IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

ROGER HAMILTON,

Plaintiff and Appellant, # 26720

v. **APPELLANT'S BRIEF**

RICHARD A. SOMMERS, MELISSA E. NEVILLE AND BANTZ, GOSCH & CREMER, PROF. L.L.C.

Defendants and Appellees.

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

Hon. Gene Paul Kean
Circuit Court Judge

Notice of Appeal filed June 12, 2013.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

SOUTH DAKOTA CASES **PAGE**

FEDERAL CASES

STATUTES AND COURT RULES

SECONDARY SOURCES

JURISDICTIONAL STATEMENT

On May 7, 2013, the circuit court issued an order for summary judgment in favor of Defendants-Appellees and against Plaintiff-Appellant. On June 12, 2013, Appellant filed a notice of appeal. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES

I. Whether the Circuit Court Erred in Striking the Expert Opinion of Minnesota Supreme Court Justice David Lillehaug?

The circuit court granted Appellees' motion to strike the testimony of Justice Lillehaug.

- *Tosh v. Schwab,* 2007 S.D. 132, 743 N.W.2d 422
- *State v. Guthrie,* 2001 S.D.61, 627 N.W.2d 401
- *State v. Hofer,* 512 N.W.2d 482 (S.D. 1994)
- SDCL 19-15-2

II. Whether Justice Lillehaug Correctly Identified the Appropriate Standard of Care for Conflicted Representation in South Dakota?

The circuit court granted Appellees' motion for summary judgment.

- *Behrens v. Wedmore,* 2005 S.D. 79, 698 N.W.2d 555

III. Whether Justice Lillehaug Correctly Identified the Appropriate Standard of Care for Identifying Possible Insurance Coverage in South Dakota?

The circuit court granted Appellees' motion for summary judgment.

- *Lenius v. King*, 94 N.W.2d 912 (S.D. 1980)

IV. Whether South Dakota Should Adopt a National Standard of Care for Legal Malpractice Actions?

The circuit court granted Appellees' motion for summary judgment.

- *Lenius v. King*, 94 N.W.2d 912 (S.D. 1980)

V. Whether the Circuit Court Erred in Finding that Collateral Estoppel Precludes Litigation on the Issue of Conflicted Representation?

The circuit court granted Appellees' motion for summary judgment.

- *Grand State Property, Inc. v. Woods, Fuller, Schultz & Smith, P.C.,* 1996 S.D. 139, 556 N.W.2d 84
- SDCL § 15-6-52(a).

VI. Whether the Circuit Court Improperly Weighed Evidence as to Whether Appellees' Conflicted Representation was the Proximate Cause of Hamilton's Damages?

The circuit court granted Appellees' motion for summary judgment.

- *Continental Grain Co. v. Heritage Bank,* 1996 S.D. 61, 548 N.W.2d 507
- *Haberer v. Rice,* 511 N.W.2d 279 (S.D. 1994)
- *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)

VII. Whether the Circuit Court Improperly Weighed Evidence as to Whether Appellees' Failure to Identify Insurance Coverage was the Proximate Cause of Hamilton's Damages?

The circuit court granted Appellees' motion for summary judgment.

- *Continental Grain Co. v. Heritage Bank,* 1996 S.D. 61, 548 N.W.2d 507
- *Haberer v. Rice,* 511 N.W.2d 279 (S.D. 1994)
- *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)

VIII. Whether the Circuit Court Committed Reversible Error by Failing to Grant a Continuance After Striking the Expert Testimony of Justice Lillehaug?

The circuit court denied Hamilton's motion for continuance.

- *Tosh v. Schwab,* 2007 S.D. 132, 743 N.W.2d 422

STATEMENT OF THE CASE AND FACTS

A. Background Facts

In the Hillhead area of eastern South Dakota (Roberts, Marshall and Day counties), many individuals engage in the business of raising bees and the production of honey on private property. (*E.g.,* App. 10.) To place one's hives onto private property, the hive owner must secure permission of each landowner in writing and then file the permission slip with the South Dakota Agricultural Department ("Department") by February 1st each year. (*Id.*) A land owner may cancel the permission at any time for any reason. (*Id.*).

Approximately 112 bee sites are relevant to the present case. (*Id.*) The Hillhead bee sites were properly registered to James Paysen ("Paysen") until about 1995. (*Id.*) Paysen "sold" his sites to Jon Kelley ("Kelley") in the mid-1990s. (*Id.*) Kelley did not register permission forms with the Agricultural Department pursuant to South Dakota law. (*Id.*) In 2006, Kelley purported to "sell" the 112 bee sites in Hillhead to Adee Honey Farms, owned by Richard Adee ("Adee") and his wife. (*Id.*)

Around the same time period, Appellant Roger Hamilton ("Hamilton"), another honey producer in the area, learned Kelley was "going under" and possibly filing for bankruptcy. (*Id.*) Hamilton was knowledgeable of state laws concerning the bee industry due to his position with various industry boards as well as having been consulted by state agencies over the years. (*Id.*) He obtained an "abandonment map" for the Marshall County area from Mike Block ("Block"), another honey producer. (*Id.*) This map showed that Paysen's name was still being used as the permissive user or licensee in the area. (*Id.*) Hamilton then went to the landowners where only Paysen's name appeared on this map and obtained revocation forms, approved by the Department, from the landowners; Hamilton did not communicate with land owners of any site which Adee had registered with the Department. (*Id.*)

Hamilton procured ten bee sites in Marshall County, previously under the control of Paysen. (*Id.*) After Hamilton secured these ten sites, he and Block drove to Pierre to register the revocation and new permission forms. (App. 11.) Block filed other permission forms he had secured by land owners by similar methods. (*Id.*) Similarly, Monte Amman ("Amman"), a mutual friend of Hamilton and Block filed registration forms on Hillhead sites. (*Id.*) In total, Hamilton secured ten sites in Marshall County. Block and Amman, collectively, secured the other 102 sites. (*Id.*) Hamilton was not involved and did not assist Block or Amman in securing their sites. (*Id.*)

A dispute arose concerning whether the bee sites were properly registered to Adee, or to Hamilton, Block and Amman. (*Id.*) The registration of these sites was litigated before an administrative law judge. (*Id.*) On May 15, 2007, Hamilton prevailed at the administrative contested case hearing, and the Office of Hearing Examiners held that the bee site locations were properly registered to him. (*Id.*)

B. Underlying Lawsuit

On August 25, 2007, Adee sued Hamilton, Block and Amman, jointly and severally, for interference with business relations and/or expectancy, unfair competition, and civil conspiracy. ("Underlying Lawsuit") (*Id.*) *See Richard Adee d/b/a Adee Honey Farms v. Monte Amman, Roger Hamilton, and Mike Block,* Roberts County File No. 07-150. On September 27, 2007, Hamilton, Block and Amman met with Richard Sommers ("Sommers") and Melissa Neville ("Neville") of the Bantz, Gosch & Cremer firm in Aberdeen (collectively "Appellees") regarding representing them in the Adee lawsuit. At this initial meeting, Neville inquired of the co-defendants as to whether they had insurance coverage that would compel the insurance carriers to respond to Adee's suit. (*Id.*) Hamilton testified that "I had a different company [than

Block and Amman], and I didn't even realize I had an advertising clause in the policy until it was too late." (*E.g.,* App. 23.) Appellees did not ask Hamilton to produce copies of any policies he might have. (*Id.*) Hamilton did in fact have a business insurance policy with the appropriate coverage that would have required his carrier to defend the lawsuit. (App. 11.) Neville reviewed the Block and Amman policies and wrote a demand letter to their carrier requesting that the insurance company defend the case and provide coverage. (*Id.*) The insurance company declined to defend the case. (*Id.*)

On October 3, 2007, after meeting with Hamilton, Block and Amman, Appellees mailed the co-defendants a letter and conflict of interest waivers. (*Id.*) Appellees failed to advise the co-defendants of the inherent conflict that exists in multi-defendant civil conspiracy cases – "a single law firm representing the co-conspirators usually sends a message to the jury the co-defendants collaborate, thereby supporting the plaintiff's case." (App. 55.) Block and Amman returned the executed waivers to Appellees. (App. 11.) Hamilton testified that he did not receive the waiver, and it is undisputed that he never signed or returned the form. (*Id.*) Also, Appellees testified that Hamilton did not sign a conflict waiver. (App. 55, ¶ 5.)

Appellees defended the Underlying Lawsuit by arguing permission forms to place bee hives on an owner's land are not a property interest because permission could be revoked at any time. (*Id.*) So, the land owner's permission could not be sold. (App. 11.) On January 5, 2009, without informing Hamilton, Amman "sold" his bee business, including the tangible assets and equipment as well as the "good will including bee hive locations" to Whetstone Valley Honey. (App. 12.) This sale severely undermined the defense of the Underlying Lawsuit. (*Id.*) Adee learned of Amman's sale in late June or early July of 2009. (*Id.*) Although this transfer

undermined Appellees' defense as to Block and Amman, it changed nothing as to Hamilton because Hamilton did nothing wrong. (App. 55-56, ¶¶ 6-7.)

On July 7, 2009, Adee made a settlement offer to Amman, through Appellees, that contemplated Amman transferring his bee hive sites to Adee and testifying against Hamilton and Block. (App. 12.) Hamilton and Block were informed of the settlement offer and the sale. (*Id.*) At this time, Appellees did not inform Hamilton that the conflict of interest that existed at the outset of the representation had dramatically sharpened. Nor did Appellees advise Hamilton to seek separate legal advice. (App. 57, ¶ 11.) Amman declined the settlement offer. (App. 12.)

On July 13, 2009, a pre-trial conference was held before Roberts County Circuit Court, Judge Flemmer presiding. (*Id.*) The Circuit Court denied Appellees' motions to exclude evidence of the Amman sale and add witnesses. (*Id.*) Sommers, however, acknowledged on the record that a conflict of interest existed; Sommers stated "there may be an irretrievable conflict now between [] Amman and the other two Defendants' … [i]t might be at this point in time one or more of these Defendants may need separate counsel."[1] (App. 56, ¶ 8.) Appellees did not make a motion to withdraw or a motion for a continuance to allow Hamilton to secure independent counsel. (*Id.* at ¶ 10.) The trial remained scheduled for July 20, 2009. (App. 12.)

Immediately following the pre-trial conference, Appellees and the co-defendants discussed settlement. (*Id.*) Hamilton testified that he did not want to settle the case because he was told that there was no evidence against him – the evidence went against Amman and Block. (App. 13; 56, ¶ 12.) Hamilton asked whether he could fire Appellees; however, Appellees told Hamilton that he would still have to go to trial on July 20. (App. 13.) Appellees did not advise

[1] At a later hearing, Sommers also admitted that if the case had gone to trial, representing all three parties would "put me almost in the position of having to cross-examine … one of my clients for the benefit of my other two clients." (App. 56, ¶ 9.)

Hamilton about the severity of the conflict of interest or that he should consult with independent counsel. (*Id.*) To induce Hamilton to settle, Sommers told Hamilton that, even if he settled, he could have his day in court with Adee by refusing to comply with the proposed settlement agreement. (*Id.*)

On July 17, 2009, Hamilton, Block and Amman signed a settlement agreement with Adee. (*Id.*) The settlement agreement required the co-defendants to send letters to the landowners requesting each landowner to register their bee sites with Adee. (*Id.*) The settlement agreement recognized that the co-defendants could not compel the landowners to register the bee hive sites to Adee, only that the co-defendants make the attempt. (*Id.*)

Hamilton informed Appellees, consistent with Sommers' prior advice, that he did not intend to comply with the settlement agreement, and hired new legal counsel, John Wiles ("Wiles"). (*Id.*) Wiles wrote a letter to Adee indicating that Hamilton did not intend to comply with the settlement agreement. (*Id.*) Adee made a motion to enforce the settlement agreement, and a hearing was held before Judge Flemmer in early December 2009. (*Id.*) Judge Flemmer denied the motion. (*Id.*) Judge Flemmer's decision was not based on the conflict of interest, and in fact, Judge Flemmer stated "[q]uite frankly, the Court made its determinations on the 13th of July with the thought that most likely on the following Monday morning there would be some type of further action," such as a motion to withdraw or for continuance. (Dec. 7, 2009, Hr'g. T. at 124:20-24.)

In 2010, following the execution of the settlement agreement, Block and Amman sued Nationwide Mutual Insurance for bad faith denial of a defense and coverage. (App. 13.) Sommers testified at the trial on behalf of Block and Amman and their testimony was

instrumental in recovering a verdict. (*Id.*) A jury awarded Block and Amman a $2.4 Million judgment against Nationwide which were later settled in lieu of an appeal. (*Id.*)

C. Legal Malpractice Lawsuit

In 2010, Hamilton sued Appellees for negligence, breach of a fiduciary duty, and negligent infliction of emotional distress. (*Id.*) During discovery, Hamilton produced two expert witnesses: current Minnesota Supreme Court Justice David Lillehaug ("Justice Lillehaug")[2] and Richard Berning ("Berning"). Appellees produced one rebuttal expert, Roy Wise ("Wise").

Hamilton retained Justice Lillehaug to opine on the applicable standard of care. (App. 67.) Justice Lillehaug was born and raised in South Dakota and was educated in South Dakota (B.A. from Augustana, Sioux Falls, with highest honors). (*Id.*) He graduated from Harvard Law School and has an exceptionally distinguished legal career, having served as U.S. Attorney for Minnesota. (*Id.*) At the time Hamilton disclosed Justice Lillehaug, he was a partner in one of the most prestigious law firms in Twin Cities and in the Midwest, and was rated as an "AV Preeminent" Attorney by Martindale-Hubbell. (*Id.* at 67-68.) His practice had been primarily in the area of complex civil litigation, and he had substantial experience analyzing conflicts issues in civil and criminal matters. (*Id.*) Prior to testifying in this matter, Justice Lillehaug appeared as attorney-of-record in a case in Rapid City, South Dakota, and represented a client in a criminal matter in Sisseton, South Dakota. (Br. Supp. Defs.' M. for Summ. J. at 14.) Moreover, in preparation for offering his opinion, Justice Lillehaug consulted with counsel in Rapid City, South Dakota and local counsel in Yankton, South Dakota to determine the appropriate standard of care. (*Id.*)

[2] After a summary judgment hearing, Justice Lillehaug was nominated and later appointed to the Minnesota Supreme Court. (App. 81-85.) Hamilton provided a Notice of Newly Discovered Evidence and Supplemental Brief regarding this information, stating that such information was substantive evidence of Justice Lillehaug's qualifications to offer expert testimony. (*Id.*)

As to conflicted representation, Justice Lillehaug opined that Appellees breached the appropriate standard of care by representing all three co-defendants in the Underlying Lawsuit. (App. 71.) Justice Lillehaug opined that (1) the seriousness of the concurrent conflict from the outset of the case made representation of Hamilton with the other co-defendants nonconsentable, (2) even if the conflict was consentable, Appellees "breached the standard of care by failing to obtain informed consent, confirmed in writing, from Hamilton before or at the time representation commenced," and (3) Appellees breached the standard of care by failing to withdraw or move for a continuance when the plaintiffs in the Underlying Lawsuit proffered a settlement offer to only one of the co-defendants and when the Amman "sale" came to light. (*Id.* at 71-79.) In reaching this conclusion, Justice Lillehaug examined South Dakota Rule of Professional Conduct 1.7 and concluded this rule is identical to the American Bar Association's Model Rules of Professional Conduct 1.7. Justice Lillehaug has practiced the bulk of his career under the Model Rules, and testified in his deposition that he had experience applying Rule 1.7 in practice. (App. 82-85.) Justice Lillehaug found that the applicable standard of care for conflicted representation in South Dakota "is consistent with and well stated by Rule 1.7" of the South Dakota Rules of Professional Conduct. (App. 26, 69.) Justice Lillehaug testified that "the standard of care with respect to conflict of interest … is essentially a national standard of care and that there is nothing unique about South Dakota in that regard." (App. 26, 86.)

As to investigation of possible insurance coverage, Justice Lillehaug opined that Appellees "should have asked [Hamilton] to search for and produce any business, homeowner's, or umbrella insurance policies he might have. Also, [Appellees] should have asked Hamilton for the identity of his agent and, as necessary, sought permission to contact the agent." (App. 79-80.) Justice Lillehaug considered the disputed fact of whether Hamilton told Appellees he did

not have insurance coverage and found "[f]or the purpose of my opinion, I do not need to determine whose version of the September 27 meeting is correct" because even if Hamilton told Appellees that he had no liability insurance, such a statement would warrant further inquiry and investigation." (App. 79.) Justice Lillehaug based this opinion "on information that [he] received from other lawyers and from - from being taught by more senior and experienced lawyers through the course of [his] career." (App. 60.)

Appellees expert, Wise, acknowledged a concurrent conflict of interest existed from Appellees representing Hamilton, Block and Amman. (Feb. 25, 2013, Aff. of Dan Rasmus, Ex. B.) Wise did not assert that the standard for representing multiple parties in a civil conspiracy matter is different in the Aberdeen South Dakota area as compared to Minneapolis, Minnesota, or any other location. (*Id.*) Wise did not identify the standard of care for conflicted representation in South Dakota, did not cite any legal authority as to the standard of care, and did not rebut Justice Lillehaug's use of Rule 1.7 as the standard of care for conflicted representation in South Dakota. (*Id.*) Rather, Wise summarily asserted that Appellees' actions did not constitute a breach of the standard of care as to conflicted representation. (*Id.*) Similarly, as to investigation of possible insurance coverage, Wise simply suggested that "[i]t would not be the standard of care in this area of our state to make further inquiry if a client tells his lawyers he doesn't have any insurance coverage" without further support. (*Id.*)

The circuit court issued a Memorandum Decision granting Appellees' motion for summary judgment on April 15, 2013. (App. 8-29.) The circuit court found that (1) collateral estoppel bared re-litigation on the issue of conflicted representation, (2) Hamilton failed to prove that he would have been successful in the Underlying Lawsuit or that the settlement was unreasonable, (3) the "locality rule" in South Dakota has been expanded to that of a state-wide jurisdiction, (4) Justice

Lillehaug failed to identify the appropriate standard of care for conflicted representation in South Dakota, (5) Justice Lillehaug failed to identify the appropriate standard of care for investigating possible insurance coverage in South Dakota, and (6) Justice Lillehaug's opinion lacked proper foundation. (*Id.* at 17-28.) In addition to these findings in the Memorandum Decision, the circuit court granted Appellees' motion to strike the testimony of Justice Lillehaug, Appellees' motion to strike portions of Affidavit of Timothy James,[3] and denied Hamilton's motion for hearing on setting a trial date.

