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

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**APPEAL # 27298**

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**VERA GOOD LANCE,**

**Plaintiff,**

**v.**

**BLACK HILLS DIALYSIS, LLC, and LEETTA BREWER,**

**Defendants.**

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# APPELLANT'S OPENING BRIEF

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**THE HONORABLE ROBERT A. MANDEL**

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**The Order granting petition for allowance of appeal from intermediate order was granted on February 10, 2105**.

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## PRELIMINARY STATEMENT

Throughout Appellant's Brief, Appellant Vera Good Lance will be referred to as "Good Lance." Appellee/Defendants Black Hills Dialysis, LLC and LeAtta Brewer, will be referred to as either "BH Dialysis" or "Brewer."

Portions of the hearing record and proceeding transcripts that have been reproduced are referenced below as ("HR ___:___"). Portions of the Appellant's Appendix that have been attached and are referenced in this Brief shall be referenced as ("App. ____.")

## JURISDICTIONAL STATEMENT

The Circuit Court denied Plaintiff Good Lance's motion to summon Shannon County jurors for trial, in a case properly venued in Shannon County, on December 19, 2014, and a notice of entry of order was served the same day. (App. 1.)

Good Lance timely and properly filed with the Supreme Court a Petition for Permission to Appeal on December 29, 2014. (App. 2.) This Court granted the Petition on February 10, 2015. (App. 3.)

Good Lance then ordered the hearing transcripts on February 12, 2015. The hearing transcripts were served on Good Lance on February 18, 2015.

## CONCISE STATEMENT OF LEGAL ISSUES

Whether United States Constitution and the South Dakota Constitution, statutes, and case law, as well as the rights of the Plaintiff/Appellant Vera Good Lance, are violated by a standing order issued by a presiding judge of the Circuit Court permanently establishing and transferring venue for all cases properly brought in Shannon County, South Dakota to another county, and in effect prohibiting a Shannon County resident from a jury of her peers in Shannon County, where she resided, and where the injury occurred and the cause of action arose, and further barring any jurors from Shannon County from being allowed to carry out their privileges of citizenship by sitting on juries for trials venued in Shannon County.

The relief Plaintiff seeks is to vacate the standing order of the presiding judge of the Seventh Judicial Circuit and to reverse the trial court's order denying Plaintiff's/Appellant's Motion to Summon Shannon County Jurors for Trial and remanding for trial consistent with such reversal, thus allowing Shannon County residents and citizens of South Dakota to be summoned and allowed to serve on this jury.

## STATEMENT OF CASE AND FACTS

Defendant Black Hills Dialysis, LLC (hereinafter "BH Dialysis") is a South Dakota limited liability corporation, doing substantial business in Shannon County, South Dakota (now Oglala Lakota County), providing dialysis services for eligible American Indians and tribal members of the Oglala Sioux Tribe. It is a corporation and has no race. Defendant LeEtta Brewer is an employee of Defendant Black Hills Dialysis, LLC who was at all times pertinent hereto acting within the scope of her employment for her co-defendant Black Hills Dialysis, LLC.

On and after June 16, 2011, Vera Good Lance (hereinafter "Good Lance"), a Shannon County resident and an American Indian, was a regular dialysis patient of BH Dialysis' Pine Ridge facility, which is located in Shannon County.

While a patient at BH Dialysis in Shannon County, Good Lance was weighed by Black Hills Dialysis staff twice during every visit for a total of 112 weigh-ins always while in her wheel chair. However, during her weigh-in on October 27, 2011, Defendant Brewer, the dialysis tech in charge of Good Lance's weigh-in, had Good Lance get out of her wheel chair and stand up, rather than remain seated in her wheel chair as was usual. Good Lance fell during the weigh-in and suffered serious injury resulting in substantial medical expense and a lengthy nursing home stay. Since the litigation began, and after her videotaped

deposition was taken, Vera Good Lance has died.

Good Lance sued BH Dialysis and Brewer in the Seventh Judicial Circuit Court and the matter was properly venued in Shannon County, pursuant to SDCL §15-5-8, which allows a lawsuit for recovery of damages to a person to be brought and tried, at the option of the plaintiff, in the country where the damages were inflicted or the cause of action arose.

Defendants BH Dialysis and Brewer did not, within the time allowed by statute, move for a change of venue, nor did they request a change of venue in writing to the plaintiff. There is no factual or legal dispute that this lawsuit was properly venued in Shannon County.

At a status and scheduling hearing on August 29, 2014, the trial court indicated that it intended to hold the trial of the case in Fall River County using Fall River County jurors, pursuant to a standing order issued by Presiding Seventh Circuit Judge Jeff Davis, which had been issued on December 17, 2009. (App. 4.)

Good Lance objected and was given a period of time to brief the issue. Good Lance timely filed a motion to summon Shannon County jurors for trial with a supporting brief, a response brief was filed by BH Dialysis and Brewer, and a reply by Good Lance was also then filed. The motion was denied by the trial court after a hearing on December 19, 2014, and specifically the trial court ordered that the Plaintiff's Motion to Summon Shannon County Jurors is denied and

further that the trial shall take place at the Fall River County Courthouse and "all jury panels shall be summoned from Fall River County." (App. 1, Order of December 19, 2014.)

Shannon County was originally formed in 1875, remaining an unorganized county until 1982, when it became an organized county of the State of South Dakota since 1982. The Shannon County Commission contracts with the Fall River County administration to administer some of its county services, including its clerk of court and other judicial-related services. Its residents are a mix of both American Indian and non-American Indian races, but it is in the majority comprised of state citizens of American Indian origin.[1] All Shannon County residents are citizens of the State of South Dakota and vested with the rights, privileges and immunities of such citizenship. American Indians became citizens of the United States of America on June 2, 1924, 8 U.S.C. § 1401(b). Because of South Dakota's Enabling Act, they also became citizens of South Dakota at the same time. Act of February 22, 1889, 25 Statutes at Large 676.

South Dakota has five (5) counties that exist entirely within the original boundaries of South Dakota Indian reservations. They are Todd, Corson, Dewey,

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BH Dialysis and Brewer have asserted that Shannon County's approximate population is 14,000 and 93% Native Americans, while Fall River County's approximate population is 6,800 and 9% Native Americans.

Shannon, and Ziebach Counties. Two of these five counties do not have full county facilities, and thus they are provided county facilities and services by agreement with a neighboring county, specifically Tripp County for Todd County, and Fall River County for Shannon County.

There have been numerous Circuit Court jury trials which have been successfully held in the South Dakota counties subsumed by Indian reservations, including but not limited to the following:

1. Estate of He Crow by He Crow v. Jensen, 494 N.W.2d 186, 187 (S.D. 1992). (Jury trial held in Pine Ridge, Shannon County, with facility assistance from the Oglala Sioux Tribal Court, with Shannon County jurors before the Honorable Merton B. Tice, Jr. May 7, 1991.)
2. State v. Finney, 337 N.W.2d 167, 168 (S.D. 1983)(Horse theft criminal case, Shannon County jury trial held on July 28, 1982, using Shannon County jurors.)
3. State v. Henry "Hank" Grooms. (Civ. No. and date unknown - Jury trial with Shannon County jurors held in Hot Springs, Fall River County – a murder trial.)
4. Casillas v. Schubauer, Todd County trial with a jury of

Todd County citizens, held in Winner, South Dakota in Tripp County, Civ. No. 03-19. This involved as joint plaintiffs an American Indian and a white person against a white resident of Todd County and ultimately resulted in a verdict for the white defendant. (Previously considered by the South Dakota Supreme Court in an appeal from a grant of summary judgment; 2006 S.D. 42, 714 N.W.2d 84.)

5. In re Peterson's Estate, 77 S.D. 525, 526, 94 N.W.2d 661, 661 (1959)(Todd County jury trial in Sixth Judicial Circuit in Winner, in Tripp County, wherein a jury comprised of Todd Country citizens returned an advisory verdict in favor of contestant.)

6. State v. Assman, 386 N.W.2d 492, 493 (S.D. 1986)(Criminal trial – Todd County trial with a Todd County jury was held on October 2, 1984, before the Honorable James W. Anderson in Winner, Tripp County, South Dakota.)

7. Kohlus v. Dosch and Ziebach County, Civ No. 00-02 (Jury Trial held in Ziebach County in 2001).

8. State v. Jensen, 2007 S.D. 76, 737 N.W.2d 285 (Shannon County jury trial, where defendant was convicted in the Circuit Court, Seventh Judicial Circuit, Shannon County, Thomas L. Trimble, J. presiding, of three counts of misuse or alteration of a brand., affirmed by the Supreme Court.)[2] This trial was held just two years before the standing order was issued.

When the standing order was issued by Presiding Seventh Circuit Judge Jeff Davis on December 17, 2009, Judge Davis reasoned that it was in part because the then-former Oglala Sioux Tribal President had issue a proclamation and executive order eight years previously, on July 26, 2001, "declaring state court service and filings unenforceable on the Pine Ridge Indian Reservation" and that as a result "a state court judge lacks jurisdiction in tribal court to summon and seat the jury panel and lacks the inherent authority to involve statutory procedures necessary to ensure a fair trial." December 17, 2009 Standing Order. (App.4,) Executive Order and Proclamation of President Steele (App. 5.)

This was a political expression only by the Oglala Sioux Tribal President and not by its lawmaking body the Oglala Sioux Tribal Council, and was a political reaction to the Nevada v. Hicks case cited below, which also came out in 2001. This expression of the political will of then-President Steele was not based

[2]There are likely other such trials but these are the trials known to Good Lance.

upon the Oglala Sioux Tribal Constitution and By-Laws, was without legal effect and was extra-constitutional. The Constitution of the Oglala Sioux Tribe clearly sets out that it is the Oglala Sioux Tribal Council, which is the legislative branch of the Tribe, has the constitutional power to "[p]romulgate and enforce ordinances governing the conduct of persons on the Pine Ridge Indian Reservation, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers." Oglala Sioux Tribal Constitution and By-Laws, Article IV, Section 1 (k) (App. 6.) The Oglala Sioux Tribal President does not have any such power, nor can he even vote unless it is to break a tie in the Tribal Council. Oglala Sioux Tribal Constitution and By-Laws, Article III, Section 6 (App. 7.)

Furthermore, the Oglala Sioux Tribal Court has a section, like state law, on concurrent jurisdiction, which states, in pertinent part, that "[i]t shall be the duty of the said Oglala Sioux Tribal Court to order delivery to the proper authorities of the State or Federal Government or any other Tribe or reservation, for prosecution, any offender, there to be dealt with according to law or ordinances authorized by law, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender." Oglala Sioux Tribal Law & Order Code, Section 1.2. (App. 8.)

As such, there are legal and constitutional protections in place in the Oglala Sioux Tribe, just as there are in the State of South Dakota, to ensure that no

individual state officer or judicial officer can actually contravene the constitution, or an ordinance or statute passed by the legislative body of the tribe. There are also adequate tribal laws to allow for agreements between the State of South Dakota or the judiciary to enforce jury summons issued by the Seventh Judicial Circuit.

