No. _____

In The
Supreme Court of the United States

JONATHAN QUINN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR H.Q., A MINOR CHILD AND TAMMY FASCHING, INDIVIDUALLY,

Petitioners,

v.

TRUCK INSURANCE EXCHANGE, FARMERS INSURANCE EXCHANGE and FARMERS INSURANCE GROUP OF COMPANIES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITION FOR WRIT OF CERTIORARI

GEORGE J. NELSON
GEORGE J. NELSON LAW OFFICE, P.C.
2640 Jackson Blvd.
Rapid City, South Dakota 57702
(605) 719-9470
gjnlaw@gmail.com

ROBIN L. ZEPHIER
Counsel of Record
ABOUREZEK, ZEPHIER & LAFLEUR
P.O. Box 9460
Rapid City, South Dakota 57709
(605) 342-0097
rzephier@azlaw.pro

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state trial court from staying a party's timely cross-motion for summary judgment, to amend its pleadings, and conduct written discovery, in order that the other party's aged motion for summary judgment may be exclusively heard and final judgment rendered, without affording any opportunity for the non-moving party to be heard on its motion or otherwise allowed to develop its affirmative case?

Whether the Due Process Clause of the Fourteenth Amendment requires a state trial court to recuse itself due to the probability of an unconstitutional level of potential or actual bias under *Caperton* and its progeny?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of the petitioning parties to the proceedings, whom are all private individuals. Co-Respondents Truck Insurance Exchange and Farmers Insurance Exchange are each "reciprocal insurers" under SDCL § 58-34-2. Farmers Group of Insurance Companies is also a party to these proceedings.

RELATED CASES

- *Barker & Little v. Jonathan Quinn*, No. 51SMC05004029, State Court, 7th Circuit Small Claims, South Dakota.
  Removed to circuit court entered October 25, 2005.
- *Barker & Little v. Jonathan Quinn*, No. 51CIV06000047, State Court 7th Circuit, South Dakota.
  Confession of Judgment & Order and Judgment entered January 21, 2010.
- *Jonathan "Jon" Quinn, Individually and as Guardian Ad Litem of H. Q., a Minor Child, and Tammy Fasching, Individually, separately and together v. Farmers Insurance Exchange, a member of Farmers Insurance Group of Companies; and Truck Insurance Exchange, a member of Farmers Insurance Group of Companies, individually and together, jointly and severally*, No. 51CIV11000957, State Court, 7th Circuit, South Dakota.

RELATED CASES – Continued

Order Granting Farmers Insurance Exchange's and Truck Insurance Exchange's Motion for Summary Judgment entered April 8, 2013.

- *Jonathan "Jon" Quinn, Individually and as Guardian Ad Litem of H. Q., a Minor Child, and Tammy Fasching, Individually, separately and together v. Farmers Insurance Exchange, a member of Farmers Insurance Group of Companies; and Truck Insurance Exchange, a member of Farmers Insurance Group of Companies, individually and together, jointly and severally ("Quinn I")* No. 26680, South Dakota Supreme Court.
  Reversed and Remanded entered March 12, 2014.

- *Jonathan "Jon" Quinn, Individually and as Guardian Ad Litem of H. Q., a Minor Child, and Tammy Fasching, Individually, separately and together v. Farmers Insurance Exchange, a member of Farmers Insurance Group of Companies; and Truck Insurance Exchange, a member of Farmers Insurance Group of Companies, individually and together, jointly and severally*, No. 51CIV11000957, State Court, 7th Circuit, South Dakota.
  Order Granting Truck Insurance Exchange's Motion for Summary Judgment entered June 30, 2017; Order Granting Farmers Insurance Exchange's Motion for Summary Judgment entered July 19, 2018.

- *Jonathan "Jon" Quinn, Individually and as Guardian Ad Litem of H. Q., a Minor Child, and Tammy Fasching, Individually, separately and*

RELATED CASES – Continued

together v. Farmers Insurance Exchange, a member of Farmers Insurance Group of Companies; and Truck Insurance Exchange, a member of Farmers Insurance Group of Companies, individually and together, jointly and severally ("Quinn II") No. 28322, South Dakota Supreme Court.
Order Denying Petition for Allowance of Appeal from Intermediate Order entered August 21, 2017; Summary Affirmance, Judgment entered May 6, 2019. (Remittitur)

- *Jonathan "Jon" Quinn, Individually and as Guardian Ad Litem of H. Q., a Minor Child, and Tammy Fasching, Individually, separately and together v. Farmers Insurance Exchange, a member of Farmers Insurance Group of Companies; and Truck Insurance Exchange, a member of Farmers Insurance Group of Companies, individually and together, jointly and severally* (Bad Faith) 51CIV17-000865, State Court, 7th Circuit, South Dakota.
  Pending.

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OPINIONS BELOW

The most recent opinion of the South Dakota Supreme Court is reported at *Quinn et al. v. Farmers Insurance Exchange et al.*, 927 N.W.2d 904 (S.D. S.Ct. 2019) (*Quinn II*) and is reprinted in the Appendix ("App.") to this Petition. 1a-6a. The previous opinion of the South Dakota Supreme Court is reported at *Quinn et al. v. Farmers Insurance Exchange et al.*, 844 N.W.2d 619 (S.D. S.Ct. 2014) (*Quinn I*), and is reprinted in the Appendix. 25a-38a.

STATEMENT OF JURISDICTION

Petitioners seek a writ of certiorari in this Court for review of the South Dakota Supreme Court opinion filed on May 6, 2019 (*Quinn II*), which constituted a "[f]inal judgment . . . rendered by the highest court of a State." 28 U.S.C. § 1257(a). The Supreme Court of South Dakota has decided an important question of federal law that has not been, but should be settled by this Court. S.Ct. R. 10(c). No petition for rehearing or for rehearing en banc was filed following issuance of the Supreme Court of South Dakota's opinion.

Title 28 U.S.C. § 1257(a) provides this Court jurisdiction to review final judgments of the South Dakota Supreme Court, as the highest court in that state, on certiorari. Further, jurisdiction rests with this Court as the final judgment implicated, and otherwise involves, certain "rights, privileges or immunities . . . specially

set up or claimed under the Constitution . . . of the United States." *Id*.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. XIV, § 1

Section 1: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Dakota Const., Art. VI, § 2

No person shall be deprived of life, liberty or property without due process of law. . . .

South Dakota Const., Art. VI, § 6

The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy. . . .

South Dakota Const., Art. VI, § 20

All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay.

STATUTES

28 U.S.C. § 1257(a): (a) Final judgments or decrees rendered by the highest court of a State in which a

decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

SDCL § 15-6-54(a): "Judgment" as used in this chapter includes a decree and means the final determination of the rights of the parties in an action or proceeding. . . .