ARGUMENT

Summary judgment is an extreme remedy, which is not intended as a substitute for trial. *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762 (citations omitted). A circuit court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Schwaiger v. Avera Queen of Peace Health Servs.,* 2006 SD 44, ¶ 7, 714 N.W.2d 874, 877 (citations omitted). The burden is on the party moving for summary judgment to establish that there are no disputed material facts. *Id.* "All reasonable inferences drawn from the facts must be

[3] The circuit court erred in striking the Affidavit of Timothy James. South Dakota Rule of Professional Conduct 3.7 directs that an attorney may not appear at trail as both an advocate and witness, unless "the testimony relates to an uncontested issue." SDCL 18-16-3.7(a). The statements in Mr. James' affidavit were not related to any substantive testimony that would ever be used at trial and did not relate to any contested matter. Rather, they had to do with the workings of the bar for purposes of whether a client can fairly obtain expert witnesses to testify against another lawyer. Appellees do not dispute the accuracy or validity of the affidavit, nonetheless Appellees moved to strike the evidence. Even if the statements involved a contested matter, the proper remedy was to disqualify Mr. James, not to strike the evidence.

viewed in favor of the non-moving party." *Id.* "Questions of law are reviewed de novo." *In re Estate of Martin,* 2001 SD 123, ¶ 15, 635 N.W.2d 473, 476.

In order to prevail on a legal malpractice action, a plaintiff must prove the four basic elements of negligence: (1) an attorney-client relationship giving rise to a duty; (2) the attorneys, either by an act or a failure to act, violated or breached that duty; (2) the attorneys' breach of duty proximately caused injury to the client; and (4) actual injury, loss or damage. *Yarcheski v. Reiner,* 2003 S.D. 108, ¶ 16, 669 N.W.2d 487, 493 (citing *Keegan v. First Bank of Sioux Falls,* 519 N.W.2d 607, 611 (S.D. 1994)). In the present case, the circuit court found that Hamilton established duty and damages.[4] (App. 17, 28-29.) The circuit court found that Hamilton failed to establish the elements of breach and proximate cause.[5] (*Id.*)

The circuit court erred in finding that Hamilton failed to establish a genuine issue of material fact regarding breach and causation. As to breach, the circuit court erred because Justice Lillehaug's opinion is supported by adequate foundation, Justice Lillehaug correctly identified the standard of care for both conflicted representation and investigation of insurance coverage, the "locality rule" is immaterial to the present case and collateral estoppel does not bar Hamilton's claims. Sections I thru V, below, address how the circuit court erred concerning breach. The circuit court also erred on the element of proximate cause by improperly weighing

[4] As to the issue of damages, the circuit court found that "it need not rule on this point." (App. 29.) However, the circuit court describes Hamilton's factual support for damages: he "has virtually a 100% retention rate for his bee sites over thiry-seven years," Appellees testified that Adee would be entitled to future lost profits related to the loss of honey production, and Hamilton's damages expert, Richard Berning based his expert opinion on the historical operations of Hamilton's sites. (App. 28.) Viewing this evidence in a light most favorable to Hamilton, a genuine issue of material fact exists, precluding summary judgment as to damages.

[5] The circuit court addresses the issues of breach and causation in reverse order. The circuit court begins its discussion with proximate cause (App. 16-23.), followed by breach. (App. 24-28.) For the purposes of clarity, this Brief will address the issues of breach and proximate cause in the order the elements are commonly cited.

evidence in favor of Appellees - sections VI and VII deal with causation. Finally, even if the circuit court did not err in striking the expert opinion of Justice Lillehaug, the circuit court committed reversible error by denying Hamilton the opportunity to secure a replacement expert after disqualifying Justice Lillehaug - section VIII addresses this issue.

I. The Circuit Court Erred in Striking the Expert Opinion of Minnesota Supreme Court Justice David Lillehaug.

The circuit court erred in finding that Justice Lillehaug's opinion was not supported by adequate foundation. Although the circuit court correctly noted Justice Lillehaug was "eminently qualified" to offer an opinion, the circuit court erred in finding that his opinion was not based on the standard of care for attorneys' practicing in South Dakota "locally," but rather was an opinion as to the standard of care for attorneys generally. (App. 27.) The circuit court first erred because any alleged deficiency in Justice Lillehaug's opinion as to a "local" standard of care goes to the weight, rather than admissibility, of his testimony.

The admission of expert testimony is governed by SDCL 19-15-2 (Rule 702). This statute provides that, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *Id.* "Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation." *Burley v. Kytec Innovative Sports Equip. Inc.,* 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402-03 (citing *State v. Guthrie,* 2001 S.D.61, ¶ 32, 627 N.W.2d 401, 415); *see also, Tosh v. Schwab,* 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428; *State v. Hofer,* 512 N.W.2d 482, 484 (S.D. 1994) (adopting holding of *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)).

A thorough review of the record shows that Justice Lillehaug's opinion was supported by adequate foundation. Justice Lillehaug was born and raised in Sioux Falls, South Dakota. Prior to this case, he appeared as attorney-of-record in a case in Rapid City, South Dakota, and represented a client in a criminal matter in Sisseton, South Dakota. In preparation for this matter, Justice Lillehaug reviewed applicable excerpts from the record, and he reviewed relevant case law, statues and court rules. *See, e.g., Burley,* 2007 S.D. 82 at ¶ 19; *Hamilton v. Silven, Schmeits & Vaughan,* 2013 WL 2318809, *4 (D. Or. May 28, 2013) ("In general, the courts have allowed experts in malpractice cases to become familiar with the applicable standard of care through research."). Finally, in confirming his opinions, Justice Lillehaug consulted with counsel in Rapid City, South Dakota and local counsel in Yankton, South Dakota. Therefore, Justice Lillehaug's opinion certainly was supported by reliable foundation. *E.g., First Western Bank Wall v. Olsen,* 2001 S.D. 16, ¶ 9, 621 N.W.2d 611, 615-16 (holding that experts' qualifications should not be examined under a "restricted focus"); *Guthrie,* 2001 S.D. 61 at ¶ 36 (acknowledging "general approach of relaxing the traditional barriers to 'opinion' testimony") (citation omitted).

Moreover, because the standard of care for conflicted representation and investigating possible insurance policies in South Dakota is the same as the national standard (as explained more thoroughly below), Justice Lillehaug provided proper foundation. As to conflicted representation, Justice Lillehaug examined South Dakota Rule of Professional Conduct 1.7 and concluded this rule is identical to the American Bar Association's Model Rules of Professional Conduct 1.7. Appellees and the circuit court do not and cannot dispute this conclusion.

Indeed, this Court has directly acknowledged South Dakota adheres to the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). *In re Discipline of Dorothy*,

2000 S.D. 23, ¶ 21, 605 N.W.2d 493, 499. Minnesota adopted the Model Rules in June 1985. (App. 60, ¶ 19.) Justice Lillehaug has practiced the bulk of his career under the Model Rules, and testified in his deposition that he has experience applying Rule 1.7 in practice. Similarly, as to investigation of possible insurance policies, Justice Lillehaug examined applicable law and formed his opinion "based on information that I've received from other lawyers and from – from being taught by more senior and experienced lawyers through the course of my career." (App. 60.) Accordingly, Justice Lillehaug's opinion as to conflicted representation and investigation of insurance policies was supported by proper foundation.

Many courts have found that an expert's limited experience in a local jurisdiction does not make that expert's testimony inadmissible, but rather, any such evidence goes to the weight of the expert's testimony. *See, e.g., Burley,* 2007 S.D. 82, ¶ 46 (Sabers, J., concurring in part & dissenting in part) (finding that circuit court's "errors result from … a rush to summary judgment when genuine issues of material fact exist, and excessive emphasis on admissibility over the weight of opinion evidence"); *see also, Hamilton,* 2013 WL 2318809, *4 (denying summary judgment and finding that "[a]lthough Plaintiff's experts' limited experience in Wyoming courts may be fertile ground for cross-examination, it is not a deficiency that prevents them from serving as expert witnesses in this case.") (citation omitted); *Sloan v. Urban Title Services, Inc.,* 770 F.Supp.2d 227, 237 (D. D.C. 2011); *Biltmore Associates, L.L.C. v. Thimmesch,* 2007 WL 5662124, * 4 (D. Ariz. Oct. 15, 2007) (denying motion to exclude expert testimony where expert was from neighboring state and opined that Model Rule 1.7 established the applicable standard of care); *First Union National Bank v. Benham,* 423 F.3d 855, 863 (8th Cir. 2005) (reversing district court's order for summary judgment and finding that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis

for the opinion in cross-examination.") (citation omitted); *Smith v. Haynsworth, Marion, McKay & Geurard,* 472 S.E.2d 612, 614 (S.C. 1996); *Walker v. Bangs,* 601 P.2d 1279, 1283 (Wash. 1979). Accordingly, the circuit court erred in striking the testimony of Justice Lillehaug on the grounds of lack of foundation.

II. Justice Lillehaug Correctly Identified the Appropriate Standard of Care for Conflicted Representation in South Dakota.

Justice Lillehaug opined that Appellees breached the appropriate standard of care by representing all three co-defendants in the Underlying Lawsuit. As stated above, Justice Lillehaug opined that (1) the concurrent conflict was nonconsentable, (2) Appellees failed to obtain informed consent, confirmed in writing, and (3) Appellees failed to withdraw or move for a continuance when the conflict sharpened. In reaching this conclusion, Justice Lillehaug found that the applicable standard of care for conflicted representation in South Dakota "is consistent with and well stated by Rule 1.7" of the South Dakota Rules of Professional Conduct. (App. 26, 69.) He also asserted there is nothing unique about analyzing Rule 1.7 in South Dakota.

The circuit court erred in part by misstating this Court's holding in *Behrens v. Wedmore,* 2005 S.D. 79, 698 N.W.2d 555.[6] The circuit court found that

> There is some dicta [in *Behrens*] that the Rules 'may establish a breach' of duty. However, even if the Rule may be relevant, there is still the proper application of the Rule to the standard of care for South Dakota attorneys.[7] … The *Behrens*

[6] At the outset, the circuit court's finding that *Behrens* "was not a case of legal malpractice" is inaccurate. (S.J. Order at 20.) The plaintiffs in *Behrens* sued the attorney-defendants for legal malpractice, alleging the attorney-defendants were "negligent in negotiating and preparing the transactional documents and in failing to warn them of the potential risks of an installment sale in bankruptcy." 2005 S.D. 79, ¶ 12. Even if the *Behrens* opinion "was more in the nature of a contractual dispute," the *Behrens* Court thoroughly analyzed the use of the South Dakota Rules of Professional Conduct as evidence of breach of the standard of care as explained below.

[7] Here, the circuit court confuses the separate and distinct legal issue of (1) the use of professional rules to establish a breach of the standard of care in legal malpractice cases with (2) the scope of the "locality rule" in South Dakota, addressed in Section IV.

> decision did not engage in any significant analysis of the application of ¶20 under the Preamble: A Lawyer's Responsibility which points out that the Rules 'are not designed to be a basis for civil liability.' The full development of that concept still awaits presentation to the Supreme Court.

(App. 27-28.)

Contrary to the circuit court's analysis, this Court in *Behrens* stated:

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

2005 S.D. 79, ¶ 51 (citation omitted). This Court explicitly stated that "fiduciary rules such as … Rule 1.7 and 1.8 regarding conflicts of interest … may establish a breach of fiduciary duty." *Id.*; *see also,* MODEL RULES OF PROF.L CONDUCT, *Scope* (2002) ("[A] lawyers violation of a Rule may be evidence of breach of the applicable standard of conduct."); R. Mallen and J. Smith, *Legal Malpractice,* § 20:7, p. 1279 (2012) (describing the majority rule that an ethics rule may be used as evidence in determining breach of the standard of care in legal malpractice actions). The circuit court erred when asserting that Rule 1.7 cannot be used to establish civil liability.

Moreover, neither the circuit court nor Appellees' expert established an alternative standard of care for conflicted representation in South Dakota. There is nothing in the record of this case even suggesting a standard of care for conflicted representation different than that established by Justice Lillehaug. Instead, the circuit court and Appellees' expert simply conclude that Justice Lillehaug is incorrect without further support. This inability on the part of Appellees to define an alternative or the "correct" standard of care is fatal to their argument and illustrates that Justice Lillehaug, in fact, opined as to the appropriate standard of care for conflicted representation in South Dakota. *See, Walker,* 601 P.2d at 1283 ("Defendants fail to identify specific inadequacies. Their objects are more appropriately addressed to the weight to

be accorded the opinions express therein.") Therefore, Rule 1.7 establishes the standard of care for conflicted representation in South Dakota, and Justice Lillehaug correctly opined that Appellees breached the standard of care.

III. Justice Lillehaug Correctly Identified the Appropriate Standard of Care for Identifying Possible Insurance Coverage in South Dakota.

Like conflicted representation, Justice Lillehaug correctly identified the standard of care in South Dakota for identifying insurance coverage and tendering the claim to a carrier. The circuit court erred by finding that Justice Lillehaug failed to identify the appropriate standard of care.[8] Justice Lillehaug opined that Appellees "should have asked [Hamilton] to search for and produce any business, homeowner's, or umbrella insurance policies he might have. Also, [Appellees] should have asked Hamilton for the identity of his agent and, as necessary, sought permission to contact the agent." (App. 79-80.) The circuit court does dispute this opinion, but rather, simply states Justice Lillehaug's opinion was not based upon the statewide professional standard of care. However, as explained above, any objection to Justice Lillehaug's opinion would go to the opinion's weight, not admissibility, and the standard of care for investigating insurance claims in South Dakota is the same as the national standard of care.

Appellees' expert made no effort to show how the investigation of insurance policies is different in South Dakota than another other locality. Rather, Appellees' expert opined "[i]t would not be the standard of care in this area of our state to make further inquiry if a client tells his lawyer he doesn't have any insurance coverage." (Feb. 25, 2013, Aff. of Dan Rasmus, Ex.

[8] The circuit court held that as to Appellees' "failure to properly advise and investigate Hamilton's insurance coverage, he can meet the first and second elements, duty and breach." (App. 22.) However, later the circuit court found that Hamilton failed to establish evidence of a state-wide standard of care concerning investigation of insurance coverage. (App. 28.) Therefore, either the circuit court correctly noted that Hamilton met the breach element of his legal malpractice action, or the circuit court confuses the concepts of breach, standard of care and causation.

B.) Appellees' expert's opinion does not state what foundation was relied upon to support this position, nor does the opinion cite any specific facts supporting this conclusion. Rather, the opinion focuses on a disputed material fact – whether Hamilton told Appellees he did not have insurance coverage. *See Papke v. Harbert,* 2007 S.D. 87, ¶¶ 57-58, 738 N.W.2d 510, 530 (holding that unsupported opinions are invalid).

In contrast to the unsupported conclusion by Appellees' expert, Justice Lillehaug's opinion takes into consideration the disputed fact as to whether Hamilton told Appellees he had insurance coverage. Justice Lillehaug opined "[f]or the purpose of my opinion, I do not need to determine whose version of the September 27 meeting is correct" because if Hamilton told Appellees that he did not have liability insurance, "such a statement would warrant further inquiry and investigation. (App. 79.) *See Lenius v. King,* 94 N.W.2d 912, 914 (S.D. 1980) (holding that a jury determines whether an attorney breached the standard of care through expert testimony). This is especially true considering Block and Amman provided insurance coverage – coverage which proved to be very advantageous to them and resulted in a $2.4 Million verdict against their insurance carrier. Therefore, Justice Lillehaug correctly identified the standard of care for investigating insurance coverage in South Dakota.

IV. South Dakota Should Adopt a National Standard of Care for Legal Malpractice Actions.

In 1980, the South Dakota Supreme Court held that "[i]n performing professional services for a client, an attorney has the duty to have that degree of learning and skill ordinarily possessed by attorneys of good standing engaged in the same type of practice *in the same or a similar locality*." *Lenius,* 94 N.W.2d at 913 (emphasis added). The *Lenius* decision focused on the need for expert witnesses in legal malpractice actions, rather than the extent of the "locality rule". The rule has not been defined by this Court since *Lenius* was decided, and the reasoning

behind the rule has been severely eroded over time. Acknowledging this erosion, the circuit court in the present case held that "if the *Lenius* standard would be reexamined by the South Dakota Supreme Court, this court believes that the standard would expand to the jurisdiction of South Dakota." (App. 26.)

In speculating that the South Dakota Supreme Court would expand the "locality rule" to that of the jurisdiction of the State of South Dakota, the circuit court noted that some courts have adopted a state-wide standard of care. *See, e.g., Mallen & Smith*, *supra,* § 20:5, p. 1259; D. Meiselman, *Attorney Malpractice: Law and Procedure,* § 2:11, pp. 35-36 (2000). However, most states have rejected the "locality rule" in favor of a national standard of care. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS, § 52, cmt. b (2000) ("The locality test is now generally rejected for all professions because all professionals can normally obtain access to standard information and facilities, because clients no longer limit themselves to local professionals, and because of the practicalities of proof in malpractice cases.").

