IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26777

DEBORAH ISACK, individually, and as Guardian and Conservator for Terry D. Isack,

Plaintiff/Appellee,

vs.

ACUITY,

Defendant/Appellant.

Appeal from the Circuit Court
Third Judicial Circuit
Codington County, South Dakota

The Honorable Robert L. Timm, Presiding Judge

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Defendant Acuity ("Acuity") appeals from a July 23, 2013, judgment awarding several hundred thousand dollars in fees to attorney John Knight ("Knight"). R 91-93.[1] Notice of Entry of the judgment was given July 29, 2013, and Notice of Appeal was filed August 2, 2013. R 94-98.

STATEMENT OF THE ISSUES

When a workers' compensation insurer retains its own counsel to represent its statutory rights of recovery and offset in an employee's action against a third-party tortfeasor and that attorney's repeated efforts to work with the employee's attorney and participate to the fullest extent in that action are ignored, is the employee's attorney entitled to a fee on the portion of a settlement allocated to the insurer's statutory rights?

The trial court gave the employee's attorney a 33% contingent fee on the insurer's recovery.

SDCL § 62-4-38

SDCL § 62-4-39

SDCL § 62-4-40

Mergen v. N. States Power Co., 2001 SD 14, 621 N.W.2d 620

[1] The record below is cited as "R" and Joint Exhibit 1 as "Ex. 1," both followed by the page number assigned by the Clerk of Courts. The trial transcript is cited as "T" and other exhibits as "Ex."

STATEMENT OF THE CASE

Acuity, a workers' compensation insurer, appeals from a judgment requiring it to pay fees to an attorney it did not hire and when it had hired its own attorney to represent its interests in a third-party action.

The case had its onset when Terry Isack ("Isack") was seriously injured in an automobile accident and received workers' compensation benefits from Acuity. R 24. Isack's wife, Deborah, retained Knight on a contingent fee basis to pursue an action against the third-party tortfeasors. Ex. 9. Acuity retained its own attorney to represent it in connection with its statutory rights of recovery and offset in the personal injury action and notified Knight of that. R 23-24. Upon settlement of the personal injury action, the parties disagreed about whether Knight was entitled to an attorney's fee on the amount allocated to Acuity's statutory recovery. Ex. 2, ¶¶ 3.2.1, 3.2.3. The parties agreed that attorney fee amounts to which Knight claimed entitlement would be placed in bank accounts and Deborah Isack would bring an action to determine whether Knight was entitled to those monies. *Id.*; Ex. 4, ¶¶ 1(a), 4(c), 10.

She filed that action in Circuit Court, Second Judicial Circuit, Codington County. R 2-5. Following a court trial, the Hon. Robert L. Timm ruled that all funds set aside be paid to Knight. R 30-31 (Appendix 1-2). A judgment to that effect was filed on July 23, 2013. R 91-93 (Appendix 16-18).

Notice of Entry was given on July 29, 2013, and Notice of Appeal was filed August 2, 2013.

STATEMENT OF FACTS

Isack was seriously injured in a motor vehicle accident on March 11, 2009, while a passenger in a van driven by Donald Walraven. R 24. The accident was caused by the negligence of Thomas Glanzer ("Glanzer"), who was in the course and scope of his employment with Hillside Hutterian Brethren, Inc. ("Hillside"). *Id*.

At the time of the accident, Isack was in the course and scope of his employment with Elite Drain & Sewer. *Id*. Acuity provided workers' compensation insurance to Elite Drain & Sewer. T 8. Accordingly, Acuity paid workers' compensation benefits to or on behalf of Isack as a result of the injuries he sustained in the accident. *Id*.

On March 23, 2009, Deborah Isack contacted Knight for legal representation regarding the accident. R 24. On April 14, 2009, Knight and Acuity communicated regarding Knight's anticipated representation of Isack and Acuity's rights in any recovery from Glanzer and/or Hillside. *Id*. Deborah Isack and Knight entered into a contingent fee "Legal Services Agreement" on June 16, 2009. Ex. 9

On June 25, 2009, Acuity contacted Charles Larson ("Larson"), an attorney at Boyce, Greenfield, Pashby & Welk, LLP, to represent it for its recovery and offset rights against any damages Isack recovered against

Glanzer and/or Hillside. R 24. In early August 2009, Larson contacted Knight to inform Knight that he was retained by Acuity and the two communicated about Larson's representation during the next several weeks. R 23; T 97; Ex. 1 at 1-3. During this time and before Knight did so, Acuity hired a life care planner to evaluate and assess Isack's future medical needs and costs. T 50-51, 80, 109. As a result, Isack did not have the expense of a life care planning expert. T 51-52.

On August 17, 2009, Deborah Isack, individually, and as Guardian and Conservator for her husband, brought a lawsuit against Glanzer and Hillside for damages (hereafter "the Litigation"). R 23. Knight did not provide Larson a copy of the summons and complaint until a month later. T 98; Ex. 1 at 3. The Answer in the Litigation admitted liability. T 106.

On September 15, 2009, Knight wrote Larson and, among other things, acknowledged that Isack and Acuity had "competing" claims in the Litigation. Ex. 1 at 3. From October 2009 through February 2010, Knight and Larson discussed various issues. These included responsibilities in prosecuting the Litigation, whether Acuity would intervene as a party to the suit, Acuity's claims, and attorney's fees and costs relating to those claims. *Id*. at 4-31.

For example, on October 2, 2009, Larson wrote Knight, saying that he was not going to be "a freeloader with regard to this action, and want to be proactive and assist you however possible." *Id*. at 6. He also advised Knight to contact him for help on anything that needed to be done. *Id*.

On October 21, 2009, Larson again wrote Knight, reiterating that he had been retained by Acuity and that Acuity "adamantly disagree[d]" that Knight was entitled to any attorney's fees on Acuity's reimbursement and offset interests. *Id*. at 9. He also said:

> Regardless on how you decide, I will be an active participant in assisting with this litigation. I would allow you to be lead counsel, and would be your grunt so to speak. I am willing to brief any issues, conduct discovery, take depositions, or do anything else necessary to assist in prosecuting this claim.

Id. Larson also repeatedly asked Knight whether he wanted Acuity to formally intervene in the Litigation. Knight did not respond. *Id*. at 16, 23, 25, 30, 31.

On February 9, 2010, Glanzer and Hillside filed a motion to consolidate the Litigation with a separate lawsuit brought by Walraven and his wife, who were represented by attorney Nancy Turbak Berry ("Berry"). R 23; T 5-6. Larson only learned of the motion when a defense attorney called to ask if he was going to contest it. T 102. Knight did not provide Larson a copy of the motion until more than three weeks later. R 32.

Because of Knight's continued failure to respond, on March 9, 2010, Acuity moved to intervene. R 23; Ex. 1 at 33. The day after the motion was filed, Knight wrote Larson acknowledging that Acuity "put us on notice that it does not believe it is required to contribute to the attorney's fees and that your firm has been retained for the purpose of pursuing Acuity's subrogation

interest."[2] Ex. 1 at 35. The Court granted Acuity's motion to intervene on April 6, 2010, and on April 8 it denied Glanzer and Hillside's motion to consolidate. R. 23.

Because Knight never complied with Larson's requests for a complete copy of the pleadings, on April 13, 2010, Larson obtained them from Jack Hieb ("Hieb"), one of Hillside's attorneys. Ex. 5 at 52. The next week, Larson suggested to Knight that it looked as if there might be a race to the courthouse between Isack and the Walravens and that "Mr. and Mrs. Isack will be best served if we push this case along." Ex. 1 at 42. He also wrote Hieb about obtaining a scheduling order "with aggressive dates." Ex. 5 at 50. Larson was concerned that the Walravens might get their case to trial first and any judgment in it might exhaust any potential recovery for Isack. Ex. 1 at 42.

On May 17, 2010, Walraven was deposed in the Walravens' action against Glanzer and Hillside, with Larson appearing on behalf of Acuity and Knight appearing on behalf of Isack. R 22. On May 27, 2010, Larson sent an email asking Knight if he had requested a scheduling order and urging they "keep this going." Ex. 1 at 51. Larson received no response. *Id*. at 53.

On June 7, Larson again asked Knight if a scheduling order had been requested, saying, "I think it is in our best interest to get this on the Court's

[2] As explained below, despite its common usage, "subrogation" is a misnomer in the workers' compensation context.

calendar and moving as quickly as possible." *Id*. On June 10, Knight emailed Larson that he intended to file a motion for a scheduling order "next week." *Id*. at 54. Two weeks later, Larson once again asked Knight whether a motion been filed. *Id*. at 55. Knight filed the motion that day. R 22.

On July 16, 2010, the trial court entered a scheduling order that, among other things, set trial to begin on October 18, 2010. *Id*. That same day Larson sent Knight an email saying,

> Please let me know how I can be of help. I don't want to step on your toes, but am involved in the case and would like to assist in prosecuting the claim. We can talk about trial issues later. For now, if there is anything we need by way of discovery or other matters, let's chat and we can keep the case on track.

Ex. 1 at 58. Knight requested Larson see if the life care plan needed to be updated and Larson continually worked with Acuity to have the most up to date and accurate plan possible. *Id*. at 59; Ex. 6; T 110-12.

Receiving no other response or direction from Knight, Larson sent a letter dated August 3 saying,

> Obviously, we will need to work together if we are going to get this case resolved. With the trial quickly approaching, we should try and get this case resolved soon if we are going to go down that route. If not, then we should continue to prepare for trial. On that note, please let me know what you would like me to do to assist in getting this case ready for trial.

Ex. 1 at 63. Larson then asked Knight about potential witnesses and discovery in preparation for trial. *Id*. at 71; Ex. 5 at 40. During those inquiries, Larson observed that while it would be less expensive to have the life care planner retained by Acuity testify by deposition "the magnitude of

this case warrants live testimony in my mind." Ex. 5 at 40. Once Knight responded on August 19, Larson made the necessary arrangements for the life care planner to testify at trial. Ex. 1, 75.

On August 24, Larson sent an email to Knight asking if there was

> anything else you need me to do by way of witnesses or early trial preparation? I assume we'll be working together on this file and aligning our interests. If that is not the case, let me know immediately and I'll do what I feel needs to be completed for trial prep. I have deferred to your judgment as I don't want to step on your toes, but will continue to be active in the case. If you don't want me to assist you, I'll approach trial from Acuity's standpoint and act accordingly. It is in our clients' interest to put work [sic] together, but I need to know now whether that is your intention.

Id. at 76. Ten days later, Larson sent another email to Knight:

> If the trial is going forward, there is a lot of work to do. I know you don't want me involved, but I'm in the lawsuit and will proceed accordingly. .... I think we have to proceed as if the case isn't going to settle. There's a lot that can and should be done in the next couple of days. If the case doesn't settle, we'll have a month to prepare for trial and we'll need to finalize expert reports, get affidavits for medical records, etc. Please keep me up to date as we should be working together to get this case resolved or tried.

Id. at 95.

From and after that email, Larson repeatedly contacted Knight requesting information to make arrangements for witnesses, update the life care plan and address other matters necessary to bring the case to trial. *Id*. at 85-92. Larson also obtained Hieb's agreement to stipulate that the medical expenses incurred by Isack were reasonable and necessary. *Id*. at 119, 129, Exhibit 5 at 17; T 118. This obviated the time and expense

associated with obtaining testimony from an expert or numerous health care providers in an action where only damages were at issue. T 118.

During this time, Knight and Berry were working on a so-called "cooperation agreement" under which Isack and the Walravens would split the proceeds of any judgment or settlement. Ex. 1 at 80; T 15-16, 31, 47. On the eve of a scheduled mediation, Knight and Berry insisted Acuity sign off on that agreement. Ex. 5 at 18-22. When Larson questioned whether the agreement was in Isack's best interests, Berry told him that "Isacks and Walravens already have a deal," threatened a bad faith lawsuit and said that unless Acuity signed the agreement the mediation would be called off. *Id*. Knight, too, raised the potential of a bad faith lawsuit. T 126-27.