SDCL § 15-12-37: A judge or magistrate having knowledge of a ground for self-disqualification under the guidelines established by Canon 3C shall not, unless Canon 3D is utilized, await the filing of an affidavit but shall remove himself on written motion to be filed in duplicate by the judge or magistrate with the clerk of courts of the county wherein the action is pending. The clerk of courts shall notify the presiding judge, and the parties or their attorneys in the manner provided by this chapter for notification on filing of an affidavit for change of judge or magistrate.

SDCL § 21-26-4: If the judgment to be confessed be for the purpose of securing the plaintiff against a contingent liability, the defendant's verified statement must state concisely the facts constituting the liability,

and must show that the sum confessed therefor does not exceed the amount of such liability.

SDCL § 58-3-1.1: As used in this chapter, the term, company, means any person engaging in or proposing or attempting to engage in any insurance business and any person or group of persons who may otherwise be subject to the administrative, regulatory, or taxing authority of the director.

SDCL § 58-5-6.1: Any company organized under the laws of any other state or country, which might have been originally qualified and incorporated under the laws of this state, and which has been admitted to do business in this state may become a domestic corporation, and be entitled to certificates of its corporate existence and license to transact business in this state. . . .

SDCL § 58-23-1: All liability insurance policies issued in this state shall provide in substance that if an execution upon any final judgment in an action brought by the injured or by another person claiming, by, through, or under the injured, is returned unsatisfied, then an action may be maintained by the injured, or by such other person against the insurer under the terms of the policy for the amount of any judgment recovered in such action, not exceeding the amount of the policy, and every such policy shall be construed to so provide, anything in such policy to the contrary notwithstanding.

SDCL § 58-34-2: A "reciprocal insurer" means an unincorporated aggregation of subscribers operating

individually and collectively through an attorney in fact to provide reciprocal insurance among themselves.

OTHER AUTHORITIES

Code of Judicial Conduct, SDCL ch. 16–2, App., Canon 3E(1)(a), (d) . . .

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality * might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge * of disputed evidentiary facts concerning the proceeding . . .

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis * interest that could be substantially affected by the proceeding, but the judge shall disclose such de minimis * interest to the parties;

(iv) is to the judge's knowledge * likely to be a material witness in the proceeding.

STATEMENT OF THE CASE

Background

This Petition involves the 14-year litigation odyssey concerning the lead poisoning of H.Q., then a two-year-old child, whose family (the "Quinns") unwittingly resided in a lead-contaminated South Dakota apartment complex in 2002. *See* 147a-171a.

To the present time, H.Q. remains severely and completely mentally disabled, even now at 17 years of age, as a result of the initial poisoning exposure.

This appeal concerns two separate, but related cases. The first case started in the Seventh Judicial Circuit Small Claims division of the circuit court, but was transferred to the circuit court, where it was ultimately resolved by a statutory settlement agreement between the family of the injured infant and the apartment owner and manager, Barker & Little ("B&L"). The second case was initiated after the settlement agreement was reduced to a final state law money judgment. 39a-54a. The Petitioners filed an action against the liability insurers of the apartment complex on the liability insurance policies. The latter case is the focus of the Petition for Certiorari.

This Petition examines the judicial actions of the circuit court of the Seventh Judicial Circuit sitting in Pennington County, South Dakota (hereinafter "circuit court") through the prism of the Due Process Clause of the Fourteenth Amendment. The Petitioners respectfully suggest that these state circuit court judicial actions, individually and collectively, are substantial in scope, and resulted in direct violations of the Due Process Clause.

In 2005, upon diagnosis of the child's medical condition of lead poisoning and its suspected cause, the Quinn family immediately left the apartment complex. Subsequently, B&L filed a small claims action against the Petitioners for rent and possession in the

Pennington County, South Dakota Small Claims division of the circuit court. At this time in 2005, B&L was represented by Marty Jackley,[1] and the Rapid City, South Dakota law firm which now is known as Gunderson, Palmer, Nelson, and Ashmore ("GPNA").[2]

The Quinn family, through counsel, filed a multi-count tort counterclaim for the families' injuries and damages arising from their lead exposure in the small claims division. The case was then transferred to the circuit court. Mr. Jackley and the firm continued to represent B&L through the transfer to the circuit court on the Quinns' counterclaim, and B&L's tender of defense to its commercial general liability and umbrella liability carriers, until at least June 2006.

In February, 2006, the Quinns' counterclaim against B&L was tendered to Farmers Insurance Exchange ("FIE"), the underwriter of B&L's Commercial Apartment general liability insurance policy coverage, and Truck Insurance Exchange ("TIE"), the underwriter of B&L's Commercial Umbrella Policy.

On March 9, 2006, TIE denied both a duty to defend and to indemnify B&L. 172a-181a. The denial letter is alleged to be fraught with numerous internal and external contradictions, restricted to only one carrier,

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[1] Mr. Jackley was appointed and confirmed as United States Attorney for South Dakota in 2006. In September, 2009, he was appointed as Attorney General for South Dakota. In January 2019, Mr. Jackley returned to GPNA. https://gpna.com/professionals/marty-j-jackley.

[2] Mr. Jackley was employed by a predecessor of GPNA.

omitted addressing applicable liability coverages, and other problems detailed in the underlying action. The letter, however, solely confined its denial upon application of an alleged lead pollution exclusion. 181a-183a. The TIE "denial" letter was not a reservation of rights letter, as the liability insurer did not defend B&L from Petitioners' personal injury claims.

Confronted with no insurance defense from the Quinns' claims, B&L entered into a settlement agreement authorized under South Dakota law now in excess of $7,000,000 with interest. The judgment restricted the Quinns' recovery to the insurance proceeds. 42a, ¶ 6. However, B&L retained some contingent financial rights of recovery against the insurers.

In 2011, armed with the final B&L judgment, the Petitioners filed an action in the circuit court against FIE and TIE arising out of the liability policies. *See* 185a-216a. This action, and the events occurring during its progress, including two South Dakota Supreme Court decisions, is the subject of this Petition. 1a-6a; 25a-38a.

This Petition presents the issue of whether the Due Process Clauses of the Fourteenth Amendment and South Dakota law were separately violated by judicial conduct, where the trial court, having denied two recusal motions and a disqualification motion against GPNA, then stayed the Petitioners' entire affirmative case, including their timely-filed cross-motion for summary judgment. The circuit court refused Petitioners' request to be heard at the same time as the insurers.

Additionally, the circuit court's action stayed proffered amended pleadings, discovery and various motions. The petitioners respectfully submit that a "fair trial in a fair tribunal"[3] was not conducted in either respect, implicating, as well as violating, constitutionally-recognized due process requirements.

