigation Conduct and Motion for Summary Judgment on Third-Party Complaint on June 8, 2018 and filed its Opinion and Order on June 11, 2018. Notice of entry of the Opinion and Order was given June 12, 2018. Blanchard's Notice of Appeal was filed July 3, 2018.

## STATEMENT OF THE LEGAL ISSUE

Whether Mid-Century Insurance Company, also known as Farmers Insurance, was entitled to summary judgment on Blanchard's insurance bad faith claim?

The trial court held in the affirmative.

Champion v. U.S. Fid. & Guar. Co. (In re Certification of Question of Law from United States Dist. Court), 399 N.W.2d 320 (S.D. 1987)

Gilchrist v. Trail King Indus., 2002 SD 155,655 N.W.2d 98

Dakota, Minn. & E.R.R. Corp v. Acuity,2009 SD 69, 771 N.W.2d 623

Walz v. Fireman's Fund Ins. Co.,1996 SD 135, 556 N.W.2d 68

SDCL 59-6-5

## STATEMENT OF THE CASE AND THE FACTS

Appellant [hereinafter 'Blanchard'] brought an action for bad faith against Appellee Mid-Century Insurance Company, also known as Farmers Insurance, the trade name that Appellee Mid-Century utilized in its acts of bad faith; Blanchard will accordingly refer to Appellee Mid-Century as 'Farmers' in this brief. Blanchard's case was brought in the Second Judicial Circuit Court of Minnehaha County, the Honorable Mark Salter presiding. After the trial court denied Farmers' first motion for summary judgment on March 15, 2016, Appendix 6, Farmers brought a third-party action against its attorney, Appellees Eric C. Blomfelt and Eric Blomfelt & Associates P.C. [hereinafter 'Blomfelt.'] Blanchard moved for summary judgment on the third-party claim against Blomfelt in 2017, at the same time that Farmers made a second motion for summary judgment against Blanchard. The statements of material fact regarding these motions are included as Appendices 2-5. The trial court granted Farmers' motion on June 8, 2018, and did not reach Blanchard's motion. Appendix 1.

Blanchard brought a claim in 2011 for workers compensation benefits from her employer Millstone and its insurer Farmers. Department of Labor Hearing Transcript at 38-41, Exhibit 4 to Bogard Affidavit dated August 24, 2015. Farmers retained Blomfelt as its attorney in the proceedings, and in Blanchard's January 13, 2014 letter that Blomfelt forwarded to Farmers, Blanchard noted that "she is now earning wages that make her ineligible for permanent total benefits," and instead demanded temporary total disability and medical benefits. Deposition Exhibit 20, Mid-Century at 367, Exhibit A to 2017 Bogard Affidavit. The demand was not accepted and the parties proceeded to an evidentiary hearing before the Department of Labor. Yet Elizabeth Neu, the Farmers

claims representative responsible for Blanchard's claim, followed a "strategy" to "prevail at hearing re: [Blanchard's] claim for perm total." Deposition Exhibit 19 at Mid-Century 1237, Neu June 10, 2014 claims note, Exhibit 19 to 2017 Joyce Affidavit (emphasis supplied). Indeed, Neu admited that she thought the purpose of the hearing was to determine whether Blanchard could work. Neu depo. at 37, Exhibit 6 to 2017 Joyce Affidavit. Even after the Department ruled in Blanchard's favor on July 8, 2014, see Blanchard v. Millstone II, Employer and Farmers Insurance, Insurer, 2014 WL 3537935 (S.D. Dept. Lab. 2014), when Blomfelt told Neu three times on July 21, 2014 that this was not a permanent total disability claim and that Blanchard was able to work, Deposition Exhibit 21, Mid-Century at 253, 254, 257, attached as Exhibit B to 2017 Bogard Affidavit, Neu still thought the appeal she authorized less than an hour after Blomfelt first reported, id. at 253, was an appeal from a decision that had found Blanchard permanently and totally disabled. Neu depo. 39-40. Blomfelt felt the chances that Blanchard would ever make such a claim were "very slim." Deposition Exhibit 2, Blomfelt First Production at 200-01, Exhibit D to 2017 Bogard Affidavit.

Neu admits that it would have been "better to see and read the Department of Labor's decision before deciding to appeal." Neu depo. 44. Blomfelt offered to send Neu a copy after he got it scanned, Deposition Exhibit 21 at Mid-Century 257, Exhibit B to 2017 Bogard Affidavit, but Neu did not accept the offer. Yet under Farmers' litigation guidelines, Neu even lacked the authority to authorize this appeal; these guidelines, which required claims representatives to obtain copies of decisions, clearly stated that appeal authority "must be obtained from Functional COE," an acronym for "Center of Excellence." Deposition Exhibit 1, Mid-Century 1878, 1884, attached as Exhibit C to

2017 Bogard Affidavit. Farmers has provided no evidence that COE authority was ever given.

Beginning on July 24, 2014, three days after Neu authorized the appeal, and continuing to the actual filing of the notice of appeal in October 2014, Neu repeatedly asked Blomfelt about the "possibility" of a settlement, and Blomfelt assured her that an appeal would give Blanchard "motivation" to settle and put Farmers in a stronger position. Deposition Exhibit 2, Blomfelt First Production at 125-26, 142-44, 327-28, Exhibit D to 2017 Bogard Affidavit; Deposition Exhibit 22, Mid-Century 176, attached as Exhibit 22 to August 1, 2017, Joyce Affidavit. Neu even wrote in her claims notes on September 10, 2014, not that she expected to win the appeal, but that her "goal" was "claim settled." Deposition Exhibit 19 and Exhibit 19 to Joyce Affidavit, Mid-Century 1236.

This was not the first instance in which Farmers and Blomfelt used an appeal to try to pressure a claimant into a settlement. Blomfelt was Farmers' counsel in Vansteenwyk v. Baumgartner Trees and Landscaping, 2007 SD 36, 731 N.W.2d 214, in which the claimant prevailed on the issue of causation in the Department of Labor, Farmers' circuit court appeal, and in Farmers' Supreme Court appeal. When the case returned to the Department of Labor for determination of the claimant's impairment rating, Farmers lost yet again, on October 14, 2008. Vansteenwyk v. Baumgartner Tress [sic] and Landscaping, 2008 WL 4893988 (S.D. Dept. Lab. 2008). A week later, an October 21, 2008, telephone conference with Blomfelt and Farmers claims personnel concluded: "AGREE WITH THE PLAN TO POST APPEAL AS LEVERAGE AND SETTLE CLAIM FOR UNDER THE ORDERED TOTALS RE INDEMNITY."

Deposition Exhibit 27 at Mid-Century 2619-2620, Exhibit E to 2017 Bogard Affidavit. Little wonder, then, that both Neu and her supervisor Lee Ziegler refused to agree that they ever had any duty to settle rather than litigate. Neu depo. 33-34, Ziegler depo. 39, Exhibit H to 2017 Bogard Affidavit. Farmers knew Blanchard was vulnerable: Neu had conducted repeated "investigations" and "surveillances" into Blanchard's situation. See Exhibits 1, 2 and 3 to 2015 Bogard Affidavit.

Yet Neu had no valid grounds to appeal. Blomfelt had judicially admitted the validity of Blanchard's claim and by so doing accepted liability for that claim. Blomfelt submitted to the Department on September 2, 2014, a set of proposed Findings of Fact and Conclusions of Law that made no objections to any of the Department's findings in its Decision, and mirrored proposals earlier submitted by Blanchard. Farmers' own proposals concluded with these paragraphs:

> 19. Claimant has successfully met her burden of establishing not only (1) that her lower back pain arose out of and in the course of employment with Millstone, but also (2) her employment with Millstone and her employment related activities were a major contributing cause of her lower back pain and her need for continuing treatment…
>
> 20. Claimant has met her burden of showing that her work activities are a major contributing cause of her current lower back pain.
>
> 21. Her injury arose out of and in the course of her employment with Millstone.
>
> 22. Her injury is a major contributing cause of her current condition and her need for continuing medical treatment and orders the following.
>
> 23. Employer and Insurer shall pay Claimant temporary total disability benefits from August 25, 2011, through August 1, 2012, in the amount of $18,763.16 (52 weeks at $360.83 per week) plus prejudgment interest at the rate of 10% per year.

> 24. Employer and Insurer shall pay the costs of medical treatment related to Claimant's back injury.

Exhibit 3 to Plaintiff's First Set of Requests for Admissions at Page 7 of Farmers' proposed "Findings of Fact, Conclusions of Law and Order," attached as Exhibit 1 to Joyce Affidavit. On September 16, 2014, the Department entered its formal Findings of Fact and Conclusions of Law and Order, which concluded with essentially identical statements. Exhibit 4 to Plaintiff's First Set of Requests for Admissions at fourth and fifth pages; Exhibit 1 to Joyce Affidavit.

Blanchard moved to dismiss Farmers' appeal on November 14, 2014 on the basis that Farmers had waived its appeal issues in its admissions before the Department of Labor. Exhibits 9 and 10 to Plaintiff's First Set of Requests for Admissions; Exhibit 1 to Joyce Affidavit. Farmers' response was Blomfelt's request on November 30, 2014 that Blanchard settle, Exhibit 7 to Plaintiff's First Set of Requests for Admissions; Exhibit 1 to Joyce Affidavit. On December 11, 2014, Blanchard pointed out once again to Farmers, through Blomfelt, that Farmers had no valid basis for appeal and emphasized that, due to Farmers' non-payment of her benefits, Blanchard was "in severe financial distress" and was "on the verge of having her vehicle repossessed and cannot pay her rent." Exhibit 8 to Plaintiff's First Set of Requests for Admissions; Exhibit 1 to Joyce Affidavit.

Farmers persisted, filing a resistance to Blanchard's motion to dismiss on December 3, 2014, then filed its main appeal brief on December 4, 2014. Exhibits 11 and 13 to Plaintiff's First Set of Requests for Admissions; Exhibit 1 to Joyce Affidavit. At the same time, Farmers embarked on yet another investigation of Blanchard's "employment and/or undisclosed income," finding only that Blanchard appeared to have

been unemployed for several months. Exhibit 8 to August 24, 2015, Bogard Affidavit at Mid-Century 273-274. Blanchard was obliged to expend yet more attorney's fees as to her motion to dismiss and her Appellee's Brief. Exhibits 12 and 14 to Plaintiff's First Set of Requests for Admissions; Exhibit 1 to Joyce Affidavit. On December 30, 2014, the circuit court dismissed Farmers' appeal, noting that Farmers "actually made no indication that [it] disagreed with the Department's findings," and that Farmers' "proposed findings of fact and conclusions of law were not in disagreement with [Blanchard's] or the Department's." Exhibit 15 to Plaintiff's First Set of Requests for Admissions; Exhibit 1 to Joyce Affidavit. Farmers did not appeal this order, and eventually paid Blanchard her benefits.

## ARGUMENT

### The circuit court erred in its legal analysis and in failing to give Blanchard the evidentiary inferences to which she was entitled.

Scope of review: "In reviewing a trial court's grant of summary judgment under SDCL 15-6-56(c), [this court] must view evidence in the light most favorable to the non-moving party and decide both whether the moving party has demonstrated the absence of any genuine issue of material fact and whether the trial court correctly decided all legal questions … [This court makes] these determinations de novo, with no deference to the [trial] court's ruling." Jorgensen Farms, Inc. v. Country Pride Coop., Inc., 2012 SD 78, ¶7, 824 N.W.2d 410, 414 (emphasis supplied) (quotations omitted). "Summary Judgment is a drastic remedy, and should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy." Berbos v. Krage, 2008 SD 68, ¶15, 754 N.W.2d 432, 436 (quotations omitted).

1. The trial court erroneously added an element to the tort of insurance bad faith. Other than the minor clarification in Mordhorst v. Dakota Truck Underwriters, 2016 SD 70, ¶9 n.1, 886 N.W.2d 322, 324 n.1, the elements for a bad faith denial of workers' compensation benefits have remained the same since Champion v. U.S. Fid. & Guar. Co. (In re Certification of Questions of Law from the United States Dist. Court), 399 N.W.2d 320, 324 (S.D. 1987), adopted Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1275 (Colo. 1985) and Anderson v. Continental Ins. Co., 271 N.W.2d 368, 377 (Wis. 1978). "In South Dakota … a claimant must prove two things to be successful: (1) an absence of a reasonable basis for denial of policy benefits[,] and (2) the [insurer's] knowledge … of [the look of] a reasonable basis for denial." Mordhorst, supra, 2016 SD 70, ¶9, 886 N.W.2d at 324 (quotations omitted).

When it decided Farmers' motion for summary judgment, however, the trial court added a further test for insurance bad faith derived from cases that have nothing to do with insurance bad faith, holding that:

> Bad faith is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.
>
> *E.P. v. Riley*, 1999 SD 163, ¶40, 604 N.W.2d 7, 17 (quoting *Cotton v. Stange*, 1998 SD 81, ¶9 n.1, 582 N.W.2d 25, 28 n.1 (citations omitted)).
>
> Black's Law Dictionary further defines bad faith as:
>
> …not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

> Black's Law Dictionary at 127 (5th Ed.) (citation omitted).
>
> Here, Blanchard has failed to identify a "dishonest purpose" or "wrongdoing" on the part of Mid-Century relating to Blomfelt's proposed findings and conclusions.

Appendix 1 at 12-13.

No South Dakota court has ever held that a claim for insurance bad faith requires proof of "a dishonest purpose," "moral obliquity," "furtive design," or "ill will." These are pertinent only to the very different issue of statutory immunity. Cotton v. Stange, 1998 SD 81, ¶¶7-9, 582 N.W.2d 25, 28, utilized the "dishonesty" test to determine the extents of "good faith" immunity under SDCL 26-8A-14 for reports of child abuse, as did E.P. v. Riley, 1999 SD 163, ¶¶39-41, 604 N.W.2d 7, 17-18, and both cases derived this version of "bad faith" from B.W. v. Meade County, 534 N.W.2d 595, 597-98 (S.D. 1995), and its construction of the same statue. But in Klein v. Sanford USD Med. Ctr., 2015 SD 95, 872 N.W.2d 802, when considering the extent of the statutory immunity for a "good faith" failure to obtain informed consent for a health care decision, this Court squarely rejected an argument by the plaintiff [Klein] that employed definitions from the seminal insurance bad faith case Kunkel v. United Sec. Ins. Co., 168 N.W.2d 723, 726 (S.D. 1969). This Court held in Klein:

> From our review of the cases cited by Klein and Sanford, and considering the language of SDCL 34-12C-7 we find persuasive this Court's definition of good faith in the context of the statutory immunity provided in SDCL 26-8A-14. We do so because both good faith for abuse reporting and good faith for health care decision-making implicate immunity considerations, unlike the business-contract considerations at issue in the cases cited by Klein. *See B.W. v. Meade Cty. 534 N.W.2d 595, 597 (S.D. 1995* ("[i]mmunity is critical to South Dakota's evident public policy").

2015 SD 95 ¶18, 872 N.W.2d at 807 (emphasis supplied).

This Court has always made it clear that any definition of the term "bad faith" must depend on the context in which it is used. Kunkel, supra, 168 N.W.2d at 726, held:

> Bad faith … is a term of variable significance and rather broad application. Generally speaking good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto. In order to understand what is meant by bad faith, a comprehension of one's duty is generally necessary … mere terminology means little. It is rather the factual situation which is significant in the light of the duty which exists, and normally the trier of fact must make the determination of liability or nonliability.

(Emphasis supplied) (quotations omitted). Thus, when discussing the similar concept of contractual "bad faith" in Garrett v. Bankwest, Inc., 459 N.W.2d 833, 842 (S.D.1990), this Court noted the distinction between the lack of "good faith" in carrying out contractual duties and the "ill-will or malice upon which a claim for punitive damages might be founded," (emphasis supplied) citing with approval Neal v. Farmers Ins. Exchange, 582 P.2d 980 (Cal. 1978). Neal held:

> The terms "good faith" and "bad faith," as used in this context [of insurance bad faith litigation] … are not meant to connote the absence or presence of positive misconduct of a malicious or immoral nature consideration which, as we shall indicate below, are more properly concerned in the determination of liability for *punitive* damages. Here we deal only with the question of breach of the implied covenant and the resultant liability for *compensatory* damages. As stated by the draftsmen of the Restatement of Contracts, "[the] phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat in the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes [from consideration] a variety of types of conduct characterized [in other contexts] as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."

582 P.2d at 986 n.5 (emphasis in original and supplied).

It was in balancing the competing interests of the employee and the insurer that this Court decided in Champion what constituted "bad faith" in the worker's compensation context:

> for proof of bad faith, there must be an absence of a reasonable basis for denial of policy benefits *and* the knowledge or reckless disregard of a reasonable basis for denial, implicit in that test is our conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured. Under these tests of the tort of bad faith, an insurance company, however, may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis.

399 N.W.2d at 324. This Court has never suggested that a worker must go beyond showing "reckless indifference" to prove "dishonest purpose," "moral obliquity," "furtive design," or "ill will." Under the Anderson / Savio tests adopted in Champion, such an additional element is not required. Kimble v. Land Concepts, Inc., 2012 Wisc. App. LEXIS 803*19 n.3 (Wis. App. 2012), reversed on different grounds Kimble v. Land Concepts, Inc, 845 N.W.2d 395 (Wis. 2014), held that, under Anderson, "[p]roof of 'evil motive' is not a prerequisite to a finding of bad faith," although proof "of special ill-will" may go to punitive damages. (Emphasis supplied.)

Teague-Strebeck Motors, Inc. v. Chryster Ins. Co., 985 P.2d 1183, 1204 (N.M. App. 1999), explained:

> We recognize the potential for confusion arising from nomenclature. The causes of action we are discussing are commonly called "insurance bad faith cases." In ordinary parlance and meaning bad faith connotes highly improper, probably evil, intent and purpose. Given that meaning, a person acting in bad faith would be deserving of some sort of punishment. However, the…cause of action for

> insurance bad faith does not require proof of aggravated misconduct or a culpable mental element to stand … The covenant of good faith and fair dealing in a first-party claim situation can be breached in a number of ways, though the most common are failures at act reasonably in timely and fairly investigating and evaluating claims and unreasonable delays in responding to claims … Thus, and insurer can breach the covenant of good faith and be liable … by actions that do not evince evil motive or other culpable mental state.

(Emphasis supplied.) Numerous other courts agree. See also, e.g., McCormick v. Sentinel Life Ins. Co., 200 Cal. Rptr. 732, 741 (Cal. App. 1984); Coe v. State Farm Mut. Auto. Ins. Co., 136 Cal. Rptr. 331, 335 (Cal. App. 1977); Best Place v. Penn Am. Ins. Co., 920 P.2d 334, 347 (Hawaii 1996); Santora v. Commercial Union Ins. Co., 1998 U.S. Dist. LEXIS 2366**7-8 (E.D. Pa. 1998). The trial court thus erred in requiring Blanchard to show proof of "dishonest purpose" or "moral obliquity." This error infected the trial court's entire decision, and that decision must be reversed.

2. The trial court erroneously disregarded the knowledge imputed to Farmers by its agent Blomfelt. It was because of the trial court's erroneous legal conclusions that it refused to consider what it recognized was "Blanchard's principal argument resisting [Farmers'] motions," whether Blomfelt's conduct should be imputed to Farmers. Appendix 1 at 12. This meant that the trial court also failed to follow the fundamental rule that the "evidence must be viewed most favorably to the nonmoving party [,] and reasonable doubt should be resolved against the moving party." Fin-Ag, Inc. v. Cimpl's, Inc., 2008 SD 47 ¶11, 754 N.W.2d 1, 6.

As Farmers' attorney in Blanchard's worker's compensation proceedings and Farmers' appeal to circuit court, Blomfelt was unquestionably Farmers' agent. Tri-State Refining and Inv. Co., Inc. v. Apaloosa, Co., 452 N.W.2d 104, 107 n.2 (S.D. 1990). This

Court held in Gilchrist v. Trail King Indus., 2002 SD 155, 655 N.W.2d 98, that an insurer's "knowledge" of its lack of a reasonable basis for a denial of benefits includes the knowledge imputed to it from its agents. In Gilchrist, the self-insured employer [Trail King] used RSI and its employee Burns as its agents to monitor the medical status of the claimant, Gilchrist. In reversing the trial court's exclusion of evidence of Burns' activities regarding the claim, this Court held:

> Once it is determined that a principal/agent relationship exists, SDCL 59-6-5 provides:
>
> As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.
>
> This statute presumes that an agent will relay to the principal all information that he or she acquires …in a claim of bad faith against an employer, the relevant inquiry is what that employer knew at the time it denied coverage to the insured … Therefore, relevant in this analysis is the knowledge that should be imputed by RSI/Burns to Trail King at the time coverage was denied to Gilchrist. Included in this imputed knowledge would be the knowledge that Burns has of Gilchrist's medical problems, unknown to Dr. Cho but known to Burns, at the time Burns solicited the work release from Dr. Cho … Here, Gilchrist contends that the motion in limine, which excluded evidence relating to Burns' actions, prevented him from presenting evidence that Trail King did not have a reasonable basis for denying policy benefits … We find that this evidence was highly relevant and should not have been kept from the jury.

2002 SD 155, ¶¶18-20, 655 N.W.2d at 102-03 (emphasis supplied). There can be no doubt that "an insurer's actual knowledge that there is no reasonable basis for denying a claim may be inferred and imputed to the insurer through the acts of its agents." Skaling v. Aetna Ins. Co., 799 A.2d 997, 1004 (R.I. 2002) (emphasis supplied)(citing Anderson v. Continental Ins. Co., supra).

It makes no difference that Blomfelt may have failed to fully inform Farmers of his actions, since every one of Blomfelt's actions are imputed to Farmers. "A principal and agent are deemed as a matter of law to have notice of whatever the other has notice of and are expected to communicate in the exercise of ordinary care and diligence…This rule applies even if they have not in fact shared their knowledge." Duffield Const., Inc. v. Baldwin, 2004 SD 51, ¶14, 679 N.W.2d 477, 483 (emphasis supplied). Accord, e.g., Aetna Life Ins. Co. v. McElvain, 363 N.W.2d 186, 189 (S.D. 1985). Indeed, South Dakota law is also settled that "knowledge of, or notice to, the attorney for a litigant or party to a legal proceeding of matters arising in the course of the litigation or proceeding is ordinarily imputed to such litigant or party." In re Grimes' Estate, 204 N.W.2d 812, 815 (S.D. 1973). In the words of the United States Supreme Court in Link v. Wabash R. Co., 370 U.S. 626, 633-34 (1962), Farmers

> voluntarily chose this attorney as [its] representative in the action, and [it] cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of [its] lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

(Emphasis supplied) (quotations omitted). Thus, whether Blomfelt sent Farmers a copy of his findings of fact and conclusions of law, as Farmers' agent, Blomfelt's knowledge of those pleadings was imputed to Farmers, and that knowledge is included in what Farmers knew at "the time coverage was denied to" Blanchard, Gilchrist, supra, when Farmers took its appeal instead of paying the benefits Blomfelt admitted were due.

An "attorney employed to manage a party's conduct of a lawsuit, has prima facie authority to make relevant judicial admissions by pleadings, written stipulations, or

formal statements into the record." Henry v. Gulf Coast Mosquito Control Com'n., 645 F.Supp. 1447, 1456 (S.D., Miss. 1986) (citing McCormick on Evidence) (emphasis supplied). Accord, e.g., Diaz v. Texeira, 2000 WL 1471607 *3 n.8 (R.I. Super. 2000); Fletcher v. Eagle River Memorial Hospital, Inc., 456 N.W.2d 788, 794 (Wis. 1990) (citing Wigmore on Evidence); Dora Tp. v. Indiana Ins. Co., 385 N.E.2d 595, 597 (Ill. App. 1979). This includes admissions by an insurer's attorney in workers' compensation litigation. Sule v. W.C.A.B. (Kraft, Inc.), 550 A.2d 847, 849 (Pa. Cmwlth. 1988) held:

> Claimant asserts that because neither doctor indicated that her disability had ceased, there is no other medical evidence to support a finding that disability had terminated. We, however, need not reach that issue because, as Claimant also points out, counsel for Employer has admitted to Claimant's disability. That attorney, in referring to the medical testimony, stated at the hearing, "We are not contending that [Claimant] has the use of the arm. The doctor's testimony is that the arm is useless."…
>
> It is well settled that an admission of an attorney during the course of a trial is binding upon his client…We view the statement by the attorney as an admission by Employer that Claimant's arm continues to be useless. A termination of benefits is proper only when the work-related disability ceases entirely…Therefore, the referee and Board erred in terminating benefits when the continuing medical disability was admitted to by the Employer.

(Emphasis supplied.)

An attorney's authority to bind his client is not restricted to statements made in briefs or at trial. Matter of Estate of Tallman, 1997 SD 49, ¶13, 562 N.W.2d 893, 896, held that a "judicial admission is binding on the party who makes it…Judicial admissions may occur at any point during the litigation process...The focus is on the statement, not on a certain stage of the litigation." (Emphasis supplied.) (Quotation omitted.) Tallman relied on the Stemper cases, which leave no doubt that Blomfelt's proposed findings of

fact and conclusions of law were judicial admissions that bound Farmers and removed all dispute as to the issues so admitted. In Stemper v. Stemper, 403 N.W.2d 405, 408 (S.D. 1987) (Stemper I), this Court accepted a husband's argument that the $600 per month alimony award against him should be "eliminated" because the trial court had "destroyed" the husband's ability to pay. On rehearing, in Stemper v. Stemper, 415 N.W.2d 159 (S.D. 1987) (Stemper II), this Court reversed itself on the alimony ruling when its attention was called to the

> legal point that defendant proposed in his findings of fact and conclusions of law, as well as a proposed judgment and decree of divorce, that:
>
> > Defendant shall pay alimony to Plaintiff in the amount of TWO HUNDRED DOLLARS ($200.00) per month until he retires, or the Plaintiff remarries…
>
> By his proposed findings of fact and conclusions of law, defendant conceded below that two hundred dollars ($200.00) alimony per month is reasonable.
>
> Judicial admissions are binding on the party who makes them... An admission of fact by an attorney is binding on that party… A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned …
>
> We overlooked defendant's proposed finding when reviewing the record, and we limit our modification of the previous decision hereby allowing two hundred dollars ($200.00) per month alimony.

415 N.W.2d at 160 (emphasis supplied). When Farmers, acting through Blomfelt, made its September 2, 2014, submissions to the Department that explicitly proposed that "Employer and Insurer shall pay [Blanchard's] temporary total disability benefits from August 25, 2011 through August 1, 2012, in the amount of $18,763.16 (52 weeks at

$360.83 per week) plus prejudgment interest at the rate of 10% per year," Farmers thus made a binding judicial admission that it owed Blanchard this amount. See also Coolsaet v. City of Veblen, 266 N.W. 726, 728 (S.D. 1929): "in the absence of fraud or collusion on their part attorneys have power to bind their clients … by consenting to judgments or decrees."

Nor does it matter that Blomfelt may claim to have subjectively believed that his overt admission of Farmers' liability was not truly an admission of liability. This Court follows the rule that "intentional conduct which constitutes a manifestation of assent will bind a party even though the party's conduct does not truly express his or her state of mind." In re Maurice M. Ricard Family Trust, 2016 SD 64, ¶15, 886 N.W.2d 326, 330 (emphasis supplied) (quotations omitted). Accord, e.g., Amdahl v. Lowe, 471 N.W.2d 770, 774 (S.D. 1991). When Farmers admitted the compensability of Blanchard's injuries through its agent Blomfelt, Blanchard's claim ceased to be "fairly debatable," and Farmers could no longer challenge that claim without incurring liability.