## ARGUMENT

"Actions for conversion of personal property, or for the recovery of damages to persons or property, may at the option of the plaintiff be brought and tried in the county where the damages were inflicted or the cause of action arose." SDCL § 15-5-8, emphasis added. As this Court has held, "[i]n the absence of statutory grounds for a change of venue, the initial choice of the plaintiff is conclusive." Am. Adver. Co. v. State By & Through Dep't of Transp., 280 N.W.2d 93, 95 (S.D. 1979); citing Putnam Ranches v. O'Neill Production Credit, 271 N.W.2d 856 (S.D.1978). This Court has also held that "[a] plaintiff's choice of venue will usually control, absent a statute requiring another location." Nielsen v. Boos, 1997 S.D. 117, 4, 571 N.W.2d 653, 654; citing Putnam Ranches, Inc., at 859. In the present matter, the damages were inflicted and the cause of action arose in Shannon County, South Dakota, and the plaintiff properly brought her action accordingly in Shannon County, South Dakota.

The defendants failed to move for a change of venue at all, and further failed to make a written request to change venue. Generally, defendants who fail to move for change of venue until four months after they were served with complaint and/or in addition fail to make a written request to the opposing party

before making a motion to the court to change venue waive any argument relating to venue. Williams Ins. of Pierre v. Bear Butte Farms P'ship, 392 N.W.2d 831 (S.D. 1986). See, also, Kolb v. Monroe, 1998 S.D. 64, 581 N.W.2d 149, 151.

In the present matter, the defendants failed to either demand a change of venue under SDCL § 15-5-10, or to make a written request for consent to change the venue to plaintiff. There is no dispute that venue in Shannon County is properly established by South Dakota law and the pleadings in this case, and the failure of defendant to raise a proper and timely challenge to venue would have, *arguendo*, failed as a matter of law under the facts of this case.

This Court has held that " . . . jurisdiction, as well as venue, is fixed by law and not by court rule designating terms of court or by statutes relating to jury selection." Nebraska Elec. Generation & Transmission Co-op., Inc. v. Markus, 90 S.D. 238, 245, n. 2, 241 N.W.2d 142, 146 (1976).

It follows that a standing order by a presiding circuit court judge cannot supersede or establish venue contrary to South Dakota statutes and case law. In the present case, Presiding Judge Jeff Davis issued a standing order on December 17, 2009, entitled "Order Establishing Jury Trial Venue" in which he ordered prospectively "[t]hat the venue of all state judicial matters filed in Shannon County shall be tried in Fall River County in accordance with the laws and policies set out in South Dakota statutory authority . . . ." December 17, 2009 Standing Order Establishing Jury Venue by the Honorable Jeff W. Davis, Presiding Judge of the Seventh Judicial Circuit (App. 4.)

This standing order by Judge Davis has been construed since that date to mean that jurors residing in

neighboring Fall River County shall be summoned to sit on and hear Shannon County cases, and this was the construction given the standing order in the present case by the Honorable Robert Mandel, Seventh Judicial Circuit.

This Court has also held that a trial court's discretion to change venue, even if it was properly and timely requested, which was not the case here, "is limited by the principle that the determination must be made upon a sufficient factual showing to justify the court's exercise of discretion." Putnam Ranches, Inc. v. O'Neill Prod. Credit Ass'n, 271 N.W.2d 856, 858 (S.D. 1978). A standing order by a circuit court presiding judge permanently changing venue, that is prospective and by its nature generalized and speculative, cannot ever meet this burden of a sufficient factual showing and is inherently, without any of the other authority cited herein, an abuse of discretion.

It should be noted that the "proclamation and executive order" by the president of the Oglala Sioux Tribe in 2001, had no legal force and effect under tribal law, and as such was simply a political statement. Further, there was at least one or more trials successfully held in Shannon County or in Fall River County utilizing Shannon County jurors after that 2001 proclamation, as recently as 2008. Several trials were held before that date either on the reservation, using the facilities of the Oglala Sioux Tribe, or in Fall River County using Shannon County jurors. There simply was no ripe problem that needed to be addressed by the standing order issued in 2009, and certainly no case-by-case factual consideration as required by the law.

Finally, the very United States Supreme Court case to which the Oglala Sioux Tribal President reacted politically, itself contravenes the very findings of Judge Davis in the standing order of December 17, 2009.

The United States Supreme Court held that

> [t]hough tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 (1832)," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). "Ordinarily," it is now clear, "an Indian reservation is considered part of the territory of the State." *U.S. Dept. of Interior, Federal Indian Law* 510, and n. 1 (1958), citing *Utah & Northern R. Co. v. Fisher*, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

Nevada v. Hicks, 533 U.S. 353, 361-62, 121 S. Ct. 2304, 2311, 150 L. Ed. 2d 398 (2001), emphasis added.

The Supreme Court went on to hold that

> tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations-to "the right to make laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government.

Id., at 364-65, 2313, 398, emphasis added. As the Supreme Court went on to note,

> Nothing in the federal statutory scheme prescribes, or even remotely suggests, that state officers cannot enter a reservation (including Indian-fee land) to investigate or prosecute violations of state law occurring off the reservation. To the contrary, 25 U.S.C. § 2806 affirms that "the provisions of this chapter alter neither ... the law enforcement, investigative, or judicial authority of any ... State, or political subdivision or agency thereof. . . .

Id., at 366, 2313, 398, emphasis added.

This Court, being respectfully sensitive to tribal-state relations, held as follows in one of its cases:

> The integrity of tribal self-government is preserved by limiting state intrusion to service of process utilizing those statutes that provide for out-of-state service. In this way, Indians who have injured nonreservation citizens of this state would not be protected from actions filed in state courts having proper subject matter and personal jurisdiction simply because they returned to the reservation. Thus, process is effective on a reservation for an action in state court provided the service complies with the requirements of SDCL 15-6-4(c).

Bradley v. Deloria, 1998 S.D. 129, 587 N.W.2d 591, 594, emphasis added. See, also, SDCL § 15-6-4(c). This certainly covers both summonses and subsequent process required if a person does not appear pursuant to such summonses, and as set forth below, any individual who fails to abide by the summons may have a warrant issued for that person and be served that warrant if found off the reservation, and certainly through a state request to the Oglala Sioux Tribal Court to have its law enforcement enforce either the summons or subsequent warrants.

Most importantly, for the Court's analysis, this Court concluded in Putnam Ranches, "[v]enue in the courts of this state is entirely statutory. In the absence of statutory grounds for a change, the initial choice of a plaintiff is conclusive." Putnam Ranches, Inc., at 859.

South Dakota law sets forth, to its great credit, once proper venue has been established, that

> [i]t is the policy of the State of South Dakota that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the municipality, district, or county where the court convenes. It is further the policy of the State of South Dakota that all citizens of this state, qualified for jury duty, shall have the opportunity to be considered for service on grand and petit juries in the courts of this state, and shall have an obligation to serve as jurors when summoned for that purpose.

SDCL § 16-13-10.1. The standing order also deprives an entire county of that opportunity required by South Dakota statute.

South Dakota laws have another provision, also to the credit of our state, which requires that "[n]o citizen shall be excluded from service as a grand or petit juror in the courts of this state on account of race, color, religion, sex, national origin, or economic status." SDCL § 16-13-10.2. This comports not only with the guarantees of the United States Constitution, but also with the South Dakota Constitution, the provisions of which often exceed minimal the fundamental constitutional rights of the United States Constitution.[3] By their place of birth within an Indian reservation in South Dakota, and their American Indian race, this standing order essentially deprives the 93 percent of Shannon County residents that are American Indian from ever enjoying one of the privileges and obligations of South Dakota citizenship, which is to sit upon a jury. More importantly here, it also deprives plaintiffs who have been injured or have had their cause of action arise in Shannon County from ever having their case heard by a fair cross-section of the community in which

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In fact, this Court has set forth the standard in the past regarding the racial composition of the jury that "[t]o establish a prima facie challenge the defendant must show that: (1) the group excluded is a 'distinct' group in the community; (2) the representation of this group in jury pools is not fair and reasonable in relation to the number of such persons in the community; (3) this under-representation is due to the systematic exclusion of the group from the jury-selection process." State v. Lohnes, 432 N.W.2d 77, 83-84 (S.D. 1988); citing Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970). Certainly, the permanent exclusion of a county's jury pool with 93 percent American Indians in favor of cases tried to a jury with 7 percent or less American Indians, by a circuit court's standing order, is by definition "the systematic exclusion of the group from the jury-selection process."

the injury occurred and the claim arose.

American Indians were made citizens of the United States in 1924. 8 U.S.C. § 1401(b). They are also considered citizens of the states in which they reside through application of a post-Civil War amendment to the United States Constitution, the Fourteenth Amendment. More specifically, "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, emphasis added. The United States Supreme Court has held that "[i]n 1924, Congress declared that all Indians born in the United States are United States citizens . . . and, therefore, under the Fourteenth Amendment, Indians are citizens of the States in which they reside." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18, n. 10, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987).

It is the public policy of the State of South Dakota that every statute, rule, regulation, executive order, and office policy of the State of South Dakota enacted, promulgated, issued, or established in contradiction to the provisions of the United States Constitution, and so judicially determined by a final judgment rendered by the South Dakota Supreme Court, the federal district court for the State of South Dakota, the United States Court of Appeals for the Eighth Circuit, or the United States Supreme Court, is void within the jurisdiction of the State of South Dakota. SDCL § 1-1A-1. Furthermore, "[N]o person may enforce any statute, rule, regulation, executive order, or office policy that is in violation of § 1-1A-1." SDCL § 1-1A-2.

The South Dakota Constitution also sets forth that "[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." S.D. Const. art. VI, § 18.

As this Court has previously discussed and held, in another case involving what was then the organized county of Tripp, and the unorganized county of Todd which was and is subsumed by the Rosebud Indian Reservation, and which involved the summons and selection of jurors from the two counties, in a case involving condemnation, and relying in part on interpretation of statutes that have since been repealed, this Court held "[w]e conclude that it would not be proper to include residents of the unorganized county of Todd in a jury panel for the organized county of Tripp any more than it is proper for Tripp County jurors to hear and determine actions properly triable in Todd County. Markus, at 245, 146, n. 2. That is helpful, despite the many statutory revisions since, because it is exactly a summary of the various statutes and the situation on the ground in these types of counties. It is exactly analogous to the situation between Shannon County and Fall River County.

A circuit court of this state may not issue standing orders or make court rules that circumvent South Dakota statutes established by the Legislature. As this Court has long held, "courts have no legislative authority, and should avoid judicial legislation, a usurpation of legislative powers, or any entry into the legislative field." AEG Processing Ctr. No. 58, Inc. v. S. Dakota Dep't of Revenue & Regulation, 2013 S.D. 75, ¶ 19, 838 N.W.2d 843, 849; citing Petition of Famous Brands, Inc., 347 N.W.2d 882, 884 (S.D.1984).

The venue statutes as established by the Legislature are adequate and clear in the present case. The same is true even of administrative rules passed by the executive branch, where this Court has held, "[a]ll administrative rules must be consistent with laws passed by our legislature." Matter of Dahl's Estate, 286 N.W.2d 528, 530 (S.D. 1979); citing Cavanagh v. Coleman, 72 S.D. 274, 33 N.W.2d 282 (1948). This is

even true of common law when it conflicts with statutes or the constitution. This Court has held that "[t]he common-law is in force in South Dakota, except where it conflicts with the Constitution or statutes of this state. As any application of this doctrine would conflict with the Constitution and statutes of this state as we have previously discussed, the doctrine is inapplicable." State v. Wilson, 2000 S.D. 133, ¶ 18, 618 N.W.2d 513, 520.