The First State Supreme Court Case – *Quinn I*[4]

On April 8, 2013, the circuit court, Judge Jeff Davis presiding, issued an order granting Farmers and Truck's Motion for Summary Judgment, which was entered on April 18, 2013. On April 24, 2013, the Quinns appealed the order to the South Dakota Supreme Court. In *Quinn I*, the South Dakota Supreme Court, referring to the "Lead Poisoning and Contamination Exclusion" to the FIE Apartment General Liability coverage, observed that, "there was never one document stipulated to by both parties as the true insurance policy in effect."[5] 33a, ¶ 17; 181a-183a. The court referred to four different versions of the policy offered the court by the insurers or their counsel.[6] 33a. It further noted, "[d]uring the course of this litigation, Farmers submitted several documents to the court and opposing counsel, each of which Farmers or Farmers' counsel attested to as 'exact duplications' or 'true and

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[3] *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed.2d 942 (1955).

[4] 25a-38a; *Quinn v. Farmers Ins. Exchange*, 2014 S.D. 14, 844 N.W.2d 619 (S.D. 2014), Appeal 26680 (*Quinn I*).

[5] *Quinn I*, *id*., ¶ 17, 844 N.W.2d at 623.

[6] *Id*., n. 4.

correct' copies of the General Commercial Liability Policy provided to Barker & Little. 33a, ¶ 17. These documents were not identical."[7] 33a, ¶ 17. The Court likewise found that, "[t]he parties to this appeal did not agree on what coverage was intended by the insurance contract between Barker & Little and Farmers."[8] 33a, ¶ 18.

The Supreme Court stated that the "facts supported a finding, beyond mere speculation and conjecture, that the parties may not have had a meeting of the minds about the lead poisoning exclusion."[9] 36a, ¶ 20. The Court ultimately found,

> The January 30 Affidavit Policy relied on by the court in granting summary judgment was in conflict with other versions of the policy submitted to the court. Applying the appropriate standard, the circuit court should have viewed the different versions of the policy in a light most favorable to Quinn, the nonmoving party. Had the circuit court done so, it would not have relied on specific language from the lead poisoning and Contamination Exclusion clause, because that language was not present in every version of the policy before the court.
>
> [¶ 23.] A review of the record leaves significant doubt as to the actual content of the insurance policy provided to Barker & Little.[10]

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[7] *Id*., 844 N.W.2d at 623-24.

[8] *Id*, ¶ 18, 844 N.W.2d at 624.

[9] *Id*., ¶ 20, 844 N.W.2d at 625.

[10] *Id*., ¶¶ 22-23; 37a.

Specifically, the Supreme Court held,

> "[w]ithout resolving the factual inquiry as to which version of the policy before the court accurately reflected the intent of the parties, the court could not determine as a matter of law that the lead poisoning claim was excluded from coverage. *It was inappropriate for the circuit court to resolve this factual inquiry on motion for summary judgment*."[11]

38a. This Court entered its judgment; reversing and remanding the matter to the circuit court. 38a.

Post-*Quinn I* Circuit Court Proceedings

The *Quinn I* reversal and remand instilled confidence that, no matter what subsequently occurred, the Petitioners could hold to the Supreme Court's law of the case that: (1) there was no stipulation as to the "true insurance policy in effect"; (2) that Farmers had submitted no less than four different versions of the policy; some of which *did not contain the lead exclusion* endorsement; (3) there was no agreement "on what coverage was intended by the insurance contract between Barker & Little and Farmers"; (5) the parties did not have "a meeting of the minds about the lead poisoning exclusion"; (6) the circuit court should have viewed the different versions of the policy in a light most favorable to Quinn, the nonmoving party"; (7) the record before the court left "significant doubt as to the actual content of the insurance policy provided to

[11] *Id*., ¶ 24, 844 N.W.2d at 626 (emphasis added).

Barker & Little"; (8) the court "could not determine as a matter of law that the lead poisoning claim was excluded from coverage"; and (9) "[i]t was inappropriate for the circuit court to resolve this factual inquiry on motion for summary judgment." 25a-38a.

However, that confidence was soon to be shaken by several notable events, and ultimately confirmed in the circuit court's actions, orders and judgments.

On February 11, 2015, Judge Robert Mandel was assigned the case. 196a. On July 15, 2015, Judge Mandel denied the Quinns' request for judicial recusal. 198a. Seventh Judicial Circuit presiding Judge Craig Pfeifle denied Quinns' request for change of judge by order on August 17, 2015. 199a.

On May 3, 2016, the circuit court denied FIE's and TIE's motions for summary judgment without prejudice to reassert them later. In the same hearing, the court set a jury trial for November 28-30, 2016.

On July 12, 2016, Farmers and Truck again filed a motion for summary judgment. 201a. On August 3, 2016, GPNA filed a substitution of counsel in the case; appearing on behalf of FIE and TIE. 202a.

TIE filed a motion for summary judgment on April 10, 2017. 202a. The court granted the motion on June 30, 2017 and entered the judgment on July 5, 2017. 204a; 21a-24a. The South Dakota Supreme Court, on September 14, 2017, denied Petitioners' petition for allowance of an interlocutory appeal from the intermediate order. 18a-20a; 204a.

FIE filed its third motion for summary judgment on September 19, 2017. 204a-205a. At the same time, FIE filed an "affidavit" of a FIE employee, along with yet another different alleged CGL insurance "policy." 205a. On September 29, 2017, the Petitioners filed a statement of material facts in opposition to the Farmer's dispositive motion; supplementing those facts on May 25, 2018. 206a. The Petitioners vehemently objected to the employee's policy affidavit on November 29, 2017. 208a.

On March 9, 2018, the Petitioners filed a motion to amend their complaint to add a 142-page, seven-count amended complaint, along with other motions requesting relief by the Plaintiffs and seeking FIE's responses to requests for production, admissions and interrogatories. 210a. On March 21, 2018, FIE moved to stay consideration of Plaintiffs' motions and to stay responses to written discovery propounded to insurer. 210a-211a.

In March 2018, the Quinns also filed an unsuccessful motion for disqualification of FIE and TIE's law firm, GPNA, from the case for the firm's representation of both B&L, in the underlying action against the Petitioners, and representing FIE and TIE in the insurance coverage litigation involving both the Quinns and B&L. 210a; 11a-13a. Attorney Marty Jackley and GPNA firm initially represented B&L, in 2005-2006 against the Quinns for unpaid rent, which drew the personal injury counterclaim against B&L arising out of Quinns' injuries for which Farmers and Truck's insurance coverage was sought.

On April 5, 2018, the Petitioners timely filed their first cross-motion and memorandum in support for partial summary judgment, along with statements of undisputed facts in support of the motion and an affidavit. 211a-212a.

At the time of the pending GPNA firm disqualification matters, in early 2018, Judge Mandel, *sua sponte*, informed the parties of his past governmental relationship with former U.S. Attorney Marty Jackley. During an April 9, 2018 hearing, Judge Mandel made the following statement on the record, in relevant part:

> "*I think the – I don't know if I would find any merit to the motion for disqualification*. But I will tell you, it – *depending upon what's presented in that regard, it creates issues for me, because Marty Jackley is a former boss of mine at the U.S. Attorney's Office.*[12] *I have tried cases jointly with him, and at least one case here in circuit court. And, depending upon his involvement in this, I am concerned that it may reach a point where I feel I have to recuse myself in this matter. But I'm not there yet . . . If there's a reason for me to recuse myself, that will make a huge difference, but I'm not going to guess at that stuff at this point.*"

(Emphasis provided) (*Id.*, April 9, 2018 Transcript, P. 10, line 13-P. 11, L. 25).