Under similar circumstances, Heesch v. Swimtastic Swim School, 823 N.W.2d 211 (Neb. 2012), reversed a trial court's holding that there was a "reasonable controversy" as to a worker's compensation claim so as to avoid the imposition of sanctions against the insurer. The appellate court found:

> The occurrence of the work injury is alleged in paragraphs 2, 3, and 4 of the petition. In an amended answer filed March 30, 2011, the defendants expressly admit the allegations of paragraphs 2, 3, and 4…the admissions in the amended answer are judicial admissions which bind the defendants, … the amended answer filed March 30, 2011, completely resolved in Heesch's favor the question of whether she had sustained an on-the-job back injury on March 15, 2010. That she had sustained such injury was an established fact to be relied upon and considered by the

> trial judge … And [the insurer's expert] opinion that she had not sustained such an injury is clearly nullified by the judicial admission and, thus, does not play any role in the assessment of whether there was a reasonable controversy. Therefore, there was no reasonable controversy about the basic compensability of Heesch's workers' compensation claim of March 15.

823 N.W.2d at 273-74 (emphasis supplied). Likewise, Williams v. KW Products, Inc., 2010 WL 1579521**3-4, 2010 Iowa App. LEXIS 301*8, 784 N.W.2d 202 (Table) (Iowa App. 2010), held that a worker's compensation claim was no longer "fairly debatable" after the insurer had made admissions of the compensability of the injury:

> on May 29, 2008, the respondents served responses to Williams's request for admissions and admitted that Williams sustained permanent physical impairment from his work-related injury...
>
> We conclude that at least as of May 29, 2008, there was no longer an issue as to whether Williams sustained permanent physical impairment as a result of his work-related injury. At that time there was no longer any reasonable or probable cause or excuse for a delay in the commencement of benefits. We conclude the commissioner erred in not awarding penalty benefits as a result of the delay occurring after May 29, 2008.

(Emphasis supplied).

It certainly does not exonerate Farmers that Blomfelt's admission of liability occurred after Farmers' initial decision to appeal in July, 2014. An insurer has "an obligation to timely reassess its initial decision denying coverage based upon information received subsequent to the initial decision." Dakota, Minn. & E.R.R. Corp. v. Acuity, 2009 SD 69, ¶34, 997 N.W.2d 623, 633 (citing Walz v. Fireman's Fund Ins. Co., 1996 SD 135, ¶12, 556 N.W.2d 68, 71). Farmers gained possession of imputed knowledge from Blomfelt on September 2, 2014 that Farmers had admitted its liability to Blanchard,

Gilchrist, supra, yet Farmers persisted in its decision to appeal. In so doing, it left no doubt that the only purpose of its now meritless appeal was to put unlawful pressure on Blanchard.

On September 10, 2014, Farmers' claims representative Neu asked Blomfelt "are they open to settle?" On October 14, 2014, Blomfelt told Neu that "[w]e filed the appeal yesterday, and I'm hoping that filing will prompt them to engage in settlement talks." Neu at once replied, "[w]hen do you feel we can present an offer to settle indemnity?" Blomfelt responded that Farmers could "make an offer any time you like, and they know we are serious about filing the appeal since we filed it." Neu replied, "Let's start when the appeal is underway." Then, even after Blanchard moved to dismiss Farmers' meritless appeal on November 14, 2014, and Farmers once again received imputed notice through its agent Blomfelt of the precise flaws in its appeal, Gilchrist, supra, Farmers' response was to instruct Blomfelt to demand on November 30, 2014 that Blanchard settle the claim that Blomfelt and Farmers had already conceded as a matter of law. It made no difference to Farmers that Blanchard had notified it, by correspondence between counsel on December 11, 2014, that because of Farmers non-payment of benefits, Blanchard was "in severe financial distress" and was "on the verge of having her vehicle repossessed and cannot pay her rent." Farmers insisted on filing more briefs on its appeal, forcing Blanchard to expend more attorney fees to vindicate her right to benefits that Farmers had already admitted were due.

The covenant of good faith implied in insurance contracts "includes a duty to settle claims without litigation in appropriate cases." Harter v. Plains Ins. Co., Inc., 1998 SD 59, ¶19, 579 N.W.2d 625, 631. See also Dakota, Minnesota & Eastern R.R. Corp. v.

Acuity, supra, 2009 SD 69, ¶29, 771 N.W.2d at 632. "The question for bad faith is whether the insurer's…decision to deny a claim was unreasonable and was made in knowing or reckless disregard of the facts at the time the insurer made its decision to litigate rather than to settle." (Emphasis supplied.) Yet both Neu and her supervisor Ziegler refused to agree that they had any such duty. It is an act of bad faith for an insurer to "exercis[e] any unfair advantage to pressure an insured into a settlement of his claim," McElgunn v. CUNA Mutual Group, 2009 WL 1254657*2 (D.S.D. 2009) (applying South Dakota law), and as Hill v. Auto Owners Ins. Co., 2015 WL 2092680**6-7 (D.S.D. 2015), also applying South Dakota law, held, insurance companies "may not force insureds to resort to litigation to vindicate contractual rights…[and] may not 'game' or manipulate its…claims handling process to obtain a more favorable result at the expense of its insured by virtue of the insurance company's superior bargaining power and resources." This is precisely what Farmers did, even after it had imputed knowledge that the pleadings filed by its own attorney had judicially admitted Farmers' liability to Blanchard. The grant of summary judgment was error and must be reversed.

3. The trial court's use of the "litigation conduct" rule was error. While the trial court made several references to this Court's discussion in Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, supra, of the admissibility of "litigation conduct" in bad faith cases, it is not clear whether the trial court actually relied on that "rule." If such was the case, the trial court erred.

This Court has made it clear precisely what "litigation conduct" is to be excluded under this "rule" and why such a rule should be enforced. Dakota, Minnesota & Eastern

R.R. Corp. v. Acuity, cited approvingly to Knotts v. Zurich Ins. Co., 97 S.W.3d 512, 522 (Ky. 2006), for one of the major rationales for this rule:

> Admission of otherwise proper litigation tactics as proof of bad faith can also penalize an insurer for pursuing legitimate avenues of defense. Moreover, impairing a party's litigation rights obstructs an attorney from zealously advocating on behalf of his or her client's interests.
>
> > Allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims. [P]ermitting allegations of litigation misconduct would have a chilling effect on insurers, which could unfairly penalize them by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law. Insurers' counsel would be placed in an untenable position if legitimate litigation conduct could be used as evidence of bad faith.

2009 SD 69 ¶39, 771 N.W.2d at 634-35 (emphasis supplied).

Likewise, after several citations to Palmer by Diacon v. Farmers Ins. Exch., 861 P.2d 895 (Mont. 1993), this Court observed that

> These litigation strategies and tactics will be offered up to juries who, with the benefit of hindsight, and without the benefit of extensive exposure to litigation practices and techniques, will second guess the defendant's rationales for taking a particular course" … Realizing the possibility of having their litigation strategy used against them in a future bad faith suit, an insurer may be discouraged from exercising its legitimate litigation rights.

2009 SD 69 ¶41, 771 N.W.2d at 635 (emphasis supplied). Farmers relied heavily on Palmer below, and quoted extensively from that portion of its holding that ruled that a court, "not a jury, is in the best position to determine the merits of appeals…Although

there are many contexts in which jury determinations may be superior to those of trial or appellate judges, the determination of the frivolousness of an appeal is not one." Palmer, supra, 861 P.2d at 917.

These concerns against infringing upon "legitimate litigation conduct" are entirely absent from Blanchard's case, as the Montana Supreme Court made abundantly clear in its authoritative application of Palmer in the subsequent case of Federated Mut. Ins. Co. v. Anderson, 991 P.2d 915 (Mont. 1999),[1] which squarely held that:

> Meritless appeals are not legitimate litigation conduct. We conclude here that John Deere's fundamental right to defend itself extends only to legitimate litigation conduct and, on balance, the relevance of its frivolous appeal outweighs any prejudice which may result to its defense.

991 P.2d at 922 (emphasis supplied). The court likewise ruled that the concerns raised by Palmer about jury consideration of the merits of an appeal are not present where a court has already found that appeal to be without merit:

> the merits of John Deere's appeal have already been decided by this Court. As a matter of law, John Deere prosecuted a meritless appeal … However, no fact-finder has yet determined whether John Deere's actions on appeal were part of an unfair claim settlement practice and, if so, whether Conifer was damaged by the actions. We conclude that Conifer was entitled to present proof to the jury that John Deere's bad faith was a continuing course of conduct … We hold that the District Court abused its discretion when it denied Conifer's motion to amend its pleadings to allege a meritless appeal as part of the basis for its claim.

991 P.2d at 923 (emphasis supplied).

[1] Partially reversed on unrelated grounds involving the standard of review in administrative appeals in Citizens Awareness Network v. Montana Bd. of Environmental Review, 227 P.3d 583, 587 n.2 (Mont. 2010).

This is exactly the situation here. Contrary to the trial court's fear of a "mini-trial," a jury would not be required to decide whether Farmers' appeal from the Department of Labor decision was meritless, because the circuit court already decided that issue when it dismissed the appeal. Farmers can no longer question that point before a jury, because when Farmers failed to appeal that dismissal, it became final and res judicata, "preclud[ing] relitigation of [the] issues that were litigated between the same parties in a prior action." Rindal v. Sohler, 2003 SD 24 ¶8, 658 N.W.2d 769, 771 (S.D. 2003). Nor would Farmers' "legitimate litigation conduct" be threatened by use of this evidence, because "[m]eritless appeals are not legitimate litigation conduct." Federated Mut. Ins. Co. v. Anderson, supra, 991 P.2d at 922. What does remain for a consideration by a jury in Blanchard's case is whether Farmers' meritless appeal was "part of an unfair claim settlement practice." Id. at 923.

Moreover, a further consideration that guided Dakota, Minnesota & Eastern Railroad Corp. v. Acuity was its observation that "[i]n most instances, questions concerning the propriety of tactical decisions by the insurer or insurer's counsel can be adequately addressed through application of the Rules of Civil Procedure." 2009 SD 69, ¶43, 771 N.W.2d 636. Farmers' bland assertion below that Blanchard's only damages were the costs of defending a meritless appeal not only ignored the allegations of Blanchard's Complaint, see Complaint, Paragraphs 13, 16, but also ignored the fact that the mere dismissal of Farmers' appeal was no remedy for Farmers' violation of its "duty to settle claims without litigation in appropriate cases," Harter, supra, a duty both Neu and her supervisor Ziegler refused to recognize. Knotts v. Zurich Ins. Co., supra, another

case quoted at length in Dakota, Minnesota & Eastern Railroad Corp. v. Acuity, supra, and cited many times by Farmers below, unequivocally held:

> Our preferred rule as to what evidence of post-filing conduct may be admissible in a bad faith action is best summed up as follows:
>
> One should note a distinguishing factor between the insurer's settlement behavior during litigation and its other litigation conduct. The Rules of Civil Procedure provide remedies for the latter … An insurer's settlement offers, on the other hand, are not a separate abuse of the litigation process itself. If a litigant refuses to settle or makes low offers, his adversary cannot avail himself of motions to compel, argument, or cross-examination to correct his failure.
>
> In principle, an insurer's duty to settle should continue after the commencement of litigation. If the insurer were immunized for objectional settlement conduct occurring after litigation begins, the insured would be left without a remedy. It makes sense, therefore, to hold the insurer responsible for such conduct.

Knotts, supra, 197 S.W.3d at 522-23 (emphasis supplied).

Farmers, acting through Blomfelt, had long followed an internal policy of using appeals to force workers' compensation settlements, as shown by its conduct in the Vansteenwyk v. Baumgartner Trees and Landscaping claim. There, after multiple losses before the Department of Labor, circuit court appeal, and this Court, Farmers, with Blomfelt's participation, openly stated its game plan when faced with adverse decisions: "POST APPEAL AS LEVERAGE AND SETTLE CLAIM FOR UNDER THE ORDERED TOTALS RE INDEMNITY." As might be expected of someone who would not agree that Farmers had a good faith duty to settle without litigation, Neu openly encouraged Blomfelt to again employ this abusive strategy. When Blomfelt informed Neu on October 14, 2014, that "[w]e filed the appeal yesterday, and I'm hoping that filing

will prompt them to engage in settlement talks," Neu's immediate response was "[w]hen do you feel we can present an offer to settle indemnity?" Using an unquestionably baseless and meritless appeal to accomplish such a goal was a flagrant violation of Farmers' duty to "not force insureds to litigation to vindicate contractual rights," Hill, supra, and there is nothing in the "litigation conduct" rule that this Court formulated in Dakota, Minnesota & Eastern Railroad Corp. v. Acuity that could bar the admission of this appeal as evidence of Farmers' bad faith in Blanchard's claim.

It can scarcely be denied that Farmers' litigation "conduct sheds light on the reasonableness of the insurer's decision or conduct in denying insurance benefits," and is admissible under Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, supra, 2009 SD 69, ¶42, 771 N.W.2d at 635. Whatever the merits of Farmers' earlier decision to deny benefits to Blanchard, Blomfelt reversed it by exercising his inherent authority to judicially admit Farmers' liability. As such, this is not the type of situation contemplated by Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, supra, where the issue is "whether defendant in bad faith denied the contractual obligation prior to the lawsuit," 2009 SD 69, ¶36, 771 N.W.2d at 634 (emphasis supplied), so that "[a]fter the onset of litigation, an [insurer's actions as it] begins to concentrate on supporting the decisions that led it to deny the claim [are deemed] marginally probative of the insurer's decision to deny coverage." 771 N.W.2d at 635. Thus, in Harvieux v. Progressive Northern Ins. Co., 2018 SD 52, ¶ 22, the motion to enforce the settlement was inadmissible because it was made long after the "investigation or valuation" that led to the denial of the claim. Here, by contrast, the decision to accept Blanchard's claim was made after litigation was commenced, by an act taken in the course of litigation, and the denial was likewise made

by an act taken in the further course of that litigation. There is nothing in Dakota, Minnesota & Eastern R.R. Corp. v. Acuity that would deny Blanchard her right to show all the "facts and law available to [the] [i]nsurer at the time it made the decision to deny coverage," 2009 SD69, ¶19, 771 N.W.2d at 629, merely because that decision was made in the course of litigation. Farmers' meritless appeal not only "sheds light on the reasonableness of the insurer's decision or conduct in denying insurance benefits," 2009 SD 69, ¶42, 771 N.W.2d at 635, that meritless appeal constituted Farmers' decision to deny insurance benefits. Evidence of that decision to appeal, and the use of that appeal as leverage to force Blanchard to settle, can thus not be excluded from evidence, and the trial court's suggestion that this evidence was inadmissible was error.

4. The trial court erroneously refused to consider the individual bad faith conduct by Neu. The law governing summary judgment is plain: "a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion." Tibke v. McDougall, 479 N.W.2d 989, 904 (S.D. 1992). Here, the trial court refused to consider the evidence that Farmers' decision to appeal was in bad faith even aside from Blomfelt's admission of Farmers' liability. The trial court did no more than dismiss Blanchard's arguments as "not serious," and concluded, without any analysis of that evidence, that Farmers made "a merits-based assessment … before deciding to appeal." Appendix 1 at 9. This disregard of the ample evidence that Blanchard presented to the trial court was a clear violation of the rule that "the evidence must be viewed most favorably to the non-moving party with reasonable doubts resolved against the moving party." Schoenwald v. Farmers Coop. Ass'n., 474 N.W.2d 519, 520 (S.D. 1991).

This Court in Crabb v. National Indem. Co., 205 N.W.2d 633, 636 (S.D. 1973) long ago recognized that "[a]n insurer cannot discharge its entire responsibility to an insured by simply employing a competent attorney and abiding by his decision." Rather, the insurer

> remains ultimately responsible … to properly investigate claims and adjust them in harmony with the terms and conditions of its policy. An insurer cannot engage in the subterfuge of avoiding its duties by the shield of retaining an attorney. Reliance on the advice of counsel must be reasonable, and the insurer retains its obligation to exercise its own independent judgment in assessing an insured's rights.

Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, 294 (Ky. App. 2007) (emphasis supplied). Accord, e.g., Dairyland Ins. Co. v. Hawkins, 292 F.Supp. 947, 953 (S.D. Iowa 1968) ("advice of counsel … does not relieve [an insurer] of its responsibility to make a reasonable investigation of its own file.") And, of course, "[w]ether [an] insurer acted in bad faith in conducting an inadequate investigation … is a question of fact for the jury." Walz, supra, 1996 SD 135, ¶8, 556 N.W.2d at 70. Indeed, in Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, supra, 2009 SD 69, ¶¶24-26, 771 N.W.2d at 631, this Court found that an insurer's decision based on an "erroneous conclusion" raised "[q]uestions of fact as to whether [the insured] failed to conduct a thorough investigation and subject the results of the investigation to 'reasonable evaluation and review,'" requiring the reversal of a summary judgement in favor of the insurer.

The record abundantly demonstrates that Farmers made no effort to fulfill its duty of making a "reasonable investigation of its own file" before it decided to appeal. Rather, the record showed that Neu was wholly mistaken as to the issues she believed she was appealing and took that appeal in violation of Farmers' own procedures. Neu admitted

that she thought Blanchard's evidentiary hearing before the Department of Labor had been to determine if Blanchard was able to work and that she believed she was "[a]ppealing [the] judge's decision of [Blanchard] being" permanently and totally disabled. Yet Neu either knew or should have known that this was not true. Neu had previously been provided with a copy of a demand letter from Blanchard's counsel in January 2014 that made it clear that Blanchard was not claiming permanent total disability benefits since she was "earning wages," and Blomfelt had repeatedly told Neu on July 21, 2014, that this was not a permanent total disability claim. Blomfelt himself considered that the chances Blanchard would ever make a permanent total disability claim were "very slim." Thus far from the lifetime award of total disability benefits that Neu believed it to be, the award here was for a paltry $18,763.16 in temporary total disability benefits.

Perhaps this might have been discovered had Neu followed Farmers' internal directive to obtain appeal authority from a higher manager; surely it would have come to light had Neu followed another Farmers regulation that she "immediately" obtain all "legal pleadings, notices or Board decisions" or "any information that could significantly affect case outcome." The law is clear that "worker's compensation manuals … have a direct bearing on whether [an insurer] followed its own procedures and South Dakota law when processing [a worker's] claim." Nye v. Hartford Acc. and Indem. Co., 2013 WL 3107492*10 (D.S.D. 2013) (decided under South Dakota law). The record is undisputed that Neu ignored Farmers' procedures and even admitted it would have been better to see and read the Department's decision before deciding to appeal. Instead, Neu decided to appeal for reasons that were false and then used that appeal to try and force a settlement.

Plainly, "[d]enying a claim for reasons known to be false is not a reasonable basis to deny a claim." Lewison v. Western Nat. Mut. Ins. Co., 2014 WL 3573403*6 (D.S.D. 2014) (applying South Dakota law) (Emphasis supplied.) Neu's own conduct raised issues of material fact as to Farmers' bad faith, and the grant of summary judgment should be reversed.

Moreover, Neu's supposed reliance on Blomfelt's advice was scarcely reasonable, since she knew or should have known that it was not coming from a "competent" attorney, Crabb, supra, but from one who had a demonstrated proclivity to waive Farmers' defenses in worker's compensation cases. In the Department of Labor decision in another of Blomfelt's cases, Allen v. Leo Bestgen Construction and Truck Ins. Exchange, 2005 WL 5190343 (S.D. Dept. Lab. 2005), a decision Farmers produced from its own files, the Department held

> The Prehearing Order entered on June 13, 2005, listed compensability as the issue to be presented at hearing. In post-hearing briefs, both parties agreed that the issue of compensability included whether Claimant sustained an injury arising out of and in the course of his employment and whether Claimant provided timely notice pursuant to SDCL 62-7-10. However, in its brief, Employer failed to address the issue of whether Claimant sustained an injury arising out of and in the course of his employment… The issue of whether Claimant sustained an injury arising out of and in the course of his employment is deemed to be waived by Employer.

(Emphasis supplied.) The Allen case resulted in the commencement of bad faith litigation against Farmers, including allegations that Farmers had interposed "frivolous defenses, including defenses it knew lacked any merit." Exhibit F to 2017 Bogard Affidavit. Nor was this the only such instance in Blomfelt's representation of Farmers. In Vansteenwyk, supra, 2007 SD 36, ¶21, 731 N.W.2d at 222, an appeal brought by Blomfelt for Farmers, this Court found Blomfelt had similarly waived a Farmers' issue concerning a failure to

make specific findings on evidence. Yet on remand, Blomfelt and Farmers decided that their best strategy was to "post [another] appeal as leverage and settle claim for under the ordered totals re indemnity."

Farmers, by force of SDCL 62-1-2, was treated as Blanchard's "employer" for purposes of the payment of workers' compensation benefits, and since Blomfelt was Farmers' own retained counsel in the workers' compensation litigation with Blanchard, "throughout the course of the litigation he acted for and on behalf of the insurance company . . . [making him one of] its agents for whom it has the customary legal liability." Continental Ins. Co. v. Bayless and Roberts, Inc., 608 P.2d 281, 294 (Alaska 1980). See, e.g., Huy Thanh Vo. v. Nelson & Kennard, 931 F.Supp.2d 1080, 1089-90 (E.D. Cal. 2013) ("As attorneys are their clients' agents . . . it appears that [a client] can be found vicariously liable for [their attorney's misconduct]." And, as South Trust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So.2d 885, 905-06 (Ala. App. 2005), held,

> a principal is liable for the intentional torts of its agent---even if the agent's acts were unknown to the principal, were outside the scope of the agent's authority, and were contrary to the principal's express directions---if the agent's acts were in furtherance of the principal's business and not wholly for the gratification of the agent's personal objectives. Applying that rule to the present case, it is clear that all of the lawyers' actions in the litigation against Greene were attributable to the Bank---even if those actions were outside the scope of the lawyers' authority from the Bank and contrary to the Bank's express directions---because the record is devoid of any evidence that, when the lawyers sued, served, and recorded a judgment against Greene, their purpose was to accomplish some personal objective rather than to further the Bank's business objective of collecting a debt.

(Emphasis supplied.) See McKinney v. Pioneer Life Ins. Co., 465 N.W.2d 192, 194-95 (S.D. 1991) ("a principal may be held liable for the [tort] of his agent acting within the scope of his actual or apparent authority, even though the principal was unaware of or received no benefit from his agent's conduct … where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually cause the injury.")

The trial court recognized in its order rejecting Farmers' first motion for summary judgment that it was required to consider whether Farmers "recklessly disregarded Blomfelt's conduct." Appendix 6 at 6. Eighteen months later, the trial court declared itself "reluctant" to consider Blomfelt's conduct in other cases. It concluded it had not been asked to "determine" the admissibility of such evidence and so would "not consider" it. Appendix 1 at 13 n.5. This ignored the fact that Blanchard had briefed this very issue at pages 8-9 of her Reply Brief on her motion for summary judgment as to the third-party complaint and directly informed the trial court at page 21 of her Resistance to Farmers' second motion for summary judgment that Blanchard "incorporate[d] that argument in full."

It was unquestionably error to not consider Blomfelt's misconduct in other cases since there can be no doubt that evidence of other wrongs is "admissible for … proving … intent … [and] knowledge" under SDCL 19-19-404(b)(2) (emphasis supplied). This statute is "a rule of inclusion, as opposed to exclusion… [o]nce a circuit court finds other acts evidence relevant, the balance tips emphatically in favor of admission." State v. Medicine Eagle, 2013 SD 60, ¶17, 835 N.W.2d 886, 892-93 (S.D. 2013). In a bad faith case, such prior acts involving other claims are unquestionably relevant, especially

where, as here, the acts were performed by the same agent of the insurance company. As Kentucky Farm Bureau Mut. Ins. Co. v. Troxell, 959 S.W.2d 82, 85-86 (Ky. 1998), held, such evidence is relevant to show that a particular agent "had previously used methods in handling claims that are [legally] unacceptable … and further, that Farm Bureau had knowledge of a pattern of conduct practiced by its agent." (emphasis supplied). Blanchard was unquestionably entitled to use evidence from Farmers' own files to show that

> Farmers' [conduct] … [was] all part of a conscious course of conduct, firmly grounded in established company policy, designed to utilize the lamentable circumstances in which [Blanchard] and her family found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have warranted.

Neal v. Farmers Ins. Exchange, supra, 582 P.2d at 987.

The trial court's refusal to even consider this evidence of bad faith in Farmers' initial decision to appeal and its reckless abdication of its control of Blanchard's claim to Blomfelt, leaves no doubt that the order for summary judgment below was error and must be reversed.

## CONCLUSION

The trial court incorrectly decided the legal questions regarding Blanchard's claim, and failed to view the evidence presented on that claim in a light most favorable to Blanchard. The order for summary judgment in favor of Farmers was thus error and must be reversed.

Blanchard requests oral argument.

Dated this 27th day of July, 2018.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy, and two hard copies of the above and foregoing **APPELLANT'S BRIEF** on the following individual, by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

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Dated this 27th day of July, 2018

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## CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies pursuant to SDCL § 25-26A-66 that the brief contains 9,570 words and 49,651 characters without spaces, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix and Certificates of Counsel, and certifies that the name and the version of the word processing software used to prepare the brief is Microsoft Word 10 using Times New Roman font 12 and left justification.

Dated this 27th day of July, 2018.

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## CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLANT'S BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

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## APPENDICES

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|---|---|
| STATE OF SOUTH DAKOTA) :SS<br>COUNTY OF MINNEHAHA ) | IN CIRCUIT COURT<br>SECOND JUDICIAL CIRCUIT |
| **CHRISTINA BLANCHARD**,<br>Plaintiff,<br>vs.<br>**MID-CENTURY INSURANCE COMPANY**, also known as **FARMERS INSURANCE**,<br>Defendants,<br><br>**MID-CENTURY INSURANCE COMPANY**,<br>Third-Party Plaintiff,<br>vs.<br>**ERIC C. BLOMFELT**, and **ERIC BLOMFELT & ASSOCIATES, P.C.**,<br>Third-Party Defendants. | **CIV 15-761**<br><br>**MEMORANDUM OPINION AND ORDER RE: SECOND MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE TO EXCLUDE LITIGATION CONDUCT AND MOTION FOR SUMMARY JUDGMENT ON THIRD-PARTY COMPLAINT** |

This matter is before the court upon the motions of the Defendant Mid-Century Insurance Company ("Mid-Century") seeking to exclude litigation conduct and for summary judgment. The Plaintiff Christina Blanchard ("Blanchard") has also moved for summary judgment as to Mid-Century's third-party complaint against Eric C. Blomfelt and Eric Blomfelt & Associates, P.C. ("Blomfelt").

The court conducted a hearing on October 23, 2017. The parties were present at the hearing through their respective attorneys. Heather Lammers Bogard represented Christina Blanchard ("Blanchard"). Michael Tobin and Meghann Joyce represented Mid-Century. Blomfelt represented himself and his firm.

After carefully considering all of the arguments advanced by counsel, reviewing the authorities, and the record, the court grants Mid-Century's second motion for summary judgment and the motion to exclude litigation conduct, rendering Blanchard's summary judgment motion moot.

## BACKGROUND

Blanchard is former employee of the Millstone II, Inc. ("Millstone") restaurant in Rapid City, South Dakota. She began receiving treatment for low-back pain in September of 2010 while she was employed and was ultimately terminated in January of 2011 because she was not able to work. Blanchard's injuries were initially viewed as compensable under South Dakota's workers' compensation statutes, and she received benefits through Millstone's workers' compensation carrier, Mid-Century.

In August 2011, Mid-Century denied further workers' compensation benefits for Blanchard, and she subsequently petitioned the South Dakota Department of Labor, seeking additional benefits. After discovery and an evidentiary hearing, the administrative law judge ("the ALJ") issued a July 2014 written decision, determining that Blanchard had "met her burden of showing that her work activities are a major contributing cause of her current

back pain." The ALJ ordered Millstone and Mid-Century to pay temporary total disability benefits through August 1, 2012, and to pay medical expenses related to treatment for her back injury.

