IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO.: 28683

SARA HALLBERG,

Plaintiff/Appellant,

vs.

SOUTH DAKOTA BOARD OF REGENTS, JEREMY REED, and FRANCESCA LEINWALL, individually,

Defendants/Appellees,

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT P. MYREN, PRESIDING JUDGE

APPELLANT'S BRIEF

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NOTICE OF APPEAL FILED JULY 31, 2018

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JURISDICTIONAL STATEMENT

Appellant Sara Hallberg appeals from an Order of Dismissal, dismissing her claims against the South Dakota Board of Regents, Jeremy Reed, and Francesca Leinwall. The Circuit Court held that the South Dakota Board of Regents and its employees Jeremy Reed and Francesca Leinwall are protected by sovereign immunity.

The Circuit Court's Order of Dismissal was signed and filed on July 9, 2018, and Notice of Entry of Order was served that same day. Appellant Hallberg timely filed a Notice of Appeal on July 31, 2018. This Court has jurisdiction pursuant to SDCL §§15-26A-3 and -4.

STATEMENT OF THE ISSUES

1. **The Circuit Court dismissed the complaint and concluded that it lacked jurisdiction to adjudicate the claims made by Hallberg against the Defendants. The Legislature has afforded relief to State employee whistleblowers under §3-16-9. Did the Circuit Court err in dismissing the Complaint and denying Hallberg her day in court, given the absence of an administrative procedure by which a state employee whistleblower like Hallberg could seek the relief the Legislature intended to make available?**

The Circuit Court held that sovereign immunity protected the South Dakota Board of Regents and its employees from claims of retaliatory discharge.

SDCL §3-16-9
Article VI, § 20 of the South Dakota Constitution
Johnson v. Kolman, 412 N.W.2d 109 (S.D. 1987)
Weltz v. Bd. of Educ. of Scotland Sch. Dist. No. 4-3 of Bon Homme Cty., 329 N.W.2d 131 (S.D. 1983)

2. **The Circuit Court concluded that the individual Defendants Francesca Leinwall and Jeremy Reed enjoyed sovereign immunity under the "discretionary acts" doctrine. The Complaint alleged that these individual defendants engaged in intentional, affirmative retaliatory misconduct proscribed by statute when they fired Hallberg. Did the Circuit Court err in extending the discretionary act doctrine to cover intentional torts?**

The Circuit Court held that when Leinwall and Reed fired Hallberg in retaliation for blowing the whistle on misconduct by other state employees, her firing was a discretionary act protected by sovereign immunity.

Ritter v. Johnson, 465 N.W.2d 196 (S.D. 1991).

Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987).

STATEMENT OF THE CASE

This case presents an issue of first impression for the Court and an opportunity to assure that the Legislature's intent to protect state employee whistleblowers is given effect. Sara Hallberg filed a complaint against the South Dakota Board of Regents and two of its employees for retaliatory discharge as prohibited under the newly enacted SDCL §3-16-9.

The Fifth Judicial Circuit Court of South Dakota, the Honorable Scott Myren presiding, dismissed Hallerg's claims, holding that the Board of Regents is protected by sovereign immunity because SDCL §3-16-9 only provides for an administrative remedy, not judicial relief. In the course of explaining its rationale, the Circuit Court confessed that it was unaware of what relief (if any) Hallberg might obtain in the administrative context.

The second aspect of the Circuit Court's opinion is equally significant. The Complaint alleged that Hallberg's supervisors (individual Defendants Leinwall and Reed) fired her in retaliation for her decision to report misconduct by other employees in her department. The Circuit Court's reasoning – that wrongful retaliatory discharge is a discretionary act for which state employees are immune from liability – would work a

revolution in the doctrine of sovereign immunity. State employees who commit intentional torts are not acting within the scope of employment. If the Circuit Court's rationale were adopted, state employees would effectively have a license to discriminate and retaliate against their subordinates without fear or consequence.

STATEMENT OF THE FACTS

Taking the allegations in the Complaint as true, the relevant facts are as follows:

On September 26, 2017, Ms. Hallberg received and accepted an offer of employment as Director of the Counseling Center in the Student Affairs Department at Northern State University ("NSU"). Complaint at ¶8. Hallberg's offer of employment set forth that her appointment to that position would commence on September 25, 2017, and would not extend beyond June 21, 2018, at which time the employment would be reviewed for consideration of annual reappointment. *Id.* at ¶9. Hallberg's direct supervisor at NSU was Francesca Leinwall. *Id.* at ¶10. Leinwall was directly supervised by Jeremy Reed, the Vice President of Enrollment Management and Student Affairs. *Id.* at ¶11.

After Hallberg began her employment, she discovered that several of the employees at Counseling Services were providing counseling services to students without a license. *Id.* at ¶13. Hallberg also noted that these unlicensed individuals signed their own therapy notes. *Id.* Hallberg raised the issue with her supervisors and with legal counsel for NSU, who took the position that the practice was legal. *Id.* at ¶14. In response, Hallberg discussed the issue and her concern about unlicensed counselors with the other institutions within the South Dakota Board of Regents. *Id.* at ¶15. Each of

those institutions informed her that they did not permit counselors to practice without a license. *Id.* Hallberg also confirmed with the South Dakota Counselors and Marriage and Family Therapist Examiners Licensing Board that individuals were required to obtain a license in South Dakota before they could lawfully provide counseling services. *Id.* at ¶16.

Hallberg subsequently requested that the unlicensed individuals at least begin the process of obtaining licensure. *Id.* at ¶17. Leinwall informed Hallberg that Hallberg could not mandate that the employees obtain a license because it was not required by their respective job descriptions. *Id.* at ¶18.

The issues at NSU did not stop with condoning unlicensed counselors to treat its students. Hallberg also observed that NSU student employees were the primary phone contact for peers who sought counseling services. *Id.* at ¶19. These student employees answered the Counseling Center's primary phone line and scheduled appointments, which allowed them access to their peers' confidential personal information, including their Student Identification numbers. *Id.* More alarmingly, those student employees, as well as other non-counseling staff, had access to the Career Center's Titanium program and therefore could gain access to patient records, including counseling notes. *Id.* at ¶20.

As Director of Counseling Services, Hallberg determined that she needed to immediately address practices that she believed to be unethical and potentially unlawful. *Id.* at ¶21. She restricted student access to the Titanium system. *Id.* at ¶24. When she became aware that student staff members were checking counseling emails, she requested that such a practice cease immediately. On several occasions, Hallberg reported to her

supervisors that these practices compromised patient confidentiality and violated professional ethical standards of counselors. *Id.* at ¶22.

Hallberg also attempted to resolve the phone issue by reassigning the primary phone to Jobi Gramlow, the senior secretary. *Id.* at ¶23. She met repeated resistance from Gramlow. *Id.* In December 2017, Hallberg discovered that Gramlow intended to hire a student who was also a counseling client at the Counseling Center. *Id.* at ¶25. Hallberg raised ethical concerns about hiring a patient and requested that the student not be hired. *Id.* at ¶26. This request was again met with resistance from Gramlow and from Doris Stusiak, the Disability Services Director. *Id.*

On December 18, 2017, Hallberg and others attended a full staff meeting of the Student Affairs Office, which included the Counseling Center, Disabilities Services, and Career Services. *Id.* at ¶28. At the meeting, Hallberg sought to identify practical solutions to the troubling issues she had discovered in her first months on the job. Hallberg presented the American Counseling Association (ACA) ethical standards concerning student workers and described how a firewall could be put in place for the Titanium system, which would restrict student employees from accessing the confidential treatment notes of their peers. *Id.* at ¶29. Hallberg next addressed Gramlow's written job description and responsibilities, which included answering phones, and she requested that the workflow at the front desk be restructured. *Id.*

NSU's response to these proactive measures was swift and unequivocal. The following day, on December 19, 2017, Hallberg received a termination letter from Leinwall. *Id.* at ¶30. The termination letter states that Hallberg was being terminated pursuant to South Dakota Board of Regents Policy because she disrupted the efficiency

or morale of the department. *Id.* at ¶31. Hallberg alleged – and the Circuit Court was bound to accept as true – that the stated reason was a pretext and that Hallberg had been terminated in retaliation for raising concerns that NSU and its employees were violating the law, violating professional and ethical norms, and compromising their students' expectation of privacy. Leinwall and her supervisor Reed had unlawfully retaliated against Hallberg because they were unwilling to address the legal and ethical matters that Hallberg brought to their attention. *Id.* at ¶32.

Hallberg sought relief from the termination and filed suit against the Board of Regents and her supervisors, stating claims for wrongful discharge and unlawful retaliation. *Id.* at ¶¶32-34. Defendants did not answer the Complaint, but instead moved to dismiss for lack of jurisdiction. The Circuit Court granted the Defendants' motion, and Hallberg filed this timely appeal.

STANDARD OF REVIEW

"A motion to dismiss under SDCL 15–6–12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader." *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190 (quoting *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496). This Court "review[s] the circuit court's ruling *de novo*, with no deference to its determination." *Id*.

ARGUMENT

I. THE LEGISLATURE HAS WAIVED SOVEREIGN IMMUNITY BY ENACTING THE WHISTLEBLOWER STATUTE, AND THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT HALLBERG WAS BARRED FROM SEEKING JUDICIAL RELIEF FOR WRONGFUL RETALIATORY DISCHARGE WHERE NO OTHER AVENUE OF RELIEF EXISTS.

The Circuit Court held that it lacked jurisdiction to consider Hallberg's claim or grant her relief and that the passage of §3-16-9 did not afford Hallberg a right to commence suit and seek judicial relief. The Circuit Court reasoned as follows:

> The legislature enacted [SDCL §3-16-9] to try to encourage people to report those type of circumstances that involve governmental entities. To the extent that they created that, I think they also waived some sovereign immunity but only to the extent that they allowed it there. So the sovereign immunity that they waived was they allowed you to file a grievance with the Civil Service Commission. They didn't specifically say what you can get from them. Presumably, that's within the confines of the rules of the Civil Service Commission. But they didn't explicitly authorize you to come to circuit court - that's a completely different place - and ask for any kind of compensation, reinstatement, back pay, future pay, attorney's fees, any of those things.

Hearing Transcript, at 17:10-23. The Court admitted that it "[did not] know what remedies are available to [Hallberg] in front of the Civil Service Commission . . . but to the extent that the state has created that opportunity, it appears to me that that's . . . [her] avenue of any sort of remedy in this particular circumstance." *Id.*

The Circuit Court erred in how it conceived of the sovereign immunity doctrine, erred in its interpretation of SDCL §3-16-9, and erred in dismissing the suit without having any evidence before it as to whether Hallberg actually had an available remedy – an open question regarding which the Circuit Court confessed ignorance.

The Circuit Court concluded that the Legislature waived sovereign immunity, with strings attached. This theory of partial waiver has two fundamental flaws: First, the

Circuit Court's interpretation of SDCL §3-16-9 is inconsistent with the statutory text and presumes that the Legislature granted the Civil Service Commission primary jurisdiction over retaliation claims, without any supporting textual or contextual evidence. On its face, SDCL §3-16-9 does not support this presumption, nor can it be squared with the general consequences that follow from waiving sovereign immunity. Because SDCL §3-16-9 contemplates that an employee whistleblower could obtain a money judgment and other compensatory damage from the State, the shield of sovereign immunity has been irrevocably punctured, and the Board of Regents is neither immune from suit nor immune from tort liability.

Second, the Circuit Court's stated rationale – that Hallberg could not seek relief from a judicial body, but was limited to grieving the Civil Service Commission – constitutes reversible error in two distinct ways. The Circuit Court essentially dismissed Hallberg's claim for failure to exhaust her administrative remedies, which is an affirmative defense and inappropriate grounds to dismiss the suit under 15-6-12(b)(5). Though this Court has held that failure to exhaust is a jurisdictional defect, the Circuit Court could not conclude that Hallberg failed to exhaust administrative remedies in the procedural context of a Motion to Dismiss because there was no record before it on which to sustain such a conclusion. At minimum, Hallberg should have been given the opportunity to establish why the exhaustion requirement is inapplicable in this case. But the Court's ruling was not just procedurally premature – it was also wrong as a matter of law.

Hallberg could not fail to exhaust administrative remedies that do not exist. As set out below, at the time the Circuit Court considered the Motion, there existed no

administrative rule outlining the procedure that Hallberg – a whistleblower claiming wrongful retaliatory discharge – was to follow and no viable path by which she might obtain substantive relief. Hallberg is left, in other words, with the proverbial "bridge to nowhere."

It is well-established that where administrative remedies are unavailable or non-existent, the "exhaustion" requirement is a nullity and a claimant may seek judicial relief directly. Under these circumstances, dismissing Hallberg's Complaint leaves her with no viable remedy and violates the "open courts" provision in Article VI, Section 20 of South Dakota's Constitution.

The Circuit Court confessed ignorance as to what relief might be available to Hallberg in the context of filing a grievance, but did not review the statutes and relevant rules to determine whether such a procedure had ever been promulgated for whistleblower claimants. This Court is as well-positioned as the Circuit Court would be to make that inquiry, and the record establishes that no such administrative remedy exists. Accordingly, for the sake of judicial economy, this Court should reverse the Circuit Court's dismissal, hold that the absence of an administrative remedy nullifies any "exhaustion" requirement that may otherwise apply, and remand with appropriate instructions to the Circuit Court so that Hallberg may prosecute her claim on the merits.

A. The Legislature, by enacting SDCL §§3-16-9 and 13-49-11, waived sovereign immunity for claims brought by state employee whistleblowers.

"The Board of Regents is . . . a corporation, or body corporate, with the power to sue and be sued[.]" SDCL §13-49-11. This Court previously held that SDCL §13-49-11, standing alone, does not create a cause of action in tort against the Board. *Kringen v.*

Shea, 333 N.W.2d 445, 446 (S.D. 1983). But, last year, the South Dakota Legislature affirmatively altered the legal landscape in enacting SDCL §3-16-9, which protects public employees who report violations, or suspected violations, of state laws and rules from retaliatory acts.

In passing SDCL §3-16-9, the Legislature broadened earlier enacted protections of SDCL §3-6D-5. The statute provides in full:

> No department, bureau, board, or commission of the state or any of its political subdivisions may dismiss, suspend from employment, demote, decrease the compensation of, or take any other retaliatory action against an employee because the employee reports in good faith to an appropriate authority a violation or suspected violation of a law or rule, an abuse of funds or abuse of authority, or substantial and specific danger to public health or safety, unless the report is specifically prohibited by law. The provisions of this section do not apply to any employee who knows the report is false or was made in a reckless disregard for the truth. A state employee who is the subject of retaliation under this section may file a grievance with the Civil Service Commission pursuant to § 3-6D-22. For purposes of an employee of a political subdivision, an appropriate authority includes any human resources department of that political subdivision, if any, any state's attorney, or the attorney general.

SDCL §3-16-9.

Under the law of qualified immunity, consent to suit is not enough – the State must also consent to substantive liability in tort or otherwise abrogate its tort immunity.[1] This Court explained as much in *Aune v. B-Y Water Dist.*, 464 N.W.2d 1, 2 (S.D. 1990). It observed that although the "sue and be sued" clause

> does not *create* a cause of action in tort, it certainly permits a cause of action in tort if one exists. To read the 'sue and be sued' clause any other way is contrary to the 'plain meaning and intent of the Legislature' by giving effect to only one-half of the clause. . . . Therefore, even though the 'sue and be sued' clause does not create a cause of action in tort, it permits one."

[1] *See generally* RESTATEMENT OF THE LAW, TORTS, §895 cmt. a & b.

