

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30441

KEVIN JUCHT,

Appellant,

vs.

NATHAN A. SCHULZ,

Appellee.

Appeal from the Circuit Court
First Judicial Circuit
McCook County, South Dakota
The Honorable Chris S. Giles, Presiding Judge

BRIEF OF APPELLANT

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Notice of Appeal Filed August 22, 2023

Oral Argument Requested

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JURISDICTIONAL STATEMENT

Kevin Jucht appeals the August 1, 2023, Order granting Defendant Nathan Schulz's motion to dismiss pursuant to SDCL 15-6-12(b)(5), notice of which was served on August 2, 2023. Jucht filed a Notice of Appeal on August 22, 2023.

STATEMENT OF THE ISSUES

1. Whether SDCL 38-21-46 creates a statute of limitations or condition precedent

The trial court held that SDCL 38-21-46 barred Jucht's claims.

Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.D. 1982)
SDCL 38-21-45

2. Whether Schulz's actual notice of the damage to Jucht's property was sufficient to meet the statutory notice requirement

The trial court declined to treat Schulz's actual notice of the damage to Jucht's property as a sufficient prerequisite for suit.

Larson v. Hazeltine, 1996 S.D. 100, 552 N.W.2d 830
Matter of Dependency and Neglect of A.L., 442 N.W.2d 233 (S.D. 1989)
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STATEMENT OF THE CASE

Kevin Jucht filed suit against Defendant Nathan Schulz ("Schulz") in the Circuit Court for McCook County, alleging that his crops had been damaged by Schulz's application of chemicals on a neighboring field. The Court, the Honorable Chris Giles presiding, dismissed Jucht's complaint pursuant to SDCL 15-6-12(b)(5). This appeal follows.

STATEMENT OF FACTS

Kevin Jucht is a farmer in McCook County. Since 2017, Jucht has planted and harvested soybeans on a property located at 26654 430th Avenue, Bridgewater, South Dakota (“the Property”). (Compl. ¶¶ 1, 4). On June 24, 2022, around 11:07 a.m., Schulz called Jucht to ask what he had planted on the Property; Jucht informed him that it was soybeans. (Compl. ¶ 6). At this time, it was 92 degrees in the area, with winds of 15 miles per hour. (Compl. ¶ 7).

Schulz proceeded to spray fields adjacent to Jucht’s property. By the time he finished at approximately 6:00 p.m., the temperature was 98 degrees Fahrenheit, with wind gusts of up to 26 miles per hour. (Compl. ¶ 7). The chemicals that Schulz sprayed drifted onto the Property and severely damaged Jucht’s soybeans, resulting in a significantly diminished yield. (Compl. ¶¶ 8, 15).

Jucht contacted the South Dakota Department of Agriculture and Natural Resources (“DANR”) to report the incident. (Compl. ¶ 9). DANR told Jucht to have no further involvement in its investigation of Schulz’s spraying unless directly asked by DANR; Jucht followed these instructions. (*Id.*). Jucht permitted a DANR inspector to enter the Property and collect vegetation samples on July 7, 2022. (Compl. ¶ 12). While Schulz had actual notice of the incident and DANR’s investigation of Jucht’s complaint, he never asked to enter the Property to inspect the damage he had caused to Jucht’s crop. (Compl. ¶¶ 10-11). Jucht never denied Schulz access to inspect the Property. (Compl. ¶ 10).

Jucht filed suit against Schulz, making claims of negligence, strict liability pursuant to SDCL 20-9-9, trespass, nuisance, punitive damages, and damages for

wrongful injury to trees and plants pursuant to SDCL 21-3-10. Schulz moved to dismiss the complaint in its entirety for failure to state a claim, on the grounds that Jucht never provided Schulz with written notice by certified mail pursuant to SDCL 38-21-46. The circuit court granted this motion on August 1, 2023. This appeal follows.

ARGUMENT

A motion to dismiss under Rule 12(b)(5) “is viewed with disfavor and is rarely granted.” *Fodness v. City of Sioux Falls*, 2020 S.D. 43 ¶ 9, 947 N.W.2d 619, 624 (quotations omitted). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Whether a complaint states a valid claim for relief is viewed in the light most favorable to the plaintiff and examined to determine if the allegations provide for relief on any possible theory. *Id.* at ¶ 10, 947 N.W.2d at 624 (quotations omitted). The circuit court’s ruling on a motion to dismiss presents a question of law to be reviewed de novo, with no deference given to the trial court’s legal conclusions. *Id.* at ¶ 9, 947 N.W.2d at 624 (quotations omitted).

The facts, as stated in Jucht’s complaint, set forth valid claims for relief because this Court has held that the notice provisions in SDCL 38-21-46 are not intended to bar civil claims for damages caused by chemical misapplication. Neither the subsequent history of SDCL 38-21-46 nor any of the authorities cited by Schulz support the conclusion reached by the circuit court. Moreover, the facts, as pleaded, show that Jucht substantially complied with the statute, and Schulz had actual notice of the spray event; even if the circuit court had been correct in holding that SDCL 38-21-46 creates a statute

of limitations or condition precedent for civil claims, its purpose and reasonable objective had been met, and Jucht should have been allowed to proceed.

I. SDCL 38-21-46 is not a statute of limitations or condition precedent

This Court has already held that SDCL 38-21-46 does not create a condition precedent or a statute of limitations for claims in civil court. *See Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696, 698 (S.D. 1982). Instead, all that can result from a failure to provide notice pursuant to SDCL 38-21-46 is that the Department of Agriculture may refuse to hold a hearing for the denial, suspension, or revocation of a license or certification for pesticide applicators or dealers. *Id.* While there have been amendments to SDCL 38-21-46 since *Durham*, none of these changes overrule the decision.

The plaintiff in *Durham* hired Varilek Farm Service to apply herbicide manufactured by Ciba-Geigy Corporation. *Id.* at 697. When the herbicide failed to control foxtail in his milo crop, the plaintiff complained to Varilek Farm Service, which relayed the complaint to Ciba-Geigy's sales representative. *Id.* at 698. The plaintiff then filed suit against Varilek Farm Services, Ciba-Geigy, and the distributor of the herbicide. *Id.* at 697. Ciba-Geigy filed a motion for summary judgment on the grounds that the plaintiff had not filed a damage claim with the South Dakota Department of Agriculture as required by SDCL 38-21-46. At the time, the statute read as follows:

Any person claiming damages from a pesticide application shall file with the secretary on a form prescribed by the secretary a written statement within thirty days after the date that the damages occurred. If a growing crop is alleged to have been damaged, the report must be filed prior to that time that twenty-five percent of the crop has been harvested.

Id. at 698. Ciba-Geigy argued that compliance with the statute was "either a condition precedent or a statute of limitations." *Id.* This Court disagreed for the following reasons, which subsequent amendments to the statute have done nothing to change.

First, *Durham* holds that Chapter 38-21 “establishes an administrative procedure to govern the issuance, suspension, revocation or modification of pesticide applicator or dealer licenses.” *Durham*, 315 N.W.2d at 698. In other words, the purpose of this chapter is not to control civil remedies for chemical misapplication, but to address licensing issues. Therefore, “[f]ailure to comply with the filing requirement of SDCL 38-21-46 does not affect an individual’s ability to bring a breach of warranty claim, but rather may result in the secretary of the Department of Agriculture refusing to hold a hearing for the denial, suspension, or revocation of a license or certification for pesticide applicators or dealers.” *Id.*

Second, the Court goes on to note that accepting Ciba-Geigy’s argument would mean establishing a thirty-day statute of limitations for a claim that would otherwise have a four-year limitations period. *Id.* Because there was no indication that the legislature intended to create a statute of limitations disparity, the Court declined to imply one. *Id.*

Nothing in the subsequent history of Chapter 38-21 indicates that the legislature sought to overturn *Durham* and convert SDCL 38-21-46 into a statute of limitations for tort claims. The first amendment, in 1991, merely changed the phrase “a pesticide application” to “any use of a pesticide.” 1991 South Dakota Laws Ch. 326 (H.B. 1034).

The second amendment in 2020 was slightly more extensive. The current version of the statute reads as follows:

Any person claiming damages from any use of a pesticide shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

- (1) Thirty days after the date that the damages were observed or should have been observed; or
- (2) If a growing crop is alleged to have been damaged, before the time that twenty-five percent of the crop has been harvested or destroyed.

This section does not apply if the person seeking reimbursement for damage was the applicator of the pesticide.

SDCL 38-21-46.

While the person receiving notice changes from the secretary to the pesticide applicator, the legislature declined to add any language stating that the mandatory notice provision was being expanded from the administrative purpose identified in *Durham* to cover all civil actions. Nor did the amendment make any statements about creating an overall statute of limitations.

The only other significant change was the addition of the last sentence, which states that the “section does not apply if the person seeking reimbursement for damage was the applicator of the pesticide.” Schulz asserted below that this sentence was clear proof that the legislature intended to create a statute of limitations. However, the statutory language supports no such conclusion. It cannot be the use of the phrase ‘reimbursement for damage.’ The version of SDCL 38-21-46 in effect at the time of *Durham* required ‘any person claiming damages from a pesticide’ to give notice, but this Court refused to conclude that the references to damages meant all damages from any source rather than damages available through Chapter 38-21. Moreover, the reason for exempting the applicator is obvious: applicators making a claim would otherwise have to give themselves notice via certified mail to trigger the administrative process. The logical reading of this provision is not that it overrules *Durham* and implies a statute of limitations, but that it was included to avoid an illogical result.

The other argument Schulz made below was that the holding in *Durham* is limited to breach of contract claims because the Court declined to consider three 1960s decisions from other jurisdictions, on the grounds that they concerned actions in trespass. While

Durham states that these cases were not persuasive due to factual difference, the opinion does not hold that SDCL 38-21-46 created a statute of limitations for all claims other than breach of contract.

The logic underlying the holding in *Durham* is equally applicable, regardless of what non-administrative remedy is being sought. Again, the Court held that Chapter 38-21 is intended to establish an administrative procedure, not control every conceivable claim concerning agricultural chemical application. There is no language in the chapter explicitly stating that tort claims are covered by the same rules. In fact, SDCL 38-21-50.2 states that “[c]ivil penalties specified in [Chapter 38-21] do not lessen the damages that may be awarded to any person injured.” This statement is not limited to contract damages, and neither is the holding in *Durham*.