Still, all parties attended a mediation on September 2, 2010. T 21-22. Larson and an Acuity adjuster from Sheboygan, Wis., were there but essentially not allowed to participate. T 69-70, 117. No settlement was reached. T 23.

A week later, Knight wrote Larson to insist that Acuity reach an agreement with him on "like damages" before any settlement or trial. R 107A; R 121. Knight said that if such an agreement were not reached "I may be presenting evidence to minimize Acuity's claim and arguing to the jury they should not award those damages to Acuity." R 107D. Larson responded the next day, summarizing Knight's lack of cooperation and the roadblocks he

had erected and telling Knight he believed the threat did not serve Isack's best interests. R 102-07 (Appendix 22-27).

Negotiations with the defendants continued after the mediation. T 23, 85. In October, Larson learned that Knight and Berry had made a global settlement demand. R 54. Larson, though, was not aware of demand until Hieb reported it to him. T 124.

In late October or early November 2010, a tentative settlement of the Litigation was reached. R 22. Isack and Acuity executed a settlement agreement on or about December 22, 2010. Ex. 2. It recognized the dispute over Knight's claim to attorney fees on amounts attributed to Acuity's reimbursement and offset rights. *Id*. at ¶¶ 3.2.1, 3.2.3. The next month, Isack and Acuity executed a separate agreement under which one-third of Acuity's reimbursement claim for past benefits and its "like damages," plus applicable sales tax, were placed in bank accounts of Knight's law firm to be held until the attorney fees issue was resolved. Ex. 4, ¶¶ 1(a), 4(c). Isack also agreed to commence an action to resolve the issue, giving rise to this lawsuit. *Id*. at ¶ 10.

Following trial in this matter, Judge Timm issued essentially a one paragraph decision. R 30-31. The extent of the analysis was that "the mere fact" that Acuity retained Larson did not "obviate or diminish Acuity's obligation" to pay attorney fees under SDCL § 62-4-39 and that Knight "was

the chef" with Larson "primarily in the kitchen to insure that his client, Acuity, got its slice of the pie." *Id.*

ARGUMENT

Introduction

This case requires the Court to determine if a workers' compensation insurer that hires its own attorney to protect its interests in claims against a third-party tortfeasor is obligated to pay attorney fees to an employee's attorney, with whom the insurer explicitly has no contractual or other agreement, when he hinders the insurer's attorney's ability to participate substantively in the litigation. Generally, an insurer's interest in a third-party claim arises from subrogation. In South Dakota, subrogation arises out of two sources: contract or equity. *American Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 2008 SD 106, ¶ 13, 757 N.W.2d 584; *Bowen v. Am. Family Ins. Group*, 504 N.W.2d 604, 605 (SD 1993). That is not the case with workers' compensation. In the event of a third party recovery in a workers' compensation claim, SDCL § 62-4-39 (Appendix 20) creates a right of reimbursement for benefits already paid and SDCL § 62-4-38 (Appendix 19) gives an employer the right to offset "like damages" recovered against future benefits owed.

Standard of Review

This case requires the Court to apply and construe several South Dakota workers' compensation statutes. Such questions are ones of law,

reviewed de novo. *See, e.g., Knapp v. Hamm & Phillips Service Co., Inc.*, 2012 SD 82, ¶ 11, 824 N.W.2d 785. *See generally Johnson v. Light*, 2006 SD 88, ¶ 10, 723 N.W.2d 125 ("Construction of a statute is a question of law and is, therefore, fully reviewable without deference to the interpretation made by the trial court.") (citations omitted).

Analysis and Authority

Three statutes address third-party tort actions arising out of workers' compensation claims. SDCL §§ 62-4-38 through -40 (Appendix 19-21); *Zoss v. Dakota Truck Underwriters*, 1998 SD 23, ¶ 10, 575 N.W.2d 258, 261 ("*Zoss I*"). The statutes allow either the employer or the employee to bring a third party action. They also obligate the party not bringing suit to cover a pro rata share of the "necessary and reasonable expense" of the litigation, which "may" include an attorney's fee. SDCL §§ 62-4-39, 62-4-40.[3] The statutes do not address what happens if, as here, the employee and insurer each retain their own counsel to represent their separate interests in the third-party action. This Court's prior decisions suggest that, under the circumstances here, the employee's attorney is not entitled to a fee on the insurer's recovery.

Bowen is the leading decision addressing responsibility for attorney fees in subrogation claims. It held that an insurer that did not participate in prosecuting or settling the claim was required to bear a proportionate share of the attorney's fees incurred by the insured when the recovery includes the

insurer's subrogation interest. 504 N.W.2d at 606. In reaching this conclusion, this Court relied on "the seminal case" of *United Servs. Auto. Ass'n v. Hills,* 172 Neb. 128, 109 N.W.2d 174 (1961). *Id. Hills* held that "where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees." 109 N.W.2d at 177. This Court observed that this rule subsequently was "nearly unanimously adopted" by other courts. 504 N.W.2d at 606.

Although *Bowen* deals with contractual subrogation rights, this Court used an analogous approach in the workers' compensation context in *Mergen v. N. States Power Co.*, 2001 SD 14, 621 N.W.2d 620. The City of Sioux Falls sought to intervene in a third party action brought by its employee and the trial court granted the City's motion on the condition it agree to pay the employee's reasonable costs and attorney's fees. *Id.* at ¶ 3. This Court held that the City had an absolute right to intervene that could not be conditioned on the payment of costs and attorney's fees. *Id.* at ¶ 6. At the same time, it observed that SDCL § 62-4-39 grants trial courts discretion to require an employer pay its share in the litigation. *Id.* at ¶ 8.

> It is clear that . . . an intervenor cannot precipitously wait for expensive litigation costs to be incurred, then intervene without being obligated to pay its *pro rata* share of reasonable litigation

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[3] The litigation expenses are not at issue. T 80. Acuity paid all the costs of the life care planner and 60 percent of the other expenses. T 153.

> expenses. This rule is fair in that an intervenor, who enters a lawsuit as a matter of right, should be held responsible for its proportionate share of reasonable expenses incurred prior to intervention as determined by the trial court after an appropriate hearing.

Id. (citing *Zoss I*, *supra*) (underlining added).

Both *Bowen* and *Mergen* indicate that an employer/insurer does not owe attorney fees to an employee's attorney if the employer/insurer actually enters and participates in the action in protect its interests. This is particularly so given *Bowen*'s reliance on *Hills*, which was applied the workers' compensation context in *Schulz v. Gen. Wholesale Co-op. Co., Inc.*, 238 N.W.2d 463 (Neb. 1976).

Schulz interpreted a Nebraska statute providing that attorney fees be divided between a claimant and employer/insurer when they join in prosecuting a third party claim. The court first observed that "the mere fact that the employer or its compensation carrier retains counsel to represent its subrogation interest will not, in and of itself, prevent an allowance of attorney's fees to the employee's counsel from the subrogation recovery." 238 N.W.2d at 466. Still, it expressed concern about the "many evils" that can result from allowing the employee's attorney a fee in every case where the parties are separately represented. *Id.*

> Instead of the needed cooperation between the attorneys for the employee and his employer, it would turn them into competitive adversaries. It would cause a "race to the courthouse" to file suit so as to give the winner the dominant role in the handling of the case. Confusion would reign as each attorney goes off on his own, as concerned about protecting or increasing his fee as in

> protecting and advancing the interests of his client. It would also place the employer or the insurance carrier in the position of having to pay two attorneys' fees, even if the attorneys it retained fully and adequately represented its interests.

Id.

Schulz also observed that even when counsel cooperate, "it is virtually inevitable that there will be mutual benefit to the parties, which, of itself, does not call for any division of attorneys' fees." *Id.* at 467. Because the insurer's attorney continued his representation of the insurer throughout and did not acquiesce in the employee's attorney representing the insurer, the court concluded the insurer "had full and adequate representation from its own counsel" and the employee's attorney was not entitled to a fee on the insurer's portion of the recovery. *Id.* at 467-68.

Schulz is the only case law cited in the trial court's decision. R. 31. Rather than apply it, however, the court simply said that, unlike the attorney in *Schulz*, Larson's contribution to "Isack's challenging claim" was "de minimis." *Id.* at 30-31.

Carter v. Par-Kan Const. Co., 348 F.Supp. 1295 (D. Neb. 1972), reached the same conclusion as *Schulz*. As here, the insurance carrier intervened in the employee's third party action. 348 F. Supp. at 1296. As here, the employee's attorney asserted entitlement to an attorney fee from the insurance company to the extent the insurer was not liable for future workers' compensation benefits. *Id.* at 1297. Although recognizing the insurer was responsible for a pro rata share of the expenses of the litigation,

it said to require the insurer to pay attorney fees under such facts required finding that the insurer's attorney did not represent his client's full interest in recovering both past payments and future liability. *Id.*

Likewise, the Alaska Supreme Court held that the general rule that a workers' compensation insurer was liable for a pro rata share of attorney's fees in a third-party tort action did not apply when the insurer retained its own counsel to protect its interests and that attorney's independent efforts contributed substantially to the recovery. *D.N. Corp. v. Hammond*, 685 P.2d 1225, 1230 (Alaska 1984). It said the key was whether the insurer's attorney "actually assisted in obtaining a recovery against a third party tort-feasor." *Id.* at 1229. *See also Summers v. Command Sys., Inc.*, 867 S.W.2d 312, 315-16 (Tenn. 1993) (if the employer has not engaged counsel or if the employer's counsel does not actively participate in the tort action, the contingent fee agreement between the employee and his attorney applies to the entire recovery, including the employer's subrogation lien).

Here, Acuity retained Larson and advised Knight of that before any lawsuit was started. Likewise, Knight was advised from the outset that Acuity did not believe it owed him an attorney fee on any recovery on its behalf because it was relying on Larson to represent its interests. Larson did not sit idly by and require Knight to carry the load. As the facts demonstrate, from virtually day one through the ultimate settlement, Larson consistently asked what he could do to assist in prosecuting the case. In

addition, he participated in discovery and motions hearings, pushed to keep the case moving forward, began trial preparation and represented Acuity's interests at the mediation.

Moreover, Acuity hired not only an investigator but also a life care planner to calculate Isack's damages, thereby obviating Isack's need to go to that expense. Larson not only kept that plan updated and dealt directly with the planner, he obtained a stipulation on medical expenses that made up the vast majority of the damages. To consider this work a *de minimis* contribution to "Isack's challenging claim" ignores the reality of the situation.

As for being challenging, this was a case of admitted liability. In fact, Hieb told Larson that his trial strategy in light of the nature and extent of Isack's injuries "was to show the jury that money wouldn't do Mr. Isack any good, that he wouldn't be able to … spend money here or there or in other places, that he was getting the care he needed but on top of that money wouldn't do him any good." T 112-13. As a result, the life care plan and medical expenses – on which Larson did all the work – were not only the vast majority of damages but virtually uncontested. It is illogical to conclude that establishing several million dollars in damages is an insignificant contribution.

Likewise, the trial court's opinion that Knight "was the chef," R 30, is questionable.[4] This is demonstrated by the two "important and substantial" contributions Knight allegedly made to the case.

First, Knight points to the so-called "cooperation agreement" with Berry. R 38-39. Yet the one he reached prior to the mediation obligated Isack to a 50-50 split of any settlement or judgment despite the fact this was an admitted liability case and Isack's injuries, and hence his damages, were far more significant than Walraven's. T 50, 85, 91-92 127-28. It was only after Larson raised concerns that the agreement was modified to a proportional one following the mediation. T 129-30.

The other is that Knight investigated Hillside's assets and liabilities, obtained information to contest any argument that Hillside could seek protection in bankruptcy and filing a petition requesting Hillside be placed in receivership. R 39. This occurred post-mediation because the bankruptcy issue had been raised and the parties thought it better "to have professionals look at" the issue. T 117. Knight's testimony and billing records confirm that that he paid outside counsel to assess the bankruptcy issues and the work took place after the mediation. T 68-69, R 10. Yet Knight never mentioned this to Larson or asked him or his firm to assist. T 72.