Id. In enacting SDCL §3-16-9, the Legislature abrogated tort immunity for retaliation against state employee whistleblowers and, at minimum, recognized that an aggrieved party may have recourse to an administrative remedy under SDCL §3-6D-22.

Even under the Circuit Court's "partial waiver" theory, an aggrieved employee could pursue a grievance and (in theory, though not in reality – as addressed below) avail herself of remedies under SDCL §3-6D-22 that would include back pay and back benefits, which could be recovered subject to potential limitation based on the particular agency's budget. *See* SDCL §3-6D-17. Thus, the statute meets the two prongs necessary to establish waiver of sovereign immunity: specific legislative authority to sue the governmental entity and a provision setting out the means by which funds will be made available to satisfy a resultant judgment or monetary award. *See, e.g., In re Request for Opinion of Supreme Court Relative to Constitutionality of SDCL 21-32-17*, 379 N.W.2d 822, 826 (S.D. 1985).

Where the State creates a path whereby a state employee can obtain damages and a money judgment, the State has waived sovereign immunity. *See id.; see also Williamson v. Dep't of Human Res.*, 572 S.E.2d 678, 681 (Ga. App. 2002) ("Where a legislative act creates a right of action against the state which can result in a money judgment against the state treasury, and the state otherwise would have enjoyed sovereign immunity from the cause of action, the legislative act *must* be considered a waiver of the state's sovereign immunity to the extent of the right of action-or the legislative act would

have no meaning.") Thus, the Legislature waived sovereign immunity for claims that fall within the scope of SDCL §3-16-9.[2]

The Circuit Court appeared to acknowledge that sovereign immunity had been waived, but it nonetheless dismissed the Complaint on the grounds that the waiver of sovereign immunity was not a full-fledged waiver that afforded Hallberg a cause of action and entitlement to judicial relief. According to the Circuit Court, the Legislature did not contemplate that an aggrieved employee would be able to vindicate his or her rights via a lawsuit. Neither the text of the statute nor the law governing sovereign immunity supports this result. And, under these particular facts where no administrative procedure exists, the "partial waiver" theory would operate to deprive every aggrieved employee of a remedy that the Legislature unequivocally intended to provide.

B. The Circuit Court's "partial waiver" argument cannot be reconciled with the statutory text of §3-16-9 and wrongfully presumes that the Circuit Court and the Civil Service Commission cannot exercise co-extensive jurisdiction over whistleblower retaliation claims.

The Circuit Court's reasoning is anchored in a flawed reading of SDCL §3-16-9. The pertinent sentence of the statute states: "A state employee who is the subject of retaliation under this section may file a grievance with the Civil Service Commission pursuant to §3-6D-22." The Circuit Court's interpretation rewrites the statute, such that a whistleblower subject of retaliation "may **only** file a grievance with the Civil Service

[2] To hold otherwise would render SDCL §3-16-9 meaningless, and "[t]here is a presumption against a construction that would render a statute ineffective or meaningless." *Brant Lake Sanitary Dist. v. Thornberry*, 886 N.W.2d 358, 361 (S.D. 2016) (quoting *Rapid City Educ. Ass'n v. Rapid City Sch. Dist.,* 522 N.W.2d 494, 498 (S.D. 1994)).

Commission." That is not what the statute says and, therefore, it cannot be what the statute means. The plain text of the statute permits, but does not require, that a whistleblower employee subjected to retaliation seek relief in this manner.

Hallberg concedes that this line of argument must contend with this Court's holding in *Montgomery v. Big Thunder Gold Mine, Inc.*, 531 N.W.2d 577 (S.D. 1995), which addressed language in SDCL §20-13-29 providing that an aggrieved person "may file with the division of human rights a verified, written charge" outlining the discriminatory or unfair practice. The *Montgomery* Court held that the use of the permissive "may" permitted one action (filing a charge with the Division of Human Rights), but did not impliedly permit another (filing suit in Circuit Court). In other words, an aggrieved party need not file a charge with the Division of Human Rights unless he or she chose to do so, but must file a charge before he or she commenced suit in Circuit Court. Stated differently, the use of "may" in §20-13-29 meant that a person could decide whether to file a charge, but was not free to decide whether to file with the division or in circuit court.

Section §3-16-9 is distinguishable from the *Montgomery* holding in two ways. First, SDCL Chapter 20-13 applies to every potential claimant who had standing to bring a claim and did not involve the waiver of sovereign immunity. By contrast, SDCL §3-16-9 implicates a far narrower class of potential claimants. Its permissive language should be understood to distinguish between those who may permissibly invoke SDCL Chapter 3-6D and those who may not.

Many state employees are barred from invoking the procedures of the Civil Service Commission under SDCL §3-6D-22 because they are excluded under the express

terms of Chapter 3-6D. *See* SDCL § 3-6D-4 (identifying sub-classes of executive branch employees to whom Chapter 3-6D does not apply).[3] If the language of SDCL §3-16-9 were shoehorned into the same interpretive box as the *Montgomery* decision, one of two equally unsatisfying conclusions would obtain: ***either*** all state employees are protected from retaliation, but only those state employees in the executive branch over whom the Civil Service Commission has authority may seek relief if subjected to retaliation; ***or*** all state employees are protected from retaliation, and the Civil Service Commission may provide relief, even for those employees over whom the Civil Service Commission otherwise lacks lawful authority.

Under either scenario, filing such a grievance would not serve as a mandatory precursor to seeking judicial relief. All employees could file suit in Circuit Court in the first instance. There is nothing anomalous about this result.

Circuit courts and administrative bodies have co-extensive jurisdiction over many types of claims. This Court has recognized statutory authority that "specifically disclaims primary jurisdiction by the administrative agency." *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 11, 706 N.W.2d 239, 243. The relevant statute, SDCL §1-26-30, recognizes that a person who has exhausted administrative remedies is entitled to judicial review. But it is well-established that this statute "presupposes that some administrative action has already occurred or been exhausted" and therefore "only addresses the exhaustion doctrine involving the timing of judicial review of administrative action." *Id.*

[3] To take one example, an assistant attorney general who engaged in protected whistleblowing and was subjected to unlawful retaliation would not be entitled to seek relief under SDCL §3-6D-22, based on the exclusion set out in SDCL §3-6D-4(10).

The text of SDCL §1-26-30 outlines the chronology and procedure that must be followed to trigger judicial review of an administrative decision, but it leaves wholly intact any right to judicial relief that would otherwise be available: "This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law." *Id.* As adduced above, state employees who are covered by SDCL Chapter 3-6D may (in theory) invoke the grievance process set out in SDCL §3-6D-22, but invoking that process is not required, on the face of the statute, to pursue such relief as a predicate of bringing an action for damages in Circuit Court.

The employee's ability to file suit with the Circuit Court in the first instance is consistent with other statutes that address the consequence of waiving sovereign immunity. Once sovereign immunity has been waived, the person or entity that would otherwise enjoy its protections is deemed to have relinquished any special status or insulating effect it would have otherwise provided.

Thus, to the extent that the State purchases liability insurance, it "shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued." SDCL §21-32-16. To the extent that public entities that participate in a risk sharing pool or purchase liability insurance, they "shall be deemed ... to have consented to suit in the same manner that any other party may be sued." SDCL §21-32A-1. The same principle should apply here: having waived sovereign immunity for retaliation claims, the State has consented to suit in the same manner as any other person may be sued.

A second factor distinguishes §3-16-9 from *Montgomery* and its interpretation of SDLC §20-13-26: the Human Rights Division has a robust, comprehensive administrative regime, the operation of which is directly related to the purpose of investigating and preventing discrimination and unfair practices. *Montgomery*, 531 N.W.2d at 580 n 1. ("The Legislature mandated that discrimination claims first be brought before the Division apparently to allow it to exercise its expertise in these matters and so that it can monitor and rectify discriminatory practices in South Dakota."). By contrast, the Civil Service Commission has a narrow domain over a sub-class of employees within the executive branch, its purpose does not directly relate to rooting out corruption or protecting whistleblowers, and – as outlined below – it presently has no specific grievance process that is addressed to state employee whistleblowers. It offers a theoretical remedy that is without substance in actual practice. In sum, even if the Civil Service Commission had a broad enough mandate to cover all state employee whistleblowing claims, it lacks the capacity or an identifiable process by which to award a whistleblower relief from the unlawful retaliatory conduct that SDCL 3-16-9 proscribes.

C. Even if the Circuit Court's statutory interpretation was correct, dismissal of Hallberg's claim was error as a matter of law because Hallberg has no recourse to a viable administrative remedy and has been denied an avenue to vindicate her substantive rights.

The Circuit Court essentially granted Defendants relief on the basis of an affirmative defense – failure to exhaust administrative remedies – that Defendants had not raised, much less proven. This aspect of the ruling was error as a matter of law, as it effectively required that Hallberg disprove an affirmative defense in her initial pleading.

The notice pleading standard, SDCL 15-6-8(a)(1), imposes no such requirement, and the burden of raising and establishing an affirmative defense always rests with the party invoking it. SDCL §15-6-8(c).

This Court may be inclined to ignore the Circuit Court's statement that it lacked jurisdiction to consider Hallberg's claim and consider whether the result (if not the rationale) is consistent with settled law. But Hallberg respectfully submits that even the most charitable review of the Circuit Court's determination cannot sustain this result.

There is no express or implied requirement that an aggrieved state employee whistleblower subjected to retaliation must exhaust administrative remedies. As set out above, the language of SDCL §3-16-9 is best understood to permit access to the administrative process, but not require that it be exhausted. Even if this Court were to read an exhaustion requirement into the statute, that requirement falls away when, as here, there exists no administrative remedy to exhaust and exhaustion is an exercise in futility. The Circuit Court never considered a crucial question – exactly what administrative remedy was Hallberg required to exhaust?

1. ***The administrative remedy theoretically afforded to aggrieved state whistleblower employees is inadequate because it does not presently exist.***

"It is well settled that exhaustion is not required when the administrative remedies are inadequate." *Johnson v. Kolman*, 412 N.W.2d 109, 112 (S.D. 1987). Hallberg was not given the opportunity to establish that the administrative grievance process afforded to whistleblower employees is inadequate, but that fact is self-evident from the established record.

SDCL §3-16-9 provides that state employees who are the subject of retaliation "may file a grievance with the Civil Service Commission pursuant to § 3-6D-22." SDCL Chapter 3-6D contains the relevant Civil Service Commission grievance provisions. SDCL 3-6D-22, enacted in 2012, also permits an employee to file a grievance with the Civil Service Commission if the employee believes that there has been retaliation for reporting a violation of state law.[4]

As set out above, only certain classes of executive-branch employees may file grievances with the Commission. The Civil Service Commission is tasked, pursuant to SDCL §3-6D-14, with promulgating rules governing grievances to the Commission. The only other statute in SDCL Chapter 3-6D addressing the grievance procedure is SDCL §3-6D-15, which governs only "[i]f a grievance remains unresolved after exhaustion of a *departmental* grievance procedure . . . ." (emphasis supplied). In that scenario, SDCL §3-6D-15 allows for a follow-up hearing before the Civil Service Commission.

The language of SDCL §§ 3-16-9 and 3-6D-22 allow for a grievance directly to the Civil Service Commission and do not require a departmental grievance be filed as a preliminary measure. Accordingly, §3-6D-15 is inapplicable on its own terms.

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[4] SDCL §3-6D-22 states:

> An employee may file a grievance with the Civil Service Commission if the employee believes that there has been retaliation because of reporting a violation of state law through the chain of command of the employee's department, to the attorney general's office, the State Government Accountability Board, or because the employee has filed a suggestion pursuant to this section.

Id.

The Civil Service Commission rules found at ARSD 55:10 do not provide any further guidance on the grievance procedure for aggrieved whistleblower employees. The only potential procedure is found in ARSD 55:10:08:16. Once again, that Rule mandates that a departmental grievance first be filed, with an optional appeal to the Commission itself. Further, by its own terms, ARSD 55:10:08:16 applies only to appeals made pursuant to certain sections, none of which apply in this case.

At all material times, Hallberg's employment was subject to a 6-month probationary period. *See* SDCL §3-6-23; ARSD 55:10:05:02. In such a circumstance, SDCL §3-6-23 provides that an employee may be dismissed without cause during his or her probation period. And the Civil Service Rule found at ARSD 55:10:05:03 recognizes this as well, providing in part:

> At any time during the probationary period an appointing authority may terminate an employee from the employee's position subject only to the appeal rights specified in § 55:10:08:04. The appointing authority shall notify the employee of this action in writing.

Unfortunately, 55:10:08:04 does not address scenarios of whistleblowing retaliation. Instead it allows for an appeal of an action on grounds of discrimination as set forth in SDCL §20-13-10, which prohibits employment practices based on an employee's "color, creed, religion, sex, ancestry, disability, or national origin . . . ."

The path from statute to rule and back again is a textual dead-end for someone in Hallberg's position, and the path to a remedy of which the Circuit Court spoke therefore leads nowhere. But that should not mean Hallberg is out of luck and without a remedy altogether.

It is well-settled that "a party must exhaust all available administrative remedies *only* if the agency actually has authority to deal with the particular question raised."

Kolman, 412 N.W.2d at 112 (emphasis in original). If a claim or grievance is not cognizable by the administrative agency, it necessarily follows that the claimant has no obligation to initiate proceedings with the agency as a precursor to seeking relief in a proceeding before a Circuit Court.

The Commission has failed to promulgate rules that provide an avenue of relief for whistleblower employees subjected to unlawful retaliation. That failure is even more apparent in the case of state employees who cannot invoke the remedies provided under Chapter 3-6D, because they belong to excluded classes enumerated in SDCL § 3-6D-4.

Because no grievance procedure exists, an attempt to invoke the protections of SDCL 3-16-9 through the Commission would be futile. "The law does not require futile acts." *Tri-City Associates v. Belmont, Inc.*, 2016 S.D. 46, ¶ 14, 881 N.W.2d 20, 23 (S.D. 2016) (citation omitted). This Court has recognized that futility and the inadequacy of the remedy are both exceptions to the exhaustion requirement. *See Kolman*, 412 N.W.2d at 112; *see also Weltz v. Bd. of Educ. of Scotland Sch. Dist. No. 4-3 of Bon Homme Cty*., 329 N.W.2d 131, 134 n.1 (S.D. 1983); *Read v. McKennan Hosp.*, 2000 SD 86, ¶ 13, 610 N.W.2d 782, 785.

Because "exhaustion is not required when the administrative remedies are inadequate," *Kolman*, 412 N.W.2d at 112, failure to exhaust administrative remedies is not an absolute bar to seeking relief in Circuit Court. But, under these circumstances, an even stronger claim may be made: denying Hallberg access to the Courts is unconstitutional.

2. ***Because no adequate administrative remedy exists, denying Hallberg an opportunity to seek judicial relief violates the "open courts" provision of South Dakota's Constitution.***

Article VI, Section 20 of the South Dakota Constitution states: "All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay." This Court has "interpreted the 'open courts' provision as a 'guarantee that for such wrongs as are recognized by the laws of the land the courts shall be open and afford a remedy.'" *Green v. Siegel, Barnett & Schutz,* 1996 S.D. 146, ¶ 13, 557 N.W.2d 396, 400.

"Article VI, § 20 provides a right of access to the courts for causes of action recognized by common law or statute." *Id.* While this provision does not "by itself become a sword to create a cause of action" or a "shield to prohibit statutorily recognized barriers," it does offer a substantive guarantee of access to the courts for those who have a valid cause of action based on existing statute or common law. *Cromwell v. Rapid City Police Dept.,* 2001 SD 100, ¶¶29-30, 632 N.W.2d 20, 27.