This Court should adopt a national standard of care in legal malpractice actions for several reasons. First, the original reasoning behind the rule no longer exists. The "locality rule" was originally established to protect rural attorneys from the "higher" standard of care expected of urban practitioners. *Mallen & Smith, supra,* § 20:5, p. 1256. This lower standard of care for rural attorneys was meant to compensate for lack of communication and access to the most recent changes in the law. For example, in 1767, Lord Mansfield explained an error by attorneys in interpreting a statute: "they were country attorneys; and might not, and probably did not know that this point was settled here above." *Id.* Because of advancements in communication and technology, the "locality rule" has primarily been rejected.

In rejecting the "locality rule" for medical professionals, the Minnesota Supreme Court found that

> Defendant's argument that plaintiff's expert witness was disqualified because of lack of knowledge of the standard of care in the 'locality' of the attending physician's practice is without merit … because of expanding means of communication and interprofessional information the geographical location of a physician's practice is no longer an essential element in determining the standard of care by which a defendant is to be judged. The literal application of the so-called 'locality rule' has been greatly weakened since then. It is common knowledge that urbanization and technological advances have significantly increased the availability of superior medical information to all practitioners.

Christy v. Saliterman, 179 N.W.2d 288, 302 (Minn. 1970) (citations omitted). It follows that the "locality rule" should be defined as a national standard of care because the reasoning behind the rule no longer exists.

Second, the standard of care for legal professionals in South Dakota should be a national standard of care because South Dakota has adopted a national standard of care for medical professions. In 1988, this Court abandoned the "locality rule" for medical professionals in favor of a national standard of care. *Shamburger v. Behrens,* 418 N.W.2d 299, 305-06 (S.D. 1988); *Meiselman, supra,* § 2:11, p. 35 ("Whereas the locality rule has been traditionally applied in medical malpractice cases, it is rarely utilized by the courts in defining the standard to be used by the jury in legal malpractice cases."). This Court has held that the standard of care for the medical profession should be used as the standard of care for the legal profession. *Lenius,* 294 N.W.2d at 913. The "locality rule" should be applied consistently in both legal and medical malpractice cases in South Dakota.

Third, limiting the scope of legal malpractice experts to "local" South Dakota lawyers would have a chilling effect on plaintiffs' access to the courts. *See, e.g.,* RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS, § 52, cmt. b ("The locality test is now generally

rejected for all professions … because clients no longer limit themselves to local professionals, and because of the practicalities of proof in malpractice cases."); *Mallen & Smith, supra,* § 20:5, p. 1255 ("In a small community the plaintiff may have difficulty finding an attorney willing to testify.").

Contrary to the circuit court's conclusion that a state-wide standard of care "eliminates Hamilton's perceived problem about the limited number of lawyers in the pool of experts," there are very few lawyers willing to bring legal malpractice actions, given the size of the South Dakota bar. (App. 26.) If experts in legal malpractice were required to be local, the only lawyers qualified to testify would be those from the "family" of defense attorneys connected to each other through the South Dakota Defense Lawyers Association ("SDDLA") and social media. (App. 61.) The problem is illustrated by the relationships between the lawyers in this case – one of the co-Appellees, Sommers, is a board member of the SDDLA, Appellees' expert, Roy Wise, is the State representative for the group and both Appellees' expert and Appellees' attorney, Mr. Welk are past presidents of the Association. (*Id*.) Appellees' counsel and their expert belong to the SDDLA, which gathered for its 2012 conference in offices of Appellees' attorneys in this matter (Mr. Welk and Mr. Sutton) and hosted a seminar focused on the psychology of preventing plaintiffs from recovering in litigation. (*Id.*) It is difficult to imagine that any attorney who belongs to the SDDLA would testify as a plaintiff's expert, even if directed to do so by the court. There are few, if any attorneys in the Aberdeen area, or in all of South Dakota, who would provide expert testimony against Appellees in this case, given defense-attorneys' circle of acquaintances and influence. (*Id.*)

Fourth, South Dakota should adopt a national standard of care because the Model Rules accurately state the common law standard of care in South Dakota. To be admitted to the Bar in states where the Model Rules apply, lawyers must pass the Multistate Professional Responsibility

Exam ("MPRE"), which is a uniform, national exam. *See e.g.,* SDCL App., Ch. 16-16, Bar Exam. Regs. § 3 ("The MPRE consists of 50 multiple-choice test questions and measures and applicant's knowledge of the ethical standards of the legal profession."). There are no exceptions to the Model Rules for "local conduct" – e.g., lawyers in Alabama, Wyoming, North Dakota and Iowa, as well as in all the other 41 states where the Model Rules apply, must pass the uniform MPRE and go through the same analysis under Rule 1.7 when determining whether a conflict of interest exists.[9] *See generally,* THE LAW OF LAWYER'S LIABILITY (M. Baldwin, S. Bertschi, D. Black, eds., First Chair Press 2012). While particular local rules, practices or customs can determine the propriety of an attorney's conduct, locality does not otherwise affect the standard of care, that being ordinary skill and knowledge. *Mallen & Smith, supra,* § 20:5, page 1255.

Finally, as applied to the present case, the difference between the local standard of care and that of the legal profession generally is a distinction without a difference. Whether South Dakota adopts a state-wide or national standard of care is immaterial to the resolution of this case. When considering whether to adopt a local or national standard of care for legal malpractice, the Georgia Supreme Court found that

> [T]he local standard versus the standard for the legal profession generally may be a distinction without a difference. … the standard of care required of an attorney remains constant whether he is considered as a practitioner of a given State or as a practitioner of 'the legal profession generally' – and that only the applications of care vary from jurisdiction to jurisdiction and from situation from situation. Hence, there is no particular value in using the standard in the individual State…

[9] The circuit court argues that "[w]hile 45 states have adopted Rule 1.7, it [sic] application to allegations of legal negligence have been anything which promotes the thought of a uniform national standard." (App. 27.) However, as explained more thoroughly below, the circuit court confuses the issues of (1) the scope of the "locality rule" in South Dakota with (2) the use of professional rules to determine breach in legal malpractice actions. The adoption of the Model Rules by 45 states is certainly evidence of a national standard of care, and South Dakota has already held that Rule 1.7 may be used as evidence of breach in legal malpractice actions in South Dakota. *See, supra,* Section II.

Kellos v. Sawilowsky, 325 S.E.2d 757, 758 (1985).

In the present case, Justice Lillehaug correctly identified that the standard of care for conflicted representation and investigating insurance policies in South Dakota is not unique from that of the legal profession generally – i.e. the standard of care for conflicted representation and investigation of insurance policies in South Dakota is the same as the national standard of care. Justice Lillehaug correctly identified that the standard of care for conflicted representation in South Dakota is the same as the standard of care for conflicted representation in the legal profession generally.

V. The Circuit Court Erred in Finding that Collateral Estoppel Precludes Litigation on the Issue of Conflicted Representation.

In granting Appellees' motion for summary judgment, the circuit court erred in finding that collateral estoppel bars re-litigation on this issue of conflicted representation. In the Underlying Lawsuit, Judge Flemmer found that Hamilton signed a conflict waiver at the outset of Appellees' representation of Hamilton, Block and Amman. The circuit court held that it was bound by the finding of fact, and that "[c]ollateral estoppel bars re-litigation of whether there was conflicted representation." (App. 18.)

First, the circuit court's holding on the issue of collateral estoppel ignores the necessary fact that Judge Flemmer's finding of fact in the Underlying Lawsuit is clearly erroneous. In the Underlying Lawsuit, Judge Flemmer found that Hamilton signed the conflict waiver, allegedly mailed to Hamilton, Block and Amman. However, a signed conflict waiver from Hamilton does not exist, and Appellees acknowledge that Hamilton never signed a conflict waiver. Therefore, Judge Flemmer's finding of fact is clearly erroneous and must be set aside. SDCL 15-6-52(a); *see also, First Nat. Bank of Biwabik, Minn. v. Bank of Lemmon,* 535 N.W.2d 866, 871-72 (S.D. 1995) (finding that while a trial judge is given great discretion in evaluating live testimony, when

physical or documentary evidence is offered, the trial court is in no better position to intelligently weigh evidence than an appellate court).

Second, the circuit court erred because collateral estoppel does not preclude litigation on the issue of conflicted representation. Collateral estoppel does not apply because the issue of whether Hamilton signed a conflict waiver is not *identical* to the issue of whether Appellees engaged in a nonconsentable, conflicted representation of Hamilton, Block and Amman. *See Grand State Property, Inc. v. Woods, Fuller, Schultz & Smith, P.C.,* 1996 S.D. 139, ¶ 13, 556 N.W.2d 84, 87-88 (finding issue in underlying declaratory judgment action was not identical to issue of breach in legal malpractice action). The issue in the Underlying Lawsuit was whether the settlement agreement between Hamilton and Adee was enforceable, whereas, the issue in the present case is whether Appellees breached their duty to Hamilton by engaging in conflicted representation. Clearly, the issue decided in the motion to enforce the settlement agreement is not identical to the present issue in this legal malpractice action. Furthermore, Hamilton was not afforded a full and fair opportunity to litigate the issue in the Underlying Lawsuit because of Appellees' conflicted representation – i.e. "but for" Appellees' negligence, Judge Flemmer would not have made the erroneous finding of fact. *Id.* ("[T]he parties were not afforded an opportunity to fully and fairly litigate the present issue.").

Finally, even if collateral estoppel is applicable, the circuit court overstates the extent of the precluded issue. The circuit court found that "[c]ollateral estoppel bars relitigation of whether there was conflicted representation;" however, Judge Flemmers' finding of fact only addresses whether Hamilton signed a conflict waiver at the outset of Appellees conflicted representation. Even if Hamilton is barred from arguing that he did not sign a conflict waiver, he still would be able to argue, through Justice Lillehaug's opinion, that the conflict was

nonconsentable and a new conflict arose at the time a settlement offer was made to Amman and all three co-defendants.

VI. The Circuit Court Improperly Weighed Evidence as to Whether Appellees' Conflicted Representation was the Proximate Cause of Hamilton's Damages.

In legal malpractice, the plaintiff must prove that the defendant-attorney's breach was the proximate cause of the plaintiff's damages. The term "proximate cause" is defined in South Dakota as: "[a]n immediate cause and which, in natural or probable sequence, produced the injury complained of.... Furthermore, for proximate cause to exist, the harm suffered must be found to be a foreseeable consequence of the act complained of." *Musch v. H-D Coop., Inc.*, 487 N.W.2d 623, 624 (S.D. 1992). The causation element is usually established by "recreating the underlying action" or looking to the "case within a case" to show how the underlying action should have occurred. *Haberer v. Rice,* 511 N.W.2d 279, 285 (S.D. 1994) (citations omitted). Causation is generally a question of fact for the jury except when there can be no difference of opinion in the interpretation of the facts. *Meiselman, supra,* § 3:2, p. 41.

Hamilton produced sufficient evidence for a jury to find that Appellee's breach was the direct and proximate cause of his damages. Two separate "cases within a case" are relevant in the present appeal: (1) whether Hamilton would have been successful in the Underlying Lawsuit, and (2) whether Hamilton's settlement with Adee was unreasonable. The circuit court erred in weighing evidence in favor of Appellees on both issues.

A. Hamilton produced evidence that he would have been successful in the Underlying Lawsuit but for Appellees' breach.

In the Underlying Lawsuit, Hamilton provided many facts upon which a jury could base a conclusion that Appellees' negligence caused his damages – i.e., "but for" the conflict of interest and advice that he join in the settlement with Block and Amman, he would not have been forced

to give up his ten bee sites. The circuit court correctly acknowledges that "Hamilton raises a question of fact as to whether he participated with Block and Amman in the alleged conspiracy." (App. 19.) In reaching this conclusion, the circuit court recognized facts supporting Hamilton's contention that he would have been successful in the Underlying Lawsuit:

> (1) Adee received a much better result through settlement than he would have at trial because he did not request any bee sites in the underlying matter; (2) Hamilton won at the administrative hearing based on the landowners having the right to decide who placed hives on their land; (3) Hamilton's damages are based on the loss of bee yards and [Appellees] cannot claim this is speculative because it is the same theory they used to argue Adee would obtain a large jury verdict; (4) Sommers told Hamilton he had done nothing wrong and that Adee could provide no fact on which a jury could find against him; (5) Block and Amman testified in their depositions that Hamilton did nothing wrong; (6) there was no interest in settlement until after the motion hearing; and (7) there was no evidence that Hamilton misrepresented facts or that he aided in misrepresentations made by Amman and Block.

(*Id.*) The circuit court's analysis on this issue should have stopped at this point because of the summary judgment standard. However, the circuit court went on to weigh evidence, finding that "[e]ven if Hamilton was the only client of [Appellees] or was represented by separate counsel, there was still evidence implicating Hamilton in the conspiracy … Therefore, Hamilton has not shown that he would have prevailed against Adee in the Underlying Lawsuit." (App. 20.) This conclusion improperly weighs evidence in favor of Appellees. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (stating "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"); *Continental Grain Co. v. Heritage Bank,* 1996 S.D. 61, ¶ 16, 548 N.W.2d 507, 511 (stating that the credibility of witnesses must be determined by the fact finder, not on summary judgment).

Contrary to the circuit court's ruling, there is no requirement under South Dakota law that Hamilton prove to a "legal certainty" at summary judgment that he would have received a better result, but for Appellees' failure to recognize the conflict of interest and instruct Hamilton to obtain his own counsel. Rather, he must only show there are facts supporting his claim in the underlying case (the case within a case) that would allow a jury to enter a verdict in his favor. *See Haberer*, 511 N.W.2d at 284-85. The facts cited above are more than sufficient to allow a jury to conclude Hamilton would not have been forced to give up his bee sites or pay any judgment to Adee had he been advised to seek independent counsel. In addition, the issue is supported by Justice Lillehaug's deposition testimony in this case. Hamilton produced sufficient evidence for a jury to find that he would have been successful in the Underlying Lawsuit but for Appellees' breach.

B. Hamilton produced evidence that the settlement was unreasonable.

The circuit court also erred in finding that Hamilton failed to prove the settlement was unreasonable. The circuit court found that "[t]he basis of Hamilton's claim is founded in the settlement agreement that was reached during the week of July 13, not a jury trial." (App. 20.) As such, "[t]he focus should be on the settlement and whether the conflicted representation tainted that process." (*Id*.) The circuit court cites the intermediate appellate court in California for the proposition that "[t]he standard should be whether the settlement is within the realm of reasonable conclusions, not whether the client could have received more or paid less. No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one." (*Id.*) (citing *Filbin v. Fitzgerald,* 211 Cal. App. 4th 154, 157, 149 Cal. Rptr. 3d 422, 433 (2012), *review denied* (Mar. 13, 2013). South Dakota has not ruled on the issue as to the standard for so called "settle and sue" cases.

The circuit court's order fails to acknowledge that Hamilton never should have been put in the position to settle. This is particularly true when there was no evidence against him, and he repeatedly told Appellees he did not want to settle. Moreover, to entice Hamilton to settle, Sommers told Hamilton that he would have his day in court with Adee and could raise all issues related to Adee's claims by challenging the settlement agreement. Hamilton's claims on this issue create a clear issue of material fact for trial. But for the conflicted representation, Hamilton would have had his day in court. He did not have the opportunity to defend himself independent of Block and Amman because Appellees failed to advise him to seek independent counsel.

Finally, the circuit court skews the summary judgment standard by placing unnecessary and impractical requirements on Hamilton contrary to public policy and defying common sense. The circuit court suggested that Hamilton needed to prove that "Adee would have walked away from the case" and that "Adee would have let Hamilton settle separately." (App. 22.) This analysis benefits the negligent lawyers by rewarding them for their own negligent actions. The issue is whether *Hamilton* made any decision regarding his case while being represented by conflicted attorneys with competing interests. Any discussion of what the parties would have done would be based on speculation – speculation created by Appellees. The circuit court placed in unreasonable burden on Hamilton and decided facts in favor of Appellees.

VI. The Circuit Court Improperly Weighed Evidence as to Whether Appellees' Failure to Identify Insurance Coverage was the Proximate Cause of Hamilton's Damages.

The circuit court erred by finding that Hamilton failed to produce evidence that Appellees' failure to investigate insurance coverage proximately caused his damages. This factual determination is illogical in that Hamilton is a substantial businessman with substantial bee keeping equipment that was known to Appellees by virtue of the nature of their

representation. Any reasonable lawyer would investigate and identify insurance policies. Hamilton testified that "I had a different company [than Block and Amman], and I didn't even realize I had an advertising clause in the policy until it was too late." (App. 23.) Hamilton had insurance, but did not know if he had insurance for his beekeeping business. The circuit court adopted Appellees' factual claim to reason that Hamilton's alleged denial that he had insurance was the proximate cause of his damages. *But see, Anderson,* 477 U.S. at 249; *Continental Grain,* 548 N.W.2d at 511. Thus, the circuit court's rational improperly weighed disputed evidence in favor of Appellees.

Moreover, the circuit court completely disregarded Hamilton's argument that even if the circuit court somehow made a factual finding that Hamilton did tell Appellees that he had no liability insurance, such a statement would warrant further inquiry and investigation by Appellees. Justice Lillehaug opined that Appellees "should have asked [Hamilton] to search for and produce any business, homeowner's, or umbrella insurance policies he might have. Also, [Appellees] should have asked Hamilton for the identity of his agent and, as necessary, sought permission to contact the agent." (App. 79-80.) *Haberer,* 511 N.W.2d at 284-85. Neither Appellees' expert nor the circuit court dispute this opinion; rather, as described above, the circuit court and Appellees' expert simply claim this is not the standard of care in South Dakota (without identifying a different standard of care). Therefore, a genuine issue of material fact exists as to whether Appellees failure to further investigate Hamilton's insurance policies was the proximate cause of his damages.