A presiding judge may not override clearly articulated statutes and preempt the power of the Legislature or the operation of statutes by a standing order that is both prospective and general.

It should also be noted that there is a process for the Legislature to consolidate Shannon County and Fall River County into one county, but the legislature has not acted in that regard. This Court discussed this in a challenge by Tripp County residents to providing various county services to members of Todd County, a county which, like Shannon County, is subsumed within an Indian reservation. The Court said that

> Consolidation comprehends the 'combination into one unit' and therefore, 'to consolidate means something more than rearrange or redivide.' *Independent District of Fairview v. Durland*, 45 Iowa 53, 56 (1876). Tripp and Todd Counties have not been combined into one unit. Each county has a separate budget. Tripp County officials keep separate accounts for the two counties. Taxes collected from the two counties are segregated. Todd County has its own highway department and Food Stamp Program. This separation of government functions is the nature of the attachment, not consolidation, as the legislature structured it, and these counties have stayed within the guidelines. Indeed all of the statutory attachment provisions were followed prior to the decision of *Little Thunder* [*v. Kneip*, 518 F. 2d 1253 (8th Cir. 1975], *supra*, and there has been no evidence of change since that decision. The right to participate in county elections does not work a consolidation of the two counties. They are still two separate units which are merely attached for administrative purposes. *In Williams v. Book*, 75 S.D. 173, 61 N.W.2d

> 290 (1953), this court stated that in the absence of constitutional limitations, legislative power over counties is plenary and supreme. As discussed earlier, the legislature had the power to attach Todd County to Tripp County in the manner prescribed by the statutes. It provided a separate method for counties to consolidate. The consolidation statutes provide that in order for consolidation of two counties to take place the electors of the counties must petition the board of county commissioners to hold an election to determine the question of consolidation. SDCL 7-2-1. A majority of all votes cast at such election must be in favor of such consolidation for it to take place. SDCL 7-2-3. There can be no consolidation until there is an election.

Tripp Cnty. v. State, 264 N.W.2d 213, 220-21 (S.D. 1978). This discussion is helpful because the South Dakota Legislature has not chosen to consolidate Shannon and Fall River Counties either, and since at least 1982 they are both organized counties and Shannon County only hires Fall River County to perform some, but not all of its county functions.

That arrangement does nothing to change or controvert the venue statutes in South Dakota, nor does it diminish the fundamental rights of Shannon County residents who are also citizens of the State of South Dakota and the United States of America, some of whom also enjoy political membership in the Oglala Sioux Tribe.

As a distinct county of the State of South Dakota, Shannon County and its residents are entitled to the same rights and privileges of citizenship as any other citizen of this state. That means that the plaintiff in this case is also entitled to have her case venued pursuant to South Dakota statutes, in Shannon County, and

to have a jury from her county hear her case accordingly, either in a temporary courthouse within Shannon County, which has been done in the past to make it easier for Shannon County jurors to appear, or to hold the trial in the Fall River County courthouse but to summons Shannon County jurors for such a trial.

There are numerous lesser restrictive alternatives to the wholesale deprivation of venue and the rights of plaintiffs and potential jurors from Shannon County by a standing order absolutely changing venue in all cases prospectively, even if there was, *arguendo*, a factual showing of a real problem of jurors not showing up when summoned. Jurors often do not show up in most of the counties in South Dakota. These alternatives include, but are not limited to issuing a warrant for ignoring such summons, which can be enforced whenever a reservation resident is found outside of the boundaries of the reservation; also by requesting an arrangement between the Oglala Sioux Tribe and the Seventh Judicial Circuit to provide tribal enforcement of state summonses when they are ignored by jurors; by holding the trial on the reservation in Shannon County so that jurors are more likely to appear because they will still be within the boundaries of the reservation – which is a reasonable alternative and has been very effective in the past in obtaining good participation by potential jurors; or by calling additional panels of jurors from Shannon County to Fall River County to ensure that there will be adequate jurors. This has been done previously, and has worked well in Tripp County, for example, when there is a Todd County jury trial held there, and in Shannon County.

## CONCLUSION

Intermediate Appellant and Plaintiff hereby respectfully requests that this Honorable Court reverse the Order of the trial court requiring the user of Fall River County jurors for a properly-venued Shannon County trial and remand to the trial court directing it to act consistent with the Court's Order to seat Shannon county jurors, and further to permanently vacate and/or quash the December 17, 2009 standing order of Seventh Judicial Circuit Court Judge Jeff Davis.

Dated this 7th day of April, 2015.

ABOUREZK & ZEPHIER, P.C.

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CERTIFICATE OF SERVICE

The undersigned Attorney for Appellant, hereby certifies that on the 7th day of April, 2015, a true and correct copy of Appellant's Brief, in the above-captioned matter, was e-mailed to:

Gregory J. Bernard
Thomas, Braun, Bernard & Burke, LLP
4200 Beach Drive, Suite 1
Rapid City, SD 57702

and the original and two (2) copies of Appellant's Brief were mailed by first class mail to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, 500 East Capitol, Pierre, South Dakota 57501.

/s/ Charles Abourezk

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A–66(b)(2), counsel for the Appellant does hereby submit the following:

The foregoing brief is 23 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word processor used to prepare this brief indicates there are a total of 5140 words and 25861 characters in the body of the brief. This Brief was prepared with WordPerfect X6 Microsoft Office Professional.

/s/ Charles Abourezk

APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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APPEAL # 27298

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VERA GOOD LANCE,

Plaintiff,

v.

BLACK HILLS DIALYSIS, LLC, and
LeETTA BREWER,

Defendants.

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# APPELLEE'S BRIEF

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THE HONORABLE ROBERT A. MANDEL

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**The Order granting petition for allowance of appeal from intermediate order was granted on February 10, 2105.**

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## JURISDICTIONAL STATEMENT[1]

Plaintiff/Appellant Hilda Kills Small, as Special Administrator of the Estate of Vera Good Lance[2] ("Kills Small") appeals from an *Order Denying Plaintiff's Motion to Summon Shannon County Jurors for Trial* dated December 19, 2014. That same day, Defendants/Appellees Blacks Hills Dialysis, LLC ("BHD") and LeEtta Brewer (collectively "Defendants") filed and served a *Notice of Entry of Order Denying Plaintiff's Motion to Summon Shannon County Jurors*. App. 1-3. On December 29, 2014, Kills Small filed a *Petition for Permission to Appeal* with the Supreme Court. App. 4-13. In response, Defendants filed *Defendant's Response to Plaintiff's Petition for Permission to Appeal.* This Court granted Kills Small's Petition on February 10, 2015. App. 14-15. This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3 and SDCL 15-26A-10.

## STATEMENT OF THE ISSUES

I. Whether Judge Davis' *Order Establishing Jury Trial Venue* dated December 17, 2009 should be vacated.

The circuit court did not vacate the *Order Establishing Jury Trial Venue*.

*State v. Knight*, 219 N.W. 258 (S.D. 1928)

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[1] For convenience, Defendants BHD and Ms. Brewer will use the same citation references as established in *Appellant's Opening Brief*. References to hearing transcripts all pertain to the Motions Hearing before the Honorable Robert A. Mandel on December 19, 2014 at 2:15 p.m. and will be designated by the letters "HR" followed by the appropriate page number(s) and line(s). References to the Appellant's Appendix will be designated by the letters "App." followed by the appropriate page number(s). References to the Appellees' Appendix will be designated by "Aple." followed by the appropriate page number(s). References to *Appellant's Opening Brief* will be designated by "App. Brief" followed by the appropriate page number(s).

[2] Mrs. Good Lance died on about October 14, 2014 of causes not related to the issues in this case. On December 3, 2014, the court entered an *Order for Appointment of Special Administrator* in which it appointed Hilda Kills Small, the daughter of Ms. Good Lance, as Special Administrator of the Estate of Vera Good Lance. The caption of the case should reflect this change.

SDCL 21-31-1

SDCL 21-31-2

SDCL 16-13-37

II. Whether under the South Dakota Constitution, the United States Constitution, South Dakota Statutes, Judge Davis' *Order Establishing Jury Trial Venue*, President John Yellow Bird Steele's Executive Order, and the Shannon/Fall River County Contract, the trial of the above captioned matter should take place in Fall River County with jury panels summoned from Fall River County.

The circuit court held in the affirmative.

*United States v. State of South Dakota*, 636 F.2d 241 (8th Cir. 1981)

*Bradley v. Deloria*, 1998 S.D. 129, 587 N.W.2d 591

*State v. Aesoph*, 2002 S.D. 71, 647 N.W.2d 743

SDCL 16-13-10.1

SDCL 16-13-35

SDCL 16-13-41

SDCL 16-13-45

## STATEMENT OF THE CASE

BHD is a South Dakota limited liability company with its principal office in Rapid City, South Dakota. BHD provides dialysis services at a Pine Ridge facility, located in Shannon County, South Dakota. On October 27, 2011, LeEtta Brewer, CNA, was employed by BHD and acting within the scope of her employment in her care of Vera Good Lance. On October 27, 2011, Mrs. Good Lance suffered a fall while being weighed in preparation for dialysis treatment. Thereafter, Ms. Good Lance sued BHD and Ms. Brewer in Shannon County, Seventh Judicial Circuit Court, State of South Dakota.

Pursuant to the Shannon/Fall River County Contract, Shannon County contracts for necessary governmental services, including court services, with Fall River County and has contracted for all court proceedings to be held at the Fall River County Courthouse located in Hot Springs. Aple. 3. Accordingly, all of the court proceedings for the circuit court matter have been held at the Fall River County Courthouse. At an August 29, 2014 hearing, the Honorable Robert A. Mandel advised the parties that the court intended to hold the trial of the matter at the Fall River County Courthouse with Fall River County jurors. Soon after, Kills Small filed *Plaintiff's Motion to Summon Shannon County Jurors for Trial* and *Brief in Support* in which it moved the court to summon Shannon County jurors and either ask for the assistance of the Oglala Sioux Tribal Court in enforcing juror summons or in the alternative hold the trial at a place within Shannon County convenient to court staff such as the Kyle Courthouse. Aple. 8-9. Defendants opposed the motion on the grounds that the circuit court is without jurisdiction over Indians residing within the exterior boundaries of the Pine Ridge Indian Reservation and cannot enforce the statutory procedures to compel and seat a jury, including contempt for failure to appear or for misconduct, which results in a denial of both parties' right to a randomly selected, fair and impartial jury and further denies the parties their equal protection and due process rights.

On December 19, 2014, after extensive briefing of the issue by both parties, the circuit court heard oral argument on Plaintiff's motion. The court denied Plaintiff's motion and signed an *Order Denying Plaintiff's Motion to Summon Shannon County Jurors for Trial* in which the court ordered that the trial take place at the Fall River County Courthouse in Hot Springs and all jury panels be summoned from Fall River

County. App. 3. That same day, Defendants filed and served a *Notice of Entry of Order Denying Plaintiff's Motion to Summon Shannon County Jurors*. App. 1-3. On December 29, 2014, Kills Small filed *Plaintiff's Petition for Permission to Appeal* with this Court. App. 4-14. In response, Defendants filed *Defendant's Response to Plaintiff's Petition for Permission to Appeal.* This Court granted Kills Small's Petition on February 10, 2015. App. 14-15.