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[12] The Hon. Robert Mandel was employed by the U.S. Attorney's Office from 1982-2011, when he was appointed to the Seventh Judicial Circuit in South Dakota by Governor Dennis Daugaard in October 2011.

Despite Judge Mandel's concern "depending what is presented," and "*that it may reach a point where I feel I have to recuse myself in this matter,*" the Court would not permit any discovery or further inquiry on the court's disclosure or otherwise concerning Mr. Jackley's involvement in the case; summarily denying the Quinns' request to develop a record. The Petitioners specifically emphasized to Judge Mandel during the April 9, 2018 hearing that Judge Mandel's former supervisor at the U.S. Attorney's office, Mr. Jackley, would most certainly be a testifying witness in the insurance litigation pending between Petitioners and TIE and FIE. Counsel informed the circuit court that, because of Mr. Jackley's and his firm, GPNA's, significant involvement in bringing the original 2005 action against the Petitioners on behalf of their client, B&L, their handling of the Petitioners' personal injury counterclaim in the small claims case and in the circuit court upon transfer of the case, and otherwise possessed knowledge of the tender of the defense of B&L to FIE and TIE through June 2006, including the March 2006 TIE denial letter.

On April 18, 2018, the circuit court entered an order which stayed the Quinns' motion to amend its complaint, their first motion for partial summary judgment, as well as other motions, and likewise stayed all discovery requested by the Plaintiffs. 212a; 14a-17a. It also ordered, in part, that only FIE's motion for summary judgment would be heard on June 4, 2018; not the Quinns' initial cross-motion for partial summary judgment.

The Quinns filed, on May 25, 2018, an 85-page response in opposition to FIE's motion for summary judgment, along with 165 paragraphs of responsive additional facts, documentary exhibits and affidavits. 214a. In addition, the Quinns filed a motion to strike the FIE employee's policy affidavit, which purported to offer up yet another differing version of the liability policy, although the Supreme Court had advised that the Petitioners were "not required to move to strike the January 30 Affidavit Policy in order to argue on appeal that the circuit court's reliance upon it was misplaced.[13] 214a.

On May 29, 2018, the court entered an order denying a hearing requesting the recusal of the judge, denied the request to strike co-counsel Mann's affidavit, refused to quash the upcoming hearing date for only Farmer's motion for summary judgment, denied Quinns' motion to lift the stay to hear Plaintiffs' motion for partial summary judgment and *stayed "all other filings . . . until after the court hears and decides [FIE's] motion for summary judgment*." 214a; 11a-13a. (Emphasis added).

The circuit court did not hear FIE's motion for summary judgment on June 4, 2018. Instead, the circuit court required a 15-page brief from both parties, summarizing their positions on the insurer's dispositive motion. The parties filed those briefs on July 13, 2018. 215a.

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[13] *Quinn I*, ¶ 21, 844 N.W.2d at 625.

On July 20, 2018, the court issued its order granting summary judgment to FIE. 216a; 7a-10a.

The Petitioners filed their Notice of Appeal concerning the separate summary judgment orders on the FIE and TIE coverages on August 16, 2018. *See* 55a-146a. It was only after the final state supreme court briefing was done, when GPNA then publicly announced that Jackley was rejoining GPNA as a law partner. On May 6, the Supreme Court issued an "Order Directing Issuance of Judgment of Affirmance." 1a-6a. (*Quinn II*). Notwithstanding *Quinn I*, the Supreme Court's Order, citing SDCL 15-26A-87.1(A)(1), stated that it was "manifest on the face of the briefs and the record that the appeal is without merit on the ground that the issues of appeal are clearly controlled by settled South Dakota law or federal law binding upon the states." 1a-2a.

This Petition for Certiorari was timely filed by the Petitioners.

REASONS FOR GRANTING THE PETITION

"[A] 'fair trial in a fair tribunal is a basic requirement of due process.'"[14]

There are several compelling reasons why this Petition should be granted by Rule 10(c) of the Rules of

[14] *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955)).

the United States Supreme Court. Those reasons are more fully discussed in the following sections. However, the Petitioners respectfully submit that setting forth some of the standards governing the Due Process Clause of the Fourteenth Amendment and the South Dakota Constitution are appropriate.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* S.D. Const. art. VI, § 2. "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986) (citations omitted).

The Due Process Clause has historically been viewed as protecting "the individual from the arbitrary exercise of the powers of the government." *Id*. (quoting *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116, 28 L.Ed. 232 (1884)).

The modern concept of procedural due process "imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). Due process rules protect persons "not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252

(1978). These "due process rules are shaped by the risk of error inherent in the truth finding process." *Mathews*, *id*., 424 U.S. at 344, 96 S.Ct. 907.

Furthermore, "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972).

"To establish a procedural due process violation, a plaintiff must demonstrate that [s]he has a protected property or liberty interest at stake and that [s]he was deprived of that interest without due process of law." *Hopkins v. Saunders*, 199 F.3d 968, 975 (8th Cir. 1999), *cert. denied* 531 U.S. 873 (2000).

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); *Osloond v. Farrier*, 2003 S.D. 28, ¶ 16, 659 N.W.2d 20, 24 (S.D. 2003). The "property interest must be derived from a source independent from the Constitution." *Osloond*, *id*. (citations omitted). "Property interests are granted by state law." *Id*. But "federal constitutional law determines whether that interest

rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 15, 802 N.W.2d 905, 911 (S.D. 2011).

Second, the individual must have been deprived of this right by a state actor. *Osloond*, *id*., referencing *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 195, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). "The Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." *Id*. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id*. A government actor may not deprive an individual of a protected property interest "'without appropriate procedural safeguards.'" *Daily*, *id*. (citations omitted).

"Determining what process is due in a particular case requires consideration of three factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Daily*, *id*., at ¶ 18, 802 N.W.2d 912 (quoting *Mathews*, *id*., 424 U.S. at 335, 96 S.Ct. 903.

The circuit court, acting through the Hon. Robert A. Mandel, took deliberative, unjustified, and arbitrary actions during a pending civil case so as to deprive the Petitioners of their procedural due process rights guaranteed under the Fourteenth Amendment of the United States Constitution and the South Dakota Constitution, ¶¶ 2, 6 and 20, respectively.

I. THE QUINNS RAISED THE COURT'S PROCEDURAL DUE PROCESS VIOLATIONS IN THE CIRCUIT COURT AND TO THE SOUTH DAKOTA SUPREME COURT IN *QUINN II*

The Petitioners raised the procedural due process arguments to the circuit court on several occasions. On May 25, 2018, they asserted the procedural due process violations in an 84-page summary judgment opposition memorandum. 214a, pp. 1-4, 35. They raised the due process issues again in the 15-page "summary" brief required by the Court. 215a. Finally, the Petitioners raised the procedural due process issues in its opening brief to the South Dakota Supreme Court in *Quinn II*. 106a-112a.