VII. The Circuit Court Committed Reversible Error by Failing to Grant a Continuance After Striking the Expert Testimony of Justice Lillehaug.

Even if this Court finds that the circuit court did not err in granting Appellees motion to strike the expert testimony of Justice Lillehaug, the circuit court committed reversible error by

failing to give Hamilton the opportunity to obtain a replacement expert witness. A party "is entitled as a matter of right to a reasonable opportunity to secure evidence on his behalf," and a continuance is one means of ensuring a party the opportunity to procure such evidence. *State v. Moeller,* 2000 S.D. 122, ¶ 7, 616 N.W.2d 424, 431 (citations omitted). This Court has identified factors that circuit courts must consider when deciding whether or not to grant a continuance, including (1) whether the due diligence of a party has failed to procure evidence on his own behalf, (2) whether the delay resulting from the continuance will be prejudicial to the opposing party, (3) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the party of the moving party, (4) whether the moving party will be prejudiced by the circuit court's refusal to grant the continuance, and (5) whether there have been any prior continuances or delays. *Id.*

In *Tosh v. Schwab,* this Court found that the circuit court committed reversible error by failing to grant a continuance after striking the expert opinion of the Appellant. 2007 S.D. 132, ¶ 26. The Court noted that (1) expert testimony was necessary to the Appellant's claim; (2) the motion for a continuance was not motivated by improper planning or bad faith, but rather, the motion was a result of the circuit court's disqualification of Appellant's expert; (3) the Appellant promptly moved to amend the scheduling order to permit the identification of a new expert; and (4) there would have been no delay or prejudice because a trial date had not yet been scheduled. *Id.*

In the present case, expert testimony is necessary to establish the breach element of Hamilton's legal malpractice claim. *Lenius,* 94 N.W.2d at 914. Hamilton's need for a continuance was not motivated by improper planning or bad faith, but rather, resulted from the circuit court's order striking the expert opinion of Justice Lillehaug. Hamilton promptly raised

the issue of a continuance at summary judgment and in a post-hearing motion for hearing on setting trial date and notice of newly discovered evidence. (App. 40-41, 81-84.) Furthermore, there would have been no delay or prejudice to the Appellees because the circuit court cancelled the scheduled trial date to give more time to decide the summary judgment motion. Thus, no trial date had been scheduled when the circuit court granted Appellees' motion for summary judgment. Therefore, the circuit court committed reversible error by denying Hamilton the opportunity to obtain a new expert after striking the expert testimony of Justice Lillehaug.

CONCLUSION

Based on the foregoing, Hamilton respectfully requests this Court reverse the circuit court's order for summary judgment, and remand this matter for trial on the merits.

ORAL ARGUMENT IS HEREBY REQUESTED.

Dated:

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE

DAN RASMUS, attorney for Appellant herein, certifies that this Appellant's Brief contains 9,916 words, according to the word processing program (Microsoft Word 2010) used to prepare this brief. This complies with the limitations set forth in SDCL 15-26A-66(b).

_____

Dan Rasmus, admitted *pro hac vice*

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 26720

ROGER HAMILTON,

Plaintiff and Appellant,

v.

RICHARD A. SOMMERS, MELISSA A. NEVILLE, and
BANTZ, GOSCH & CREMER, PROF. L.L.C.,

Defendants and Appellees.

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

The Honorable Gene Paul Kean

Circuit Court Judge

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NOTICE OF APPEAL FILED JUNE 12, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Case Law

Other South Dakota Authorities

Other Case Law

Secondary Sources

JURISDICTIONAL STATEMENT

Appellees Richard A. Sommers ("Sommers"), Melissa A. Neville ("Neville") and Bantz, Gosch & Cremer, Prof. L.L.C. ("the Bantz Gosch Firm") agree with Appellant Roger Hamilton ("Hamilton")'s jurisdictional statement.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court Properly Rejected the Use of a Nationwide Standard of Care Governing Legal Malpractice and Breach of Fiduciary Duty Cases in South Dakota?

The Circuit Court concluded that a statewide standard rather than a nationwide standard of care applies to legal malpractice and breach of fiduciary duty claims in South Dakota.

Lenius v. King, 294 N.W.2d 912 (S.D. 1980)
Matter of Yemmanur, 447 N.W.2d 525, 529 (S.D. 1989)
Ronald E. Mallen & Jeffery M. Smith, *Legal Malpractice* § 20:5 (2012 ed.)

II. Whether the Circuit Court Properly Struck Lillehaug's Opinions?

The Circuit Court struck Lillehaug's opinions because he applied the incorrect standard of care and, thus, his opinions lacked foundation, were irrelevant, and would be unhelpful to the jury.

SDCL 19-15-2
Burley v. Kytec Innov. Sports Equip., Inc., 2007 S.D. 82, ¶ 12, 737 N.W.2d 397
Tosh v. Schwab, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428
Behrens v. Wedmore, 2005 S.D. 79, 698 N.W.2d 555

III. Whether the Circuit Court Properly Granted Summary Judgment Because Hamilton Did Not Carry His Burden of Establishing a Breach of the Standard of Care?

The Circuit Court granted summary judgment on the legal malpractice and breach of fiduciary duty claims for failure to proffer admissible expert testimony.

Lenius v. King, 294 N.W.2d 912 (S.D. 1980)
Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, LLP, Civ. No. 10-5009, 2011 WL 902489 (D.S.D. Mar. 15, 2011)
Luther v. City of Winner, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343

IV. Whether the Circuit Court Correctly Granted Summary Judgment For Failure of Proof on Proximate Cause?

The Circuit Court granted summary judgment on proximate cause regarding the conflicted representation claim.

Weiss v. Van Norman, 1997 S.D. 40, 562 N.W.2d 113
Filbin v. Fitzgerald, 149 Cal. Rptr. 3d 422 (Cal. Ct. App. 2012)
Selle v. Tozser, 2010 S.D. 64, 786 N.W.2d 748

V. Whether the Circuit Court Abused Its Discretion in Denying a Continuance After Striking Lillehaug's Expert Opinions?

The Circuit Court denied Hamilton's motion for continuance.

Tosh v. Schwab, 2007 S.D. 132, 743 N.W.2d 422
Brooks v. Milbank Ins. Co., 2000 S.D. 16, 605 N.W.2d 173
Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, LLP, Civ. No. 10-5009, 2011 WL 902489 (D.S.D. Mar. 15, 2011)
State v. Moeller, 2000 S.D. 122, 616 N.W.2d 424

VI. Whether the Circuit Court Properly Concluded that Collateral Estoppel Precluded Relitigation of Whether Hamilton Signed the Conflict Waiver?

The Circuit Court determined Hamilton was collaterally estopped from relitigating this issue.

American Family Ins. Grp. v. Robnik, 2010 S.D. 69, 787 N.W.2d 768
Estes v. Millea, 464 N.W.2d 616, 618 (S.D. 1990)

STATEMENT OF THE CASE

This appeal arises out of the decision by Judge Gene Paul Kean, sitting by designation as the Circuit Court, dismissing Hamilton's legal malpractice and breach of a fiduciary duty claims against Sommers, Neville, and the Bantz Gosch Firm (collectively "the Attorneys"). After properly disclosing the risks of joint representation, the Attorneys jointly represented beekeepers Hamilton, Mike Block, and Monte Amman in the matter of *Richard Adee v. Monte Amman, Roger Hamilton, and Mike Block*, Civ. 07-150, Fifth Judicial Circuit, Roberts County, South Dakota ("Underlying Lawsuit"). Adee

alleged that Hamilton, Block, and Amman conspired to wrongfully obtain permission to place bees on the landowners' land. Adee sued all three for tortious interference with business relations and/or expectancy, unfair competition, and civil conspiracy. The primary defense in the Underlying Lawsuit was the legal argument that beekeepers cannot sell bee site locations and, thus, they have no legally protected property interest.

Shortly before trial, Amman purported to "sell" his bee sites to another beekeeper by a written installment agreement. This agreement undermined the planned joint defense. At a hearing a week before trial in the Underlying Lawsuit, Judge Flemmer denied a motion to exclude the installment agreement, denied a request to add additional witnesses, and denied a motion to continue. Following the hearing, the parties settled. Hamilton later refused to comply with the settlement, and Judge Flemmer granted Adee's motion to enforce the settlement.

Hamilton then sued the Attorneys for legal malpractice, breach of fiduciary duty, and negligent infliction of emotional distress. Initially, Hamilton claimed that the Attorneys wrongfully represented all three defendants in the Underlying Lawsuit. During discovery in this action, Hamilton alleged for the first time he had insurance coverage for the Underlying Lawsuit.

In this action, Hamilton identified David Lillehaug, a Minnesota attorney, as his standard of care expert. The Attorneys moved to strike Lillehaug's opinions as irrelevant, unreliable, and unhelpful to the jury because Lillehaug relied on a nationwide rather than a local standard of care. Appellees also moved for summary judgment on all

claims. The Circuit Court granted summary judgment on all claims and granted Appellees' motion to strike.[1]

STATEMENT OF FACTS

A. Hamilton Conspires with Block to Obtain Bee Locations in Northeast South Dakota.

Hamilton is a beekeeper located in Hazel, South Dakota. (CR 374). Beekeepers typically pay landowners for the right to place bee hives on their land in South Dakota. (*Id.* at 369). The landowner completes a written permission slip granting authority to locate the bees. (*Id.*). In exchange, beekeepers pay the landowner either in cash or with honey. (*Id.*). Permission must be registered with the South Dakota Department of Agriculture ("the Department"). (*Id.*). Importantly, a landowner can revoke permission to place the bees at any time. (CR 362-63). *See also* SDCL 38-18-3. Thus, beekeepers cannot sell bee locations to other beekeepers. (CR 362-63).

A dispute arose in 2009 related to 112 bee site locations in Marshall, Roberts, and Day Counties, South Dakota, in an area referred to as the "Hillhead area." (CR 363). The bee sites at issue were previously registered to James Paysen. (*Id.*). Paysen later "sold" the bee site locations to John Kelley when Paysen retired in the mid 1990s. (CR 362). Kelley did not, however, re-register any of the sites with the Department. (CR 360-61). In 2006, Kelley "sold" the 112 bee site locations to Adee Honey Farms, which is owned by Richard Adee. (CR 362-63).

Meanwhile, Hamilton heard that Kelley was going bankrupt. (CR 362). In the summer of 2006, Hamilton started talking with Hillhead area landowners about placing

[1] "CR" refers to citations to the Certified Record. "H-App." refers to Hamilton's appendix. "BG-App." refers to the Attorneys' appendix.

his bees on their land and revoking the permission previously granted to Paysen, Kelley, or Adee. (CR 361-63). Hamilton worked with his friend and fellow beekeeper Mike Block to solicit Paysen's sites. Block provided Hamilton with an abandonment map showing the sites. (*Id.*). Block also prepared a "revocation form" used to revoke landowners' permission. (CR 366, 652). Block gave Hamilton the form. (*Id.*). Hamilton, Block, and Monte Amman, a mutual friend and beekeeper, divided the Hillhead area sites based on geography. (CR 304). In total, Hamilton acquired and obtained permission to place his bees on 10 different bee sites in Marshall County that were previously registered to Paysen. (*Id.*). The remaining sites were split between Block and Amman.

Block and Hamilton allegedly made misrepresentations to some landowners during the revocation process. (CR 316). After Hamilton secured permission forms to put his bees on the sites, he and Block drove together to Pierre to register the sites with the Department before Adee registered permission slips for the same sites. (CR 109).

Soon after, a dispute arose regarding to whom various bee site locations were properly registered. (CR 360). The registration of these sites was litigated in an administrative contested case hearing. (*Id.*). Hamilton, Block, and Amman prevailed at the administrative hearing, and thus, ten bee site locations were registered to Hamilton. (*Id.*).

B. Adee's Underlying Lawsuit against Hamilton, Block, and Amman.

Following the administrative hearing, Adee commenced the Underlying Lawsuit. (CR 132-37). Adee's claims sought to hold Hamilton, Block, and Amman jointly and severally liable. (CR 133).

Hamilton spoke with Block about who to hire as an attorney. (CR 356). Block said he had engaged Sommers to represent him, and if Hamilton wanted to talk with Sommers, to go ahead and do so. (CR 356). As a result, Hamilton, Block, Amman, Sommers, and Neville met on September 27, 2007, at the Bantz Gosch Firm's office. (CR 355). During this initial meeting, Sommers advised Hamilton, Block, and Amman of the potential conflict of interest related to joint representation of all three defendants. (*Id.*). Hamilton, Block, and Amman orally agreed to have the Attorneys represent them all. (*Id.*).

During the meeting, the Attorneys raised the issue of insurance coverage with the three clients. (CR 257). Hamilton said he did not have insurance. (CR 257, 281). Later, Block and Amman discovered they had the same insurance policy and gave their information to Neville. (CR 257).

On October 3, 2007, Neville sent a letter to Hamilton, Block, and Amman confirming the joint representation and reminding the clients of the associated risks. (BG-App 111-12). The October 3 letter enclosed a conflict of interest waiver. (CR 648-49).[2] Block, Hamilton, and Amman all received the letter and signed the conflict waiver.[3] (*Id.*).

During discovery of the Underlying Lawsuit, the Attorneys collected evidence and prepared for trial. The Attorneys expected that several landowners would testify that Block made multiple misrepresentations to them about the bee sites and Adee. (CR 316,

[2] The conflict waivers signed by Block and Amman are found at (BG-App 113-14). Hamilton received the same waiver form.

[3] In enforcing the settlement in the Underlying Lawsuit, Judge Flemmer specifically found that Hamilton received and signed the conflict letter and waiver. (BG-App 105).

258). At least one landowner alleged that Hamilton made a misrepresentation. (*Id.*). The Attorneys also anticipated that telephone records between Block and Hamilton would have been introduced at trial, which would have established numerous calls between Block and Hamilton during the alleged dates of the conspiracy. (CR 291).

Throughout the Underlying Lawsuit, Block paid all attorneys' fees and bills from the Attorneys. (CR 360). Hamilton and Amman agreed to reimburse Block for the attorneys' fees paid. (CR 354). Hamilton has never repaid Block for the attorneys' fees. (*Id.*).

The primary defense in the Underlying Lawsuit was that Adee had no legally protected interest in the bee sites because the permissive use was revocable at any time and bee sites could not be sold. (CR 313). During the Underlying Lawsuit, Amman secretly entered into an installment agreement dated January 5, 2009 ("the Installment Agreement"). (CR 643-44). In the Installment Agreement, Amman sold his bee business to Whetstone Valley Honey, Inc. (*Id.*). Critically, the Installment Agreement expressly stated that Amman sold "good will including bee hive locations." (*Id.*). This sale devastated the main defense that bee sites could not be sold because one of the alleged co-conspirators purported to sell site locations. (CR 313-14).

The Installment Agreement also placed a calculable dollar value on each of the sites. (CR 312). By including a price of $350,000 for goodwill, the Installment Agreement valued each site at approximately $5,000. (CR 312). There were over a hundred sites at issue in the Underlying Lawsuit, so based upon the "value" assigned to each site under the Installment Agreement the total loss to Adee exceeded $500,000.

(*Id.*). The total damage exposure in the Underlying Lawsuit was $5,000 per site (over $500,000) plus over $1,000,000 in lost profits. (CR 248-49).

On July 7, 2009, Adee offered to settle with Amman if Amman gave up his bee locations and agreed to testify truthfully. (CR 292). The Attorneys communicated that settlement offer to all three clients. (*Id.*). In response, Amman said he did not want to settle, and that even if he wanted to settle, he could not do so because he had entered into the Installment Agreement. (CR 311). This was the first time Sommers and Neville learned about the Installment Agreement. (*Id.*). Hamilton admitted that Sommers explained the Installment Agreement "was a major problem" for the defense of the Underlying Lawsuit because Amman "sold" his bee sites. (CR 352).

Sommers, Neville, and other members of the Bantz Gosch Firm held a meeting to discuss their obligation to disclose the Installment Agreement to Adee's attorney. (CR 286). The Attorneys ultimately determined they had a duty to disclose the Installment Agreement and did so. (*Id.*).

Less than a week later on July 13, 2009, a pretrial hearing was held before Judge Flemmer. (CR 284). The trial was scheduled to commence on July 20. (CR 307). Before the pretrial hearing, Sommers filed a motion to exclude the Installment Agreement at trial. (CR 308). In the alternative, Sommers orally moved for a continuance to obtain the testimony of witnesses who could explain why the Installment Agreement had been drafted in this fashion. (CR 283-84). The court denied the motion in limine to exclude the Installment Agreement. (*Id.*). The trial court also denied the motion to continue. Hamilton, who attended the hearing, admitted it went badly. (CR 349).

After the pretrial hearing, Sommers and Neville met with Hamilton, Block, and Amman outside the courthouse. (CR 348). At this meeting, Sommers raised the possibility of settling the lawsuit. (*Id.*). During the week following the pretrial hearing, Hamilton, Block, and Amman worked with Sommers to settle the Underlying Lawsuit. (*Id.*). At the same time, Neville worked to prepare for trial. (CR 253-54). Adee's attorney, Kent Cutler, demanded that any settlement would be with all defendants in the Underlying Lawsuit or none. (CR 248).

Hamilton, Block, and Amman all signed a written settlement agreement with Adee on July 17, 2009. (CR 633-37). Under the terms of the settlement, Hamilton, Block, Amman, and Whetstone agreed to transfer their interests in 119 bee site locations to Adee and to send a letter in the fall of 2009 requesting that each landowner register their site with Adee. (*Id.* at 637). Hamilton, Block, and Amman also agreed to pay Adee $7,500 for the delivery of honey to the 119 landowners for the 2009 season. (*Id.* at 636).