## ARGUMENT

### I. Kills Small does not have standing to vacate Judge Davis' *Order Establishing Jury Trial Venue*.

Kills Small appears to assert that Judge Davis' *Order Establishing Jury Trial Venue* is beyond his jurisdiction as a presiding judge of the Seventh Judicial Circuit. See App. Brief 2 ("Whether United States Constitution and South Dakota Constitution . . . are violated by a standing order issued by a presiding judge of the Circuit Court permanently establishing and transferring venue. . .[.]) This notion finds further support when one considers the relief Kills Small seeks. Kills Small asks this Court to "vacate the standing order of the presiding judge of the Seventh Judicial Circuit and to reverse the trial court's order denying Plaintiff's/Appellant's Motion to Summon Shannon County Jurors for Trial and remanding for trial consistent with such reversal, thus allowing Shannon County residents and citizens of South Dakota to be summoned and allowed to serve on this jury." App. Brief 2. This is not the proper posture for Kills Small to seek to vacate Judge Davis' order.

SDCL 21-31-1 provides:

> A writ of certiorari may be granted by the Supreme and circuit courts, when inferior courts, officers, boards, or tribunals have exceeded their

> jurisdiction, and there is no writ of error or appeal nor, in the judgment of the court, any other plain, speedy, and adequate remedy.

SDCL 21-31-2 sets forth the proper procedure to apply for a writ of certiorari which begins with the interested party making an affidavit. The only other plausible option to ask this Court to vacate a presiding circuit court judge's standing order is a writ of mandamus which similarly requires an application by affidavit. SDCL 21-29-1 and 21-29-2. Kills Small has made no such applications in this case. "Both certiorari and mandamus are extraordinary remedies and apt for use by this [C]ourt in proper cases in the exercise of its general superintending control over inferior courts and for the purpose of preventing injustice by acts of such courts beyond the scope of their jurisdiction." *State v. Knight*, 219 N.W. 258, 261 (S.D. 1928). Additionally, Judge Davis is not a party to this action and has not been given the opportunity to defend his *Order Establishing Jury Trial Venue*. If Kills Small believes that such order is beyond the presiding judge's jurisdiction, then the proper remedy is for Kills Small to institute an action for a writ of certiorari or a writ of mandamus, bring the presiding judge into the action as a party, and give the presiding judge the opportunity to respond and defend. *Id.*

Even if Kills Small had standing to ask this Court to vacate a presiding judge's order, Judge Davis' order is consistent with South Dakota law. SDCL 16-13-37 addresses a presiding judge's duties regarding jury panels and summonses. It provides:

> The presiding judge of each circuit, or a judge of the circuit designated by him, shall prescribe the manner in which the jury panels are to be utilized for the trial of cases in the counties of the circuit and how they shall be summoned.

SDCL 16-13-37. As the presiding judge of the Seventh Judicial Circuit, Judge Davis' *Order Establishing Jury Trial Venue* is within this power.

II. Under the South Dakota Constitution, the United States Constitution, South Dakota Statutes, Judge Davis' *Order Establishing Jury Trial Venue*, President John Yellow Bird Steele's Executive Order, and the Shannon/Fall River County Contract, the trial of the matter should take place in Fall River County with jury panels summoned from Fall River County.

The South Dakota Constitution provides that the right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy. S.D. Const. Art. VI, § 6. See also SDCL 15-6-38(a). An essential element of the constitutional right to a fair and impartial jury is that the jury be randomly selected from a fair cross section of the county in which the case is tried. SDCL 16-13-10.1 (emphasis added); *St. Cloud v. Class*, 550 N.W.2d 70 (S.D. 1996). To that end, "all citizens of this state, qualified for jury duty, shall have the opportunity to be considered for service on . . . petit juries in the courts of this state and shall have an obligation to serve as jurors when summoned for that purpose." SDCL 16-13-10.1. Each grand and petit juror summoned shall appear before the court on the day and at the hour specified in the summons and shall not depart without leave of court. SDCL 16-13-41. An essential element of the random fair cross-section requirement of the parties' right to a fair and impartial jury is the circuit court's ability to enforce compulsory attendance of potential jurors summoned for jury duty. See *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wa. 1943) (compulsory attendance of jurors is necessary if the requirement of the representative character of a jury is to be met).

Under state law, if a potential juror fails to return a summons to appear for jury service, the sheriff of the county shall personally serve the summons on the juror. SDCL 16-13-35. The policy of obligatory jury service is enforced through the court's contempt powers. SDCL 16-13-45. However, if the circuit court's *Order Denying*

*Plaintiff's Motion to Summon Shannon County Jurors for Trial* is reversed, compulsory attendance of jurors will be nonexistent.

Nearly 93 percent of the population of Shannon County is Native American. Aple. 23. As the Court is aware, Shannon County is entirely within the exterior boundaries of the Pine Ridge Indian Reservation. If Kills Small succeeds in overturning the circuit court, of those jurors summoned by the clerk for jury duty, a vast majority will be Native Americans living within the exterior boundaries of the Pine Ridge Indian Reservation not subject to the circuit court's jurisdiction.

The circuit court has no jurisdiction over Indians residing on the Pine Ridge Indian Reservation. *United States v. State of South Dakota*, 636 F.2d 241, 244, n.3 (8th Cir. 1981) ("The State of South Dakota and Fall River County officials have no jurisdiction over Indians residing on the [Pine Ridge Indian] Reservation."). It is well established that state officials have no jurisdiction on Indian reservations, either to serve process on an enrolled Indian or to enforce a state judgment. *Bradley v. Deloria*, 1998 S.D. 129, ¶ 5, 587 N.W.2d 591, 593 (citations omitted). "An Indian reservation constitutes a sovereign nation separate from a state and a reservation Indian's domicile on the reservation is not an in-state contact which grants jurisdiction to state courts." *Id.* (citations omitted). Tribal members residing in Indian country are generally not subject to state statutory requirements and cannot be compelled to appear as jurors. *State v. Aesoph*, 2002 S.D. 71, 647 N.W.2d 743, 758, n.13. Because the circuit court has no jurisdiction on the Pine Ridge Indian Reservation, it cannot enter a valid contempt order against persons living there. See *Bradley*, 587 N.W.2d 591 at 593 and *Family Farms,*

*Inc. v. Heartland Organic Foods, Inc.*, 2003 S.D. 45, 661 N.W.2d 719 (abrogated on other grounds by *Sazama v. State ex. rel. Muilenberg*, 2007 S.D. 17, 729 N.W.2d 335).

Kills Small cites *Bradley v. Deloria* and particularly SDCL 15-6-4(c) and asserts "[t]his certainly covers both summonses and subsequent process required if a person does not appear pursuant to such summonses. . . [.]" App. Brief 14-15. Kills Small's argument is misplaced. Defendants agree that SDCL 15-6-4(c) allows for an Indian residing in Indian country to be served a summons by a person not a party to the action who is an elector of any state. However, this statute does not address South Dakota's compulsory process for jurors who fail to accept notice of juror summonses or who fail to appear. Instead, if the Fall River/Shannon County Clerk of Courts sent juror summons to prospective Shannon County jurors and they were not returned, the proper statutory procedure is for the Court to order the Shannon County Sheriff to personally serve the summonses upon those prospective jurors who have not returned summonses and for the Court to issue contempt orders against those who still refuse to return summonses or fail to appear for jury selection at the appointed time and the court may further fine and imprison such persons. SDCL 16-13-35 & 45. However, the Sherriff of Shannon County and the circuit court, as officials of the State of South Dakota, have no jurisdiction over Indians residing on the Pine Ridge Indian Reservation. *Bradley*, 587 N.W.2d 591 at 593. The inability to follow this procedure would be a substantial failure to comply with the statutory guarantees of randomness and fairness in the jury selection process.

Kills Small's proposed jury selection process is flawed. There is no compulsion or threat of contempt on the prospective jurors to return juror summonses or to appear as ordered. In fact, by executive order and proclamation of the OST Tribal President,

prospective jurors living on the Pine Ridge Indian Reservation are instructed and expected to ignore the subpoenas Kills Small suggests be issued in this case. See App. 17-18. Kills Small asserts that the executive order is merely a political expression and is without legal effect and invites this Court to simply ignore an executive order of tribal government. App. Brief 8-9. Kills Small has provided no evidence that this order is no longer in effect or that it is not being followed in Pine Ridge. Furthermore, John Yellow Bird Steele was re-elected as president of the Oglala Lakota Nation on November 4, 2014. Defendants submit that it is unlikely that President John Yellow Bird Steele will revoke his own executive order proclaiming that service of process issued by any state court is inapplicable and without force or effect throughout the exterior boundaries of the Pine Ridge Indian Reservation. Nevertheless, any such revocation would not change the current status of the law that the circuit court lacks jurisdiction over Indians residing on the Pine Ridge Indian Reservation.

The Honorable Jeff W. Davis, as Presiding Judge of the Seventh Judicial Circuit, has addressed the jurisdictional deficiency associated with judicial proceedings filed in Shannon County in his *Order Establishing Jury Trial Venue*. The order provides in part:

> [T]he venue of all state judicial matters filed in Shannon County shall be tried in Fall River County in accordance with the law and policies set out in South Dakota Statutory authority, the Shannon/Fall River County Contract for governmental services and Oglala Sioux Tribal Proclamation and Executive Order declaring state court service and filings unenforceable on the Pine Ridge Indian Reservation. This Order allows consideration of the fact that a state court judge lacks jurisdiction in tribal court to summon and seat the jury panel and lacks the inherent authority to invoke statutory procedures necessary to ensure a fair trial. The Order further allows consideration of factors affecting efficient administration of judicial resources such as time, cost, and court services necessary to conduct a jury trial.

App. 16 (emphasis added).

Kills Small represents to the Court that the "holding" in *Nebraska Elec. Generation & Transmission Co-op., Inc. v. Markus*, 241 N.W.2d 142 (S.D. 1976), supports its position. App. Brief 18. Kills Small cites a footnote of the case and erroneously represents it as this Court's holding. *Id.* The holding in *Nebraska Elec.* actually supports the jury panel procedure the circuit court intends to follow in this case. In *Nebraska Elec.* an electric cooperative brought a condemnation proceeding against a husband and wife for condemnation of their land for a power line easement. The real property involved in the condemnation was located in Todd County. *Nebraska Elec.* at 243. Todd County does not have a county seat; the town of Winner in neighboring Tripp County serves as Todd County's administrative center. Therefore, the condemnation case was tried in Tripp County. *Id.* Counsel for the electric cooperative challenged the jury panel *inter alia* on the ground that no Todd County residents were included on the panel. *Id.* This Court held that the electric co-op did not to meet its burden of proof that prejudice resulted from the trial court's failure to impanel a new jury. *Id.* at 245. In affirming the trial court's decision, this Court noted the following regarding the trial court's procedure in compiling the jury panel:

> In an affidavit filed on July 26, 1974, the Tripp County clerk of courts stated in part: 'That in securing the jury panel for the jury that heard the Markus case there was an intentional omission of any residents of Todd County, South Dakota, in the compilation of the jury panel.' We presume that the trial court was not unmindful of the procedure used to impanel a jury for Tripp County by reason of the statement of the trial judge in denying the motion 'for the reason that Todd County has been attached to Tripp County for the purpose of Court activity and for the further reason that the Court does not have jurisdiction over the majority of the residents of Todd County and could not therefore compel them to serve as jurors.'