II. DURING THE STATE CIVIL TRIAL, THE PETITIONERS POSSESSED PROPERTY INTERESTS AT STAKE, ESTABLISHED AND COGNIZABLE UNDER SOUTH DAKOTA PROPERTY LAW, FOR WHICH THEY WERE DEPRIVED WITHOUT DUE PROCESS OF LAW

The Petitioners assert that they possessed cognizable property interests under South Dakota law. Their state law-defined property interests were derived from a common source.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Roth*, *id*., 408 U.S. at 576, 92 S.Ct. at 2708. To have a property interest, a person must "have a legitimate claim of entitlement to it . . . It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Id*.

At the time of originally filing the second action in circuit court against the liability insurers, the Petitioners possessed a state court judgment against B&L in the amount of $4,000,070.30. A "judgment" under South Dakota law means, "the final determination of the rights of the parties in an action or proceeding." SDCL § 15-6-54(a). The Petitioners' judgment was prepared as authorized by SDCL § 21-26-4. The action against the insurers was authorized by SDCL § 58-23-1 from the aforementioned judgment.

III. THE CIRCUIT COURT AND THE HON. ROBERT A. MANDEL WERE STATE ACTORS FOR PURPOSES OF ESTABLISHING PROCEDURAL DUE PROCESS VIOLATIONS

The Petitioners submit that the circuit court and the Hon. Robert Mandel are both "state actors" for the purposes of analyzing the alleged Procedural Due Process violations raised in this Petition.

"Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmondson Oil, Inc.*, 457 U.S. 922, 924, 102 S.Ct. 2744, 2747, 73 L.Ed.2d 482 (1982). A judge, "beyond all question[,] is a state actor." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 624, 111 S.Ct. 2077, 2085, 114 L.Ed.2d 660 (1991). Likewise, the circuit court in a state is a state actor for the purposes of the Due Process Clause.

Both the circuit court and the Hon. Robert Mandel are "state actors" pursuant to the Due Process Clause of the Fourteenth Amendment.

IV. THE ACTIONS OF THE CIRCUIT COURT CONSTITUTED PROCEDURAL DUE PROCESS VIOLATIONS

Once the South Dakota Supreme Court handed down *Quinn I* in 2014, the Petitioners knew that the circuit court going forward in the case, "could not determine as a matter of law that the lead poisoning claim was excluded from coverage." Most importantly,

in post-*Quinn I* proceedings in the Seventh Circuit Court, "[i]t was inappropriate for the circuit court to resolve this factual inquiry [concerning whether the lead exclusion was actually on the Apartment liability coverage] on motion for summary judgment."

Yet, this Petition is proof that the circuit court subsequently made exactly that determination on the insurer's motion for summary judgment, which the Supreme Court opined could not be made, and resolved the factual inquiry the highest court in the state said was "inappropriate." The circuit court was able to do so, because it improperly stayed, in tandem, the Petitioners' entire affirmative case, and marginalized the Quinns' opposition to the FIE summary judgment. This Petition examines the circuit court's actions in the context of violations of the procedural due process rights of the Petitioners under the Fourteenth Amendment and the South Dakota Constitution.

Emboldened by *Quinn I* and several insurer corporate representative depositions, including the deposition of the FIE's alleged policy records custodian and policy affiant, Ms. Alcocer, on February 7, 2018, the Petitioners discovered previously unknown summary judgment-quality claims and defenses to both insurers' summary judgment positions on coverage. They embarked on an aggressive campaign to amend their petition, challenge the previous TIE summary judgment, including the custodian's affidavit, and conduct discovery on these issues and defenses.

On March 9, 2018, the Petitioners filed a motion to amend their petition,[15] submitted a wide range of motions to take advantage of coverage/policy issues concerning the TIE denial letter, the lead contamination and pollution exclusions, and other claims and defenses. At the same time, the Petitioners propounded extensive discovery[16] to FIE which principally sought discovery of the insurer's policy training materials, internal policies and procedures relative to their affirmative defenses, with concentration on the lead and pollution endorsement/exclusion the insurers asserted in the denial letter, which was replete with errors and omissions by TIE.

In the face of this onslaught, on March 20, 2018, FIE immediately moved to schedule a hearing on its motion for summary judgment originally filed in September 2017, but indefinitely postponed thereafter. The next day, FIE moved to stay all of Petitioners' motions and stay responses to discovery requests.

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[15] The proposed second amended complaint was 142 pages in length, contained 473 paragraphs, 236 factual paragraphs individually sourced in summary judgment format under state law (Am.Comp. ¶¶ 23-259), and stated causes of action for Count I-Declaratory Judgment, Count II-Breach of Contract-Duty to Defend, Count III-Breach of Contract-Duty to Indemnify, Count IV-Tortious Loss of Settlement Opportunity, Count V-Deceit, Count VI-Bad Faith, Count VII-Exemplary Damages.

[16] The Petitioners propounded their first Request for Admissions (175 requests), and 6th Request for Production of Documents and Interrogatories on March 9, 2018.

On April 5, 2018, the Petitioners filed their first cross-motion for summary judgment.[17]

At an April 9, 2018 hearing,[18] Judge Mandel disclosed his relationship with GPNA attorney, and former U.S. Attorney supervisor, Marty Jackley.

On April 19, 2018, Judge Mandel entered an order of the circuit court staying the following:

- "[Petitioners'] Motion for Reconsideration of Summary Judgment" for TIE;
- "[Petitioners'] Second Motion for Leave to Amend and Supplement Complaint and Brief in Support filed March 9, 2018";
- "[Petitioners'] Second Motion to Amend and Supplement Complaint and Brief in Support, filed March 22, 2018";
- "[Petitioners'] First Cross-Motion for Summary Judgment";
- "[Petitioners'] Interrogatories to [insurers] (Sixth Set)";
- "[Petitioners'] Requests for Production of Documents (Sixth Set)";
- "[Petitioners'] Requests for Admissions to [insurers]."

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[17] Petitioners' cross-motion for summary judgment was 72 pages long, together with 179 statements of undisputed material facts individually sourced as required under state law.

[18] The Court's colloquy about the relationship was set out verbatim, *supra*.

The order also provided that, "*any further motions or discovery are stayed until such time as this Court rules first* on the [Petitioners'] Motion for Order to Show Cause for Disqualification of Former Legal Counsel of the Insureds and then *on the [FIE] Motion for Summary Judgment*." 14a-17a. (Emphasis added).

On May 25, 2018, the Quinns filed an 84-page memorandum in opposition to FIE's summary judgment and filed 165 additional statements of material uncontroverted fact, for which the insurers never responded. Later, the circuit court would order the parties to submit 15 page-limit briefs on summary judgment.