The *Durham* Court’s second reason for holding that SDCL 38-21-46 did not bar a civil action – lack of legislative intent to create a statute of limitations – is likewise not limited to breach of warranty claims. Just as the plaintiff in *Durham* had four years to file a breach of warranty action under SDCL 57A-2-725, Jucht would have six years to file his claims under SDCL 15-2-13. There is no language in Chapter 38-21 implying a statute of limitations for any claims, whether sounding in tort or contract. Because the statute does not distinguish between negligence and contract claims, the rule set forth in *Durham* should not be interpreted to do so.

Moreover, the cases offered by the defendant in *Durham* do not support Schulz’s arguments. See *McArdle v. Stewart*, 446 P.2d 379 (Okla. 1968); *Olmstead v. Reedy*, 387 P.2d 631 (Okla. 1963); *Cross v. Harris*, 370 P.2d 703 (Or. 1962). Unlike any version of SDCL 38-21-46, the statutes being interpreted in *McArdle*, *Olmstead*, and *Cross* contain

language that explicitly makes the filing of a report a condition precedent for the right to commence a civil action.

The version of the relevant statute in effect in 1963 when *Olmstead* was decided stated that “No action for such damages may be brought or maintained, however, unless the person claiming the damages shall have filed with the Board a written statement of damages...” *Olmstead*, 387 P.3d at 632. The current version is even more clear: “Prior to or to filing an action against an applicator for damages to growing crops or plants, any person alleging damages to growing crops or plants shall...file a written complaint statement...Any person failing to comply with paragraph 1 of this subsection shall be barred from filing an action for damages against the applicator.” Okla. Stat. Ann. tit. 2, § 3-82 (West). Similarly, the applicable statute in *Cross* contained the following language: “No action against a custom applicator, arising out of the use or application of any pesticide, shall be commenced unless the claimant has filed a report of the loss with the department...” 370 P.2d at 705.

No version of SDCL 38-21-46, whether present or former, contains language explicitly prohibiting civil actions. The statutes themselves are not comparable; the cases based upon them are no more persuasive in a trespass case than they were in the breach of contract dispute presented in *Durham*.

Further, the only language in SDCL chapter 38-21 barring a claim is found in SDCL 38-21-47, which provides that a claim will be barred only when the landowner refuses entry to an applicator requesting access to inspect damaged property. The legislature was clear what narrow situation impacts the ability to bring a claim against the applicator – actually denying a request by the applicator to inspect – which did not occur

in this case. *See* SDCL 38-21-47. Schulz was fully aware of the spray incident and chose not to inspect the Property; hence, Jucht never denied Schulz access.

As the Complaint makes clear, Jucht is not demanding civil penalties under Chapter 38-21, or the suspension or revocation of Schulz's applicator license. His claims, as pleaded, sound in tort, and the certified mail requirements of SDCL chapter 38-21 do not apply.

II. Schulz had actual notice of the harm to Jucht

Even if the Court were to conclude that SDCL 38-21-46 implies a 30-day statute of limitations or condition precedent for tort claims, it was still error for the circuit court to dismiss Jucht's claims because Schulz had actual notice of the spray event and declined to investigate. This Court has previously held that, even in instances where there is a statutory notice requirement, actual notice will suffice. *See, e.g., Matter of Dependency and Neglect of A.L.*, 442 N.W.2d 233, 236 (S.D. 1989) (although tribe did not receive registered notice of dependency proceeding in manner required by Indian Child Welfare Act, it had actual notice). This is true even when notice is jurisdictional. *See Rapid City Educ. Ass'n on Behalf of Lynch v. Rapid City Sch. Dist. No. 51-3*, 446 N.W.2d 770, 771 (S.D. 1989).

"Substantial compliance with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served." *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835 (quotations omitted).

The purpose and reasonable objectives of the notice requirement in SDCL 38-21-46 are clear: there must be an opportunity for the applicator to view the damage to the crops. This is why the statute provides alternative limitations of either 30 days, or before 25% or more of the crop has been harvested or destroyed. SDCL 38-21-47 confirms this, stating that “the person seeking reimbursement for damages shall permit the applicator...to enter the person’s property for the purpose of observing and examining the alleged damage.” If the landowner does not allow the examination to occur, the claim will be barred. *Id.* Substantial compliance with a notice requirement is sufficient when it gives the opportunity for reasonable investigation. *See Matter of Estate of Smeenk*, 2022 S.D. 41 ¶ 25, 978 N.W.2d 383, 391.

In fact, the foreign cases Schulz cites show that, even when the statute explicitly states civil actions are prohibited absent the filing of a notice, substantial compliance providing notice to the applicator is sufficient. In *Olmstead*, the defendant sought to strike damages that had not been included in the plaintiff’s initial filing. 387 P.2d at 632. The court noted that the statute “appears to us not to have been intended to terminate or limit the rights of one whose property is damaged by an applicator of pesticides but to prevent undue delay in reporting any damages. Another purpose of the statutory requirement apparently was to afford defendants an opportunity to investigate the circumstances while the claimed damages were fresh and prior to change and to preserve evidence for their defense.” *Id.* at 633. The court held that the plaintiff’s substantial compliance with the statute was sufficient, as these purposes had been served. *Id.*

Cross held that the notice statute “should be given a liberal construction in favor of the claimant” and that substantial compliance is sufficient. 370 P.2d at 705. In doing

so, it cited to a prior case involving the same statute, *Loe v. Lennardt*, 362 P.2d 312 (Or. 1961). The landowners in *Loe* filed suit after defoliant sprayed by the defendant damaged his crops. 362 P.2d at 314. While the landowners filed a report with the state, they failed to serve copies on the defendants as required by statute. *Id.* at 319. The plaintiffs argued that the defendants had actual notice and no prejudice resulted. *Id.* The Oregon Supreme Court agreed:

When it is seen that the purpose of [the statute] was served by the filing of the plaintiffs' claim and that the defendants received actual knowledge thereof, there is no reason to deny the plaintiffs their day in court in this case. The statute which requires the filing of the verified claim within sixty days of the injury is a manifest limitation upon a common-law right. *Id.*

As set forth in the Complaint, Schulz reported the incident to DANR and followed the state's instructions not to have any further involvement in the investigation. (Compl. ¶ 9). Schulz had actual notice of DANR's investigation but chose not to inspect Jucht's damaged crops. (Compl. ¶¶ 10-11). The only entry request was from DANR; Jucht permitted DANR to enter the property and collect vegetation samples. (Compl. ¶¶ 11-12). As in *Loe*, the purposes of the statute were satisfied by the landowner's substantial compliance; there was no reason to deny Jucht his day in court.

Loe highlights an additional reason that the dismissal of Jucht's complaint was erroneous. The landowner in that case had made a report using a form supplied by a state agency, which apparently made no provision for two of the statutory requirements, including verification and notification to the applicator. 362 P.2d at 319. Despite the fact that the landowner could have reviewed the statute and decided to verify and notify on his own, the court held that a "further reason why substantial compliance...sufficed to preserve the plaintiffs' right of action in this case is the fact that the claim which was

filed was prepared on a form supplied by the state agency charged with the administration of the law. To deny a remedy on these facts would convert the statute into a trap for the unskilled, even though the purposes of the statute were served and no prejudice resulted to the defendants.” *Id.* at 320. Like the landowner in *Loe*, Jucht was lulled into a false sense of security by the information he received from the state agency charged with investigating his complaint. He promptly contacted DANR and obeyed the agency’s instructions not to be further involved in the investigation unless asked to do so by DANR. (Compl. ¶ 9). As in *Loe*, the applicator had actual notice and the opportunity to inspect the damage. The purpose of the statute was served, and there was no prejudice to Schulz. Jucht should not have been punished for listening to a government agency.

CONCLUSION

For the foregoing reasons, including the plain language of the applicable statutes and binding authority (*Durham*), this Court should reverse the circuit court and hold that Jucht may pursue his claims for significant damage to his crops caused by Schulz.

Dated at Sioux Falls, South Dakota, this 6th day of October, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 3,309 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 6th day of October, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Brief of Appellant” was filed electronically with the South Dakota Supreme Court and that the original of the same was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on 6th October, 2023.

The undersigned further certifies that an electronic copy of “Brief of Appellant” was emailed to the attorneys set forth below, on 6th October, 2023:

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on this 6th day of October, 2023.

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APPENDIX

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STATE OF SOUTH DAKOTA

COUNTY OF MCCOOK

KEVIN JUCHT,

Plaintiff,

vs.

NATHAN SCHULZ,

Defendant.

)
) SS
)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

44CIV23-000028

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PURSUANT
TO SDCL 15-6-12(B)(5)**

This matter having come before this Court on July 31, 2023, pursuant to the Defendant Nathan Schulz's Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5) with Circuit Court Judge Chris Giles presiding, Defendant appeared by and through his attorney Matthew J. McIntosh and Plaintiff appeared by and through his attorney Mitch A. Peterson.

The Court having considered the filings and arguments of counsel, and consistent with the Court's oral decision and order at the close of the hearing which is incorporated herein, the Court:

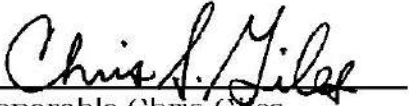
ORDERED that Defendant's Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5) is GRANTED. Plaintiff's Complaint shall be dismissed, on the merits, with prejudice.

8/1/2023 3:52:50 PM

Attest:
Shelton, Diane
Clerk/Deputy



BY THE COURT:


Honorable Chris Giles
Circuit Court Judge, First Circuit

South Dakota Codified Laws

Title 38. Agriculture and Horticulture (Refs & Annos)

Chapter 38-21. Agricultural Pesticide Application (Refs & Annos)

SDCL § 38-21-46

38-21-46. Notice of damage--Requirements--Exception

Effective: July 1, 2020

Currentness

Any person claiming damages from any use of a pesticide shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

- (1) Thirty days after the date that the damages were observed or should have been observed; or
- (2) If a growing crop is alleged to have been damaged, before the time that twenty-five percent of the crop has been harvested or destroyed.

This section does not apply if the person seeking reimbursement for damage was the applicator of the pesticide.

Credits

Source: SL 1974, ch 255, § 20; SL 1991, ch 326, § 18; SL 2020, ch 174, § 18.