C. Hamilton and Block Renege on the Settlement.

Sometime after the settlement, Hamilton advised the Attorneys that he did not intend to comply with the settlement. (CR 344). Hamilton then hired attorney John Wiles to represent him. (*Id.*).

On October 6, 2009, Adee's attorney indicated that the time had arrived for Hamilton, Block, and Amman to send the letters to each of the landowners per the settlement. (*Id.*). In response, Wiles sent a letter to Adee's attorney indicating that Hamilton did not intend to comply. (*Id.*). Block also refused to comply and hired Lee Schoenbeck to represent him. (CR 38).

Adee filed a motion to enforce the settlement agreement. Judge Flemmer held a hearing on the motion in December of 2009. (CR 435-38). Judge Flemmer rejected Block and Hamilton's argument that the settlement agreement was unenforceable because of duress or fraud. (CR 438). As part of his findings of fact, Judge Flemmer specifically found that Hamilton had signed the conflict waiver form that Neville mailed to him. (CR 436). Hamilton did not appeal from this ruling.

D. Hamilton Sues the Attorneys.

On September 29, 2010, Hamilton sued the Attorneys and asserted three causes of action: (1) legal malpractice; (2) breach of fiduciary duty; and (3) negligent infliction of emotional distress. (CR 1-7). The legal malpractice and breach of fiduciary duty claims were based upon the alleged conflicts of interest relating to the joint-representation of Hamilton, Block, and Amman. (*Id.*).

While discovery was proceeding in the Underlying Lawsuit, Neville wrote a demand letter to Block and Amman's insurance carrier, Nationwide Mutual Insurance Company ("Nationwide"), requesting coverage in Adee's tort lawsuit against them. (CR 257). Nationwide declined coverage. (CR 235). Block and Amman later hired Attorney Schoenbeck, who commenced a declaratory judgment action and bad faith claim against Nationwide. (CR 38). A jury trial awarded a substantial award to Block and Amman and against Nationwide for its bad faith denial of coverage. (*Id.*).

Following the Nationwide verdict, Hamilton filed a motion to amend his complaint in this action on May 31, 2012. (CR 36-43). The amended complaint asserted the same three previous legal causes of action against the Attorneys, but for the first time Hamilton alleged that he had the same type of insurance coverage as Block and Amman,

and that the Attorneys were liable for malpractice based upon their alleged failure to properly investigate Hamilton's insurance coverage. (*Id.*).

Hamilton identified David Lillehaug[4] as his standard of care expert. At his deposition, Lillehaug admitted that his standard of care opinions were based on a national standard of care. (BG-App. 47-48). Because Lillehaug's opinions applied the wrong standard of care, the Attorneys moved to strike Lillehaug's opinions. They also moved for summary judgment because: (1) Hamilton failed to bear his burden of presenting evidence that the Attorneys violated the applicable, local standard of care; (2) Hamilton failed to produce evidence from which a reasonable jury could find the alleged malpractice proximately caused harm to Hamilton; and (3) the evidence did not support a negligent infliction of emotional distress claim. Hamilton agreed to dismissal of the negligent infliction of emotional distress claim.

Judge Kean granted Appellees' motion for summary judgment and struck Lillehaug's opinions. (BG-App. 2-4). Hamilton appeals.

ARGUMENT

To survive summary judgment, Hamilton must present admissible expert testimony indicating the Attorneys failed to comply with the applicable local standard of care. *See Lenius v. King*, 294 N.W.2d 912, 913. (S.D. 1980) (stating except in "clear and palpable cases (such as violation of the statute of limitations), expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice."); *Hamilton v. Bangs, McCullen,*

[4] During the pendency of this litigation, David Lillehaug was appointed to the Minnesota Supreme Court. (H-App. 81-85). At the time attorney Lillehaug gave his opinions, he was not a member of the Minnesota Supreme Court and will be referred to as Lillehaug.

Butler, Foye & Simmons, LLP, Civ. No. 10-5009, 2011 WL 902489, at *12 (D.S.D. Mar. 15, 2011) ("In the absence of expert evidence to support [the client's] claim the defendants violated their fiduciary duty, the defendants are entitled to summary judgment as a matter of law.").

Relying on Lillehaug, Hamilton argues he presented expert testimony on the standard of care. Hamilton ignores, however, that Lillehaug wrongfully applied a national, rather than local, standard of care.[5]

I. A Local Standard of Care, Rather than a National Standard of Care, Governs the Conduct of Attorneys in Legal Malpractice and Breach of Fiduciary Duty Claims in South Dakota.

In *Lenius*, this Court confirmed that a local standard of care applies to attorney malpractice claims. The Court quoted at length the trial court's instruction:

> In performing professional services for a client, an attorney has the duty to have that degree of learning and skill ordinarily possessed by attorneys of good standing engaged in the same type of practice in the *same or a similar locality*.
>
> It is his further duty to see that care and skill ordinarily exercised in like cases by members in good standing of his profession engaged in the same line of practice in the *same or similar locality under similar circumstances*, and to be diligent in an effort to accomplish the purpose for which he is employed. A failure to perform any such duty is negligence.
>
> You must decide whether the defendant possessed and used the knowledge, skill and care which the law demands of him from the evidence of attorneys who testified as expert witnesses.

Lenius, 294 N.W.2d at 913 (emphasis added). This Court expressly held this instruction properly stated the law regarding the applicable standard of care. *Id.*

[5] Misconstruing the Attorneys' argument, Hamilton focuses on Lillehaug's qualifications rather than the foundation and substance of Lillehaug's opinions. (Appellant's Brief 15-18).

Later, in *Matter of Yemmanur*, 447 N.W.2d 525, 529 (S.D. 1989), the Court confirmed *Lenius's* locality rule is different than a national standard of care. In *Yemmanur*, the Court discussed suspension of a doctor's license for gross incompetence and distinguished gross incompetence from basic negligence. During that discussion, the Court noted that *Lenius* defined the applicable negligence standard for all professionals, including doctors. *Id.* at 528 n.3. The Court further explained, however, that the locality rule discussed in *Lenius* "does not apply to specialists in medicine as they adhere to a national standard of care." *Id.* at 529 n.4; *see also Stovall v. Clarke*, 113 S.W.3d 715, 722-23 (Tenn. 2003) (distinguishing the standard of care for the "same or similar localities" from a national standard of care). In fact, *Yemmanur* confirmed *Lenius's* locality rule was narrower than a statewide standard of care. *Yemmanur*, 447 N.W.2d at 528-29 (noting that the locality rule governed negligence while a broader, statewide standard governed gross incompetence for physician licensure purposes).

Hamilton asks the Court to overrule *Lenius* and adopt a nationwide standard of care. The Court should reject this invitation. Instead, South Dakota's locality rule should be construed no broader than a statewide standard of care. Indeed, a leading legal malpractice treatise confirms that the most common geographic interpretation of the locality rule provides for a statewide standard of care. 2 Ronald E. Mallen & Jeffery M. Smith, *Legal Malpractice* § 20:5 at 1259 (2012 ed.) ("Mallen & Smith") ("The most logical and commonly stated territorial selection . . . is that of the jurisdiction, typically the state."). Judge Kean similarly embraced a statewide standard of care. (BG-App 25).

Relying on **medical** malpractice claims, Hamilton argues that the Court should adopt a national standard of care. (Appellant's Br. 21-22). Hamilton wrongly states,

however, that a national standard of care governs all medical malpractice cases in South Dakota. *See Yemmanur*, 447 N.W.2d at 529 n.4.[6]

More importantly, the inherently different type of knowledge required to practice medicine and practice law require different standards of care:

> Unlike the medical field, however, [an attorney's] knowledge of local practices, rules, or customs may be determinative of, and essential to, the exercise of adequate skill and knowledge. An attorney must know local statutes, ordinances or rules. Frequently, trial attorneys place great weight on the cultural, economic or social characteristics of the community in which the matter is to be tried.

Mallen & Smith, § 20:05 at 1256. An attorney's knowledge of the local jury, judges, and cultural issues all affect whether the attorney exercised the reasonable standard of care. *Id.*

Others similarly define the standard of care for legal malpractice cases as a statewide standard. *See* Restatement[7] (Third) of the Law, *The Law Governing Lawyers* § 52 at 377 (ALI Pub. 2000); *Smith v. Haynesworth, Marion, McKay & Geurard*, 472

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[6] A national standard of care is applied in medical malpractice cases for physicians who are specialists. *See Veith v. O'Brien*, 2007 S.D. 88, ¶ 49 n.23, 739 N.W.2d 15 ("*Shamburger II* established the principle in South Dakota case law that *medical specialists* will be measured by a national rather than local standard of care.") (emphasis added). Most recently, in *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 17, 756 N.W.2d 345, 353, the South Dakota Supreme Court cited *Shamburger II* and stated that South Dakota no longer "refers to a local standard of care." Although not expressly stated as being a case that is limited to medical specialists, *Mousseau* did involve a medical specialist, namely a neurosurgeon. *Id.* ¶ 2, 756 N.W.2d at 353.

[7] Hamilton boldly cited the Restatement for the proclamation that the "locality test" has seldom been recognized for lawyers. (Appellant's Br. 22). The full passage, however, actually supports the Attorneys' position that the statewide test is appropriate. *See* Restatement (Third) of the Law, § 52 at 377 ("The professional community whose practices and standards are relevant in applying this duty of competence is ordinarily that of lawyers undertaking similar matters in the relevant jurisdiction **(typically, a state)**. The narrower 'locality test,' under which the standards of a local community governed, has seldom been recognized for lawyers.").

S.E.2d 612, 614 (S.C. 1996) (stating most jurisdictions have expanded the "relevant geographic region to create a statewide standard of care"); *Chapman v. Bearfield*, 207 S.W.3d 736, 740 (Tenn. 2006) (adopting a statewide standard of care for legal malpractice); *Traystman, Coric, & Keramidas v. Hundley*, 925 A.2d 1161, 1164 (Conn. Ct. App. 2007) (stating the locality rule is a narrower geographic standard of care than the "general standard of care," which the court indicated "usually means jurisdictionwide or statewide standard"); *Little v. Matthewson*, 442 S.E.2d 567, 570 (N.C. Ct. App. 1994) (defining same or similar legal community as a statewide standard of care). "The rationale for this development is that attorneys are generally regulated on a statewide basis, with state rules of procedure and different substantive laws." *Smith*, 472 S.E.2d at 614.

Hamilton also argues that application of *Lenius's* locality rule will prevent plaintiffs from finding attorneys willing to act as experts.[8] If true, then it would be expected that an appeal addressing application of the locality rule in South Dakota would have occurred in the last 33 years since *Lenius* was decided. Instead, there have been numerous legal malpractice cases in South Dakota since *Lenius* in which the plaintiff apparently found an expert. *See e.g.*, *Behrens v. Wedmore*, 2005 S.D. 79, 698 N.W.2d 555; *Estate of Gaspar v. Vogt, Brown, & Merry*, 2003 S.D. 126, 670 N.W.2d 918, 921;

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[8] Hamilton's references to the connections of attorneys involved in this case are irrelevant and improper. (Appellant Br. 23-24). The Circuit Court struck the affidavit of attorney James containing these unsupported assertions "because [the affiant] is counsel of record on the case and the affidavit offers substantive testimony." (BG-App. 6). Hamilton did not appeal this issue, therefore, the Circuit Court's order became final and Hamilton's discussion of this "evidence" outside the record is improper. *See Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, ¶ 19 n.10, 821 N.W.2d 224, 231 n.10.

Dakota Cheese, Inc. v. Ford, 1999 S.D. 147, 603 N.W.2d 73.[9] Furthermore, Judge Kean stated, "Would it surprise you to know that I have four legal malpractice cases going right now, and they all involve people who have been hired to give expert opinions," and "where they have hired attorneys to come in and testify and they are South Dakota lawyers." (Transcript of Motion Hearing dated March 12, 2013, at 18-19).

Hamilton's argument also misunderstands the locality rule. The locality rule does not limit the scope of *who* can opine on the standard of care, rather, it mandates *what* the expert is opining about. *See* Mallen & Smith, § 20:05 at 1261. A plaintiff may be able to establish the applicable standard of care through an out-of-state expert who educated themselves regarding the applicable local standard of care. *See Brett v. Berkowitz*, 706 A.2d 509, 517-18 (Del. 1998) (excluding expert in legal malpractice case who was not familiar with the standard of practice in Delaware but stating an out-of-state expert could testify if "well acquainted and thoroughly conversant" with the standard of care in Delaware).

In short, the locality rule still applies in South Dakota. Hamilton's request to overrule *Lenius,* deviate from the general rule, and adopt a national standard of care should be rejected.

II. The Circuit Court Properly Excluded Lillehaug's Opinions Because Lillehaug Applied the Incorrect Standard of Care.

Judge Kean excluded Lillehaug's proffered opinions for two independent reasons: Lillehaug lacks the foundation to testify about "the applicable standard of conduct governing attorneys in the same or similar locality as Roberts County, South Dakota,

[9] Ability to procure an expert may have more to do with the merits of the claim rather than the unavailability of experts in South Dakota.

which means a South Dakota statewide standard of conduct;" and Lillehaug's opinions, which are based the wrong standard of care, are "irrelevant, unhelpful to the jury, and confusing to the jury . . . ." (BG-App. 4).

The Supreme Court reviews "a trial court's decision to admit or deny an expert's testimony under the abuse of discretion standard." *Tosh v. Schwab*, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Burley v. Kytec Innov. Sports Equip., Inc.*, 2007 S.D. 82, ¶ 12, 737 N.W.2d 397, 402 (quotations omitted).

The admissibility of expert testimony is governed by SDCL 19-15-2 (Rule 702), which provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." Under Rule 702, the proffered expert must be "qualified." *Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404. Qualification as an expert on some matters does not make the expert qualified to opine on all matters, however. *See Garland v. Rossknecht*, 2001 S.D. 42, ¶ 11, 624 N.W.2d 700, 703 ("A fundamental baseline for reliability is that experts are limited to offering opinions within their expertise.").

Even if an expert is qualified, "[b]efore admitting expert testimony, a court must first determine that such qualified testimony is relevant and based upon reliable foundation." *Burley*, 2007 S.D. 82, ¶ 13, 737 N.W.2d at 402. The trial court "is responsible for deciding whether an expert's knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[,]" and part of that responsibility

includes deciding "whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case." *Id.* ¶ 16, 737 N.W.2d at 404 (quotations omitted). When ruling on the admissibility of expert testimony, the court "needs to exercise its gatekeeping function." *Rogen v. Monson*, 2000 S.D. 51, ¶ 13, 609 N.W.2d 456, 459 (quotations omitted). Unlike with other witnesses, expert testimony has a particular danger of confusing the issues, misleading the jury, or causing unfair prejudice "because of its aura of special reliability and trustworthiness." *State v. Raymond*, 540 N.W.2d 407, 410 (S.D. 1995) (internal quotations omitted).

Hamilton bears the burden of establishing the admissibility of Lillehaug's expert testimony by a preponderance of the evidence by showing it was "competent, relevant, and reliable." *Tosh*, 2007 S.D. 132, ¶ 18, 743 N.W.2d at 428 (quotations omitted).

In analyzing Lillehaug's opinions, Hamilton's claims logically are divided into two categories: (A) the conflicted representation claim; and (B) the insurance investigation claim.

A. <u>The Conflicted Representation Claim</u>

Lillehaug opined that the Attorneys' joint representation of all three defendants in the Underlying Lawsuit violated the applicable standard of care. (H-App. 69-70). Critically, Lillehaug conceded that his opinions are based on a national standard:

> Q: . . . . I asked: Are you familiar with the standard of care for legal ethics in South Dakota? And what you're saying to me is that you believe, as is relevant to this case, that it's a national standard of care and it's not a local standard of care, is that correct?
>
> A: Correct.

(BG-App. 47-48).

As noted above, however, a national standard of care does not apply to legal malpractice claims in South Dakota. Because Lillehaug's opinions are based on the incorrect standard of care, the opinions are irrelevant and unhelpful to the jury. *See Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404. Further, permitting Lillehaug to offer opinions based on the incorrect standard of care likely would confuse and mislead the jury. *See Raymond*, 540 N.W.2d at 410. As a result, the Circuit Court properly excluded the opinions.

Hamilton argues that Lillehaug opined on the correct standard because Model Rule of Professional Conduct 1.7 sets a national standard of care. (Appellant Br. 17-18). To support his argument for a national standard, Hamilton notes that South Dakota requires applicants to take the Multistate Professional Responsibility Examination ("MPRE"). (Appellant Br. 24). Hamilton's argument is a non-sequitor. As noted above, the Model Rules of Professional Conduct do not establish a national standard of care. If the rules themselves do not set the standard of care, administration of a test on the rules of professional conduct cannot establish a national standard of care.

Further, the specific opinions proffered by Lillehaug in this case illustrate why this Court should not adopt a national standard of care. Lillehaug opined that "[i]n a case alleging conspiracy or concerted action, the very appearance of a single firm representing the alleged co-conspirators usually sends a message to the jury that the co-defendants collaborate, thereby supporting the plaintiff's case." (H-App. 72). As discussed above, however, the thoughts, cultural values, and opinions of a jury are inherently local issues. *See* Mallen & Smith, § 20:05 at 1256. Lillehaug cannot extend any knowledge he

gleaned from his career before juries in Hennepin County, Minnesota, to what a jury would think or do in any county in South Dakota.