On May 29, 2018, the circuit court denied the following:

- [Petitioners'] Disqualification of defense counsel;
- [Petitioners'] Oral Motion for separate hearing on the issue of the Court's decision not to recuse itself;. . . .
- [Petitioners'] Motion to Quash June 4, 2018 [Farmer's] Motion for Summary Judgment, Motion to Stay [Farmer's] Motion for Summary Judgment;
- [Petitioners'] Motion to Lift the Stay as to [Quinns'] Cross-Motion for Summary Judgment.

The Court also *again ordered* that, "[Petitioners'] Cross-Motion for Summary Judgment, as well as all

other filings, are stayed until after the Court hears and decides the Defendant's Motion for Summary Judgment. . . ." 11a-13a.

The actions of the circuit court and the Hon. Robert Mandel, a member of that court, constituted "deliberate decisions of government officials" which arguably deprived the Petitioners of their cognizable South Dakota property interests. *Daniels, id.* These actions, taken individually and collectively, constituted discrete violations of the Due Process Clause of the Fourteenth Amendment and South Dakota Constitution, Art. VI, §§ 2, 6 and 20.

The circuit court, through the actions of Judge Mandel, committed procedural due process violations in two areas. First, in early 2018, the court stayed, for the remainder of the case, Plaintiffs' first cross-motion for summary judgment, their motion to amend the petition to include new, relation-back causes of actions, extensive requests for admissions, request for production of documents and interrogatories directed to the insurers' internal policies, procedures and interpretations concerning the lead and newly asserted pollution exclusions, and other motions. The court further denied the Petitioners' motion to hear FIE's summary judgment motion at the same time as the Quinns' first cross-motion for summary judgment, and to lift the stay ordered by the court.

The circuit court, while allowing the insurers to proceed, unabated, with their respective third summary judgment motions and hearings concerning the

commercial general liability coverage and commercial umbrella policy, summarily denied and stayed the Petitioners' affirmative case. Furthermore, the court denied the Petitioners' attempt to follow the South Dakota Supreme Court's finding and holdings in *Quinn I*, therein forcing Petitioners to dramatically cut its array of defenses from their comprehensive 84-page summary judgment opposition memorandum to only 15 pages.

The second area of due process violations committed by the circuit court concerned the failure of Judge Mandel to recuse himself from the case, notwithstanding two separate requests. The Quinns unsuccessfully moved to recuse the court soon after his entry into the case in February 2015. The Petitioners then unsuccessfully sought recusal from the presiding judge.

Finally, Judge Mandel, *sua sponte*, disclosed his relationship with GPNA partner and his superior, Marty Jackley, while both U.S. attorneys in South Dakota, but refused to recuse himself or disqualify the GPNA firm that Mr. Jackley worked for against the Petitioners, and by which he is presently employed. Nevertheless, the court did not recuse itself.

These actions constituted several violations of the Petitioners' procedural due process rights guaranteed by the Fourteenth Amendment and South Dakota Constitution, Art. VI, §§ 2, 6 and 20. The Petitioners elaborate below.

A. THE CIRCUIT COURT'S REFUSAL TO ALLOW THE PETITIONERS TO ARGUE THEIR TIMELY FILED CROSS-MOTION FOR SUMMARY JUDGMENT, TO COMPLETE DISCOVERY OF THE INSURERS' INTERNAL POLICIES, PROCEDURES, AND INTERPRETATIONS CONCERNING THE EXCLUSIONS AT ISSUE, TO AMEND THEIR PETITION AND OTHER COURT ACTIONS TO RESTRICT THEIR AFFIRMATIVE CASE, AND THEIR DEFENSE OF THE INSURERS' SUMMARY JUDGMENT, CONSTITUTED DELIBERATIVE, UNJUSTIFIED AND ARBITRARY ACTIONS VIOLATING PETITIONERS' DUE PROCESS RIGHTS

The Petitioners present an issue that appears to be a question of first impression in procedural due process jurisprudence. That is, at what point do actions of a state trial court implicate federal and state procedural due process protection to litigants who are denied fair access to the court? After all, South Dakota's Constitution declares that, "[a]ll courts shall be open, and every man for an injury done him in his . . . person, shall have a remedy by due course of law, and right and justice, administered without denial or delay." S.D. Const. Art. VI, § 20.

The Petitioners reasonably argue in this Petition, that under these facts and legal record, the circuit court was not truly "open" for the Petitioners' claim. Further, the circuit court did not provide a "remedy by

due course of law." Finally, they assert that Petitioners were not served "justice administered without denial or delay."

But, the above state standards are *not* the standards by which this Petition will be adjudged. For it is one thing to be rejected by the Petitioners' own highest court in *Quinn II*, which joined the circuit court in ignoring the South Dakota's Supreme Court's *Quinn I* decision, but it is quite another to adequately assert violations of the Procedural Due Process Clause in the Fourteenth Amendment in this hallowed venue. Yet, those violations are clear and plain.

The circuit court made "deliberate" judicial decisions which deprived the Petitioners of their due process rights to property under federal law. *See Daniels*, *id*. Their individual guarantees of these rights, while "intended to secure the individual from the arbitrary exercise of the powers of government," *Hurtado v. California*, 110 U.S. at 527, 4 S.Ct. at 116, were, in fact and law violated, because the Petitioners have demonstrated they owned a protected property interest at stake and were deprived of that interest without due process of law. *Hopkins v. Sanders*, *id*.; *Osloond v. Farrier*, *id*., 659 N.W.2d at 24.

The overarching purpose of procedural due process is to "convey to the individual a feeling that the government has dealt with him fairly." *Carey v. Piphus*, *id*., 435 U.S. at 262, 98 S.Ct. at 1051. The Petitioners submit that the Petition establishes a prima facie case of procedural due process violations committed by the

circuit court. Under no concept of due process, as understood by any court, can justice be done where a litigant is deprived by judicial orders staying its affirmative case to the preference of another litigant and minimalizing its defenses to another party's dispositive motion.

It is noteworthy that the FIE's summary judgment motion was originally filed in September 2017. In early March 2018, the hearing had not yet been scheduled by the insurer. It was not until the Petitioners' March 9, 2018 filings that the insurer then scheduled the summary judgment motion; followed the next day by its motion to stay.

In essence, the case sub judice was over for the Petitioners at this time. Certainly, the court was fixed upon resolving the GPNA disqualification motion, which it denied, but the circuit court's April 17, 2018 and May 29, 2018 orders specifically froze the Quinns' affirmative case, including their cross-motion for summary judgment. It was never lifted – even though the Petitioners made a motion to lift the stay that was denied in the latter order.