Notes of Decisions (1)

S D C L § 38-21-46, SD ST § 38-21-46

Current through the 2023 Regular Session and Supreme Court Rule 23-17

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IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 30441

KEVIN JUCHT,

Plaintiff and Appellant,

vs.

NATHAN SCHULZ,

Defendant and Appellee.

APPELLEE'S BRIEF

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

Honorable Chris Giles, Circuit Court Judge

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Notice of Appeal Filed August 22, 2023

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT

Appellee will refer to himself as “Schulz.” Appellee will refer to Appellant as “Jucht.” Appellee will refer to the Record on Appeal as “R:” followed by the page number(s) assigned by the McCook County Clerk of Courts.

JURISDICTIONAL STATEMENT

Jucht appealed from the Order Granting Schulz’s Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5) for which the notice of entry of order was entered on August 2, 2023. (R:38.) Jucht filed its Notice of Appeal on August 22, 2023. (R: 66.)

STATEMENT OF THE LEGAL ISSUES

- 1. Whether the trial court erred by dismissing Jucht’s Complaint as Jucht failed to comply with the mandatory condition precedent in SDCL 38-21-46 prior to filing his action.**

The trial court found the South Dakota Legislature, through SDCL 38-21, created a comprehensive set of rules and regulations to deal with pesticide application in South Dakota. The trial court found that the South Dakota Legislature created a condition precedent in SDCL 38-21-46 which creates a mandatory directive to provide notice by certified mail to the pesticide applicator of the alleged damage within the earlier of: (1) thirty days after the date that the damages were observed or should have been observed; or (2) if a growing crop is alleged to have been damaged, before the time that twenty-five percent of the crop has been harvested or destroyed. After complying with the mandatory directive to provide notice by certified mail, SDCL 38-21-47 requires the person claiming damage to allow entry and inspection by the applicator and up to four representatives. The failure to allow entry is a bar to asserting a claim against the applicator.

The trial court reasoned if a party fails to give notice, the right to inspect cannot be triggered and thus, “if there’s no notice, you’re not going to have an inspection.” The trial court ultimately found that the notice under SDCL 38-21-46 is required and mandatory in order to pursue a cause of action of this nature. The Court ruled, “I think I have to interpret the plain language of the statute in the defendant’s favor and grant the 12(b)(5) motion to dismiss for failing to give that proper notice.”

Legal Authority:

SDCL 15-6-12(b)(5)

SDCL 38-21-46

SDCL 38-21-47

Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.D. 1982)

McArdle v. Stewart, 446 P.2d 379 (Okla. 1968)

Olmstead v. Reedy, 387 P.2d 631 (Okla. 1963)

STATEMENT OF THE CASE

On April 27, 2023, Jucht filed his Complaint against Schulz. (R: 2-7.) Schulz was served by a Hanson County Sheriff on April 27, 2023. (R: 9.) On May 23, 2023, pursuant to SDCL 15-6-12(b)(5), Schulz filed his Motion to Dismiss for failure to state a claim upon which relief can be granted. (R:12-17.) On July 31, 2023, the motion was heard in the First Judicial Circuit Court, County of McCook, State of South Dakota, before the Honorable Chris Giles. On August 1, 2023, the Court filed its Order Granting Defendant's Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5). (R:37.) Notice of entry of judgment was filed on August 2, 2023. (R:38-39.) Jucht filed his Notice of Appeal on August 22, 2023. (R:66.)

STATEMENT OF FACTS

Jucht owns and farms property located at 26654 430th Avenue, Bridgewater, McCook County, South Dakota. (R:2, ¶ 1.) Jucht planted soybeans on his property in 2022. (R:2, ¶ 4.) On June 24, 2022, Schulz allegedly sprayed fields adjacent to Jucht's property with a chemical mixture in such a manner as to cause severe drift onto Jucht's property and damaged his soybeans. (R:2, ¶ 5.)

Jucht reported the incident to the South Dakota Department of Agriculture and Natural Resources ("DANR"). Jucht never sent notice by certified mail to Schulz

pursuant to SDCL 38-21-46. (R:3, ¶ 9.) Instead, Jucht filed his Complaint on April 27, 2023, commencing this lawsuit. (R:4, ¶ 19.) In response, on May 23, 2023, pursuant to SDCL 15-6-12(b)(5), Schulz filed his Motion to Dismiss for failure to state a claim upon which relief can be granted. (R:12-17.)

STANDARD OF REVIEW

Jucht has appealed the trial court's Order Granting Defendant's Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5). (R:66.) Whether a complaint fails to state a claim upon which relief can be granted "is a question of law [this Court] review[s] de novo." *Kaiser Trucking, Inc. v. Liberty Mut. Fire Ins. Co.*, 2022 S.D. 64, ¶ 13, 981 N.W.2d 645, 650, *Nooney v. StubHub, Inc.*, 2015 S.D. 102, ¶ 9, 873 N.W.2d 497, 499. Under a motion to dismiss under SDCL 15-6-12(b)(5), this Court tests "the legal sufficiency of the pleading, not the facts which support it." *Kaiser Trucking, Inc.*, 2022 S.D. 64, ¶ 13 (citing *Hallberg v. South Dakota Bd. of Regents*, 2019 S.D. 67, ¶ 10, 937 N.W.2d 568, 572, *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n. Servs.*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712). Therefore, this Court must "accept the material allegations as true and construe them in a light most favorable to the pleader to determine whether the allegations allow relief." *Id.* (citing *Sisney v. Best Inc.*, 2008 S.D. 70, ¶ 8, 754 N.W.2d 804, 809). However, "the court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences[,] and sweeping legal conclusions cast in the form of factual allegations." *Mordhorst v. Dakota Truck Underwriters and Risk Admin. Servs.*, 2016 S.D. 70, ¶ 8, 886 N.W.2d 322, 324 (citing *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 4, 699 N.W.2d 493, 496).

ARGUMENT AND AUTHORITIES

1. THE TRIAL COURT DID NOT ERR BY DISMISSING JUCHT'S COMPLAINT AS JUCHT FAILED TO COMPLY WITH THE MANDATORY CONDITION PRECEDENT IN SDCL 38-21-46 PRIOR TO FILING HIS ACTION

Pursuant to SDCL 15-6-12(b), a party is required to make a motion asserting any of the defenses listed in 15-6-12(b)(1)-(6) before further pleading. SDCL 15-6-12(b). Accordingly, Schulz was served with the Summons and Complaint on April 28, 2023, and filed his motion to dismiss on May 23, 2023. A complaint should be dismissed for failure to state a claim when “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *N. Am. Truck & Trailer*, 2008 S.D. 45, ¶ 6, 751 N.W.2d 710, 712.

A. Failing to provide notice of a spray event to the applicator by certified mail as required by SDCL 38-21-46 & SDCL 38-21-47 bars a claim for damages.

The record illustrates that Jucht can prove no set of facts in support of his claim for damages related to pesticide application because he failed to comply with the mandatory directive of SDCL 38-21-46 and SDCL 38-21-47, which creates a condition precedent to bringing a claim of this nature.

SDCL 38-21-46 unambiguously states:

Any person claiming damages from any use of a pesticide shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

- (1) Thirty days after the date that the damages were observed or should have been observed; or
- (2) If a growing crop is alleged to have been damaged, before the time that twenty-five percent of the crop has been harvested or destroyed.

This section does not apply if the person seeking reimbursement for damage was the applicator of the pesticide.

SDCL 38-21-46. Building upon the mandatory directive to provide notice to the applicator, SDCL 38-21-47 provides:

Upon notifying the applicator as required under § 38-21-46, the person seeking reimbursement for the alleged damage shall permit the applicator and up to four representatives of the applicator to enter the person's property during reasonable hours for the purpose of observing and examining the alleged damage. If the person fails to allow entry, the person is barred from asserting a claim against the applicator.

SDCL 38-21-47.

Therefore, determining whether Jucht can prove any set of facts in support of his claim for damages related to pesticide application is a question of statutory interpretation of SDCL 38-21-46 and SDCL 38-21-47. This Court has consistently applied the same rules of statutory interpretation. When interpreting statutes, courts should “give words their plain meaning and effect, and read statutes as a whole.” *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d 161, 166. Further, statutes relating to the same subject are to be read as a whole. *See Dakota Plains AG Center, LLC v. Smithey*, 2009 S.D. 78, ¶ 47, 772 N.W.2d 720, 722.

“The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute.” *City of Rapid City v. Anderson*, 2000 S.D. 77, ¶ 7, 612 N.W.2d 289, 291–92 (citations omitted). The intent of a statute is determined from what the Legislature said, rather than what we think it should have said. *See id.* “Words and phrases in a statute must be given their plain meaning and effect.” *Id.* (citing *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17). In “construing statutes together, it is presumed that the legislature did

not intend an absurd or unreasonable result.” *Id.* Further, “[w]hen the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute.” *Id.*

Finally, this Court has held, “when shall is the operative verb in a statute, it is given obligatory or mandatory meaning.” *Reck v. S.D. Board of Pardons and Paroles*, 2019 S.D. 42, ¶ 19, 932 N.W.2d 135, 139 (citing *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 21, 757 N.W.2d 756, 762). This canon of statutory interpretation was codified at SDCL 2-14-2.1 which provides:

[a]s used in the South Dakota Codified Laws to direct any action, the term, shall, manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.

SDCL 2-14-2.1

Accordingly, SDCL 38-21-46 creates a mandatory, nondiscretionary, condition precedent that any person claiming damages from any use of a pesticide shall notify by certified mail the pesticide applicator of the alleged damage. Jucht admits in his Complaint that he failed to comply with this mandatory directive. (R:4, ¶ 19.)

Jucht attempts to circumvent the mandatory directive by suggesting that the “only language in SDCL chapter 38-21 barring a claim is found in SDCL 38-21-47, which provides that a claim will be barred only when the landowner refuses entry to an applicator requesting access to inspect damaged property.” (Appellant’s Brief, p. 8). Jucht argues, the “legislature was clear what narrow situation impacts the ability to bring a claim against the applicator – actually denying a request by the applicator to inspect – which did not occur in this case.” (Appellant’s Brief, p. 8-9).