Lillehaug has no personal experience with Roberts County (or South Dakota) juries. Rather, he was a Minneapolis attorney from a 250-lawyer mega law firm. (H-App. 67). He had virtually no experience in South Dakota courts. He admitted he appeared as attorney-of-record in one federal court case in Rapid City, South Dakota. (BG-App. 45-46). He also represented a client in a criminal matter for a short period of time in Sisseton, South Dakota. (*Id.*). He never argued a motion in South Dakota circuit court. (*Id.*). In short, other than reading Rule 1.7, Lillehaug has no basis for opining about the standard of conduct in South Dakota for conflicted representation, and his opinions are not helpful to the jury. *See Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404.

Disregarding Lillehaug's lack of knowledge about the standard of care in South Dakota, Hamilton argues that Rule 1.7 alone establishes a national standard of care and thus Lillehaug opined on the correct standard. Rule 1.7 cannot, however, set a national standard of care because the Model Rules of Professional Conduct expressly state a violation of a rule does not automatically establish a violation of the standard of care:

> Violation of a Rule should *not itself* give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached . . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *They are not designed to be a basis for civil liability*. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to

> seek enforcement of the Rule. *Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.*

S.D. Rules of Prof. Conduct Scope ¶ 20 (emphasis added).

This Court, in dicta, discussed the interplay of the Rules of Professional Conduct and malpractice cases in *Behrens v. Wedmore*, 2005 S.D. 79, 698 N.W.2d 555. In *Behrens*, the Court quoted the scope language above and stated that a violation of S.D. Rule of Prof. Conduct 1.5 did not automatically establish a breach of fiduciary duty. *Id.* ¶ 51, 698 N.W.2d. at 575. Citing Mallen & Smith, the Court then noted in dictum that a violation of Rule 1.7 *may* establish a breach of fiduciary duty. *Id.* ¶ 51, 698 N.W.2d. at 576 (citing Mallen & Smith §§ 14.5-14.7).

Relying on the scope language, Mallen & Smith confirms that the Rules of Professional Conduct *alone* cannot establish the standard of care. Mallen & Smith, § 20:7 at 1275. Instead, as stated by Mallen & Smith, violation of a rule is only evidence of a breach of the standard of care. *Id.* at 1275-76 ("The last sentence conforms to a judicial trend that a violation of a Model Rule can be evidence of a breach of a civil standard of conduct, though the Rule, itself, may not set the standard of care.").

Indeed, other courts have recognized that the ethical rules, without additional evidence, do not establish the standard of care. *See Hizey v. Carpenter*, 830 P.2d 646, 651-54 (Wash. 1992). In *Hizey*, the Washington Supreme Court, *en banc*, addressed the use of the Code of Professional Responsibility and the Model Rules of Professional Conduct in a legal malpractice case when the plaintiff argued the trial court erred in prohibiting reference to the ethical rules. In affirming the trial court, the Washington Supreme Court rejected the plaintiff's argument that the ethical rules conclusively

established the standard of care. *Id.* at 651. The court did acknowledge that the ethical rules remain relevant, but the expert must base the opinion on the failure to comply with the applicable standard of care or duty[10] rather than simply a violation of the ethical rule. *Id.* at 654.

Relying on the locality rule, other jurisdictions have excluded testimony of experts that merely opined the attorney-defendant violated the applicable ethical rule. *See Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 406 (Tenn. 1991). In *Lazy Seven*, the legal malpractice claim arose out of an alleged conflict of interest. *Id.* at 402. The proffered expert opined that the attorney-defendant violated the applicable standard of care by failing to comply with the Code of Professional Responsibility, and that the code established the standard of care. *Id.* On appeal, the Tennessee Supreme Court affirmed the exclusion of the proffered testimony because the professor expert was not asked whether he was familiar with the practice of law in the area including Knoxville. *Id.* at 406. Rather, the expert's standard of care opinion was based solely upon the Code of Professional Responsibility, which could not alone establish a standard of care. *Id.* at 406-07. Similarly, Lillehaug and Hamilton cannot rely on Model Rule 1.7 alone to establish the standard of care.

Finally, Hamilton claims that Lillehaug's use of the national standard of care is accurate because the Attorneys' expert did not state the specific standard of care for an attorney practicing in South Dakota. This argument is irrelevant because the defendant in a legal malpractice suit has no burden to produce an expert as to the standard of care on

[10] Notably, the Washington Supreme Court stated that "[i]n Washington, the standard of care for lawyers is a *statewide*, rather than local or community standard." *Id.* at 652 (emphasis added).

summary judgment. *See Hamilton*, 2011 WL 902489, at *8 ("A defendant moving for summary judgment in a legal malpractice case need not present expert testimony establishing a standard of care even though a plaintiff in that position would need to do so[.]").

In short, Hamilton's expert has virtually no experience in South Dakota. He took no efforts to familiarize himself with South Dakota practice. Instead, he made a fundamental assumption—South Dakota applies a nationwide standard of care set by Rule 1.7. This assumption was incorrect, and as a result, Lillehaug's opinions are fatally flawed and inadmissible.

B. <u>Insurance Investigation Claim.</u>

Like his conflict of interest opinion, Lillehaug's opinions on the insurance investigation claim are not based on a local, South Dakota standard of care. Instead, Lillehaug admitted that his insurance investigation opinions are based upon "his experience, learning from other lawyers with respect to cases that involve insurance." (BG-App. 59). Lillehaug has no experience in South Dakota involving insurance cases, however. He admitted that he has only spoken with one attorney in South Dakota regarding insurance coverage practice, namely Rex Haag in Rapid City, South Dakota. (*Id.* at 60). He further admitted that he did not know whether the standard of care regarding investigating insurance coverage in South Dakota differed from the standard of care he learned in Minnesota:

> Q. Are you familiar with the standard practice regarding investigating insurance coverage in South Dakota by South Dakota lawyers?
>
> A: I'm not aware that there is anything different with respect to South Dakota as far as investigating insurance coverage than in any other state.

Q: Have you done any investigation to determine whether there is any standard of care different in South Dakota than what you have had:

A: No.

(*Id.* at 61).

Lillehaug had no foundation to testify about the standard of conduct in South Dakota. His opinions are based upon either a national standard of care (the conflicted representation claim) or a Minneapolis standard of care (insurance investigation claim). These opinions are based upon the incorrect standard, are unhelpful to the jury, and are inadmissible. *See Burley*, 2007 S.D. 82, ¶ 16, 737 N.W.2d at 404. The Circuit Court properly excluded Lillehaug's opinions.

III. Hamilton Fails His Burden of Producing Admissible Evidence Establishing a Local Standard of Care.

The Circuit Court properly granted summary judgment dismissing the legal malpractice and the breach of fiduciary duty claims. As described above, Lillehaug's opinions were properly stricken. Without this testimony, Hamilton cannot bear his burden of production, and summary judgment should be affirmed. *See Lenius*, 294 N.W.2d at 913; *Hamilton*, 2011 WL 902489, at *12.

Even if Lillehaug's testimony was admitted, summary judgment would still be appropriate. As noted above, Lillehaug's opinions are **not** based on a local standard of care. As a result, there is no expert testimony on the applicable standard of care, and summary judgment is appropriate. *Lenius*, 294 N.W.2d at 914; *Hamilton*, 2011 WL 902489, at *12. *See also Luther*, 2004 S.D. 1, ¶ 16, 674 N.W.2d at 346 ("The trial court did not err in granting Britton's summary judgment motion on the basis of Luther's failure to present expert testimony on the engineer's professional standard of care.").

IV. The Circuit Court Properly Granted Summary Judgment On The Conflicted Representation Claim Based On Proximate Cause.

Judge Kean also granted summary judgment on the conflicted representation claims because Hamilton fails to bear his burden of production regarding proximate cause. Legal malpractice claims in South Dakota have four essential elements: "(1) an attorney-client relationship giving rise to a duty; (2) the attorneys, either by an act or a failure to act, violated or breached that duty; (3) the attorneys' breach of duty proximately caused injury to the client; and (4) actual injury, loss, or damage." *Yarcheski v. Reiner*, 2003 S.D. 108, ¶ 16, 669 N.W.2d 487, 493. Similarly, to recover on a claim for breach of fiduciary duty, the plaintiff must establish: "1) that the defendant was acting as fiduciary of the plaintiff; 2) that he breached a fiduciary duty to the plaintiff; 3) that the plaintiff incurred damages; and 4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages." *Grand State Prop. Inc. v. Woods, Fuller, Shultz & Smith, P.C.*, 556 N.W.2d 84, 88 (S.D. 1996). Under both claims, in order to survive summary judgment, Hamilton must present evidence from which a reasonable jury could find the alleged breach proximately caused him harm. *See Tolle v. Lev*, 2011 S.D. 65, ¶ 22, 804 N.W.2d 440, 446 (stating the party resisting summary judgment must "'show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.'").

"The term proximate cause is defined . . . as: An immediate cause and which, in natural or probable sequence, produced the injury complained of . . . . Furthermore, for proximate cause to exist, the harm suffered must be found to be a foreseeable consequence of the act complained of." *Weiss v. Van Norman*, 1997 S.D. 40, ¶ 13, 562 N.W.2d 113, 116-17 (quotations omitted). Issues of proximate cause are typically jury

questions unless "reasonable men can draw but one conclusion from facts and inferences[,]" and then summary judgment is appropriate. *Mitchell v. Ankney*, 396 N.W.2d 312, 313 (S.D. 1986); *see also Weiss*, 1997 S.D. 40, ¶ 13, 562 N.W.2d at 116 ("Causation is generally a question of fact for the jury except when there can be no difference of opinion in the interpretation of the facts."). Further, a plaintiff cannot rely on speculation to survive summary judgment. *See Stern Oil Co., Inc. v. Brown*, 2012 S.D. 395, ¶ 8, 817 N.W.2d 395, 398 ("[T]he party challenging summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.").

Here, without resorting to speculation, no reasonable jury could have found that Hamilton would have received a better result in the Underlying Lawsuit "but for" the Attorneys' allegedly negligent conduct. Hamilton voluntarily settled the Underlying Lawsuit before trial. Following the settlement, he sued his former attorneys. These so-called "settle and sue" legal malpractice cases present unique causation and damage issues. *See Filbin v. Fitzgerald*, 149 Cal. Rptr. 3d 422, 425 (Cal. Ct. App. 2012).

In *Filbin*, the trial court in the malpractice action found the negligent acts caused the clients "to settle for $574,000 less than they would have otherwise received." *Id.* at 430. On appeal, the California Court of Appeals reversed because the clients failed to prove the attorney's negligent acts actually harmed them. In reaching this decision, the court discussed the causation problems created by "settle and sue" cases and concluded the client must prove that he or she *certainly* would have received a better result at trial but for the malpractice. *Id.* at 432.

The court adopted the legal certainty test because of the "hindsight vulnerability of lawyers is particularly acute when the challenge is to the attorney's competence in settling the underlying case." *Id.* (internal quotation omitted). Speculation that the client would have received a better result at trial or through settlement cannot sustain the causation and damage elements. *Id.* Thus, in settle and sue cases, "[t]he standard should be whether the settlement is within the realm of reasonable conclusions[.]" *Id.* at 433. Similarly, other courts have rejected legal malpractice claims in "settle and sue" cases when the alleged damages are speculative. *See Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39, 42 (Mo. Ct. App. 1991); *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142, 145-46 (Cal. Ct. App. 1995); *Elizondo v. Krist*, 2013 WL 4608558 (Tex. 2013).

Here, other than speculation, Hamilton has presented nothing indicating that but for the Attorneys' alleged negligent conduct—joint representation of all three co-defendants—he would have received a better result at trial. As the Circuit Court stated: "Even if Hamilton was the only client of [the Attorneys] or was represented by separate counsel, there was still evidence implicating Hamilton in the conspiracy . . . Therefore, Hamilton has not shown that he would have prevailed against Adee in the Underlying Lawsuit." (BG-App. 18).

Hamilton argues he presented sufficient evidence to create a question of fact on whether he would have prevailed at trial because he presented evidence that he did not engage in misconduct. (Appellant Br. 30). Instead, he alleges the evidence of wrongdoing in the Underlying Lawsuit implicated Block and Amman only. Hamilton's argument ignores, however, the civil conspiracy claim in the Underlying Lawsuit, which makes him jointly and severally liable for Block and Amman's conduct. *Selle v. Tozser*,

2010 S.D. 64, ¶ 24, 786 N.W.2d 748, 756 (stating "that civil conspiracy is merely a method of establishing joint liability for the underlying tort.").

Even if the Attorneys did not jointly represent all three clients in the Underlying Lawsuit, the factual allegations and risks at trial would still be the same. Adee was going to present testimony from several landowners indicating Block and Hamilton misrepresented facts to induce them to register their sites with Block and Hamilton rather than Adee. (CR 316). These alleged misrepresentations are the wrongful conduct supporting Adee's tortious interference claim.

At trial, the jury also would have heard evidence that Block and Hamilton shared bee site lists, jointly prepared the form to secure the landowner's revocation of prior permission, and divided the Hillhead territory by geographic area. (CR 304). This is sufficient evidence to create a substantial risk of an adverse judgment against Hamilton on the conspiracy claim.

Moreover, at the time of settlement and with trial rapidly approaching, Amman's Installment Agreement that "sold" bee sites destroyed the primary defense in the Underlying Lawsuit, namely that Adee had no protected legal interest in his bee sites because it is not legally permissible to "sell" sites. Even if Hamilton would have had independent counsel, the jury would still have heard evidence about joint conduct and Amman's (an alleged co-conspirator's) Installment Agreement.

The evidence also establishes that the settlement was reasonable under the circumstances. Hamilton had to give up ten bee sites and money for honey in exchange for avoiding the risk of losing over $1.5 million at trial. He did not even pay *any* legal fees.

The differences between the damages alleged in the Underlying Lawsuit and what Hamilton is alleging in this case proves the settlement was reasonable. Adee claimed damages against Hamilton, Block, and Amman in an amount close to $1.5 million. (CR 248-49). Hamilton was exposed to joint and several liability for that whole amount under the conspiracy claim. Here, Hamilton alleges damages for approximately $700,000. (CR 405). This disparity confirms the reasonableness of the settlement in this case. *See Vincent v. DeVries*, 72 A.3d 886, 898 (Vt. 2013) ("We agree with defendant and the trial court that when a claim for malpractice damages is predicated on the difference between the settlement actually reached and the resolution that would have been reached in the absence of the malpractice, the settlement must be reasonable.").

In short, Hamilton failed to meet his burden of producing evidence from which a reasonable jury could have found that the joint representation caused him any harm. Any alleged damages would be purely speculative, and speculative damages are not recoverable. *Bailey v. Duling*, 2013 S.D. 15, ¶ 36, 827 N.W.2d 351, 364. Summary judgment was properly granted.

Regarding the negligent insurance investigation claim, Judge Kean did not reach the argument that Hamilton failed to present sufficient evidence of proximate cause. (BG-App 21). If he had reached this argument, summary judgment would be warranted because: (1) Hamilton's alleged insurance policy is not contained in the record, which prevents the Court from determining whether insurance coverage exists; (2) neither Hamilton, nor his attorneys James, Rasmus, and Wiles commenced a declaratory judgment action to determine whether coverage existed under the policy; (3) no evidence exists that a declaratory judgment action would have failed to procure coverage; and (4)

no evidence exists whether coverage would be denied for other reasons, such as failure to provide timely notice of the claim.[11] Thus, Hamilton failed his burden of presenting evidence indicating the alleged negligent insurance investigation proximately caused any harm.

V. The Circuit Court Did Not Abuse Its Discretion in Denying a Continuance After Striking Lillehaug's Opinions.

Hamilton requested that if the Circuit Court excluded Lillehaug's opinions, then the court should grant a continuance so Hamilton could find a replacement expert. Judge Kean denied the motion to continue and granted summary judgment. The Circuit Court did not abuse its discretion in denying the motion to continue because the Attorneys would have been substantially prejudiced and the proceedings in this case would have been delayed.

"The granting or refusal of a continuance rests within the sound discretion of the circuit court, and its rulings on motions for continuances will not be reversed on appeal in the absence of an abuse of discretion." *Brooks v. Milbank Ins. Co.*, 2000 S.D. 16, ¶ 26, 605 N.W.2d 173, 180 (internal quotations omitted). The trial court considers the following factors when deciding whether to grant a continuance:

> (1) whether the delay resulting from the continuance will be prejudicial to the opposing party; (2) whether the continuance motion was motivated by procrastination, bad planning, dilatory tactics or bad faith on the part of the moving party or his counsel; (3) the prejudice caused to the moving party by the trial court's refusal to grant the continuance; and (4) whether there have been any prior continuances or delays.

State v. Moeller, 2000 S.D. 122, ¶ 7, 616 N.W.2d 424, 431.

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[11] Neville testified Hamilton told the Attorneys he did not have insurance. (CR 257). As noted by Judge Kean, Hamilton has not presented evidence disputing this fact. (BG-App 21).

The delay resulting from the continuance would have been prejudicial to the Attorneys because a continuance would have given Hamilton a second opportunity to meet his burden on the standard of care. The locality rule has been essentially unmodified for over thirty years. Hamilton should not have been surprised by the exclusion of an expert that opines on a national standard of care. *See Dakin v. Springboro Pediatrics*, Civ. No. 2012-113, 2013 WL 3379582, at *3 (Ohio Ct. App. July 1, 2013) ("Appellant knew at the time of filing . . . that he would be required to present expert testimony as to the medical standard of care, breach of that standard of care, and causation in order to establish his medical malpractice claim. The trial court was not obligated to delay the proceedings until such time that appellant was able to prove his case."). Thus, the continuance motion was motivated by bad planning or procrastination, and the ends of justice do not support a continuance when Hamilton knew he would have to provide admissible expert testimony on the correct standard of care. *See Hamilton*, 2011 WL 902489, at *8 (granting summary judgment and rejecting plaintiff's motion to continue for additional time to find an expert on the standard of care).