These two orders made it clear that "any further [Quinn] motions or discovery are stayed until such time that this Court rules . . . on the [insurer's] Motion for Summary Judgment." The Petitioners never received any opportunity to argue the filed motion to reconsider the TIE summary judgment, or obtain answers to the propounded discovery, and were never allowed to argue for a ruling on the second amended

complaint. They also were never allowed to argue their cross-motion for summary judgment, as the circuit court granted summary judgment to FIE, notwithstanding the *Quinn I* opinion. In all reality, the circuit court orders ended the plaintiff's affirmative case.

The circuit court was still not done with the matter. It proceeded to marginalize the Petitioners' opposition to the insurer's summary judgment. The Petitioners filed an extensive memorandum in opposition to the insurer's summary judgment. The 72-page opposition included over 170 additional statements of uncontroverted material fact, which was never addressed by the court or the insurer. At the same time, the Petitioners filed a motion to strike the summary judgment affidavit of the latest iteration of Farmer's policy records custodians. Again, the court never held a hearing or otherwise ruled on this critical motion.

The final act of the circuit court was the requirement that each party submit a 15 page-limit brief on the insurer's motion for summary judgment. A week later, the court awarded summary judgment to Farmers on the comprehensive liability coverage. In the wake of the circuit court's judgment, the stay remained until the predictable, unfortunate end.

The Petitioners submitted state and federal authorities challenging the circuit court's stay of their cross-motion for summary judgment. The Petitioners cited, *Puerto Rico American Ins. Co. v. Rivera-Vazquez*, 603 F.3d 125 (1st Cir.2010), where the First Circuit reversed a district court over the "proper handling of

cross-motions for summary judgment." *Id*., 603 F.3d at 127.

The appellants in the case argued that the court treated the two motions differently, which gave the insurer an unfair preference "because the court happened to decide the insurer's motion first." *Id*. at 132. The circuit court held that this "different treatment" was an abuse of discretion. Applicable here, the Court observed that the lower court acted to abuse its discretion "by giving one set of litigants (the insurers) a largesse that it withheld from the other set of litigants (the appellants)." *Id*. at 132-33. The court also stated that, "[i]t is settled law that each cross-motion for summary judgment must be decided on its own merits." *Id*. Apt here, the court noted the "arbitrariness of this approach is obvious."

Applied to this Petition, although it does not appear the cases were based upon procedural due process, nonetheless, the court's failure to properly address the Petitioners' cross-motion for summary judgment was deliberative, unjustified, and arbitrary in violation of their rights. The situation in this Petition is worse, because here the Petitioners' cross-motion was stayed, *and was never heard by the circuit court*. In the cited case, at least the cross-motion was heard – a far cry from this case.[19]

This Honorable Court is requested to impose constraints upon the actions of the state circuit court, due

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[19] *See Tri-State Co. of Minnesota v. Bollinger*, 476 N.W.2d 697, 700 (1991).

to the court's mistaken or unjustified deprivation of the Petitioners' property interests within the meaning of the Due Process Clause of the Fourteenth Amendment. *See Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). While "due process rules are shaped by the risk of error inherent in the truth finding process," *Mathews*, *id*., 424 U.S. at 344, 96 S.Ct. 907, these actions are so extreme and violative of Petitioners' rights as to support granting of the Petition.

B. THE CIRCUIT COURT'S TWO REFUSALS TO RECUSE ITSELF, IN THE CONTEXT OF A SEPARATE REFUSAL TO DISQUALIFY THE INSURERS' LAW FIRM, LIKEWISE CONSTITUTED PROCEDURAL DUE PROCESS VIOLATIONS

"[J]ustice must satisfy the appearance of justice."[20]

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."[21] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law."[22] "The Due Process Clause

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[20] *Offutt v. U.S*., 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954).

[21] *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242, 100 S.Ct. 1610, 1613, 64 L.Ed.2d 182 (1980).

[22] *Id*.

has been implemented by objective standards that do not require proof of actual bias."[23]

Although most matters relating to judicial disqualification [do] not rise to a constitutional level,"[24] this Court asks whether "under a realistic appraisal of psychological tendencies and human weakness, the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.' "[25]

In light of these authorities, circuit judge, the Honorable Robert Mandel, who twice refused to disqualify himself during the underlying proceedings in state court, displayed the probability of actual bias on an "unconstitutional level." In doing so, Judge Mandel should have recused himself in these proceedings, particularly in light of the extreme circumstances present.

The Petitioners have detailed earlier in this Petition the unusual, if not, outrageous court orders entered in early 2018, which stayed the Petitioners' affirmative case, including various motions, their initial cross-motion for summary judgment, and discovery, as well as "all other [Petitioners'] filings until after the Court hears and decides the [insurer's] Motion for

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[23] *Caperton v. A.T. Massey Coal Co., Inc*., 556 U.S. 868, 883, 129 S.Ct. 2252, 2263, 173 L.Ed.2d 1208 (2009).

[24] *Caperton*, *id*., 556 U.S. at 876, 129 S.Ct. at 2259, quoting *FTC v. Cement Institute*, 333 U.S. 683, 702, 68 S.Ct. 793, 92 L.Ed. 1010 (1948).

[25] *Id.*, 556 U.S. at 883-84, 129 S.Ct. at 2263, quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

Summary Judgment. . . ." The circuit court never reached any of Petitioners' motions, their cross-motion for summary judgment or discovery, because it granted summary judgment to the defendant insurer. At the same time, after entering the stay order, it ordered the Petitioners to submit a 15-page limit brief in opposition, when it had already submitted over seventy pages of opposition briefing and submitted 170 additional statements of material uncontroverted fact which were never responded to by the insurer.

These prejudicial actions were set against the background of the insurer's law firm and Judge Mandel's former supervising U.S. Attorney colleague, who both represented the tortfeasor B&L against the Petitioners, then the firm later entered the subsequent related case on behalf of the insurers challenging the Petitioners' and B&L's insurance claims. The Petitioners were not aware of the relationship until Judge Mandel disclosed the relationship in an April 2018 hearing, but the court would not allow any discovery on the matter. In any case, the court again refused to recuse himself of his own volition, and further refused a second, oral motion from Petitioners to recuse himself from the case.

The Petitioners' motions, requests and Supreme Court brief all separately analyzed South Dakota law regarding Judicial Canons 3E(1)(a), and (d), and SDCL § 15-12-37. The Petitioners' analysis, like the *Caperton* court, concluded the appropriate standard was an objective one, requiring disqualification where there is an

appearance of partiality even though no actual partiality exists.

In light of the case authorities cited herein, it is axiomatic that a judicial officer, such as Judge Mandel or any other judge that encounters an obvious situation where a former employer (then U.S. Attorney Marty Jackley) will certainly be a case witness such as in the underlying Quinn case, clearly mandates that the judicial officer must recuse himself/herself, knowing about the past employment relationship of the potential witness. It is grossly unfair for a judicial officer such as Judge Mandel, to disregard the interests of justice and act in such a way as to totally deprive one party from due process and fair application of the normal rules of practice and procedure.