*Id.* at n. 1. (emphasis added). In *Nebraska Elec.*, the trial court did not have jurisdiction over the majority of the residents in Todd County because Todd County lies entirely

within the boundaries of the Rosebud Indian Reservation. This Court has upheld the use of the precise jury procedure that the circuit court intends to use in this case; the circuit court can try the case in Fall River County, as Shannon County is attached to Fall River County for purposes of court activity, and the court can impanel a jury from Fall River County as it is the same county in which the case will be tried and the court lacks jurisdiction over the majority of residents in Shannon County.[3]

Kills Small also argues that *Nevada v. Hicks* "contravenes the very findings of Judge Davis in the standing order of December 17, 2009." App. Brief 13. Again, Kills Small is in error. In *Nevada v. Hicks,* Hicks was an Indian residing on a reservation who came under suspicion of having illegally killed a California bighorn sheep off the reservation. *Nevada v. Hicks,* 533 U.S. 353, 355-56 (2001). A Nevada state game warden obtained a search warrant subject to obtaining approval from the tribal court. *Id.* According to the judge who issued the search warrant, this tribal-court authorization was necessary because "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation." *Id.* at 356. A search warrant was obtained from the tribal court, and the warden, accompanied by a tribal police officer searched Hicks' yard and did not find evidence of the alleged crime. *Id.* Approximately a year later, a tribal police officer reported to the warden that he had observed two mounted bighorn sheep heads in Hicks' home. *Id.* The warden again obtained a search warrant from state and tribal court and searched Hicks' home unsuccessfully. *Id.* Hicks claimed that his sheep heads had been damaged and the second search exceeded the bounds of the warrant. *Id.* Hicks brought

[3] Anecdotally, Kills Small notes a number of state court cases which were apparently tried on Indian Reservations in Todd or Shannon county or with Todd or Shannon county residents as jurors. However, there is no evidence that the place of the trial or the jurisdiction over venire members was a controverted issue in any of these cases.

suit against the tribal judge, tribal officers, state wardens, and the State of Nevada in tribal court. *Id.* The Supreme Court held the following: the tribal court did not have jurisdiction to adjudicate tort claims arising from state officials execution of process on reservation lands for evidence of an off-reservation crime; the tribal court did not have authority to adjudicate § 1983 claims; and exhaustion of claims in tribal court was not required before seeking relief in federal court. *Id.* at 374. The Supreme Court's holdings do not change that in this case the circuit court is without jurisdiction to impanel a jury from the Pine Ridge Indian Reservation.

The Honorable Judge Mandel addressed *Nevada v. Hicks* in denying *Plaintiff's Motion to Summon Shannon County Jurors for Trial*. Judge Mandel stated:

> But two of the cases that I look at, and I've got to apologize, I don't have the cites in front of me here, but that I think shed a lot of light on this are, first, the U.S. Supreme Court cases of Nevada v. Hicks, which there's been a lot of discussion about whether or not what was said in that was largely dicta or controlling or what, and it hasn't really been revisited to any great extent by the Supreme Court since then. But that would indicate some merit to your position, Mr. LaFleur. Because that would indicate that, for example, the State could engage in service of process on the reservation, even to Tribal members within the reservation boundary. But, as I say, it's largely believed that most of that is dicta.
>
> However, the Supreme Court of the State of South Dakota, in the Cummings case, which was a criminal matter, basically ended up with that ruling that it was dicta. That was a hot-pursuit case involving the defendant who had allegedly been driving under the influence off the reservation, he was followed onto the reservation and, ultimately, taken into custody, and the decision was made that the State had no jurisdiction to do that by the State Supreme Court. And they specifically discuss Nevada v. Hicks, and they - - you know, I'm not quoting them word for word, but essentially they didn't feel that it did constitute such a ruling in the state and that the State did not have jurisdiction to do that.

HR 9:3-25; 10:1-14.

Furthermore, in discussing *Nevada v. Hicks,* this Court stated:

> [T]his Court has already determined that our State never effectively asserted jurisdiction over the reservations in South Dakota. Nothing in current federal enactments has overruled the general proposition that the State has no jurisdiction to act on the reservations in South Dakota. It is difficult to maintain the proposition that the State, after having failed to effectively assert jurisdiction when given the opportunity by Congress, now suddenly gains that jurisdiction through no action of the State or the Tribe.
> . . .
>
> We decline to usurp the power of the United States Congress to make laws with respect to Native American rights and sovereignty and the authority of the Supreme Court to interpret those laws by relying on dicta from a factually and legally distinguishable case.

*State v. Cummings*, 2004 S.D. 56, 679 N.W.2d 484, 488-89. The circuit court correctly considered this Court's analysis regarding the State's jurisdiction in Indian Country as set forth in *Cummings,* and it applied that same reasoning in denying Kills Small's motion.

Judge Mandel did not end with an analysis of *Nevada v. Hicks* only. The circuit court went on to note the following:

> I have looked at the documents in this case, and I think they're telling. The executive order issued by John Yellow Bird Steele does specifically say that the service of process issued by any State court shall not hereinafter apply to, nor be of any force or effect throughout the exterior boundaries of the Pine Ridge Indian Reservation.
>
> And I go further and I look at the order establishing jury trial venue signed by Judge Davis on the 17th of December of 2009, and that clearly sets forth how this matter is to be handled.
> . . .
>
> And I'll simply say that, at this point, the Court is going to deny plaintiff's motion to summon Shannon County jurors for trial. We are going to go forward with the trial here in Fall River County. The jury panels will be summoned from Fall River County. And I make - - I think both sides have approached this in depth and I make no criticism of anyone in this, but based on both the state of the law and the order in this circuit, that's going to be the Court's decision in this matter.

HR 10:15-25; 11:6-15. In issuing its *Order Denying Plaintiff's Motion to Summon Shannon County Jurors for Trial,* the circuit court considered both state and federal case law, President John Yellow Bird Steele's Executive Order, as well as Judge Davis' *Order Establishing Jury Trial Venue*.

Finally, Kills Small continually asserts that this is a venue issue, and Defendants did not move for or request a change of venue. App. Brief 4, 15. Kills Small's reliance on venue is in error. Venue is not the true defect at issue if the circuit court's *Order Denying Plaintiff's Motion to Summon Shannon County Jurors for Trial* is reversed; jurisdiction is the defect. In defining venue, Blacks Law discusses the relationship between venue and jurisdiction:

> Venue must be carefully distinguished from jurisdiction. Jurisdiction deals with the power of a court to hear and dispose of a given case. . . Venue is of a distinctly lower level of importance; it is simply a statutory device designed to facilitate and balance the objectives of optimum convenience for parties and witnesses and efficient allocation of judicial resources.

Black's Law Dictionary (9th ed. 2009) (internal citations omitted). Blacks Law defines jurisdiction at great length including defining jurisdiction as follows: a court's power to bring a person into its adjudicative process; a court's power to decide a case or issue a decree; a geographic area within which political or judicial authority may be exercised. *Id.* The circuit court's lack of jurisdiction over Indians on the Pine Ridge Indian Reservation is the true shortcoming at issue and Kills Small's proposed jury selection process fails as a result of this jurisdictional deficiency. Furthermore, venue is established by Judge Davis' Order and by the fact that Shannon County is annexed to Fall River County, so no change of venue is necessary. In fact, the contract between Shannon and Fall River County provides: "The parties further agree that court proceedings will be

held at the Fall River County Courtroom during the term of this Contract at no additional cost to Shannon." Aple. 3. This is a Shannon County case that, consistent with Judge Davis' Order and the Shannon/Fall River County Contract, is being properly held in Fall River County. This Court should affirm the circuit court and allow the circuit court to proceed with the trial at the courthouse in Hot Springs with a Fall River County jury.

A. Structural Infirmity of Kills Small's Proposed Jury Selection Process Violates Defendants' Constitutional and Statutory Rights to a Fair and Impartial Jury

Because the circuit court lacks jurisdiction to enforce compulsory attendance of jurors, or to enforce any orders necessary to carry out the function of impaneling a jury from the Pine Ridge Reservation, Kills Small's proposed jury selection process suffers from a structural defect which is not subject to a harmless error review. *State v. Blem*, 2000 S.D. 69, 610 N.W.2d 803; *State v. LaMere*, 2 P.3d 204 (Mont. 2000). A structural defect is an error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Blem*, 610 N.W.2d at 810 (citing *LaMere*, 2 P.3d at 214).

The right to an impartial jury is a fundamental right. *Blem*, 610 N.W.2d at 809. The jury selection statutes in South Dakota are designed to secure rights deemed fundamental to our system of justice by minimizing and, indeed, preempting the violation of such fundamental rights from the outset of trial. *Id.* The South Dakota statutory procedures for selecting jurors establish objective methods for the random selection of trial jurors in South Dakota. *Id.* These objective procedures, by seeking to eliminate as far as possible the vagaries of human subjectivity and arbitrariness from the jury selection process, secure a defendant's fundamental right to an impartial jury. *Id.*

To guard against arbitrary injustice, it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. *Id.* at 212 (citation omitted). Accordingly, the underlying purpose of the jury selection statutes is to provide a random selection of jurors from the entire panel or array, thus securing a fair and impartial jury. *Id.* at 213 (citation omitted); SDCL 16-13-10.1. Therefore, the jury selection process must be in substantial compliance with the prescribed statutory procedures in order to ensure randomness and fairness. *Blem* at 810. The substantial compliance standard vindicates not only the rights of the individual [parties], but also the rights of the public in ensuring that the jury system remains inviolate. *LaMere*, 2 P.2d at 211; S. D. Const., Art. VI, § 6; SDCL 15-6-38(a). These procedures primarily serve to ensure that jury panels will be selected, drawn, and summoned in a manner that reflects a fair cross-section of the community. *LaMere*, 2 P.3d at 214.

In *LaMere*, part of the Montana jury selection statutory scheme provided that:

> The clerk shall serve notice by mail on the persons drawn as jurors and require response thereto by mail as to their qualifications to serve as trial jurors. . . . If a person fails to respond to the notice, the clerk shall certify the failure to the sheriff, who shall then serve notice personally on such person and require a response to the notice.

*Id.* at 209. The trial court in *LaMere* directed the clerk to summon 100 jurors for the defendant's trial commencing the next day. Instead of following the statutory procedures, however, the clerk summoned 101 prospective jurors by telephone from a list of 200 potential jurors randomly selected by computer. *Id.* at 206. The defendant objected to the clerk's juror summons process on the basis that it did not substantially comply with the state's statutory procedures because the clerk failed to mail or have the

sheriff serve the summonses. *Id.* The defendant argued that the method of summoning jurors resulted in an arbitrary removal and *de facto* screening of the venire panel when a prospective juror did not receive, answer, or return the clerk's call. *Id.* at 206-07. The Montana Supreme Court agreed and reversed the trial court's ruling that the selection process complied with the law and the defendant's constitutional right to a fair trial. *Id.* at 209.