Hamilton argues that *Tosh v. Schwab*, 2007 S.D. 132, 743 N.W.2d 422, controls. In *Tosh*, this Court held that the circuit court committed reversible error when it denied a continuance after striking the expert opinion of a necessary expert. *Id.* ¶ 24, 743 N.W.2d at 429-30. This case is distinguishable from *Tosh*. First, in *Tosh*, the trial date had yet to be scheduled and there would have been no recognizable delay or prejudice to the other party. *Id.* ¶ 26, 743 N.W.2d at 430. In fact, due in part to military deployments, the case was not tried until twenty months after the date the expert's opinion was struck. *Id.*

In this case, the trial was scheduled for April 16, 2013. (CR 744). The trial was only cancelled a month prior to trial in light of Lillehaug's appointment to the Supreme Court of Minnesota. (CR 999). Even after the trial was cancelled, Hamilton requested that the trial proceed as soon as possible and that Lillehaug immediately be allowed to testify by video deposition before being sworn in as a justice. (CR 983). The Attorneys agreed to proceed as soon as possible with trial and proceed with Lillehaug's video deposition if his testimony was admissible. (CR 971-72). Thus, unlike in *Tosh* where there were no pending motions or deadlines set, the parties here agreed to proceed and were actively working towards trying the case.

Second, in *Tosh*, the Supreme Court encouraged trial courts to "take a broader view in evaluating good cause for an amendment [of a scheduling order]. The most relevant factor in considering such amendments is usually the effect that the amendment will have on delaying the ultimate disposition of the case." *Tosh*, 2007 S.D. 132, ¶ 24, 743 N.W.2d at 430. Here, an amendment would have allowed Hamilton a do-over. His first attempt at proving his case failed. A continuance would have allowed expert discovery to begin anew, the briefing process to start again, and months would have been added to the process resulting in substantial delays and prejudice to the Attorneys.

It was not unreasonable or arbitrary for the Circuit Court to deny the motion to continue. The Circuit Court did not abuse its discretion.

VI. The Issue of Res Judicata is Moot, but the Circuit Court Properly Concluded that Collateral Estoppel Precluded Relitigation of Hamilton's Signed Waiver.

This issue does not affect the issues presented in this case and is a "red herring" argument.[12]

The South Dakota Supreme Court reviews a circuit court's application of res judicata de novo. *American Family Ins. Grp. v. Robnik*, 2010 S.D. 69, ¶ 14, 787 N.W.2d 768, 774. "Res judicata consists of two preclusion concepts: 'issue preclusion' and 'claim preclusion.'" *Id.* ¶ 15, 787 N.W.2d at 774. "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided . . . . This effect also is referred to as direct or collateral estoppel." *Id.* (quotations omitted).

The Supreme Court adopted a four-part test for collateral estoppel:

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication?

Estes v. Millea, 464 N.W.2d 616, 618 (S.D. 1990).

The specific issue – whether Hamilton signed the conflict waiver – was decided by Judge Flemmer in the prior adjudication. Hamilton nevertheless argues collateral estoppel does not apply because the legal issues in enforcing the settlement and this action are not identical. (Appellant Br. 27). The legal issues do not, however, have to be identical. Rather, the *exact factual issue* of whether Hamilton signed the consent waiver is both identical and essential to both claims. Therefore, Hamilton is collaterally estopped from relitigating that essential fact. *See Estes*, 464 N.W.2d at 618 ("While

[12] Nevertheless, in the interests of diligence, the Attorneys will address this issue briefly.

collateral estoppel does not bar a cause of action, it does bar relitigation of an essential fact or issue involved in the earlier suit.").

Second, Judge Flemmer entered a final judgment on the merits, and that judgment was not objected to or appealed by Hamilton. (CR 436). Hamilton now argues that Judge Flemmer's finding of fact is clearly erroneous. This rationale, however, is exactly why the doctrines of issue preclusion and collateral estoppel exist. If Hamilton thought Judge Flemmer's finding was clearly erroneous in the Underlying Lawsuit then he had to appeal *that* decision. To do so now is contrary to established law.

Next, Hamilton previously litigated the issue and lost on the merits against Adee. It does not matter that the Attorneys and Adee are not in privity. *See id.* at 619. Finally, Hamilton had a full and fair opportunity to ligate the issue in the prior adjudication before Judge Flemmer, but chose not to appeal.

Accordingly, Judge Flemmer "judicially passed upon and determined" the fact or issue that Hamilton signed the conflict waiver and, thus, this issue is precluded from being relitigated in this case. *See Nemec v. Goeman*, 2012 S.D. 14, ¶ 15, 810 N.W.2d 443, 446-47 (holding that because the circuit court never made a specific finding on the mother's fitness in the guardianship action, the issue was not precluded from being raised in a later custody action because "no court has ever 'judicially passed upon and determined' " the mother's fitness). The Circuit Court did not err.

CONCLUSION

Based on the foregoing, the Circuit Court's decision should be affirmed.

Dated this 23rd day of October, 2013.

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ORAL ARGUMENT

Appellees respectfully request oral argument before the Court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellees' Brief does not exceed the number of words permitted under SDCL § 15-26A-66, said Brief containing 9,486 words.

Meghan K. Woster

CERTIFICATE OF SERVICE

I, Meghan K. Woster, hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P. and that on the 23rd day of October, 2013, two (2) true and correct copies of the Appellees' Brief were served upon:

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by U.S. Mail, first class postage prepaid, and the original and fourteen (14) copies of the foregoing Appellees' Brief were served by via UPS Ground to Ms. Shirley Jameson-Fergel, Clerk of Court, South Dakota Supreme Court, 500 East Capitol Avenue, Pierre, SD 57501.

Meghan K. Woster

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

ROGER HAMILTON,

Plaintiff and Appellant,

v.

RICHARD A. SOMMERS, MELISSA E. NEVILLE AND BANTZ, GOSCH & CREMER, PROF. L.L.C.

Defendants and Appellees.

26720

APPELLANT'S REPLY BRIEF

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

Hon. Gene Paul Kean
Circuit Court Judge

Notice of Appeal filed June 12, 2013.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES, COURT RULES & SECONDARY SOURCES

Appellees' completely mischaracterize the way in which Hamilton's expert, Justice Lillehaug, prepared for making his expert report and how he came to his conclusions concerning the applicable standard of care. Only after carefully reviewing the record and contacting South Dakota attorneys about the application of ethical rules and other laws in South Dakota did he concluded Appellees' violated the standard of care. There is nothing in the record of this case even remotely suggesting Justice Lillehaug's analysis is flawed.

Justice Lillehaug is "eminently qualified" to render an opinion concerning the standard of care in this case, and he did not suggest that a standard of care from Minnesota or any other state should be applied to South Dakota. Rather, Justice Lillehaug concluded, after analyzing Rule 1.7 under South Dakota law, that analysis in South Dakota would be similar to other states that have adopted the Model Rules of Professional Responsibility. This conclusion cannot be used to disqualify him as Hamilton's expert. Moreover, Appellees do not and cannot criticize Hamilton's expert based on any *Daubert* criteria – rather, they imply and do not even argue that a lawyer from Minneapolis analyzes whether he or she has a conflict of interest in a fashion different than lawyers in Roberts County, South Dakota.

Hamilton produced sufficient evidence that Appellees breached the applicable standard of care in South Dakota. (*Infra,* Sections I-IV.) Likewise, Hamilton produced sufficient evidence that Appellees' breach proximately caused Hamilton's damages. (Section V.) Finally, the circuit court erred by failing to grant a continuance after striking the expert opinion of Justice Lillehaug. (Section VI.) Accordingly, summary judgment must be reversed.

ARGUMENT

I. The Circuit Court Erred in Striking the Expert Opinion of Minnesota Supreme Court Justice David Lillehaug.

At the outset, Appellees and the circuit court correctly note that an out-of-state expert may familiarize himself with the "local" standard of care through research. (Appellees' Br. at 16; H-App. 27.) *See also, Hamilton v. Silven, Schmeits & Vaughan,* 2013 WL 2318809, *4 (D. Or. May 28, 2013) ("In general, the courts have allowed experts in malpractice cases to become familiar with the applicable standard of care through research."). Despite this acknowledgement, Appellees argue that Justice Lilleghaug's opinion was not supported by adequate foundation.[1] Appellees' argument ignores and improperly weighs the research Justice Lillehaug conducted when forming his opinion, and any alleged deficiency in Justice Lillehaug's opinion goes to the weight, rather than admissibility, of his testimony.

Justice Lillehaug was born and raised in South Dakota and received his undergraduate degree from Augustana College in Sioux Falls. (H-App. 67.) Appellees recognize that Justice Lillehaug spoke with an attorney in South Dakota to familiarize himself with the "local" standard of care in this case, and obviously, Justice Lillehaug spoke with local counsel regarding the appropriate standard of care. (Appellees' Br. at 23.) In addition, Appellees admit that Justice Lillehaug represented two South Dakota clients in Rapid City and Sisseton, respectively.[2] (*Id.* at 20.) Furthermore, Appellees do not dispute that Justice Lillehaug reviewed the record and researched relevant rules, statutes and case law in forming his opinion.

[1] Appellees argue the circuit court struck the opinions of Justice Lillehaug on two independent grounds: (1) inadequate foundation, and (2) the opinions are allegedly "irrelevant, unhelpful to the jury and confusing." (Appellees' Br. at 16-17.) However, both of these grounds are based on the same premise – Justice Lillehaug allegedly lacked foundation to opine on the appropriate standard of care in South Dakota. It follows that the circuit court struck the opinion of Justice Lillehaug based on the sole ground that his opinion lacked foundation.

[2] Considering his qualifications, Justice Lillehaug could be admitted into the South Dakota bar without examination. *See In re Yanni,* S.D. 2005 59, ¶ 17; 697 N.W.2d 394, 400-401.

Despite this research and factual basis, Appellees argue that Justice Lillehaug's opinion was not supported by adequate foundation. This conclusion improperly weighs evidence. This Court has held that the rules of evidence are to be interpreted "liberally with the 'general approach of relaxing the traditional barriers to "opinion" testimony.'" *State v. Guthrie,* 2001 S.D. 61, ¶ 36, 627 N.W.2d 401, 416 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 588 (1993)).[3] In *Burley v. Kytec Innov. Sports Equip., Inc.,* this Court reversed the circuit court's order striking the plaintiff's expert witness, stating the circuit court "set the bar too high in determining the admissibility of the expert's opinion." 2007 S.D. 82, ¶ 1, 737 N.W.2d 397, 400. The circuit court's holding that Justice Lillehaug's opinion was not supported by adequate foundation raises countless questions concerning the admissibility of expert testimony – e.g., if a Supreme Court Justice of a neighboring state is not permitted to provide expert testimony in South Dakota, then what out-of-state expert could testify in a South Dakota case? *C.f., Burley,* 2007 S.D. 82, ¶ 17 (rejecting argument that proffered expert was not qualified because she had not previously testified on the subject matter); *see also, First Western Bank Wall v. Olsen,* 2001 S.D. 16, ¶ 9, 621 N.W.2d 611, 615-16 (holding expert witnesses should not be examined under a "restricted focus"). The record establishes that Justice Lillehaug's opinion was amply supported for the purposes of summary judgment.

Finally, any alleged deficiency in Justice Lillehaug's opinion goes to the weight, rather than admissibility, of his testimony. *Burley,* 2007 S.D. 82, ¶ 24 ("Any other deficiencies in an expert's opinion or qualifications can be tested through the adversary process at trial."), ¶ 46 (Sabers, J., concurring in part & dissenting in part) (finding that circuit court's "errors result from …

[3] The circuit court committed reversible error by failing to make *Daubert* findings of fact as to whether Justice Lillehaug's opinion was reliable and relevant. *Burley,* 2007 S.D. 82, ¶ 25 (remanding to circuit court to rule on the *Daubert* reliability factor).

a rush to summary judgment when genuine issues of material fact exist, and excessive emphasis on admissibility over the weight of opinion evidence"). Many other courts have admitted the testimony of expert witnesses with limited experience in the local jurisdiction. *See, e.g., Hamilton,* 2013 WL 2318809, *4; *Sloan v. Urban Title Services, Inc.,* 770 F.Supp.2d 227, 237 (D. D.C. 2011); *Biltmore Associates, L.L.C. v. Thimmesch,* 2007 WL 5662124, * 4 (D. Ariz. Oct. 15, 2007); *First Union National Bank v. Benham,* 423 F.3d 855, 863 (8th Cir. 2005); *Smith v. Haynsworth, Marion, McKay & Geurard,* 472 S.E.2d 612, 614 (S.C. 1996); *Walker v. Bangs,* 601 P.2d 1279, 1283 (Wash. 1979). Appellees fail to rebut this argument or distinguish the cited cases. Accordingly, Appellees effectively concede that any deficiency as to the foundation of Justice Lillehaug's opinion would go toward the weight of his testimony on cross-examination, and not the admissibility of his opinions. The circuit court erred in striking the testimony of Justice Lillehaug.

II. Justice Lillehaug Correctly Identified and Hamilton Presented Sufficient Evidence of the Appropriate Standard of Care for Conflicted Representation and Identifying Possible Insurance Coverage in South Dakota.

Appellees' skew this Court's precedent and improperly weigh evidence. Justice Lillehaug correctly applied the facts of the Underlying Lawsuit to Rule 1.7 to provide evidence that Appellees' conflicted representation breached the applicable standard of care. Similarly, Justice Lillehaug correctly opined that Appellees' failure to investigate insurance coverage breached the applicable standard of care. Accordingly, Hamilton produced sufficient evidence that Appellees breached the applicable standard of care, and the circuit court erred in granting summary judgment.

A. Conflicted Representation

Appellees ask this Court to overrule its holding in *Behrens v. Wedmore* that "fiduciary rules such as … Rule 1.7 and 1.8 regarding conflicts of interest … may establish a breach of

fiduciary duty."[4] (Appellees' Br. at 21.) 2005 S.D. 79, ¶ 51, 698 N.W.2d 555, 576 (citation omitted). Appellees and the circuit court undermind this Court's precedent by stating the holding in *Behrens* is merely dicta. (Appellees' Br. at 21; H-App. 27.) The holding in *Behrens* that a violation of Rule 1.7 may establish a breach of fiduciary duty was addressed in a majority decision, rather than a footnote or dissenting opinion; the holding was central to the resolution of the case; and the issue was fully briefed and argued by both parties on appeal. *Id.* Thus, this Court has ruled that a violation of Rule 1.7 may establish a breach of fiduciary duty, and this Court should reject Appellee's invitation to overrule *Behrens.*

Even if a violation of Rule 1.7 does not provide conclusive evidence of breach of a fiduciary duty, a violation of Rule 1.7 may be used as evidence of a breach of the standard of care. Appellees acknowledge that violation of Rule 1.7 is evidence of a breach of the standard of care. (Appellees' Br. at 21.) *C.f.,* MODEL RULES OF PROF.L CONDUCT, *Scope* (2002) ("[A] lawyers violation of a Rule may be evidence of breach of the applicable standard of conduct."); R. Mallen and J. Smith, *Legal Malpractice,* § 20:7, p. 1279 (2012) (describing the majority rule that an ethics rule may be used as evidence in determining breach of the standard of care in legal malpractice actions).

In the present case, Justice Lillehaug applied the facts of the Underlying Lawsuit to Rule 1.7 to provide evidence of breach of the standard of care. Justice Lillehaug opined that

[4] In addition to Rule 1.7, Appellees violated Rule 1.8 of the South Dakota Rule of Professional Conduct. Rule 1.8(g) states in pertinent part "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients…, unless each client gives informed consent, in a writing signed by the client." It is undisputed that Appellees represented the co-defendants, including Hamilton; Appellees participated in making an aggregate settlement of the claims; and Appellees did not receive written informed consent from Hamilton at the outset of the lawsuit or when the conflict sharpened at the time of settlement.

Appellees breached the appropriate standard of care by representing all three co-defendants in the Underlying Lawsuit. More specifically, Justice Lillehaug opined that Appellees violated the standard of care by (1) failing to advise Hamilton the concurrent conflict was nonconsentable, (2) failing obtain informed consent from Hamilton, confirmed in writing, and (3) failing to withdraw or move for a continuance when the conflict sharpened. (H-App. 71-79.)

In reaching this conclusion, Justice Lillehaug found that the applicable standard of care for conflicted representation in South Dakota "is consistent with and well stated by Rule 1.7" of the South Dakota Rules of Professional Conduct. (H-App. 26, 69.) Viewing the evidence and inferences in a light most favorable to Hamilton, Justice Lillehaug's opinion correctly identified the applicable standard of care for conflicted representation in South Dakota. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (stating "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"); *Continental Grain Co. v. Heritage Bank,* 1996 S.D. 61, ¶ 16, 548 N.W.2d 507, 511 (stating that the credibility of witnesses must be determined by the fact finder, not on summary judgment).

Appellees argue for the first time in their Brief that Justice Lillehaug failed to establish the applicable standard of care because he did not opine as to "what a jury would think or do in any county in South Dakota." (Appellees' Br. at 19-20.) However, it is not an expert witness' duty to speculate as to what a jury may or may not do, rather, an expert witness gives an opinion as to "whether a lawyer possessed and used the knowledge, skill, and care which the law demands of him." *Lenius v. King,* 294 N.W.2d 912, 914 (S.D. 1980).

Appellees attempt to place an unreasonable and unnecessary burden on expert witness testimony. Appellees and the circuit court have not even attempted to state what the "correct"

standard of care is for conflicted representation in South Dakota. Although Appellees have no obligation to produce an expert, their inability to define an alternative or the "correct" standard of care is fatal to their argument and illustrates that Justice Lillehaug, in fact, opined as to the appropriate standard of care. *See Walker,* 601 P.2d at 1283 ("Defendants fail to identify specific inadequacies. Their objects are more appropriately addressed to the weight to be accorded the opinions express therein."). Justice Lillehaug correctly identified the appropriate standard of care for conflicted representation in South Dakota, and the circuit court erred in granting Appellees' motion for summary judgment.