The later summary affirmance by the state supreme court, in effect, disallowed any vestige of fairness and justice, to be revealed in a written appellate opinion, so that the severely disabled minor victim and her family, were forever deprived of any chance to know or realize the legal or factual rationalization as to why her case was not deserving of justice and fairness.

Any judicial officer being confronted with an obvious and clear conflict of interest such as confronted by Judge Mandel in his official state role as a judge deciding issues in this case, must recuse themselves from any involvement in the decision making or consideration of this case. It is in accordance with due process and fundamental fairness that, upon the recusal of a

conflicted judge from hearing or deciding anything on the case, that a different judge would be appointed, who did not have any such prior employment relationship and/or conflict of interest with the witness Mr. Jackley, who could then decide the issues in the case or the trial on the merits.

Under the objective standard employed both federally and by state law, the Petitioners respectfully suggest Due Process was violated, in that the law was similar in scope and application. Under state law, Canon 3 E(1)(a) compelled the circuit court to disqualify itself due to "personal bias or prejudice." Additionally, the Court likewise had a duty to disqualify itself due to a disclosed "close personal relationship" under Canon 3E(1)(d).

V. THE *MATHEWS* THREE-PART TEST FOR ESTABLISHING WHAT PROCESS IS DUE PROVIDES COMPELLING REASONS FOR GRANTING THIS PETITION

The Petitioners submit that, applying this Court's precedents in the underlying circumstances, the actions of the state circuit court violated their procedural due process rights, and, these same due process rights require recusal. *See Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) ("[T]he probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.").

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[26] This Court has held that,

> "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[27]

The Petitioners briefly address the *Mathews* factors.

A. THE PETITIONERS POSSESSED PRIVATE INTERESTS THAT WERE IRREPARABLY AFFECTED BY THE OFFICIAL ACTIONS OF THE CIRCUIT COURT

The Petitioners' private interest consist of a final South Dakota money judgment against B&L, authorized under state law. The Quinn family obtained the circuit court judgment in the case originally started by

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[26] *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

[27] *Id*., 424 U.S. at 903, 96 S.Ct. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71, 90 S.Ct. 1011, 1018-22, 25 L.Ed.2d 287 (1970)).

B&L. The judgment was mature and final before the second case was initiated against B&L's insurance carriers. It was these property interests that were irreparably affected by the circuit court's actions violating Petitioners' due process rights.

The circuit court's actions were contrary to the fundamentally fair procedures set out by state legislative and judicial authorities, and, as applied by the court, were constitutionally inadequate as a matter of federal and South Dakota constitutional law. The circuit court should at least have provided a hearing to Petitioners on their cross-motion for summary judgment, after allowing the proposed second amended complaint to be filed, and discovery to be conducted, by and through another circuit judge.

B. THE RISK OF AN ERRONEOUS DEPRIVATION THROUGH THE COURT'S DELIBERATIVE, UNJUSTIFIED AND ARBITRARY ACTIONS WERE SIGNIFICANT, THEREBY MANDATING ADDITIONAL OR SUBSTITUTE PROCEDURAL SAFEGUARDS

The Petitioners suggest that the "degree of potential deprivation that may be created by a particular decision" factor[28] weighs favorably to granting this Petition. The risk of erroneous deprivation through the circuit court's deliberative, unjustified and arbitrary

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[28] *Mathews*, *id*., 424 U.S. at 341, 96 S.Ct. 906 (citing *Morrisey*, *id*.).

actions were, in fact, significant and total. The Petitioners' cognizable property interests were rendered meaningless by the court's actions, as their affirmative case was effectually neutralized, without affording any remedy or opportunity for hearing.

This Court likewise reviews the "possible length of wrongful deprivation."[29] This "important factor in assessing the impact of official action on the private interests" likewise favors this Petition. As alluded to throughout this Petition, the circuit court's actions pose a permanent loss to a permanently injured minor and her family. Without this Court's intervention, manifest injustice occasioned by fundamentally unfair state actions, will be the result.

This Court also looks at the "fairness and reliability" of the existing procedures, and "the probable value, if any, of additional procedural safeguards."[30] The circuit court's local rules, and the rules of the South Dakota Supreme Court, are unquestionably fair and reliable. It is in their unfair and unjust application that serves as the basis of this Petition.

It is one thing for Petitioners to lose the case which is the subject of this Petition on the merits – it is quite another to lose where you are improperly restrained from reasonably developing and arguing the merits and prevented from fully defending the merits of the prevailing party. The latter is Petitioners' dire

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[29] *Id*. (citing *Fusari v. Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975)).

[30] *Id*., 424 U.S. 343, 96 S.Ct. 907.

situation. The actions of the circuit court were deliberately and arbitrarily designed to accomplish the results presented in this Petition. Petitioners' final and last resort is represented in this Petition.

C. THE REMEDIAL ACTIONS THE COURT COULD EMPLOY UPON REVERSAL AND REMAND, AND ITS IMPACT UPON THE GOVERNMENT'S INTEREST AND ITS ATTENDANT ADMINISTRATIVE BURDENS, ARE MINIMAL

"In striking the appropriate due process balance the final factor to be assessed is the public interest."[31] This Court in *Mathews* described this factor in terms of "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand." *Id*. "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.' "[32]

This Court need not concern itself with the "ad hoc weighing of fiscal and administrative burdens against the [Petitioners'] interest." *Id*. This court can, among the remedial actions it could employ, upon ordering reversal and remand, is vacating both summary

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[31] *Id*., 424 U.S. at 347, 96 S.Ct. at 909.

[32] *Id*., 424 U.S. at 348-49, 96 S.Ct. at 909 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72, 71 S.Ct. 624, 649, 95 L.Ed.2d 817 (1951).

judgments for FIE and TIE, and reversing the *Quinn II* Supreme Court decision. Further, this Court should reset the state case back to March 9, 2018; thereby permitting the case to proceed with Petitioners' second amended complaint, the answers to discovery and permitting Petitioners' eventual cross-motion for summary judgment to include the claims and defenses. Additionally, this Court should order a full hearing on the cross-summary judgment, as supplemented by the amended pleading and discovery. However, for these remedies to possess any judicial economy or efficacy, this Court would necessarily also order Judge Mandel's recusal from the case.

These suggested remedial actions would operate "to insure that [Petitioners] are given a meaningful opportunity to present their case."[33]

Restarting the case would not present any significant financial or administrative burden upon the circuit court.

[33] *Id.*, 424 U.S. at 349, 96 S.Ct. at 909.

CONCLUSION

The Petitioners pray this Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE J. NELSON
GEORGE J. NELSON LAW OFFICE, P.C.
2640 Jackson Blvd.
Rapid City, South Dakota 57702
(605) 719-9470
gjnlaw@gmail.com

ROBIN L. ZEPHIER
Counsel of Record
ABOUREZEK, ZEPHIER & LAFLEUR
P.O. Box 9460
Rapid City, South Dakota 57709
(605) 342-0097
rzephier@azlaw.pro

Counsel for Petitioners