Specifically, the court found that failure to substantially comply with the state statutes governing jury selection process requires a *per se* rule of reversal. *Id.* at 211. The rule of automatic reversal prevails because the error by the clerk was structural in nature, and affected the very framework within which the trial proceeds. *Id.* In other words, structural errors indelibly affect the essential fairness of the trial itself. *Id.* Such structural errors precede the introduction of any evidence at trial and so it is impossible to quantitatively assess the prejudicial impact of an improperly impaneled jury in the context of the evidence at trial. *Id.* at 216. It is pure conjecture as to whether a properly selected jury would have decided a case differently than an improperly selected jury actually decided the case. *Id.* at 211. The Montana court reasoned that a structural error in the jury selection process can never be treated as harmless error because:

> (1) such an error precedes the presentation of any evidence to the jury, and cannot be analyzed as mere trial error without resorting to speculation; (2) such an error, because it precedes the trial process, cannot be quantitatively assessed for its prejudicial impact relative to the evidence introduced at trial; (3) such an error, being other than an error in the trial process, affects the framework within which the trial proceeds; and (4) the impartiality of the jury goes to the very integrity of our justice system, and the right to an impartial jury is so essential to our conception of a fair trial that its violation cannot be considered harmless error.

*Id.* at 217.

Following the *LaMere* court, this Court reached the same conclusion in *Blem*. The defendant's conviction in *Blem* was reversed by this Court because of a structural error in the jury selection process prior to the presentation of any evidence. *Blem* involved a defendant on trial for manslaughter. *Blem*, 610 N.W.2d at 805. Before voir dire commenced, the State sent a letter to the trial court requesting that it remove two potential jurors for cause. *Id.* at 807. The defendant objected, arguing that dismissing the jurors prior to voir dire would violate the statutory jury selection process, thus denying him an opportunity to determine that the two prospective jurors were not biased and should not be removed for cause. *Id.* at 808. Over defendant's objection, the trial court removed the jurors before voir dire. Reversing the trial court, this Court ruled that the removal of the potential jurors was error. *Id.* at 809.

This Court found that a statute in effect at the time provided that a juror may be excused for cause only on actual or implied bias.[4] *Id.* The criminal jury selection statute also provided that counsel for the parties shall conduct examination of prospective jurors. *Id.* at 808 (citing SDCL 23A-20-6).[5] Relying substantially upon the reasoning in *LaMere*, this Court in *Blem* found that the removal of the two jurors was a structural error resulting in a substantial failure to comply with the jury selection process. *Id.* at 810. Thus, the defendant's constitutional right to a fair and impartial jury was violated. *Id.* at 810. Importantly, the court cited with approval the *LaMere* reasons cited above for

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[4]The statute in question (SDCL 23A-20-12) was subsequently repealed and replaced with 23A-20-13.1. Section 23A-20-13.1 is the criminal version of the civil dismissal for cause statute found at SDCL 15-14-6.1. The court ruled that even if 23A-20-13.1 were in effect at the time, the same result would obtain.

[5]Compare SDCL 15-6-47(a): The court shall permit the parties or their attorneys to conduct examination of prospective jurors.

finding error where a trial proceeds with a jury selected through a process that was structurally defective. *Id.* at 809-10.

In the case presently before this Court, the circuit court's inability to enforce compulsory attendance of potential jurors from Shannon County is a structural defect, which, if permitted, would violate the Defendants' constitutional right to a random, fair and impartial jury.[6] Under Kills Small's jury selection process, the circuit court lacks any authority whatsoever to enforce the statutory scheme designed to ensure random selection of jurors from a fair cross-section of the county. Under this process, there are any number of possibilities in which the jury could be tainted or called into suspicion. For example, because there is no compulsory attendance nor threat of punishment for failing to appear or failing to follow the rules of the court, there is no incentive for disinterested jurors to appear for trial, and there is incentive for interested jurors to appear for trial (i.e., those desiring a particular outcome). There also exists the potential that the makeup of prospective jurors can be influenced by the litigants. For example, certain summoned jurors can be encouraged to appear or not appear for jury duty, and without compulsory attendance, the court and counsel would have no way of uncovering the improper influence. Similarly, there also exists the possibility that the cost of jury service may be too great for some prospective jurors who may then elect not to attend for that reason, thus causing underrepresentation or elimination of certain segments of the community from consideration as jurors. Without compulsory attendance, those living at greater distances can simply choose not to attend if they feel it would be too burdensome financially or logistically.

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[6]For the same reasons, it would also violate Kills Small's constitutional right to a random, fair and impartial jury.

The result of Kills Small's proposed jury selection process is to allow the potential jurors to decide whether they will or will not serve on a jury, rather than having the court and the litigants make that determination. This is an arbitrary removal and *de facto* screening of those venire members who choose not to respond to the subpoenas. This is neither random nor fair. As this Court has recognized, it would be extremely difficult, if not impossible, for the litigants to show that any of the above or other scenarios will or did occur at trial. *Blem*, 610 N.W.2d at 809-10. The prejudicial impact of such an error in the jury selection process cannot be quantitatively assessed relative to the evidence introduced at trial. *Id.* The mere fact that such great potential exists is sufficient to raise a reasonable apprehension that the parties will not get an impartial trial under Kills Small's proposed scheme. It is fundamentally unfair for any litigant to be forced into trial by a jury selected under such a flawed process. Such a process denies the parties their constitutional right to a random, fair jury. For this reason, the circuit court should be affirmed.

B. Kills Small's Proposed Jury Selection Process Violates the Defendants' Equal Protection Rights

The Equal Protection Clauses embodied in the Fourteenth Amendment to the United States Constitution and in Art. VI, § 18 of the South Dakota Constitution guarantees equal protection of the laws to all persons. Equal protection of laws requires that the rights of every person be governed by the same rule of law under similar circumstances. *State v. Krahwinkel*, 2002 S.D. 160, ¶ 21, 656 N.W.2d 451, 460. In traditional equal protection analysis, on both the federal and state levels, there exist three tests to be applied, depending upon the nature of the interest involved. *Lyons v. Lederle Laboratories*, 440 N.W.2d 769 (S.D. 1989). Where fundamental rights are at issue, strict

scrutiny applies. *Id.* The parties' right to a fair and impartial jury in this case is a fundamental right. *Blem*, 610 N.W.2d at 810. As such, the Court's application of the jury selection statutes in this case must withstand strict scrutiny in order to pass constitutional muster. In other words, there must be a compelling state interest furthered by the particular application (or inapplication) of the jury selection statutes in this case, which application is narrowly tailored to further that interest. *CID v. Dept. of Social Services*, 1999 S.D. 108, 598 N.W.2d 887, n.10.

Kills Small's proposed jury selection process denies the Defendants equal protection of the law. In this case, the Defendants are similarly situated as all defendants in civil cases in this state. As such, they are entitled to the benefit of the statutory protections in the jury selection statutes designed to ensure a fair and impartial jury. Although the jury selection statutes are designed to eliminate subjectivity and arbitrariness from the jury selection process in order to secure a defendant's fundamental right to an impartial jury, *Blem*, 610 N.W.2d at 810, such protections are absent from Kills Small's proposed process because the court lacks jurisdiction to enforce those powers necessary to ensure a fair and impartial jury - compulsory attendance and contempt powers. No compelling governmental interest sufficient to outweigh the Defendants' fundamental right to fair and impartial jury is served by subjecting the Defendants to a trial by jurors who are not subject to the court's jurisdiction, either in the jury selection process or during the trial itself. No compelling governmental interest is served by denying the Defendants a random, fair jury drawn with the same protections afforded other litigants in the jury selection statutes. For this reason, Kills Small's proposed process denies Defendants the equal protection of the law in violation of their

state and federal constitutional rights.[7] Under these circumstances, the circuit court should be affirmed.

C. Kills Small's Proposed Jury Selection Process Violates the Defendants' Due Process Rights

Both the South Dakota Constitution and the United States Constitution, through application of the Fourteenth Amendment, guarantee that the parties will not be deprived of life, liberty, or property without due process of law. See South Dakota Constitution, Art. VI, § 2; U. S. Const., amend. V and XIV. In this case, the Defendants are at risk to pay a substantial sum of money if a jury finds them liable to the Plaintiff and awards damages. The procedural protections against subjectivity and arbitrariness in the jury selection statutory scheme designed to ensure a fair and impartial jury are nonexistent under Kills Small's proposed process. As applied to the Defendants, the jury selection process proposed by Kills Small violates both the procedural and substantive due process rights secured to the Defendants by the state and federal constitutions.

Procedural due process provides that certain substantial rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures. *Tri-County Landfill Ass'n, Inc. v. Brule County*, 2000 S.D. 148, 619 N.W.2d 663, 668. In this case, if the circuit court is reversed, the procedures in the jury selection statutes designed to ensure randomness and fairness will be nonexistent. Kills Small's proposed process is constitutionally inadequate, as it fails to ensure as much as possible that the Defendants will receive a fair and impartial jury trial.[8]

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[7]For the same reasons, it denies Kills Small equal protection of the law.

[8] For the same reasons, it fails to ensure as much as possible that Kills Small will receive a fair and impartial jury trial.

Substantive due process provides that certain types of governmental acts violate the Due Process Clause regardless of the procedures used to implement them. *Id.* at 668 (citation omitted). In this case, without jurisdiction over the prospective jurors and without the power necessary to empanel and instruct a jury from or in Pine Ridge, no procedure used to draw a jury from Shannon County will overcome this structural defect. Again, no compelling governmental interest is served by denying the Defendants the procedural and substantive due process protections afforded to them by the state and federal constitutions. For this reason, the circuit court should be affirmed.

D. Jurisdiction, not race, is at issue

Kills Small asserts that the standing order deprives American Indians from enjoying the privilege and obligation of sitting on a jury "[b]y their place of birth within an Indian reservation in South Dakota, and their American Indian race[.]" App. Brief 16. Kills Small further alleges that the "permanent exclusion of a county's jury pool with 93 percent American Indians in favor of cases tried to a jury with 7 percent or less American Indians, by a circuit court's standing order, is by definition "the systematic exclusion of the group from the jury-selection process."' App. Brief 16, n. 3. Kills Small's race-based arguments are misplaced.

In effect, the standing order affects 100% of Shannon County residents, including residents who are not members of the Oglala Sioux Tribe.[9] Defendants' arguments are based upon the fact that the circuit court lacks the power and authority to exercise

[9] Kills Small and her counsel lack standing to assert the rights of a Shannon County venire member. "Every action shall be prosecuted in the name of the real party in interest." SDCL 16-6-17(a). Mr. LaFleur does not represent a client that is a potential Shannon County venire member in this case who is allegedly aggrieved by the presiding judge's standing order or by Judge Mandel's ruling which is being appealed. Therefore, there is no case in controversy regarding the rights of Shannon County citizens to sit on a jury.

jurisdiction over Native American venire members residing within the exterior boundaries of the Pine Ridge Indian Reservation - a structural defect, the prejudicial effect of which cannot be proven post-trial by either party. Without jurisdiction, under Kills Small's proposed process, the parties would effectively have a volunteer jury. This would result in a deprivation of both Defendants and Kills Small's constitutional right to a randomly selected, fair and impartial jury as well as their equal protection and due process rights.

