

AUG 10 2017

Shirley A. Johnson-Ley
Clerk

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

<p>LP6 CLAIMANTS LLC, v. SOUTH DAKOTA DEPARTMENT OF TOURISM AND STATE DEVELOPMENT, SOUTH DAKOTA GOVERNOR'S OFFICE OF ECONOMIC DEVELOPMENT, SOUTH DAKOTA DEPARTMENT OF TOURISM, THE STATE OF SOUTH DAKOTA, SDRC INC., SD Investment Fund LLC 6, and JOOP BOLLEN,</p> <p>Plaintiff, Defendants.</p>	<p>#28339 CIV. NO. 15-312</p> <p>STATE'S RESPONSE TO PETITION FOR LEAVE TO APPEAL INTERMEDIATE ORDER</p>
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The State of South Dakota, South Dakota Department of Tourism and State Development, South Dakota Governor's Office of Economic Development and South Dakota Department of Tourism (collectively, the "State"), Defendants, by and through its Special Assistant Attorneys General, Paul E. Bachand and Robert L. Morris, and hereby submits this Response to Plaintiff's Petition for Leave to Appeal Intermediate Order.

1. Procedural History and Background

Plaintiff served its Amended Complaint on the State on or about December 8, 2015. The State filed a Motion to Dismiss on January 6, 2016, the basis of which was sovereign immunity, lack of statutory notice requirements, and statute of limitations. On July 18, 2017, the Honorable John L. Brown, Presiding Sixth Circuit Court Judge, issued his Memorandum Decision and Order ("Memorandum") granting the State's Motion to Dismiss.¹ On July 19, 2017, the Notice

¹ Exhibit A, attached hereto and incorporated herein by reference.

of Entry of Order Granting Motion to Dismiss was served upon Plaintiff.² On July 28, 2017, Plaintiff filed a Petition for Leave to Appeal Intermediate Order (“Plaintiff’s Petition”). The State files this response to the Plaintiff’s petition.

2. Summary of Argument

The Plaintiff’s Petition should be denied for several reasons. First, an appeal from an intermediate order is discretionary, not a matter of right. Second, discretionary appeals are a rare breed, granted infrequently, and looked upon with disfavor as it amounts to piecemealing a case. Third, Plaintiff fails to meet its heavy burden as it presents no compelling reasons why the Circuit Court’s ruling should be reviewed now.

3. Legal Argument

A. SDCL 15-26A-3(6): Standard Applicable to Discretionary Appeals

As admitted through Plaintiff’s Petition, the Memorandum dismisses Plaintiff’s claims against the State, but does not affect Plaintiff’s claims against other litigants.³ Accordingly, Plaintiff’s Petition is an intermediate appeal governed by SDCL 15-26A-3(6). Under that statute, intermediate appeals are 1) not matters of right, 2) left to judicial discretion, and 3) only granted where this Court considers that the ends of justice will be served by a determination of the questions involved without awaiting the final determination of the proceeding. SDCL 15-26A-3(6).

The South Dakota Supreme Court has provided guidance holding that discretionary appeals are considered appropriate only in the rare case and are to be granted infrequently. *Ochs v. Nw. Nat’l Life Ins. Co.*, 254 N.W.2d 163, 169 (S.D. 1977). Federal courts echo this sentiment,

² Exhibit B, attached hereto and incorporated herein by reference.

³ See Plaintiff’s Petition, pg. 3, ¶ 2.

holding that interlocutory appeals should be used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation. *See White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994), *internal citations and quotations omitted*. Further, it has long been the policy of federal courts to discourage piecemealing a case because interlocutory appeals result in additional burdens on both the court and the litigants, with permission to allow interlocutory appeals granted sparingly and with discrimination. *See Mendez v. Dole* (D. Minn., 2017), *internal citations and quotations omitted*. In addition, the Plaintiff bears the heavy burden to show its petition warrants an intermediate appeal. *See White, supra.*, at 376, *internal citations and quotations omitted*.

B. Plaintiff’s Petition Does Not Warrant an Intermediate Appeal.

The issue at hand is whether Plaintiff’s Petition warrants an intermediate appeal. In scattershot methods, Plaintiff’s Petition cites to an online blog, delves into speculation regarding other litigants, speculation regarding its likelihood of success, and engages in willful blindness about existing caselaw. For the lion’s share of Plaintiff’s arguments, it cites no legal authority and as such these arguments should be deemed waived. *See Veith v. O’Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29; SDCL 15-26A-1; SDCL 15-26A-60(6). Additionally, Plaintiff’s Petition does not meet its heavy burden and, as a corollary, does not warrant an intermediate appeal.

i. The Dakota Free Press, Other Litigants, and Judicial Economy.