Without an administrative procedure in place, the judicial system is the only means by which Hallberg may assert a claim for wrongful retaliation. Even if this Court were to accept the notion that such a claim should, in theory, begin with the Civil Service Commission, that notion is a dead-end in practice because Hallberg has no identifiable procedure by which to seek relief and her claim is not properly cognizable by that body under any of its administrative rules.

Cromwell teaches that once sovereign immunity has been waived, it cannot be reclaimed, so as to deny claimant a remedy based on a barrier that was consciously

removed. The same basic principle applies here: to maintain that Hallberg's sole recourse is to invoke a remedy that should exist, but does not, is functionally the same as denying her the possibility of obtaining relief in any form or fashion. Even the Circuit Court's rationale does not contemplate this possibility, yet that is what upholding its decision would effectively mandate.

This result, if upheld, would violate Hallberg's substantive right to access the courts, which attaches as soon as the Legislature determined that someone in her position – a state employee whistleblower wrongfully subjected to retaliation – is entitled to relief. There can be no question that the Legislature has adopted that public policy. To uphold the Circuit Court's ruling not only works a fundamental injustice in this particular case, but also offends a basic individual right enshrined in South Dakota's Constitution.

3. ***This Court can and should address the exhaustion issue, as it is a legal issue ripe for adjudication and the interests of judicial economy are well-served by providing the parties and Circuit Court with a definitive ruling that avoids the possibility of a subsequent appeal.***

Because the issue of exhaustion was not raised below until Defendants' reply brief in support of its motion to dismiss, Plaintiff did not have the opportunity to brief the issue below. The Circuit Court did not consider whether a substantive administrative remedy existed that Hallberg could theoretically exhaust. Still, that vacuum in the record does not preclude this Court from considering and deciding that issue for at least three reasons.

First, the adequacy of the administrative remedy in this case boils down to whether a remedy has been provided at all. That issue poses a legal question, requiring interpretation of statutes and administrative rules, which this Court would review *de novo* if the same question came to it on a procedurally perfect record.

Second, the rule that cautions appellate courts from deciding questions that were not first decided below is not jurisdictional. *See State v. Chant*, 2014 S.D. 77, ¶ 7, 856 N.W.2d 167, 169 (recognizing that reviewing questions raised for the first time in the appellate court "is merely a rule of procedure and not a matter of jurisdiction"). Under these circumstances, it is hard to fathom how or why this Court would remand for consideration of a purely legal issue, particularly now that Hallberg has had a chance to brief the issue.

Third, the interests of judicial economy favor a definitive ruling. If Hallberg is correct, she should be permitted to pursue her claim on the merits. She respectfully submits that remanding the matter back to the Circuit Court with instructions to undertake the same analysis this Court can complete at this juncture is both inefficient and unfair to all parties involved.

II. INDIVIDUAL DEFENDANTS FRANCESCA LEINWALL AND JEREMY REED ARE NOT IMMUNE FROM SUIT UNDER THE "DISCRETIONARY ACTS" DOCTRINE FOR THE INTENTIONAL TORT OF WRONGFULLY DISCHARGING HALLBERG IN RETALIATION FOR HER PROTECTED WHISTLEBLOWING ACTIVITY.

The Circuit Court indicated that it was accepting as true all facts alleged in the Complaint, but nonetheless concluded that individual Defendants Leinwall and Reed were immune from suit because the decision to terminate falls within the discretionary act doctrine. If the "discretionary act" doctrine includes immunity from otherwise unlawful acts, then South Dakota employees have effectively been handed a license to discriminate, retaliate, and intimidate other state employees, simply because their salary is paid by the tax dollars of their fellow citizens.

The result and the rationale used to reach it run contrary to the basic principle that intentional torts do not constitute "discretionary acts," as confirmed by this Court in *Swedlund v. Foster*, 2003 SD 8, 657 N.W.2d 39, and its immediate predecessors, *Hart v. Miller*, 2000 SD 53, 609 N.W.2d 138, *Gasper v. Freidel*, 450 N.W.2d 226 (S.D. 1990), and *Ritter v. Johnson*, 465 N.W.2d 196 (S.D. 1991).

A. The Circuit Court departed from well-established precedent when it held that the discretionary act doctrine covers intentional torts.

Whether a State employee is protected by sovereign immunity is a question of law reviewed de novo by this Court. *Hansen v. S.D. Dept. of Transp.*, 1998 S.D. 109, ¶ 6, 584 N.W.2d 881, 883. State employees are often shielded from sovereign immunity in the performance of discretionary functions, as opposed to ministerial duties, because such discretionary acts are part of the State's sovereign policy-making power. *See Ritter v. Johnson*, 465 NW.2d 196, 198 (S.D. 1991). But a State employee who commits "intentional tort[s] or acts ultra vires exceeds the scope of his [or her] official authority and will not be shielded by immunity." *Bego v. Gordon*, 407 N.W.2d 801, 808 (S.D. 1987). Further, "[o]fficial immunity must be narrowly construed in light of the fact that it is an exception to the general rule of liability." *Id.* at 809 n. 10.

Decisions to terminate an employee may involve discretion, but that discretion cannot be driven by an impermissible retaliatory motive that takes the discharge outside the permissible scope of employment. The Circuit Court erred as a matter of law in dismissing the intentional tort of wrongful retaliatory discharge under the rationale that the individual defendants were acting in the scope of their employment and undertaking a discretionary function, i.e., making an employment decision and terminating an

employee. The facts alleged in the Complaint do not permit that conclusion, as it affirmatively alleges that the individual Defendants wrongfully and intentionally subjected Hallberg to retaliatory discharge. That intentional tort is not – and can never be – immune under the discretionary function doctrine.

An employee is not acting within the scope of employment if he or she commits an intentional tort, and both the result the Circuit Court reached and the rationale used to get there constitute reversible error.

Numerous decisions from this Court recognize that the discretionary acts doctrine does not immunize intentional torts. Consider this illustrative sampling:

- *Bego v. Gordon*, 407 N.W.2d at 809-812. Claims by former music teacher against school principal and superintendent were not subject of summary judgment dismissal because (a) fact-finder could conclude that principal had committed intentional tort of false imprisonment, thereby invalidating any invocation of discretionary function doctrine or claim that principal was acting in scope of his employment; and (b) superintendent could not invoke discretionary act doctrine with respect to intentional tort claims of false imprisonment, battery, and defamation because genuine issues of material fact existed on those issues.

- *Hart v. Miller*, 2000 SD 53 at ¶37, 609 N.W.2d at 148. This Court reversed the grant of summary judgment of a §1983 lawsuit, but affirmed the dismissal of claims of false imprisonment, assault, and invasion of privacy because there existed no material factual disputes on these issues. *Id.* at ¶¶41-42, This Court was firm, however, in rejecting the claim that law enforcement personnel enjoyed immunity from these claims: "[s]overeign immunity does not apply, as it is inapplicable to intentional torts committed by state employees." *Id.* ¶38.

- *Swedlund v. Foster*, 2003 SD 8 at ¶43, 657 N.W.2d at 56: This Court held that discretionary function did not apply to intentional torts in any circumstance and likewise held that police officers' act of entering house without lawful authority was not privileged and therefore did not immunize them from intentional tort claims of trespass, assault and battery, intentional infliction of emotional distress, false arrest, and false imprisonment.

The Circuit Court's perfunctory analysis of the discretionary function doctrine ignored this line of precedent and cannot be sustained in light of the principles that such cases embody and affirm.

To hold to the contrary would completely insulate actors who would otherwise fall within the scope of the statutory ban on retaliation in SDCL §3-16-9. *See Southern California Rapid Transit District v. Superior Court of Los Angeles County*, 30 Cal. App 4th 713, 726 (Cal. App. 1994) ("To recognize that [a state actor's] discharge of plaintiffs was simply a discretionary act to which qualified immunity applied, even though such discharge was a retaliatory act expressly prohibited by [California law], would emasculate the entire effect and purpose of the statute.").

CONCLUSION

The South Dakota Legislature made significant progress in avoiding the taint of corruption by protecting state employees who incur significant risk in choosing to blow the whistle on violations of law, corruption, or safety violations. That protection expresses a public policy that is intended to prevent retaliation against whistleblowers and afford them relief in the unfortunate event that speaking out on behalf of the public interest triggers retaliatory misconduct.

Hallberg's case falls within the heartland of this statute, but unfortunately she has been denied the opportunity to seek the very relief that the Legislature intended to provide. The Circuit Court misinterpreted the relevant statute and administrative rules (or absence thereof) in deeming itself to lack jurisdiction to hear Hallberg's claim and in concluding she could not seek judicial relief. It compounded that error in holding that

she was limited to an administrative remedy that does not exist and effectively penalizing her for failing to engage in a futile exercise. This Court can and should reverse the Circuit Court's dismissal and remand with instructions to permit her claim to proceed on the merits in Circuit Court without requiring the Sisyphean exercise of exhausting an administrative process that does not exist.

This Court should also reverse the erroneous decision to dismiss the individual Defendants, as the Complaint, taken as true, alleges that each engaged in unlawful retaliation – an intentional tort that does not fall within the discretionary function doctrine. Here, too, Hallberg has been prevented from seeking relief to which she is lawfully entitled based on a misreading and misapplication of principles governing when immunity applies and when it definitively does not.

REQUEST FOR ORAL ARGUMENT

Hallberg respectfully requests the privilege of being heard at oral argument and submits that this case presents issues of importance, above and beyond her immediate claim, to justify allotting 20 minutes per side.

Dated: September 28, 2018.

CADWELL SANFORD DEIBERT & GARRY LLP

By /s/ *Alex M. Hagen*

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief is 27 pages and was prepared using Microsoft Word and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 7,211 words.

Dated: September 28, 2018.

/s/ *Alex M. Hagen*
Alex M. Hagen

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Brief, with attached Appendix, was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: scclerkbriefs@ujs.state.sd.us

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on September 28, 2018.

The original and two copies of the Appellant's Brief, with attached Appendix, were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

on September 28, 2018.

/s/ *Alex M. Hagen*
Alex M. Hagen

APPELLANT'S INDEX

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF BROWN FIFTH JUDICIAL CIRCUIT

* *

SARA HALLBERG,	*	06CIV18-000244
Plaintiff,	*	
vs.	*	ORDER OF DISMISSAL
SOUTH DAKOTA BOARD OF REGENTS, JEREMY REED, and FRANCESCA LEINWALL, Individually,	* *	
Defendants.	*	

* *

This matter came before the Court on June 29, 2018, for a hearing on Defendants' Motion to Dismiss. Plaintiff appeared personally and with her attorney Michelle Stratton. Defendants appeared through their attorney Reed Rasmussen. Upon consideration of the written submissions and the arguments of counsel, the Court has determined it has no jurisdiction because Defendant South Dakota Board of Regents is entitled to sovereign immunity as the State of South Dakota has only waived sovereign immunity with respect to claims under SDCL 3-16-9 to the extent that it has created an administrative remedy. Sovereign immunity also bars the claims against individual Defendants Jeremy Reed and Francesca Leinwall because the alleged acts committed by them, as set forth in Plaintiff's Complaint, were discretionary. Based on this reasoning,

IT IS HEREBY ORDERED that Defendants' Motion is granted and Plaintiff's Complaint is dismissed, with prejudice.

BY THE COURT:

Attest:
Walberg, Peggy
Clerk/Deputy

Signed: 7/9/2018 11:24:42 AM

Circuit Court Judge

STATE OF SOUTH DAKOTA)SS
COUNTY OF BROWN)

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

* *

SARA HALLBERG, Plaintiff,
-vs-
SOUTH DAKOTA BOARD OR REGENTS, JEREMY REED and FRANCESCA LEINWALL, individually, Defendants.

CIV. 18-244

MOTIONS HEARING

* *

DATE & TIME: June 29, 2018
1:00 p.m.

BEFORE: THE HONORABLE SCOTT P. MYREN
CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota 57401

LOCATION: Brown County Circuit Courtroom
Brown County Courthouse
Aberdeen, South Dakota 57401

APPEARANCES: FOR PLAINTIFF:

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THE COURT: We're on the record. It's a civil file 18-244. Sara Hallberg v. South Dakota Board of Regents, Jeremy Reed, Francesca Leinwall. And we're here for a motion today, a motion to dismiss that was filed by the defendants.

I'll let you identify yourselves for the record since I don't know all of you.

MR. RASMUSSEN: Reed Rasmussen for the defendants.

MS. STRATTON: Michelle Stratton for the plaintiff, Ms. Hallberg. And I'm here with Sara Hallberg.

THE COURT: And that's her sitting next to you?

MS. STRATTON: Yes.

THE COURT: Okay. So reviewing the file before court, of course, I read through everything that was submitted. And the only thing that I'm aware of that the parties want me to address today is the motion to dismiss. Are you aware of anything else?

MR. RASMUSSEN: No, Your Honor.

MS. STRATTON: No.

THE COURT: Okay. Let's go ahead and hear whatever you want to add.

MR. RASMUSSEN: Thank you, Your Honor.

The state and its entities are entitled to sovereign immunity unless they've consented to be sued. I don't think there is any dispute about that. Without a waiver of sovereign immunity, the court lacks jurisdiction.

SDCL 3-22-17 provides that sovereign immunity is waived only to the extent coverage is provided by the PEPL Fund. As demonstrated in the information that's been provided, the PEPL Fund agreement provides no coverage for the type of claims being asserted by the plaintiff in this case.

It doesn't appear the plaintiff is arguing that the PEPL Fund, or disputing the fact that the PEPL Fund provides no coverage. Instead, she contends that the whistleblower statute, SDCL 3-16-9, constitutes a waiver of sovereign immunity. As discussed in our reply brief, the allegations of the complaint don't come within the terms of the whistleblower statute.

First of all, the plaintiff made no complaint of a violation of law or rule, an abuse of funds or abuse of authority, or substantial and specific danger to the public health and safety, which is what is required in the whistleblower statute. Furthermore, what she did report was not reported to a human resources department, a state's attorney, or the attorney general as is also required by the statute.

THE COURT: Assuming that she had, do you think that still would have been a waiver?

MR. RASMUSSEN: No. That's my next point. Even if her allegations did fall under the statute and a proper complaint had been made, the statute doesn't constitute waiver of

sovereign immunity for a legal action such as this.

The remedy provided by the statute is to allow an aggrieved person to file a grievance with the South Dakota Civil Service Commission. That's the exclusive remedy. The statute does not waive sovereign immunity for a claim such as this.

And, in fact, the legislature clearly could have done that. It was in the next statute in the book, 3-16-10, which deals with a different subject, but that statute says if there is no grievance available, a civil action can be pursued against the state. Absolutely nothing like that in the whistleblower statute. And so I just don't think there is any question the Board of Regents is entitled to a dismissal on the grounds of sovereign immunity.

As far as the individual defendants are concerned, despite the fact the caption of the complaint says that they are being served in -- sued individually, the allegations relate to official acts; therefore, they are also protected by sovereign immunity. Furthermore, the acts alleged were discretionary. It was a decision of, a hiring and firing decision. This also entitles them to sovereign immunity protection. And that's all discussed in the brief. I don't think I need to go through that in detail.

That's our position, Your Honor, and we believe the motion to dismiss as to all defendants should be granted.

THE COURT: You may respond.

MS. STRATTON: I just would like to note for the record that we do object to most of what is in the reply brief submitted by defendants. I don't think the question before the Court today is whether her claims fall within the statute and what the statute requires. I think the only question is whether it's waived sovereign immunity or not.