[4] It is unclear if that analogy was intended to be ironic or droll given that, at the time of trial, Knight was employed as a chef in a restaurant owned by Berry. R 54.

The latter is consistent with Knight's approach to the case and Larson throughout. Not only was the lawsuit not started until after Acuity retained Larson, Knight didn't provide Larson with a copy of it. In fact, Larson got a complete copy of the pleadings only through defense counsel. Knight served no discovery requests and never replied to discovery requests served on Plaintiff. T 30. The only deposition in which he participated was David Walraven's, in which Larson also participated. *Id*. Knight never responded to Larson's almost continuous inquiries about what assistance he could lend or the repeated requests for input from Knight on whether Acuity should move to intervene. *Id*. at 82, 84. In fact, throughout the case Larson "got as much information from [defense counsel] as [he] did from Mr. Knight." T 124.

This is just one of the "evils" that arose. Another stemmed from the fact the "like damages" that offset future workers' compensation benefits do not include damages for pecuniary loss, such as loss of companionship and society or loss of consortium. *Zoss I*, 1998 SD 23, ¶ 12; *Zoss v. Dakota Truck Underwriters*, 1999 SD 37, ¶¶ 13-16, 590 N.W.2d 911 ("*Zoss II).* The burden is on the employee or spouse to either obtain an express allocation of pecuniary loss in the settlement or a judicial determination of it. *Zoss I,* 1998 SD 23, ¶ 13 (citing *Nichols v. Cantara & Sons,* 659 A.2d 258, 259-61 (Me. 1995)*See also Zoss II*, 1999 SD 37, n.3. A claimant and third party tortfeasor "cannot negotiate a settlement in which the employer's insurer is not a party whereby a substantial portion of the total amount is allocated to loss of

consortium." *Zoss I*, 1998 SD 23, n.4 (quoting *Dearing v. Perry,* 499 N.E.2d 268, 272 (Ind. Ct. App. 1986)).

Had Acuity not retained Larson a year before, there would have been a clear conflict at the mediation. The more an employee's attorney seeks to allocate a settlement to pecuniary loss, the less recovery there is for the employer/insurer. Conversely, the more a settlement is allocated to "like damages," the less the employee receives. This presents an intrinsic conflict. *See, e.g.,* S.D. Rules of Professional Conduct, Rule 1.7, comment [23] ("A conflict may exist by reason of … the fact that there are substantially different possibilities of settlement of the claims"); *D.N. Corp.*, 685 P.2d at 1229, n.13 ("The statutory lien a workers' compensation carrier possesses may handicap a tort claimant's effort to settle his or her case. … Under the circumstances claimant and carrier should not be represented by the same counsel."). That conflict is plainly demonstrated by Knight actually suggesting he might "present[] evidence to minimize Acuity's claim and argu[e] to the jury they should not award those damages to Acuity." R 107D. Even Knight admits that taking that position or threatening bad faith was not representing or protecting Acuity's statutory rights. T 91.

There is yet another policy issue at stake. The attorney fees award is based on Knight's contingent fee agreement with Plaintiff. Ex. 4, ¶¶ 1(c), 4(a); Ex. 9. Knight and Acuity never had an agreement on an attorney's fee, let alone a contingent one. T 80-81. Under the Rules of Professional Conduct

any contingent fee agreement "shall be in writing." S.D. Rules of Professional Conduct, Rule 1.5(c). The decision below creates a contingent fee contract out of thin air and totally contrary to the irrefutable intent of the party upon which it is imposed.

Moreover, SDCL §§ 62-4-39 and 62-4-40 address allocating "reasonable" expenses of any recovery. Similarly, the Rules of Professional Conduct mandate that an attorney's fees be "reasonable under the circumstances." S.D. Rules of Professional Conduct, Rule 1.5, comment [1]. "Under settled law in South Dakota, an attorney has the burden of establishing that the charged fee is justified and reasonable, and a contingent fee does not, per se, equate with a reasonable attorney fee." *Stanton v. Hills Materials Co.*, 553 N.W.2d 793, 797 (SD 1996) (Gilbertson, J., concurring) (citing *In re Estate of Lingscheit*, 387 N.W.2d 738, 741-42 (SD 1986)). *See also In re Discipline of Dorothy*, 2000 SD 23, ¶ 27, 605 N.W.2d 493 (the attorney claiming a fee must produce competent evidence to show it is justified and reasonable) (citing *In re Estate of Schuldt*, 428 N.W.2d 251, 256 (SD 1988)). Certainly, fees of several hundred thousand dollars are not reasonable in the context here.

This is demonstrated in part by Knight's records. They show he worked a total of 29.9 hours between being first contacted in March 2009 and the beginning of August 2009, when he was specifically advised that Larson

was representing Acuity's interests. Ex. 8.[5] Even if Acuity were charged an hourly rate triple Larson's, that totals less than $11,000, exclusive of sales tax. T. 135. Knight's records reflect a total of 262.6 hours spent on the litigation. Ex. 8. A fee three times Larson's rates would total less than $95,000 but the award here amounts to a rate of more than $2,100 an hour. T 135.

CONCLUSION

Acuity told Knight from the outset that he was not representing its statutory interests; Larson was. Although Acuity and Larson handled those elements of the case that constituted the vast majority of damages, Knight was nonresponsive, if not obstructive, when Larson sought to actively participate in the lawsuit to represent his client's interests. Under such circumstances, particularly where there was no contract between them, the governing statutes do not obligate Acuity to pay Knight an attorney's fee. As a result, Acuity requests the judgment below be reversed.

[5] Knight's claim that he did not keep track of all his time is irrelevant as he has the burden to show reasonableness. T 86-87.

Dated at Sioux Falls, South Dakota, this _____ day of November, 2013.

DAVENPORT, EVANS, HURWITZ
& SMITH, L.L.P.

_____

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REQUEST FOR ORAL ARGUMENT

Appellant Acuity requests the Court hear oral argument in this matter.

_____

Timothy M. Gebhart

APPENDIX

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Deborah Isack, individually, and as Guardian and Conservator for Terry D. Isack, Plaintiff/Appellee v. Acuity, Defendant/Appellant

No. 26777

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 26777

DEBORAH ISACK, individually, and as Guardian and Conservator for Terry D. Isack,

Plaintiff and Appellee,

vs.

ACUITY,

Defendant and Appellant.

Appeal from the Circuit Court
Third Judicial Circuit
Codington County, South Dakota

Honorable Robert L. Timm, Presiding Judge

APPELLEE'S BRIEF

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Notice of Appeal filed August 2, 2013

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JURISDICTIONAL STATEMENT

Plaintiff Deborah Isack ("Isack") agrees with the jurisdictional statement proffered by Defendant Acuity ("Acuity").

STATEMENT OF THE ISSUE

1. Whether the circuit court correctly concluded that an injured employee who recovers damages from a third-party for his injuries is entitled to deduct attorneys' fees from the amount reimbursed to the employer for past workers' compensation benefits paid and from the amount allocated for future "like damages"?

   The circuit court concluded Isack was entitled to deduct attorneys' fees from these amounts on two bases: (1) relying on the applicable statute, and (2) alternatively, finding under the facts of this case, the contributions of Isack's attorney were significant and the contributions of Acuity's attorney were de minimus.

   Most apposite authority:

   SDCL § 62-4-39

STATEMENT OF THE CASE

Acuity appeals from a decision of the circuit court, the Third Judicial Circuit, Codington County, the Honorable Robert L. Timm, presiding.

This appeal stems from an automobile accident that occurred on March 11, 2009, in which Terry Isack ("Terry") was a passenger in a van driven by Donald Walraven. Terry and Walraven were working for Elite Drain & Sewer, which was insured for workers' compensation purposes by Acuity. In addition to Terry receiving workers' compensation benefits for his injuries, Terry's wife Deborah Isack (on behalf of Terry) pursued an action against the third-party tortfeasors. Walraven and his wife also sued the tortfeasors. John Knight represented Isack

and Nancy Turbak Berry ("Berry") represented Walravens in that action. Acuity retained Charles Larson to represent its reimbursement rights for workers' compensation benefits paid and its rights of offset for future "like damages."

Eventually, Isack and Walravens reached a settlement with the third-party tortfeasors. Isack and Acuity agreed to allocate a portion of the settlement to satisfy Acuity's rights to be reimbursed for past benefits paid, and allocating an amount representing the offset for future workers' compensation benefits ("like damages") that would have been paid by Acuity had it not been for the settlement with the tortfeasor. Isack and Acuity disagreed, however, about whether Isack could deduct a share of Isack's attorneys' fees from those amounts. Accordingly, one-third of the amounts (representing Knight's contingent fee) plus sales tax, was placed in a trust account.[1]

Isack then filed a declaratory judgment action under SDCL Chapter 21-24, asking the circuit court to determine the parties' rights regarding the funds held in trust. Prior to a court trial in that action, the parties submitted a Stipulation of Facts, as well as their Trial Briefs. Testimony and exhibits were presented at the court trial held on April 25, 2013. On May 9, 2013, the court issued its Letter Decision, concluding Acuity's reimbursement and offset should be reduced by the amount of the attorneys' fees incurred in the recovery of funds for Isack's past benefits and future "like damages." Findings of Fact and Conclusions of Law

[1] The settlement agreement with the tortfeasors contains a confidentiality clause. Accordingly, Isack respectfully requests the Court not reference the amount of the settlement in its decision.

were filed on July 3, 2013. Judgment in favor of Isack was filed on July 23, 2013. Notice of Entry was filed on July 29, 2013, and Notice of Appeal was filed by Acuity on August 2, 2013.

STATEMENT OF THE FACTS

Terry suffered injuries in a motor vehicle accident on March 11, 2009. SR 24. Terry was a passenger in a van driven by Walraven, who was also injured. *Id.* The accident was caused by the negligence of Thomas Glanzer ("Glanzer") while he was in the scope of his employment with Hillside Hutterian Brethren, Inc. ("Hillside"). *Id.* At the time of the accident, Terry and Walraven were also in the scope of their employment and Terry was insured for workers' compensation purposes by Acuity.[2] *Id.*

On March 23, 2009, Isack contacted John Knight ("Knight") for legal representation regarding the accident. *Id.* On April 14, 2009, Knight and Acuity communicated regarding Knight's involvement on behalf of Isack, and Acuity's right of reimbursement from any recovery Isack may have against Glanzer and Hillside. *Id.* On June 25, 2009, Acuity contacted attorney Charles Larson ("Larson"), to represent Acuity on its rights against damages Isack potentially would recover. *Id.* In early August 2009, Larson informed Knight that Acuity had retained Larson. SR 23.

[2] Walraven was the owner of the employer Elite Drain & Sewer and, therefore, received no workers' compensation benefits as a result of the accident.