Plaintiff’s Petition alleges the State engaged in fraudulent inducement with no proof save citations to the Dakota Free Press online blog.⁴ The Dakota Free Press blog is neither a disinterested factfinder nor is it a credible authority. It is most certainly a shaky foundation on which to attribute the type of scienter Plaintiff ascribes in its brief. More to the point, this Court

⁴ *See* Plaintiff’s Petition, pg. 2, ¶ 2.

should send a clear message that no online blog can impugn the wisdom of the Circuit Court's decision which rests upon clear legal authority.

Plaintiff's Petition further opines that Defendant Bollen is "likely" unable to respond to judgments,⁵ while also having the temerity to claim that the principles of judicial economy would be served by allowing an intermediate appeal. First, whether Plaintiff's lawsuit can win the day is far from certain. Second (assuming *arguendo* that Plaintiff's lawsuit is victorious), Plaintiff's claim that Defendant Bollen cannot respond financially to any verdict amounts to nothing more than Plaintiff's speculation and, ultimately, has no bearing on the legal issue at hand – sovereign immunity – which the Circuit Court cited in dismissing the State from this case. Third, the principles of judicial economy speak directly against piecemealing a case, for if every intermediate order were appealed, the wheels of justice would grind to a halt. *See Dole, supra.; White, supra.* Plaintiff's leaps of logic are simply done without any citation to legal authority, should be deemed waived, and (again) do nothing to impugn the wisdom of the Circuit Court's decision.

ii. The Likelihood of Success and Existing Caselaw

Plaintiff's Petition speculates about the likelihood of success. As noted above, there is no legal authority making this applicable. Accordingly, this argument should be deemed waived. *See O'Brien, supra.* Nevertheless, without waiving the foregoing, the claim of a successful appeal will be addressed.

Whether Plaintiff's appeal can be successful is rooted in our state's constitutional provisions, statutes, and existing caselaw.⁶ Moreover, the gravamen of Plaintiff's Petition

⁵ *See* Plaintiff's Petition, pg. 3, ¶ 3.

⁶ To avoid needless duplication, the State herein incorporates fully by reference the Circuit Court's Memorandum Decision and supporting analysis.

focuses on the case of *L.R. Foy Const. Co. v. S.D. State Cement Plant Comm'n*, 399 N.W.2d 340 (S.D. 1987),⁷ a case already given exacting scrutiny by the Circuit Court's Memorandum Opinion dismissing the State from this case.⁸ Accordingly, the likelihood of Plaintiff's success on any appeal is low.

Further, Plaintiff's Petition attempts to muddy the waters by quibbling over semantics.⁹ The Plaintiff can plead anything under the sun. Yet, that does not prevent the Circuit Court from its concise legal analysis **showing** that there have been no Constitutional enactments regarding the EB5 program, no express legislative waivers of sovereign immunity, no engagement in commercial activities, nor any activities falling under the purview of the Uniform Commercial Code. No matter the Plaintiff's pleadings, they do not affect the above-listed items as a matter of law.

CONCLUSION

Based on the foregoing legal authorities and argument, the State requests that this Court enter an order denying Plaintiff's Petition for Leave to Appeal Intermediate Order.

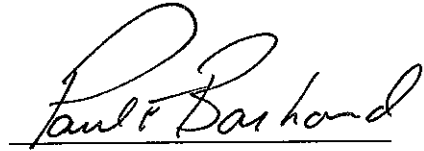
⁷ See Plaintiff's Petition, pgs. 4-5.

⁸ Of note, Plaintiff's Petition does not address the other supporting cases that the Circuit Court relied upon, which amounts to little more than cherry-picking authority. See Memorandum Decision and Order, pg. 5-6; *High Grade Oil Co., Inc. v. Sommer*, 295 N.W.2d 736, 738 (S.D. 1980); *Aune v. B-Y Water Dist.*, 464 N.W.2d 1, 3 (S.D.1990).

⁹ See Plaintiff's Petition, pg. 5, "**shown**" argument.

Dated this 10th day of August, 2017.

RESPECTFULLY SUBMITTED:



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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the State of South Dakota, hereby certifies that on the 10th day of August, 2017, a true and correct copy of the State's Response to Plaintiff's Petition for Leave to Appeal Intermediate Order was served electronically on the following:

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Dated this 10th day of August, 2017.

A handwritten signature in cursive script that reads "Paul E. Bachand". The signature is written in black ink and is positioned above a horizontal line.

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