I'm certainly prepared to discuss those issues if the Court would like us to, but I would rather just address the sovereign immunity question, whether it's been waived or not. Whether the claims fall within the language of the statute, because I think that should be addressed later, viewed properly in front of the Court, and then we can have a chance to respond to whether we think her claims fall within that statutory language.

So with that, unless the Court has questions, first I'd like to address the sovereign immunity for the board. I think 3-16-9 clearly waives sovereign immunity. With the history lately and the political atmosphere, the legislature is aware that we didn't have any protections for employees in the state. State employees and generally employees of other employers in the state don't have, outside of case law, protection for whistleblowing claims.

They enacted 3-16-9 to encourage employees to report violations of law, misuse of public funds, and to provide some

accountability for the government. I think if it doesn't waive sovereign immunity and the Court decides that it doesn't, then it strips the effect and the purpose of the statute to protect whistleblowers and to ensure some government accountability.

I cited a Minnesota case, *Janklow*. Excuse me. A very similar statute. Granted, it's a little different, it's a more broad statute because it applies to all employers in the state, but the underlying policy is the same with the whistleblowing statutes. They're meant to protect employees, encourage reports, and ensure that the employees who do that have a remedy and that they can, the employers can be held to that standard and not violate the law. So I think there is no question that this has to waive sovereign immunity or there is just no effect to the statute.

THE COURT: So it looks under that statute, though, that the remedy that they provided for her is to file a grievance with the Civil Service Commission.

MS. STRATTON: Right. And we believe that there is an exception that exists in this case, and we will present that. I think exhaustion of administrative remedy is an affirmative defense that they would need to raise in an answer. We don't have an answer right now. But we do think that there is an exception that applies.

THE COURT: So did she file a grievance?

MS. STRATTON: No.

THE COURT: If she had filed a grievance, what would be her, what would be the, I guess, remedy that the Civil Service Commission could give her?

MS. STRATTON: Our position is that although the legislature has included that provision, there really isn't a grievance process that the Civil Service Commission has put into place. That has lagged behind and hasn't followed. So there really isn't anything there to provide a process and a remedy which is why we think that there is an exception to the exhaustion; that the process would be futile and there is no reason that she needs to go through a process that doesn't exist.

THE COURT: Okay. What else?

MS. STRATTON: So separate from the sovereign immunity piece that, or along with it, we have cited to -- I think even if the Court decides that sovereign immunity isn't waived by virtue of 3-16-9, the state can consent to suit in other areas. I don't think the PEPL Fund is the sole way that the state can consent to a suit.

One example is contract claims. There is case law that says to the extent that the state has entered into contracts that grant the other party impliedly the right to a cause of action, the state has consented to suit under those contracts. I've cited the insurance statutes which say to the extent that

they violate liability insurance, the state has consented to suit. And I think you have to read those insurance statutes together with the PEPL Fund statutes. And to hold that the PEPL Fund is the only way that the state waives sovereign immunity would render the insurance statutes ineffective and meaningless. So I think you have to read them together and say that there is potentially insurance out there that would cover it and that that would also waive sovereign immunity. It just -- the PEPL Fund is not the only way that the state consents to suit.

Lastly, the personal liability of Leinwall and Reed, I think the answer is easy. If the Court finds that 3-16-9 has waived sovereign immunity for the state, then there is no protection for the employees to fall under individually.

But regardless of whether the Court finds that sovereign immunity is waived for the state and the board, they're still liable individually because they are not protected for intentional misconduct that is illegal. That's especially true if it's found that the, that sovereign immunity hasn't been waived for the state and the employees are found to not be liable for sovereign immunity, then there is absolutely no purpose or effect to the statute anymore because there is no protection, and nobody is ever held liable for retaliatory conduct under the statute. So I think regardless of what the Court finds for the 3-16-9 and the waiver, individually, the

employees that retaliate against others are still held liable for their individual actions.

THE COURT: So what did Francesca Leinwall do that was intentional and illegal?

MS. STRATTON: So they were in a supervisory role --

THE COURT: Speak -- I'm very specifically talking about that individual --

MS. STRATTON: Oh, sure.

THE COURT: -- and then we'll talk about the other one.

MS. STRATTON: So my understanding is that she's in a supervisory role and has the ability to make those decisions and contribute to those decisions.

THE COURT: Hiring and firing.

MS. STRATTON: Yes.

THE COURT: Okay. And so what hiring and firing decision -- the language that you used a few moments ago was that you thought that those individuals would not be protected under sovereign immunity if they had engaged in intentional and illegal conduct. That was the formulation, I believe, that you used. So the intentional conduct would be, presumably, exercising the decision to discharge your employee -- your client.

MS. STRATTON: Correct.

THE COURT: What you're thinking, what you're classifying as illegal is that the discharge was in violation of 3-16-9?

MS. STRATTON: Right. To do it in retaliation for whistleblowing would be illegal under the statute because the statute makes it very clear that you cannot retaliate for reports of violations of -- or what you suspect in good faith to be violations of statute or rules.

THE COURT: Okay. So case law that says that that excludes them from sovereign immunity protection?

MS. STRATTON: Sure. I've cited in my brief, and I'll rely on that, case law that says employees are held liable for their individual actions for their -- hold on one second. I'll get the language correct here.

THE COURT: I think the case law that you rely on is *ultra vires* type circumstances.

MS. STRATTON: Right. Intentional towards or *ultra vires*. And if they fire them illegally, that's clearly outside of the scope of their ability to do -- that's just not a decision that they can make is to fire someone illegally.

THE COURT: Okay. What else?

MS. STRATTON: Unless the Court would like us to address, you know, whether the claims fall within the terms of 3-16-9 or any other questions about the administrative remedy part, we would just ask that the Court deny the motion to dismiss today.

THE COURT: Mr. Rasmussen, what else?

MR. RASMUSSEN: Well, Your Honor, the motion to dismiss is

based upon the allegations in the complaint, and so I think the Court can look at those allegations and apply them to the statute. And if the Court does that, you'll see, as we argued in our brief, that the statute just doesn't, the whistleblower statute doesn't apply in this case.

But beyond that, again, even assuming that the acts did fall within the statute, I agree with counsel that the legislature enacted the statute, they enacted the whistleblower statute, and that statute clearly says your remedy is to go to the Civil Service Commission. It cites SDCL 3-6D-22, which we quoted on page 4 of the brief, that talks about the grievance procedure with the Civil Service Commission. Counsel's argument that it would be a futile effort, I mean, there is no basis for that in the record here whatsoever.

THE COURT: What is your understanding of the remedies that her client could achieve in front of the Civil Service Commission, if any?

MR. RASMUSSEN: I believe the Civil Service Commission could reverse the decision and return her to her employment.

THE COURT: Reinstatement.

MR. RASMUSSEN: Reinstatement, yeah.

THE COURT: And would that normally be something that falls within sovereign immunity?

MR. RASMUSSEN: If the statute did not exist, there

probably wouldn't be the ability to go to the Civil Service Commission. So I think to that extent, yeah, the state has waived sovereign immunity to the extent of allowing a claim such as this to go to the Civil Service Commission, but it certainly does not waive it to the extent of allowing a civil action such as this.

They argue that that Minnesota case is on point. It's not. The Minnesota case had said nothing about what a remedy would be. And that's true of the cases the Minnesota case cites: The North Carolina case, and the other one. I can't remember which state it was from. But the North Carolina case specifically said if there is a violation of the statute, you can bring a civil action against the state. And the legislature did that in the very next statute. They said that that was one of the remedies. There is no such remedy in, in the 3-16-9.

The argument that there is potentially insurance out there, that's just, there is no basis for that. The insurance statute that they cite was adopted in 1981. Five years later the PEPL statute 3-22-17 was adopted. And that's where if there is coverage for the state, it's through the PEPL Fund for a situation like this, and clearly there is not.

THE COURT: It's essentially a self-insurance program.

MR. RASMUSSEN: Yeah. Essentially, yes.

And, finally, as far as the individuals are concerned,

again, you have to look at what's alleged in the complaint. And there was talk about intentional illegal conduct. The only things alleged in the complaint is that the plaintiff complained about the fact that they were considering hiring a client of the counseling center to work there, that some of the student workers there potentially had access to patient records, and that there were unlicensed counselors there.

THE COURT: But her position is that their decision was illegal because it retaliated against her for reporting the things that they're classifying as whistleblower-type complaints.

MR. RASMUSSEN: But that gets back to the terms of the statute. None of those things are illegal acts or fall within any of the terms of that statute. And beyond that, they weren't reported to an HR director, a state's attorney, or the attorney general. And so they can't, you can't say they're illegal acts. A counselor at a university is allowed to work unlicensed. I cited that statute in my brief. And so the acts of Ms. Leinwall and Mr. Reed, who is Leinwall's supervisor, and there is only, there is really nothing in there about what he did other than that she was terminated, but the letter of termination came from Ms. Leinwall, so I'm not sure what it is Mr. Reed was supposed to have done. But beyond that, there is just nothing there to show that this wasn't clearly a discretionary act, that a decision was made

to terminate the employee, and that falls within sovereign immunity.

THE COURT: You can respond if you want to.

MS. STRATTON: The only thing I would like to respond since we're touching so much on the language of the statute, I think it's important to note that you only need a good faith belief that there is a violation of the law. It doesn't need to actually be a violation of the law or a rule, just a good faith belief that it is. Then you fall under the protection of that. So it's broader than some other statutes out there that grant relief only for something that actually turns out to be a violation.

The second thing to note is that you do not have to report only to an HR department, state's attorney, or attorney general. That is for political subdivisions. Whether the board is a political subdivision is a whole different question. I would argue it's not. And, two, the language says an appropriate authority includes those. It doesn't limit it to a report of only to those departments. It is just an option. It makes it clear that those are appropriate authorities.

So I think her claims fall within the statute, clearly are within the scope of it, and there is, they're just, our position is there is no basis to say that they do not.

THE COURT: Thank you.

So this will be the decision of the Court.

It's a motion to dismiss. And the status of the case or the way that I'm supposed to look at the case at this stage is I'm supposed to take all of the allegations that are made by the plaintiff and assume them to be true, essentially, which is the way I'm looking at the case.

So I'm looking at it and saying that Ms. Hallberg was working at the, at the university. She pointed out these things which she believed to be violations of either policy or laws, and that her employers were unhappy with her because of her pointing those things out and, as a result, decided to terminate her employment. And, in my view, that falls within the idea of the whistleblower statute. The issue is what effect that has on this particular case.

So I'll start with the university. And the State of South Dakota, being its own entity, has sovereign immunity. And the statutes in South Dakota say that you can't sue the state unless they've given you permission to sue them. And the only place that they allow, the only way that they allow themselves to be sued is by those specific areas that are set forth in the PEPL Fund.

There is an insurance statute that was referenced that was some time before that says that to the extent the state buys insurance, they have waived immunity. But then after that statute was enacted, the state had created this program called

the PEPL Fund, which is, in essence, a self-insurance program. And in the formulation of that PEPL Fund, it says that the only way we're waiving immunity is if we've provided coverage under the PEPL Fund.

And then looking at the terms of the PEPL Fund, the claims that you've made in this particular action are specifically excluded from the PEPL Fund, meaning that they have not waived sovereign immunity for the Board of Regents, the university system.

Each of the individuals would normally -- as employees of that system, you've sued them saying that you're suing them individually, but what you're suing them for is the things that they did as employees of that system. Normally, they would be entitled to sovereign immunity, also. The same sovereign immunity that the Board of Regents has.

There are possible situations where they may have done something that prevented them from exercising that sovereign immunity, removed themselves from it, and that would be circumstances where they did some pretty outrageous type actions that take them outside of the protections of the sovereign immunity. Off the top of my head, I'm not thinking of a good example. I'm trying to think of some that I've seen in the past. Things like illegal conduct where people have committed crimes. The other example would be where they're making, where they're doing something as the employee, but

it's beyond the scope of the role that they have as an employee of that entity.

What these two individuals did was exercise their discretionary functions as employees. They didn't exceed the power that they had as employees. They had the power to fire you. They may not have done it for the right reasons, and it appears -- in taking all of your claims to be true, it appears that they, in fact, you may have had, you may have or have had a claim under the 3-16-9 whistleblower provision.

The legislature enacted that provision, as your counsel described, to try to encourage people to report those type of circumstances that involve governmental entities. To the extent that they created that, I think they also waived some sovereign immunity but only to the extent that they allowed it there. So the sovereign immunity that they waived was they allowed you to file a grievance with the Civil Service Commission. They didn't specifically say what you can get from them. Presumably, that's within the confines of the rules of the Civil Service Commission. But they didn't explicitly authorize you to come to circuit court - that's a completely different place - and ask for any kind of compensation, reinstatement, back pay, future pay, attorneys fees, any of those things.

So it's this Court's determination that the State of South Dakota has not waived its sovereign immunity for the

claims that you've asserted in circuit court here today and that I don't have any jurisdiction to give you any of the remedies that you're seeking here in court today. So I'm going to grant their motion to dismiss.

I don't know -- like I said, I don't know what remedies are available to you in front of the Civil Service Commission, I don't know whether they're available to you at this point any longer, but to the extent that the state has created that opportunity, it appears to me that that's your, your avenue for any sort of remedy in this particular circumstance.

The same is true for the two individuals. As I explained, their acts were not *ultra vires*. They're not illegal acts. They may have been acts which, taking your claims to be true, may have been contrary to the whistleblower provisions, but that does not remove their ability to claim sovereign immunity to any extent different than what I've outlined is your remedy under 3-16-9, the Civil Service Commission.

I do these from the bench. I try to do the best job I can to explain it. Sometimes I'm confusing or not as clear as I think I am, so I give the attorneys a chance to ask me questions to try to clarify because, of course, we'll be preparing some paperwork consistent with the Court's decision.

Mr. Rasmussen, any questions?

MR. RASMUSSEN: No, Your Honor.

THE COURT: Did you have any questions?

MS. STRATTON: No, Your Honor.

THE COURT: And I will let the attorneys work together.

Mr. Rasmussen, if you will submit proposed paperwork, share it with opposing counsel.

If you'd like to file objections or alternatives, I'll be happy to consider them.

Anything else, Mr. Rasmussen?

MR. RASMUSSEN: No, Your Honor. Thank you.

THE COURT: Anything else?

MS. STRATTON: No. Thank you.

THE COURT: Then we're off the record.

(Whereupon, the proceedings were adjourned at 1:30 p.m.)

STATE OF SOUTH DAKOTA)
)SS CERTIFICATE
COUNTY OF BROWN)

THIS IS TO CERTIFY that I, Kristi A. Brandt, RPR, Official Court Reporter for the Circuit Court, Fifth Judicial Circuit, Brown County, South Dakota, took the proceedings of the foregoing case, and the foregoing pages, 1-19 inclusive, are a true and correct transcript of my stenotype notes.

Dated at Aberdeen, South Dakota, this 14th day of August, 2018.

/s/ Kristi A. Brandt
Kristi A. Brandt, RPR
Official Court Reporter
My Commission Expires:
February 21, 2019

3-16-9. Retaliation prohibited for reporting violations, abuse, or danger to public. No department, bureau, board, or commission of the state or any of its political subdivisions may dismiss, suspend from employment, demote, decrease the compensation of, or take any other retaliatory action against an employee because the employee reports in good faith to an appropriate authority a violation or suspected violation of a law or rule, an abuse of funds or abuse of authority, or substantial and specific danger to public health or safety, unless the report is specifically prohibited by law. The provisions of this section do not apply to any employee who knows the report is false or was made in a reckless disregard for the truth. A state employee who is the subject of retaliation under this section may file a grievance with the Civil Service Commission pursuant to § 3-6D-22. For purposes of an employee of a political subdivision, an appropriate authority includes any human resources department of that political subdivision, if any, any state's attorney, or the attorney general.