On August 17, 2009, Isack (through Knight) commenced a lawsuit against Glanzer and Hillside for the recovery of damages. *Id.* From October 2009 through February 2010, Knight and Larson had communications regarding various issues, including questions of responsibilities in prosecuting the lawsuit, whether Acuity would intervene as a party to the suit, Acuity's subrogation claim, and attorney's fees and costs relating to the subrogation claim. *Id.* On February 9, 2010, Glanzer and Hillside filed a motion to consolidate the two lawsuits brought against them by Isack and the Walravens. *Id.* On March 9, 2010, Acuity, through Larson, moved to intervene in the lawsuit. *Id.* The Court granted Acuity's motion to intervene on April 6, 2010, and Notice of Entry of the order was made on May 10, 2010. *Id.* On April 8, 2010, the Court, in a letter opinion, denied Glanzer's and Hillside's motion to consolidate. *Id.*

Isack, Glanzer, and Hillside participated in a mediation on September 2, 2010, with Knight, Berry and Larson in attendance. SR 22. In late October or early November 2010, the parties reached a tentative settlement of Isack's and Walravens' claims against Glanzer and Hillside. *Id.* The parties entered into a Settlement Agreement and Partial Release of Claims on December 22, 2010. *Id.* The Settlement Agreement and Partial Release of Claims reserved the issue between Acuity and Isack regarding Knight's fees. *See id.*

On January 26, 2011, Isack and Acuity entered into a separate Settlement Agreement regarding the workers' compensation benefits paid to Isack, the division of proceeds received from the settlement with Glanzer and Hillside, and

the payment of "like damages." *Id.* The Agreement required Isack to file suit against Acuity to resolve the issue regarding the payment of attorneys' fees on Acuity's reimbursement lien and the amount allocated for future "like damages." SR 21. Acuity was served with the Complaint for the present lawsuit on March 11, 2011. *Id.*

Isack and Acuity submitted a Stipulation of Facts, which included attached exhibits. SR 15-20. The court trial took place on April 25th, with the circuit court taking testimony from Knight, Berry and Larson. *See* TT. Based upon the pleadings, the Stipulation of Facts, and the testimony and exhibits presented at trial, the circuit court entered Findings of Fact ("FOF"), which included:

- Larson's participation in the mediation was de minimus.
- Knight's involvement in and work done on Isack's lawsuit against Glanzer and Hillside was valuable, important, and substantial in successfully prosecuting the lawsuit and ultimately recovering a settlement.
- An important and substantial contribution by Knight to the successful prosecution of the lawsuit and recovery of settlement against Glanzer and Hillside included Knight negotiating and reaching an agreement with Walravens' attorney, Nancy Turbak Berry, regarding apportionment between Isack and Walravens of all settlement funds recovered. This allowed Knight and Turbak Berry to present a united front against Glanzer and Hillside, and further avoided a "race to the courthouse" between Knight and Turbak Berry. Knight's prior working relationship with Turbak Berry was an important factor in Knight being able to negotiate the agreement with Turbak Berry.
- An important and substantial contribution by Knight to the successful prosecution of the lawsuit and recovery of a settlement against Glazer and Hillside further included investigating Hillside's assets and liabilities and obtaining information necessary to counter

an argument regarding the possibility of Hillside filing for protection under bankruptcy laws, and Knight's filing of a petition requesting that Hillside be placed in a receivership and a receiver be appointed to oversee and manage Hillside's assets.

- Larson's involvement on behalf of Acuity was primarily an attempt by Acuity to avoid being responsible for Acuity's proportionate share of Knight's fees.

- Larson's contribution to prosecuting the claim against Glanzer and Hillside, and contributions to the settlement with Glanzer and Hillside, was de minimus.

- Larson's involvement on behalf of Acuity interfered with and complicated Knight's efforts to prosecute the lawsuit against Glanzer and Hillside, Knight's efforts to negotiate an agreement with Turbak Berry, and Knight's efforts to negotiate a settlement with Glanzer and Hillside.

- Knight requested numerous times that Acuity obtain an updated life care plan for Isack, but Acuity failed to timely do so, and Acuity's failure to timely update Isack's life care plan interfered with and complicated Knight's efforts to negotiate a settlement with Glanzer and Hillside.

- Acuity admits it is responsible to pay, and has paid, Acuity's proportionate share of Isack's costs and expenses (excluding the disputed attorneys' fees) incurred in prosecuting the claim against Glanzer and Hillside.

SR 38-42.

While Acuity has referenced evidence in its appeal brief attempting to contradict the circuit court's findings and conclusions, as explained below, the Court need look no further than the evidence that supports the circuit court's findings and conclusions. For instance, the circuit court considered the fact that Knight became involved in the underlying lawsuit less than two weeks after the accident. TT 41. Knight immediately began investigating the case, gathering

evidence to support the claim of liability against Glanzer and Hillside and building Isack's claim for damages. TT 42-43. Nearly five months passed before Knight was even aware that Acuity had retained Larson as its attorney, and before Knight had contact with Larson. TT 48. Further, Acuity did not move to intervene in the underlying lawsuit until almost a full year after the accident. SR 74.

Knight's contributions to the underlying lawsuit were substantial: in addition to preparing the pleadings, Knight consulted with Isack on numerous occasions, answering her many questions and discussing legal and personal issues, such as whether to withdraw Terry's life support. TT 39-41. In addition, prior to Acuity's involvement, Knight worked to obtain all of Terry's medical records, medical expenses and payment records, and contacted a life care planner, who began preparing the life care plan. TT 43, 51. Early on and prior to Acuity's involvement, Knight also worked with counsel for Glanzer and Hillside's insurer. TT 44-46. It was also Knight who worked to obtain information and updates on the life care plan that was eventually obtained. TT 52.

In addition, Knight did extensive work to prepare for trial, including having Terry videotaped to show the nature and extent of his injuries; determining the extent of the defendants' assets; determining the amount of insurance coverage; determining whether defendant would incur tax liability from a sale of its assets to follow through on its threat of filing for bankruptcy. TT 65-69. When the case went to mediation, Knight testified that Larson was present on behalf of Acuity, but Larson did not participate meaningfully in the mediation. TT 69.

Knight summarized his more important contributions to the case:

> Well for sure my most important contribution would have been the work I did in establishing their assets and responding to Jeff Sveen's arguments about their assets and what we were going to be able to recover and how the bankruptcy was going to affect that. . . . And when that became clear, that's when I decided that I should try to get a receivership appointed and I think that that action cut that out, that we probably would have gone to trial and we might still be waiting for an appeal or at least contributed to that not happening by filing that receivership because it at least posed that possibility that they weren't going to be able to pursue that strategy. . . .

TT 70-71.

Acuity's involvement in the underlying tort action was more of a hindrance than a help to Knight: "it made it more difficult for us to pursue the strategy that we wanted to pursue, it made it more difficult for us to, you know, attack the defendant's defenses." TT 74. Acuity's involvement "made it difficult because I was struggling with them and trying to explain to Deb why they were involved and spending time doing that that I could have better used to reach a final settlement or get the case tried." TT 74-75. Acuity's involvement slowed down the decision process. TT 75.

Knight also believes, along with Nancy Turbak Berry, that such involvement could adversely affect future cases:

> so for you to enter into a contingency fee agreement to pursue that and then to say to the client oh, you don't get a set off for their share of what the fees would be, I think it just creates a situation where you have lots of instances where people won't have a chance to hire attorneys.

TT 75-76.

Both Knight and Berry believe their cooperative efforts were important and for the benefit of both Isack and Walravens. Berry testified:

> As I mentioned, both his client and mine were very very seriously injured. . . . they each had huge claims in terms of the dollar value of their claims. There was no way of knowing early on what resources would be available from the defendants or their insurers to satisfy the claims, but we both recognized that given the severity of our clients' claims there was a significant possibility that there might not be adequate insurance and other resources. So that really had at least two consequences, one is that the defense through Jack Hieb let us know very early on that they were not going to settle a case with one of us unless they were simultaneously settling with the other one because obviously they weren't going to pay a certain amount of money and have an I guess you'd say unliquidated or unresolved claim out there that they might not be able to cover. The second consequence of it was at least as serious or maybe more serious was that if we weren't talking about settlement and we were going to actually be trying the cases and getting judgments, then John's clients and my clients were likely going to be engaged in a race to the courthouse and we both I think realized early on that there was no way to know who would win that. And so it could be kind of a possibly sort of a winner take all situation that I think John and I both recognized early on would be far too risky to either of our clients. So as I think about the situation of these claims arising from this case, the first of several issues that were critical to how the whole situation was handled was that John's clients and mine needed to find a way to cooperate with each other to the extent they could, and John and I as their respective advocates had to foster that cooperation while at the same time representing our individual client's best interests and then kind of find a delicate balance there.

TT 10-11. Knight similarly testified as to the importance of that cooperative effort:

> Well, primarily because we thought it would be in both of our clients' best interests . . . . I think that was because we thought we could put the maximum amount of leverage on Hieb and Jeff Sveen in trying to reach a settlement or going to trial and that it gave us a real big advantage in both settlement and at trial if we were combining the cases and attacking them at the same time instead of

> pursuing our separate interests. . . . I felt like putting those two cases together would give us the most leverage in terms of how we tried the cases, which one we tried first and how that could affect the possible settlement and also the outcome on the jury verdicts. So it gave us the control, it took away all of their control, . . . and it made sense to me that if we could agree that we wouldn't settle for less than a certain amount that we could combine the cases and that that would work the best for everybody.

TT 47-48.

Berry also testified that Acuity's involvement made her and Knight's job more difficult. TT 12. There was a great deal of cooperation between Berry and Knight to ensure that they obtained the best possible recovery for their respective clients. TT 15-16. According to Berry, Acuity did not contribute to those efforts:

> [Acuity] seemed to not get what it was we needed to do. I mean it seemed like they weren't able to grasp the concept that we needed to cooperate and to the extent that Charlie [Larson] did get involved in some emails and so forth with John and me, he on behalf of Acuity was reluctant to cooperate . . . . He didn't seem to kind of get the concept of why it was a mutual interest of the Isacks and the Walravens to work out a cooperation agreement.

TT 16-17.

Berry admitted that Knight did the majority of the work on determining the extent of Hillside's assets, and in her opinion, Acuity contributed nothing toward that end. TT 17. In fact, when Berry asked Larson to find information regarding the extent of Hillside's liability policy, Larson provided little detail beyond the fact that the amount of liability insurance available was incorrect. TT 19. Larson was also asked to determine if there was another entity that could be held vicariously liable for Hillside's negligence, but again, Larson never provided any

information in that regard. TT 20. Berry also testified that it was Knight who did the majority of the work in response to Hillside's threat of bankruptcy and the idea of a receivership, and Acuity had no involvement. TT 20, 29.

At the mediation, Berry and Knight and their clients were in a room together, to continue their cooperative efforts, but Larson was in a separate room. TT 22. In fact, Berry did not think either Larson or Acuity participated at all in the mediation process. TT 23.

Berry explained that if a workers' compensation subrogation claim were involved in a personal injury claim, without a discount for attorneys' fees, "it would create a real dilemma as to whether we could take the case in the first place." TT 27. Berry testified in such cases, she would either be unable to charge a fee, and likely not take the case, or settlement would be impossible because there would not be enough money for the client, for the attorney and for the subrogated insurer, and one would have to bring the case to trial to maximize recovery. TT 28.

In addition to the Stipulation of Facts, the parties' briefing, and the trial testimony, the circuit court had before it nearly 500 pages of exhibits. *See* SR 21-26 (Stipulation of Facts and Exhibits attached thereto). Those exhibits demonstrate involvement by both Knight and Larson. *See id.* However, as explained below, some evidence of Larson's involvement, as claimed in Acuity's brief, is simply irrelevant in determining whether to affirm or reverse the circuit court's decision. Indeed, in applying the applicable standard of review, this Court

need only determine whether there is sufficient evidence to *support* the circuit court's decision, not whether there is evidence *contrary to* the circuit court's decision. There can be no question that sufficient evidence exists in the record to support the circuit court's findings.

ARGUMENT

A. Standard of Review

1. Acuity Ignores the Alternative Determinations Made by the Circuit Court, Both of Which Support the Court's Decision

The basis of Acuity's appeal is confusing. Acuity asserts "this case requires the Court to apply and construe several South Dakota workers' compensation statutes. Such questions are ones of law, reviewed de novo." Acuity Brief, p. 11. Acuity's brief, however, does not analyze what statutory language Acuity asserts the circuit court incorrectly applied or construed. Instead, Acuity's brief focuses on facts it asserts contradicts the circuit court's factual findings that Knight's contributions to recovery were significant while Larson's were de minimus.

The statutes involved, SDCL § 62-4-39 in particular, are clear and unambiguous. SDCL § 62-4-39 states that if the employee recovers damages from a tortfeasor, the employer may recover the amount it has paid in workers' compensation benefits, less the expenses and attorney fees (up to 35%) incurred in collecting the same. The circuit court did *not* find SDCL § 62-4-39 was ambiguous; rather, it held that statute plainly required Acuity's reimbursement and

allocation to be reduced by the amount of Isack's attorneys' fees. Where a statute is unambiguous, there is no need for interpretation. *See Springer v. Cahoy,* 2013 WL 6329307, ___ N.W.2d ___ (S.D. 2013).