This is not the first time that Kills Small has made race the issue. At the circuit court level, in support of denying *Plaintiff's Motion to Summon Shannon County Jurors for Trial*, Defendants set forth arguments similar to those contained in this brief. In *Plaintiff's Brief in Reply to Defendant's Brief in Opposition to Plaintiff's Motion to Summon Shannon County Jurors for Trial*, Kills Small responded to Defendants' arguments by essentially labeling the Defendants and even their counsel as racists. For example, Kills Small went so far as to say the following:

> Defendant[s] [*sic*] opposes the Plaintiff's Motion to Summon Shannon County Jurors for Trial by invoking the kind of surreal logic that previously existed in the deep South of the United [States] [*sic*].
> . . .
> If one were to summarize the essence of Defendant's argument, it is that although Defendant[s] [*sic*] can do business in and make profits off of the residents of Shannon County, these same residents are not quite good enough to enjoy the privilege of citizenship by sitting on juries hearing cases properly brought in Shannon County.
> . . .
> Under the facts and law, this position only strains credulity, it may actually rise to the level of some of the worst racially-discriminatory arguments ever made in the court system in South Dakota.

Aple. 25-26. Kills Small then goes on to personally attack Defendants' counsel. Aple. 27 ("While it is a refreshing experience to see Defendants' counsel arguing for the

sovereignty and jurisdiction of the Oglala Sioux Tribe . . .”). Kills Small’s racially charged accusations and innuendoes are undeserving and unproductive.

Defendants’ arguments are rooted in jurisdiction. It happens that the circuit court’s lack of jurisdiction over approximately 93% of the population of Shannon County stems from the fact that the majority Shannon County’s residents are Native American, however, articulating lack of jurisdiction does not make Defendants or their arguments racist. The circuit court’s lack of jurisdiction over the vast majority of Shannon County residents is at issue in this case.

## CONCLUSION

In denying *Plaintiff’s Motion to Summon Shannon County Jurors for Trial*, the circuit court ensured that the statutory procedure that protects both Plaintiff and Defendants’ right to a randomly selected, fair and impartial jury is intact. The circuit court should, consistent with the South Dakota Constitution, the United States Constitution, South Dakota Statutes, Judge Davis’ Order Establishing Jury Trial Venue, the OST Executive Order and Proclamation, and Shannon/Fall River County Contract, proceed with the trial of the matter in Fall River County and empanel a Fall River County jury as it is the county in which the case will be tried and the circuit court has jurisdiction over those potential jurors residing in Fall River County. Kills Small’s proposed jury selection process results in an irreparable jurisdictional deficiency of the circuit court. Consequently, the parties are denied the right to a randomly selected, fair and impartial jury and are denied their equal protection and due process rights. Therefore, Defendants respectfully request that this Court affirm the circuit court’s *Order Denying Plaintiff’s Motion to Summon Shannon County Jurors for Trial*.

## REQUEST FOR ORAL ARGUMENT

Appellees Black Hills Dialysis, LLC and LeEtta Brewer, by and through undersigned counsel, hereby request an opportunity to present oral argument before this Court.

Dated this _____ day of June, 2015.

Respectfully submitted,

_____
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## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 8,277 words and 42,568 characters. I have relied on the word and character count of our word processing system used to prepare this Brief. The original Appellee's Brief and all copies are in compliance with this rule.

Dated this _____ day of June, 2015.

_____

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**CERTIFICATE OF SERVICE**

I, Gregory J. Bernard, attorney for Defendants in the above-entitled matter, do hereby certify that a true and correct copy of the within and foregoing *Appellee's Brief* was e-mailed to:

Jon J. LaFleur
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on the _____ day of June, 2015.

_____

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

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**APPEAL # 27298**

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**VERA GOOD LANCE,**

**Plaintiff,**

**v.**

**BLACK HILLS DIALYSIS, LLC, and LEETTA BREWER,**

**Defendants.**

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# APPELLANT'S REPLY BRIEF

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**THE HONORABLE ROBERT A. MANDEL**

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**The Order granting petition for allowance of appeal from intermediate order was granted on February 10, 2105**.

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## PRELIMINARY STATEMENT

Throughout Appellant's Brief, Appellant Vera Good Lance and her daughter Hilda Kills Small will be referred to as "Appellant," or as "Good Lance," (in Appellee's Brief, Appellant is referred to as "Kills Small," referring to Good Lance's daughter who has been substituted as plaintiff after Good Lance's death during the pendency of the proceedings). Appellee/Defendants Black Hills Dialysis, LLC and LeAtta Brewer, will be referred to as either "Appellees," or as "BH Dialysis" or "Brewer."

Portions of the hearing record and proceeding transcripts that have been reproduced are referenced below as ("HR ___:___"). Portions of the Appellant's Appendix that have been attached and are referenced in this Brief shall be referenced as ("App. ____.")

## ARGUMENT

State law can be simply reduced to its most salient point – a standing order by a presiding circuit court judge cannot supersede or establish venue contrary to South Dakota statutes and case law. Nebraska Elec. Generation & Transmission Co-op., Inc. v. Markus, 90 S.D. 238, 245, n. 2, 241 N.W.2d 142, 146 (1976); and SDCL §§ 15-5-8 and 15-5-10. Further, that "[i]n the absence of statutory grounds for a change of venue, the initial choice of the plaintiff is conclusive." Am. Adver. Co. v. State By & Through Dep't of Transp., 280 N.W.2d 93, 95 (S.D. 1979).

The position of Black Hills Dialysis and Brewer in their Brief sets forth

their position throughout, and might be summed up as a "fix" in search of a problem**.** There are and have been no problems set forth in this record which should cause this Court or any other to support a standing order by a Circuit Court judge which overrides the venue statutes and South Dakota case law, and judicially creates an exception to the Legislature's establishment of venue by statute in this and other similar cases in the Seventh Circuit.

As this Court has long held, "[j]udges should refrain from negating a legislative act unless it is demanded by manifest necessity." Faircloth v. Raven Indus., Inc., 2000 S.D. 158, ¶ 10, 620 N.W.2d 198, 202. The Standing Order by the then-Presiding Judge of the Seventh Circuit did not establish such "manifest necessity" in the Standing Order, but instead reacted politically to an eight year old and equally-political statement by the then-Oglala Sioux Tribal President John Steele. Those kinds of political tit-for-tat acts are beneath the dignity of the South Dakota courts, and further are indifferent to South Dakota law. It should be noted that if a trial court acts, utilizing its discretion, to sidestep South Dakota statutes, the use of such discretion "is limited by the principle that the determination must be made upon a sufficient factual showing to justify the court's exercise of discretion." Putnam Ranches, Inc. v. O'Neill Prod. Credit Ass'n, 271 N.W.2d 856, 858 (S.D. 1978). There was no such factual showing in this case, and even if there was, *arguendo*, it is wrong under the law where there was no timely or proper challenge by defendants to the venue chosen by plaintiff.

Nor is there sufficient ground upon which to permanently divest an entire county composed mostly of American Indians of the opportunity to sit on and participate in a jury, or more importantly to deprive a Shannon County plaintiff of her right to choose to have her court case heard by a jury from the county in which she resides and where the injury occurred. Citizens of Shannon County are either full residents of South Dakota, or they are not.

BH Dialysis and Brewer suggest that the curtain of the law be lifted and repositioned to exclude Shannon County plaintiffs from having a jury from their county sit on their otherwise properly-venued trials – interestingly, the same Shannon County which constitutes Appellee's business customer base. Shannon County residents are apparently adequate as business customers, but inadequate as jurors.

Appellees suggest that in spite of longstanding South Dakota statutes establishing venue, of which BH Dialysis had notice when it began doing business in Shannon County, it does not trust Shannon County juries to sit on its case, and by Shannon County jurors being seated, it would deprive Appellees of equal protection of the law. Conversely, in the subtext of its argument, BH Dialysis suggests that overriding the venue statutes and making an exception to exclude Shannon County jurors would not deprive Shannon County residents, and more specifically Good Lance, of equal protection of the law.

In the distorted constitutional and legal view of BH Dialysis, there is a hierarchical gradient of statutory rights and protections of the law and the American Indian residents of Shannon County must assume their natural position at the bottom of that hierarchy – contrary to the venue statutes and the specific failure of BH Dialysis and Brewer to timely and properly challenge venue.

This is a view that the South Dakota Supreme Court has never shared in the past, because it has always understood the unique and dual citizenship role of American Indian citizens of South Dakota, and this Court has done its best to carefully maintain American Indians as South Dakota citizens with full rights in our state, even if they also happen to have political membership in a South Dakota Indian tribe. Morton v. Mancari, 417 U.S. 535, 554, 94 S. Ct. 2474, 2484, 41 L. Ed. 2d 290 (1974).

BH Dialysis cites to a South Dakota Supreme Court for the proposition that "[i]t is well established that state officials have no jurisdiction on Indian reservations, either to serve process on an enrolled Indian or to enforce a state judgment." Appellee's Brief, at 7; citing Bradley v. Deloria, 1998 S.D. 129, ¶ 5, 587 N.W.2d 591, 593 (citations omitted). However, BH Dialysis omits the Court's

holding which followed in the same case, holding that process is effective on a

reservation if service complies with SDCL § 15-6-4(c):

> The integrity of tribal self-government is preserved by limiting state intrusion to service of process utilizing those statutes that provide for out-of-state service. In this way, Indians who have injured nonreservation citizens of this state would not be protected from actions filed in state courts having proper subject matter and personal jurisdiction simply because they returned to the reservation. Thus, process is effective on a reservation for an action in state court provided the service complies with the requirements of SDCL 15-6-4(c).

Bradley, at ¶ 8.

The other pertinent South Dakota statute, in addition to 15-6-4(c), sets forth that "[s]ervice of process upon the persons subject to § 15-7-2 may be made by service outside this state in the same manner provided for service within this state with the same force and effect as though service had been made within this state." SDCL § 15-7-3. As such, even if the Circuit Court had found there was a real problem seating Shannon County jurors, which has not been established either in the language of the Standing Order itself, nor anywhere in the record thus far, the Circuit Court may first attempt to serve Shannon County jurors in the same manner, and with the same penalties it would enforce upon any other noncompliant, properly-summonsed resident. Active, standing warrants for contempt of court pursuant to SDCL § 16-13-45 might also be available to law enforcement as further penalty, if reservation residents fail to comply with a jury

summons and are later found off the reservation.[1] This is one of a multitude of potential mechanisms for ensuring adequate juror numbers even if BH Dialysis and Brewer, *arguendo*, had demonstrated factually there was a problem that required being fixed, which they have not. The Circuit Court and the clerk of courts also have another device available, pursuant to SDCL § 16-13-42, wherein the clerk of courts may summons additional jurors from the master list compiled by the clerk of courts, if an inadequate number of jurors is present.

BH Dialysis also asserts that "[t]ribal members residing in Indian country are generally not subject to state statutory requirements and cannot be compelled to appear as jurors." Appellee's Brief, at 7; citing State v. Aesoph, 2002 S.D. 71, 647 N.W.2d 743, 758, n.l3. In fact, as set forth above, with further analysis, that is not true. It is worth noting in Aesoph that pursuant to SDCL § 16-13-43, when the trial court in that case ran out of jurors because there was traditionally a high no-show rate from the Lower Brule Reservation (not established in this case on the record), this Court noted that "[t]he trial court, in response to Aesoph's objection,

[1] "If any person summoned to appear as a grand juror or petit juror fails, refuses, or neglects to appear, or willfully fails to complete and return the jury questionnaire, or if having appeared, fails, without good case, to attend as required by the court, such person is guilty of contempt of the court and may be fined by the court in any sum not less than fifty nor more than five hundred dollars. If any person, when a second order of attachment is issued, neglects or refuses to appear, such person may be fined as above provided and imprisoned by the court not longer than ten days in the county jail." SDCL § 16-13-45.

ordered another group of additional prospective jurors be contacted, including residents from Lower Brule. Three of the individuals in this second group of additional jurors actually served on the panel." Aesoph, at ¶ 44, 758. This is further demonstration of solutions available to trial courts that are considerably less severe than the complete preclusion of the jury pool of an entire county, without any demonstration at all of a problem, and further based upon prior trials successfully held either in Shannon County or in Fall River County with Shannon County jurors. The instances of successful trials using Shannon County jurors, in Appellant's Opening Brief, were not refuted at all by Appellees.