Source: SL 2017, ch 25, § 1.

3-6D-22. Grievance for retaliation against whistleblower. An employee may file a grievance with the Civil Service Commission if the employee believes that there has been retaliation because of reporting a violation of state law through the chain of command of the employee's department, to the attorney general's office, the State Government Accountability Board, or because the employee has filed a suggestion pursuant to this section.

Source: SL 2012, ch 23, § 59; SL 2017, ch 32, § 12.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28683

SARA HALLBERG,

Plaintiff/Appellant,

vs.

SOUTH DAKOTA BOARD OF REGENTS, JEREMY REED, and FRANCESCA LEINWALL, Individually,

Defendants/Appellees.

Appeal from the Circuit Court, Fifth Judicial Circuit
Brown County, South Dakota

The Honorable Scott P. Myren, Presiding Judge

APPELLEES' BRIEF

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Notice of Appeal filed August 2, 2018

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* *

SARA HALLBERG,	*	Appeal No. 28683
Plaintiff and Appellant,	*	
vs.	*	
SOUTH DAKOTA BOARD OF REGENTS, JEREMY REED, and FRANCESCA LEINWALL, Individually,	*	
Defendants and Appellees.	*	

* *

APPELLEES' BRIEF

PRELIMINARY STATEMENT

This Brief will refer to Plaintiff/Appellant Sara Hallberg as Plaintiff. Defendant South Dakota Board of Regents will be referred to as Board of Regents. Defendants Jeremy Reed and Francesca Leinwall will be referred to by their individual names. References to the Appendix attached to Plaintiff/Appellant's Brief will be designated as App followed by the page number. The Clerk's Index will be referred to as CI followed by the page number. Finally, Plaintiff's Brief will be referred to as PB followed by the page number.

JURISDICTIONAL STATEMENT

Defendants agree with the Jurisdictional Statement set forth in Plaintiff's Brief.

STATEMENT OF LEGAL ISSUES

1. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFF'S COMPLAINT AGAINST THE BOARD OF REGENTS ON THE GROUNDS OF SOVEREIGN IMMUNITY?

   The trial court granted the Board of Regents' Motion to Dismiss.

   Long v. State, 2017 S.D. 79, 904 N.W.2d 502;

   Schafer v. Shopko Stores, Inc., 2007 S.D. 116, 741 N.W.2d 758;

   Montgomery v. Big Thunder Gold Mine, Inc., 531 N.W.2d 577 (S.D. 1995);

   South Dakota Board of Regents v. Heege, 428 N.W.2d 535 (S.D. 1988);

   SDCL 3-16-9;

   SDCL 3-6D-22.

2. DID THE TRIAL COURT ERR IN DISMISSING CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS ON THE GROUNDS OF SOVEREIGN IMMUNITY?

   The trial court granted the individual Defendants' Motions to Dismiss.

   Truman v. Griese, 2009 S.D. 8, 762 N.W.2d 75;

   Hansen v. South Dakota Department of Transportation, 1999 S.D. 109, 584 N.W.2d 881;

   SDCL 3-16-9.

STATEMENT OF THE CASE

This is an action for wrongful discharge. Plaintiff's Complaint alleges "she was wrongfully discharged because she reported troubling practices up the chain of command and was subjected to unlawful retaliation as a result." (CI 4, ¶ 1). Defendants moved for dismissal of Plaintiff's Complaint on the grounds of lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to SDCL 15-6-12(b)(1) and (5). (CI 14). A

hearing was held before the Honorable Scott P. Myren on June 29, 2018. (App 002). On July 9, 2018, an Order of Dismissal was filed. (App 001). Notice of Entry was served that same day. (CI 58). Plaintiff filed a timely Notice of Appeal on August 2, 2018. (CI 61).

STATEMENT OF THE FACTS

Although Plaintiff's Statement of the Facts contains a few statements not set forth in Plaintiff's Complaint, overall it correctly summarizes the allegations in Plaintiff's Complaint. Defendants do not intend to set forth a separate Statement of the Facts.

ARGUMENT

1. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF'S CLAIM AGAINST THE BOARD OF REGENTS IS BARRED BY SOVEREIGN IMMUNITY.

Pursuant to Article III, § 27of the South Dakota Constitution and the common law, the state and its entities are entitled to sovereign immunity unless the state has consented to be sued. If the state has not waived sovereign immunity, the courts lack jurisdiction. *Pennington County v. State of South Dakota*, 2002 S.D. 31, ¶ 14, 641 N.W.2d 127; *Wulf v. Senst*, 2003 S.D. 105, ¶ 20, 669 N.W.2d 135. As a state entity, the Board of Regents is entitled to sovereign immunity. *Kringen v. Shea*, 333 N.W.2d 445, 446 (S.D. 1983). *See also* SDCL 3-21-7.

SDCL Chapter 3-22established the Public Entity Pool for Liability (PEPL) effective March 1, 1997. SDCL 3-22-17 provides that suits against the state are authorized to the extent that the PEPL fund provides coverage. The statute goes on to state that nothing in Chapter 3-22 "may be construed to otherwise waive or abrogate any immunity or defense available to any state entity or employee." Whether a party is protected by sovereign immunity is a question of law. *Adrian v. Vonk*, 2011 S.D. 84, ¶ 8,

807 N.W.2d 119; *Truman v. Griese*, 2009 S.D. 8, ¶ 10, 762 N.W.2d 75; *Hansen v. South Dakota Department of Transportation*, 1999 S.D. 109, ¶ 7, 584 N.W.2d 881.

Plaintiff's claim arises from the termination of her employment. Her prayer for relief seeks compensatory damages, damages for emotional distress and mental anguish, and punitive damages, as well as equitable relief in the form of front pay and back pay. Paragraph I E 12 of Appendix A to the PEPL Memorandum of Liability Coverage to the Employees of the State of South Dakota provides that there is no coverage "for back pay, front pay, benefits, emotional injuries, penalties, attorney fee awards, punitive damages, or any other form of damages, arising from employee grievances, administrative claims, or legal actions. . . ."[1]

Plaintiff's Brief does not take issue with the assertion that the PEPL fund provides no coverage for her claim. Instead, Plaintiff argues that South Dakota's whistleblower statute, SDCL 3-16-9, serves to waive sovereign immunity for Plaintiff's claims. That statute provides, in pertinent part, as follows:

> No . . . board . . . of the state or any of its political subdivisions may dismiss . . . or take any other retaliatory action against an employee because the employee reports in good faith to an appropriate authority a violation or suspected violation of a law or rule, an abuse of funds or abuse of authority, or substantial and specific danger to public health or safety, unless the report is specifically prohibited by law. . . . A state employee who is the subject of retaliation under this section may file a grievance with the Civil Service Commission pursuant to § 3-6D-22.

Plaintiff did not file a grievance with the Civil Service Commission before commencing this litigation. (APP 007-008). Plaintiff claims she did not need to do so.

[1] The PEPL Memorandum of Liability Coverage is attached to Defendants' Brief in Support of Motion to Dismiss. (CI 16).

SDCL 3-16-9 IS A LIMITED WAIVER OF SOVEREIGN IMMUNITY WHICH RESTRICTS AN AGGRIEVED PARTY TO SOLELY PURSING A CLAIM THROUGH THE CIVIL SERVICE COMMISSION.

SDCL 3-16-9 serves as a limited waiver of sovereign immunity. This Court has recognized that the legislature has the power to grant a limited waiver. *See CitiBank, N.A. v. South Dakota Department of Revenue*, 2015 S.D. 67, ¶ 36, 868 N.W.2d 381; *Pourier v. South Dakota Department of Revenue and Regulation*, 2010 S.D. 10, ¶ 14, 778 N.W.2d 602.[2] Despite this, Plaintiff argues that the phrase "may file a grievance with the Civil Service Commission" does not limit a plaintiff to only pursuing a remedy through the Civil Service Commission but also allows a circuit court action such as this one. (PB 12-13).

Plaintiff recognizes that her argument flies in the face of the decision in *Montgomery v. Big Thunder Gold Mine, Inc.*, 531 N.W.2d 577 (S.D. 1995). Plaintiff unsuccessfully attempts to distinguish *Montgomery*. A review of the opinion reveals that the Court's reasoning in that case serves to undermine Plaintiff's argument in this case. SDCL 20-13-29 provides that a person "claiming to be aggrieved by a discriminatory or unfair practice *may* file with the Division of Human Rights a verified, written charge...." (emphasis added). In *Montgomery*, the plaintiff did not file a written charge with the Division of Human Rights. Montgomery made an argument very similar to the one being made by Plaintiff in this case. That argument was rejected.

> Montgomery argues that use of the permissive word "may" in the first sentence indicates the Legislature did not intend that if a person had a discrimination case it had to be filed with the Division. We interpret this language to mean that a discrimination victim is not required to file a charge at all.

[2] In those cases, it was held that SDCL 10-59-17 constituted only a limited waiver of sovereign immunity.

> It does not propose that a person may file either with the Division or in circuit court.

Id. at 579.

The meaning of the word "may" was also addressed by the United States District Court in *Mann v. Tyson Fresh Meats, Inc.*, 2008 WL 4360914 (D.S.D. 2008), wherein the Court stated: "[T]he use of the word 'may' does not modify the filing requirement, but rather indicates that a person claiming to be aggrieved by a discriminatory or unfair practice has a choice whether to seek redress under the statute." *Id.* at * 4.

There is no basis to assume the word "may" in SDCL 3-16-9 means anything different than it does in SDCL 20-13-29. A person who believes they are entitled to relief under the whistleblower statute may either file a claim with the Civil Service Commission or decide to do nothing. It does not mean that person has an option to either file with the Civil Service Commission or file in circuit court.

Plaintiff's reading of the statute makes no sense. If the legislature had intended to allow an aggrieved party to file a claim with either the Civil Service Commission or the circuit court, the legislature could have said so. In fact, in SDCL 3-16-10, a statute adopted at the same time as SDCL 3-16-9, it did so. SDCL 3-16-10 deals with a prohibition on retaliation for reporting of a public official's misuse of public funds. That statute allows an aggrieved employee to file a grievance with the appropriate governmental entity. It concludes by stating, "if no grievance process exists, a civil action may be filed in circuit court." If the legislature had intended to allow a civil court action to be filed in connection with a claim under SDCL 3-16-9, it could have specifically said so. If the legislature had wanted plaintiffs to be given the option of filing with the Civil Service Commission or in circuit court, it could have said that also.

However, by only referencing the Civil Service Commission, it can hardly be argued that the legislature meant to also allow claims to be filed in circuit court. If that was the case, the reference to the Civil Service Commission would be mere surplusage. "[I]t is presumed that the legislature does not intend to insert surplusage in its enactments and, where possible, the law must be construed to give effect to all of its provisions." *U.S. West Communications, Inc. v. Public Utilities Commission of the State of South Dakota*, 505 N.W.2d 115, 123 (S.D. 1993). *See also Maynard v. Heeren,* 1997 S.D. 60, ¶ 14, 563 N.W.2d 830, where the Court stated: "When we interpret a statute or court rule, '[n]o wordage should be found to be surplus. No provision can be left without meaning. If possible, effect should be given to every part and every word.'" (quoting *Cummings v. Mickelson*, 495 N.W.2d 493, 500 (S.D. 1993)).

It must be assumed the legislature had a reason for including the provision concerning the Civil Service Commission. The statute makes it clear that the reason was because the legislature's limited grant of sovereign immunity provided only for relief to initially be pursued through the Civil Service Commission. Because Plaintiff failed to pursue relief through the Civil Service Commission, the trial court properly granted the Motion to Dismiss.

PLAINTIFF'S ARGUMENT CONCERNING FUTILITY OF THE FILING OF A GRIEVANCE WITH THE CIVIL SERVICE COMMISSION SHOULD BE REJECTED BECAUSE PLAINTIFF FAILED TO FULLY PRESENT THAT ARGUMENT TO THE CIRCUIT COURT.

Plaintiff attempts to avoid the clear language of SDCL 3-16-9 by arguing that a claim with the Civil Service Commission would have been futile and, therefore, she could immediately go to circuit court. (PB 20). Plaintiff bases her argument on language in SDCL 3-6D-15, which indicates an aggrieved party must first exhaust a departmental

grievance procedure before filing a claim with the Civil Service Commission. (PB 18-19).[3]

The Court should not even consider Plaintiff's argument regarding the futility of pursuing relief with the Civil Service Commission because that issue was not fully addressed at the trial court level. Plaintiff claims she did not have an opportunity to brief the issue below. (PB 22). The whistleblower statute was first raised by Plaintiff in her Brief in Opposition to Defendants' Motion to Dismiss. (CI 42). Plaintiff quoted the statute in its entirety, including the portion regarding the requirement of filing a grievance with the Civil Service Commission. *Id.* at p. 2. Plaintiff said nothing in that Brief about the futility of pursuing a claim under SDCL 3-6D-22. In oral argument before the trial court, Plaintiff's counsel stated that there was no grievance process available through the Civil Service Commission and that such a proceeding would be futile. (App 008, 012). Plaintiff, however, provided the trial court with no authority concerning that claim. Plaintiff did not ask the trial court for permission to do any supplemental briefing regarding the issue.

This Court "has said on countless occasions that an issue may not be raised for the first time on appeal." *Long v. State*, 2017 S.D. 79, ¶ 19, 904 N.W.2d 502 (quoting *Mortweet v. Eliason*, 335 N.W.2d 812, 813 (S.D. 1983)). In *Kreisers, Inc. v. First Dakota Title Ltd. Partnership*, 2014 S.D. 56, ¶ 46, 852 N.W.2d 413, the Court stated: "After review of the record, it is does not appear that Kreisers fully presented this argument before the circuit court. Because the circuit court and First Dakota did not have

[3] Plaintiff also claims that the Civil Service Commission statutory scheme does not allow certain employees to seek relief under SDCL 3-6-22. (PB 13-14). That may be an argument for another day but is not applicable to this case since there is no claim Plaintiff is barred from seeking relief under the terms of SDCL 3-6D-4.

an opportunity to fully address and consider the application of the tax benefit rule, we decline to reach it here." The same reasoning is applicable to this case. Plaintiff's argument concerning futility was not fully addressed before the trial court. As such, it should not be considered by this Court. Plaintiff attempts to get around this rule by citing *State v. Chant*, 2014 S.D. 77, 856 N.W.2d 167, which held that the Court has the discretion to ignore the general rule "when faced with a compelling case." *Id.* at ¶ 7. In *Chant*, the case involved the ability of a defendant to collaterally attack a prior conviction for enhancement purposes. This was deemed to be a significant enough constitutional issue for the Court to ignore the general rule. This case does not raise an issue similar to what was involved in *Chant*.

The *Chant* case relied upon the decision in *Sharp v. Sharp*, 422 N.W.2d 443 (S.D. 1988). In that case, the Court declined to address a constitutional issue that was raised for the first time on appeal. In doing so, the Court commented: "While this is an issue of substantial importance, this is not a matter of existing emergency." *Id.* at 446. Likewise, the argument raised by Plaintiff is not one of "existing emergency." As such, the general rule should be applied and Plaintiff's argument concerning futility should be rejected.

RELIEF FOR A WHISTLEBLOWER IS AVAILABLE THROUGH THE CIVIL SERVICE COMMISSION.