Mid-Century learned of the adverse result in a July 21, 2014, email from its outside counsel, Blomfelt, to its claims adjuster, Beth Neu ("Neu"). In the initial email and others that followed in succession, Blomfelt advised of the possibility of seeking appellate review of the ALJ decision in circuit court. He acknowledged that "[n]ormally, when a judge picks one doctor's testimony over the other, the decision is not a very good candidate for an appeal." However, Blomfelt also believed the ALJ had clearly erred when he credited the treating physician's testimony regarding causation. In Blomfelt's view, the treating physician's testimony was flawed because it was offered without an understanding of Blanchard's job duties, and he advised that an appeal might well be successful. In one email from the July 21, 2014, exchange, Blomfelt wrote:

> I am shocked by this decision, and I think the judge got it totally wrong. It is ridiculous that a claimant can simply have a doctor say an injury is "work-related" due to repetitive motion without knowing a single thing about a claimant's job duties involving repetitive motion. I believe an appeal would be successful given this even though it is a battle of the experts issue.
>
> I recommend we appeal and see what the Circuit Court in South Dakota does. As I said, although this is not a PTD claim at the moment, this claimant will use this decision to try to claim PTD in the future when she decides she simply no longer wants to work. Her treating doctor will back her up if she says she is in too much pain from this mystery injury to continue with her present job.

Lammers Bogard Affidavit of 10/6/17 at Ex. A.

Neu agreed with the recommendation to appeal, writing in an email, "[l]et's proceed in appealing." *Id.* She also asked about the likelihood of augmenting the record with additional evidence which Blomfelt advised was not possible. Fixed and determined in the plan to appeal, Mid-Century needed only to wait, as Blomfelt put it, to receive "the signed order from the Department to trigger the [appeal] deadline." *Id.*

On September 11, 2014, Neu emailed Blomfelt, asking if there were any updates in the "litigation status" of the Blanchard case. Neu also wondered if Blanchard would be "open to settle[.]" *Id.* Blomfelt responded that the ALJ had yet to issue a final order and further advised that he doubted Blanchard would "have much motivation to settle at the moment." *Id.* In Blomfelt's view, Mid-Century would be "in a stronger position once we file [the appeal], and hopefully win, the appeal." *Id.*

At the heart of this case is Blomfelt's action after the ALJ's decision and after Mid-Century's decision to appeal but before filing the notice of appeal. In his July 2014 decision, the ALJ ordered the parties to submit proposed findings of fact and conclusions of law, specifically allowing Millstone and Mid-Century twenty days after receipt of Blanchard's proposed findings and conclusions to "submit Objections and/or Proposed Findings of Fact and Conclusions of Law." Joyce Affidavit of 7/16/15 at Ex. 1. After a prompt by the ALJ, Blomfelt submitted proposed finding of fact and conclusions of law that were *consistent* with the adverse ALJ written decision and without stating any objections to the ALJ's decision. There is no indication Mid-Century was

aware of the failure to object. The ALJ signed Blanchard's proposed findings and conclusions with minor modifications on September 16, 2014.

Blomfelt filed a timely notice of appeal to circuit court on Mid-Century's behalf on October 13, 2014. Noting Blomfelt's failure to oppose or object to the ALJ's decision, Blanchard moved to dismiss the appeal, arguing that Mid-Century was effectively bound by its counsel's proposed findings and conclusions which she described as judicial admissions. Blanchard also alleged the effort to prosecute the appeal under the circumstances constituted a vexatious refusal and sought attorney's fees.

The circuit court determined that Blomfelt's failure to propose different findings and conclusions or object to the ALJ's decision was fatal and granted Blanchard's motion to dismiss the appeal. *Id.* at Ex. 1. In a December 30, 2014, written decision, the circuit court concluded that, in the absence of Mid-Century's contrary proposed findings and conclusions or objection to the ALJ's decision, appellate review was limited to whether the findings support the conclusions of law which, in the circuit court's view, they surely did. *Id.* The circuit court did not grant Blanchard's request for an award of attorney's fees.

In this ensuing civil action, Blanchard has alleged Mid-Century acted in bad faith by pursuing what it has termed a frivolous appeal. Mid-Century has twice moved for summary judgment, first contending that its litigation conduct effectively prevented Blanchard's claim. The court denied the first summary judgment motion, concluding the existence of genuine issues of material fact regarding Mid-Century's knowledge precluded summary judgment. The denial

was made without prejudice, though, and Mid-Century now renews its motion for summary judgment and also moves the court *in limine* to exclude evidence of its litigation conduct, both with the benefit of pretrial discovery.

As is relevant here, the parties' discovery has not revealed any information to suggest that Mid-Century was aware that Blomfelt's proposed findings and conclusions were infirm until Neu received a copy of the circuit court's decision.[1] Indeed, according to an entry in the claims file by Neu, Blomfelt did not report the nature of the motion to dismiss the circuit court appeal and did not acknowledge to Neu the allegation of Blanchard's counsel that his failure to object to the ALJ's decision was fatal to the appeal. Instead, Blomfelt described the motion as routine, without merit and something that could delay, but not prevent, appellate review:

> Received email from d/a [defense attorney] dated 11/30/14. He states he is filing brief, c/a [claimant's attorney] will then respond w/brief of their own. c/a has filed motion to dismiss the appeal. D/a states that this is not unusual, but their motion is not very well grounded. D/a states we may have a hearing on the motion. It just depends on how the judge wants to treat the motion. The appeal is going to take longer to reach a resolution because the judge has to rule on the motion before getting to the actual substance of the appeal itself. D/a state he will see if now that the briefs are being filed, if c/a has any interest in settling.

Joyce Affidavit of 8/1/17 at Ex. 19 (using upper/lower case print).

Additional facts will be added as necessary.

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[1] Mid-Century paid Blanchard the benefits ordered by the ALJ soon after the circuit court issued its decision dismissing the appeal.

## Analysis and Authorities

### A. Summary judgment

The standard for a trial court's determination of summary judgment is well-settled:

> Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law.... When a motion for summary judgment is made and supported as provided in § 15–6–56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15–6–56, must set forth specific facts showing that there is a genuine issue for trial.

*Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp.*, 2014 SD 97, ¶ 11, 857 N.W. 2d 865, 869 (quotations and embedded citations omitted); *see also North Star Mutual Ins. Co. v. Rasmussen*, 2007 SD 55 ¶ 14, 734 N.W.2d 352, 356 (a court determining a summary judgment motion must view the facts most favorably to the nonmoving party, resolving any reasonable doubts against the moving party).

### B. Blanchard cannot demonstrate Mid-Century's knowledge or reckless disregard, and Blomfelt's conduct fails to shed light on the allegation of bad faith.

South Dakota recognizes a cause of action for bad faith based upon an insurer's conduct in a workers' compensation case. *Hein v. Acuity*, 2007 SD 40, ¶ 10, 731 N.W.2d 231, 235. The claim is unlike traditional third-party or first-party bad faith claims and "exists when an insurer breaches its duty to deal in good faith and fairly when processing a workers' compensation claim."

*Id.* at ¶ 11. An employee alleging bad faith against a workers' compensation insurer must satisfy a two-part test:

(1) There was an absence of a reasonable basis for denial of policy benefits; and

(2) The insurer knew of or recklessly disregarded the lack of a reasonable basis for denial.

*Id.* at ¶ 14.

"[W]orkers' compensation bad faith will not arise whenever an insurer's conduct toward a claimant is unreasonable." *Id.* at ¶ 18. The insurer is permitted to "challenge claims which are fairly debatable," and thus, "will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." *Id.*

Where a plaintiff seeks to prove bad faith with evidence of an insurer's conduct during the underlying litigation, additional principles of evidence apply. In *Dakota, Minnesota and Eastern Railroad Corp. v. Acuity ("DM&E")*, 2009 SD 69, 771 N.W.2d 623, our Supreme Court established what this court has previously described as a formidable standard for plaintiffs seeking to admit evidence of an insurer's litigation conduct. *See* Memorandum Opinion and Order of 3/15/16. Indeed, the DM&E decision states that it would be a "rare case" where an insurer's litigation conduct is admissible under the rules of evidence. *Id.* at ¶ 42.

The Court in DM&E identified a strong public policy against allowing this type of evidence for reasons that seem as practical as they are legal:

> As an evidentiary matter, many courts have questioned the probative value of an insurer's post-filing conduct as evidence of

> bad faith... These litigation strategies and tactics will be offered up to juries who, with the benefit of hindsight, and without the benefit of extensive exposure to litigation practices and techniques, will second guess the defendant's rationales for taking a particular course. Realizing the possibility of having their litigation strategy used against them in a future bad faith suit, an insurer may be discouraged from exercising its legitimate litigation rights.

*Id.* at ¶ 41 (blocked quote, embedded quotations and internal citations omitted). In determining questions of admissibility relating to litigation conduct, the court's inquiry focuses upon "whether the insurer's post-filing conduct sheds light on the reasonableness of the insurer's decision or conduct in denying insurance benefits." *Id.* at ¶ 40.

Here, Blanchard cannot show that Mid-Century acted in bad faith. Even if Blomfelt's conduct in proposing infirm findings and conclusions to the ALJ deprived Mid-Century of a reasonable basis for denying benefits, it does not follow that Mid-Century knew of or acted with reckless disregard of Blomfelt's conduct.

The undisputed material facts indicate that Neu and Blomfelt undertook a merits-based assessment of Mid-Century's potential appeal before deciding to proceed with appellate review in June of 2014. Neu authorized the circuit court appeal[2] based upon Blomfelt's advice which included his view that the ALJ had incorrectly credited the treating physician's testimony and that Mid-Century should seek review in an effort to preempt the possibility of a future

[2] Any factual disputes regarding whether internal Mid-Century claims-handling rules required Neu to obtain supervisory approval before authorizing the appeal are not material to the question of Mid-Century's knowledge of Blomfelt's errors.

claim by Blanchard for permanent total benefits. Simply put, the decision to appeal, which predated Blomfelt's findings and conclusions, was not frivolous, and Blanchard does not seriously argue otherwise.

Beyond this, there is no evidence that Mid-Century or Neu had actual knowledge that its appeal had been fatally impacted by the findings and conclusions Blomfelt submitted to the ALJ. Nor is there evidence that Mid-Century or Neu acted with reckless disregard of this fact. Indeed, Neu reasonably relied upon Blomfelt to act consistent with Mid-Century's plan to perfect and prosecute an appeal challenging the merits of the ALJ's decision.[3]

The unvarnished fact that Mid-Century also allowed for the possibility of ongoing settlement negotiations after the decision to appeal and after the notice of appeal does not change the analysis. Mid-Century's ability to resolve the case on appeal was directly tied to the strength of its legal position. In fact, Blomfelt advised Neu in a September 11, 2014, email that Blanchard would not "have much motivation to settle at the moment[]" but that Mid-Century would be "in a stronger position once we file [the appeal], and hopefully win, the appeal." Lammers Bogard Affidavit of 10/6/17 at Ex. A.

Distilled to its essence, Blanchard's bad faith claim is narrow. She does not allege the original denial of continued benefits in August of 2011 constitutes bad faith, and she does not seem to claim the decision to appeal,

[3] Blanchard has suggested that it was improvident for Neu to tell Blomfelt that she did not need to see "every piece of paper" related to the case. However, the court is unaware of any claim by Blanchard that Neu would have been able to identify the deficiency in Blomfelt's proposed findings and conclusions had she seen them.

itself, is bad faith. Instead, she claims Blomfelt's findings and conclusions rendered Mid-Century's continued denial of benefits during the pendency of the appeal frivolous. However, this claim rests uneasily upon patently irreconcilable theories – i.e. Mid-Century engaged in a surreptitious effort to prolong litigation and secure a discounted settlement on appeal by acting conspicuously and obviously to defeat its own appeal. The argument is confounding and unsustainable.

Indeed, as an evidentiary matter, the court questions whether evidence of Blomfelt's ill-fated findings and conclusions is even legally relevant under Rule 401 which requires relevant evidence to have any tendency to "make a fact more or less probable[.]" *See* SDCL § 19-19-401. The court cannot discern how Blomfelt's obvious professional conduct[4] could conceivably further an allegedly secret effort by Mid-Century to act in bad faith. However, even if the evidence of Blomfelt's conduct satisfied Rule 401, any possible probative force is substantially outweighed by the danger of confusing the issues and the likelihood that the jury would become involved in a collateral "mini-trial" on the finer points of administrative law and appellate practice. *See* SDCL § 19-19-403.

[4] References in this Memorandum Opinion and Order to alleged professional errors of Blomfelt are not judicial determinations of professional negligence. Suffice it to say here that the undisputed facts establish that Blomfelt's proposed findings and conclusions were an obvious and conspicuous part of his professional work for Mid-Century. It is equally undisputed that his conduct resulted in an insufficient administrative appellate record as determined by the circuit court judge presiding over Mid-Century's appeal in a decision that was never, itself, appealed to the Supreme Court.

Evidence of the litigation conduct associated with Blomfelt's errors would not "shed light" upon the reasonableness of Mid-Century's course which was to pursue an appeal on the merits of the case. At issue in Blanchard's claim is not the allegedly untoward "litigation strategies and tactics" of an insurer, but rather the unilateral professional conduct of its outside counsel. Given the incongruity underlying Blanchard's claim, the court perceives little or no probative force associated with this evidence.

Blanchard's principal argument resisting Mid-Century's motions centers on agency principles which she invokes in an effort to impute Blomfelt's conduct to Mid-Century. However, the argument overlooks the essence of a bad faith claim – bad faith. Our Supreme Court has described bad faith as in the following terms:

> Bad faith' is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.

*E.P v. Riley*, 1999 SD 163, ¶40, 604 N.W.2d 7, 17 (quoting *Cotton v. Stange*, 1998 SD 81, ¶ 9 n. 1, 582 N.W.2d 25, 28 n. 1 (citations omitted)).

Black's Law Dictionary further defines bad faith as:

> ...not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary at 127 (5th Ed.) (citation omitted).

Here, Blanchard has failed to identify a "dishonest purpose" or "wrongdoing" on the part of Mid-Century relating to Blomfelt's proposed

findings and conclusions. Viewing the facts in the light most favorable to her, she has perhaps demonstrated that Mid-Century should be liable for any professional negligence by Blomfelt – but not the existence of bad faith. Mid-Century possesses a statutory right to appeal an adverse administrative decision, and it undertook a merits-based analysis before deciding to appeal. As indicated above, the inclination to engage in ongoing settlement discussions does not, as evidenced by the undisputed material facts presented here, sustain a claim of bad faith. In the end, the only event that in Blanchard's view rendered Mid-Century's circuit court appeal frivolous was, at most, the result of Blomfelt's alleged negligence, not Mid-Century's malicious design. [5]

**C. Blanchard's motion for summary judgment re: Mid-Century's third-party complaint is moot.**

"It is a fundamental principle of our jurisprudence that courts do not adjudicate issues that are not actually before them in the form of cases and controversies." *Moeller v. Weber*, 2004 SD 110, ¶ 45, 689 N.W.2d 1, 16. A case is moot when the issue presented is academic or nonexistent and when "judgment, if rendered, will have no practical legal effect upon the existing

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[5] Blanchard's submissions refer to alleged conduct by Mid-Century in another case in an effort to strengthen its argument that Mid-Century had an improper purpose here. The court is reluctant to consider this proffered information from another case whose circumstances might differ in significant ways. The information seems to implicate Rule 404(b) of the South Dakota Rules of Evidence in the sense the court is being asked to determine the existence of disputed material facts based upon other acts evidence. The court has not been asked to determine the admissibility of this evidence and will, therefore, not consider it here. *See Stern Oil Co. v. Brown*, 2012 SD 56, ¶ 16, 817 N.W.2d 395, 401 ("[T]he focus in summary judgment hearings centers on the existence of admissible and probative evidence to support the challenged claim or defense.") (citations omitted).

controversy." *Hewitt v. Felderman*, 2013 S.D. 91, ¶ 11, 841 N.W.2d 258, 262 (quoting *Investigation of the Highway Constr. Indus. v. Bartholow*, 373 N.W.2d 419, 421 (S.D.1985). "No consideration of policy of convenience should induce a court to render a decision which would be merely advisory." *Danforth v. City of Yankton*, 25 N.W.2d 50, 55 (S.D. 1946).

Blanchard's summary judgment motion aimed at eliminating Mid-Century's third-party complaint against Blomfelt is moot. The third-party complaint seeks indemnity against Blomfelt in the event Mid-Century is determined to be liable to Blanchard. However, with the court's decision to grant Mid-Century's second motion for summary judgment, Blanchard's motion for summary judgment no longer presents a live controversy.

**ORDER**

Based upon the foregoing, it is hereby ordered:

1) that Mid-Century's second motion for summary judgment is granted;

2) that Mid-Century's motion in limine to exclude litigation conduct is granted:

3) Blanchard's motion for summary judgment regarding Mid-Century's third-party claim against Blomfelt is denied as moot; and

4) that the clerk will provide a copy of this Memorandum Opinion and Order to the parties' counsel electronically or by U.S. Mail.

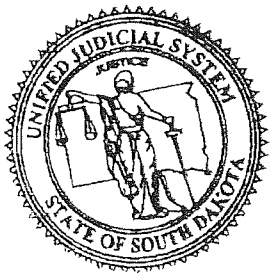
Dated this 8th day of June, 2018.

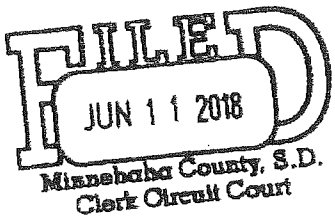
BY THE COURT:

Mark Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____ Deputy



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

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CHRISTINA BLANCHARD,

Plaintiff,

v.

MID CENTURY INSURANCE COMPANY, also known as FARMERS INSURANCE,

Defendant.

**Civ. No. 15-761**

**STATEMENT OF UNDISPUTED MATERIAL FACTS**

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Defendant Mid Century Insurance Company ("Mid Century"), by and through its attorneys of record, Boyce Law Firm, L.L.P., and pursuant to SDCL 15-6-56(c), respectfully submits this statement of undisputed material facts in support of its second motion for summary judgment. The citations below refer to the Affidavit of Meghann M. Joyce in Support of Motion in Limine and Second Motion for Summary Judgment and attached exhibits, or the files and records of this action. The following facts are not in dispute and support the motion for summary judgment:

1. Mid Century provided Plaintiff Christina Blanchard's ("Plaintiff") employer, Millstone II, Inc. ("Millstone") in Rapid City, South Dakota, workers' compensation insurance at all relevant times. (Joyce Aff., Ex. 1, ¶ 1; Joyce Aff., Ex. 2, ¶ 1).

2. Plaintiff first alleged that she began experiencing back pain in August 2010, but she did not seek medical treatment until September 23, 2010. (FOF, ¶¶ 5, 10).

3. Plaintiff eventually sought workers' compensation benefits from Mid Century. (FOF, ¶ 5; Joyce Aff., Ex. 1, ¶ 2; Joyce Aff., Ex. 2, ¶ 2).[1]

4. On July 22, 2011, Dr. Peter Vonderau, one of Plaintiff's treating physicians, placed her at maximum medical improvement with a five-percent whole-person impairment. (FOF, ¶ 27).

5. On August 25, 2011, Mid Century denied Plaintiff further workers' compensation benefits. (FOF, ¶ 30).

6. On November 15, 2011, Plaintiff filed a petition for hearing with South Dakota Department of Labor ("Department"), seeking workers' compensation benefits for her alleged work-related back injury. (Complaint, ¶ 6).

7. After discovery and an evidentiary hearing, Administrative Law Judge Donald Hageman ("Judge Hageman") issued a written decision, finding in Plaintiff's favor and directing the parties to submit proposed findings of fact and conclusions of law. (Complaint, ¶ 7; Joyce Aff., Ex. 1, at Ex. 1; Joyce Aff., Ex. 2, at ¶ 5).

8. In reaching his decision, Judge Hageman credited the testimony of Plaintiff's treating physician on the issue of causation over the testimony of Millstone and Mid Century's expert. (Joyce Aff., Ex. 1, at Ex. 1; Joyce Aff., Ex. 2, ¶ 5; Joyce Aff., Ex. 6 ("Neu Depo."), Exs. 19, 22).

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1. References to the "FOF" or "COL" refer to Administrative Law Judge Donald W. Hageman's signed and filed findings of fact and conclusions in Plaintiffs' underlying workers' compensation proceeding, which were attached as Exhibit 4 to Plaintiff's First Set of Requests for Admission to Defendant. (*See* Joyce Aff., Exs. 1, 2).

9. Plaintiff timely submitted her Proposed Findings of Fact and Conclusions of Law. (Joyce Aff., Ex. 1, at Ex. 2; Joyce Aff., Ex. 2, ¶ 6).

10. When prompted by Judge Hageman, Eric Blomfelt ("Blomfelt"), who was Millstone and Mid Century's retained attorney of record in the workers' compensation proceeding, proposed findings of fact and conclusions of law similar to the Department's decision. (Complaint, ¶¶ 8-9; Joyce Aff., Ex. 1, at Ex. 3; Joyce Aff., Ex. 2, ¶ 7).

11. Blomfelt did not provide Mid Century a copy of his September 2, 2014, Proposed Findings of Fact and Conclusions of Law before submitting them to the Department. (Joyce Aff., Ex. 1, at Ex. 3; Joyce Aff., Ex. 2, ¶ 7; Joyce Aff., Ex. 3, at 3; Neu Depo., Exs. 19, 22).

12. Blomfelt did not submit objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law. (Complaint, ¶¶ 8-9; Joyce Aff., Ex. 1, at Ex. 3; Joyce Aff., Ex. 2, ¶ 7).

13. Judge Hageman entered Findings of Fact, Conclusions of Law, and an Order directing Millstone and Mid Century to pay Plaintiff temporary total disability benefits from August 25, 2011, through August 1, 2012, and to pay medical expenses related to her back injury. (Complaint, ¶ 10; Joyce Aff., Ex. 1, at Ex. 4; Joyce Aff., Ex. 2, at ¶ 9).

14. Blomfelt advised Millstone and Mid Century that decisions in which the Department finds one expert's testimony more credible than another are ordinarily not good candidates for an appeal, but that this case may prove an exception to that general rule due to obvious deficiencies in the testimony of Plaintiff's treating physician, including the fact that he offered his opinion without knowing the scope of her job duties. (Neu Depo., 43-47, 62-63, Exs. 19, 22; Joyce Aff., Ex. 7 ("Blomfelt Depo."), 64-65, 83-84, 88-94).

15. On October 13, 2014, Millstone and Mid Century appealed Judge Hageman's decision to circuit court. (Joyce Aff., Ex. 1, at Exs. 5-6; Joyce Aff., Ex. 2, ¶¶ 10, 12-13).

16. Millstone and Mid Century followed Blomfelt's recommendation to appeal the Department's decision. (Neu Depo., 43-47, 62-63, Exs. 19, 22; Blomfelt Depo., 58-59, 64-65, 83-84, 88-94).

17. Mid Century reasonably relied on the advice of its attorney to continue to defend Plaintiff's claim for further workers' compensation benefits by appealing the Department's unfavorable decision. (Neu Depo., 43-47, 62-63, Exs. 19, 22; Blomfelt Depo., 64-65, 83-84, 88-94).

18. Mid Century believed that pursuing an appeal was reasonable and prudent. (Neu Depo., 43-47, 62-63, Exs. 19, 22).

19. On November 6, 2014, Plaintiff's counsel sent Blomfelt a letter, warning him that Millstone and Mid Century's appeal was frivolous because he had failed to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. (Blomfelt Depo., 42-43).

20. Blomfelt neither provided Mid Century a copy of Plaintiff's counsel's November 6, 2014, letter nor discussed it with Mid Century's agents or representatives. (Joyce Aff., Ex. 3, at 1-2; Blomfelt Depo., 42-43).

21. On November 14, 2014, given Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law, Plaintiff moved to dismiss the appeal. (Joyce Aff., Ex. 1, at Exs. 9, 10; Joyce Aff., Ex. 2, ¶¶ 23, 27).

22. Plaintiff not only addressed the procedural deficiencies in Millstone and Mid Century's appeal but also sought restitution for the delay and costs that the appeal caused her. (Joyce Aff., Ex. 1, at Exs. 9, 10, 12; Joyce Aff., Ex. 2, at ¶¶ 23, 27, 33).

23. Blomfelt did not forward to Mid Century Plaintiff's November 14, 2014, motion to dismiss based on Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. (Joyce Aff., Ex. 1, at Exs. 9, 10; Joyce Aff., Ex. 2, ¶¶ 23, 25-27, 29-30; Joyce Aff., Ex. 3, at 2; Joyce Aff., Ex. 5, at 21; Blomfelt Depo., 44).

24. On November 30, 2014, Blomfelt did inform Elizabeth Neu ("Neu"), Mid Century's assigned claims adjuster, via email that Plaintiff had filed a motion to dismiss, but he did not discuss the basis of the motion to dismiss with Mid Century's agents and representatives at that time. (Joyce Aff., Ex. 3, at 2-3; Joyce Aff., Ex. 4, at 5; Neu Depo., Exs. 19, 22; Blomfelt Depo., 47-49). Instead, he assured her that the motion "was not unusual," and that it was "not very well grounded." (Neu Depo., Exs. 19, 22; Blomfelt Depo., 47-49).

25. On November 30, 2014, Blomfelt made a settlement overture that Mid Century had authorized. (Joyce Aff., Ex. 1, at Ex. 7; Joyce Aff., Ex. 2, ¶¶ 15, 17). But, at that time, Mid Century did not know that Blomfelt had failed to properly perfect its appeal to circuit court. (Joyce Aff., Ex. 1, at Ex. 7; Joyce Aff., Ex. 2, ¶¶ 15, 17; Neu Depo., Exs. 19, 22).

26. Blomfelt neither provided Mid Century a copy of his December 3, 2014, response to Plaintiff's motion to dismiss nor did he discuss the basis of Plaintiff's motion to dismiss with Mid Century's agents or representatives at that time. (Joyce Aff., Ex. 1, at Ex. 11; Joyce Aff., Ex. 2, ¶ 31; Neu Depo., Exs. 19, 22; Blomfelt Depo., 47-49).

27. Blomfelt did not forward to Mid Century a copy of Plaintiff's December 4, 2014, reply brief in support of her motion to dismiss Millstone and Mid Century's appeal nor did he discuss the basis of Plaintiff's motion to dismiss with Mid Century's agents or representatives at that time. (Joyce Aff., Ex. 1, at Ex. 12; Joyce Aff., Ex. 2, ¶¶ 33, 35-36; Joyce Aff., Ex. 5, at 21; Blomfelt Depo., 47-49).

28. Blomfelt did not immediately discuss with Mid Century's agents or representatives the arguments made by Plaintiff's counsel in support of her motion to dismiss Millstone and Mid Century's appeal at the December 5, 2014, hearing. (Joyce Aff., Ex. 2, ¶ 36; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 47-49). He merely informed them that the hearing had taken place, and that the judge was going to take some time to consider the motion. (Neu Depo., 54-55, Exs. 19, 22).

29. On December 11, 2014, Plaintiff's counsel sent Blomfelt a letter, informing him that Plaintiff was in severe financial distress, and that, given Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law, Millstone and Mid Century had no valid basis to appeal. (Joyce Aff., Ex. 1, at Ex. 8; Joyce Aff., Ex. 2, ¶ 18; Neu Depo., 54 ).

30. Blomfelt did not forward the December 11, 2014, letter to Mid Century or discuss the basis of the motion to dismiss with Mid Century's agents or representatives at that time. (Joyce Aff., Ex. 1, at Ex. 8; Joyce Aff., Ex. 2, ¶¶ 18, 20-21; Joyce Aff., Ex. 3, at 2; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54; Blomfelt Depo., 43, 47-49).