For support, Jucht relies on *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696 (S.D. 1982). Jucht argues, as he did at the trial court level, that this “Court has already ruled that SDCL 38-21-46 does not create a condition precedent or statute of limitations for claims in civil court.” (Appellant’s Brief, p. 4). Jucht contends, “all that can result from a failure to provide notice pursuant to SDCL 38-21-46 is that the Department of Agriculture may refuse to hold a hearing for the denial, suspension, or revocation of a license or certification for pesticide applicators or dealers.” (*Id.*)

However, this Court in *Durham* did not reject the same argument Schulz is making in this case, i.e., that the notice procedure of SDCL 38-21-46 acts as a condition precedent for any person claiming damages from another person’s use of a pesticide as an adjoining landowner. Instead, this Court specifically limited its decision to the breach of contract claim presented in *Durham*. 315 N.W.2d at 698. This Court held:

[A]ppellant contends that statutes similar to SDCL 38-21-46 have been interpreted by other state courts to create a condition precedent or a statute of limitations to a claimant's recovery. *See McArdle v. Stewart*, 446 P.2d 379 (Okla. 1968); *Olmstead v. Reedy*, 387 P.2d 631 (Okla. 1963); and *Cross v. Harris*, 230 Or. 398, 370 P.2d 703 (1962). We do not find these cases persuasive to our fact situation, however, because each of these cases involved an action in trespass in which damages resulted from the spraying activities performed by an adjoining landowner. The case before us is for breach of contract.

Id. This case before the Court is not a breach of contract case but is a case based on Jucht claiming damages from Schulz’s use of a pesticide as an adjoining landowner.

Further, in *Durham*, this Court examined a previous version of the statute. This entire statutory scheme was amended in 2020, 38 years after the decision in *Durham*. The amendment in 2020 required notice to be sent by certified mail directly to the applicator, and the legislature completely overhauled SDCL 38-21-47. *See* SL 2020, ch

174 § 18. Most importantly, the amendment in 2020 created a bar to bringing a claim for failing to comply with SDCL 38-21-46 and SDCL 38-21-47. *See id.* Neither the requirement to notify the applicator nor the bar against bringing claims was present in 1982 when *Durham* was decided by this Court. The current version of these statutes aligns South Dakota law with the cases referenced by this Court in *Durham*.

In both *McArdle* and *Olmstead*, the Oklahoma Supreme Court examined a similar statute and ultimately held, the “language of the statute seems to clearly provide that the filing of the written statement of damages is a condition precedent to the right to commence the action.” *McArdle*, 446 P.2d 379 (Okla. 1968), *Olmstead*, 387 P.2d 631, 633 (Okla. 1963).

The North Dakota Supreme Court has addressed this same issue with nearly identical facts in *Laufer v. Doe*, 2020 N.D. 159, 946 N.W.2d 707. In *Laufer*, the plaintiff appealed from a judgment dismissing his complaint alleging property damage caused by pesticide application by an adjoining neighbor for failing to comply with the statutory notice requirements. 2020 N.D. 159, ¶ 1. The statute at issue provided:

1. a. Before a person may file a civil action seeking reimbursement for property damage allegedly stemming from the application of a pesticide, the person shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

- (1) Twenty-eight days from the date the person first knew or should have known of the alleged damage; or
- (2) Before twenty percent of the crop or field allegedly damaged is harvested or destroyed.

b. Subdivision a does not apply if the person seeking reimbursement for property damage was the applicator of the pesticide.

2. Upon notifying the applicator as required under subsection 1, the person seeking reimbursement for the alleged property damage shall permit the

applicator and up to four representatives of the applicator to enter the person's property for the purpose of observing and examining the alleged damage. If the person fails to allow entry, the person is barred from asserting a claim against the applicator.

NDCC 4.1-33-18.

Like Schulz, the defendant in *Laufer* argued that the plaintiff was required to notify him by certified mail of the alleged damages to his crops and the plaintiff failed to comply with the statutory requirements. *Id.* at ¶ 2. Like Jucht, plaintiff argued, that the statutes did not apply because he was bringing an action for breach of the duty of care and negligence rather than a claim under NDCC 4.1-33. *Id.* at ¶ 3.

The lower court found that NDCC 4.1-33-18 is “clear and unambiguous, a person bringing a civil action seeking reimbursement for property damage caused by the application of pesticide must provide written notice via certified mail to the person who allegedly caused damage.” *Id.* ¶ 4. An appeal followed, and the North Dakota Supreme Court began its review by setting forth the canons of statutory construction. *Id.* at ¶ 11. The North Dakota Supreme Court held, “the plain language of the statute states a person must provide notice to the pesticide applicator by certified mail... [t]he notice requirement applies to any civil action seeking reimbursement for damages caused by application of pesticide” and thus the lower court properly applied the notice requirement to this case. *See id.* at ¶ 13.

The case before this Court is the exact same as *Laufer*. The statutory notice provisions are not complicated – a party alleging damage must send notice by certified mail to the pesticide applicator. Jucht provided notice to the DANR– but he did not provide notice to the one person he is required by law to notify – Schulz. Further, Jucht’s

argument that Schulz failed to investigate improperly flips the burden onto Schulz. The burden is on the person claiming damages to provide notice, not the applicator to request entry onto the property. It is only after notifying the “applicator as required under § 38-21-46, that a person seeking reimbursement for the alleged damage shall permit the applicator and up to four representatives of the applicator to enter the person's property.” SDCL 38-21-47.

During the hearing on Schulz’s Motion to Dismiss, the trial court heard this same argument. Referring to SDCL 38-21, the trial court stated

[i]t appears to the Court that the legislature attempted to create a very comprehensive set of rules and regulations dealing with the aspects of pesticide application, and it appears to me that it is more than just an administrative procedure dealing with pesticide application licenses.

(R:54-55, 13:24-14:5.) In support, the trial court noted that SDCL 38-21-33.1 creates civil penalties and criminal penalties for violations of SDCL 38-21, not just administrative punishment. (R:55-56, 14:6-15:5.) Second, the trial court drew an analogy between the condition precedent created in SDCL 38-21-46 and the condition precedent required any time an individual attempts to sue a municipality or the State of South Dakota. (R:56, 15:6-20.) The trial court stated, “[the condition precedent] doesn’t change the statute of limitations on actually filing your case, but there’s a notice letter that has to be sent.” (R:56, 15:13-15.) The Court further elaborated,

It appears to the Court that they [legislature] wanted notice early on so there was an opportunity to review the purported damages and have witnesses available. Plaintiff is claiming in their argument that a claim is only barred if you deny the request to enter the property and inspect the damages.

The Court believes that if you fail to give notice under 38-21-46, the right to inspect is not necessarily triggered, but if you fail to give the notice, how can they ask for that right to inspect? So if there's no notice, you're not going to have an inspection.

It appears the notice under SDCL 38-21-46 is required and mandatory in order to pursue a cause of action of this nature.

(R:57,16:2-16.)

The trial court's rationale aligns with the canons of statutory construction. As noted above, when interpreting statutes, this Court presumes that the Legislature did not intend an absurd result. *See Moss*, 1996 S.D. 76, ¶ 10. SDCL 38-21-46 creates a mandatory directive to provide notice to the applicator, and SDCL 38-21-47 builds off this directive as the language of SDCL 38-21-47 specifically incorporates SDCL 38-21-46 providing, "[u]pon notifying the applicator as required under SDCL§ 38-21-46..."

To not read these two statutes together would create an absurdity wherein a party claiming damage would be better suited to withhold providing any notice to the applicator. Under Jucht's interpretation of SDCL 38-21-46 and SDCL 38-21-47, if the party claiming damage just fails to give notice, there is no bar to the claim and there would be no opportunity for the applicator to prepare a defense. This is an absurdity or, more precisely, a strategic circumvention of the law that the legislature clearly did not intend to create. Instead, SDCL 38-21-46 and SDCL 38-21-47 are designed to prevent this type of conduct by a party claiming damage as a result of pesticide application.

The South Dakota Supreme Court has not rejected the argument presented by Schulz. The motion to dismiss was properly granted as Jucht can prove no set of facts in support of his claim for damages related to pesticide application because he failed to comply with the mandatory directive of SDCL 38-21-46.

B. Notice to South Dakota Department of Agriculture and Natural Resources does not excuse Jucht's failure to comply with SDCL 38-21-46

Jucht's argues that his failure to comply with SDCL 38-21-46 is excused because Jucht notified DANR and Schulz had actual notice of DANR's investigation of Jucht's complaint. (Appellant's Brief, p. 9.)

First, as noted above, the rules of statutory interpretation require Courts to "give words their plain meaning and effect, and read statutes as a whole." *Bowers*, 2018 S.D. 50, ¶ 16. Jucht appears to argue that Schulz's notice of the DANR's investigation is the equivalent to a notice sent by certified mail from the person claiming damages from the applicator's use of a pesticide to the actual applicator. However, if this was true, then SDCL 38-21-46 would have no purpose. This Court has repeatedly held, we "should not adopt an interpretation of a statute that renders the statute meaningless when the Legislature obviously passed it for a reason." *Peterson, ex rel. Peterson v. Burns*, 2001 SD 126, ¶ 30, 635 N.W.2d 556, 567-68. SDCL 38-21-46 requires notice to be provided to the applicator by certified mail. The statute means what it says. Jucht was required to send actual notice by certified mail to Schulz – not to the DANR.

The North Dakota Supreme Court's decision in *Laufer* again provides insight on this situation. In *Laufer*, plaintiff argued the statutory notice was satisfied as the defendant had actual notice because plaintiff called defendant directly and reported the alleged damage. *Id.* at ¶ 3. Defendant even admitted in a deposition to receiving notice of the damages claimed. *Id.*

However, the lower court found that NDCC 4.1-33-18 is "clear and unambiguous, a person bringing a civil action seeking reimbursement for property damage caused by the application of pesticide must provide written notice via certified mail to the person who allegedly caused damage." *Id.* ¶ 4. Further, the lower court concluded that even if

the defendant received actual notice, “such notice did not satisfy the statutory requirements and was therefore insufficient” and judgment was entered against the plaintiff. *Id.* On appeal, the North Dakota Supreme Court recognized that direct communication from the plaintiff to the defendant did not satisfy the mandatory directive of the statute. *See id.* at ¶ 16. Ultimately, the North Dakota Supreme Court recognized that strict compliance is required and the defendant’s actual notice of the potential claim was not sufficient. *Id.* at ¶ 19.