Even if the Court decides to consider Plaintiff's futility argument, it should be rejected because South Dakota law provides a remedy for an alleged whistleblower through the Civil Service Commission. Plaintiff's argument is based on the fact SDCL 3-6D-15 references the need to pursue a departmental grievance procedure before filing a claim with the Civil Service Commission. First of all, there is no evidence in the record one way or the other as to whether Plaintiff had a departmental grievance procedure

available to her. That is of no consequence since Plaintiff misreads the statutory scheme implemented by the legislature.

SDCL 3-16-9 specifically refers to a grievance with the Civil Service Commission pursuant to SDCL 3-6D-22. Similar language can be found in SDCL 1-56-12, which states: "Pursuant to § 3-6D-22, an employee may file a grievance with the Civil Service Commission if the employee believes that there has been retaliation because of reporting a violation of state law." SDCL 3-6D-22 states:

> An employee may file a grievance with the Civil Service Commission if the employee believes that there has been retaliation because of reporting a violation of state law through the chain of command of the employee's department, to the attorney general's office, the State Government Accountability Board, or because the employee has filed a suggestion pursuant to this section

Under Plaintiff's argument, these statutes are meaningless.

By directly linking SDCL 3-16-9 to SDCL 3-6D-22, the legislature did not seek to create a new judicial cause of action against the state. It merely added the complained of conduct in SDCL 3-16-9 to the SDCL 3-6D-22 process.[4] SDCL 3-6D-15 provides that the process is subject to judicial review pursuant to Chapter 1-26. The available remedy under the administrative process includes reinstatement, back pay, back benefits or placement in a comparable position. *See* SDCL 3-6D-17. SDCL 3-16-9 does not create a direct cause of action against defendants in state court. It creates an administrative remedy. The creation of an administrative remedy is not an absolute waiver of sovereign immunity subjecting the state to direct suits in circuit court.

The legislature clearly intended for the Civil Service Commission to have jurisdiction over this type of grievance. Without citing any authority, Plaintiff concludes

[4] The same can be said for SDCL 1-56-12.

that the provision in SDCL 3-6D-15 concerning exhaustion of a departmental grievance procedure creates a situation where an aggrieved party has no means to seek relief.

Plaintiff's argument fails to read SDCL 3-6D-15 and 3-16-9 *in pari materia*:

> The object of the rule of pari materia is to ascertain and carry into effect the intention of the legislature. It proceeds upon the supposition that the several statutes were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. For purposes of determining legislative intent, we must assume that the legislature in enacting the provision has in mind previously enacted statutes relating to the same subject matter. As a result, the provision should be read, if possible, in accord with the legislative policy embodied in those prior statutes.

M.B. v. Konenkamp, 523 N.W.2d 94, 97-98 (S.D. 1994) (quoting *State v. Chaney*, 261 N.W.2d 674, 676 (S.D. 1978)). *See also State v. Moss*, 2008 S.D. 64, ¶ 35, 754 N.W.2d 626; *Lewis and Clark Rural Water System, Inc. v. Seeba*, 2006 S.D. 7, ¶ 15, 709 N.W.2d 824. When the statutes are read together, SDCL 3-16-9 can reasonably be interpreted to modify the introductory sentence of SDCL 3-6D-15 by eliminating the need for the departmental grievance procedure if one does not exist.

Another canon of construction is that terms of a statute relating to a particular subject will prevail over the general terms of another statute. *In re Wintersteen Revocable Trust Agreement*, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785. Furthermore, a more recent statute supersedes an older statute. *In the Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 19, 914 N.W.2d 550. In this case, SDCL 3-16-9, the newer statute, is more specific to the whistleblower issue. SDCL 3-6D-15 is a general statute affording a hearing before the Commission. This supports the proposition that where a claim is pursued under SDCL 3-6D-22, a departmental grievance is not required.

Plaintiff's argument essentially makes SDCL 3-6D-22 totally ineffective. This would also be true for the language in both SDCL 3-16-9 and SDCL 1-56-12 which references SDCL 3-6D-22. Such an interpretation would create an absurd result. It would mean that the legislature established the right to file a grievance but did not provide the right to a hearing. This Court has emphasized the need to avoid absurd results and harmonize statutes.

> We have said that legislative "intent must be determined from the statute as a whole, as well as enactments relating to the same subject." *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17 (citing *U.S. West Communications, Inc. v. Public Util. Comm'n,* 505 N.W.2d 115, 122-23 (S.D. 1993) (citations omitted)). "There are instances when it is necessary to look beyond the express language of a statute in determining legislative intent. Most notably . . . if confining ourselves to the express language would produce an absurd result." *MGA Ins. Co., Inc. v. Goodsell*, 2005 S.D. 118, ¶ 17, 707 N.W.2d 483, 487 (citations omitted). "We presume that the Legislature intended no absurd or unreasonable result." *Moeller v. Weber*, 2004 S.D. 110, ¶ 46, 689 N.W.2d 1, 16. "[W]here statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them 'harmonious and workable.'" *Wiersma v. Maple Leaf Farms*, 1996 S.D. 16, ¶ 4, 543 N.W.2d 787, 789 (citations omitted). "Furthermore, '[w]e should not adopt an interpretation of a statute that renders the statute meaningless when the Legislature obviously passed it for a reason.'" *Zubke v. Melrose Tp.,* 2007 S.D. 43, ¶ 14, 731 N.W.2d 918, 922.

Schafer v. Shopko Stores, Inc., 2007 S.D. 116, ¶ 7, 741 N.W.2d 758. Plaintiff's argument would result in statutes becoming meaningless. The legislature could not have intended to adopt meaningless statutes. The relief afforded under SDCL 3-16-9 is pursuit of a claim through the Civil Service Commission. Plaintiff failed to do that. Her failure to pursue this administrative remedy resulted in the circuit court lacking jurisdiction.

"Failure to exhaust administrative remedies where required is a jurisdictional defect. This error requires dismissal, because at that point primary jurisdiction rests with the administrative agency and not with the courts." *South Dakota Board of Regents v. Heege*, 428 N.W.2d 535, 539 (S.D. 1988). As such, the circuit court lacked jurisdiction to hear Plaintiff's claim and properly granted the Motion to Dismiss.

Relying on *Johnson v. Kolman*, 412 N.W.2d 109 (S.D. 1987), Plaintiff argues that she was not required to pursue her claim through the Civil Service Commission because her claim was not cognizable by the administrative agency. (PB 19-20). Exhaustion did not apply in the *Johnson* case because the Department of Labor had no authority to deal with the issues raised by the plaintiff. *Id.* at 112. There is no claim in this case that the Civil Service Commission did not have authority to deal with the issues raised by Plaintiff.

This Court has set forth five exceptions to the requirement of exhaustion of administrative remedies.

> (1) Exhaustion is not required where a person, through no fault of his own, does not discover the purported wrong until after the time for application of administrative relief. *Lick v. Dahl*, 285 N.W.2d 594 (S.D. 1979).
>
> (2) Exhaustion is not required where the agency fails to act. *Weltz v. Board of Education of Scotland*, 329 N.W.2d 131 (S.D. 1983) (footnote 1).
>
> (3) Exhaustion is not required where the agency does not have jurisdiction over the subject matter of the parties. *Johnson, supra* at 112.
>
> (4) Exhaustion is not required where the board having appropriate jurisdiction has improperly made a decision prior to a hearing or is so biased that a fair

and impartial hearing cannot be had. *Mordhorst v. Egert*, 88 S.D. 527, 223 N.W.2d 501 (S.D. 1974).

(5) Exhaustion is not required in extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief. *Mordhorst, supra*; *Johnson, supra*.

Heege, 428 N.W.2d at 529. None of these exceptions apply to this case. Plaintiff's argument based on the *Johnson* case should be rejected.

Plaintiff also argues that the failure to exhaust administrative remedies is an affirmative defense and inappropriate grounds to dismiss a case under SDCL 15-6-12(b)(5). (PB 8). First of all, the dismissal was based on lack of jurisdiction under SDCL 15-6-12(b)(1). (App 001). Furthermore, there is no prohibition against claiming failure to exhaust administrative remedies in connection with a motion to dismiss. *See Mann*, 2008 WL 4360914, * 2. The trial court properly determined that Plaintiff's failure to exhaust her administrative remedies by filing a claim with the Civil Service Commission provided grounds for dismissal of her Complaint.

2. THE TRIAL COURT CORRECTLY DETERMINED THAT PLAINTIFF'S CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS ARE BARRED BY SOVEREIGN IMMUNITY.

THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO DISMISSAL OF PLAINTIFF'S COMPLAINT BECAUSE THE ACTS THEY ALLEGEDLY COMMITTED WERE DONE IN THEIR OFFICIAL CAPACITIES.[5]

The body of Plaintiff's Complaint does not specify whether Mr. Reed and Ms. Leinwall are being sued individually or in their official capacities. The caption of the

[5] Although the trial court did not cite this as a reason for its decision, this Court has the authority to affirm a lower court on grounds other than those cited by the lower court. *See Gleason v. Peters,* 1997 S.D. 102, ¶ 6, 568 N.W.2d 482. ("[W]e may affirm the trial court if any reason exists to do so."); *In re C.W.*, 1997 S.D. 57, ¶ 14, 562 N.W.2d 903. ("We will withhold the judgment of the trial court if it is right for any reason.").

Complaint states: "Jeremy Reed, and Francesca Leinwall, individually." (CI 4). A state employee sued in an official capacity shares the state's immunity. *Hansen*, 1998 S.D. 109, ¶ 16. "The defense of sovereign immunity may not be evaded simply by suing officers in their individual capacity." *Wright v. Prairie Chicken*, 1998 S.D. 46, ¶ 12, 579 N.W.2d 7. In *Bego v. Gordon*, 407 N.W.2d 801, 806 (S.D. 1987), this Court held that a party's pleadings may be considered to determine whether the allegedly wrongful acts were committed in an official or individual capacity. This point was emphasized by the court in *Lewis v. Kelchner*, 658 F. Supp. 358, 361-62 (M.D. Pa. 1986), wherein it was stated:

> [T]he plaintiff's complaint is brought against defendant Kelchner both as an individual and as President of Mansfield. However, plaintiff's allegations against defendant Kelchner only attack the defendant's actions as an official of Mansfield. The plaintiff does not once allege any wrongdoing on the part of Kelchner as an individual and in a nonofficial capacity. Since the complaint is void of any violations of plaintiff's rights by Kelchner as an individual, there is no genuine issue of material fact in this respect. Therefore, summary judgment shall be granted in favor of defendant Kelchner as an individual.

Paragraph 10 of Plaintiff's Complaint alleges that Ms. Leinwall was Plaintiff's direct supervisor. Paragraph 11 alleges Mr. Reed is Ms. Leinwall's direct supervisor. Without identifying anyone, paragraph 14 alleges that Plaintiff raised an issue concerning unlicensed counselors with her supervisors and legal counsel for NSU. Paragraph 18 alleges Ms. Leinwall informed Plaintiff she could not mandate that employees obtain a license because it was not required by their job descriptions. Paragraph 22 states that Plaintiff reported to her supervisors her concerns about patient confidentiality. Paragraph 27 alleges that during her employment, Plaintiff reported to and was supervised by Ms.

Leinwall and Mr. Reed. Finally, paragraph 30 states that Plaintiff received a termination letter from Ms. Leinwall on December 19, 2017. There is nothing else in Plaintiff's Complaint that specifically refers to Leinwall, Reed or Plaintiff's "supervisors."

The allegations in the Complaint are directed toward the actions of Ms. Leinwall and Mr. Reed in their official capacities. Certainly, the letter from Ms. Leinwall to Plaintiff terminating her employment was done in Leinwall's capacity as the Associate Vice President for Student Affairs. As far as Mr. Reed is concerned, the Complaint is unclear as to what it is Plaintiff claims he did wrong, other than supervising Ms. Leinwall. Such supervision would be carried out in his official capacity. Despite the fact that the caption of the Complaint indicates Ms. Leinwall and Mr. Reed are being sued individually, the allegations in the Complaint do not bear that out. Because the actions alleged in the Complaint were done in the individual Defendants' official capacities, they are also protected by sovereign immunity and entitled to dismissal.

THE ACTIONS OF THE INDIVIDUAL DEFENDANTS WERE DISCRETIONARY, THEREBY ENTITLING THEM TO DISMISSAL OF PLAINTIFF'S COMPLAINT.

Even if the individual Defendants are deemed to have been properly sued individually, the trial court properly granted their Motion to Dismiss because they were engaged in the performance of discretionary acts. State employees sued in their individual capacity are immune from suit when they perform discretionary functions. *Truman*, 2009 S.D. 8, ¶ 20; *Sisney v. Reisch*, 2008 S.D. 72, ¶ 12, 754 N.W.2d 813; *King v. Landguth*, 2007 S.D. 2, ¶ 11, 726 N.W.2d 603. Sovereign immunity does not apply if an employee is performing a ministerial function. *King*, 2007 S.D. 2, ¶ 10.

> [A] ministerial act is defined as *absolute, certain, and imperative*, involving merely the execution of a specific duty arising from fixed designated facts or the execution of

> a set task imposed by a law prescribing and defining the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple, definite duty arising under and because of stated conditions and imposed by law. A ministerial act envisions direct adherence to a governing rule or standard with a compulsory result. It is performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action. In short, once it is determined that the act should be performed, subsequent duties may be considered ministerial. If there is a *readily ascertainable standard* by which the action of the government servant may be measured, whether that standard is written or the product of experience, it is not within the discretionary function exception.

Hansen, 1998 S.D. 109, ¶ 23 (quoting 57 Am.Jur. 2d *Municipal, County, School & State Tort Liability*, § 120, at 132-33 (1988)) (emphasis in original). In defining ministerial, the *Hansen* decision also referenced the PEPL Memorandum of Liability Coverage which defines a ministerial act as "an act or task that involves obedience to instructions, *but demands no special discretion, judgment or skill*." *Id.* at ¶ 16[6] (emphasis in original).

Whether an act is discretionary or ministerial is a question of law. *Adrian*, 2011 S.D. 84, ¶ 8; *Truman*, 2009 S.D. 8, ¶ 34; *Hansen*, 1998 S.D. 109, ¶ 18. "Whether a state employee who is sued in an individual capacity is entitled to immunity depends upon 'the function performed by the employee.'" *Brown Eyes v. South Dakota Department of Social Services*, 2001 S.D. 81, ¶ 8, 630 N.W.2d 501 (quoting *Kruger v. Wilson*, 325 N.W.2d 851, 853 (S.D. 1982)). Applying a liberal reading to Plaintiff's Complaint, the function performed by the individually named employees in this case was to terminate Plaintiff's employment after she complained about the manner in which NSU's counseling office was being run. A decision to terminate Plaintiff's employment did not involve the mere execution of a specific duty. That decision involved the exercise of

[6] *See* Memorandum of Liability Coverage ¶ III 6. (CI 16).

discretion and cannot be classified as a ministerial act. This provides still another reason for the granting of the Motion to Dismiss in favor of Defendants Leinwall and Reed.

PLAINTIFF'S COMPLAINT FAILS TO CONTAIN FACTS TO SUPPORT A VIOLATION OF SDCL 3-16-9.

Plaintiff attempts to avoid the discretionary function exception by arguing that it does not immunize intentional torts. (PB 25). The problem with Plaintiff's argument is that her Complaint does not set forth facts to support a claim of an intentional tort under SDCL 3-16-9.