The court made an alternative determination in the event the statutes required the Court to allocate fees based upon contributions by the attorneys to the recovery from the tortfeasors. SR 66-67 (COL 16). This determination was fact-intensive, requiring the circuit court to assess the respective attorneys' *quantity* of work as well as the *quality* or nature of that work.

Acuity's stated issue on appeal is not even framed as one involving construction of a statute:

> When a workers' compensation insurer retains its own counsel to represent its statutory rights of recovery and offset in an employee's action against a third-party tortfeasor and that attorney's repeated efforts to work with the employee's attorney and participate to the fullest extent in that action are ignored, is the employee's attorney entitled to a fee on the portion of a settlement allocated to the insurer's statutory rights?

Acuity's Brief, p. 1. Notably, there is no mention of whether the circuit court's "construction" or "interpretation" of a statute was correct. *See id.* Similarly, in the beginning of its argument section, Acuity does not frame the issue as one of correct statutory interpretation, but rather, whether a workers' compensation insurer is obligated to pay an attorney fee "when [the employee's attorney] hinders the insurer's attorney's ability to participate substantively in the litigation." Acuity's Brief, p. 11. Indeed, Acuity recites a litany – a full seven pages – of *facts* it claims contradict the circuit court's findings.

Thus, according to Acuity itself, the only issue is whether the circuit court's factual findings regarding the respective attorneys' efforts are supported in the record. Such an issue involves factual findings, not conclusions of law. *See In the Matter of Nelson Living Trust*, 2013 SD 58, ¶ 24, 835 N.W.2d 874, 882 n. 9. The Court in *In the Matter of Nelson Living Trust*, held that where the court was required to resolve disputed facts and "did not require the court to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles," the issue was one of fact. *See id.* In determining whether Acuity's reimbursement should be reduced by the amount of Isack's attorneys' fees, the circuit court considered a substantial number of facts, without the consideration of legal principles, and the one issue is this case is, therefore, a review of factual findings. *See id.* The clearly erroneous standard applies to questions of fact. *See Osman v. Karlen & Assoc.*, 2008 SD 16 ¶ 15, 746 N.W.2d 437, 442-43 ("We review the circuit court's finding of fact under the clearly erroneous standard.").

At most, the issue here is a *mixed* question of law and fact. *See e.g. Estate of Henderson*, 2012 SD 80, ¶ 9, 823 N.W.2d 363, 366. However, even a mixed question of law and fact calls for application of the clearly erroneous standard of review in this case: "In deciding a mixed question of law and fact, the standard of review. . . for the application of law to fact depends on the nature of the inquiry." *Id.* "If the application of the rule of law to the facts requires an inquiry that is 'essentially factual' – one that is founded 'on the application of the fact-finding

tribunal's experience with the mainspring of human conduct' – the concerns of judicial administration will favor the [circuit] court, and the [circuit] court's determination should be classified as one of fact reviewable under the clearly erroneous standard." *McQuay v. Fischer Furniture*, 2011 SD 91, ¶ 10, 808 N.W.2d 107, 111 (other citations omitted). The circuit court's task in determining whether Larson's involvement in the case eliminated Acuity's duty to share in the attorneys' fees expended in obtaining the settlement Acuity wishes to share in, was "essentially factual." *See id.*

For all these reasons, the sole issue in this case involves review of the circuit court's findings of fact, to which the Court applies the clearly erroneous standard of review. *See Osman*, 2008 SD 16 ¶ 15, 746 N.W.2d at 442-43 ("We review the circuit court's finding of fact under the clearly erroneous standard.").

2. The Clearly Erroneous Standard of Review

Under the clearly erroneous standard of review, the Court can reverse only when it is "'left with a definite and firm conviction that a mistake has been made,' after a thorough review of the evidence." *Id.* The Court's review is limited under this standard:

> [O]ur function is not to decide factual issues de novo. The question is not whether this Court would have made the same findings that the trial court did, but whether on the entire evidence we are left with a definite and firm conviction that a mistake has been committed. This court is not free to disturb the lower court's findings unless it is satisfied that they are *contrary to a clear preponderance of the evidence*. Doubts about whether the evidence supports the court's findings of *fact are to be resolved in favor of the successful party's "version of the evidence and of all inferences*

fairly deducible therefrom which are favorable to the court's action."

Id. (other citations omitted) (italics added). In other words, the "question on appeal is not whether this court would make the same finding, but whether there is sufficient evidence to support the trial court's finding." *Golden v. Oahe Enterprises, Inc.*, 319 N.W.2d 493, 494 (S.D. 1982). The Court does not consider whether there is evidence "contrary to" to the court's findings, but whether there is sufficient evidence "to support" the court's findings. *Cf. Enger v. FMC*, 1997 SD 70, ¶ 15, 565 N.W.2d 79, 84.[3] Based on the above principles, the Court should decline Acuity's invitation to embark on a review of the other evidence contained in the record that Acuity claims is contrary to or in contradiction of the circuit court's finding. Rather, where as here, the record contains more than sufficient facts in support of the circuit court's findings and decision, the Court must affirm.

B. Acuity's Reimbursement and Allocation for Like Damages Should Be Reduced by the Amount of Isack's Attorneys' Fees

1. South Dakota Workers' Compensation Statutes Specifically Require Acuity's Reimbursement and Allocation to Be So Reduced

Again, the precise issue on Acuity's appeal is confusing. It appears from its brief and statement of the issue that Acuity is appealing the circuit court's factual determinations. In the event, however, Acuity is asserting that the Court

[3] While *Enger* is in the context of review of an agency decision, there is no reason the same principles would not apply to review of a circuit court decision. It is difficult to believe the Court would afford more deference to an agency and an administrative law judge than to a circuit court judge.

did not correctly interpret South Dakota's workers' compensation statutes, Isack feels it is necessary to address that issue.

Acuity asserts it is statutorily allowed to share in the damages Isack was able to obtain from the third-party tortfeasors in the underlying case, relying on SDCL § 62-4-39 (allowing the employer to "recover from the employee an amount equal to the amount of compensation paid by the employer to the employee"). At the same time, Acuity asks the Court to disregard the remainder of that statute that requires a deduction of the amount the employer can recover for the "necessary and reasonable expense of collecting" such damages, "which expenses may include an attorney's fee." SDCL § 62-4-39.

The statutory language in SDCL § 62-4-39 is specific, clear and unambiguous. If the employee pursues a claim against a third party and recovers damages, the employer is entitled to be reimbursed the benefits it has paid, less the necessary and reasonable expense of collecting the same, including attorney's fees. *See also Zoss v. Dakota Truck Underwriters,* 1998 SD 23, ¶ 10, 575 N.W.2d 258*; St. Paul Fire & Marine Ins. Co. v. Farner*, 648 F.2d 489, 491 (8th Cir. 1981); *Liberty Mutual Ins. Co. v. Garry*, 1998 SD 22, ¶ 8, 574 N.W.2d 895.

Acuity refers to SDCL § 62-4-40. However, SDCL § 62-4-39 is specific and applies when the employee pursues a claim (as Isack did in this case). It is reasonable to interpret SDCL § 62-4-40 as only applying in the event an employee elects *not* to pursue a claim. This interpretation is supported by the language of SDCL § 62-4-40, which gives the employer the right to recover from the third-

party the full "amount of the liability." This would not make sense if the employee pursues a claim.

SDCL § 62-4-40 also requires that the employer hold, for the benefit of the employee, the money collected in excess of the insurer's subrogation claim, and the employer can even deduct from the excess money the employer's attorney's fees. Again, such language would lead to an absurd result if the employee is pursuing the claim. In construing the statutes as a whole, the logical interpretation is that SDCL § 62-4-40 only applies in the event the employee does not pursue a claim and that SDCL § 62-4-39 applies here.

Also, while SDCL § 62-4-39 controls the issue of workers' compensation benefits that had already been paid through the date of recovery, SDCL § 62-4-38 addresses the issue of an offset for future workers' compensation benefits ("like damages"). The Court in *Zoss I*, explained the roles of each of these statutes:

> SDCL 62-4-38 through -40 each address a different aspect of reimbursement. SDCL 62-4-38 deals with reimbursement of benefits owed but not yet paid when the employee brings the lawsuit against the third party. SDCL 62-4-39 also applies when the employee initiates the lawsuit and concerns reimbursement for benefits already paid. SDCL 62-4-40 allows the employer to sue the third party for compensation paid or payable…

Zoss, 1998 SD 23 at ¶ 10, 575 N.W.2d at 261.

The court went on to confirm that the workers' compensation insurer was liable for its proportionate share of attorney's fees and costs, not only on the reimbursement for past benefits paid, but also for future benefits, stating:

> In cases where there is a third-party recovery which exceeds compensation paid, with the employee retaining the excess, the expense and attorney's fee will be assessed on a pro rata basis. . . . Here, Insurer's lien could potentially attach to the entire settlement, assuming Zoss neither dies nor remarries before Insurer's future liability equals or exceeds the net settlement. Under such circumstances, Insurer bears responsibility for all expenses and attorney's fees.
>
> "Since the employer's right of reimbursement extends not only to past compensation paid but to future liability, most courts have concluded that the employer's share of the fees and costs involved in the employee's third-party recovery should be calculated on his total potential liability, rather than on past benefits actually paid."

Id. at ¶ 16, 575 N.W.2d at 263 (internal and other citations omitted).

This also makes sense, otherwise employees would have the incentive to delay settlement as long as possible. As stated in *Zoss I:*

> It is inconsistent to state that as to past benefits paid, Insurer is entitled to dollar-for-dollar reimbursement, but that future benefits are credited only to the extent they constitute "like" damages. Such a holding would encourage employees to rush to a settlement with a third-party tortfeasor in order to reduce the insurer's lien.

Id. at ¶ 8, 575 N.W.2d at 261. This same type of logic applies to the case at hand. To say that a deduction for attorney's fees applies to reimbursement for past benefits paid, but not to the offset against future benefits, would encourage employees to delay a recovery for as long as possible.

Also, to help keep this in perspective, it is important to note that the money allocated to offset "like damages" does not belong to Acuity. Acuity agrees they will never receive any of it. TT 79 and Ex. 1. When Terry passes away, if there is still money in the account, the funds will be distributed to Isack's heirs. The funds

only act as an offset against Acuity's liability for future medical bills. The money was recovered by Isack, belongs to Isack, and Isack's attorney is entitled to a fee on the money. Because the funds benefit Acuity, it is only fair that Acuity bear its fair share of the attorney's fees incurred in recovering the same.

The circuit court, relying on SDCL §§ 62-4-38 and -39, correctly held that Acuity was entitled to reimbursement for the amount of past benefits it paid, and that it was entitled to an offset against future benefits it would have had to pay, *less* Isack's attorneys' fees incurred in recovering the same. Acuity has not set forth any reason for concluding that the circuit court misconstrued, misinterpreted or misapplied those statutes.

2. The Court Need Only Determine Whether the Circuit Court's Factual Findings are Adequately Supported and Not Whether There is Contrary Evidence

In addition to its holding that the workers' compensation statutes plainly require that Acuity's reimbursement and allocation be reduced by the amount of Isack's fees, the circuit court made an additional determination that in the event the statutes require the Court to allocate fees based upon the attorneys' respective contributions, Knight is still entitled to his fees. The circuit court's findings included:

- Knight's involvement was valuable, important, and substantial in successfully prosecuting the lawsuit and ultimately recovering a settlement.
- Substantial contributions by Knight included negotiating and reaching an agreement with Walravens' attorney regarding apportionment between Isack and Walravens of all settlement funds,

allowing them to present a united front against the tortfeasors and avoided a "race to the courthouse" between Knight and Turbak Berry. Knight's prior working relationship with Turbak Berry was an important factor in Knight being able to negotiate the agreement.