As a last resort, Jucht makes an argument for substantial compliance. (Appellant’s Brief, p. 9.) This Court has consistently held that “substantial compliance is not established unless the statute has been actually followed sufficiently to carry out the substance essential to every reasonable objective of the statute.” *In re Alcohol Beverage License Suspension of Cork n Bottle, Inc.*, 2002 S.D. 139, ¶ 12, 654 N.W.2d 432, 435.

SDCL 38-21-46 states, “[a]ny person claiming damages from any use of a pesticide *shall* notify by certified mail the pesticide applicator of the alleged damage [...]” As noted above, when shall is used in a statute it manifests a mandatory directive and does not confer any discretion in carrying out the action so directed. SDCL 2-14-2.1.

Jucht cannot substantially comply with the substance essential to every reasonable objective of the statute as he failed to comply with a mandatory provision. In fact, Jucht failed to comply with the entire statute. One of the reasonable objectives of SDCL 38-21-46 and SDCL 38-21-47 is to provide notice to the pesticide applicator that a party is claiming damages from the applicator’s use of a pesticide. The other reasonable objective of SDCL 38-21-46 and SDCL 38-21-47 is to provide the applicator an opportunity to inspect and prepare a defense to the claim for damages. Schulz actual

notice of an investigation by the DANR is not the equivalent to Schulz's actual notice of a claim for damages. Jucht's failure to provide notice deprived Schulz of the reasonable objective of the statutes and thus Jucht did not substantially comply with the statutes.

Further, Jucht reliance on *Olmstead v. Reedy*, 387 P.2d 631 (Okla. 1963), *Loe v. Lennardt*, 362 P.2d 312 (Or. 1961), and *Rapid City Educ. Ass'n on Behalf of Lynch v. Rapid City School Dist. No. 51-4*, 446 N.W.2d 770 (S.D. 1989) is misplaced. (Appellant's Brief, p. 10.). These cases are clearly distinguishable, because in all three cases the party claiming damage attempted to file the proper notice.

For example, in *Rapid City Educ. Ass'n on Behalf of Lynch*, the district filed its notice of appeal by first class mail when the notice was required by statute to be served by registered or certified mail. 446 N.W.2d at 771. Ultimately, this Court's decision rested on the fact the association waived the argument by failing to object at the appropriate time. *Id.* Of course, in this case, Schulz properly presented his objection in his Motion to Dismiss.

Jucht also argues in his brief that in *Olmstead*, the court held "that the plaintiff's substantial compliance with the statute was sufficient, as these purposes had been served." (Appellant's Brief, p. 10.). However, in *Olmstead*, the party claiming damage had in fact timely filed a notice of damage to peanuts, a cow, peas, pecan trees, tress around the house and the pasture, and flowers. *Olmstead*, 387 P.2d at 632. While the party claiming damage failed to include damage to alfalfa crop or truck patch, the Court noted the "defendants lodged no motion in the trial court to strike from the petition either of the items pleaded (alfalfa and truck garden) but not included in [the] notice filed with Board." *Id.* Therefore, the court held, such "statement was sufficient to have placed

defendants on notice that the plaintiffs had allegedly suffered damages to several items as a result of the spraying of pesticides by the defendants.” *Id.* at 633. In comparison, Jucht did not provide incomplete notice or late notice – Jucht never provided notice to Schulz.

Jucht also attempts to rely on *Loe v. Lennardt*, 362 P.2d 312 (Or. 1961) for substantial compliance. However, in *Loe*, the party claiming damage did in fact file a report of loss within the time provided by statute. 362 P.2d at 319. Further, the defendants in *Loe* conceded they investigated the loss, an allegation missing in this litigation. *Id.* The court noted, “[w]hen a claim has been filed, full investigation made, and the claim rejected for some reason not connected with the form of the notice or its manner of service, the defects in the notice do not bar a meritorious action based upon a statutory right against a municipality.” *Id.*

Finally, Jucht states, “He promptly contacted DANR and obeyed the agency’s instruction not to be further involved in the investigation unless asked to do so by DANR.” (Appellant’s Brief, p. 12.). Accepting this statement as true, the DANR told Jucht to stay out of DANR’s investigation, but no one told Jucht to forego his statutory duties to provide mandatory notice to Schulz. Jucht cites no authority to support his argument that by providing notice to DANR he no longer has to provide notice under SDCL 38-21-46.

Here, notice was not properly sent to Schulz, a full investigation was not completed by Schulz, and the claim was dismissed for failing to conform with the statute. This case is materially distinguishable from cases cited by Jucht. As in *Laufer*, the statutory provisions are not complicated and this Court should require strict compliance.

CONCLUSION

The trial court properly found that the South Dakota Legislature, through SDCL 38-21, created a comprehensive set of rules and regulations to deal with pesticide application in South Dakota. As part of this statutory structure, the South Dakota Legislature created a condition precedent in SDCL 38-21-46 which creates a mandatory directive to provide notice by certified mail to the pesticide applicator of the alleged damage. Jucht failed to comply with this directive.

The trial court properly reasoned that if a party fails to give notice, the right to inspect cannot be triggered and thus, “if there’s no notice, you’re not going to have an inspection.” The trial court correctly found that the notice under SDCL 38-21-46 is required and mandatory in order to pursue a cause of action of this nature and thus the Motion to Dismiss was proper.

Respectfully submitted this 17th day of November, 2023.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

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REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests the Court grant oral argument on the issues presented in the appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 4,385 words and 26,862 characters, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any certificates of counsel, and any addendum materials. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellee's brief and all copies are in compliance with this rule.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

By: /s/ Matthew J. McIntosh
Matthew J. McIntosh
P.O. Box 9579
Rapid City, SD 57709
Email: mmcintosh@blackhillslaw.com

CERTIFICATE OF SERVICE

I certify that on November 17th, 2023, a true and correct copy of the foregoing Appellee's Brief was filed electronically via Odyssey with the Clerk of the South Dakota Supreme Court, and service was made upon Appellant's counsel via e-filing:

Mitch Peterson
Davenport, Evans, Hurwitz & Smith, L.L.P
206 West 14th Street | PO Box 1030
Sioux Falls, SD 57101-1030
mpeterson@dehs.com

/s/ Matthew J. McIntosh
Matthew J. McIntosh

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STATE OF SOUTH DAKOTA)	IN CIRCUIT COURT
) SS	
COUNTY OF MCCOOK)	FIRST JUDICIAL CIRCUIT
KEVIN JUCHT,)	44CIV23-000028
)	
Plaintiff,)	
)	
vs.)	ORDER GRANTING DEFENDANT'S
)	MOTION TO DISMISS PURSUANT
NATHAN SCHULZ,)	TO SDCL 15-6-12(B)(5)
)	
Defendant.)	

This matter having come before this Court on July 31, 2023, pursuant to the Defendant Nathan Schulz's Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5) with Circuit Court Judge Chris Giles presiding, Defendant appeared by and through his attorney Matthew J. McIntosh and Plaintiff appeared by and through his attorney Mitch A. Peterson.

The Court having considered the filings and arguments of counsel, and consistent with the Court's oral decision and order at the close of the hearing which is incorporated herein, the Court:


ORDERED that Defendant's Motion to Dismiss Pursuant to SDCL 15-6-12(b)(5) is GRANTED. Plaintiff's Complaint shall be dismissed, on the merits, with prejudice.

8/1/2023 3:52:50 PM

Attest:
Shelton, Diane
Clerk/Deputy



BY THE COURT:


Honorable Chris Giles
Circuit Court Judge, First Circuit

APP 001

In The Matter Of:

Kevin Jucht v.

Nathan A. Schulz

Court Proceeding

July 31, 2023

Pat Beck, Court Reporter

Original File 073123Jucht.txt

Min-U-Script® with Word Index

APP 002

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF McCOOK) FIRST JUDICIAL CIRCUIT
3 * * * * *
4 KEVIN JUCHT, 44CIV23-000028
5 Plaintiff,
6 v.
7 NATHAN A. SCHULZ,
8 Defendant.
9 * * * * *
10 BEFORE: The Honorable Chris S. Giles
11 Judge of the Circuit Court for
12 First Judicial Circuit
 Salem, South Dakota
13 APPEARANCES:
14 Mr. Mitchell A. Peterson
15 Davenport, Evans, Hurwitz &
 Smith
16 P.O. Box 1030
 Sioux Falls, South Dakota
17 for the Plaintiff;
18 Mr. Matthew J. McIntosh
19 Beardsley, Jensen & Lee
 4200 Beach Drive, Suite 3
20 Rapid City, South Dakota
 for the Defendant.
21 PROCEEDINGS: The above-entitled matter came
22 on for hearing on the 31st day
23 of July, 2023, commencing at the
24 approximate hour of 8:30 a.m. in
 the courtroom of the McCook
 County Courthouse, Salem, South
25 Dakota.

Pat L. Beck, Court Reporter
605.351.8200 stenopat@sio.midco.net

1 THE COURT: The first matter this morning is a civil
2 matter, McCook County Civil File 23-28, Kevin Jucht,
3 J-U-C-H-T, v. Nathan A. Schulz, S-C-H-U-L-Z. We
4 have Mr. Peterson who represents the plaintiff. We
5 have Mr. McIntosh who represents the defendant.
6 We're here in connection with the defendant's motion
7 to dismiss pursuant to SDCL 15-6-12(b).

8 Mr. McIntosh, are you ready to proceed?

9 MR. MCINTOSH: I am, Your Honor.

10 THE COURT: And, Mr. Peterson, are you ready to
11 proceed?

12 MR. PETERSON: Yes, Your Honor.

13 THE COURT: Mr. McIntosh, you can present your
14 argument, and you can remain seated if you'd like.

15 MR. MCINTOSH: Thank you, Judge. Two housekeeping
16 issues. One, thank you to the Court and
17 Mr. Peterson for allowing me to hold this hearing
18 earlier according to my schedule and conflict. And
19 also I would like for the record to reflect that I
20 have withdrawn my argument in my reply brief
21 regarding something outside of the pleadings. I do
22 want to keep this a 12(b)(6) examination only of the
23 pleadings and not outside to convert it to a summary
24 judgment hearing.