The whistleblower statute prohibits adverse employment actions against an employee "because the employee reports in good faith to an appropriate authority a violation or suspected violation of a law or rule, an abuse of funds or abuse of authority, or substantial and specific danger to public health or safety . . . ." Plaintiff's Complaint alleges three subjects about which she claims she raised concerns. The first is that NSU allowed unlicensed counselors to provide counseling services. (CI 4, ¶¶ 13-18). Secondly, Plaintiff states she complained about students who worked for the counseling center violating professional confidentiality because they had access to patient records and answered the phone to schedule appointments. (*Id.* at ¶¶ 19-24). Finally, Plaintiff alleges she raised concerns about the counseling center's plans to hire a counseling center client as an employee. (*Id.* at ¶¶ 25-26).

Paragraph 14 of Plaintiff's Complaint alleges that she raised the issue of unlicensed individuals providing counseling services with "her supervisors and with legal counsel for NSU." She does not identify who the "supervisors" were but presumably one of them would have been Ms. Leinwall since paragraph 18 alleges Leinwall informed Plaintiff she could not mandate that employees obtain a license. There is nothing in the

Complaint with regard to Mr. Reed having taken any action concerning the unlicensed counselors situation.

In the portion of her Complaint dealing with confidentiality, Plaintiff again states that she reported her concerns to "her supervisors," without identifying who those supervisors were. (*Id.* at ¶ 22). Paragraph 23 complains about resistance from a secretary. There is no allegation that either Ms. Leinwall or Mr. Reed condoned the alleged resistance from the secretary.

Finally, the claims involving the hiring of a counseling center employee makes no reference to the individual Defendants. Paragraph 26 alleges that Plaintiff received resistance from the secretary and the Disability Services Director, neither of whom is a named Defendant.

The Complaint then goes on to allege that, following a meeting on December 18, 2017, Plaintiff received a termination letter from Ms. Leinwall the following day. (*Id.* at ¶¶ 28-30). It is significant to note that the Complaint does not specifically allege that Mr. Reed did anything. Paragraph 11 identifies him as Ms. Leinwall's direct supervisor. Paragraph 27 states that Plaintiff was supervised by both Ms. Leinwall and Mr. Reed. As noted above, in a couple of instances, Plaintiff alleges she reported complaints to "her supervisors." Mr. Reed is not identified as one of the supervisors to whom a report was actually made. More importantly, there are no claims that Mr. Reed attended the December 18, 2017 meeting or that he had anything to do with the termination letter. The Complaint simply cannot be read to assert an intentional tort claim against Mr. Reed. Although there are more allegations against Ms. Leinwall, a fair reading of the Complaint

and SDCL 3-16-9 also leads to the conclusion that the Complaint fails to allege an intentional tort against Ms. Leinwall.

For SDCL 3-16-9 to apply, the report must concern a violation or suspected violation of a law or rule, an abuse of funds or abuse of authority or a specific danger to public health and safety. None of Plaintiff's allegations involve a claim about abuse of funds or abuse of authority or make an allegation concerning danger to public health or safety. Therefore, the statute can only apply if Plaintiff reported a violation of law or a rule. There is no allegation in the Complaint that allowing students to answer the phone and potentially have access to patient records violates any law or rule. There is also no allegation that the hiring of a client as an employee violates any law or rule.

The only claimed violation of law is the allegation concerning unlicensed individuals being allowed to provide counseling services. In paragraph 14 of her Complaint, Plaintiff states that unnamed supervisors and legal counsel for NSU told her the practice was legal. In paragraph 16, Plaintiff alleges that the South Dakota Counselors and Marriage and Family Therapist Examiners Licensing Board told her that practicing without a license is not permitted under South Dakota law. That simply is not the case. SDCL Chapter 36-32 sets forth the rules for the licensing of professional counselors in South Dakota. SDCL 36-32-12(2) specifically exempts persons "employed by a school, college, university, or other institution of higher learning" from the licensing requirements.

Plaintiff's argument relies on cases where there were clear allegations of intentional torts. *Bego* involved allegations of wrongful detention, assault and defamation. 407 N.W.2d at 808. *Hart v. Miller*, 2000 S.D. 53, 609 N.W.2d 138, contains

claims of false imprisonment and invasion of privacy. *Id.* at ¶ 38. In *Swedlund v. Foster*, 2003 S.D. 8, 657 N.W.2d 39, the plaintiff made allegations of assault and battery, intentional infliction of emotional distress, false arrest, false imprisonment and trespass. *Id.* at ¶ 39. No such intentional torts are alleged in this case. Plaintiff's attempt to argue that she sufficiently alleged an intentional tort for retaliation in violation of SDCL 3-16-9 is simply not supported by her Complaint. The Complaint itself seems to recognize this when paragraph 1 states Plaintiff was discharged because she reported "troubling practices." It is certainly possible that the practices about which Plaintiff complained were "troubling" to her but they were not a violation of law which would bring them within the conduct prohibited by SDCL 3-16-9. Because SDCL 3-16-9 does not apply to Plaintiff's allegations, it obviously cannot be used as the basis for a waiver of sovereign immunity. Judge Myren properly granted the Motion to Dismiss with regard to the allegations against Ms. Leinwall and Mr. Reed.

CONCLUSION

The language of SDCL 3-16-9 is not ambiguous. It unequivocally states that the relief available to a person making a claim concerning a violation of SDCL 3-16-9 is to file a grievance with the Civil Service Commission pursuant to SDCL 3-6D-22. Plaintiff did not do this. As this Court stated in *Montgomery*, "Montgomery never filed a charge with the Division, so the trial court was without jurisdiction to hear the issue." 531 N.W.2d at 580. That same reasoning applies here.

Furthermore, Plaintiffs' attempts to claim that the dismissal of Defendants Leinwall and Reed was improper because they allegedly committed intentional torts is unavailing

based on the allegations contained in the Complaint. For all the reasons set forth herein, the trial court's decision to grant Defendants' motion to dismiss should be affirmed.

Dated this 13th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 6,009 words and 31,035 characters (not including spaces).

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellees, hereby certifies that on the 13th day of November, 2018, a true and correct copy of the foregoing APPELLEES' BRIEF was served by electronic transmission on the following:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO.: 28683

SARA HALLBERG,

Plaintiff/Appellant,

vs.

SOUTH DAKOTA BOARD OF REGENTS, JEREMY REED, and FRANCESCA LEINWALL, individually,

Defendants/Appellees,

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE SCOTT P. MYREN, PRESIDING JUDGE

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED JULY 31, 2018

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I. A LIMITED WAIVER OF SOVEREIGN IMMUNITY IS NOT AN EMPTY GESTURE – IT MUST CONFER A REMEDY UPON THE CLASS OF AGGRIEVED PARTIES TO WHOM IT APPLIES.

Defendants now acknowledge that SDCL §3-16-9 is, at minimum, a limited waiver of sovereign immunity. But their argument ignores the consequences of even a limited waiver in the context of state employee whistleblower claims. Defendants take issue with Hallberg's textual interpretation of SDCL §3-16-9, but fail to engage the substance of Hallberg's position.

Defendants' reading rests on a hodge-podge of interpretive principles, which are deployed to substantiate conclusory assertions that stand at a far remove from the actual statutory language. Hallberg's interpretation is the only interpretation that faithfully reads the relevant statutes. Because no administrative process exists for an aggrieved whistleblower in her position, a judicial remedy must be recognized. The Circuit Court's decision erred as a matter of law in holding otherwise.

A. The Civil Service Commission cannot be the exclusive remedy for state employee whistleblowers because it is unavailable to a large swath of state employees.

Under Defendants' interpretation, a person with a colorable whistleblower claim under SDCL §3-16-9 "may either file a claim with the Civil Service Commission or decide to do nothing." Appellee's Brief, at 6. They rely on *Montgomery v. Big Thunder Gold Mine, Inc.*, 531 N.W.2d 577 (S.D. 1995) and *Mann v. Tyson Fresh Meats, Inc.*, 2008 WL 4360914 (D.S.D. 2008). Both cases involve civil rights claims arising under SDCL Chapter 20-13, and each held that exhaustion at the administrative level was a

prerequisite to judicial review and an aggrieved party seeking relief could not begin in Circuit Court.

The administrative relief under SDCL Chapter 20-13 is universal and available to all aggrieved persons, whereas the administrative relief afforded under SDCL §3-16-9 is limited to state employee whistleblowers who are covered under Chapter 3-6D-4. When the Legislature amended SDCL Chapter 3-16 to add the whistleblower statute, statutes were already in place addressing the circumstances under which relief may be sought from the Civil Service Commission. Importantly, the same pre-existing statutory regime defined *who* may seek such relief.

Section 3-6D-4 is entitled "Employees covered by chapter – Exemptions" and it defines the class of employees who may file with the Civil Service Commission, and a subsection therein defines those employees who are expressly excluded from that process, including "directors and administrative-policy making positions" of the Board of Regents.

When the Legislature adopted SDCL §3-16-9, it is presumed to know and understand that certain employees were categorically barred from seeking relief from the Commission. This is a well-settled principle of statutory interpretation. *See, e.g., United States v. Bailey,* 34 U.S. 238, 256, 9 L.Ed. 113 (1835) ("Congress must be presumed to have legislated under this known state of laws[.]") In passing SDCL §3-16-9, the Legislature provided a remedy for a specific type of violation – retaliation against all state whistleblower employees. But it did not explicitly expand the scope of employees who may enlist the procedures of the Civil Service Commission to include those who otherwise would be excluded.

The limiting effect of SDCL § 3-6D-4 is a centerpiece of Hallberg's interpretation of SDCL §3-16-9. SDCL § 3-6D-4 defines both who is eligible for relief from the Civil Service Commission and who is not, and it thereby serves as the gatekeeper statute. Yet the statute is relegated to a footnote in Defendants' briefing, with the assertion that Hallberg's claim "may be an argument for another day . . . since there is no claim Plaintiff is barred from seeking relief under the terms of SDCL 3-6D-4." Appellee's Brief, at 8 n.3. This statement is fatally flawed in two ways.

First, the Civil Service Commission is empowered to adjudicate certain disputes over certain employees. To date, the Commission has not promulgated rules and a process to hear any whistleblower grievance, which it is authorized and required to do under SDCL § 3-6D-14. Until the Commission establishes an administrative framework, there is no means by which an otherwise eligible state whistleblower may vindicate his or her rights.

Second, even assuming that rules had been promulgated, that does not expand the scope of the Commission's adjudicative authority. The Legislature has not conferred upon the Civil Service Commission the *power* to adjudicate disputes involving employees who are not covered by its terms. Defendants never provide an explanation as to why employees who are *per se* excluded from that administrative process may nonetheless invoke it. And the gratuitous comment regarding Hallberg is unearned. She was hired as the Director of Counseling Services. *See* Complaint, at ¶8. As currently postured, it is unclear whether she falls under the exclusion set out at SDCL § 3-6D-4(5).

Accordingly, the Defendants' reading of SDCL §3-16-9 is both incomplete and stripped of meaningful context. Even if this Court were to apply the reasoning of

Montgomery to the statutory language of SDCL §3-16-9, there remain some state employees who are left without a remedy because they are excluded from the Civil Service Commission's administrative process. Such employees must have recourse to relief by filing suit in Circuit Court, or else the protection afforded to whistleblower employees is meaningless. And, as will be shown below, interpreting SDCL §3-16-9 to waive sovereign immunity but provide a remedy in name only is a violation of South Dakota Constitution's guarantee of access to the courts.

B. Because there exists no administrative procedure, exhaustion is futile and Plaintiff is entitled to bring her action directly in Circuit Court.

In this case, employees who could theoretically gain access to the Civil Service Commission stand on no better footing than those who are excluded from that administrative process. At present, *no* state employee has a remedy if subjected to retaliation for whistleblowing, because there exists no defined procedure to seek relief from the Civil Service Commission for a whistleblowing violation under Chapter 3-6D. Accordingly, even if the employee is part of the class who may lawfully seek such relief as a general matter, the statute is effectively a dead letter for any state employee whistleblower who seeks relief in the face of retaliation.

Defendants' response to this argument is two-fold: first they seek to circumvent the issue by claiming that Hallberg is not entitled to establish that the administrative remedy is meaningless because she did not raise that argument below. The waiver argument is a red herring, as Hallberg had no opportunity to raise the argument in response to Defendants' initial claim that sovereign immunity required dismissal of the claim and did in fact raise the issue after Defendants presented new arguments in their reply brief.

Second, Defendants cherry-pick canons of construction to create out of whole cloth a path by which state whistleblower employees may grieve issues to the Civil Service Commission. This reading has the virtue of reaching a result that the Defendants want to reach, but at a cost of re-writing what the statutes on the books say and creating out of thin air an administrative procedure for the Civil Service Commission to follow.

1. *Defendants' waiver argument is baseless.*

Defendants seek to avoid addressing the lack of an administrative process and go so far as to claim that Plaintiff cannot establish futility because it was not sufficiently briefed below. But the issue was raised below during oral argument, in response to a ground for dismissal raised by the Court in oral argument. Defendants maintain that Hallberg, as an appellant, is precluded from establishing why the Court erred on a matter of law in deciding a Motion to Dismiss on grounds that Defendants had not raised or argued in their opening brief. Defendant's position is not only contrary to the law of waiver, but fundamentally unfair, given the shape-shifting nature of Defendants' position below and now on appeal.

The Defendants' Brief in Support of Motion to Dismiss was six pages and set out three principal arguments. The first argument, consisting of 2 pages, maintained that the Board of Regents was immune from suit "[b]ecause the PEPL fund provides no coverage for Plaintiff's claim." (AR00018). The remainder of the brief advanced arguments for dismissal of the two individual defendants.

In the Reply Brief, Defendants sang a very different tune. For the first time, Defendants argued that "the allegations in Plaintiff's Complaint do not fall within the

terms of SDCL §3-16-9." (AR00049). Rather than claim an immunity from suit, this claim attacked the legal sufficiency of the pleadings. Not until Defendants had the last word did they suggest that the facts alleged in the claim, if taken as true, failed to state a cognizable claim. Defendants also argued, for the first time, that even if sovereign immunity had been waived, it was a limited waiver, and the only remedy available was to file a grievance with the Civil Service Commission. (AR0051-52) These new arguments were not about whether sovereign immunity had been waived, the putative basis of the Motion, but were instead efforts to convince the Court to dismiss the Complaint even if it accepted Plaintiff's rebuttal as to why sovereign immunity had been waived.

At oral argument, Plaintiff's counsel began by objecting to Defendants' effort to raise new arguments in the reply brief and then offered to address those issues if the Court wanted. Appellant's Index, at 005 (HT at 5:2-7). Counsel outlined that exhaustion is an affirmative defense and further explained that even if it applied, an exception existed because the administrative process did not exist and therefore could not be exhausted. The following exchange ensued:

> THE COURT: If she had filed a grievance, what would be her, what would be the, I guess, remedy that the Civil Service Commission could give her?
>
> MS. STRATTON: Our position is that although the legislature has included that provision, there really isn't a grievance process that the Civil Service Commission has put
> into place. That has lagged behind and hasn't followed. So there really isn't anything there to provide a process and a remedy which is why we think that there is an exception to the
> exhaustion; that the process would be futile and there is no reason that she needs to go through a process that doesn't exist.
>
> THE COURT: Okay. What else?

APPENDIX008 (HT 7:2-14). Ms. Stratton returned to this theme once more and offered to provide further detail at the close of her rebuttal, but the Court was not interested.

> THE COURT: Okay. What else?
> MS. STRATTON: Unless the Court would like us to address, you know, whether the claims fall within the terms of 3-16-9 or any other questions about the administrative remedy part, we would just ask that the Court deny the motion to dismiss
> today.
> THE COURT: Mr. Rasmussen, what else?