- Substantial contributions by Knight further included investigating Hillside's assets and liabilities and obtaining information necessary to counter an argument regarding the possibility of Hillside filing for protection under bankruptcy laws, along with Knight's filing of a petition requesting that Hillside be placed in a receivership.

- Larson's involvement on behalf of Acuity was primarily an attempt by Acuity to avoid being responsible for Acuity's proportionate share of Knight's fees.

- Larson's contribution to the lawsuit and settlement was de minimus.

- Larson's involvement interfered with Knight's efforts to prosecute the lawsuit against Glanzer and Hillside, Knight's efforts to negotiate an agreement with Turbak Berry, and Knight's efforts to negotiate a settlement with Glanzer and Hillside.

- Knight requested numerous times that Acuity obtain an updated life care plan for Isack, but Acuity failed to timely do so, which interfered with Knight's efforts to negotiate a settlement with Glanzer and Hillside.

SF 38-42.

Rather than recognize the circuit court's numerous factual findings in support of its conclusion, Acuity attempts to contradict those findings with evidence of Larson's involvement. As noted above, however, the question before this Court on this issue is not whether it would make the same findings, but whether there is sufficient evidence to support the trial court's findings. *See Golden*, 319 N.W.2d at 494. Accordingly, the Court need not even consider Acuity's proffered evidence that is contrary to the circuit court's findings

(evidence as to Larson's supposed involvement). Rather, it need only review the record to determine if the evidence supports the circuit court's findings. *Cf. Enger*, 1997 SD 70, ¶ 15, 565 N.W.2d at 84. The record is replete with evidence of Knight's significant efforts in obtaining a settlement for Isack, and is lacking in evidence of significant contribution by Larson toward that end.

Even if the Court considers the evidence set forth in Acuity's brief, such evidence does not diminish or contradict the circuit court's findings and conclusions. Acuity claims, for example, that Larson "consistently asked what he could do to assist in prosecuting the case." Acuity's Brief, p. 16. However, asking what one can do to assist and actually assisting are vastly different. Further, Larson's requests to assist reinforce the fact that Acuity had nothing independent to contribute to the lawsuit. In any event, Knight and Berry both testified that when Larson was given a task to assist with, such as determining the amount of Hillside's liability insurance and determining whether there was another entity that could be held vicariously liable, Larson's efforts were minimal. TT 19-20.

Further, as to some of the significant issues in the case – cooperating with the other injured employee, determining the extent of Hillside's assets, addressing Hillside's threatened bankruptcy, ensuring payment of a recovery through a receivership – Larson did not contribute. TT 17, 20, 29. And while Acuity claims Larson participated in the mediation, it admits it was only in regard to Acuity's, not Isack's interests, and both Knight and Berry testified Larson's participation

was not meaningful or not at all. Acuity's Brief, p. 17; TT 23, 69. Acuity's version of Larson's involvement with the life care plan is refuted by Knight's testimony, which established that it was Knight who obtained all of Terry's medical records, expenses and payments, and who initially contacted and worked with the life care planner. TT 43, 51. The circuit court specifically noted Acuity's failure to obtain an updated life care plan, which interfered with and complicated Knight's efforts to negotiate a settlement. SR 70-71 (FOF 39).

Acuity dismisses the circuit court's conclusion that the underlying case was challenging, stating it was an admitted liability case. However, such an assertion fails to take into account the fact that Hillside was woefully underinsured and there were two injured employees who had to share in whatever recovery was made. TT 17-20, 70-71; SR 71-72. Consequently, there were serious concerns about whether Hillside and its members would file for bankruptcy, whether there would be any recovery at all, and whether to have a receiver appointed. *See id.*

Acuity's dismissal of the cooperative effort between Knight and Berry also flies in the face of the evidence before the circuit court and its resulting conclusions. Both Knight and Berry testified about the importance of their cooperative efforts for the benefit of both Isack and Walraven, as explained above. TT 10-11; 47-48. The circuit court found, "[a]n important and substantial contribution by Knight to the successful prosecution of the lawsuit and recovery of settlement against Glanzer and Hillside included Knight negotiating and reaching an agreement with Walravens' attorney, Nancy Turbak Berry . . . [T]his allowed

Knight and Turbak Berry to present a united front against Glanzer and Hillside." SR 71-72 (FOF 34). Rather than assist in Knight's and Berry's cooperative efforts, the circuit court concluded that Larson's participation interfered with and complicated those efforts. SR 71 (FOF 38).

Acuity's attempt to attribute Knight's efforts regarding the bankruptcy and receivership issues to others is simply insufficient to overcome the circuit court's findings to the contrary. Knight's and Berry's testimony about Knight's efforts in regard to these issues sufficiently support the circuit court's findings.

For the same reasons, Acuity's attempts to contradict the circuit court's findings about "Knight's approach to the case and Larson" fall short. Acuity's Brief, p. 19. The circuit court specifically found that it was Larson who interfered with and complicated the efforts to prosecute the suit and reach a settlement. Again, the only inquiry is whether this finding is supported by record evidence. In light of the testimony from Knight and Berry about their attempts to involve Larson by asking him to investigate the amount of Hillside's liability insurance and whether there was another entity that could be held vicariously liable, and Larson's minimal efforts toward those ends, the circuit court's findings are adequately supported.

3. The Authorities Relied Upon by Acuity are Distinguishable

Despite the fact that Acuity makes clear from the start that subrogation in the context of workers' compensation does not arise out of contract or equity, but rather by statute, Acuity relies on a line of cases outside the workers'

compensation arena, which do not apply SDCL § 62-4-39. Accordingly, Acuity's reliance on these authorities is misplaced.

For example, Acuity relies heavily on *Bowen v. American Family Ins. Group*, 504 N.W.2d 604, 605 (S.D. 1993). *Bowen* is distinguishable for the simple reason that it was not in the workers' compensation context, and therefore, the statute that allows for reimbursement of attorneys fees was not at issue. *Bowen* involved the deduction of attorney's fees from a subrogation claim arising under an automobile insurance policy. Because there were no applicable state statutes on the issue, the case was decided under common law. The legislature, of course, can by statute displace the common law. *See Liberty Mut. Ins. Co.*, 1998 SD 22, ¶ 7, 574 N.W.2d at 896. "Workers' compensation laws are purely statutory and 'the rights of the parties and the manner of procedure under the law must be determined by its provisions.'" *Schipke v. Grad*, 1997 SD 38, ¶ 10, 562 N.W.2d 109, 112 (other citations omitted). In the case at hand, we have a specific statute, SDCL § 62-4-39, that controls, so *Bowen* is of no help to Acuity.

In any event, *Bowen* does not stand for the broad proposition espoused by Acuity. In fact, the insurer in *Bowen*, like Acuity in this case, argued that its "subrogation interest was protected through its own efforts and not those of [plaintiff's attorney]." *Bowen*, 504 N.W.2d at 605. Indeed, the court recognized American Family's own efforts in protecting its subrogation interest, including notifying the insured it was obligated to protect American Family's subrogation interest and in sending the insured its form release and subrogation agreement. *Id.*

at 606. The court held "American Family was a beneficiary of Bowen's settlement. It naturally follows that American Family should bear a proportionate share of the attorney fees that were incurred in obtaining the settlement." *Id.* at 607. In so holding, the court made no mention that its holding was based on American Family's failure to participate. *See id.* Rather, its holding was based entirely on the fact that "American family benefitted from Bowen's effort in securing payment from a third party." *Id.*

Acuity also mistakenly relies on *Mergen v. Northern States Power Co.,* 2001 SD 14, 621 N.W.2d 620. In *Mergen*, the employee (Mergen) was injured in the scope of his employment with the City of Sioux Falls and recovered workers' compensation benefits from the City. Mergen then started a suit against a third-party tortfeasor (NSP) and the City later moved to intervene in the suit. The sole issue before this Court was whether the City should have been allowed to intervene in the case, and the Court ruled in favor of the City on that issue. The Court, in dicta, then endorsed Isack's position, stating: that under SDCL § 62-4-39, the ruling "does not limit nor hinder a trial court's discretion in imposing reasonable costs and fees between parties." *Id*. at ¶ 7. In addition, SDCL § 62-4-39 "certainly allows trial courts discretion so that an intervenor pays its fair share." *Id*. at ¶ 8.

The Court in *Mergen* added, "This rule is fair in that an intervenor, who enters a lawsuit as a matter of right, should be held responsible for its proportionate share of reasonable expenses incurred prior to intervention as

determined by the trial court after an appropriate hearing." *Id*. Reliance on a case that never directly addressed the issue, but merely mentioned it in dicta, is misplaced.

Acuity next relies on a Nebraska case, *Schultz v. General Wholesale Co-op Co., Inc.*, 238 N.W.2d 463 (Neb. 1976), where the court interpreted a Nebraska statute allowing for an employer or insurer's subrogation right to damages recovered by the employee from a third-party. What Acuity omits from this case, however, is the court's recognition that "the mere fact that the employer or its compensation carrier retains counsel to represent its subrogation interest will not, in and of itself, prevent an allowance of attorney's fees to the employee's counsel from the subrogation recovery." *Schultz*, 238 N.W.2d at 466. Rather, the court held that in Nebraska, attorney's fees may be denied only where "the employer or its insurance carrier is fully and adequately represented by its own counsel *and* where the services of the employee's attorney were not relied upon to affect the subrogation recovery." *Id*.

In any event, the facts in *Schultz* are vastly different from those in this case. In *Schultz*, the workers' compensation insurer (St. Paul) hired an attorney to represent its interests "[i]mmediately following the accident." *Id.* at 465. The injured plaintiff, however, did not hire his own attorney for almost fourteen months after the accident. *See id.* And, significantly, the court in *Schultz* found that "all investigation regarding the accident and plaintiff's medical condition, and all contact and negotiations with representatives of [the third-party tortfeasor]

were accomplished by" St. Paul's attorneys. *Id.*

The court described how St. Paul's attorneys took the lead on the case against the third-party tortfeasor by conducting the investigation and inspection, having photographs taken, interviewing witnesses, obtaining evidence, giving notice of its subrogation claim, obtaining medical reports and bills, determining liability and computing the amount of its claim. *Id.* at 467. The court further found that by the time the plaintiff hired his own attorney, the third-party tortfeasor had already admitted liability and by that point, "St. Paul furnished [plaintiff's attorney] with the results of [St. Paul's attorney's] investigation. . . . Assuming [plaintiff's attorney's] efforts did benefit St. Paul, it is evident that the plaintiff also benefited from [St. Paul's] investigation." *Id.* The court held, "[a]t no time did St. Paul's counsel terminate or abandon its representation or rely on or acquiesce in representation of their client by [plaintiff's attorney]. Their representation of St. Paul remained active and viable throughout, culminating in their participation in the District Court hearing to approve the final lump sum settlement." *Id.*

The above factual findings made by the court in *Schultz* are vastly different from the specific factual findings made by the circuit court in this case. Accordingly, even if the Court were to find *Schultz* germane to this case, it is factually distinguishable. Indeed, application of the principles set forth by the court in *Schultz* to the facts in this case leads to the inescapable conclusion that Acuity's reimbursement and allocations must be reduced by the amount of Isack's

attorneys' fees.

Carter v. Par-Kan Const. Co., 348 F.Supp. 1295, 1297 (D.Neb. 1972), is similarly distinguishable. The court in *Carter* found the plaintiff had "not established that the representation of the insurance company was merely token and in bad faith." *Id.* In the present case, however, the circuit court, after hearing all the evidence, concluded that Acuity's involvement was "de minimus." As set forth above, there is more than sufficient evidence in the record to support this finding.

The Alaska Supreme Court in *D.N. v. Hammond*, 685 P.2d 1225 (Alaska 1984), addressed this issue without the aid of a specific statute requiring the sharing of attorneys' fees. Rather, the court held the question was whether the insurance carrier's act of hiring its own attorney "constitutes the sort of action which renders the *Cooper* cost-sharing rule inapplicable." *Id.* at 1229 (citing *Cooper v. Argonaut Ins. Co.*, 556 P.2d 525 (Alaska 1976) (holding a "compensation carrier is required to pay its pro rata share of litigation expenses [including attorney's fees] incurred by an employee in recovering from a third-party tortfeasor.").