31. On December 30, 2014, after briefing and a hearing, the circuit court dismissed Millstone and Mid Century's appeal, concluding that the appeal "directly contradict[ed] the

proposed findings of fact and conclusion[s] of law [Millstone and Mid Century] submitted to the Department," and that Millstone and Mid Century "actually made no indication that [they] disagreed with the Department's findings." (Complaint, ¶ 17; Joyce Aff., Ex. 1, at Exs. 10-12, 15; Joyce Aff., Ex. 2, ¶¶ 27, 31, 33, 36, 42).

32. The circuit court did not award Plaintiff the attorneys' fees and costs she incurred in defending Millstone and Mid Century's appeal of the Department's decision. (Joyce Aff., Ex. 1, at Ex. 15; Joyce Aff., Ex. 2, ¶ 42).

33. Blomfelt did not forward to Mid Century the circuit court's December 30, 2014, letter decision, which granted Plaintiff's motion to dismiss Millstone and Mid Century's appeal on the basis that Blomfelt had failed to either object to Plaintiff's Proposed Findings of Fact or Conclusions of Law or propose competing findings of fact and conclusions of law, until July 13, 2015, nearly six months after the decision had been rendered. (Joyce Aff., Ex. 1, at Ex. 15; Joyce Aff., Ex. 2, ¶ 42; Joyce Aff., Ex. 3, at 3; Joyce Aff., Ex. 4, at 5).

34. After the appeal was dismissed, Millstone and Mid Century paid Plaintiff the workers' compensation benefits that the Department awarded her. (Neu Depo., Ex. 19).

35. Mid Century learned for the first time that Blomfelt had failed to properly perfect its appeal to circuit court in a January 6, 2015, email, a week after the circuit court dismissed the appeal. (Joyce Aff., Ex. 1, at Exs. 3, 7, 8, 9, 10, 11, 12, 15; Joyce Aff., Ex. 2, ¶¶ 7, 12, 15, 17-18, 20-21, 23, 25-27, 29-31, 33, 35-36, 42; Joyce Aff., Ex. 3, at 1-3; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 42-44, 47-49).

36. When pursuing its appeal, Mid Century was not aware that Blomfelt had not properly perfected it. (Joyce Aff., Ex. 1, at Exs. 3, 7, 8, 9, 10, 11, 12, 15; Joyce Aff., Ex. 2, ¶¶

7, 12, 15, 17-18, 20-21, 23, 25-27, 29-31, 33, 35-36, 42; Joyce Aff., Ex. 3, at 1-3; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 42-44, 47-49).

Dated this 1st day of August, 2017.

/s/ *Meghann M. Joyce*

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*Attorneys for Defendant Mid Century Insurance Co.*

## CERTIFICATE OF SERVICE

I, Meghann M. Joyce, hereby certify that I am a member of the Boyce Law Firm, L.L.P., and that on the 1st day of August, 2017, the foregoing Statement of Undisputed Material Facts was electronically served through the Odyssey File and Serve System to:

Heather Lammers Bogard
hbogard@costelloporter.com

Stephen C. Hoffman
shoffman@costelloporter.com

/s/ *Meghann M. Joyce*
Meghann M. Joyce

STATE OF SOUTH DAKOTA )
:SS
COUNTY OF MINNEHAHA )

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

**********

CHRISTINA BLANCHARD,

Plaintiff,

v.

MID-CENTURY INSURANCE COMPANY, also known as FARMERS INSURANCE,

Defendant.

MID-CENTURY INSURANCE COMPANY,

Third-Party Plaintiff,

v.

ERIC C. BLOMFELT, and ERIC BLOMFELT & ASSOCIATES, P.C.,

Third-Party Defendant.

**********

**Civ. No. 15 -761**

**PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Comes now Plaintiff, and, pursuant to SDCL 15-6-56(c)(2), makes this statement of the material facts as to which Plaintiff contends a genuine issue exists to be tried, and to respond to the Statement of Undisputed Material Facts served by Defendant on August 1, 2017.

1. Plaintiff agrees with Defendant's Paragraph 1.

2. Plaintiff agrees with Defendant's Paragraph 2.

3. Plaintiff agrees with Defendant's Paragraph 3.

4. Plaintiff agrees with Defendant's Paragraph 4.

5. Plaintiff agrees with Defendant's Paragraph 5.

6. Plaintiff agrees with Defendant's Paragraph 6.

7. As to Defendant's Paragraph 7, Plaintiff agrees that the South Dakota Department of Labor conducted a hearing on Plaintiff's claim for worker's compensation benefits, which at that time no longer included a claim for permanent total disability benefits, as Defendant knew from a demand letter dated January 13, 2014, sent by Plaintiff's counsel to Defendant's counsel Blomfelt and provided by Blomfelt to Defendant, Exhibit A to Affidavit of Heather Lammers Bogard dated October 6, 2017, even though Defendant's claims representative still thought that the purpose of the hearing was to determine whether Plaintiff could work and that Plaintiff was making a claim for "perm total." Deposition Exhibit 19 at Mid-Century 1237, Exhibit 19 to Joyce Affidavit; Neu depo. at 37, Exhibit 6 to Joyce Affidavit. Plaintiff agrees that the Department of Labor, in a decision dated July 8, 2014, ruled in favor of Plaintiff and requested that the parties submit proposed findings of fact and conclusions of law.

8. Plaintiff agrees with Defendant's Paragraph 8.

9. Plaintiff agrees with Defendant's Paragraph 9.

10. As to Defendant's Paragraph 10, Plaintiff agrees that Blomfelt, Defendant's attorney of record, proposed findings of fact and conclusions of law not only similar to the Department's Decision but virtually identical to those submitted by Plaintiff. Joyce Aff., Exhibit 1 at Exhibits 2 and 3.

11. As to Defendant's Paragraph 11, Plaintiff denies that the question of whether Blomfelt physically provided copies of pleadings to Defendant is relevant here, in that Defendant admits that Blomfelt was its attorney of record, Defendant's Statement of Material Fact 10, so that Defendant had imputed noticed of these pleadings pursuant to SDCL 59-6-5 regardless of whether Blomfelt shared his knowledge.

12. Plaintiff agrees with Defendant's Paragraph 12.

13. As to Defendant's Paragraph 13, Plaintiff agrees that the Department of Labor awarded Plaintiff $18,763.16 in temporary total disability benefits plus medical benefits. Joyce Aff., Exhibit 1 at Exhibit 4.

14. As to Defendant's Paragraph 14, Plaintiff agrees that the statements quoted were contained in Blomfelt's July 21, 2014 reports to Defendant, through its claims representative Neu, of the Department's July 8, 2014, Decision, but state that in his reports Blomfelt also told Neu three times that Plaintiff's case was not one for permanent total disability benefits and that Plaintiff was able to work. Mid-Century at 253, 254, 257, Exhibit B to Affidavit of Heather Lammers Bogard dated October 6, 2017.

15. As to Defendant's Paragraph 15, Plaintiff agrees that Defendant's appeal was taken on October 13, 2014, but Neu's decision to appeal was made on July 21, 2014, less than an hour after Blomfelt first reported the Department's Decision, and without ever seeing the Department's Decision, which Blomfelt had offered to send her. Mid-Century at 253-257, Exhibit B to Affidavit of Heather Lammers Bogard dated October 6, 2017.

16. As to Defendant's Paragraph 16, Plaintiff agrees that Blomfelt recommended an appeal, but states that Neu's immediate decision to appeal on July 21, 2014 was in violation of Defendant's litigation guidelines, which required her to immediately obtain a copy of the Department's Decision and to obtain authority for the appeal from Defendant's "Functional COE," Mid-Century 1874, 1884, Exhibit C to Affidavit of Heather Lammers Bogard dated October 6, 2017, and Defendant has failed to produce evidence showing that either guideline was followed. Neu has admitted that it would have been better to see and read the Department's Decision before appealing. Neu depo. at 44.

17. Plaintiff denies Defendant's Paragraph 17. Neu's decision to appeal was in violation of Defendant's guidelines, see Response to Paragraph 16, supra, and was based on Neu's false belief that the Department's Decision had found Plaintiff permanently and totally disabled. Neu depo. at 39-40. If Neu had followed Defendant's guidelines and had properly sought authorization for the appeal from Defendant's COE, Defendant would likely have learned that it was unreasonable to believe that Plaintiff might later claim permanent total disability benefits, Neu's after-the-fact justification for the appeal, Neu depo. at 54, since Blomfelt in fact believed the chances of that were legally very slim. Blomfelt First Production at 200-201, Exhibit D to Affidavit of Heather Lammers Bogard dated October 6, 2017. Neu's true reason for the appeal was to use it as leverage to force Plaintiff to settle, as shown by Neu's constant discussions with Blomfelt about the "possibility" of settlement and the use of an appeal to put Defendant in a "stronger position to settle and to 'prompt'" Plaintiff to settle. Blomfelt First Production at 125-126, 142-144, 327-328, Exhibit D to Affidavit of Heather Lammers Bogard dated October 6, 2017. Neu's goal was not to win the appeal, according to her September 10, 2014, claim note, but "claim settled," Mid-Century 1236, Exhibit 19 to Joyce Aff., and Neu testified she thought Defendant would have at least a 50/50 improved chance of settlement with an appeal. Neu depo. at 47-49. This strategy was consistent with Defendant's established practice, recorded in the claims notes of Vansteenwyk v. Baumgartner Trees and Landscaping, a prior worker's compensation claim in which Blomfelt represented Farmers, in which Defendant's team leader stated the "plan" was "TO POST APPEAL AS LEVERAGE AND SETTLE CLAIM FOR UNDER THE ORDERED TOTALS RE INDEMNITY." Mid-Century 2619-2620, Exhibit E to Affidavit of Heather Lammers Bogard dated October 6, 2017. Defendant, from the knowledge it gained from its repeated investigations and surveillances of

Plaintiff, knew Plaintiff was vulnerable to such pressure. Exhibits 1, 2 and 3 to August 24, 2015 Bogard Affidavit. Further, even if Defendant's initial decision to appeal could have been reasonable, that decision ceased to be reasonable once Blomfelt, acting as Defendant's attorney, committed the acts set forth in Paragraphs 10 and 12 of Defendant's Statement of Undisputed Material Facts and judicially admitted Defendant's liability to Plaintiff, notice of which was imputed to Defendant by operation of SDCL 59-6-5. Moreover, Defendant could not reasonably rely on Blomfelt to not waive Defendant's legal position, since it knew Blomfelt had previously waived its defenses in Allen v. Leo Bestgen Construction and Truck Ins. Exchange, 2005 WL 5190343 (S.D. Dept. Lab. 2005), another case that resulted in bad faith litigation being commenced against Defendant. Exhibits F and G to Affidavit of Heather Lammers Bogard dated October 6, 2017. It was thus reckless for Defendant to allow Blomfelt to file pleadings on its behalf while not requiring Blomfelt to send those pleadings to Defendant, Blomfelt depo. at 44; Ziegler depo. at 66-67, attached as Exhibit H to Affidavit of Heather Lammers Bogard dated October 6, 2017, in violation of Defendant's own litigation guidelines that required claims representatives to immediately obtain copies of all pleadings and decisions and to not relinquish their files to defense counsel. Mid-Century 1870, 1874, Exhibit C to Affidavit of Heather Lammers Bogard dated October 6, 2017.

18. Plaintiff denies Defendant's Paragraph 18 for the same reasons stated in Plaintiff's response to Paragraph 17.

19. Plaintiff agrees with Defendant's Paragraph 19.

20. As to Defendant's Paragraph 20, Plaintiff denies that the question of whether Blomfelt physically provided a copy of the letter to Defendant or discussed that letter with Defendant is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

21. Plaintiff agrees with Defendant's Paragraph 21.

22. Plaintiff agrees with Defendant's paragraph 22.

23. As to Defendant's Paragraph 23, Plaintiff denies that the question of whether Blomfelt physically provided a copy of the motion to dismiss to Defendant is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

24. As to Defendant's Paragraph 24, Plaintiff denies that the question of whether Blomfelt discussed the basis of the motion with Neu is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11. Further, Neu did not request a copy of the motion when Blomfelt told her of it. Blomfelt depo. at 47.

25. As to Defendant's Paragraph 25, Plaintiff agrees that Blomfelt made a settlement overture authorized by Defendant, but denies that Defendant did not know that Blomfelt's appeal was frivolous, since Defendant admits that Blomfelt was its attorney of record, Defendant's Statement of Material Fact 10, so that Defendant had imputed knowledge of Blomfelt's actions on Defendant's behalf pursuant to SDCL 59-6-5 regardless of whether Blomfelt shared his knowledge. Plaintiff also incorporates herein her response to Defendant's Paragraph 35, infra.

26. As to Defendant's Paragraph 26, Plaintiff denies that the question of whether Blomfelt physically provided copies of his pleadings to Defendant or discussed them with Defendant is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

27. As to Defendant's Paragraph 27, Plaintiff denies that the question of whether Blomfelt physically provided copies of Plaintiff's reply brief to Defendant or discussed it with Defendant is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

28. As to Defendant's Paragraph 28, Plaintiff denies that the question of whether Blomfelt affirmatively discussed the arguments at the hearing with Defendant is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

29. Plaintiff agrees with Defendant's Paragraph 29.

30. As to Defendant's Paragraph 30, Plaintiff denies that the question of whether Blomfelt physically provided a copy of the letter to Defendant or discussed the motion to dismiss with Defendant is relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

31. Plaintiff agrees with Defendant's Paragraph 31.

32. Plaintiff agrees with Defendant's Paragraph 32.

33. As to Defendant's Paragraph 33, Plaintiff denies that the questions of whether Defendant failed to ask to see a copy of the circuit court's decision until July 2015, or whether Blomfelt did not forward the decision to Defendant until July 2015, are relevant here for the same reasons stated in Plaintiff's response to Paragraph 11.

34. Plaintiff agrees with Defendant's Paragraph 34.

35. Plaintiff denies Defendant's Paragraph 35. Since Defendant admits that Blomfelt was its attorney of record, Defendant's Statement of Material Fact 10, Defendant at all times knew Blomfelt's appeal was frivolous through the knowledge imputed to Defendant pursuant to SDCL 59-6-5 regardless of whether Blomfelt shared his knowledge. Further, there is an issue of fact as to whether Farmers' oversight of Blomfelt was reckless, given its knowledge of Blomfelt's prior act in waiving Farmers' defenses in Allen v. Leo Bestgen Construction and Truck Ins. Exchange, Exhibits F and G to Affidavit of Heather Lammers Bogard dated October 6, 2017, and Neu's violation of Farmers' litigation guidelines to immediately obtain copies of all

pleadings and decisions and to not relinquish her file to defense counsel. Mid-Century 1870, 1870, Exhibit C to Affidavit of Heather Lammers Bogard dated October 6, 2017. Moreover, there is an issue of fact as to whether Defendant ratified Blomfelt's actions by failing to disavow those actions at the moment Defendant received knowledge of them through the January 6, 2015 email. Although Defendant, through counsel on April 6, 2016, claimed to have repudiated Blomfelt's actions, see Exhibit J to Affidavit of Heather Lammers Bogard dated October 6, 2017, (Blomfelt "has essentially been fired from all work for the greater Farmers family of insurers because of what occurred in this case"), neither Neu nor Ziegler were aware of such an action, Neu depo. at 55; Ziegler depo. at 63, 69-70; Third Party Defendant's Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production at Interrogatory No. 4. Exhibit I to Affidavit of Heather Lammers Bogard dated October 6, 2017.

36. Plaintiff denies Defendant's Paragraph 36 for the same reasons stated in Plaintiff's response to Paragraph 35.

Dated this 16th day of October, 2017.

**COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP**

By: */s/ Heather Lammers Bogard*

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hbogard@costelloporter.com
shoffman@costelloporter.com
*Attorneys for Plaintiff*

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2017, a true and correct copy of the foregoing **Plaintiff's Response to Defendant's Statement of Undisputed Material Facts** was served upon the following counsel of record, indicated as follows:

| | | |
|---|---|---|
| Michael F. Tobin | [ ] | U.S. Mail |
| Boyce Law Firm, L.L.P. | [ ] | Hand Delivery |
| P.O. Box 5015 | [ ] | Electronic E-mail |
| Sioux Falls, SD 57117 | [x] | Odyssey File & Serve |
| (605) 336-2424 | | |
| MFTobin@boycelaw.com | | |
| *Attorneys for Defendant Mid-Century Ins. Co.* | | |

| | | |
|---|---|---|
| Eric Blomfelt | [ ] | U.S. Mail |
| Blomfelt & Associates | [ ] | Hand Delivery |
| 5221 Cornerstone Dr. | [ ] | Electronic E-mail |
| Fort Collins, CO 80528 | [x] | Odyssey File & Serve |
| (970) 674-8000 | | |
| eblomfelt@gmail.com | | |
| *Third-Party Defendant* | | |

**COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP**

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*Attorneys for Plaintiff*

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

**********

CHRISTINA BLANCHARD,

Plaintiff,

v.

MID-CENTURY INSURANCE COMPANY, also known as FARMERS INSURANCE,

Defendant.

MID-CENTURY INSURANCE COMPANY,

Third-Party Plaintiff,

v.

ERIC C. BLOMFELT, and ERIC BLOMFELT & ASSOCIATES, P.C.,

Third-Party Defendant.

**********

**Civ. No. 15 -761**

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT RE: THIRD PARTY COMPLAINT**

Comes now Plaintiff and, pursuant to SDCL 15-6-56(c), makes this statement, for purposes of the Motion for Summary Judgement Re: Third Party Complaint only, of the material facts relevant to this motion as to which there is no genuine issue to be tried:

1. Third Party Plaintiff [hereinafter Farmers] retained Third Party Defendant [hereinafter Blomfelt] as Farmers' attorney of record to defend Farmers against a workers compensation claim brought by Plaintiff [hereinafter Blanchard] in the South Dakota Department of Labor, Third Party Complaint, Paragraphs 6-7.

2. The Department of Labor ruled in favor of Blanchard. Third Party Complaint Paragraph 9.

3. Farmers, acting through Blomfelt, submitted Proposed Findings of Fact and Conclusions of Law similar to the findings made in the Department's decision, and did not object to the Proposed Findings of Fact and Conclusions of Law proposed by Blanchard. Third Party Complaint, Paragraphs 10-11.

4. Despite this evident agreement with the decision made by the Department of Labor on Blanchard's claim, Farmers, acting through Blomfelt, appealed the Department's award of benefits to circuit court. Third Party Complaint, Paragraphs 12-13.

5. Blanchard moved to dismiss Farmers' appeal, and the circuit court granted Blanchard's motion, finding that Farmers' appeal directly contradicted the proposed findings of fact and conclusions of law that Farmers submitted to the Department of Labor. Third Party Complaint, Paragraphs 14-15.

6. Blanchard thereafter commenced a bad faith action against Farmers alleging that Farmers sought to use its baseless and meritless appeal to exploit Blanchard's desperate need for money by intentionally attempting to settle Blanchard's claim for less money than the amount Farmers had already accepted as due to Blanchard. Complaint, Paragraph 14.

7. Farmers alleges that Blomfelt negligently exposed Farmers to liability to Blanchard through Blomfelt's actions as Farmers' attorney of record in Blanchard's claim. Third Party Complaint, Paragraphs 20-24.

8. Blomfelt had represented Farmers in workers' compensation litigation since 2005 and had served as Farmers' counsel of record in the at least twenty-two workers' compensation claims. Exhibit 5 to the August 1, 2017 Joyce Affidavit at 3-7.

9. During all the time that he represented Farmers in workers compensation litigation, Blomfelt believed he had the authority to take every action that he took in that representation, and that no Farmers employee ever objected to anything that Blomfelt did in the course of that representation. Blomfelt depo. at 54.[1]

10. During his representation of Farmers in the Blanchard proceedings, Blomfelt believed he had full authority to take every action that he took, and no Farmers employee ever told him that he had any limitations on his authority in that representation. Blomfelt depo. at 54.

11. When Blomfelt began representing Farmers in workers compensation litigation, a Farmers employee told Blomfelt that the company did not want to see every single piece of paper filed in a case and to only let Farmers know if something required Farmers' attention or to provide a copy of a document if it was requested. Blomfelt depo. at 44.

12. Lee Ziegler, the supervisor of Elizabeth Neu, the claims representative to whom Blomfelt reported in Blanchard's claim, admitted that Farmers does not always receive every document in a workers compensation claim, and was unsurprised that Blomfelt was told not to send every legal document to Farmers. Zeigler depo. at 66-67.[2]

13. Neu never expressed any dissatisfaction to Blomfelt that she was not receiving documents. Neu depo. at 60.[3]

14. Blomfelt informed Farmers that Blanchard had filed a motion to dismiss, but Farmers did not ask to see a copy. Blomfelt depo. at 47.

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[1] The Blomfelt deposition is attached as Exhibit 7 to the August 1, 2017 Joyce Affidavit.

[2] The Ziegler deposition is attached as Exhibit H to the October 6, 2017 Bogard Affidavit.

[3] The Neu deposition is attached as Exhibit 6 to the August 1, 2017 Joyce Affidavit.

15. Farmers' production to Blanchard in this case included a copy of the Department of Labor 2005 decision in Allen v. Leo Bestgen Construction and Truck Ins. Exchange, 2005 WL 5190343 (S.D. Dept. of Lab. 2005). Exhibit G to the October 6, 2017 Bogard Affidavit.

16. In Allen, Blomfelt represented Truck Insurance Exchange. Exhibit G to Bogard Affidavit at 1.

17. Truck Insurance Exchange, together with Mid-Century Insurance Company and Farmers Insurance Exchange are "all one company." Ziegler depo. at 6; Neu depo. at 7.

18. In Allen, the Department of Labor ruled that Farmers, through Blomfelt, raised the issue of whether the claimant's injury arose out of and in the course of employment, but that the issue had been waived due to Blomfelt's failure to address it in his post-hearing brief. Exhibit G to Bogard Affidavit at 1.

19. Farmers continued to hire Blomfelt to represent in its workers' compensation litigation after the Department of Labor decision in Allen. Blomfelt depo. at 86.

20. Blomfelt was Farmers' counsel of record in Vansteenwyk v. Baumgartner Trees and Landscaping, 731 N.W.2d 214 (S.D. 2007), in which the claimant prevailed on the issue of causation in the Department of Labor, Farmers' circuit court appeal, and Farmers' Supreme Court appeal. When the case returned to the Department of Labor for determination of the claimant's impairment rating, Farmers lost yet again, on October 14, 2008. Vansteenwyk v. Baumgartner Tress[sic] and Landscaping, 2008 WL 4893988 (S.D. Dept. Lab. 2008).

21. On October 21, 2008, following a telephone conference involving Blomfelt, Farmers' claim Representative Michael Shoback and Farmers TL [Team Leader] Lyn Estes, concerning Farmers' strategy in Vansteenwyk following their loss, Estes stated that Farmers' strategy would be; "TO POST APPEAL AS LEVERAGE AND SETTLE CLAIM FOR UNDER THE

ORDERED TOTALS RE INDEMNITY," Exhibit E to Affidavit of Heather Lammers Bogard dated October 6, 2017 at Mid-Century 2619-2620. (Emphasis supplied)

22. A Farmers "team leader" is the same as a "claims supervisor." Ziegler depo. at 7, 18.

23. On October 14, 2014, in reporting to Neu about the Blanchard case, Blomfelt told Neu that "[w]e filed the appeal yesterday, and I'm hoping that filing will prompt them to engage in settlement talks," Neu's immediate response was "[w]hen do you feel we can present an offer to settle indemnity?" Exhibit D to Affidavit of Heather Lammers Bogard dated October 6, 2017, at Blomfelt First Production at 142-143.

Dated this 6th day of October, 2017.

**COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP**

By: */s/ Heather Lammers Bogard*
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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of October, 2017, a true and correct copy of the foregoing **Statement of Material Facts in Support of Motion for Summary Judgment Re: Third Party Complaint** was served upon the following counsel of record, indicated as follows:

| | | |
|---|---|---|
| Michael F. Tobin<br>Boyce Law Firm, L.L.P.<br>P.O. Box 5015<br>Sioux Falls, SD 57117<br>(605) 336-2424<br>MFTobin@boycelaw.com<br>*Attorneys for Defendant Mid-Century Ins. Co.* | [ ]<br>[ ]<br>[ ]<br>[x] | U.S. Mail<br>Hand Delivery<br>Electronic E-mail<br>Odyssey File & Serve |

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*Third-Party Defendant*

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[ ] Electronic E-mail
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**COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP**

By: */s/ Heather Lammers Bogard*
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*Attorneys for Plaintiff*

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

**********

CHRISTINA BLANCHARD,

Plaintiff,

v.

MID CENTURY INSURANCE COMPANY, also known as FARMERS INSURANCE,

Defendant.

MID CENTURY INSURANCE COMPANY,

Third-Party Plaintiff,

v.

ERIC C. BLOMFELT, and ERIC BLOMFELT & ASSOCIATES, P.C.,

Third-Party Defendant.

**********

**Civ. No. 15-761**

**RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AND STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS**

Defendant Mid Century Insurance Company ("Mid Century"), by and through its attorneys of record, Boyce Law Firm, L.L.P., and pursuant to SDCL 15-6-56(c), respectfully responds as follows to Plaintiff Christina Blanchard's ("Plaintiff") Statement of Material Facts in Support of Motion for Summary Judgment Re: Third Party Complaint and submits this Statement of Additional Undisputed Material Facts. The citations below refer to the Affidavit of Meghann M. Joyce in Support of Motion in Limine and Second Motion for Summary Judgment and attached exhibits, or the files and records of this action.

## RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

1. Not disputed.[1]

2. Not disputed.

3. Not disputed.

4. Disputed, to the extent that Plaintiff characterizes Eric Blomfelt's ("Blomfelt") proposal of findings of fact and conclusions of law similar to the South Dakota Department of Labor's ("Department") decision and failure to submit objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law as Mid Century's agreement with the Department's decision. The record facts establish that Mid Century and Blomfelt disagreed with the Department's decision, and that Mid Century believed that an appeal of the Department's decision was reasonable and prudent. (Joyce Aff., Ex. 6 ("Neu Depo."), Exs. 19, 22; *see also* Neu Depo., 43-47, 62-63; Joyce Aff., Ex. 7 ("Blomfelt Depo."), 58-59, 64-65, 83-84, 88-94; Statement of Additional Undisputed Material Facts, ¶¶ 14, 16-18).

5. Not disputed.

6. Not disputed, to the extent that Plaintiff's Complaint states that Mid Century "sought to use its baseless and meritless appeal to exploit [Plaintiff's] desperate need for money

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1. As has been previously briefed and argued in this matter, Defendant Mid Century Insurance Company ("Mid Century") provided Plaintiff Christina Blanchard's ("Plaintiff") employer, Millstone II, Inc. in Rapid City, South Dakota, workers' compensation insurance at all relevant times. (Joyce Aff., Dated July 16, 2015, Ex. 1, ¶ 1; Joyce Aff., Dated July 16, 2015, Ex. 2, ¶ 1). Mid Century continues to contend that there is no legal entity by the name of "Farmers Insurance." (Giles Aff., ¶ 2). Moreover, Farmers Insurance Group is also not a legal entity and has never been licensed to transact business in any state in the United States. (Id.). Rather, Farmers Insurance Group is a service mark registered with the United States Patent and Trademark Office, Register No. 1,821,673, used for business and promotional purposes by certain Farmers Insuring Entities. (Id.). Accordingly, to the extent that Plaintiff refers to Mid Century as "Farmers" through its Statement of Material Facts, Mid Century objects.

by intentionally attempting to settle [Plaintiff's] claim for less money than the amount [Mid Century] had already accepted as due to [Plaintiff]," but not to the extent that Mid Century admits or concedes that those allegations are true.