APPENDIX011 (HT 10:18-24). Based on the foregoing, the allegation that Plaintiff is barred from addressing futility because it was not presented below is factually wrong. The argument may have been ignored by the Court, but that is hardly a basis for claiming that it was waived.

In the same vein, Defendants' waiver argument misses the forest for the trees: Plaintiff did not have occasion to fully present the argument below, because Defendants never raised exhaustion as a basis for dismissal and because failure to exhaust is an affirmative defense. When Hallberg took the initiative at oral argument to raise the futility argument, the Circuit Court rejected it and went so far as to decide that it lacked jurisdiction, even while confessing that it did not know what remedies were available in front of the Civil Service Commission. APPENDIX019 (HT, 17:15-19, 18:5-10).

Defendants are in no position to invoke the doctrine of waiver. On appeal, they maintain that "failure to pursue this administrative remedy resulted in the circuit court lacking jurisdiction." Appellee Brief, at 12. This was never a basis for their Motion to Dismiss, even in the Reply Brief, when they raised new arguments not previously heard. Denying Hallberg the opportunity to respond to new arguments is not the function of the waiver doctrine, especially when her counsel raised the issue with the Court at oral

argument and, in response, was told: "OK, what else?" and at the end of her argument, again asked the Court if it would like to hear more on that issue and it did not. The doctrine of waiver has no application here.

2. *Where a putative administrative remedy is unavailable because no administrative process exists, an aggrieved claimant is entitled to commence a civil action to vindicate her rights and seek a remedy.*

Defendants are unable to identify a statute or administrative rule that provides a pathway for a state whistleblower employee subjected to retaliation to be heard. The best that Defendants muster is the claim that the linkage of SDCL §3-16-9 and §3-6D-22 "added the complained of conduct in SDCL 3-16-9 to the SDCL 3-6D-22 process." Appellee Brief, at 10. But this is a misnomer – there is no such thing as a SDCL 3-6D-22 process, and Defendants assume what they have the burden of proving in suggesting that such a process exists.

SDCL 3-6D-22 identifies a substantive right to file a grievance in response to retaliation for certain whistleblowing activities, but the process to pursue that right must be found elsewhere. Hallberg established that the Civil Service Commission has not promulgated rules or otherwise adopted a procedure under ARSD 55:10 for whistleblower grievances. Defendants ignore this issue entirely in their responsive briefing. Instead, the only candidate they cite is SDCL §3-6D-15. And here Defendants' argument gets particularly slippery.

First, they maintain that SDCL §3-16-9 must be read in *pari materia* with SDCL §3-6D-15, which presumably means that SDCL §3-16-9 should be read with an understanding that SDCL §3-6D-15 was on the books at the time that the Legislature passed SDCL §3-16-9. But Defendants make a far more grandiose assertion: "When the

statutes are read together," they claim, "SDCL 3-16-9 can reasonably be interpreted to modify the introductory sentence of SDCL 3-6D-15 by eliminating the need for the departmental grievance procedure if one does not exist." Appellee's Brief, at 11. As will be shown, this claim misreads SDCL §3-16-9 and ignores the administrative rules that have been put into place. At its most basic level, Defendants' argument calls on this Court to write a new law, rather than interpret the one that is on the books.

First, nothing in SDCL §3-16-9 suggests that it was intended to modify §3-6D-15, nor is there grounds to claim that it modifies the introductory sentence of the latter statute. The first sentence of § 3-6D-15 states: "If a grievance remains unresolved after exhaustion of a departmental grievance procedure, an employee may demand a hearing before the Civil Service Commission as provided for in contested cases in chapter 1-26." Grammatically, this sentence states a condition that must be satisfied before an employee may request a hearing. The word "after" plainly signals a temporal succession: an aggrieved employee must first invoke and proceed through the departmental grievance procedure before being able to demand a hearing.

By contrast, the function of SDCL §3-16-9 is to broaden the scope of whistleblower protection. It says nothing about procedure, much less contains an express or implied amendment of the prerequisites that must be met before an aggrieved employee may demand a hearing under SDCL Chapter 1-26.[1]

Defendants also err in suggesting that §3-16-9 "eliminates the need for a departmental grievance procedure if one does not exist." That situation never arises. The

[1] Defendants also fail to acknowledge that the Legislature did modify SDCL § 3-6D-15 in 2018 and yet did not change it to state what Defendants claim that it should. See South Dakota Session Laws 2018, Ch. 12, § 4.

Civil Service Commission has promulgated a catch-all appeal procedure that applies if a covered employee's department does not have an approved departmental appeal procedure. *See* ARSD 55:10:08:16. But this catchall provision, taken on its own terms, does not apply to any grievance that arises from whistleblower retaliation – it sets out an appeal procedure for appeals made pursuant to §55:10:08:01 through 05, none of which encompass whistleblower grievances.

Hallberg does not question that the Civil Service Commission has authority to promulgate rules governing grievances arising under §3-16-9 or §3-6D-22, but it has not exercised that authority. This is why Hallberg and all other whistleblower claimants must be permitted to file suit in circuit court: the statute affords some of them a right to file a grievance (others are ineligible under SDCL §3-6D-4), but at present, even that limited right is a path to nowhere. There exists no administrative procedure governing the filing of a grievance on grounds of whistleblower retaliation, nor has the Commission put into place a rule that sets out how to take that grievance to the next step in the administrative process, where a remedy might be obtained.

Defendants' tacit strategy is to read SDCL §3-16-9 as though it can fill a procedural gap in the administrative rules. That strained reading has no textual support and is borne from expediency, not proper application of the canons of statutory interpretation or even a fair reading of the applicable administrative rules that are actually on the books.

Elsewhere in their argument, Defendants invoke SDCL § 3-16-10, which was enacted at the same time as SDCL §3-16-9 and which prohibits retaliation for reporting a public official's misuse of public funds. Subsection 10 provides that "a civil action may

be filed in circuit court" if "no grievance process exists." According to Defendants, the absence of similar language in SDCL §3-16-9 signifies the intent that whistleblower retaliation claims under that section would be limited to the hypothetical relief afforded by the Civil Service Commission.

But, here, too, Defendants' argument pays too little attention to the statutory text: the right to commence a civil action springs into being "if no grievance process exists." Subsection 10 codifies a basic principle of the law governing administrative remedies: if there exists no process to grant relief for violation of a right that has been recognized, then the claimant may seek such relief in court.

The language in SDCL §3-16-10 does not break new ground, but codifies a right that this Court has recognized in its administrative exhaustion jurisprudence. *See, e.g., Weltz v. Bd. of Educ. of Scotland Sch. Dist. No. 4-3 of Bon Homme Cty*., 329 N.W.2d 131, 134 n.1 (S.D. 1983); *Read v. McKennan Hosp*., 2000 SD 66, ¶ 13, 610 N.W.2d 782, 785. Numerous other courts have recognized that a claimant need not exhaust remedies if the process itself does not exist. *See, e.g., Walker v. Southern Ry. Co.,* 385 U.S. 196, 198-99 (1966) (railman not required to exhaust administrative procedures that did not exist at the time his claim accrued); *Panola Land Buyers Ass'n v. Shuman,*762 F.2d 1550, 1556 (11th Cir. 1989) ("Courts will not require exhaustion when the administrative remedy is inadequate because it does not exist . . . "); *Bartholomew Cty. Beverage Co. v. Barco Beverage Corp.,* 524 N.E. 2d 353, 355 (Ind. Ct. App. 1988) (noting that "[t]he doctrine which requires an aggrieved party to exhaust administrative remedies does not apply when an administrative procedure and remedy does not exist or when the remedy is

impossible or fruitless and of no value under the circumstances" and holding that plaintiff was not required to exhaust administrative remedies).

Moreover, the right to seek relief in court where the administrative process affords no remedy is recognized in South Dakota's Constitution: "for such wrongs as are recognized by the laws of the land the courts shall be open and afford a remedy." *Green v. Siegel, Barnett & Schutz,* 1996 S.D. 146, ¶ 13, 557 N.W.2d 396, 400; S.D. Const. Art. VI, § 20. As Hallberg previously established, the Circuit Court's decision effectively relegates her to administrative purgatory that violates the constitutional guarantee to access to the Courts. *See* Appellant's Principal Brief, at 21-22.

Hallberg may very well be an outlier – the Civil Service Commission may spur into action and promulgate rules that cover the type of whistleblower retaliation claim at issue, just as the Legislature may intervene and clarify what process employees excluded under 3-6D-4 are to follow. But at present, Hallberg has a right, but no procedure and no remedy to pursue in the administrative process. Well-established law holds that she is entitled to pursue her claim via a civil action, and this Court should reverse and remand with instructions to the Circuit Court that adhere to that principle.

II. SOVEREIGN IMMUNITY DOES NOT PROTECT AGAINST INTENTIONAL TORTS AND THERE ARE NO GROUNDS TO CARVE OUT AN EXCEPTION TO PROTECT STATE EMPLOYEE SUPERVISORS WHO FIRE A SUBORDINATE IN RETALIATION FOR THE SUBORDINATE'S PROTECTED WHISTLEBLOWING ACTIVITY.

Defendants largely ignore Hallberg's argument that the decision to fire someone in contravention of State law is not protected by sovereign immunity. *See Southern*

California Rapid Transit District v. Superior Court of Los Angeles County, 30 Cal. App 4th 713, 726 (Cal. App. 1994); *Janklow v. Minn. Bd. Of Examiners for Nursing Home Admin.s*, 552 N.W.2d 711, 718 (Minn. 1996). Defendants neither distinguish authority cited by Hallberg for that proposition nor cite dispositive authority in support of their position. This is unsurprising – Hallberg is unaware of any decision holding that a State employee can discharge a subordinate in retaliation for the subordinate's statutorily protected whistleblowing activity and be protected by sovereign immunity because employment decisions are typically discretionary.

Rather than engage the substance of the issue, Defendants cast about for alternative grounds upon which the Circuit Court's ruling may be upheld. Defendants first argue that the individual defendants sued in their individual capacity should be understood to have been sued in their official capacity. This argument is baseless.

When a plaintiff names an official in his individual capacity, the plaintiff is seeking "to impose personal liability upon a government official for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). That is exactly what Hallberg is up to here. Hallberg is suing her supervisors – the individuals she seeks to hold personally responsible for the retaliatory discharge – and has explicitly indicated that they are being sued in their individual capacity. The conclusory claims from the Defendants to the contrary must be rejected.

Defendants devote the remainder of their briefing to challenging the level of detail alleged in Hallberg's Complaint and advocating conclusions that are untenable if its allegations are read in the light most favorable to her.

Defendants maintain that the only potentially illegal conduct that Hallberg reported was the unlicensed individuals that were practicing as counselors. Defendants assert that such conduct is not illegal and point to SDCL Chapter 36-32, claiming that it allows unlicensed counselors to practice at educational institutions in this State. Appellee's Brief at 20. Again, Hallberg was not required in her complaint to specifically list the rules (including the adopted professional rules that Plaintiff must follow) and statutes that were being violated by Defendants' practices. Plaintiff's complaint sufficiently sets forth that, after investigation of the matter, Hallberg believed that Northern State University was an outlier among South Dakota universities by failing to employ licensed counselors as required by state law.

The Defendants effectively ask the Court to disbelieve the well-pleaded allegations in the Complaint and hold that the Board of Regents did not violate any law in this case. But that holding has no bearing on whether Hallberg has stated a cause of action against the individual defendants. A retaliation claim is not a proxy contest as to whether the report that catalyzed the retaliatory misconduct was correct – an employee who has suspicions that a law or rule is being violated need only report those suspicions in good faith in order to engage in the activity the statute is intended to protect. SDCL §3-16-9.

Further, the Complaint sets out numerous violations of other "rules" that she reported and about which she raised concern. These include rules about accessing confidential student records (including requests for mental health services), access to counseling notes, and hiring a student who was also a patient. *See* Complaint, ¶¶ 13-19, 26. Here, too, these allegations, when read in context, suffice to establish the type of

subject matter that, if reported, would constitute protected activity. In claiming that the allegations are somehow deficient, Defendants would hold Hallberg's Complaint to a level of particularity that is not required. *See East Side Lutheran Church of Sioux Falls v. Next, Inc.*, 2014 S.D. 59, ¶ 13, 852 N.W.2d 434, 439 n.6 ("South Dakota still adheres to the rules of notice pleading. Under notice pleading, a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings.") (citations omitted).

Finally, Defendants' argument misconstrues the requirements for employee protection under SDCL §3-16-9. An actual violation of statute or rule need not have occurred in order to trigger the statutory protection. Rather, it holds that an employee cannot be discharged in retaliation for "report[ing] in good faith to an appropriate authority a violation *or suspected violation of law or rule* . . . ." The question is not whether Defendants actually violated laws or rules in relation to matters and issues Halberg raised with her direct supervisor, Leinwall, and Leinwall's supervisor, Reed.[2]

The allegations plainly suffice to establish that Hallberg engaged in the activity that the statute is intended to protect (good-faith reporting of violations or suspected violations of law or rules that she reported "up the chain of command") and then was subject to the activity that it proscribes (retaliation). When taken as true, the Complaint also makes out a plausible basis to conclude that both Defendants had personal

[2] Defendants maintain that when the Complaint refers to "her supervisors," it is unclear to whom it refers and therefore the Complaints fails to state a cognizable claim. On a Motion to Dismiss that tests the sufficiency of the pleadings, this Court takes allegations to be true, along with all reasonable inferences to be drawn therefrom. *Nygaard v. Sioux Valley Hosp. & Health Sys*., 2007 SD 34, ¶ 5, 731 N.W.2d 184, 190. It is reasonable to infer that the phrase "her supervisors" refers to Defendants Leinwall and Reed, the only individuals whom the Complaint identifies by name as Hallberg's supervisors.

knowledge of the reports Hallberg made, either issued or authorized the termination letter that gave a pretextual reason for her termination, and thereby directly retaliated against Hallberg or condoned or authorized such retaliation. No more is required.

Of course, these arguments should not distract from the operative question on appeal – whether SDCL §3-16-9 should be construed in a manner that immunizes supervisors from retaliating against their subordinates who blow the whistle on suspected misconduct. The answer must be no, because such a reading defeats the very purpose for which the statute was enacted. There being no other grounds upon which to sustain dismissal of the Complaint against the individual Defendants, the Circuit Court must be reversed.

CONCLUSION

The Defendants repeatedly accuse Hallberg of interpreting the whistleblowing statutes in a manner that would render them meaningless. But this accusation conflates the diagnosis for the symptom. The Legislature affirmatively waived sovereign immunity so that state employee whistleblowers may seek relief if subjected to retaliation, but neither the Legislature nor the Civil Service Commission has followed through and promulgated rules by which such relief may be obtained.

It is not the judiciary's job to fill procedural gaps or look past categorical exclusions. Even those canons of construction that assure that statutory interpretation does not lead to absurd results do not give the Court license to rewrite statutes, expand the scope of an agency's authority, or conjure up an administrative procedure for a circumstance that is not covered by any statute or administrative rule.

On the other hand, it is within this Court's mandate to assure that an aggrieved party has a path to obtain a remedy. And that is what is called for here. Hallberg respectfully submits that the Circuit Court's order dismissing her claims should be vacated and the matter should be remanded with instructions to permit her to seek the relief prayed for in her well-pleaded Complaint.

Date: December 20, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Reply Brief is 17 pages and was prepared using Microsoft Word and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 4,689 words.

Dated: December 20, 2018.

/s/ *Alex M. Hagen*
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Appellant's Reply Brief was sent by e-mail for electronic filing and service to:

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