In deciding this issue, without the aid of a statutory mandate such as SDCL § 62-4-39, the court in *D.N. Corp.* noted "that some states have drawn a distinction between 'active' and 'passive' representation of an employer or carrier: if the carrier's attorney does no more than monitor the case, the carrier is still required to contribute to the claimant's litigation expense." *D.N. Corp.*, 685 P.2d at 1229

(other citations omitted). The court held, "[w]e think this distinction is a sound one. If a compensation carrier's attorney does no more than monitor the activities of the claimant's attorney, the fact that that carrier has chosen to hire its attorney on a contingent-fee basis should not be permitted to obscure the fact that the carrier's attorney has not actually assisted in obtaining a recovery against a third party tort-feasor." *Id.*

Thus, the court held that if the carrier's attorney's efforts on the carrier's behalf "substantially contributed to the $1,000,000 settlement, he should be able to recover the fees he seeks . . . . If on the other hand, [the carrier's attorney's] efforts on behalf of the carrier did not substantially contribute to the third party tort recovery, the *Cooper* rule applies, the carrier was obligated to make a pro rata contribution to the [plaintiff's] attorneys' fees, and [the carrier's attorney] should only recovery as one of those attorneys." *Id.* at 1230 (italics added). The Alaska Supreme Court, therefore, remanded the case to the trial court for a determination of whether the carrier's attorney's "independent work for the carrier *substantially contributed* to the settlement." *Id.* at 1230 n.14.

In this case, we already have the circuit court's specific factual findings as to Acuity's attorney's participation in the case. Those findings do not support a conclusion that Larson's work was "active" and "substantially contributed" to the settlement, and actually support the opposite conclusion – that Larson's involvement was merely "passive" and as the circuit court concluded, "de minimus." Again, these are specific factual findings by the circuit court after

hearing all the evidence, which cannot be overturned unless found to be clearly erroneous.

4. Acuity's Policy Arguments are Misplaced

Acuity next argues there are two policy reasons not to require it to bear its share of attorneys' fees: (a) the purported intrinsic conflict when allocating damages and (b) Knight's contingent fee agreement. *See* Acuity's Brief, pp. 19-20. Both arguments are misplaced.

a. There Is No Conflict in Allocating Damages

The issue of apportionment of damages between pecuniary loss and "like damages" is something that can be resolved *after* the maximum amount of money is recovered from the third-party defendants. A plaintiff's motivation at a mediation or trial is to recover as much money as can be recovered from the third party. After a verdict or settlement is reached with a third party, the money recovered can be apportioned between pecuniary loss and "like damages." This apportionment can be made by agreement between the employee and the workers' compensation insurance company, or if they are unable to agree, the apportionment can be resolved by the court. *See e.g. Dakota Plains Ag Center, LLC v. Smithey*, 2009 SD 78, 772 N.W.2d 170.

Indeed, Acuity's argument only reinforces that it did not contribute to the recovery of funds from the third party. Instead, Acuity focused on trying to maximize the amount allocated to Acuity's subrogation claim.

b. Knight's Fees are Not Unreasonable

Likewise, Acuity's policy argument that Knight's contingent fee is somehow unreasonable, is misplaced. Contingency fee contracts have long been recognized as legitimate and appropriate legal contracts regarding attorney fees. Contingency fee contracts allow a significant percentage of the public to obtain legal representation in situations where they would not otherwise be able to pay an hourly rate and/or in cases where the outcome is in question as to either liability or the ability to recover the damages. Acuity's position undermines the integrity of those contracts and interferes with the contractual relationship.

Moreover, Acuity's position creates a chilling effect in cases like this, where the medical expenses exceed the amount of liability insurance limits. If insurers are able to avoid paying a proportionate share of the fees, injured parties and workers' compensation claimants will have even more difficulty obtaining legal representation where recovery is uncertain or doubtful. Attorneys will likely accept fewer cases if they cannot recover a fee because the insurance company is allowed to intervene simply by paying another law firm a reduced hourly rate to "protect their interests."

Further, Acuity relies on authorities wholly outside the context of SDCL § 62-4-39 in making this unreasonableness argument. Acuity cites to Justice Gilbertson's concurring opinion in *Stanton v. Hills Materials Co.*, 553 N.W.2d 793, 797 (S.D. 1996), as support for its claim that Knight's fee was somehow unreasonable. *Stanton* did not address the issue in this case, but rather, a

completely different issue – whether the award of lump-sum attorneys' fees without notice to the employer was proper. *Id.* at 795. The reasonableness of the fee was not even at issue; rather, Justice Gilbertson in his concurrence wrote separately to provide guidance as to the appropriate fee to be awarded. *See id.* at 796. *Stanton* is of no consequence to the present case involving the sharing of attorneys' fees under SDCL § 62-4-39.

In re Discipline of Dorothy, 2000 SD 23, ¶ 20, 605 N.W.2d 493, 498, is also inapplicable, as it addressed the reasonableness of an attorney's fees in the context of a disciplinary complaint. The disciplinary board concluded that Dorothy's attorneys' fees were unreasonable because Dorothy "engaged in discovery and trial tactics which served only to complicate and extend the proceeding which resulted in unreasonable fees and costs to his client." *Id.* There is no evidence, nor even any allegation that Knight engaged in such conduct.

Further, the facts do not support a finding that Knight's fees are unreasonable. As noted by Acuity, Knight's records show that he expended over 262 hours on Isack's case. Knight also testified he did not record all of his time on the case. TT 86-87. Acuity dismisses this testimony as irrelevant because it claims Knight "has the burden to show reasonableness." Acuity Brief, p.22 n.5. This is not, however, a disciplinary action in which such a burden is placed on an attorney defending the amount of fees charged to a client. Further, Knight's client, Isack, is not challenging the amount of fees, nor is this a contractual issue between Knight and Acuity.

In any event, the circuit court made specific findings that Knight's fees were reasonable. *See* SR 68-69 ("Isack's necessary and reasonable expense of attorneys' fees and sales tax in recovering Acuity's subrogation claim"), (reducing Acuity's recovering by Isack's necessary and reasonable expense of collecting from Glanzer and Hillside), ("Isack's necessary and reasonable attorneys' fees and sales tax for collecting 'like damages'"). These findings are not erroneous, in light of the evidence it had before it, including Knight's time put into this case; the complexity of the threatened bankruptcy, asset investigation, collection and receivership issues; the fact that the contingency rate is typical; the amount of the settlement ultimately achieved for both Isack and Acuity; the gravity of the situation given the seriousness of Terry Isack's injuries; the non-billable time Knight expended in counseling and consoling Isack on important non-legal issues; the inability of Isack to pay hourly for Knight's services; and the risks involved in undertaking a case of this nature, including the fact that Hillside was woefully underinsured, the uncertainly regarding the ownership and extent of Hillside's assets, and the risk that if the tortfeasors filed for bankruptcy there might not be any recovery. *See Stanton*, 553 N.W.2d at 798 (Gilbertson, J. concurring).

CONCLUSION

In determining whether to reduce the amount of Acuity's reimbursement and offset by its share of Isack's attorneys' fees, the circuit court was called upon to apply SDCL § 62-4-39, which unambiguously allows for such a reduction. The circuit court made a number of factual findings, including that Knight's

contributions to the recovery were significant and Larson's were de minimus. Those factual findings are subject to the clearly erroneous standard of review, which requires this Court to determine whether there is sufficient evidence to support the circuit court's findings. Such a review demonstrates the circuit court's findings in this case are more than adequately supported in the record, and should not be overturned.

For all these reasons, Isack respectfully requests that the Court affirm the circuit court's Judgment and Findings of Fact and Conclusions of Law.

Respectfully submitted this 20th day of December, 2013.

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ORAL ARGUMENT IS HEREBY REQUESTED

CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL 15-26A-66. It is typed in the proportionally spaced typeface of Times New Roman 13 point. The word processor used to prepare this brief indicates that there are a total of 9,459 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Issues, and Certificates of counsel.

_____

Jon Sogn

CERTIFICATE OF SERVICE

The undersigned certifies that two (2) true and correct copies of the Appellee's Brief were duly served by United States mail, first-class postage prepaid, on December 20, 2013, to the following-named persons at their last known post office address as follows:

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The undersigned further certifies that the original and fifteen (15) copies of Appellee's Brief were mailed to Ms. Shirley Jameson-Fergel, Clerk of the South Dakota Supreme Court, 500 East Capitol, Pierre, SD 57501-5070, by United States Mail, first-class postage prepaid, on December 20, 2013.

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Jon Sogn

APPENDIX

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26777

DEBORAH ISACK, individually, and as Guardian and Conservator for Terry D. Isack,

Plaintiff/Appellee,

vs.

ACUITY,

Defendant/Appellant.

Appeal from the Circuit Court
Third Judicial Circuit
Codington County, South Dakota

The Honorable Robert L. Timm, Presiding Judge

REPLY BRIEF OF APPELLANT

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Notice of Appeal filed August 2, 2013

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I. The Trial Court Incorrectly Construed And Applied the Relevant Statutes.

Appellee Deborah Isack ("Isack") first argues that Appellant Acuity ("Acuity") misstates the standard of review by saying this case involves the trial court interpreting and applying governing statutes. Yet the trial court did interpret SDCL §§ 62-4-38 and 62-4-39 so as to bind a workers' compensation insurer to whatever fee agreement a claimant reaches with his or her attorney, even though the insurer hired its own attorney. *See* R. 91-93; Ex. 4; Ex. 9.[1] Particularly given Isack's argument that the trial court did so because SDCL § 62-4-39 is unambiguous, Appellee's Brief at 12-13, this case does present the type of question subject to *de novo* review.[2]

The trial court's interpretation and application of SDCL § 62-4-39 disregards its language. The statute and the case law addressing it say an employer is responsible for a "reasonable" share of the

[1] As in Acuity's initial brief, the record below is cited as "R" and trial exhibits as "Ex." The trial transcript is cited as "T."

expense of the third party action, which "may" include an attorney's fee. It is virtually black letter law that, when used in statutes, "may" has a permissive or discretionary meaning and is not obligatory or mandatory as "shall" is. *See, e.g., Farmland Ins. Companies of Des Moines, Iowa v. Heitmann*, 498 N.W.2d 620, 625 (S.D. 1993) ("If the legislature had intended UIM coverage limits to be subject to contractual terms, it could have used the discretionary "may" instead of the mandatory "shall."). *Cf.* SDCL § 2-14-12.1 (use of shall in a statute "manifests a mandatory directive," not a discretionary one). This Court specifically recognized that SDCL § 62-4-39 does not mandate the award of expenses. *Mergen v. N. States Power Co.*, 2001 SD 14, ¶ 8, 621 N.W.2d 620, 623. As a result, the trial court's interpretation and application of it are contrary to its plain language.

Isack also asserts that SDCL § 62-4-40, dealing with third party claims by employers/insurers, isn't relevant because it "only applies in the event an employee elects *not* to pursue a claim" against the tortfeasor. Appellee's Brief at 17 (emphasis in original).

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[2] Appellee's contentions regarding the clearly erroneous standard of review are discussed later in this brief.

This proposition is contrary to *Mergen*. It said a self-insured employer had "an absolute right to intervene" in a third party action brought by the employee. 2001 SD 14, ¶¶ 6-7, 621 N.W.2d at 622. Plainly, the fact an action is originally brought under SDCL § 62-4-39 does not prevent an employer/insurer from asserting its interests under SDCL §§ 62-4-38 and 62-4-40. Moreover, the employer/insurer is responsible only for a proportionate share of reasonable expenses "incurred prior to intervention." 2001 SD 14, ¶ 8, 621 N.W.2d at 622 (emphasis added).[3] Such an approach totally ignores SDCL § 62-4-40 and reads it out of existence in cases like this.

Appellee's efforts to reject the ramifications of the ruling below and her position do not erase them. In fact, they raise more concern.