25 This is a motion for a 12(b)(6) based on

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APP 004

1 statutory instruction. The argument that I've
2 presented in my motion and my supplemental reply
3 brief is asking this Court to apply the mechanics of
4 statutory construction that the South Dakota Supreme
5 Court has repeatedly held, specifically that the
6 statutes are to be read with their plain meaning and
7 effect, but the statute should be read as a whole,
8 and if, when challenged, the operative verb in a
9 statute, it is mandatory.

10 SDCL 2-14-2.1 codifies this and indicates that
11 when "shall" is used, it manifests a mandatory
12 directive. It does not confer any discretion, zero.
13 And that's what we're asking the Court today is an
14 examination of a statute that was enacted in 2020.
15 We have no case law directly on point and we're
16 looking for guidance from the Court.

17 There is a statute that is controlling,
18 SDCL 38-21-46, and in that statute it specifically
19 states that any person claiming damages from any use
20 of pesticide shall notify by certified mail the
21 pesticide applicator of the alleged damage and then
22 set the time frame to do so.

23 What we know in this case and from the face of
24 the pleadings is that the plaintiff did not comply
25 with the statute. The plaintiff did not send

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APP 005

1 certified mail to the defendant within 30 days or
2 within the time period the crop was harvested. In
3 fact, the plaintiff has never sent certified mail
4 regarding this statute.

5 So the only question that is really presented
6 and before this Court is whether a plaintiff in a
7 case in which they are alleging damages by an
8 adjoining neighbor is required to comply with
9 SDCL 38-21-46.

10 It is our position that this statute is a
11 condition precedent. It creates the barrier upon
12 which a plaintiff must comply to initiate a claim.

13 The plaintiff's counsel has cited a case,
14 Durham, it's 315 N.W. 2d 696. In that case it's
15 really the only guidance that we have on this topic,
16 and it is cited in the newly-formed statute from
17 2020. It involves a case in which a sprayer, an
18 applicator, is suing his own manufacturer,
19 distributor, and seller of an herbicide.

20 In that case, the South Dakota Supreme Court
21 notes that the appellant's argument is not
22 persuasive as it relates to citing three Oklahoma
23 cases because those cases involved an action in
24 trespass in which damages resulted from the spraying
25 activities performed by an adjoining landowner while

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APP 006

1 Durham involved a breach of contract, a breach of
2 warranty case.

3 I think that's important because in this case,
4 in Durham, the only holding that we have in
5 South Dakota, the Court ultimately found that a
6 predecessor version of this statute did not create a
7 condition precedent, i.e., the person did not have
8 to provide notice at that time to the department
9 prior to filing the lawsuit.

10 However, the South Dakota Supreme Court does
11 specifically lay out in that portion of the opinion
12 that this is different. It's different because you
13 have a case in which you have a breach of contract
14 and the person that would be making the complaint is
15 the applicator.

16 So what we have is a codification of that same
17 rationale in 38-21-46, in 2020, when the legislature
18 states at the end of that statute that the section
19 does not apply when the person seeking reimbursement
20 for damage was the applicator of the pesticide.

21 2020 is a reflection of what the holding was in
22 Durham, and in it it was also an opportunity for the
23 South Dakota legislature to say this is the
24 requirement. If you have a claim for any damages
25 from any use of pesticide, you have to send notice

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APP 007

1 by certified mail to the applicator.

2 It simply wasn't done in this case. And by
3 reading these statutes as a whole, they stack upon
4 one another.

5 38-21-47 then says, upon notifying the
6 applicator, as required under Section 46, the person
7 is to allow the individual to come in and inspect
8 the property and bring people to help them observe
9 and examine the alleged damage, and if they fail to
10 do so, the person is barred from asserting the claim
11 against the applicator.

12 Opposing counsel has made the argument that
13 there is no bar to bringing the claim if you don't
14 send notice. The bar is only to if you don't allow
15 inspection. Well, that would create an absurdity in
16 this case in which 46 would not rely on 47 and you
17 could get around a loophole of ever providing or
18 ever allowing somebody to come on your property just
19 by not sending the certified mail. You would create
20 a back doorway to avoid the entire statute, and
21 that's not what it's designed to do.

22 The South Dakota Supreme Court has repeatedly
23 held that the legislature, the statutes mean what
24 they say.

25 In this case, it is our argument that the

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APP 008

1 plaintiff was required to send certified mail notice
2 to my client, the defendant, in this matter. He did
3 not and therefore his claim is barred. Thank you,
4 Judge.

5 THE COURT: Thank you. Mr. Peterson.

6 MR. PETERSON: Thank you, Judge. I came down with
7 laryngitis yesterday. There's probably a joke in
8 there somewhere about a lawyer with laryngitis, but
9 I've got most of my voice back today, so I'll try to
10 be brief.

11 The Durham case is absolutely persuasive and
12 the definitive authority here. Reading right from
13 the case, it talks about -- it says the appellant,
14 so this would be the person in Mr. Schulz' shoes,
15 the appellant contends that the trial court erred in
16 refusing to grant its motion for summary judgment
17 based on Durham's failure to file a damage claim
18 with the Department of Ag under 38-21-46.

19 That is exactly the same statute we're talking
20 about. At the time that Durham was decided, that
21 statute said that any person claiming damage from a
22 pesticide application shall file with the secretary,
23 on a form prescribed by the secretary, a written
24 statement within 30 days after the date that the
25 damage has occurred. That's a "shall" as well.

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APP 009

1 They shall do this.

2 The only thing that's different now is our
3 legislature has required not a filing with the
4 Department of Ag but a notice to the applicator. So
5 the form and the party to whom notice is given is
6 what was changed in 38-21-46 back in the 2020
7 legislative session.

8 In Durham it's stated that the appellant argues
9 that the filing requirements in 38-21-46 serve as
10 either a condition precedent or a statute of
11 limitations barring the cause of action. And the
12 Court said this argument is not valid for several
13 reasons. And I think it's important to analyze
14 those reasons to figure out what our supreme court
15 would say on this issue because it's been quite
16 clear on it.

17 First of all, the whole 38-21, according to
18 Durham, it establishes an administrative procedure
19 to govern the issuance, suspension, revocation, or
20 modification of pesticide applicator or dealer
21 licenses. And it says very clearly that a failure
22 to follow the notice requirements in 38-21-46,
23 quote, does not affect an individual's ability to
24 bring a breach of warranty claim, but rather may
25 result in the secretary refusing to hold a hearing

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APP 010

1 for the denial, suspension, or revocation of a
2 license.

3 That's what 38-21 is about is about licensing
4 of pesticide applicators, investigating complaints
5 and other procedures related to the possible
6 suspension or revocation of those licenses.

7 Durham is quite clear on that. That is the
8 purpose of the statute. The fact that the person to
9 whom notice is to be given and the form of the
10 notice changed in 2020 doesn't change that core
11 holding of Durham. 38-21 is about licensing. It's
12 not about tort claims or civil liability.

13 Additionally, the notion that 38-21-46 creates
14 a 30-day statute of limitation was flatly rejected
15 by Durham. That's not at all what the legislature
16 did, and the changes in 2020 don't change that
17 either.

18 Additionally, the cases from Oregon and
19 Oklahoma upon which Mr. McIntosh relies were
20 specifically rejected as not being persuasive
21 authority in South Dakota.

22 Ultimately, in 2020 the legislature again just
23 changed the form and the recipient of the notice and
24 it did not put in there any specific penalty or
25 specific consequence for failing to provide that

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APP 011

10

1 notice other than the department could say, We're
2 not going to have a hearing to revoke this person's
3 license. We're not going to have a hearing to
4 oppose civil penalties. And that's up to the
5 discretion of the department if it fails to give
6 notice.

7 The only language -- and it happened in 2020 as
8 well -- the only language that actually bars a claim
9 is if an applicator seeks entry onto land to
10 investigate and the owner denies them access. That
11 is the very clear, very simple statutory
12 interpretation. And it's not even really an
13 interpretation. It's set out in Section 47 of
14 38-21.

15 Additionally, I think it's important to keep in
16 mind not only what Durham said about the overall
17 purpose of 38-21 being administrative and
18 license-related, but the Court should also look at
19 38-21-45, which is a short statute very clear about
20 what is intended. And this also was updated in
21 2020. And that chapter, Section 38-21-45, states,
22 Nothing in this chapter may be construed to relieve
23 any person from liability for any damage to another
24 caused by the use of pesticides, even though the use
25 conforms to the rules promulgated under the

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APP 012

11

1 authority of this chapter.

2 That is the rule of construction that our
3 legislature has imposed for Chapter 38-21 is that
4 nothing can be construed to relieve any person from
5 liability for damage caused by pesticides.

6 There's only one particular section that would
7 be outside of that, and that is when -- that is
8 under 47, when you deny access to somebody to your
9 land to investigate. That is the only language our
10 legislature has said affects a claim. Nothing else
11 affects a tort claim for trespass, nuisance,
12 negligence, or the other claims that Mr. Jucht
13 brings in this case because our statutes are clear
14 and our legislature -- or excuse me -- our supreme
15 court has already answered this question in Durham.
16 With no material change to the statute, the binding
17 authority, and the statute's clearly on point,
18 require denial of the motion to dismiss. This claim
19 should proceed to discovery and ultimately a trial
20 merits.

21 THE COURT: Thank you. Are you okay?

22 MR. PETERSON: I'm good. I just sound a little
23 scratchy.

24 THE COURT: Mr. McIntosh, you're the moving party.
25 Any brief rebuttal?

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APP 013

12

1 MR. MCINTOSH: Your Honor, I would only point out
2 that it has been 38 years since the decision was
3 made in Durham. During that time period the
4 South Dakota legislature did modify the statute and
5 it specifically says that a person's required to do
6 what the statute says.

7 That did not happen in this case. And the
8 citations to the Oklahoma decisions in Durham, all
9 those cases hold that the very similar statute did,
10 in fact, create a condition precedent.

11 The same arguments are being presented today,
12 the same arguments that were made in Durham were
13 presented in these Oklahoma cases. They involved --
14 and the reason that they were not controlling in
15 Durham was because their facts were different than
16 the facts that we actually have here.

17 So these cases from Oklahoma are very much
18 persuasive to the facts of our case. They involve
19 an adjoining landowner whose pesticide spray
20 allegedly damages a neighbor. That is our fact
21 scenario in this case.