7. Not disputed, except to the extent that this paragraph misstates or mischaracterizes the allegations set forth in Mid Century's third-party complaint as that document speaks for itself.

8. Not disputed.

9. Disputed. While Blomfelt may have believed that he had authority to take every action that he took in his representation of Mid Century, Mid Century contends that it is undisputed that he did not have authority to act negligently by failing to properly perfect its appeal of the Department's adverse decision to circuit court or to affirmatively conceal the gravity of and basis for the motion to dismiss that appeal from Mid Century. (*See* Statement of Additional Undisputed Material Facts, ¶¶ 11, 19-20, 23-30, 33, 35, 36).

10. Disputed. While Blomfelt may have believed that he had authority to take every action that he took in his representation of Mid Century, Mid Century contends that it is undisputed that he did not have authority to act negligently by failing to properly perfect its appeal of the Department's adverse decision to circuit court or to affirmatively conceal the gravity of and basis for the motion to dismiss that appeal from Mid Century. (*See* Statement of Additional Undisputed Material Facts, ¶¶ 11, 19-20, 23-30, 33, 35, 36).

11. Not disputed, except that this fact and testimony, if true, does not excuse Blomfelt's concealment of the gravity of and basis for the motion to dismiss Mid Century's

appeal of the Department's adverse ruling to circuit court. (*See* Statement of Additional Undisputed Material Facts, ¶¶ 11, 19-20, 23-30, 33, 35, 36).

12. Not disputed, to the extent that this paragraph states that Lee Ziegler so testified. Furthermore, this fact and testimony does not excuse Blomfelt's concealment of the gravity of and basis for the motion to dismiss Mid Century's appeal of the Department's adverse ruling to circuit court. (*See* Statement of Additional Undisputed Material Facts, ¶¶ 11, 19-20, 23-30, 33, 35, 36).

13. Not disputed, except that this fact and testimony, if true, does not excuse Blomfelt's concealment of the gravity of and basis for the motion to dismiss Mid Century's appeal of the Department's adverse ruling to circuit court. (*See* Statement of Additional Undisputed Material Facts, ¶¶ 11, 19-20, 23-30, 33, 35, 36).

14. Not disputed, except that while Blomfelt previously informed Mid Century that a motion to dismiss had been filed, Mid Century learned from the first time that Blomfelt had failed to properly perfect its appeal to circuit court in a January 6, 2015, email, a week after the circuit court dismissed the appeal. (Joyce Aff., Ex. 1, at Exs. 3, 7, 8, 9, 10, 11, 12, 15; Joyce Aff., Ex. 2, ¶¶ 7, 12, 15, 17-18, 20-21, 23, 25-27, 29-31, 33, 35-36, 42; Joyce Aff., Ex. 3, at 1-3; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 42-44, 47-49; Statement of Additional Undisputed Material Facts, ¶ 11, 19-20, 23-30, 33, 35, 36).

15. Not disputed, except that this fact is wholly irrelevant, inadmissible, and therefore immaterial. SDCL 19-19-403; SDCL 19-19-404(b); *Dakota, Minn. & E. R.R. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623.

16. Not disputed, except that this fact is wholly irrelevant, inadmissible, and therefore immaterial. SDCL 19-19-403; SDCL 19-19-404(b); *Dakota, Minn. & E. R.R. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623.

17. Disputed. There is no legal entity by the name of "Farmers Insurance." (Giles Aff., ¶ 2). Moreover, Farmers Insurance Group is also not a legal entity and has never been licensed to transact business in any state in the United States. (Id.). Rather, Farmers Insurance Group is a service mark registered with the United States Patent and Trademark Office, Register No. 1,821,673, used for business and promotional purposes by certain Farmers Insuring Entities. (Id.).

18. Not disputed, except that this fact is wholly irrelevant, inadmissible, and therefore immaterial. SDCL 19-19-403; SDCL 19-19-404(b); *Dakota, Minn. & E. R.R. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623. Furthermore, to the extent that this paragraph misstates or mischaracterizes the Department's ruling, the Department's decision speaks for itself. *See Allen v. Leo Bestgen Constr. & Truck Ins. Exch.*, 2005 WL 5190343 (S.D. Dep't of Labor Sept. 22, 2005).

19. Not disputed.

20. Not disputed, except that this fact is wholly irrelevant, inadmissible, and therefore immaterial. SDCL 19-19-403; SDCL 19-19-404(b); *Dakota, Minn. & E. R.R. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623. Furthermore, to the extent that this paragraph misstates or mischaracterizes the Department's ruling, the Department's decision speaks for itself. *See Vansteenwyk v. Baumgartner Trees & Landscaping*, 2008 WL 4893988 (S.D. Dep't of Labor Oct. 14, 2008)

21. Not disputed, except that this fact is wholly irrelevant, inadmissible, and therefore immaterial. SDCL 19-19-403; SDCL 19-19-404(b); *Dakota, Minn. & E. R.R. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623. Furthermore, to the extent that this paragraph misstates or mischaracterizes the contents of the document it cites, the document speaks for itself. (Lammers Board Aff., Dated Oct. 6, 2017, Ex. E, at Mid-Century 2619-20).

22. Not disputed.

23. Disputed, to the extent that this paragraph implies that Mid Century acted in bad faith by, as Plaintiff alleges in her Complaint, pursuing a meritless appeal to leverage a settlement from Plaintiff. At the time of this conversation, Mid Century reasonably believed that its appeal of the Department's adverse ruling to circuit court was reasonable and prudent, and it was not at all aware that Blomfelt had not properly perfected its appeal. (Joyce Aff., Ex. 1, at Exs. 3, 7, 8, 9, 10, 11, 12, 15; Joyce Aff., Ex. 2, ¶¶ 7, 12, 15, 17-18, 20-21, 23, 25-27, 29-31, 33, 35-36, 42; Joyce Aff., Ex. 3, at 1-3; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 43-47, 54-55, 62-63, Exs. 19, 22; Blomfelt Depo., 42-44, 47-49, 58-59, 64-65, 83-84, 88-94; Statement of Additional Undisputed Material Facts, ¶ 11, 14, 16-20, 23-30, 33, 35, 36).

## STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS

1. Mid Century provided Plaintiff Christina Blanchard's ("Plaintiff") employer, Millstone II, Inc. ("Millstone") in Rapid City, South Dakota, workers' compensation insurance at all relevant times. (Joyce Aff., Ex. 1, ¶ 1; Joyce Aff., Ex. 2, ¶ 1).

2. Plaintiff first alleged that she began experiencing back pain in August 2010, but she did not seek medical treatment until September 23, 2010. (FOF, ¶¶ 5, 10).

3. Plaintiff eventually sought workers' compensation benefits from Mid Century. (FOF, ¶ 5; Joyce Aff., Ex. 1, ¶ 2; Joyce Aff., Ex. 2, ¶ 2).[2]

4. On July 22, 2011, Dr. Peter Vonderau, one of Plaintiff's treating physicians, placed her at maximum medical improvement with a five-percent whole-person impairment. (FOF, ¶ 27).

5. On August 25, 2011, Mid Century denied Plaintiff further workers' compensation benefits. (FOF, ¶ 30).

6. On November 15, 2011, Plaintiff filed a petition for hearing with South Dakota Department of Labor ("Department"), seeking workers' compensation benefits for her alleged work-related back injury. (Complaint, ¶ 6).

7. After discovery and an evidentiary hearing, Administrative Law Judge Donald Hageman ("Judge Hageman") issued a written decision, finding in Plaintiff's favor and directing the parties to submit proposed findings of fact and conclusions of law. (Complaint, ¶ 7; Joyce Aff., Ex. 1, at Ex. 1; Joyce Aff., Ex. 2, at ¶ 5).

8. In reaching his decision, Judge Hageman credited the testimony of Plaintiff's treating physician on the issue of causation over the testimony of Millstone and Mid Century's expert. (Joyce Aff., Ex. 1, at Ex. 1; Joyce Aff., Ex. 2, ¶ 5; Joyce Aff., Ex. 6 ("Neu Depo."), Exs. 19, 22).

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2. References to the "FOF" or "COL" refer to Administrative Law Judge Donald W. Hageman's signed and filed findings of fact and conclusions in Plaintiffs' underlying workers' compensation proceeding, which were attached as Exhibit 4 to Plaintiff's First Set of Requests for Admission to Defendant. (*See* Joyce Aff., Exs. 1, 2).

9. Plaintiff timely submitted her Proposed Findings of Fact and Conclusions of Law. (Joyce Aff., Ex. 1, at Ex. 2; Joyce Aff., Ex. 2, ¶ 6).

10. When prompted by Judge Hageman, Eric Blomfelt ("Blomfelt"), who was Millstone and Mid Century's retained attorney of record in the workers' compensation proceeding, proposed findings of fact and conclusions of law similar to the Department's decision. (Complaint, ¶¶ 8-9; Joyce Aff., Ex. 1, at Ex. 3; Joyce Aff., Ex. 2, ¶ 7).

11. Blomfelt did not provide Mid Century a copy of his September 2, 2014, Proposed Findings of Fact and Conclusions of Law before submitting them to the Department. (Joyce Aff., Ex. 1, at Ex. 3; Joyce Aff., Ex. 2, ¶ 7; Joyce Aff., Ex. 3, at 3; Neu Depo., Exs. 19, 22).

12. Blomfelt did not submit objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law. (Complaint, ¶¶ 8-9; Joyce Aff., Ex. 1, at Ex. 3; Joyce Aff., Ex. 2, ¶ 7).

13. Judge Hageman entered Findings of Fact, Conclusions of Law, and an Order directing Millstone and Mid Century to pay Plaintiff temporary total disability benefits from August 25, 2011, through August 1, 2012, and to pay medical expenses related to her back injury. (Complaint, ¶ 10; Joyce Aff., Ex. 1, at Ex. 4; Joyce Aff., Ex. 2, at ¶ 9).

14. Blomfelt advised Millstone and Mid Century that decisions in which the Department finds one expert's testimony more credible than another are ordinarily not good candidates for an appeal, but that this case may prove an exception to that general rule due to obvious deficiencies in the testimony of Plaintiff's treating physician, including the fact that he offered his opinion without knowing the scope of her job duties. (Neu Depo., 43-47, 62-63, Exs. 19, 22; Joyce Aff., Ex. 7 ("Blomfelt Depo."), 64-65, 83-84, 88-94).

15. On October 13, 2014, Millstone and Mid Century appealed Judge Hageman's decision to circuit court. (Joyce Aff., Ex. 1, at Exs. 5-6; Joyce Aff., Ex. 2, ¶¶ 10, 12-13).

16. Millstone and Mid Century followed Blomfelt's recommendation to appeal the Department's decision. (Neu Depo., 43-47, 62-63, Exs. 19, 22; Blomfelt Depo., 58-59, 64-65, 83-84, 88-94).

17. Mid Century reasonably relied on the advice of its attorney to continue to defend Plaintiff's claim for further workers' compensation benefits by appealing the Department's unfavorable decision. (Neu Depo., 43-47, 62-63, Exs. 19, 22; Blomfelt Depo., 64-65, 83-84, 88-94).

18. Mid Century believed that pursuing an appeal was reasonable and prudent. (Neu Depo., 43-47, 62-63, Exs. 19, 22).

19. On November 6, 2014, Plaintiff's counsel sent Blomfelt a letter, warning him that Millstone and Mid Century's appeal was frivolous because he had failed to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. (Blomfelt Depo., 42-43).

20. Blomfelt neither provided Mid Century a copy of Plaintiff's counsel's November 6, 2014, letter nor discussed it with Mid Century's agents or representatives. (Joyce Aff., Ex. 3, at 1-2; Blomfelt Depo., 42-43).

21. On November 14, 2014, given Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law, Plaintiff moved to dismiss the appeal. (Joyce Aff., Ex. 1, at Exs. 9, 10; Joyce Aff., Ex. 2, ¶¶ 23, 27).

22. Plaintiff not only addressed the procedural deficiencies in Millstone and Mid Century's appeal but also sought restitution for the delay and costs that the appeal caused her. (Joyce Aff., Ex. 1, at Exs. 9, 10, 12; Joyce Aff., Ex. 2, at ¶¶ 23, 27, 33).

23. Blomfelt did not forward to Mid Century Plaintiff's November 14, 2014, motion to dismiss based on Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. (Joyce Aff., Ex. 1, at Exs. 9, 10; Joyce Aff., Ex. 2, ¶¶ 23, 25-27, 29-30; Joyce Aff., Ex. 3, at 2; Joyce Aff., Ex. 5, at 21; Blomfelt Depo., 44).

24. On November 30, 2014, Blomfelt did inform Elizabeth Neu ("Neu"), Mid Century's assigned claims adjuster, via email that Plaintiff had filed a motion to dismiss, but he did not discuss the basis of the motion to dismiss with Mid Century's agents and representatives at that time. (Joyce Aff., Ex. 3, at 2-3; Joyce Aff., Ex. 4, at 5; Neu Depo., Exs. 19, 22; Blomfelt Depo., 47-49). Instead, he assured her that the motion "was not unusual," and that it was "not very well grounded." (Neu Depo., Exs. 19, 22; Blomfelt Depo., 47-49).

25. On November 30, 2014, Blomfelt made a settlement overture that Mid Century had authorized. (Joyce Aff., Ex. 1, at Ex. 7; Joyce Aff., Ex. 2, ¶¶ 15, 17). But, at that time, Mid Century did not know that Blomfelt had failed to properly perfect its appeal to circuit court. (Joyce Aff., Ex. 1, at Ex. 7; Joyce Aff., Ex. 2, ¶¶ 15, 17; Neu Depo., Exs. 19, 22).

26. Blomfelt neither provided Mid Century a copy of his December 3, 2014, response to Plaintiff's motion to dismiss nor did he discuss the basis of Plaintiff's motion to dismiss with Mid Century's agents or representatives at that time. (Joyce Aff., Ex. 1, at Ex. 11; Joyce Aff., Ex. 2, ¶ 31; Neu Depo., Exs. 19, 22; Blomfelt Depo., 47-49).

27. Blomfelt did not forward to Mid Century a copy of Plaintiff's December 4, 2014, reply brief in support of her motion to dismiss Millstone and Mid Century's appeal nor did he discuss the basis of Plaintiff's motion to dismiss with Mid Century's agents or representatives at that time. (Joyce Aff., Ex. 1, at Ex. 12; Joyce Aff., Ex. 2, ¶¶ 33, 35-36; Joyce Aff., Ex. 5, at 21; Blomfelt Depo., 47-49).

28. Blomfelt did not immediately discuss with Mid Century's agents or representatives the arguments made by Plaintiff's counsel in support of her motion to dismiss Millstone and Mid Century's appeal at the December 5, 2014, hearing. (Joyce Aff., Ex. 2, ¶ 36; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 47-49). He merely informed them that the hearing had taken place, and that the judge was going to take some time to consider the motion. (Neu Depo., 54-55, Exs. 19, 22).

29. On December 11, 2014, Plaintiff's counsel sent Blomfelt a letter, informing him that Plaintiff was in severe financial distress, and that, given Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law, Millstone and Mid Century had no valid basis to appeal. (Joyce Aff., Ex. 1, at Ex. 8; Joyce Aff., Ex. 2, ¶ 18; Neu Depo., 54 ).

30. Blomfelt did not forward the December 11, 2014, letter to Mid Century or discuss the basis of the motion to dismiss with Mid Century's agents or representatives at that time. (Joyce Aff., Ex. 1, at Ex. 8; Joyce Aff., Ex. 2, ¶¶ 18, 20-21; Joyce Aff., Ex. 3, at 2; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54; Blomfelt Depo., 43, 47-49).

31. On December 30, 2014, after briefing and a hearing, the circuit court dismissed Millstone and Mid Century's appeal, concluding that the appeal "directly contradict[ed] the

proposed findings of fact and conclusion[s] of law [Millstone and Mid Century] submitted to the Department," and that Millstone and Mid Century "actually made no indication that [they] disagreed with the Department's findings." (Complaint, ¶ 17; Joyce Aff., Ex. 1, at Exs. 10-12, 15; Joyce Aff., Ex. 2, ¶¶ 27, 31, 33, 36, 42).

32. The circuit court did not award Plaintiff the attorneys' fees and costs she incurred in defending Millstone and Mid Century's appeal of the Department's decision. (Joyce Aff., Ex. 1, at Ex. 15; Joyce Aff., Ex. 2, ¶ 42).

33. Blomfelt did not forward to Mid Century the circuit court's December 30, 2014, letter decision, which granted Plaintiff's motion to dismiss Millstone and Mid Century's appeal on the basis that Blomfelt had failed to either object to Plaintiff's Proposed Findings of Fact or Conclusions of Law or propose competing findings of fact and conclusions of law, until July 13, 2015, nearly six months after the decision had been rendered. (Joyce Aff., Ex. 1, at Ex. 15; Joyce Aff., Ex. 2, ¶ 42; Joyce Aff., Ex. 3, at 3; Joyce Aff., Ex. 4, at 5).

34. After the appeal was dismissed, Millstone and Mid Century paid Plaintiff the workers' compensation benefits that the Department awarded her. (Neu Depo., Ex. 19).

35. Mid Century learned for the first time that Blomfelt had failed to properly perfect its appeal to circuit court in a January 6, 2015, email, a week after the circuit court dismissed the appeal. (Joyce Aff., Ex. 1, at Exs. 3, 7, 8, 9, 10, 11, 12, 15; Joyce Aff., Ex. 2, ¶¶ 7, 12, 15, 17-18, 20-21, 23, 25-27, 29-31, 33, 35-36, 42; Joyce Aff., Ex. 3, at 1-3; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 42-44, 47-49).

36. When pursuing its appeal, Mid Century was not aware that Blomfelt had not properly perfected it. (Joyce Aff., Ex. 1, at Exs. 3, 7, 8, 9, 10, 11, 12, 15; Joyce Aff., Ex. 2, ¶¶

7, 12, 15, 17-18, 20-21, 23, 25-27, 29-31, 33, 35-36, 42; Joyce Aff., Ex. 3, at 1-3; Joyce Aff., Ex. 4, at 5; Joyce Aff., Ex. 5, at 21; Neu Depo., 54-55, Exs. 19, 22; Blomfelt Depo., 42-44, 47-49).

Dated this 16th day of October, 2017.

/s/ *Meghann M. Joyce*

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## CERTIFICATE OF SERVICE

I, Meghann M. Joyce, hereby certify that I am a member of the Boyce Law Firm, L.L.P., and that on the 16th day of October, 2017, the foregoing Response to Plaintiff's Statement of Material Facts and Statement of Additional Undisputed Material Facts was electronically served through the Odyssey File and Serve System to:

Heather Lammers Bogard
hbogard@costelloporter.com

Stephen C. Hoffman
shoffman@costelloporter.com

/s/ *Meghann M. Joyce*
Meghann M. Joyce

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| STATE OF SOUTH DAKOTA) :SS<br>COUNTY OF MINNEHAHA ) | IN CIRCUIT COURT<br>SECOND JUDICIAL CIRCUIT |
| CHRISTINA BLANCHARD,<br><br>Plaintiff,<br><br>vs.<br><br>MID-CENTURY INSURANCE COMPANY, also known as FARMERS INSURANCE,<br><br>Defendants. | CIV 15-761<br><br>**MEMORANDUM OPINION AND ORER** |

This matter is before the court upon the motion of the Mid-Century Insurance Company ("Mid-Century") for summary judgment. Mid-Century has also moved to dismiss Farmers Insurance or, alternatively, to amend the caption. The court conducted a hearing on August 31, 2015. The parties were present at the hearing through their respective attorneys. Heather Lammers Bogard and Stephen Hoffman represented Christina Blanchard ("Blanchard"). Michael Tobin and Meghann Joyce represented Mid-Century.

After carefully considering all of the arguments advanced by counsel, reviewing the authorities, and the record, the court denies Mid-Century's motions for summary judgment and to dismiss or amend the caption.

## BACKGROUND

Blanchard worked at the Millstone II, Inc. ("Millstone") restaurant in Rapid City, South Dakota, from March 2008 to January 2011. She was hired as a line and

prep cook and was later promoted to a managerial position. Her duties included lifting boxes and bags weighting up to fifty pounds over her head.

In August 2010, Blanchard began experiencing lower back pain. She sought treatment in September of that year and continued treatment throughout the fall of 2010. By December, Blanchard was unable to work and in January of 2011, she was terminated by Millstone. She continued treatment until July of 2011 when one of her treating physicians placed her at maximum medical improvement with a 5% whole-person impairment.

In August 2011, Millstone's workers' compensation carrier, Mid-Century,[1] denied further workers' compensation benefits for Blanchard, and she subsequently petitioned the South Dakota Department of Labor ("the Department of Labor"). After discovery and an evidentiary hearing, the administrative law judge ("the ALJ") decided in Blanchard's favor and directed the parties to submit proposed findings of fact and conclusions of law.

Blanchard timely submitted her proposed findings and conclusions. Mid-Century's attorney for the claim, Eric Blomfelt ("Blomfelt"), submitted his findings and conclusions when prompted by the ALJ and did not submit any objections to the Blanchard's submissions. In fact, Blomfelt submitted findings and conclusions that were essentially identical to Blanchard's and to the ALJ's written decision. The ALJ entered findings of fact and conclusions of law and an order directing Millstone and Mid-Century to pay Blanchard temporary total disability benefits from August

[1] Mid-Century was known as "Farmers Insurance" in the underlying workers' compensation proceeding. *See e.g.* Affidavit of Meghann M. Joyce, Ex. 1 at Ex. 15.

25, 2011, through August 1, 2012, and to pay medical expenses related to her back injury.

On October 13, 2014, Mid-Century appealed the ALJ's decision to circuit court. Blanchard moved to dismiss the appeal based on Blomfelt's failure to object to the adverse proposed findings and conclusions. The circuit court granted the motion in a written opinion, essentially concluding that Blomfelt's failure to object to Blanchard's findings and conclusions narrowed the scope of review so profoundly that it precluded meaningful appellate review. After the appeal was dismissed, Mid-Century paid Blanchard the previously-ordered benefits.

In this action, Blanchard alleges Mid-Century's decision to pursue the appeal, constituted a bad faith denial of benefits.[2] Mid-Century has moved for summary judgment, arguing that its litigation conduct does not provide a proper basis for a bad faith insurance claim.

Additional facts will be added as necessary.

## ANALYSIS AND AUTHORITIES

### A. Summary judgment

The standard for a trial court's determination of summary judgment is well-settled:

> Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... A disputed fact is not material unless it would affect

[2] While Mid-Century did pay Blanchard after the appeal was dismissed, she alleges that the delay associated with the appeal amounted to a denial of benefits.

> the outcome of the suit under the governing substantive law.... When a motion for summary judgment is made and supported as provided in § 15–6–56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15–6–56, must set forth specific facts showing that there is a genuine issue for trial.

*Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp.*, 2014 SD 97, ¶ 11, 857 N.W. 2d 865, 869 (quotations and embedded citations omitted); *see also North Star Mutual Ins. Co. v. Rasmussen*, 2007 SD 55 ¶ 14, 734 N.W.2d 352, 356 (a court determining a summary judgment motion must view the facts most favorably to the nonmoving party, resolving any reasonable doubts against the moving party).

**B. Mid-Century cannot satisfy the Rule 56 standard under the applicable test for a workers' compensation bad faith claim.**

Traditionally, bad faith claims against insurers have arisen in either a third-party or first-party context. Third-party bad faith is "based on principles of negligence and arises when an insurer wrongfully refuses to settle a case brought against its insured by a third-party." *Hein v. Acuity*, 2007 SD 40, ¶ 9, 731 N.W.2d 231, 235. First-party bad faith, by contrast, is an intentional tort that most often occurs when an insurer violates the contract with its insured and "consciously engages in wrongdoing during its processing or paying of policy benefits[.]" *Id.* at ¶ 10.

Our Supreme Court has explained that bad faith in a workers' compensation context is unique:

> Wrongful conduct toward an employee claimant by the employer's insurer in a workers' compensation case does not fit the traditional definition of either first- or third-party bad faith. A bad faith claim related to workers' compensation is not based on an insurer's refusal to settle its own insured's suit as in third-party cases, but exists when an

> insurer breaches its duty to deal in good faith and fairly when processing a workers' compensation claim. And, unlike first-party bad faith, the claimant, not the insured employer, brings the action against the insurer. Nonetheless, it is within the first-party bad faith context that multiple jurisdictions, including South Dakota, recognize a bad faith cause of action based on an insurer's conduct in a workers' compensation case.

*Id.* (citing *Champion v. U.S. Fidelity & Guaranty Co.*, 399 N.W.2d 320, 324 (S.D. 1987)).

"[W]orkers' compensation bad faith will not arise whenever an insurer's conduct toward a claimant is unreasonable." *Id.* at ¶ 18. Instead, an employee alleging bad faith against a workers' compensation insurer must satisfy a two-part test:

(1) There was an absence of a reasonable basis for denial of policy benefits; and

(2) The insurer knew or recklessly disregarded the lack of a reasonable basis for denial.

*Id.* at ¶ 14. The insurer, however, is permitted to "challenge claims which are fairly debatable," and thus, "will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." *Id.*

Applying these principles to the existing record, the court determines it must deny Mid-Century's motion for summary judgment. Assuming, arguendo, that Attorney Blomfelt's conduct effectively left Mid-Century without a reasonable basis for denying benefits, genuine issues of material fact remain concerning the question of Mid-Century's knowledge. The record in this regard is not yet well-developed. There is, for instance, no indication among the materials submitted by the parties

that either Blomfelt or Mid-Century's claims personnel have been deposed in an effort to illuminate this issue further.

Mid-Century does offer its responses to Blanchard's requests for admissions as evidence that it "did not know or appreciate the significance of Blomfelt's errors[.]" *See* Mid-Century Reply Brief at 11. However, these responses are simply brief statements denying knowledge which, as far as the court can determine, have not been further tested through the adversarial process and additional pretrial discovery. In fact, the degree of its knowledge was not identified as an undisputed material fact by Mid-Century.

Beyond this, disclaiming actual knowledge, even if it were undisputed, addresses only part of the second prong of a bad faith claim. Left unaddressed is the question of whether Mid-Century recklessly disregarded Blomfelt's conduct, again, assuming without deciding that it eliminated a reasonable basis for denial. This area seems particularly well-suited to further factual development because Mid-Century's statement regarding knowledge is phrased alternatively – it did not know or appreciate the significance of Blomfelt's conduct. Additional discovery can add clarity to what Mid-Century did know, when and what action it took.

This inquiry focusing on knowledge or recklessness is an indispensable component of the analysis set out by our Supreme Court, and any disputes regarding it are material. Moreover, at this early stage of the case, the absence of additional information in this regard prevents a determination that Mid-Century is entitled to judgment as a matter of law.

Mid-Century's principal argument in support of its motion for summary judgment strays from the essential legal test set out in *Hein* and *Champion* and relies too heavily upon evidentiary principles that potentially limit proof at trial, but do not necessarily bar liability. *See Dakota, Minnesota and Eastern Railroad Corp. v. Acuity ("DM&E")*, 2009 SD 69, 771 N.W.2d 623. In *DM&E*, our Supreme Court addressed, among other things, the relevance of an insurer's litigation conduct as an evidentiary matter. It did not hold that an insurer's litigation conduct could be immunized from liability as a matter of law.

The distinction is perceptible. As an evidentiary issue, an insurer's litigation conduct is examined to determine whether it sheds light upon the reasonableness of an insurer's conduct and, ultimately, assessed under Rule 403 of the South Dakota Rules of Evidence, all for the purpose of determining admissibility at trial. A pretrial summary judgment motion in a bad faith action contemplates a fundamentally different issue – i.e. whether to conduct a trial at all. A careful reading of the *DM&E* opinion illustrates the point.