B. Insurance Investigation Coverage

Like conflicted representation, Appellees and the circuit court improperly weigh evidence as to investigation of insurance coverage. Justice Lillehaug opined that Appellees' "should have asked [Hamilton] to search for and produce any business, homeowner's, or umbrella insurance policies he might have. Also, [Appellees] should have asked Hamilton for the identity of his agent and, as necessary, sought permission to contact the agent." (H-App. 79-80.) Appellees' expert stated "[i]t would not be standard of care in this area of our state to make further inquiry if a client tells his lawyer he doesn't have any insurance coverage." (Feb. 25, 2013, Aff. of Dan Rasmus, Ex. B.) This is precisely the fact question for the jury to resolve, and Appellees' and the circuit court erred by improperly weighing evidence in favor of Appellees. *See, e.g., Anderson,* 477 U.S. at 249; *Continental Grain,* 548 N.W.2d at 511. Hamilton presented sufficient evidence of the appropriate standard of care in South Dakota, and the circuit court erred in granting summary judgment as to whether Appellees' breached that standard of care.

III. Regardless of Whether South Dakota Adopts a Statewide or National Standard of Care for Legal Malpractice Actions, Justice Lillehaug Correctly Identified the Appropriate Standard of Care in this Case.

Contrary to Appellees' assertion, this Court need not overrule *Lenius* to resolve this appeal in favor of Hamilton for multiple reasons. (Appellee's Br. 13.) Appellees argument concerning the locality rule is merely a "red herring" to distract this Court from the true issue – Justice Lillehaug correctly identified the proper standard of care in the present case.

First, the difference between a state-wide and national standard of care, as applied to the present case, is a distinction without a difference. As the Georgia Supreme Court found "the standard of care required of an attorney remains constant whether he is considered as a practitioner of a given State or as a practitioner of 'the legal profession generally.'" *Kellos v. Sawilowsky,* 325 S.E.2d 757, 758 (1985). In the present case, Justice Lillehaug correctly identified that the standard of care for conflicted representation and investigating insurance policies in South Dakota is not unique from that of the legal profession generally – *i.e.* the standard of care for conflicted representation and investigation of insurance policies in South Dakota is the same as the national standard of care. Appellees failed to explain how South Dakota's standard of care for conflicted representation or investigation of insurance coverage differs from the national standard of care. Accordingly, the difference between a state-wide and national standard of care, as applied to this case, is a distinction without a difference.

Additionally, adopting a national standard of care would harmonize *Lenius* with existing case law. The standard of care for the medical profession is the same as the standard of care for the legal profession. *Martinmaas v. Engelmann,* 2000 S.D. 85, ¶ 30, 612 N.W.2d 600, 608 (citing *Lenius,* 294 N.W.2d at 914). And, this Court abandoned the "locality rule" for medical practitioners in favor of a national standard of care. *Id.*; *see also, Mousseau v. Schwartz,* 2008 S.D. 86, ¶ 17, 756 N.W.2d 345, 353 ("[W]e no longer subscribe to that portion of the statement

that refers to a local standard of care, *see Shamburger II,* 418 N.W.2d at 306 (adopting a national standard of care by which the *practitioner* shall be measured.")) (emphasis added). Therefore, adopting a national standard of care would harmonize *Lenius* with existing case law.

Appellees do not dispute that the original reasoning behind the "locality rule" no longer exists because of advancements in technology and transportation. *See, e.g., Christy v. Saliterman,* 179 N.W.2d 288, 302 (Minn. 1970); *c.f., State v. Waff,* 373 N.W.2d 18, 26-27 (S.D. 1985) (Henderson concurring) ("Innovations in society, technological advances beyond our wildest imagination, and revolutionary economic change and expansion require adaptability in the ever-development and growth of the law.").

Furthermore, Appellees' argument concerning the availability of expert witnesses in South Dakota is premised on unsupported, anecdotal evidence and improper testimony by the circuit court. (Appellees' Br. at 16. (quoting circuit court stating "I have four legal malpractice cases going right now, and they all involve people who have been hired to give expert opinions)); SDCL § 19-14-5 (Rule 605) (stating that presiding judge may not offer testimony). Therefore, while non-dispositive to the resolution of this case, this Court should reject the "locality rule" and adopt a national standard of care.

IV. The Circuit Court Erred in Finding, Sua Sponte, that Collateral Estoppel Precludes Litigation on the Issue of Conflicted Representation.

Appellees argument that the signed waiver issue "does not affect the issues presented in this case" is clearly incorrect and merely an attempt to dissuade this Court from addressing the issue. (Appellees' Br. at 33.) The circuit found, sua sponte, that "collateral estoppel bars relitigation of whether there was conflicted representation." (Order at 11.) This finding is overly

broad and clearly erroneous. If the finding is allowed to stand, than Hamilton will be severely prejudiced because he will be denied the right to present evidence of breach at trial.

Appellees argument on the collateral estoppel issue is incorrect for several reasons. First, Appellees completely fail to acknowledge the fact that Judge Flemmer's finding that Hamilton signed a conflict waiver at the outset of Appellees' representation of Hamilton, Block and Amman is clearly erroneous. It is undisputed that a signed conflict waiver from Hamilton does not exist, and Appellees acknowledge that Hamilton never signed a conflict waiver. (H-App. 55, ¶ 5.) Therefore, pursuant to SDCL 15-6-52(a), the finding of fact can and should have been set aside. *See also, First Nat. Bank of Biwabik, Minn. V. Bank of Lemmon,* 535 N.W.2d 866, 871-72 (S.D. 1995). Since Appellees failed to address this issue, they effectively concede that Judge Flemmer's finding of fact is clearly erroneous, and the circuit court erred in precluding Hamilton's conflicted representation argument based on collateral estoppel.

Moreover, Appellees do not dispute that the circuit court's holding is overly broad. The circuit court found that "[c]ollateral estoppel bars relitigation of whether there was conflicted representation;" however, Judge Flemmers' finding of fact only addresses whether Hamilton signed a conflict waiver at the outset of Appellees conflicted representation. Even if Hamilton is barred from arguing that he did not sign a conflict waiver, he still would be able to argue, through Justice Lillehaug's opinion, that the conflict was nonconsentable and a new conflict arose at the time a settlement offer was made to Amman and all three co-defendants.

Furthermore, contrary to Appellees' assertions, collateral estoppel does not preclude litigation on the issue of conflicted representation because the issues to be precluded are not identical. The issue in the Underlying Lawsuit was whether the settlement agreement between Hamilton and Adee was enforceable, whereas, the issue in the present case is whether Appellees

breached their duty to Hamilton by engaging in conflicted representation. Appellees' proposition that legal issues do not have to be identical misstates South Dakota law. *See Grand State Property, Inc. v. Woods, Fuller, Schultz & Smith, P.C.,* 1996 S.D. 139, ¶ 13, 556 N.W.2d 84, 87-88. Moreover, Appellees' reliance on *Nemec v. Goeman,* 2012 S.D. 14, ¶ 15, 810 N.W.2d 443, 446-47, is flawed because Judge Flemmer did not "pass" on the issue of whether Hamilton signed a conflict waiver, but rather, he made an explicit (clearly erroneous) finding. Lastly, Hamilton was not afforded a full and fair opportunity to litigate the issue in the Underlying Lawsuit because of Appellees' conflicted representation – i.e. "but for" Appellees' negligence, there would not have been a settlement agreement or erroneous finding of fact. 1996 S.D. 139, ¶ 13 ("[T]he parties were not afforded an opportunity to fully and fairly litigate the present issue.").

Finally, the circuit court's sua sponte ruling procedurally prejudiced Hamilton. A circuit court "should notify the parties when it intends to rely on a legal doctrine or precedents other than those briefed and argued by the litigants." *Leonhardt v. Leonhardt,* 2012 S.D. 71, ¶ 12, 822 N.W.2d 714, 717 (citing *Heisler v. Metro. Council,* 339 F.3d 622, 631 (8th Cir. 2003)). In their briefing, Appellees did not apply the elements of collateral estoppel to the facts, and completely abandoned the argument in their reply brief and at the hearing. This was insufficient to put Hamilton on notice that collateral estoppel was an issue that the circuit court would consider during the summary judgment hearing. *Id.* Accordingly, Hamilton suffered procedural prejudice by the circuit court's sua sponte ruling, and collateral estoppel does not preclude litigation on this issue of conflicted representation.

V. The Circuit Court Improperly Weighed Evidence as to Whether Appellees' Breach was the Proximate Cause of Hamilton's Damages.

Appellees correctly note that issues of proximate cause are typically questions of fact for the jury. (Appellees' Br. at 25-26.) In the present case, Hamilton produced ample evidence that would allow a reasonable jury to conclude that Appellees' conflicted representation proximately caused Hamilton's damages because (1) Hamilton would have been successful in the Underlying Lawsuit but for Appellees' breach, and (2) the settlement agreement between Hamilton and Adee was unreasonable. Moreover, by failing to address the issue, the circuit court conceded that Hamilton produced sufficient evidence that Appellees' failure to investigate insurance coverage proximately caused Hamilton's damages. Appellees, like the circuit court, improperly weigh evidence in arguing that Hamilton cannot satisfy causation. Accordingly, the circuit court erred in granting summary judgment on the issue of proximate cause.

A. Hamilton produced evidence that he would have been successful in the Underlying Lawsuit but for Appellees' breach.

Appellees' attempt to provide facts that Hamilton had a "substantial risk" of receiving an adverse judgment in the Underlying Lawsuit. (Appellees' Br. at 28.) *See Mitchell v. Ankney,* 396 N.W.2d 312, 313 (S.D. 1986). This argument ignores the circuit court's findings that

> (2) Hamilton won at the administrative hearing based on the landowners having the right to decide who placed hives on their land; … (5) Block and Amman testified in their depositions that Hamilton did nothing wrong; … (7) there was no evidence that Hamilton misrepresented facts or that he aided in misrepresentations made by Amman and Block

(H-App. 19.) Based on these facts and the supporting opinion of Justice Lillehaug, "Hamilton raises a question of fact as to whether he participated with Block and Amman in the alleged conspiracy." (*Id.*) Appellees, like the circuit court, improperly weigh evidence in arguing that Hamilton has not provided sufficient evidence he would have been successful in the Underlying Lawsuit. (Appellees' Br. at 27-28.) *See, e.g., Anderson,* 477 U.S. at 249; *Continental Grain,* 548 N.W.2d at 511.

Moreover, Appellees' argument is disingenuous because, as the circuit court found, Appellee Sommers "told Hamilton he had done nothing wrong and that Adee could provide no fact on which a jury could find against him." (H-App. 19.) Appellees do not dispute this finding. Appellees misstate and improperly weigh evidence. Hamilton produced more than sufficient evidence to allow a reasonable jury to find that he would have been successful in the Underlying Lawsuit but for Appellees' breach.

B. Hamilton produced evidence that the settlement amount was unreasonable.

Assuming, *arguendo*, this Court adopts the "settle and sue" standard urged by Appellees, Hamilton has produced sufficient evidence the settlement between Hamilton and Adee was unreasonable. Appellees' argument ignores the fact that there would not have been a settlement but for Appellees' conflicted representation. As stated above, there was no evidence directly implicating Hamilton in Adee's claims. But for the conflicted representation, Hamilton would have had his day in court. He did not have the opportunity to defend himself independent of Block and Amman because Appellees failed to advise him to seek independent counsel loyal only to him.

Also, *Filbin v. Fitzgerald* is inapposite to the present case. In *Filbin*, the plaintiff received impartial advice concerning settlement from a new attorney after firing his original attorney two and a half months earlier. 149 Cal. Rptr. 3d 422, 428 (Cal. Ct. App. 2012). The plaintiff then sued his original attorney. *Id.* The California Court of Appeals found that "[plaintiffs'] decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from [the defendant-attorney]. The consequences of that decision are likewise theirs alone." *Id.* at 425.

In the present case, Hamilton told Appellees he did not want to settle. Rather than advising Hamilton to seek independent counsel, Appellees pressured and coerced Hamilton to settle. Appellees told Hamilton the court would not grant a continuance if he terminated their representation, and Appellee Sommers told Hamilton he would have his day in court with Adee and could raise all issues related to Adee's claims by challenging the settlement agreement. Appellees' conflicted representation tainted the settlement process itself. Accordingly, Hamilton has produced sufficient evidence the settlement was unreasonable, and the circuit court erred in granting summary judgment on the issue of proximate cause.

C. The circuit court conceded that Hamilton produced sufficient evidence on the negligent insurance investigation claim.

Appellees correctly note the circuit court failed to address the issue of proximate cause as it relates to Appellees investigation of possible insurance coverage. This Court has repeatedly held it will not address issues not decided by the circuit court. *See, e.g.,* *In re GCC License Corp.*, 2001 SD 32, ¶ 22, 623 N.W.2d 474, 483; *Steiner v. County of Marshall,* 1997 SD 109, ¶ 27, 568 N.W.2d 627, 633; *Matter of Petrik,* 1996 SD 24, ¶ 11, 544 N.W.2d 388, 390; *Fanning v. Iversen,* 535 N.W.2d 770, 776 (S.D.1995); *Fullmer v. State Farm Ins. Co.,* 514 N.W.2d 861, 867 (S.D.1994); *Schull Const. Co. v. Koenig,* 80 S.D. 224, 121 N.W.2d 559, 561 (1963).

Notwithstanding this Court's policy against addressing issues not address by the lower court, Hamilton produced sufficient evidence on the issue of causation. Assuming Hamilton had insurance coverage and Appellees breached their duty to Hamilton by failing to inquire as to his coverage, (*supra* Section II.B.), Hamilton would have received a similar judgment as Block and Amman. Block and Amman, through Appellees' subsequent representation, received a $2.4 Million verdict against their insurance carrier. It follows that "but for" Appellees failure to

investigate Hamilton's insurance coverage, Hamilton would have received a judgment that would have remedied Appellees' negligence in the Underlying Lawsuit. Viewing this evidence in a light most favorable to Hamilton, sufficient evidence exists to establish a genuine issue of material fact concerning whether Appellees' failure to investigate insurance coverage was the proximate cause of Hamilton's damages.

VI. The Circuit Court Committed Reversible Error by Failing to Grant a Continuance After Striking the Expert Testimony of Justice Lillehaug.

Appellees concede that Hamilton established two of the four factors the court considers when deciding whether to grant a continuance. *State v. Moeller,* 2000 S.D. 122, ¶ 7, 616 N.W.2d 424, 431 (continuance factors). First, there were no prior continuances or delays. And more importantly, Hamilton suffered great prejudice by the circuit court's refusal to grant a continuance. Expert testimony was necessary to Hamilton's claims and the denial deprived Hamilton the "right to a reasonable opportunity to secure evidence on his behalf." *Tosh v. Schwab,* 2007 S.D. 132, ¶ 25, 743 N.W.2d 422, 430 (citing *Moeller,* 2000 S.D. 122, ¶ 7).

Appellees allege they would have been prejudiced by a continuance because the case would be delayed and a continuance would have given Hamilton a "do-over". (Appellees' Br. at 32.) However, any alleged inconvenience to Appellees is completely overshadowed by the fact that Hamilton was foreclosed from having his claim heard on the merits. *C.f., Urich v. Fox*, 687 P.2d 893, 896 (Wyo. 1984); *Sapp v. Wong*, 609 P.2d 137, 142 (Haw. 1980); *Yates v. Superior Court In and For Pima County*, 586 P.2d 997, 998 (Ariz. 1978) ("The inconvenience caused by a delay was completely overshadowed by the fact that petitioner would be foreclosed from having her claim considered by the panel on its merits..."); *Winkelman v. Allen*, 519 P.2d 1377, 1387 (Kan. 1974); *Schwarz v. Ulmer*, 370 P.2d 889, 894-95 (Colo. 1962).

Any alleged prejudice suffered by Appellees was mitigated because Hamilton moved to amend the scheduling order to permit the identification of a new expert promptly – even before the circuit court had ruled on the summary judgment motion. *See Tosh,* 2007 S.D. 132, ¶ 26. Also, the circuit court had the option of mitigating any economic disadvantage resulting from the delay of a continuance by requiring Hamilton to pay costs occasioned by the postponement. *Matter of C.T.E.,* 485 N.W.2d 591, 594 (S.D. 1992); *see also,* SDCL § 15-17-60. Therefore, any alleged inconvenience of Appellants is greatly outweighed by the prejudice Hamilton suffered from the denial of the motion for continuance.

Contrary to Appellees' assertion, Hamilton's request for continuance was not motivated by bad planning or procrastination. Hamilton retained two expert witnesses to support his claims, and Justice Lillehaug produce an expert report and was deposed by Appellees. Hamilton could not have known at the time he retained Justice Lillehaug that the circuit court would err in disqualifying his expert. Although Hamilton had obtained an expert, the expert became unavailable only because Appellees were successful in their motion to strike. *See Tosh,* 2007 S.D. 132, ¶ 26. The circuit court committed reversible error by failing to grant Hamilton's continuance after disqualifying Hamilton's expert witness, Justice Lillehaug.

CONCLUSION

Based on the foregoing, Hamilton respectfully requests this Court reverse the circuit court's order for summary judgment, and remand this matter for trial on the merits.

Dated:

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

DAN RASMUS, attorney for Appellant herein, certifies that this Appellant's Reply Brief contains 4.997 words, according to the word processing program (Microsoft Word 2010) used to prepare this brief. This complies with the limitations set forth in SDCL 15-26A-66(b).

_____
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