22 So those cases, unlike in Durham, when you have
23 a breach of contract, where the sprayer is the one
24 who did something wrong is him, it's himself, he's
25 suing his manufacturer.

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APP 014

13

1 In the cases that Durham looks at and says,
2 Well, that doesn't really apply here because that's
3 an adjoining landowner case. That is what we have
4 here. And that's the difference between Durham and
5 this case is that you have a third-party defendant
6 in this case who is being accused of spraying and
7 allowing drift and other things to damage a
8 neighbor's crops.

9 The statute says if that's what you're
10 claiming, you have to provide notice within 30 days.
11 He didn't do it. He doesn't get to bring his claim.
12 Thank you, Judge.

13 THE COURT: Thank you. First, the Court does feel
14 that this matter is ripe for a consideration of a
15 15-6-12(b) motion to dismiss based purely on the
16 pleadings. I would note that I did receive an
17 e-mail from Mr. McIntosh asking the Court to
18 disregard the one section contained in the
19 defendant's reply brief where there's reference to
20 the DANR letter in some proceedings there, so the
21 Court has disregarded that. It's based -- my
22 decision is based purely on the pleadings today.

23 This is an interesting issue. The Court
24 reviewed SDCL Chapter 38-21. It appears to the
25 Court that the legislature attempted to create a

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APP 015

14

1 very comprehensive set of rules and regulations
2 dealing with the aspects of pesticide application,
3 and it appears to me that it is more than just an
4 administrative procedure dealing with pesticide
5 application licenses.

6 I want to note two different statutes within
7 that chapter that are a basis for why I think it is
8 attempting to be a comprehensive set of rules and
9 regulations when dealing with pesticides.

10 First, SDCL 38-21-33.1 actually creates a
11 Class 2 misdemeanor involving -- it says, No person
12 may act as a pesticide dealer or advertise as a
13 pesticide dealer at any time without first obtaining
14 a pesticide dealer's license issued by the
15 secretary.

16 Yes, it's still dealing with licenses, but it
17 actually sets up criminal offense. There's also a
18 civil penalty that can be imposed not to exceed
19 \$5,000 per violation.

20 Then there is also SDCL 38-21-44 dealing with
21 suspension, revocation, or modification of a
22 license. And that also sets up a criminal penalty,
23 another Class 2 misdemeanor for violation and
24 another civil penalty that can be imposed not to
25 exceed \$5,000.

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APP 016

15

1 So, yes, while we're dealing with licenses for
2 the applicators, it appears to the Court that the
3 legislative intent in 2020, with the passing of this
4 chapter, was to be comprehensive in dealing with
5 pesticide situations.

6 It appears to the Court that they did set up a
7 condition precedent, and I make the analogy -- I
8 don't have the cites -- but anytime plaintiff wants
9 to sue a municipality or the State of South Dakota,
10 there's a letter that has to be sent six months
11 after the incident takes place before you can pursue
12 your cause of action.

13 It doesn't change the statute of limitations on
14 actually filing your case, but there's a notice
15 letter that has to be sent.

16 The Court views this 30-day requirement similar
17 to that situation. It appears that the Court --
18 excuse me -- the legislature was attempting to
19 create a comprehensive set of rules dealing with
20 pesticides.

21 The Court notes SDCL 38-21-46 that talks about
22 the 30-day letter after the damages are observed, or
23 should have been observed, which then leads into the
24 second component of 38-21-47, which then allows an
25 inspection and up to four representatives of the

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APP 017

1 applicator.

2 It appears to the Court that they wanted notice
3 early on so there was an opportunity to review the
4 purported damages and have witnesses available.
5 Plaintiff is claiming in their argument that a claim
6 is only barred if you deny the request to enter the
7 property and inspect the damages.

8 The Court believes that if you fail to give
9 notice under 38-21-46, the right to inspect is not
10 necessarily triggered, but if you fail to give the
11 notice, how can they ask for that right to inspect?
12 So if there's no notice, you're not going to have an
13 inspection.

14 It appears the notice under SDCL 38-21-46 is
15 required and mandatory in order to pursue a cause of
16 action of this nature.

17 Now, I did note the Durham case. Mr. Peterson,
18 it caused me to give great consideration to the
19 language in that case. I think it's
20 distinguishable. Two reasons. First, it's 38 years
21 prior to the recent additions and changes to this
22 chapter, so they've changed it, I believe, with the
23 intent of putting that notice requirement out there,
24 and it is a slightly different factual situation
25 regarding a contract, a breach of contract claim.

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APP 018

17

1 So at this point I think I have to interpret
2 the plain language of the statute in the defendant's
3 favor and grant the 12(b)(5) motion to dismiss for
4 failing to give that proper notice.

5 So, Mr. McIntosh, you're directed to prepare an
6 order consistent with the Court's ruling. There was
7 no testimony, so I don't believe there's the need
8 for findings of facts and conclusions of law.

9 The Court may detail findings to support what
10 hopefully, I believe, support my ruling on the
11 record today, so I'm not going to issue a written
12 decision in connection with that.

13 So, Mr. McIntosh, if you'd prepare a short
14 order consistent with that, share the language in
15 the proposed order with Mr. Peterson, and then it
16 can be filed after there's no dispute. If there's a
17 dispute on the language, then e-mail the Court and
18 I'll resolve the dispute.

19 Upon entry of the order, that would trigger
20 Mr. Peterson's opportunity to pursue this further.

21 It's one where the Supreme Court has not really
22 ruled on what is required with that notice or not.
23 I'm making my interpretation based on the way I
24 think it has to be applied. If the Supreme Court
25 feels that's incorrect, they'll tell us. But it is

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APP 019

18

1 a case of first impression, I believe, under this
2 chapter and this provision.

3 So, Mr. McIntosh, any questions regarding the
4 Court's ruling or what I'm asking of you today?

5 MR. MCINTOSH: No, Judge.

6 THE COURT: Mr. Peterson, any questions?

7 MR. PETERSON: No. And my client appeals. It's
8 de novo, so I don't think we need to get findings
9 and all that kind of stuff because it really doesn't
10 matter in terms of the appellant review.

11 THE COURT: And that's why I did want to make sure
12 the record was pretty clear as to my reasoning, and
13 if they disagree with my reasoning, then they'll
14 give us direction as to how this is to be followed
15 in the future. Thank you.

16 MR. MCINTOSH: Thanks, Judge.

17 MR. PETERSON: Thank you, Judge.

18 (End of Proceeding.)
19
20
21
22
23
24
25

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APP 020

19

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF LINCOLN)

4
5 I, Pat L. Beck, Registered Merit Reporter
6 and Notary Public within and for the State of South
7 Dakota:

8 DO HEREBY CERTIFY that I took the
9 proceedings of the foregoing Hearing, and the
10 foregoing pages 1-18, inclusive, are a true and
11 correct transcript of my stenotype notes.

12 I FURTHER CERTIFY that I am not an
13 attorney for, nor related to the parties of this
14 action, and that I am in no way interested in the
15 outcome of this action.

16 In testimony whereof, I have hereto set my
17 hand and official seal this 14th day of August,
18 2023.

19
20
21 /s/ Pat L. Beck

22 Pat L. Beck, Notary Public

23 Expiration Date: June 11, 2028

24 Iowa CSR: No. 1185

25
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APP 021

Kevin Jucht v.
Nathan A. Schulz

Court Proceeding
July 31, 2023

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South Dakota Codified Laws

Title 38. Agriculture and Horticulture (Refs & Annos)

Chapter 38-21. Agricultural Pesticide Application (Refs & Annos)

SDCL § 38-21-46

38-21-46. Notice of damage--Requirements--Exception

Effective: July 1, 2020

Currentness

Any person claiming damages from any use of a pesticide shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

- (1) Thirty days after the date that the damages were observed or should have been observed; or
- (2) If a growing crop is alleged to have been damaged, before the time that twenty-five percent of the crop has been harvested or destroyed.

This section does not apply if the person seeking reimbursement for damage was the applicator of the pesticide.

Credits

Source: SL 1974, ch 255, § 20; SL 1991, ch 326, § 18; SL 2020, ch 174, § 18.

Notes of Decisions (1)

S D C L § 38-21-46, SD ST § 38-21-46

Current through the 2023 Regular Session and Supreme Court Rule 23-17

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South Dakota Codified Laws

Title 38. Agriculture and Horticulture (Refs & Annos)

Chapter 38-21. Agricultural Pesticide Application (Refs & Annos)

SDCL § 38-21-47

38-21-47. Inspection of damages--Requirements

Effective: July 1, 2020

Currentness

Upon notifying the applicator as required under § 38-21-46, the person seeking reimbursement for the alleged damage shall permit the applicator and up to four representatives of the applicator to enter the person's property during reasonable hours for the purpose of observing and examining the alleged damage. If the person fails to allow entry, the person is barred from asserting a claim against the applicator.

Credits

Source: SL 1974, ch 255, § 20; SL 2020, ch 174, § 19.

S D C L § 38-21-47, SD ST § 38-21-47

Current through the 2023 Regular Session and Supreme Court Rule 23-17

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West's North Dakota Century Code Annotated
Title 4.1. Agriculture
Chapter 4.1-33. Pesticide Control

NDCC, 4.1-33-18

Formerly cited as ND ST 4-35-21.3

§ 4.1-33-18. Pesticide application--Alleged property damage--Notification of applicator

Currentness

1. a. Before a person may file a civil action seeking reimbursement for property damage allegedly stemming from the application of a pesticide, the person shall notify by certified mail the pesticide applicator of the alleged damage within the earlier of:

(1) Twenty-eight days from the date the person first knew or should have known of the alleged damage; or

(2) Before twenty percent of the crop or field allegedly damaged is harvested or destroyed.

b. Subdivision a does not apply if the person seeking reimbursement for property damage was the applicator of the pesticide.

2. Upon notifying the applicator as required under subsection 1, the person seeking reimbursement for the alleged property damage shall permit the applicator and up to four representatives of the applicator to enter the person's property for the purpose of observing and examining the alleged damage. If the person fails to allow entry, the person is barred from asserting a claim against the applicator.

Credits

S.L. 2017, ch. 67 (S.B. 2027), § 2, eff. July 1, 2017.

Notes of Decisions (2)

NDCC 4.1-33-18, ND ST 4.1-33-18

Current with legislation from the 2023 Regular Session. The statutes are subject to change as determined by the North Dakota Code Revisor. (These changes will be incorporated later this year.)