In the first part of its *DM&E* opinion, our Supreme Court reversed the trial court's decision to grant summary judgment to Acuity on the DM&E's bad faith claim. The Supreme Court determined that "[j]ury questions remain whether Acuity's investigation and denial of the UM claim was unreasonable, and whether it knew or recklessly disregarded the lack of a reasonable basis for denial under the policy."[3] *DM&E*, 2009 SD 69, ¶ 32.

[3] This determination is not unlike the conclusion reached by this court under the facts of this case.

It was after this decision to reverse the trial court that the Supreme Court considered DM&E's additional arguments regarding Acuity's litigation conduct. The Supreme Court acknowledged that it already "reversed the circuit court's entry of summary judgment," but offered its analysis of the evidentiary issues because it anticipated they were "likely to arise on remand." *Id.* at ¶ 33. Without question, the Supreme Court's comments about the relevance of litigation conduct were made to guide the trial court on remand, not to suggest that such conduct was not actionable. *See id.* at ¶ 44 (after completing discovery, "[t]he circuit court should apply these rules in considering the admissibility of the evidence DM&E seeks to offer.")

Still, as purely an evidentiary matter, the Supreme Court in *DM&E* did establish a formidable standard for plaintiffs seeking to admit evidence of an insurer's litigation conduct. The Court held it would be a "rare case" where an insurer's litigation conduct is admissible under the rules of evidence. *DM&E* at ¶ 42. The court identified a strong public policy against allowing this type of evidence for reasons that seem as practical as they are legal:

> As an evidentiary matter, many courts have questioned the probative value of an insurer's post-filing conduct as evidence of bad faith... These litigation strategies and tactics will be offered up to juries who, with the benefit of hindsight, and without the benefit of extensive exposure to litigation practices and techniques, will second guess the defendant's rationales for taking a particular course. Realizing the possibility of having their litigation strategy used against them in a future bad faith suit, an insurer may be discouraged from exercising its legitimate litigation rights.

*Id.* at ¶ 41 (blocked quote, embedded quotations and internal citations omitted).

Mindful of this, the court's decision here is made without prejudice to the ability of either party to seek summary judgment following additional discovery or the ability to seek, through a pretrial motion in limine, to exclude evidence of Mid-Century's litigation conduct. A motion to exclude this evidence would, under the facts as the court understands them, likely be dispositive as a practical matter since there is no allegation that Mid-Century's pre-appeal denials were not reasonable or made in bad faith. Therefore, any motion to exclude the evidence by Mid-Century should be brought at the same time as a renewed summary judgment motion.

**C. Mid-Century's motion to dismiss or, alternatively, amend the caption to eliminate "Farmers Insurance"**

Mid-Century's motion to dismiss or amend the caption rests upon its somewhat technical argument that "Farmers Insurance" is not a legal entity and that the similar-sounding "Farmers Insurance Group" is merely a registered trade name. However, the argument is not based upon any rule, statute or case, and the court is not aware of any need to dismiss the case as to "Farmers Insurance" since it is essentially an alias and not an additional party. The idea of referencing an alias as an "also known as" name in a case caption is not uncommon. *See e.g. United States v. Finck*, 407 F.3d 908. 916 (8th Cir. 2005) (affirming district court's decision to add criminal defendant's alias to caption where defendant claimed to be known by a different name).

It is possible that the court could order the amendment of the caption if it were confusing or inaccurate, but there is no allegation that the Farmers moniker is unconnected to the case. Indeed, the opposite seems true. The materials included

within the record indicate that the references to Millstone's insurer in the Department of Labor litigation were simply, "Farmers Insurance." Given its prominence in the case, the court expects that "Farmers," "Farmers Insurance" or even the correct trade name of "Farmers Insurance Group" will all be very much a part of the testimony in the event of a trial, even if the caption were amended. Under the circumstances, the court can discern no unfair prejudice to Mid-Century or confusion by allowing the caption to remain as it is.

ORDER

Based upon the foregoing, it is hereby ordered:

1) that Mid-Century's motion for summary judgment is denied, without prejudice;

2) that Mid-Century's motion to amend the caption is denied:

3) that the clerk will provide a copy of this Memorandum Opinion and Order to the parties' counsel electronically or by U.S. Mail.

Dated this 5th day of March, 2016.

BY THE COURT:

Mark Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

UNIFIED JUDICIAL SYSTEM JUSTICE OF SOUTH DAKOTA

FILED
MAR 17 2016
Minnehaha County, S.D.
Clerk Circuit Court

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28652

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**CHRISTINA BLANCHARD,**
Plaintiff/Appellant,

vs.

**MID-CENTURY INSURANCE COMPANY,** also known as **FARMERS INSURANCE,**
Defendant/Appellee

**MID-CENTURY INSURANCE COMPANY,**
Third-Party Plaintiff/Appellee

vs.

**ERIC C. BLOMFELT,** and **ERIC BLOMFELT & ASSOCIATES, P.C.,**
Third-Party Defendants/Appellee

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**APPEAL FROM THE CIRCUIT COURT**
**SECOND JUDICIAL CIRCUIT**
**MINNEHAHA COUNTY, SOUTH DAKOTA**
The Honorable Mark Salter
Circuit Court Judge

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Notice of Appeal filed
July 3, 2018

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# APPELLEE'S BRIEF


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## South Dakota Case Law

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**Other Case Law**

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## JURISDICTIONAL STATEMENT

Appellee Mid-Century Insurance Company, also known as Mid-Century Insurance ("Mid-Century"), agrees with Appellant Christina Blanchard's ("Blanchard") jurisdictional statement.

## STATEMENT OF ISSUES

**I. Whether the Circuit Court Erred in Granting Farmer's Motion for Summary and Dismissing Blanchard's Claims of Bad Faith as a Matter of Law?**

The Circuit Court entered an order granting Mid-Century's Motion for Summary Judgment dismissing the Complaint

- *Hein v. Acuity*, 2007 SD 40
- *Sayer v. Lee*, 40 SD 170 (1918)
- *Dakota, Minnesota, and Eastern Railroad v. Acuity*, 2009 SD 69

## STATEMENT OF THE CASE[1]

On March 16, 2015, Blanchard filed a summons and complaint in which she alleged a claim of bad faith against Mid-Century related to an underlying workers' compensation case. (SR, 3-8). Mid-Century submitted a motion for summary judgment on July 16, 2015, which was denied "without prejudice to the ability of either party to seek summary judgment following additional discovery…" (Appellant's Appx., 60). On March 28, 2016, Mid-Century brought a third-party complaint against Appellee Eric Blomfelt ("Blomfelt"). On August 1, 2017, after significant discovery had been completed, Mid-Century filed a second motion for summary judgment. (SR, 378). The trial court ultimately granted Mid-Century's second motion for summary judgment on June 8, 2018. (Appellant's Appx., 1-15). Blanchard filed her notice of appeal on July 3, 2018, appealing the trial court's granting of summary judgment. (SR, 663).

[1] References to the Settled Record will be abbreviated as "SR" with reference to the correct page number; references to Appellant's Appendix will be abbreviated as

## STATEMENT OF THE FACTS

### A. Blanchard's Alleged Work-Related Injury

Blanchard's underlying workers' compensation claim stemmed for her time working at the Millstone II, Inc. ("Millstone") restaurant in Rapid City, South Dakota, from March 2008 to January 2011. (SR, 3-4). Blanchard's job required her to lift boxes and bags weighing up to 50 pounds over her head. (Appx., 34-38). In August 2010, during the Sturgis Motorcycle Rally, Blanchard began experiencing low back pain. (*Id.*). Blanchard did not seek medical treatment until September 23, 2010. (*Id.*). In January of 2011, Mid-Century, Millstone's workers' compensation insurer, began providing Blanchard workers' compensation benefits. (*Id.*) On July 22, 2011, Dr. Peter Vonderau, one of Blanchard's treating physicians, placed her at maximum medical improvement with a five-percent whole-person impairment. On August 25, 2011, Mid-Century denied Blanchard further workers' compensation benefits. (*Id.*, ¶ 30, 31).

### B. Blanchard's Workers' Compensation Claim

On November 15, 2011, Blanchard filed a petition for hearing with the South Dakota Department of Labor ("Department") seeking workers' compensation benefits for her alleged work-related back injury. (SR, 3-9). Typical to workers' compensation claims, Blanchard's petition essentially presented a battle of experts. For example, Dr. Vonderau testified in support of her petition, whereas Dr. Jerry Blow, who conducted an independent medical examination for Millstone and Mid-Century, testified that Blanchard's work activities were not a major contributing cause. (Appx., 34-38, ¶¶ 29, 33, 35).

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"Appellant's Appx." with reference to the correct page number; references to Appellee's Appendix will be abbreviated as "Appx." with reference to the correct page number.

After discovery and an evidentiary hearing, Administrative Law Judge Donald Hageman ("Judge Hageman") issued a written decision, finding in Plaintiff's favor and directing the parties to submit proposed findings of fact and conclusions of law. (Appx., 11-18). Plaintiff timely submitted her Proposed Findings of Fact and Conclusions of Law. (Appx., 19-24). When prompted by Judge Hageman, Blomfelt, who was Millstone and Mid-Century's retained attorney of record in the workers' compensation proceeding, inexplicably proposed findings of fact and conclusions of law similar to the Department's decision and failed to object to Plaintiff's Proposed Findings of Fact and Conclusions of Law. (Appx., 25-33). Ultimately, Judge Hageman entered Findings of Fact, Conclusions of Law, and an Order directing Mid-Century to pay Plaintiff temporary total disability benefits from August 25, 2011, through August 1, 2012, and to pay medical expenses related to her back injury. (Appx., 34-38).

Mid-Century was then faced with the decision whether to appeal the Department's decision.[2] In reaching his decision, Judge Hageman credited the testimony of Plaintiff's treating physician on the issue of causation over the testimony of Mid-Century's expert. (Appx., 11-18; 159-176; 203-250). Blomfelt correctly advised Mid-Century that decisions in which the Department finds one expert's testimony more credible than another are ordinarily not good candidates for an appeal. (Appx., 159-176; 203-250). But Blomfelt also advised Mid-Century that this case may prove an exception to that general rule due to obvious deficiencies in the testimony of Plaintiff's treating physician, including the fact that he offered his opinion without knowing the scope of her job duties. (Appx., 170-175, 193, 198-201, 203-250). Based on Blomfelt's

recommendation, Mid-Century believed that pursuing an appeal was reasonable and prudent. (Appx., 170-171, 175, 203-250).

Millstone and Mid-Century followed Blomfelt's recommendation to appeal the Department's decision. (Appx., 39-42, 170-171, 175, 192-94, 198-201, 203-250). However, because Blomfelt failed to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law, Plaintiff moved to dismiss the appeal. (Appx., 46-53). After briefing and a hearing, the circuit court dismissed Millstone and Mid-Century's appeal, concluding that the appeal "directly contradict[ed] the proposed findings of fact and conclusion[s] of law [Millstone and Mid-Century] submitted to the Department," and that Millstone and Mid-Century "actually made no indication that [they] disagreed with the Department's findings." (Appx., 48-58, 105-110). After the appeal was dismissed, Millstone and Mid-Century paid Plaintiff the workers' compensation benefits that the Department awarded her. (Appx., 159-176, 203-224).

**C. Mid-Century's Knowledge**

It is undisputed that Mid-Century did not know of the following facts or documents until after the Circuit Court dismissed the appeal:

- Blomfelt did not provide Mid-Century a copy of his September 2, 2014, Proposed Findings of Fact and Conclusions of Law before submitting them to the Department. (Appx., 25-33; 159-176, 203-250).

- On November 6, 2014, Blanchard's counsel sent Blomfelt a letter, warning him that Millstone and Mid-Century's appeal was frivolous because he had failed to either object to Blanchard's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. (Appx., 188).

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[2] As detailed below, Mid-Century had no knowledge of its attorney's errors with the findings of fact and conclusions of law.

Blomfelt neither provided Mid-Century a copy of Plaintiff's counsel's November 6, 2014, letter nor discussed it with Mid-Century's agents or representatives. (*Id*.)

- Blomfelt did not forward to Mid-Century Blanchard's November 14, 2014, motion to dismiss based on Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. (Appx., 46-53, 188). On November 30, 2014, Blomfelt did inform Elizabeth Neu ("Neu"), Mid-Century's assigned claims adjuster, via email that Plaintiff had filed a motion to dismiss, but he did not discuss the basis of the motion to dismiss with Mid-Century's agents and representatives at that time. (Appx., 46-53, 159-176, 189, 203-250). Instead, he assured her that the motion "was not unusual," and that it was "not very well grounded." (Appx., 159-176, 189, 203-250).

- On November 30, 2014, Blomfelt made a settlement overture that Mid-Century had authorized. (Appx., 43; 114 at ¶¶ 15, 17). But, at that time, Mid-Century did not know that Blomfelt had failed to properly perfect its appeal to circuit court. (Appx., 43, 159-176, 203-250).

- Blomfelt neither provided Mid-Century a copy of his December 3, 2014, response to Plaintiff's motion to dismiss nor did he discuss the basis of Plaintiff's motion to dismiss with Mid-Century's agents or representatives at that time. (Appx., 54-55, 159-176, 189, 203-250).

- Blomfelt did not forward to Mid-Century a copy of Plaintiff's December 4, 2014, reply brief in support of her motion to dismiss Millstone and Mid-Century's appeal nor did he discuss the basis of Plaintiff's motion to dismiss with Mid-Century's agents or representatives at that time. (Appx., 56-58, 153, 189).

- Blomfelt did not immediately discuss with Mid-Century's agents or representatives the arguments made by Plaintiff's counsel in support of her motion to dismiss Millstone and Mid-Century's appeal at the December 5, 2014, hearing. (Appx., 117, 173, 189, 203-250). He merely informed them that the hearing had taken place, and that the judge was going to take some time to consider the motion. (Appx., 173, 203-250).

- On December 11, 2014, Plaintiff's counsel sent Blomfelt a letter, informing him that Plaintiff was in severe financial distress, and that, given Blomfelt's failure to either object to Plaintiff's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law, Millstone and Mid-Century had no valid basis to appeal. (Appx., 44-48, 114-15, 173). Blomfelt did not forward this letter to Mid-Century or discuss the basis of the motion to dismiss with Mid-Century's agents or representatives at that time. (Appx., 44-45, 114-15, 121, 129, 153, 188-89).

- Blomfelt did not forward to Mid-Century the circuit court's December 30, 2014, letter decision, which granted Plaintiff's motion to dismiss Millstone and Mid-Century's appeal on the basis that Blomfelt had failed to either object to Plaintiff's Proposed Findings of Fact or Conclusions of Law or propose competing findings of fact and conclusions of law, until July 13, 2015, nearly six months after the decision had been rendered. (Appx., 105-110, 118-19, 122, 129).

While Blomfelt previously informed Mid-Century that a motion to dismiss had been filed, Mid-Century learned for the first time that Blomfelt had failed to properly perfect its appeal to circuit court in a January 6, 2015, email, a week after the circuit court dismissed the appeal. (Appx., 25-33, 43-58, 105-119, 122, 129, 173-174, 188-89, 203-250). At no time when pursuing its appeal was Mid-Century aware that Blomfelt had not properly perfected it. (*Id*.)

After the circuit court dismissed Mid-Century's appeal on December 30, 2014, Mid-Century paid Blanchard her workers' compensation benefits. (Appellant's Brief, 7). Given that (1) Mid-Century initially decided to appeal Blanchard's workers compensation decision based on the merits and prior to Blomfelt's submission of the errant findings of facts and conclusions of law, (2) that Mid-Century was unaware of Blomfelt's errant findings of facts and conclusions prior to its submission; and (3) that Blomfelt intentionally hid and precluded Mid-Century access to documents relating to Blanchard's motion to dismiss the appeal, the trial court was correct in holding that Mid-Century's decision to continue to deny Blanchard's workers' compensation benefits for the duration of an appeal Mid-Century believed it was justified in filing is not sufficient to maintain a claim of bad faith.

## LEGAL STANDARD

The Court reviews "a circuit court's entry of summary judgment under the *de novo* standard of review." *Heitmann v. Am. Family Mut. Ins. Co.*, 2016 SD 51, ¶ 8, 883

N.W.2d 506, 508. The Court "will affirm the trial court's grant ... of a motion for summary judgment when no genuine issues of material fact exist, and the legal questions have been correctly decided." *Estate of Lien v. Pete Lien & Sons, Inc.*, 2007 SD 100, ¶ 9, 740 N.W.2d 115, 119.

## ARGUMENT

### A. The Trial Court Did Not Error in its Analysis of the Elements of the Tort of Bad Faith in the Workers' Compensation Case

The trial court correctly identified that a cause of action based upon an insurer's conduct in a workers' compensation case, unlike traditional third-party or first-party bad faith claims, "exists when an insurer breaches its duty to deal in good faith and fairly when processing a workers' compensation claim." (Appellant's Appx., 7) (citing *Hein v. Acuity*, 2007 SD 40, ¶ 10, 731 N.W.2d 231, 235). The trial court accurately stated the two-part test that must be satisfied when an employee alleges bad faith against a workers' compensation insurer:

> (1) There was an absence of a reasonable basis for denial of policy benefits; and
> (2) The insurer knew of or recklessly disregarded the lack of a reasonable basis for denial.

*(Id*., 8*)* (citing Hein, 2007 SD 40, at ¶ 14).

In light of this two-pronged test, the trial court went on to hold that the "[u]ndisputed material facts indicate that Neu and Blomfelt undertook a merits-based assessment of Mid-Century's potential appeal before deciding to proceed with appellate review in June of 2014." (*Id*.) Moreover, the trial court held that the determination to appeal by Mid-Century was based on "Blomfelt's advice which included his view that the ALJ had incorrectly credited the treating physician's testimony and that Mid-Century should seek review in an effort to preempt the possibility of a future claim by Blanchard

for permanent total benefits." (*Id*., 10). Mid-Century's decision to appeal predated Blomfelt's submission of the findings and conclusions, and the trial court determined that such appeal was not "frivolous." (*Id*.) Given the evidence in the record, the trial court found that there was "no evidence that Mid-Century or Neu had actual knowledge that its appeal had been fatally impacted by the findings and conclusions Blomfelt submitted to the ALJ" nor was "there evidence that Mid-Century or Neu acted with reckless disregard of this fact." (*Id*.)

The trial court also held that just because Mid-Century "allowed for the possibility of ongoing settlement negotiations after the decision to appeal and after the notice of appeal does not change the analysis." (*Id*.) Mid-Century was advised by Blomfelt in a September 11, 2014, email that Mid-Century would be "in a stronger position [to settle] once we file [the appeal], and hopefully win the appeal." (*Id*.) As such, the trial court accurately picked up on the essence of Blanchard's claim—that is, such claim was "narrow" as she did not allege that the original denial of continued benefits in August of 2011 constituted bad faith nor was the actual decision to appeal in bad faith either. (*Id*., 10). Instead, Blanchard's claim stemmed from the assertion that Blomfelt's errant findings of fact and conclusions of law somehow rendered Mid-Century's continued denial of benefits during the pendency of the appeal frivolous. (*Id*., 11). In fact, the trial court emphasized that Blanchard overlooked the premises of a bad faith claim in the workers' compensation context. (*Id*.) Specifically, the issue centered on whether Mid-Century knew or recklessly disregarded the facts related to whether it had a reasonable basis to deny Blanchard's claims once Blomfelt submitted the faulty findings of fact and conclusions of law. The trial court, focusing in on this point, found that

neither "Mid-Century or Neu had actual knowledge that its appeal had been fatally impacted by the findings and conclusions Blomfelt submitted to the ALJ." (*Id.*, 10). Mid-Century reasonably relied on Blomfelt to "perfect and prosecute the appeal" and, as such, the trial court was correct in holding that, as a matter of law, Blanchard could not show Mid-Century knew of or recklessly disregarded the lack of a reasonable basis for denial. (*Id*.) (citing *Hein*, 2007 SD 40).

In analyzing the second prong of the test for bad faith claims in the workers' compensation setting, the trial court stated that Blanchard failed to identify a "dishonest purpose" or "wrongdoing" on the part of Mid-Century as it related to Blomfelt's findings of fact and conclusions of law. (*Id*., 12-13). By stating as much, the trial court did not add an additional prong to the two-part test but was simply explaining why Mid-Century did not know of or recklessly disregard the lack of a reasonable basis for denial, assuming one existed. This is further demonstrated as the trial court went on to state:

> Mid-Century possesses a statutory right to appeal an adverse administrative decision, and it undertook a merits-based analysis before deciding to appeal. As indicated above, the inclination to engage in ongoing settlement discussions does not, as evidenced by the undisputed material facts presented here, sustain a claim of bad faith.

(*Id*., 13).

Bad faith claims in the workers' compensation setting not only requires "wrongful conduct," but something even beyond that— "the relationship between a workers' compensation claimant and an insurer is adversarial and not contractual…an action alleging bad faith requires more than an allegation of wrongful conduct." *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs*., 2016 SD 70, ¶ 9, 886 N.W.2d 322, 324 (quoting *Hein v. Acuity*, 2007 SD 40, ¶ 18, 731 N.W.2d 231, 237) (emphasis added). "Wrongful conduct toward an employee claimant by the employer's insurer in a workers'

compensation case does not fit the traditional definition of either first- or third-party bad faith. A bad faith claim related to workers' compensation is not based on an insurer's refusal to settle its own insured's suit as in third-party cases but exists when an insurer breaches its duty to deal in good faith and fairly when processing a workers' compensation claim. And, unlike first-party bad faith, the claimant, not the insured employer, brings the action against the insurer." *Hein v. Acuity*, 2007 S.D. 40, ¶ 11, 731 N.W.2d 231, 235, holding modified by *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 S.D. 70, ¶ 11, 886 N.W.2d 322 (citing *Champion*, 399 N.W.2d at 320 (S.D. 1987)*; Reed v. Hartford Accident & Indem. Co.*, 367 F.Supp. 134, 135 (E.D.Pa.1973); *Stafford v. Westchester Fire Ins. Co. of New York, Inc.*, 526 P.2d 37, 43-44 (Alaska 1974), overruled on other grounds, *Cooper v. Argonaut Ins. Cos.*, 556 P.2d 525 (Alaska 1976); *Gibson v. Nat'l Ben Franklin Ins. Co.*, 387 A.2d 220, 222-23 (Me.1978); *Southern Farm Bureau Cas. Ins. Co. v. Holland*, 469 So.2d 55, 58 (Miss.1984); *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148, 609 P.2d 257, 261 (1980); *Coleman v. Am. Universal Ins. Co*., 86 Wis.2d 615, 273 N.W.2d 220, 223-24 (1979)).

In fact, a bad faith claim in workers' compensation cases is a "distinct cause of action" as such a claim "does not have the necessary attribute of a traditional first-party bad faith claim, *i.e*. a contractual relationship." *Hein*, 2007 SD 40, ¶ 14. "The Compensation Act should not be a 'shield' which will insulate those who would engage in intentional wrongdoing in the settlement and investigation of workers' claims. No one should be allowed intentionally and tortuously to cut off a claimant unilaterally for whatever purpose they choose and then hide behind workers' compensation exclusivity in

assurance that the only retribution will come in the form of a compensation penalty paid for by society. *Matter of Certification of a Question of Law from the U.S. Dist. Court, Dist. of S. Dakota, W. Div.*, 399 N.W.2d 320, 323 (S.D. 1987), holding modified by *Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.*, 2016 SD 70, 886 N.W.2d 322 (quoting *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148, 609 P.2d 257 (1980)).

Blanchard makes much ado about the trial court's statement relating to dishonesty and wrongful conduct. However, as shown above, such terminology has always surrounded workers' compensation bad faith claims. The trial court's reference to the lack of a "dishonest purpose" or "wrongdoing" on the part of Mid-Century relating to Blomfelt's proposed findings of fact and conclusions of law is simply part of the analysis of whether Mid-Century denied Blanchard's claim without a reasonable basis and knew or recklessly disregarded the facts of such denial—the trial court did not add a "further test." As stated in the trial court's own memorandum, it recognized that a determination of the existence of a bad faith claim turns on a two-part test pursuant to *Hein v. Acuity*, 2007 SD 40. (Appellant's Appx., 7-9). The trial court determined that the undisputed material facts show that Mid-Century did not know of or recklessly disregard the lack of a reasonable basis for denial given Blomfelt's independent malpractice and, therefore, there was no basis for a bad faith claim as a matter of law. (*Id.*) ("Even if Blomfelt's conduct in proposing infirm findings and conclusions to the ALJ deprived [Mid-Century] of a reasonable basis for denying benefits, it does not follow that [Mid-Century] knew of or acted with reckless disregard of Blomfelt's conduct."). Blanchard's complaint that the trial court supplemented an additional test is inaccurate; the trial court applied the correct

two-prong test and ultimately held that the second prong was not met, that is, Mid-Century did not know and did not recklessly disregard the lack of a reasonable basis *i.e.* that its appeal had been fatally impacted by the negligent findings of fact and conclusions of law submitted by Blomfelt.

### B. The Trial Court did not Err when it Refused to Impute Blomfelt's Knowledge to Mid-Century

"[I]n a claim of bad faith against an employer, the relevant inquiry is what that employer knew at the time it denied coverage to the insured." *Gilchrist v. Trail King Indus., Inc.*, 2002 SD 155, ¶ 18, 655 N.W.2d 98, 103 (citing *Julson v. Federated Mut. Ins. Co.*, 1997 SD 43, ¶¶ 6, 8, 562 N.W.2d 117, 119–20). Generally, an agent's knowledge is imputed to the principal, however, this rule is not without limitation and "contemplates the existence of…good faith…" *Mid-Century Mut. Auto. Ins. Co. v. Bechard*, 80 SD 237, 248, 122 N.W.2d 86, 92 (1963). Blanchard asserts that this Court's holding in *Gilchrist*, 2002 SD 155, stands for the principle that an "insurer's knowledge of its lack of a reasonable basis for a denial of benefits includes the knowledge imputed to it from its agents." (Appellant's Brief, 13). However, *Gilchrist* was not a workers' compensation bad faith case and this Court even recognized the different imputation rule in such a case:

> In *Walz v. Fireman's Fund Ins. Co.*, we articulated a two-prong test for bad faith in the worker's compensation context: For proof of bad faith, there must be an absence of a reasonable basis for denial of policy benefits and the knowledge or reckless disregard of the lack of a reasonable basis for denial, implicit in that test is our conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company *where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured.*

*Gilchrist*, 2002 SD 155, ¶ 19 (emphasis added).

An insurance company is only imputed with its agent's knowledge of the lack of a reasonable basis for denial "where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured"—here, the trial court found no reckless disregard or reckless indifference. *Id.* (quoting *Walz v. Fireman's Fund Ins. Co.*, 1996 SD 135, ¶ 7, 556 N.W.2d 68, 70); Appellant's Appx., 10 ("Nor is there evidence that Mid-Century or Neu acted with reckless disregard of this fact.").

Furthermore, *Gilchrist* did not deal with an agent who concealed facts that he was obliged to inform the principal about. In such cases, there is an exception to the general rule of imputation:

> Such a presumption cannot be indulged, however, where the facts to be communicated by the agent to the principal would convict the agent of *an attempt to deceive and defraud the principal*. The truth is that where an agent, though ostensibly acting in the business of the principal, *is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it*.

*Schneider v. Thompson*, 58 F.2d 94, 96 (8th Cir. 1932) (emphasis added).