First, if which statute applies is determined by who first brings the lawsuit, the decision undoubtedly creates a race to the courthouse. This is demonstrated in part by the fact Isack's attorney, John Knight, didn't inform Acuity's attorney, Charles Larson, that he'd filed suit or provide him copies of the pleadings for

[3]Although Appellee claims this language is dicta, *Mergen* obviously relies upon the statutes at issue here and the prior case law interpreting them.

a month, despite knowing Larson represented Acuity. T 98; Ex. 1 at 3. Instead, Larson was told of the lawsuit by defense counsel. T 98. In fact, Knight's billing records suggest he only began preparing a summons and complaint after Larson contacted him. Ex. 8 at p. 4.

The impact of a race to the courthouse is also seen with the now oft-mentioned "cooperation agreement" between Knight and Nancy Turbak Berry, the attorney for the individual driving the vehicle Isack was in. It was only after Isack obtained a trial date prior to Berry that she sought a "cooperation agreement." *See, e.g.,* T 106, 128-29. Berry's intent was to beat Isack to trial so Isack would need to pursue his claim in bankruptcy court, but Isack's earlier trial date stymied that plan. *Id.*; Ex. 1 at p. 103. Thus, Berry wanted an arrangement whereby any settlement or judgment was split equally between her client and Isack, despite the fact Isack's damages were far greater. *See, e.g.,* T 50, 85, 91-92 127-28.

Isack also says Acuity waited months to formally intervene in the litigation, implying that Acuity wasn't interested in pursuing the case. Appellee's Brief at 7. She fails to mention that once Larson learned Knight had filed suit, he repeatedly sought to discuss

intervention with Knight but got no response until after filing the motion to intervene. *See, e.g.,* Ex. 1 at pp. 175-77, 179-181, 185, 187, 191, 194, 196, 198-99. Additionally, if Acuity weren't interested in actively pursuing its claim, flying a representative from Wisconsin to attend a mediation in Watertown, T 117, is a rather costly ruse.

Appellee then argues there is no potential or actual conflict if an attorney represents both the employee and employer when there may be a need to determine and allocate "like damages" under SDCL § 62-4-38. She claims no conflict arises because the plaintiff's motivation is to recover as much money as possible from the third party. Appellee's Brief at 31. That is contradicted by Knight himself. Before the scheduled trial in the underlying litigation, he threatened to "present[] evidence to minimize Acuity's claim and arguing to the jury they should not award those damages to Acuity." R 107D. He admitted such a position did not represent or protect Acuity's statutory rights. T 91. *See also* Ex. 1 at 207 (acknowledging Isack and Acuity had "competing" claims). This contention also ignores that in the one case Isack cites, *Dakota Plains Ag Center, LLC* v. *Smithey,* 2009 SD 78, 772 N.W.2d 170, the insurer was

separately represented. The same is true of *Zoss v. Dakota Truck Underwriters*, 1998 SD 23, ¶ 10, 575 N.W.2d 258, 261 and *Zoss v. Dakota Truck Underwriters*, 1999 SD 37, 590 N.W.2d 911.

Isack's claim that Acuity's position threatens the ability of employees to obtain counsel is a straw man. Nothing stops an employee's attorney from reaching an agreement to represent the insurer where "like damages" aren't an issue or any potential conflict over it is resolved. Likewise, *Mergen* indicates attorney fees incurred prior to an insurer's intervention in a lawsuit can be awarded. 2001 SD 14, ¶ 8, 621 N.W.2d at 622. If the insurer does not intervene or contribute to prosecuting the claim, the statutes and case law still permit the attorney a "reasonable" fee.

The trial court's interpretation of the statutes essentially deprives an employer/insurer of the right to hire its own counsel if it doesn't win the race to the courthouse. It also creates an incentive for the employee to do whatever possible to hamper the insurer's participation in the lawsuit. , Isack's assertion that there is a difference between asking to assist "and actually assisting," Appellee's Brief at 22, is especially unconvincing in light of the

pervasive documentation that Knight simply ignored Larson and sought to hamper or prevent him participating in the lawsuit. Similarly, the record shows that the reason Larson did not more actively participate in the mediation was because he and the Acuity representative were relegated to a separate room and not consulted during it. *See, e.g.,* T 22-23, 69.

The record also refutes Isack's related assertion that Larson's efforts "reinforce the fact that Acuity had nothing independent to contribute to the lawsuit." Appellee's Brief at 22. Larson's work on the life care plan, with a planner Acuity hired before suit was ever filed, established damages of at least $4.5 million. Not only did this constitute the majority of damages, Larson's obtained defense counsel's agreement to allow its admission at trial – along with the prior medical expenses – without contest. T 112-13. Given this was a case of admitted liability, to say Larson and Acuity did not independently contribute is puzzling at best. Essentially, then, the decision sanctions an attorney receiving a substantial fee from someone he or she did not represent for work the attorney never performed.

There seems little question the foundation of the trial court's ruling is an incorrect interpretation of the applicable statutes. As such, the judgment should be reversed.

II. The Decision Below Should Be Reversed Even If The Clearly Erroneous Standard Applies.

Isack argues that despite the trial court's error in interpreting the statutes, the judgment should still stand because the trial court determined Knight's contributions to the case were "substantial" and Larson's were *de minimis*. R 91. She asserts that because that determination was based on factual findings, to which the clearly erroneous standard of review applies, this Court's only task is to determine whether there is "substantial evidence" to support the findings. Appellee's Brief at 16. She then suggests that in doing so the Court need not "embark on a review of the other evidence" detailed by Acuity because it is "simply irrelevant." *Id*. at 11-12, 16, 20-21. Isack's interpretation of the clearly erroneous standard is incorrect.

She bases her assertions on *Enger v. FMC*, 1997 SD 70, ¶ 15, 565 N.W.2d 79, 84. Although recognizing *Enger* is an administrative

appeal, she does not mention that it involved the "substantial evidence" standard of review that originated with and applied under the Administrative Procedures Act. *Id*. (quoting *Kent v. Lyon*, 1996 SD 131, ¶ 15, 555 N.W.2d 106, 110). This Court discarded "substantial evidence" analysis in *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225 228. In so doing it observed that it was "simply inaccurate to conclude, [sic] findings supported by substantial evidence are not clearly erroneous." *Id*. (citing 1 S. Childress & M. Davis, *Federal Standards of Review* § 2.07 at 2-44 (2d ed. 1992)). Thus, even if *Enger* ever applied outside administrative appeals, the proposition for which it is cited was rejected 15 years ago.

Similarly, the clearly erroneous standard also does not limit this Court to looking only at what evidence might support the trial court's findings. To the contrary, the Court conducts a "complete review" of "the entire evidence" and "all the evidence." *See, e.g., Kreps v. Kreps*, 2010 S.D. 12, ¶ 25, 778 N.W.2d 835, 843; *Zarecky v. Thompson*, 2001 SD 121, ¶ 8, 634 N.W.2d 311, 314. In doing so, it examines whether the evidence "clearly preponderates against" the

findings. *Parsley v. Parsley*, 2007 S.D. 58, ¶ 15, 734 N.W.2d 813, 817 (quoting *City of Deadwood v. Summit, Inc.*, 2000 SD 29, ¶ 9, 607 N.W.2d 22, 25). Without reiterating all the facts cited in its initial brief, Acuity submits that even if the clearly erroneous standard applies, the following are part of what demonstrates the decision fails that test.

- As noted, the so-called "cooperation agreement" Isack claims is so significant and substantial only arose when Isack obtained a trial date earlier than the driver. The race to the courthouse Isack claims it avoided had already occurred. More significantly, the initial proposed agreement was modified to give Isack a larger share of any settlement or judgment because Acuity did not think it was in Isack's best interests. T 126-30; Ex. 1 at 76, 112.

- Again, Acuity obtained the life care plan, Larson worked diligently to update it and he obtained defense counsel's agreement to allow it into evidence without objection. For Knight to claim now that he did the work to update the plan and obtain "all" medical records, expense and payments, Appellee's Brief at 23, rings hollow in light of his contradictory assertions that Larson and Acuity

delayed updating the plan and in providing medical reports and payments.[4] *See, e.g.*, T 53, 58-61.

- Because Larson's efforts also meant the life care plan and medical expenses would be admitted essentially uncontested had trial proceeded, Knight's task was to prove non-like damages, a minority of the total. Knight made little if any contribution, let alone a substantial or significant one, to the ability to prove the vast majority of the damages at trial.

- Despite having been involved in the case since the outset, as trial approached Knight had served no discovery requests, never replied to discovery requests the defense served on him and participated in only one deposition, one in which Larson also participated. T 30.

- Although seeking a very significant fee from Acuity, Knight's cooperation with Larson was limited and grudging at best. Exhibit 1 makes clear that Knight did little or nothing to protect Acuity's interests. As noted, he threatened that at trial he may be

[4] Any delay in updating the plan resulted from Appellee not communicating with the life care planner and her husband moving into the long term care facility shortly before. T 152; Ex. 1 at pp. 76, 104. This is essentially a red herring as the defense never objected to the timing and said it would not contest the plan at trial.

"presenting evidence to minimize Acuity's claim and arguing to the jury they should not award those damages to Acuity." Ex. 1 at p. 107D. In this situation, any attorney fee claimed by Knight was not "necessary" as to Acuity, especially considering his billing records. They show he worked a total of 29.9 hours on the case between Isack contacting him in March 2009 and the beginning of August that year, when Larson advised him Larson was representing Acuity.

Certainly, a "complete review" of "the entire evidence" preponderates against the findings of fact regarding Knight's contributions to the case. It certainly does not support that such a sizable attorney fee award is "reasonable" under SDCL § 62-4-39, particularly when Knight knew from the outset he was not representing Acuity.

CONCLUSION

Not only does the decision below incorrectly apply the workers' compensation right of recovery and offset statutes, its interpretation of them produces significant consequences. These range from hindering another party to gain a larger attorney fee to ignoring potential conflicts of interest to judicially amending SDCL § 63-4-39

by essentially incorporating the fee agreements between claimants and their attorneys.

For these reasons and those in its initial brief, Acuity requests the Court reverse the judgment below.

Dated: January 10, 2014

/s/ *Timothy M. Gebhart*

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

DEBORAH ISACK, individually, and as Guardian and Conservator for Terry D. Isack, Plaintiff/Appellee, vs. ACUITY, Defendant/Appellant.	No. 26777 **CERTIFICATE OF SERVICE**

Timothy M. Gebhart, one of the attorneys for Defendant/Appellant hereby certifies on this 10th day of January, 2014, I caused the following documents:

- **Reply Brief of Appellant;**
- **Certificate of Compliance;**
- **Certificate of Costs; and**
- **Certificate of Service**

to be filed electronically with the Clerk of the Supreme Court via email and that the original and two copies of the brief were mailed by United States mail, postage prepaid, to:

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The undersigned further certifies that the above documents were also emailed to Plaintiff/Appellee's attorney:

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DEBORAH ISACK, individually, and as Guardian and Conservator for Terry D. Isack, Plaintiff/Appellee, vs. ACUITY, Defendant/Appellant.	No. 26777 **CERTIFICATE OF COMPLIANCE**

STATE OF SOUTH DAKOTA)
: ss.
COUNTY OF MINNEHAHA)

Timothy M. Gebhart, being first duly sworn upon oath, states and alleges as follows:

1. I am an attorney licensed to practice law in the State of South Dakota and a member of the law firm of Davenport, Evans, Hurwitz & Smith, L.L.P., attorneys for Defendant/Appellant in the above matter.

2. Reply Brief of Appellant was prepared using Microsoft Word 2010 with Century Schoolbook 12-point font, in both body text and footnotes.

3. Brief of Appellant contains 2,274 words.

Further affiant sayeth not.

Dated: January 10, 2014 /s/ *Timothy M. Gebhart*

Timothy M. Gebhart
Attorney for Appellant

Dated: January 10, 2014 /s/ *JoAnn Lynde*

JoAnn Lynde
Notary Public, South Dakota
My Commission expires: April 14, 2017