End of Document

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30441

KEVIN JUCHT,

Appellant,

vs.

NATHAN A. SCHULZ,

Appellee.

Appeal from the Circuit Court
First Judicial Circuit
McCook County, South Dakota
The Honorable Chris S. Giles, Presiding Judge

REPLY BRIEF OF APPELLANT

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Notice of Appeal Filed August 22, 2023

Oral Argument Requested

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ARGUMENT

This Court held that SDCL 38-21-46 did not create a statute of limitations or condition precedent in *Durham v. Ciba-Geigy Corp.*, 315 N.W.2d 696 (S.D. 1982). While the Code has since been amended, nothing in the statutory history indicates, let alone demonstrates, an intention to overturn *Durham*. Even if this were not the case, the trial court's failure to consider Jucht's substantial compliance with the notice statute was reversible error. The trial court's decision to dismiss should be overturned.

I. *Durham* continues to be controlling precedent

Schulz asserts that the 2020 amendments to Chapter 38-21 overruled *Durham* and "created a bar to bringing a claim for failing to comply with SDCL 38-21-46 and SDCL 38-21-47." However, this assertion is made without any explanation of how, exactly, the overruling occurred. There is no reference to *Durham* or the details of its holding in the statutes, and the amendment did not add any language stating that civil actions are barred if the notice requirement is not met. The new statute, like the version reviewed in *Durham*, was part of a statutory scheme intended to establish "an administrative procedure to govern the issuance, suspension, revocation or modification of pesticide applicator or dealer licenses." *See Durham*, 315 N.W.2d at 698. As in 1982, it has nothing to say about statutes of limitations or conditions precedent for civil actions.

The North Dakota case cited by Schulz provides an excellent example of the type of language a legislature would use to create a statute of limitations or condition precedent for a civil action. *See Laufer v. Doe*, 946 N.W.2d 707 (N.D. 2020). The statute at issue in *Laufer* explicitly states that compliance is a prerequisite to filing a civil action: **"Before a person may file a civil action** seeking reimbursement for property damage allegedly stemming from the application of a pesticide, the person shall notify by

certified mail the pesticide applicator of the alleged damage...” NDCC 4.1-33-18 (emphasis added). “The plain language states a person must provide notice...before the person may file a civil action...The statute unambiguously is not limited to [administrative actions].” *Laufer*, 946 N.W.2d at 711. In short, North Dakota’s notice requirement applies to civil actions because the statute says it does.

The same is true for SDCL 3-21-2, to which Schulz and the trial court make analogy as justification for the dismissal. The notice provision for public entities and officials reads as follows: “No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice...is given to the public entity as provided by this chapter...” SDCL 3-21-2. As with NDCC 4.1-33-18, there is clear, unambiguous language stating that an action cannot proceed unless there is written notice.

Chapter 38-21, however, contains no such unambiguous language. Neither SDCL 38-21-46 nor SDCL 38-21-47 refers to civil actions in any way, or states that the notice requirement creates a statute of limitations or a condition precedent for civil claims. This case is not, as Schulz asserts, “the exact same as *Laufer*.” The North Dakota and South Dakota statutes have very different language. North Dakota’s states that compliance is necessary before a person may file a civil action; South Dakota’s does not. *Laufer* is distinguishable for the same reasons that the cases proffered by the defendant in *Durham* and discussed in detail in Jucht’s opening brief are distinguishable: the statutes explicitly state that compliance is a prerequisite to a civil action. See *McArdle v. Stewart*, 446 P.2d 379 (Okla. 1968); *Olmstead v. Reedy*, 387 P.2d 631 (Okla. 1963); *Cross v. Harris*, 370 P.2d

703 (Or. 1962). SDCL 38-21-46 and SDCL 38-21-47 do not. If the South Dakota legislature had wanted to create a statute of limitations or a condition precedent, it would have done what the North Dakota legislature did, and, indeed, what the South Dakota legislature itself did when it enacted SDCL 3-21-2: include explicit language about civil actions. Neither the 1991 nor the 2020 amendments did anything of the sort. Schulz and the district court did not apply the plain language of SDCL 38-21-46 and SDCL 38-21-47 or the canons of statutory construction; they added words where the legislature did not.

Schulz then argues that SDCL 38-21-46 and SDCL 38-21-47 must bar this case because, as the trial court stated, the legislature “attempted to create a very comprehensive set of rules and regulations” when it created Chapter 38-21. But the legislature had created a very comprehensive set of rules and regulations prior to *Durham*, which “establishe[d] an administrative procedure to govern the issuance, suspension, revocation or modification of pesticide applicator or dealer licenses.” *Durham*, 315 N.W.2d at 698. The mere existence of comprehensive rules did not mean there was a statute of limitations or condition precedent for civil actions in 1982, and it does not mean that now. The only absurdity and ‘strategic circumvention of the law’ would be to read a new requirement into Chapter 38-21 that didn’t exist at the time of *Durham* and is nowhere made explicit in the text.

As he did below, Schulz relies on dicta in *Durham* as proof its holding does not apply in this case. However, as stated in Appellant’s opening brief, *Durham* does not hold that SDCL 38-21-46 created a statute of limitations or condition precedent for all claims other than breach of contract. The line in question was an explanation for why the Court was not persuaded by three cases from other jurisdictions, which, as previously discussed,

would have been distinguishable in any event due to the language of the statutes being interpreted. This Court has never held that SDCL 38-21-46 creates a statute of limitations or condition precedent that would bar claims such as Jucht's; as stated in Jucht's opening brief, the logic set forth in *Durham* and the actual language of the Code, both in 1982 and today, provide no justification for doing so. The chapter in question is about administrative procedure, not civil actions; whether the civil action is pleaded as breach of contract, trespass, or any other tort is irrelevant. The trial court erred in holding that Jucht's claims were barred.

II. Actual notice was sufficient

Schulz makes two arguments for why his actual knowledge of both the spray event and the DANR investigation should be ignored. First, he asserts that, because the statute requires notice via certified mail, strict compliance is necessary. The second argument appears to be that substantial compliance requires defective notice rather than actual notice.

The argument for strict compliance relies once more on *Laufer*. However, *Laufer* is inapplicable because it was decided under North Dakota law, which apparently requires strict compliance with statutory notice requirements, and actual notice of a claim does not matter. 946 N.W.2d at 712. South Dakota law, on the other hand, clearly accepts actual notice and substantial compliance as sufficient. *See, e.g., Matter of Dependency and Neglect of A.L.*, 442 N.W.2d 233, 236 (S.D. 1989); *Matter of B.J.E.*, 422 N.W.2d 597, 600 (S.D. 1988). Both of those cases concerned the mandatory notice requirement of the Indian Child Welfare Act. 25 U.S.C.A. § 1912. ("In any involuntary proceeding in a State court...the party seeking the foster care placement of, or termination of parental rights to, an Indian child **shall** notify...the Indian child's tribe, by registered mail with

return receipt requested, of the pending proceedings and of their right to intervention.”). Despite the statute’s use of the word ‘shall’, this Court did not require strict compliance. It was enough that the respective tribes knew of the ongoing proceeding. North Dakota may require strict compliance, but South Dakota clearly does not.

Schulz’s second argument appears to be that substantial compliance requires taking specific steps under the statute and failing on some technical ground. But substantial compliance is not about technicalities; it is about whether the purpose of the statute has been served. *See Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830, 835 (“Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served.”). As Schulz recognizes, the reasonable objectives of SDCL 38-21-46 and 38-21-47 are to provide: 1) notice to the pesticide applicator that a party is claiming damages from an applicator’s use of a pesticide; and 2) an opportunity to inspect and prepare a defense to the claim for damages. (Appellee’s Br. at 13). The actual notice Schulz received provided exactly that. Schulz knew there was a spray incident on Jucht’s property and knew that DANR was investigating it; with that knowledge in hand, he could have inspected the damaged crop. The purpose of the statute was served.

There is a good reason substantial compliance has not been defined as attempted compliance that failed due to technical errors. If, for example, Jucht had written a letter to inform Schulz of the crop damage and sent an envelope via certified mail to Schulz within the 30 days but failed to put the letter in the envelope, he would have undertaken all but one of the steps set forth in SDCL 38-21-46 without providing any of the necessary information to Schulz or giving him reason to believe he should investigate.

The statutory duty is not to send a piece of certified mail; it is to give notice. As alleged in the Complaint, Schulz received notice of both the crop damage and the DANR investigation. The trial court should have held that Jucht, by notifying DANR, substantially complied with the notice requirement.

What Schulz's discussion of *Loe v Lennardt*, 262 P.2d 312 (Or. 1961) fails to mention is that the plaintiffs' failure was one of notice; while the farmers had indeed filed a report of loss form with the state department of agriculture, they had not met the statutory requirement of serving copies on the pesticide applicator. *Id.* at 319. Nor did the *Loe* court rest its case on the fact that a form had been filed. It was the applicator's actual knowledge, which it obtained from the department of agriculture, that was ultimately found dispositive because it served the purpose of the statute. *Id.* at 320. Schulz, like the applicator in *Loe*, had actual knowledge of the spray incident and the DANR investigation. The fact that he, unlike the applicator in *Loe*, declined to use this knowledge to investigate should not be held against Jucht.

There is also the issue of DANR telling Jucht to take no further action. Schulz argues that this is irrelevant because no one specifically mentioned the statute. However, this, in and of itself, is significant. The DANR investigators' knowledge of the statutory specifics was superior to that of a farmer; their failure to inform Jucht that he could still send notice to the applicator should have been considered by the trial court. Further, there are questions of fact as to the exact statements made to Jucht that were not appropriate for a motion to dismiss. The trial court erred in dismissing the case when Jucht had only followed orders.

CONCLUSION

The trial court ignored established precedent in dismissing Jucht's claims. The decision must be reversed.

Dated at Sioux Falls, South Dakota, this 12th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief of Appellant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 365, this Reply Brief contains 1,871 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 12th day of December, 2023.

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The undersigned hereby certifies that the foregoing “Reply Brief of Appellant” was filed electronically with the South Dakota Supreme Court and that the original of the same was filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on 13th December, 2023.

The undersigned further certifies that an electronic copy of “Reply Brief of Appellant” was emailed to the attorneys set forth below, on 13th December, 2023:

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