It is well settled that knowledge is not imputed to the principal in situations "where the agent's relations to the subject-matter, or his previous conduct, render it certain that he will not disclose it. In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interests, rather than that he will disclose it." *Id.* (citations omitted). *See also Allied Waste N. Am., Inc. v. Lewis, King, Krieg & Waldrop, P.C.*, 93 F. Supp. 3d 835, 849 (M.D. Tenn. 2015) ("But Defendants point to no cases holding that knowledge or notice is imputed to a client because it contemporaneously retains two law firms, both of whom are alleged to have committed

malpractice and both of whom allegedly have a vested interest in insuring that the client does not become aware of the malpractice. Such a result would be perverse").

Furthermore, "[w]hen an attorney acts in bad faith or intentionally neglects the client's business, the general rule does not apply." *Allen v. Nissley*, 184 Conn. 539, 543, 440 A.2d 231, 234 (1981) (citing *Sayer v. Lee*, 40 SD 170, 173, 166 N.W. 635 (1918)). "[A] client is not charged with the attorney's knowledge when circumstances render it certain or probable that the attorney will disregard the duty to communicate the material facts to his client." *Id*. (citing *Farnsworth v. Hazelett*, 197 Iowa 1367, 1373, 199 N.W. 410 (1924); *Farr v. Newman*, 14 N.Y.2d 183, 190-91, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964); *Florence v. De Beaumont*, 101 Wash. 356, 364, 172 P. 340 (1918); *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 169-70, 66 N.W. 518 (1896); 7A C.J.S., Attorney & Clients 182.

Despite the limited question as to whether Blomfelt's *knowledge* is imputed to Mid-Century such as to meet the requirements of a bad faith claim, Blanchard cites several cases for the argument that a client is bound to its attorney's knowledge and actions. Yet, a majority of the cases cited do not address admissions or actions of attorneys, but rather, the actions of an insurer's or other principal's agents.[3] Moreover,

[3] *See, e.g., Duffield Constr. v. Baldwin*, 2004 SD 51, 679 N.W.2d 477 (holding that landowners had knowledge that improvements for which lessee had contracted were being made, and that landowners were therefore equitably estopped from attacking mechanic's lien); *Gilchrist v. Trail King Indus., Inc.*, 2002 SD 155, 655 N.W.2d 98 (holding that employer's rehabilitation consultant was employer's agent, and that evidence of the consultant's actions and knowledge was relevant to employee's bad faith claim against self-insured employer); *Aetna Life Ins. Co. v. McElvain*, 363 N.W.2d 186 (S.D. 1985) (holding that second mortgagees were charged with constructive knowledge of the contents of mortgage because their real estate brokerage firm was aware of it, even though those facts were not communicated to them); *Skaling v. Aetna Ins. Co.*, 799 A.2d 997 (R.I. 2002) (noting that an insurer's actual knowledge that there is no reasonable

none of the cases cited address the entirely different question of whether an insurer may be held vicariously liable in bad faith for its attorney's negligence or other litigation misconduct, or whether an attorney's litigation conduct is even admissible. Even so, the question for this Court is whether Blomfelt's knowledge can be imputed to Mid-Century such as to satisfy the elements of a bad faith claim in a workers' compensation case—to which that question has been answered in the negative.

As even Blanchard must recognize, under South Dakota law, an attorney's actions are not always imputed to the client. For example, in *Sayer v. Lee*, after a trial, a verdict and judgment were entered in plaintiff's favor. 40 SD 170, 166 N.W. 635. She was, however, dissatisfied with the amount of the verdict and directed her attorney, who had prosecuted and tried the case, to take the necessary steps to either secure a new trial or perfect an appeal. Her attorney promised to do so, and, from time to time, he assured plaintiff that he was taking those steps. Understandably, the plaintiff relied on her attorney to proceed with her case, and she therefore believed that her case was being properly handled. She later learned, however, that her attorney had done nothing to secure a new trial or pursue an appeal. She employed new counsel, who moved for an extension of time to move for a new trial. The motion was granted, and the defendant appealed, arguing that the plaintiff was bound by her attorney's negligence. On appeal, the South Dakota Supreme Court disagreed, explaining:

> As a rule, a client is bound by the acts of his attorney; but this is true only so far as such acts relate to management of business entrusted to an attorney or to various steps taken by him in the transaction of his client's business. Where an attorney acts in good faith within the scope of his

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basis for denying a claim may be inferred and imputed to the insurer through the acts of its agents but not specifically addressing whether insurer is vicariously liable for attorney's negligence).

> authority in representing his client, his acts, both of commission and omission, will be regarded as the acts of his client, and the negligence of the attorney will be regarded as the negligence of the client. . . . . But this rule does not apply where the attorney has acted in good faith or intentionally neglects his client's business.
>
> In this case, there was a total failure on the part of the attorney to take any steps whatever to attend to the business entrusted to his care. While he promised to proceed with the motion for a new trial and assured [plaintiff] from time to time that the necessary steps were being taken, as a matter of law, he neglected to do anything at all. Such negligence should not be imputed to [plaintiff]. When [plaintiff] employed her attorney, who was a member of the bar in good standing to look after her case and he accepted such employment, [plaintiff] had done everything that an ordinarily prudent and vigilant person would do. . . . To hold, or even suggest, that he should have gone further, . . . would be a reflection upon the integrity and intelligence of the profession.

*Id.* at 170, 166 N.W. at 636 (quoting *Searles v. Christensen*, 5 SD 650, 60 N.W. 29 (1894) (additional internal citations omitted)). Ultimately, the Court held that the plaintiff's failure to serve her motion for a new trial was excusable, and that the trial court was therefore justified in setting aside her default. *Id.*

More specifically, some courts have held that an insurer is not at all liable for its attorney's litigation negligence or misconduct. In *Merritt v. Reserve Insurance Company*, the plaintiff filed an action against the defendant as a result of injuries he sustained in an automobile accident with the defendant. 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973). The defendant's insurer retained counsel to defend him, and the case went to trial. The jury returned a verdict against the defendant for four times the policy limits, and the insured then assigned to the plaintiff his claim against the insurer for failure to settle within the policy limits. When the plaintiff brought the bad faith claim, she alleged that defense counsel had been negligent in defending the case. On the insurer's motion, the trial court dismissed the claim that imputed liability to the insurer

for the defense counsel's conduct. When the insurer eventually appealed a jury verdict in the plaintiff's favor, the plaintiff cross-appealed that issue, and the California Court of Appeals reversed, rejecting an insurer's vicarious liability for defense counsel's conduct:

> Having chosen competent independent counsel to represent the insured in litigation, the [insurer] may rely upon trial counsel to conduct the litigation, and the carrier does not become liable for trial counsel's legal malpractice. If trial counsel negligently conducts the litigation, the remedy for his negligence is found in an action against counsel for malpractice and not in a suit against counsel's employer to impose vicarious liability. . . . The conduct of the actual litigation, including the amount and extent of discovery, the interrogation, evaluation, and selection of witnesses, the employment of experts, and the presentation of the defense in court, remains the responsibility of trial counsel, and this is true both on plaintiff's side and on defendant's side of the case.

34 Cal. App. 3d at 880-82, 110 Cal. Rptr. 511. *See also Martin v. State Farm Mut'l Auto. Ins. Co.*, 761 So. 2d 380, 381 (Fla. Ct. Ap. 2000); *Gibson v. Casto*, 504 S.E.2d 705, 708 (Ga. Ct. App. 1998); *Brocato v. Prairie St. Mid-Century Ins. Ass'n*, 520 N.E.2d 1200, 1203 (Ill. Ct. App. 1998); *Herbert A. Sullivan v. Utica Mut'l Ins. Co.*, 788 N.E.2d 522 (Mass. 2003); *Feliberty v. Damon*, 527 N.E.2d 261 (N.Y. Ct. App. 1988); *Brown v. Lumbermen's Mut'l Cas. Co.,* 369 S.E.2d 367 (N.C. Ct. App. 1988); *Mentor Chiropractic Ctr., Inc. v. State Farm Fire & Cas. Co.*, 744 N.E.2d 207, 211 (Ohio Ct. App. 2000); *State Farm Mut'l Auto. Ins. Co. v. Traver,* 980 S.W.2d 625 (Tex. 1998); *Evans v. Steinberg*, 699 P.2d 797 (Wash. Ct. App. 1985)).

Other courts require that the insurer have knowledge or participate in the attorney's negligence or litigation misconduct to be held vicariously liable. *See Rose v. St. Paul Fire and Marine Insurance*, 599 S.E.2d 673 (W. Va. Ct. App. 2004); *Givens v. Mullikan ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002). There is no evidence in this case that Mid-Century had any such knowledge or participated in

Blomfelt's negligence. To the contrary, the evidence is that Blomfelt affirmatively hid his negligence from Mid-Century.

Based on Blomfelt's recommendation, Mid-Century reasonably decided to appeal the Department's adverse ruling, and Blomfelt assured it that he would take the necessary steps to ensure that the appeal was properly perfected. *See Sayer*, 40 SD at 170, 166 N.W. at 636. Because the eventual appeal's procedural deficiencies had not yet happened when Mid-Century made that decision, it must instead be Mid-Century's alleged decision to pursue the appeal after the motion to dismiss that Plaintiff seeks to impute. But, after the motion to dismiss was filed, Blomfelt failed to forward relevant correspondence and pleadings to Mid-Century and even assured Mid-Century that the appeal was normally progressing, thus affirmatively concealing the basis of the motion to dismiss and mispresenting its gravity. At that point, Blomfelt was not merely acting negligently but was acting adversely to Mid-Century and for his own purposes. *See* Restatement (Second) of Agency, § 282(i) (stating that an agent's knowledge in a transaction undertaking for the principal is imputed to the principal, unless the agent is "secretly . . . acting adversely to the principal and entirely for his own or another's purposes)). Thus, if the merely negligent attorney in *Sayer* was no longer acting "in good faith within the scope of his authority," then certainly the same can be said for Blomfelt, and his knowledge and actions in pursuing Mid-Century's appeal of the Department's adverse ruling should not be imputed to Mid-Century.

Ultimately, the trial court was correct is not attributing Blomfelt's knowledge and/or actions to Mid-Century. Neither Blomfelt's knowledge, nor his actions, are imputable to Mid-Century given Blomfelt's negligence in his errant findings of fact and

conclusions of law and his later actions of attempting to conceal said malpractice by failing to forward and/or communicate with Mid-Century important details of the case and its appeal.

### C. Legitimate litigation conduct is inadmissible to establish insurance bad faith

The trial court was correct in holding that Blomfelt's litigation conduct was neither relevant nor probative of any fact and, any possibly probative force of such evidence would be outweighed by the danger of confusing the issues. (Appellant's Appx., 11). Despite this holding, the trial court didn't base its ultimate decision on this point as it specifically found that:

> At issue in Blanchard's claim is not the allegedly untoward litigation strategies and tactics of an insurer, but rather the unilateral professional conduct of its outside counsel. Given the incongruity underlying Blanchard's claim, the court perceives little or no probative force associated with this evidence.

(*Id*.)

Regardless, in South Dakota, it is established that an insurer's litigation conduct can rarely be used to establish insurance bad faith. As this Court previously recognized, in *Dakota, Minnesota, and Eastern Railroad v. Acuity*, the South Dakota Supreme Court addressed, among other things, the question whether an insurer's litigation conduct can be used to establish insurance bad faith. 2009 SD 69, 771 N.W.2d 623. The Court first reversed the trial court's decision to grant Acuity summary judgment on DM&E's bad faith claim, determining that "[j]ury questions remain[ed] whether Acuity's investigation and denial of the UM claim was unreasonable, and whether it knew or recklessly disregarded the lack of a reasonable basis for denial under the policy." *Id.* ¶ 32. Although the Court had already reversed the grant of summary judgment, it nonetheless

analyzed other evidentiary issues to provide the circuit court guidance on remand. *Id.* ¶ 33. In so doing, the Court recognized that it would be a rare case where an insurer's litigation conduct would be admissible to establish an insurer's bad faith. *Id.* ¶ 42. While the *DM&E* Court did not hold that an insurer's litigation conduct was never actionable, it did establish a formidable standard for plaintiffs seeking to admit evidence of an insurer's litigation conduct. *Id.*

Plaintiff nonetheless attempts to avoid this formidable standard. Relying heavily on *Federated Mutual Insurance Company v. Anderson*, 991 P.2d 915 (Mont. 1999), Plaintiff argues that the rule established in *DM&E* only protects "proper" or "legitimate" litigation conduct, and that Mid-Century's litigation conduct is thus admissible because its appeal was "meritless." Given the Court's heavy reliance on the probative value of litigation conduct to the elements of insurance bad faith under South Dakota law, Mid-Century disagrees that *DM&E*'s holding is so limited. *See DM&E*, 2009 S.D. 69, ¶¶ 42-43, 771 N.W.2d at 635-36. Furthermore, in *Federated Mutual*, the degree to which the insurer had knowledge of or participated in the litigation conduct is not at all clear, thus potentially making that case quite distinguishable. *See* 991 F.2d 915. Ultimately, even if this Court accepts Plaintiff's argument that *DM&E*'s holding is limited to "proper" or "legitimate" litigation conduct, it is undisputed that Mid-Century was at all times engaged in legitimate litigation conduct as it was unaware of Blomfelt's mistakes, and the exclusion of evidence of litigation conduct was appropriate by the trial court.

1. Based on what it knew, Mid-Century decision to appeal the Department's adverse ruling was reasonable and legitimate

The trial court correctly held that Mid-Century undertook a "merits-based assessment" of the potential appeal before deciding to appeal. (Appellant's Appx., 9).

Mid-Century decided to appeal the Department's ruling long before any procedural deficiencies arose. On July 21, 2014, Blomfelt correctly advised Mid-Century that decisions in which the Department finds one expert's testimony more credible than another are ordinarily not good candidates for an appeal, but that this case may prove an exception to the general rule:

> We received the decision back from the South Dakota Department of Labor. Unfortunately, the news is not good. The judge decided to credit the treating physician's testimony as the basis for causation even though the doctor had no idea concerning the claimant's job duties. This is something that is quite a stretch to pin causation on the opinion of a doctor who says the injury is work-related due to repetitive activity on the job but yet has no understanding of the claimant's job duties. There is even South Dakota Supreme Court precedent against this. Normally, when a judge picks one doctor's testimony over the other, the decision is not a very good candidate for appeal. However, in this case, we have a strong reason to appeal the decision and allow a higher court to recognize the obvious deficiencies in the treating doctor's opinion.

(Appx., 159-176, 225-250). This advice is similarly reflected in Mid-Century's claims notes from that same day:

> RECEIVED EMAIL FROM D/A DATED 07/21/14 STATING HE RECEIVED DECISION BACK FROM SD DEPT OF LABOR, THE JUDGE CREDITED EE'S PHYSICIANS TESTIMONY AS THE BASIS OF CAUSATION EVEN THOUGH THE DR HAD NO IDEA OF EE'S JOB DUTIES PER D/A. D/A STATES THAT NORMALLY, WHEN A JUDGE PICKS ONE DR'S TESTIMONY OVER THE OTHER, THE DECISION IS NOT VERY GOOD CANDIDATE FOR APPEAL. HOWEVER, D/A STATES THAT WE HAVE STRONG REASON TO APPEAL THIS DECISION & ALLOW A HIGHER COURT TO RECOGNIZE THE OBVIOUS DECIFICIES IN THE TREATING DR'S OPINION. WE WILL PURSUE IN APPEALING THE JUDGE'S DECISION.

(Appx., 203-224). Despite Plaintiff's speculative allegation that Mid-Century pursued its appeal to leverage a settlement from her, these notes and correspondence reveal that Mid-Century appealed the Department's adverse ruling because it did not believe that she was

entitled to further workers' compensation benefits, and that it had a reasonable basis for that decision. *See Estate of Elliott ex rel. Elliott v. A&B Welding Supply Co., Inc.*, 1999 SD 707, ¶ 16, 594 N.W.2d 707, 709 ("When challenging a summary judgment, the nonmoving party 'must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.'") (quoting *Himrich v. Carpenter*, 1997 SD 116, ¶ 18, 569 N.W.2d 568, 573).

The procedural deficiencies in Mid-Century's appeal of the Department's adverse ruling did not arise until several weeks later. On July 23, 2014, after Judge Hageman invited the parties to submit findings of fact and conclusions of law, Blanchard timely submitted her Proposed Findings of Fact and Conclusions of Law. Blomfelt, however, did not submit his Proposed Findings of Fact and Conclusions of Law similar to the Department's decision until September 2, 2014, six weeks after Mid-Century had already made the decision to appeal the Department's adverse ruling. At that time, Blomfelt did not know that he had waived any rights on appeal by proposing those findings of fact and conclusions of law or by failing to submit objections to Blanchard's Proposed Findings of Fact and Conclusions of Law. Thus, on October 13, 2014, when Mid-Century filed their notice of appeal, if Blomfelt believed that the appeal was reasonable, then, by Plaintiff's argued extension, Mid-Century had every reason to believe that its appeal of the Department's adverse ruling was entirely meritorious.

Mid-Century's decision to appeal the Department's adverse ruling was reasonable and legitimate. While Mid-Century later learned – *after* the motion to dismiss was granted – that Blomfelt had failed to properly perfect its appeal to circuit court, the reasonableness of its decision to appeal the Department's ruling must be judged by the

information it had when it made that decision. *See DM&E*, 2009 SD 69, ¶ 19, 771 N.W.2d at 629 (recognizing that the question whether an insurer engaged in bad faith "is determined based upon the facts and law available to [the] insurer at the time it made the decision to deny coverage") (quoting *Walz v. Fireman's Fund Ins. Co.*, 1996 SD 135, ¶ 8, 556 N.W.2d 68, 70). When Mid-Century decided to appeal the Department's adverse ruling to circuit court, it simply chose to litigate the case on its merits as it had done all long. At that time, Mid-Century did not – and could not – have known of its eventual appeal's procedural deficiencies because they had not yet happened. To date, Blanchard has not once argued that Mid-Century acted unreasonably in litigating the claim before the Department. Had Blomfelt properly perfected Mid-Century's appeal, it is evident that this insurance bad faith claim would never have been brought.

2. Based on what it knew, Mid-Century's pursuit of its appeal of the Department's adverse ruling was reasonable and legitimate

Blanchard then argues that Mid-Century pursued a "baseless appeal," but it is clear that Mid-Century made no such decision. On November 6, 2014, more than three weeks after Blomfelt filed the notice of appeal, Blanchard's counsel sent Blomfelt a letter, warning him that Mid-Century's appeal was frivolous because he had failed to either object to Blanchard's Proposed Findings of Fact and Conclusions of Law or propose competing findings of fact and conclusions of law. Although this letter is the first record evidence that Blomfelt was aware that he had failed to properly perfect the appeal, it is uncontroverted that Blomfelt neither provided Mid-Century a copy of Blanchard's counsel's November 6, 2014, letter nor discussed with Mid-Century's agents or representatives.

Furthermore, it is undisputed that Blomfelt did not forward the relevant pleadings to Mid-Century or discuss the basis of the motion to dismiss with Mid-Century's agents or representatives while the appeal was pending. Instead, he actually assured Mid-Century that the motion to dismiss the appeal was routine, and that it would likely be denied:

> RECEIVED EMAIL FROM D/A DATED 11/30/14. HE STATES THAT HE IS FILING BRIEF. C/A WILL THEN RESPOND W/ BRIEF OF THEIR OWN. C/A HAS FILED MOTION TO DISMISS THE APPEAL. D/A STATES THAT THIS IS NOT UNUSUAL, BUT THEIR MOTION IS NOT VERY WELL GROUNDED. D/A STATES WE MAY HAVE A HEARING ON THE MOTION. IT JUST DEPENDS HOW THE JDUGE WANTS TO TREAT THE MOTION. W/ THE MOTION, THE APPEAL IS GOING TO TAKE LONGER TO REACH A RESOLUTION BECAUSE THE JUDGE HAS TO RULE ON THE MOTION BEFORE GETTING TO THE ACTUAL SUBSTANCE OF THE APPEAL ITSELF. D/A STATES HE WILL SEE IF NOW THAT THE BRIEFS ARE BEING FILED, IF C/A HAS ANY INTEREST IN SETTLING.

(Appx., 159-176, 188-89, 203-250). Mid-Century learned for the first time that Blomfelt had failed to properly perfect its appeal to circuit court in a January 6, 2015, email, *after* the circuit court granted Blanchard's motion to dismiss. Not only was Mid-Century's decision to appeal the Department's adverse ruling entirely reasonable when it made that decision, but it is also absolutely undisputed that Mid-Century did not know until after the circuit court granted Blanchard's motion to dismiss that Blomfelt had failed to properly perfect it. Thus, as a matter of law, at no time during its appeal of the Department's adverse ruling to circuit court did Mid-Century's know of or engage in any improper or illegitimate litigation conduct.

Given that the underlying litigation conduct was reasonable and legitimate, the trial court was correct in disregarding Blomfelt's litigation conduct as having no probative force associated with the evidence in record and, moreover, that such evidence

could not be used to establish insurance bad faith. However, this all assumes the trial court based its decision that litigation conduct would be inadmissible, which seems to have been an alternative ground whereby the trial court found that, even looking at litigation conduct, Plaintiff still couldn't satisfy the two-prong test in *Hein* and, thus, summary judgment was appropriate.

### D. The Trial Court Properly Assessed the Evidence Before It

Blanchard's last argument is that the trial court improperly failed to weigh evidence she believes demonstrated bad faith aside from Blomfelt's actions. The premise of Blanchard's argument rests on its assertions that Neu was mistaken as to the issues she believed Mid-Century was appealing and, as a result, Mid-Century did not make a reasonable investigation prior to appealing.

While Blanchard asserts that Neu was wholly unaware as to the issues being appealed, the trial court held that the undisputed material facts showed otherwise. Neu undertook a "merits-based assessment" of Mid-Century potential appeal before deciding to proceed with appellate review in June of 2014. (Appellant's Appx., 9). Neu did so "based upon Blomfelt's advice which included his view that the ALJ had incorrectly credited the treating physician's testimony" and that Mid-Century should seek review in an effort to "preempt the possibility of a future claim by Blanchard for permanent total benefits." (*Id*.) The trial court also correctly held that there was "no evidence that…Neu had actual knowledge that its appeal had been fatally impacted by the findings and conclusions Blomfelt submitted to the ALJ." (*Id*., 10). Nor was "there evidence that…Neu acted with reckless disregard of this fact. Indeed, Neu reasonably relied upon Blomfelt to act consist with [Mid-Century's] plan to perfect and prosecute an appeal challenging the merits of the ALJ's decisions." (*Id*.) Blanchard's suggestion that Neu

did not know what the appeal regarded is false as further demonstrated by Neu's claim notes:

> RECEIVED EMAIL FROM D/A DATED 07/21/14 STATING HE RECEIVED DECISION BACK FROM SD DEPT OF LABOR, THE JUDGE CREDITED EE'S PHYSICIANS TESTIMONY AS THE BASIS OF CAUSATION EVEN THOUGH THE DR HAD NO IDEA OF EE'S JOB DUTIES PER D/A. D/A STATES THAT NORMALLY, WHEN A JUDGE PICKS ONE DR'S TESTIMONY OVER THE OTHER, THE DECISION IS NOT VERY GOOD CANDIDATE FOR APPEAL. HOWEVER, D/A STATES THAT WE HAVE STRONG REASON TO APPEAL THIS DECISION & ALLOW A HIGHER COURT TO RECOGNIZE THE OBVIOUS DECIFICIES IN THE TREATING DR'S OPINION. WE WILL PURSUE IN APPEALING THE JUDGE'S DECISION.

The undisputed material facts, as recognized by the trial court, clearly show that an appeal was contemplated by Neu as a challenge the Department's credibility decision and that is the basis in which the appeal was had.

Blanchard further states that the trial court erred in not considering facts related to whether Neu followed Mid-Century's own internal policies. However, the trial court considered this fact and correctly identified that any "factual disputes whether internal…claims handing rules required Neu to obtain supervisory approval before authorizing the appeal are not material to the question of Mid-Century's knowledge of Blomfelt's errors." (Appellant's Appx., 9). Neu went through a merits-based analysis with Blomfelt in deciding to appeal—whether Mid-Century's own procedures were followed is irrelevant to the question of whether Mid-Century's decision to appeal was frivolous or as to whether Mid-Century knew of Blomfelt's errors.

The last argument made by Blanchard is that Neu knew or recklessly disregarded past acts by Blomfelt. However, the trial court was correct in rejecting said argument as Blomfelt's conduct from other cases involve "circumstances [that] might differ in

significant ways." (Appellant's Appx., 13). Such evidence would be neither relevant nor probative as to whether Neu or Mid-Century had knowledge of whether their decision to appeal was without merit. SDCL 19-19-401. Moreover, such information is inadmissible character evidence, implicating SDCL 19-19-404(b). As recognized by the trial court, summary judgment motions hinge on the existence of admissible and probative evidence to support the challenged claim or defense. *Stern Oil Co. v. Brown*, 202 SD 56, ¶ 16, 817 N.W. 2d 395, 401.

However, even assuming that the trial court should have considered such evidence, such evidence would have no impact as to the issues at hand. Blanchard cites to *Robert R. Allen, Claimant v. Leo Bestgen Constr., Employer & Truck Ins. Exch., Insurer*, alleging that Blomfelt had a "proclivity to waive Mid-Century's defenses in worker's compensation cases." *See* No. HF No. 166, 2004/05, 2005 WL 5190343, at *1 (S.D. Dept. Lab., 2005). First, it should be noted that this case was decided in 2005—almost a decade removed from when the facts took place in this case. Secondly, that case did not involve an appeal—rather, an issue seems to have been waived by Blomfelt because no authority was cited, however, there was still an issue related to whether the claimant provided timely notice. *Id.* The fact that an issue was waived in 2005 because of a lack of authority cited by Blomfelt has nothing to do with whether Neu should have trusted Blomfelt's advice related to whether there was a meritorious appeal.[4] Blomfelt's acts in this case are neither relevant nor admissible to prove "intent" or "knowledge" under SDCL 19-19-404(b)(2).

[4] This is especially true given that the decision to appeal was meritorious and only became frivolous once Blomfelt filed his errant findings of fact and conclusions of law.

The only other case Blanchard cites to is *Vansteenwyk*, an appeal by Mid-Century brought by Blomfelt. 2007 SD 36, ¶ 21, 731 N.W.2d 214, 222. Blomfelt had asserted, as error, that the Department failed to examine the credibility of a one of the physicians in a workers' compensation case. However, this Court found that an ALJ is not always required to make such specific findings regarding a witness' credibility or demeanor and that Blomfelt could not cite any authority supporting this requirement. *Id*. As a result of the lack of authority, this Court found such issue waived. *Id*. Again, this was a case that took place over seven years before the date of the events of this case. Furthermore, this case did not involve the propriety of the appeal itself, but a credibility issue on appeal—in fact, it should be noted that the appeal was not dismissed. And, again, the issue was related to Blomfelt's failure to cite authority—not whether the appeal itself was frivolous. *Id.*

Blomfelt's actions in the cases cited above are neither relevant nor admissible to the case at hand as correctly held by the trial court. Both cases are nearly decades old; neither of the cases would have informed Neu or Mid-Century to not rely on Blomfelt's advice related to whether there was a meritorious appeal as to this case; nor are there any facts in the record that demonstrate Neu was even aware of these other cases that occurred many years prior. While not the decisive test, reliance on the advice of counsel is a factor in determining the test of good faith and here, Neu and Mid-Century were entitled to rely on the advice of Blomfelt. *Crabb v. Nat'l Indem. Co*., 87 SD 222, 228, 205 N.W.2d 633, 636 (1973).

Blanchard erroneously cites *Kentucky Farm Bureau Mut. Ins. Co. v. Troxell*, 959 S.W.2d 82, 85 (Ky. 1997), where the court briefly stated that "evidence was relevant in

the trial below to show that Farm Bureau was aware that this particular adjuster had previously used methods in handling claims that are unacceptable…." This case presents no persuasive authority here. First, this case involved prior acts by the adjuster, not an attorney. The court did not address the issue of the ability of an insurance carrier or adjuster to rely on the advice of counsel. While that court found that the adjuster's past "unacceptable" methods were relevant, these past methods were not disclosed—such past behavior might have been much more relevant than Blomfelt's past conduct in this case. *Id.* Ultimately, the circumstances in *Troxell* are completely different from the facts here where the only "past acts" of Blomfelt involved two unrelated circumstances from years past where he had waived two defenses by failing to cite to authority. These past cases do not demonstrate any sort of "proclivity" that Blomfelt could not adequately advise Neu or Mid-Century about the merits of an appeal as neither of the two cited cases deal with the propriety of an appeal itself. Even assuming the trial court should have taken into account Blomfelt's actions in the two cases cited, the result is the same—Neu and Mid-Century went through a merits-based assessment to appeal with Blomfelt and the initial decision to appeal has not been challenged. It was only after Blomfelt's submission of the errant findings of fact and conclusions of law that the appeal was no longer meritorious; and nothing in Blomfelt's past would have indicated to Mid-Century or Neu that Blomfelt wouldn't file proper findings of facts and conclusions of law. As such, the trial court was correct in disregarding the two instances where Blomfelt had waived issues from cases dating seven to nine years ago.

## CONCLUSION

Give the above, the trial correctly granted Appellee's Motion for Summary Judgment. Simply put, Mid-Century did nothing wrong; it certainly did nothing in bad faith. Instead, Mid-Century followed the advice of its attorney and was unaware of its attorney's mistakes. Once Mid-Century learned of these mistakes after the dismissal of its appeal of the Department's decision, Mid-Century promptly paid Plaintiff what was owed. Because the trial court's summary judgment decision is correct, Mid-Century respectfully requests that this Court affirm that decision.

Dated this 7th day of September, 2018.

*/s Mitchell W. O'Hara*
*Electronically Filed*
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee Mid-Century Insurance Company also known as Farmers Insurance complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,323 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

*/s Mitchell W. O'Hara*
*Electronically Filed*
Mitchell W. O'Hara

## CERTIFICATE OF SERVICE

I, Mitchell W. O'Hara, hereby certify that I am a member of the law firm of Boyce Law Firm, LLP and that on the 7th day of September 2018, a true and correct copy of the foregoing was served was served electronically upon:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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Appeal No. 28652

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**CHRISTINA BLANCHARD,**

Plaintiff/Appellant,

vs.

**MID-CENTURY INSURANCE COMPANY,** also known as **FARMERS INSURANCE,**

Defendant/Appellee

**MID-CENTURY INSURANCE COMPANY,**

Third-Party Plaintiff/Appellee

vs.

**ERIC C. BLOMFELT,** and **ERIC BLOMFELT & ASSOCIATES, P.C.,**

Third-Party Defendants/Appellee

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**APPEAL FROM THE CIRCUIT COURT**
**SECOND JUDICIAL CIRCUIT**
**MINNEHAHA COUNTY, SOUTH DAKOTA**
The Honorable Mark Salter
Circuit Court Judge

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Notice of Appeal filed

July 3, 2018

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# APPELLANT'S REPLY BRIEF

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## ARGUMENT

The circuit court erred in its legal analysis and in failing to give Blanchard the evidentiary inferences to which she was entitled on a motion for summary judgment.

1. The trial court erroneously added an element to the tort of insurance bad faith.

Farmers insists that the circuit court did no more than conduct a standard analysis of the elements of bad faith, and that the circuit court's reference to the need to show a "dishonest purpose" was "simply explaining" its decision. Farmers, of course, can only make such a claim by ignoring what the circuit court actually said. Since the circuit court's reasoning on this point served as the basis for its entire decision, including its view of what evidence it was obliged to consider, Blanchard will risk the chance that she is being repetitive and will repeat the portions of the circuit court's actual "explanation" that Farmers has neglected to quote:

> Blanchard's principal argument resisting Mid-Century's motions centers on agency principles which she invokes in an effort to impute Blomfelt's conduct to Mid-Century. However, the argument overlooks the essence of a bad faith claim – bad faith. Our Supreme Court has described bad faith as in the following terms:
>
> > 'Bad faith' is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.
>
> *E.P. V. Riley*, 1999 SD 163, ¶40, 604 N.W.2d 7, 17 (quoting *Cotton v. Stange*, 1998 SD 81, ¶9 n. 1, 582 N.W.2d 25, 28 n. 1 (citations omitted)).
>
> Black's Law Dictionary further defines bad faith as:
>
> > …not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary at 127 (5th Ed.) (citation omitted).

> Here, Blanchard has failed to identify a "dishonest purpose" or "wrongdoing" on the part of Mid-Century relating to Blomfelt's proposed findings and conclusions…In the end, the only event that in Blanchard's view rendered Mid-Century's circuit court appeal frivolous was, at most, the result of Blomfelt's alleged negligence, not Mid-Century's malicious design.

June 8, 208 Memorandum Opinion and Order at 12-13 (emphasis supplied).

In other words, the circuit court refused to impute the actions and knowledge of Farmers' attorney to Farmers to show that Farmers denied Blanchard's claim with a reckless disregard of its lack of a reasonable basis for the denial because Blanchard did not show Farmers had a "malicious design." This is circular reasoning at its worst: the circuit court essentially held that Blanchard must prove that Farmers acted wrongfully, but cannot present the evidence to show that Farmers acted wrongfully because without that evidence there is no proof that Farmers acted wrongfully. Farmers seems to suggest that a requirement that a claimant show "dishonest purpose," "moral obliquity" or "malicious design" is somehow implied by this Court's observation in Hein v. Acuity, 2007 SD 40, ¶16, 731 N.W.2d 231, 237 that "[b]ecause any injury in a workers' compensation bad faith claim stems from the insurer's denial, not the insurer's conduct alone, a central element of the cause of action is whether there has been a wrongful denial of benefits." (emphasis supplied). But in Mordhorst v. Dakota Truck Underwriters, 2016 SD 70, ¶9, 886 N.W.2d 323, 324, this Court left no doubt that "wrongful conduct" does not mean anything beyond the elements this Court has utilized since it recognized this tort in 1987:

> an action alleging bad faith requires more than an allegation of wrongful conduct…In South Dakota, such a claimant must prove two things to be

> successful: (1) "an absence of a reasonable basis for denial of policy benefits].]" and (2) "the [insurer's] knowledge…of [the lack of] a reasonable basis for denial."

All that Blanchard is required to show is that Farmers acted recklessly, not that it acted with a "dishonest purpose" or a "malicious design." See, e.g., Teague-Strebeck Motors Inc. v. Chrysler Ins. Co., 985 P.2d 1183, 1204 (N.M. App. 1999). As this Court has made clear, these additional showings of "moral obliquity" are relevant only to issues of statutory immunity, not insurance bad faith. Klein v. Stanford USD Med. Ctr., 2015 SD 95 ¶ 18, 872 N.W.2d 802, 807. Moreover, there can be no doubt that, if the trial court had imputed Blomfelt's knowledge and actions to Farmers as required by the law of agency, the trial court would have been obliged to conclude that there was evidence that Farmers had in fact acted "recklessly." Because the trial court's misapprehension of the law of insurance bad faith prevented it from even considering this evidence of Farmers' knowledge, the trial court erred and its order granting summary judgment must be reversed.

2. The trial court erroneously refused to impute the knowledge and actions of Farmers' agent Blomfelt to Farmers. As Farmers correctly notes in its statement of this issue, the "Trial Court…Refused to Impute Blomfelt's Knowledge" to Farmers. Appellee's Brief at 12. Farmers defends this by another attempt to validate the trial court's circular reasoning, this time twisting an out-of-context quotation from Gilchrist v. Trail King Indus., Inc., 2002 SD 155, ¶ 19, 655 N.W.2d 98, 103 to suggest that an agent's knowledge cannot be imputed to an insurer to show recklessness unless it has already been established that the insurer acted recklessly. First, it must be noted that Farmers is flatly wrong when it claims that "Gilchrist was not a workers' compensation bad faith

case," Appellee's Brief at 12. See Gilchrist, supra, 2002 SD 155, ¶ ¶ 1, 8, 655 N.W.2d at 99, 100. Second, Gilchrist states no such limitation. Just as the knowledge of the agent of a workers' compensation claimant is imputed the claimant regardless of what the agent actually told the claimant, Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ ¶ 31-32, 616 N.W.2d 493, 500, so too is the knowledge of an agent of an insurer or self-insurer imputed to that insurer or self-insurer to show "what that [self-insurer] knew at the time it denied coverage to the insured," Gilchrist, supra, 2002 SD 155, ¶ 18, 655 N.W.2d at 103. Gilchrist makes it plain that "evidence relating to [the agent's] actions…[constitutes] evidence that [the insurer] did not have a reasonable basis for denying policy benefits," and that such "evidence [is] highly relevant and [must] not [be] kept from the jury." Gilchrist, 2002 SD 155, ¶ 20, 655 N.W.2d at 103. This is precisely what the trial court's order for summary judgment accomplished, despite the fact there can be no doubt that Blomfelt was Farmers' agent. Tri-State Refining and Inv. Co., Inc. v. Apaloosa Co., 452 N.W.2d 104, 107 n.2 (S.D. 1990) ("An attorney-client relationship is one of agency.")

Farmers then repeats arguments so specious that when it raised them below, the trial court did not even mention them. For instance, Farmers relies on authority that an agent's knowledge is not imputed when he is either defrauding his principal or intentionally neglecting the principal's business. Yet Farmers' own Third Party Complaint against Blomfelt neither alleged fraud nor made any claim that Blomfelt "acted in bad faith or intentionally neglect[ed]" Farmers' business, unlike the attorney in Sayer v. Lee, 166 N.W. 635, 636 (S.D. 1918) (emphasis supplied). Rather, Farmers' Third Party Complaint alleged only "professional negligence," and Farmers never produced any evidence that Blomfelt "intentionally neglected" Farmers' business, acted

in bad faith towards Farmers, or acted dishonestly to advance the interests of anyone besides Farmers. In the uncontradicted testimony Blomfelt gave in his deposition, see Appellee's Appendix 188-89, Blomfelt insisted that he did not forward a copy of Blanchard's motion that raised the defects in Farmers' appeal to Farmers because Farmers did not ask for a copy after he reported the motion had been made, Blomfelt depo. at 47, in accord with Farmers' usual practice to not request to see all pleadings. Blomfelt depo. at 44.[1] Blomfelt affirmatively denied that he was trying to hide any mistakes. Blomfelt depo. at 46. Likewise, Blomfelt asserted, under oath and without contradiction, that he was not acting to advance his own interests or the interests of any third person instead of Farmers' interests in the Blanchard claim. See Appellee's Appendix 148-53, Third-Party Defendant's Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production at Interrogatory Nos. 25, 28, 31, 34, 37, 40, 43, 46, 49, 52.

Restatement (Second) of Agency §282(1), cited by Farmers, makes it clear that an agent's knowledge in a transaction undertaken for the principal is imputed to the principal unless the agent is "secretly…acting adversely to the principal and entirely for his own or another's purposes." (Emphasis supplied.) All that Farmers showed was that Blomfelt may have been negligent in his relations with it. But even if Blomfelt did commit malpractice, Farmers cannot use claims of negligence to insulate itself from Blomfelt's knowledge and actions:

> An agent is not deemed to have acted adversely to his principal's interests simply because he blundered and made an unwise, negligent, or grossly

[1] Ziegler, the Farmers supervisor on this claim, agreed that this was the policy followed by at least some Farmers adjusters. Ziegler depo. at 66-67, Exhibit H to 2017 Bogard Affidavit.

> negligent mistake that harmed those interests. Instead, an agent is deemed to have acted adversely to his principal's interests only when he acts, or fails to act, for the purpose of advancing his own interests or those of a third party. The Restatements (both Second and Third) of Agency make that clear…It has to be so. If…a principal were not held accountable for his agent's actions or inactions unless they benefitted the principal, the mistakes, oversights, or negligence of even the most loyal and devoted agent would never be charged against the principal…principals would have an iron clad guarantee against any loss from their agent's actions or inactions. That is not how the legal regime of agency operates. There is no upside-only slant to it. If there were…instead of there being a narrow adverse interest exception, there would be a broad adverse impact exception that would eviscerate the rule that the principle is responsible for the actions of his agent. Agency law would be turned upside down, and no one would be willing to deal with a principal through his agent.

Cadet v. Florida Dept. of Corrections, 853 F.3d 1216, 1229, 1231 (11th Cir. 2017) (on rehearing) (emphasis supplied). As with all issues on summary judgment, the evidence regarding Blomfelt's agent-principal relations with Farmers was to "be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the nonmoving party…[t]he judge's function…is not to weigh the evidence and determine the matters' truth." Hamilton v. Sommers, 2014 SD 76, ¶¶ 17, 42, 855 N.W.2d 855, 861, 866. No court may, on this record, find that Blomfelt in fact committed fraud or "intentional neglect" so as to prevent his actions from being imputed to Farmers.

Farmers' further argument that an insurer can never be responsible for its attorney's misconduct must also be rejected. The cases Farmers cites for this remarkable proposition have nothing to do with a first-party bad faith case like the one Blanchard has brought against Farmers. See Hein, supra, 2007 SD 40, ¶ 10, 731 N.W.2d at 235 ("it is within the first-party bad faith cause of action based on an insurer's conduct in a worker's compensation case.") The cases Farmers misleadingly thrusts upon this Court, whether based on bad faith, breach of contract, or negligence, are in the third-party context, see

Hein, supra, 2007 SD 40, ¶ 9, 731 N.W.2d at 235, in which a liability insurer is alleged to have breached its duty to defend its insured in a lawsuit brought against the insured by appointing incompetent defense counsel to conduct that defense. In such a situation, as Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 788 N.E.2d 522, 540 (Mass. 2003), one of the cases cited by Farmers, explains, the insurance company is not liable because it has no control over the attorney under the rules of ethics governing lawyers hired by an insurer to represent the insured:

> "A lawyer shall not permit a person who recommends, employees, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." As such, a lawyer hired by an insurer to represent an insured owes an unqualified duty of loyalty to the insured and must act at all times to protect the insured's interests…It is the lawyer who controls the strategy, conduct, and daily details of the defense. To the extent that the lawyer is not permitted to act as he or she thinks best, the lawyer properly can withdraw from the case…In these circumstances, an insurer cannot be vicariously liable for the lawyer's negligence. See *Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, F.Supp. 452, 454-455 (M.D. Pa. 1997) ("The attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability.")

(Emphasis supplied.) South Dakota, of course, follows the same ethical standards for lawyers. See South Dakota Rule of Professional Conduct 1.8(f)(2): "A lawyer shall not accept compensation for representing a client from one other than the client unless… [t]here is no interference with the lawyer's independence of professional judgment."

Farmers, by force of SDC 62-1-2, was itself Blanchard's "employer" for purposes of the payment of workers' compensation benefits, and since Blomfelt was Farmer's own retained counsel in the workers' compensation litigation with Blanchard, "throughout the course of the litigation he acted for and on behalf of the insurance company…[making him one of] its agents for whom it has the customary legal liability." Continental Ins. Co.

v. Bayless and Roberts, Inc., 608 P.2d 281, 294 (Alaska 1980). See also, e.g., Huy Thanh Vo. v. Nelson & Kennard, 931 F.Supp.2d 1080, 1089-90 (E.D. Cal. 2013); South Trust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So.2d 885, 905-06 (Ala. App. 2005). There can thus be no doubt that Blomfelt's knowledge and conduct, whether or not actually relayed to Farmers, is imputed to Farmers under both SDCL 59-6-5 and the common law governing the relationship between lawyers and their clients. See In Re Grimes' Estate, 204 N.W.2d 812, 815 (S.D. 1973) ("notice to an attorney is notice to a client, and knowledge of an attorney is knowledge of, or imputed to, his client, and, more specifically, knowledge of, or notice to, the attorney for a litigant or party to a legal proceeding of matters arising in the course of the litigation or proceeding is ordinarily imputed to such litigant or party"); Link v. Wabash R. Co., 370 U.S. 626, 633-34 (1962). Farmers conspicuously does not dispute that Blomfelt's proposed findings of fact and conclusions of law constituted a judicial admission that conclusively established Farmers' liability to Blanchard. Nor does Farmers question the legal proposition that it would be bad faith for an insurer, having made such admissions, to continue to litigate the case as leverage for a settlement more favorable to the insurer. Since Blomfelt's knowledge and actions, which must be imputed to Farmers to show its knowledge when the appeal was filed and prosecuted, Gilchrist, supra, 2002 SD 155, ¶20, 655 N.W.2d at 103, show that this is precisely what Farmers did, Blanchard presented an unquestionably viable claim for bad faith, and the trial court erred when it granted summary judgment against her.

Indeed, as Blanchard pointed out below, the record also presents an issue of fact as to whether Farmers ratified Blomfelt's actions. Farmers admits that it learned on January 6, 2015, that "Blomfelt had failed to properly perfect [the] appeal." Appellee's

Brief at 6. Farmers did not make any move to repudiate Blomfelt's actions until Blanchard sued Farmers months later, and then Farmers' actions were murky at best. In Mitchell v. Iverson, 2007 WL 1302652*4 (Bkrtcy. D.S.D. 2007), applying South Dakota law, a party attempted to distance herself from a pleading made by her attorney in a separate action. The court held:

> Iverson…wants the Court to decline to apply judicial estoppel because she says she had no control over what her state court attorney plead. That theory is meritless. Iverson's state court attorney was her agent, and she is bound by the attorney's acts. *See Sayer v. Lee*, 166 N.W. 635, 636 (S.D. 1918)(client bound by acts of her attorney within scope of business entrusted to the attorney). There is no evidence Iverson's state court counsel did anything outside the scope of authority given by Iverson… Moreover, Iverson did not assail her state court counsel's actions until this adversary proceeding arose. *See Petersen v. Petersen*, 245 N.W.2d 285, 288 (S.D. 1976) (client may ratify his attorney's acts by failing to timely repudiate them).

(Emphasis supplied.) As Mitchell noted, Petersen v. Petersen, 245 N.W.2d 285, 288 (S.D. 1976) made it abundantly clear that "a client makes his attorney's act his own if he does not disavow it the first moment he receives knowledge that his attorney has transcended his authority." (Emphasis supplied.) While Farmers, through counsel on April 6, 2016, claimed to have repudiated Blomfelt's actions, see Exhibit J to Bogard Affidavit (Blomfelt "has essentially been fired from all work for the greater Farmers family of insurers because of what occurred in this case"), the Farmers employees involved were unaware of such an action, nor was Blomfelt ever notified of such an action. Neu depo. 55, Appellee's Appendix 173; Ziegler depo. 63, 69-70, Exhibit H to 2017 Bogard Affidavit; Third-Party Defendant's Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production at Interrogatory No. 4, Appellee's Appendix 142. This lack of repudiation clearly shows that Farmers, for all its

protestations to the contrary, made Blomfelt's actions its own, and the order granting Farmers' motion for summary judgment must be reversed.

3. The trial court's use of the "litigation conduct" rule was error. Farmers' arguments continue to depend on its untenable position that Blomfelt's actions could not be imputed to it. It now argues that because it supposedly did not "know" that it was pursuing a meritless appeal that was not "legitimate litigation conduct" protected by Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, 2009 SD 69, ¶¶39, 41, 771 N.W.2d 623, 634-35, see Federated Mut. Ins. Co. v. Anderson, 991 P.2d 915, 922-23 (Mont. 1999), Farmers should nonetheless be protected by the "litigation conduct" doctrine. The fundamental premise of this position, as Blanchard has already shown, is without legal merit since Blomfelt's actions must in fact be imputed to Farmers, and Blanchard will not repeat her arguments on that point. True, Farmers now advances, without any legal or factual analysis to support it, the additional suggestion that the "litigation conduct" rule should apply because Blomfelt claims that he did not realize that his proposed findings of fact and conclusions of law constituted a judicial admission of Farmers' liability, so he did not realize Farmers' appeal was frivolous until Blanchard's counsel told him so. But Farmers never addresses the fact that Blomfelt's subjective state of mind is irrelevant to the issue of whether his September 2, 2014, submissions to the Department acted as Farmers' formal agreement to pay Blanchard's benefits. Such "'facts are viewed objectively and if a party voluntarily indulges in conduct reasonably indicating assent [it] may be bound even though [its] conduct does not truly express the state of [its] mind.'" Setliff v. Atkins, 2000 SD 124, ¶13, 616 N.W.2d 878, 885. Once those submissions were made, Farmers could no longer legitimately challenge its liability by an appeal. Even if

Farmers' initial July 2014 decision to appeal was legitimate – which Blanchard denies – Farmers was legally obliged "to timely reassess its initial decision denying coverage based upon information received subsequent to the initial decision." Dakota, Minn. & E.R.R. Corp. v. Acuity, supra, 2009 SD 69 at ¶34, 997 N.W.2d at 633; Walz v. Fireman's Fund Ins. Co., 1996 SD 135, ¶12, 556 N.W.2d 68, 71. Farmers gained possession of imputed knowledge from Blomfelt on September 2, 2014, and from Blanchard's subsequent correspondence, motions and briefs served on Blomfelt, that Farmers had admitted its liability to Blanchard, Gilchrist, supra, yet Farmers persisted in its decision to appeal. In so doing, it left no doubt that the only purpose of its now meritless appeal was to put unlawful pressure on Blanchard to settle. Blanchard showed in extensive arguments in her opening brief – arguments that Farmers has largely failed to address – that such actions are not protected by any "litigation conduct" rule. Likewise, Farmers does not even acknowledge that since its bad faith arose from its "settlement behavior during litigation," the "litigation conduct rule" does not apply. Knotts v. Zurich Ins. Co., 97 S.W.3d 512, 522-23 (Ky. 2006), a case cited several times with approval by this Court in Dakota, Minn. & E.R.R. Corp. v. Acuity. It is thus clear that, to the extent its order was based on the "litigation conduct rule," trial court erred in granting summary judgment against Blanchard, and that order must be reversed.

4. The trial court erroneously failed to consider Neu's individual bad faith conduct. Farmers does no more than mouth the trial court's conclusion that Neu made a "merits-based assessment" of Farmers' basis for an appeal before she authorized it and therefore did not act in bad faith. To come to this conclusion, however, the trial court had to ignore the rule that the "'judge's function at the summary judgment stage . . . is not to

weigh the evidence and determine the matters' truth'… [but is to] view the evidence 'most favorably to the nonmoving party and resolve reasonable doubts against the moving party.'" Schaefer v. Sioux Spine & Sport, Prof. LLC, 2018 SD 5 ¶ 9, 906 N.W.2d 427, 430. Farmers, like the trial court, either fails to address or superficially dismisses as "not material" the evidence that this "merits-based assessment" was made in less than half an hour after Blomfelt reported the Department's decision, Appellee's Appendix at 233-36, without obtaining a copy of that decision and without getting authorization from the Farmers COE, in direct violation of Farmers' claims handling guidelines. Nor did the trial court, nor does Farmers now, address the facts that Neu admitted that she mistakenly thought her appeal was from a decision that found Blanchard permanently and totally disabled, Neu depo. 39-40; Appellee's Appendix at 169; admitted that it would have been "better to see and read the Department of Labor's decision before deciding to appeal," Neu depo. 44; Appellee's Appendix 170; and wrote in her claims notes on September 10, 2014, not that she expected to win the appeal, but that her "goal" was "claim settled." Appellee's Appendix at 1236. Moreover, it must be noted, the trial court did not mention and Farmers does not dispute the settled law that "worker's compensation manuals…have a direct bearing on whether [an insurer] followed its own procedures and South Dakota law when processing [a worker's] claim." Nye v. Hartford Acc. and Indem. Co., 2013 WL 3107492*10 (D.S.D. 2013) (decided under South Dakota law), and that "[d]enying a claim for reasons known to be false is not a reasonable basis to deny a claim." Lewison v. Western Nat. Mut. Ins. Co., 2014 WL 3573403*6 (D.S.D. 2014) (applying South Dakota law) (emphasis supplied). Neu's conduct thus plainly raised issues of material fact as to Farmers' bad faith.

Yet the trial court and Farmers suggest that any such inconvenient facts are irrelevant because Blomfelt recommended an appeal. Advice of counsel, however, is no more a conclusive defense to a claim of bad faith than an insurer's assertion that it relied on a medical report to deny a claim. Mordhorst, supra, 2016 SD at 70, ¶12, 886 N.W.2d at 325: "an insurer's basis for denial is not necessarily reasonable simply because the insurer relies on the opinion of a medical practitioner." Likewise, "[a]n insurer cannot discharge its entire responsibility to an insured by simply employing a competent attorney and abiding by his decision," Crabb v. National Indemnity Co., 205 N.W.2d 633, 636 (S.D. 1973), but must instead "exercise its own independent judgment in assessing an insured's rights," Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, 294 (Ky. App. 2007), and "make a reasonable investigation of its own file." Dairyland Ins. Co. v. Hawkins, 292 F.Supp. 947, 953 (S.D. Iowa 1968). Blanchard presented clear evidence that Neu's hasty, ill-founded decision to appeal and her decisions to then pursue that appeal with the goal of "settling" rather than "winning," breached Farmers' duty to not "exercis[e] any unfair advantage to pressure an insured into a settlement of his claim." McElgunn v. CUNA Mutual Group, 2009 WL 1254657*2 (D.S.D. 2009) (applying South Dakota law). This is particularly so where Neu's reckless actions were in direct violation of Farmers' requirement that she obtain copies of both Blomfelt's pleadings and the pleadings filed by Blanchard, Deposition Exhibit 1, Mid-Century 1874, attached as Exhibit C to 2017 Bogard Affidavit, which unquestionably would have given her actual notice of Blomfelt's misconduct. Given Blomfelt's checkered history in conducting litigation for Farmers, see Vansteenwyk v. Baumgartner Trees and Landscaping, 2007 SD 36, ¶ 21, 731 N.W.2d 214, 222; Allen v. Leo Bestgen

Construction and Truck Ins. Exchange, 2005 WL 5190343 (S.D. Dept. Lab. 2005), Blomfelt was perhaps the last attorney to be trusted to handle a case with such non-existent supervision. The trial court itself recognized, in 2016, that it needed to consider whether Farmers "recklessly disregarded Blomfelt's conduct," Appellant's Brief Appendix 6 at 6, but in 2018 refused to do so. Other wrongs by Blomfelt, all imputed to Farmers as the acts of an agent, were admissible to show Farmers' knowledge, SDCL 19-19-404(b)(2), and that Blomfelt "had previously used methods in handling claims that are [legally] unacceptable." Kentucky Farm Bureau Mut. Ins. Co. v. Troxell, 959 S.W.2d 82, 85-6 (Ky. 1998). Neu's actions alone, including her failure to supervise Blomfelt in the manner required by Farmers' own guidelines, established a claim for bad faith, and the trial court's "belief that [Blanchard] will not prevail at trial [was] not an appropriate basis for granting [Farmers'] motion." Tibke v. McDougall, 479 N.W.2d 989, 904 (S.D. 1992). The order below should be reversed.

## CONCLUSION

For all the reasons stated, Blanchard urges this Court to reverse the summary judgment in favor of Farmers, and to remand this action with directions that Blanchard be allowed to present her claims to a jury.

Dated this 18th day of September, 2018.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy, and two hard copies of the above and foregoing **APPELLANT'S REPLY BRIEF** on the following individual, by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

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## CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies pursuant to SDCL § 25-26A-66 that the brief contains 4,452 words and 23,181 characters without spaces, exclusive of the Table of Contents, Table of Authorities, and Certificates of Counsel, and certifies that the name and the version of the word processing software used to prepare the brief is Microsoft Word 10 using Times New Roman font 12 and left justification.

Dated this 18th day of September, 2018.

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## CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLANT'S REPLY BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

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