In its Brief, Appellees assert that Good Lance has no standing to ask this Court to vacate the Standing Order. However, she has been injured by this Standing Order, and does have standing. As this Court has established,

> Standing requires that a party allege (1) a personal injury in fact, (2) a violation of his or her own, not a third-party's rights, (3) that the injury falls within the zone of interests protected by the constitutional guarantee involved, (4) that the injury is traceable to the challenged act, and (5) that the courts can grant redress for the injury.

Sioux Falls Argus Leader v. Miller, 2000 S.D. 63, ¶ 6, 610 N.W.2d 76, 80; citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472, 74, 102 S.Ct. 752, 758, 59, 70 L.Ed.2d 700 (1982). Very simply, in the trial court and on appeal Good Lance has properly raised and

alleged that she has been injured by the Standing Order and that it has violated her rights and not the rights of another, that the Standing Order and its operation to deny Good Lance the right to a jury trial utilizing jurors from Shannon County falls within the zone of interests protected by the constitutional guarantee involved, Good Lance's injury is traceable to the Standing Order, and this Court can grant redress for her injury either by specifically exempting her from the operation of this Standing Order or if it offends South Dakota statutes and the constitution, to vacate the entire Standing Order by the former Presiding Judge. This sets forth adequate standing.

Since this Court has allowed an intermediate appeal, Good Lance believes there is a "plain, speedy and adequate remedy in the ordinary course of law." Id., at ¶ 4, 80; citing SDCL § 21-30-2. If this Court deems it necessary, it has the constitutional and statutory authority to issue a writ of prohibition, because Good Lance is "beneficially interested," but the ordinary course of the law appears to be adequate here, because this Court has quickly taken up this issue. Id.

Appellees go through a discussion of SDCL § 16-13-10.1, but this is misplaced and skirts the preliminary analysis of proper venue under South Dakota law. One could hardly argue with this statute as it is written, but it is simply inapplicable to the issue before this Court involving the Standing Order. As previously discussed, the assertion that "if the circuit court's Order Denying

Plaintiff's Motion to Summon Shannon County Jurors for Trial is reversed, compulsory attendance of jurors will be nonexistent," is simply not true based upon the law, nor upon prior, successful trials in Shannon County. Appellee's Brief, at 7. There is, at worst, concurrent jurisdiction and a means to summons jurors or add to the summoned jurors if an insufficient amount fail to show up, and a means to be able to hail in Shannon County jurors by asking the Oglala Sioux Tribal Courts and law enforcement on the reservation to serve the jury summonses, or to later penalize jurors who fail to appear upon the summonses. See, generally, arguments *Supra.* at pages 4-5. The issue is not jurisdiction, but rather whether service of process, and particularly jury summonses, is effective on a reservation. It is, if service complies with SDCL § 15-6-4(c). The days are long past when the specter of "jurisdiction" can be waved about in the manner it has here. Appellees suddenly appear to be the greatest advocates of tribal sovereignty and tribal jurisdiction in their Brief, as a way to attempt to get their Fall River County jury, but it needs to be pointed out here that BH Dialysis knowingly chose to conduct business in Shannon County and was apparently willing to do so with all the risks that might entail, including the risk that it could be subject to a Shannon County jury in Circuit Court. It was apparently not disturbed enough by this possibility to timely challenge venue, as South Dakota law requires.

Appellees then highlight a portion of the Standing Order, that "[t]his Order

allows consideration of the fact that a state court judge lacks jurisdiction in tribal court to summon and seat the jury panel and lacks the inherent authority to invoke statutory procedures necessary to ensure a fair trial." Appellee's Brief, at 10. In fact, this analysis in the Standing Order is just inaccurate under South Dakota law. "Jurisdiction" becomes the tricky phrase here, because if one were to only apply the jurisdiction analysis, it then ends up in a different place than it does with regard to proper juror summons and service of process on the reservation. Because the Seventh Circuit has the ability to summons jurors under SDCL § 15-6-4(c), it has the ability to hold jurors accountable for contempt of court if they fail to appear, it has the ability to have the Shannon County Sheriff serve summonses on Shannon County residents, it has the ability to request that the Oglala Sioux Tribe's law enforcement and tribal court assist in serving and enforcing the summonses, and the clerk of courts has the ability to call additional jurors from Shannon County if an insufficient number show up. Furthermore, it cannot be assumed that the majority of those called are also tribal members, as the actual ratio of tribal members to whites in the jury pool is closer than the census makes it appear. The Circuit Court also has the power to summons whites who reside in Shannon County and who may be on the jury panel called.

The important thing to remember here is that many trials have been

successfully held in the past both in Shannon County and in Fall River County utilizing Shannon County jurors. See generally, Appellant's Opening Brief. Again, there was no problem that the Circuit Court needed to suddenly fix in late 2009 when the Standing Order was issued – a full eight years after the purported cause of that fix was cited. In fact, Appellees paint themselves into a corner, arguing that Nevada v. Hicks has no effect, was *dicta* (as articulated by Judge Mandel), and was specifically distinguished by this Court in State v. Cummings, 2004 S.D. 56, 679 N.W.2d 484; while supporting Judge Davis' rationale regarding the political statement in the form of an executive order by Oglala Sioux Tribal President Steele questioning Nevada v. Hicks and made in reaction to it eight years prior. Appellee's Brief, at 12-13. In fact, if that reading is accurate, this Court and President Steele were not at odds after all.

More realistically, Shannon County is not some dark hole within which rationality and the rule of law disappears, and this state has made too many strides in tribal-state relations to automatically assume that. As we know from watching the United States Congress and our Legislature, one cannot stop political figures from the United States, South Dakota, or an Indian tribe from using their offices to say just about anything for political gain with their particular constituencies, but there is still the rule of law and both the South Dakota Supreme Court and the Oglala Sioux Tribe's courts, including its law-trained Supreme Court, have been

very good about maintaining the rule of law above and beyond political hyperbole.[2]

As this Court has noted in the past, in a criminal case of longstanding precedent, where the record in that case reflected that the Standing Rock Sioux Tribe had not enacted into their tribal code any provisions for extradition (while the Oglala Sioux Tribe has), this Court held that "the trial court had jurisdiction over Spotted Horse for the purpose of trial." State v. Spotted Horse, 462 N.W.2d 463, 468 (S.D. 1990). In that case, a reservation resident had committed a crime off the reservation and had fled to the reservation, but this Court found it had jurisdiction over him for the purpose of criminal prosecution. That is not dissimilar to this situation. If there is valid service of process of juror summonses and a Shannon County resident did not show up pursuant to the summons, that person will have committed contempt of court within the state's jurisdiction.

Appellees then argue that "structural infirmity of Kills Small's proposed jury selection process violates defendants' constitutional and statutory rights to a

[2]The Oglala Sioux Tribe's Supreme Court has shown its willingness to follow the rule of law when it affirmed a tribal court order requiring a fugitive from South Dakota (tribal member Alex Richards) to be extradited to South Dakota pursuant to the Tribe's extradition law, in a decision that was unpopular politically. It should be presumed that the Oglala Sioux Tribe and its courts will follow its own laws in this case as well, as previously referenced in Appellant's Opening Brief.

fair and impartial jury." Appellee's Brief, at 14-15. The reasoning in this section is a little sketchy, and Appellees go all the way to Montana to try to make it fit, but at its core, it appears to suggest that allowing a Shannon County jury to hear a Shannon County case properly venued under state law and never timely challenged by the defendants violates a fundamental right to an impartial jury. This is an argument that is simply not ripe, as we do not yet know if in fact a Shannon County jury can be called and seated, as the trial court has completely preempted the right of Good Lance to have any jurors from Shannon County, pursuant to the Standing Order. Boever v. S. Dakota Bd. of Accountancy, 526 N.W.2d 747, 750 (S.D. 1995); citing Meadows of West Memphis v. City of West Memphis, 800 F.2d 212, 214 (8th Cir.1986). ("Ripeness involves the timing of judicial review and the principle that '[j]udicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote. [Citations omitted.] Courts should not render advisory opinions or decide moot theoretical questions when the future shows no indication of the invasion of a right. . . . Even if a court has jurisdiction to decide the constitutionality of the law, it should decline to do so if the issue is so premature that the court would have to speculate as to the presence of a real injury.") In this case, Appellees cannot injure the actual rights of Good Lance by depriving her of a jury from Shannon County when she has otherwise complied

with South Dakota law, by alleging a possible future harm without any factual basis in the record for that purported and speculative harm.

Appellees next assert a hypothetical violation of their equal protection and due process rights. They allege that "they are entitled to the benefit of the statutory protections in the jury selection statutes designed to ensure a fair and impartial jury." But how have they been deprived? Good Lance properly followed the state venue statutes. At trial the Appellees' attorneys may conduct *voir dire* and seat the best jury it can. As this Court has previously said, the jury statutes cited and argued by Appellees must give way to the venue statutes. Nebraska Elec. Generation & Transmission Co-op., Inc. v. Markus, 90 S.D. 238, 245, n. 2, 241 N.W.2d 142, 146 (1976)("jurisdiction, as well as venue, is fixed by law and not by court rule designating terms of court or by statutes relating to jury selection.")

Again, with regard to Appellee's due process argument, they are arguing a speculative and "hypothetical" future deprivation that is not yet ripe, potentially occurring in the future because "the Defendants are at risk to pay a substantial sum of money if a jury finds them liable to the Plaintiff and awards damages." Appellee's Brief, at 20-21. This is reaching and preposterous to the extreme, and states a risk that defendants are subject to no matter where it is tried. If a Shannon County jury is seated, which is very likely based upon past actual trials, and a jury finds for the plaintiff and against defendant, under normal circumstances, a losing

party could not then allege a deprivation of due process. There are no known cases in South Dakota to that effect. That presumes the worst – that the Appellees will not be able to examine the Shannon County jury, it could not conduct meaningful *voir dire*, that defendants would otherwise have their hands completely tied and not be able to participate in such a trial, and that Judge Mandel would oversee and apparently cooperate in this possible deprivation in the future. This is simply irrational speculation of the highest order.

Lastly, Appellees roll out the race card, when in fact the very premise of their argument is the actual problem – that a Shannon County jury is not capable of wanting to participate or of fairly hearing and trying the facts at trial – when there is no evidence in the record indicating this has been, or will be, the case. In 2015, that subtextual argument must be refuted, in the interest of the law of South Dakota and the future of our society in this state.

## CONCLUSION

For all of the foregoing reasons, as well as the Appellant's Opening Brief, Appellant urges this Court to remand for trial before a Shannon County jury and vacate the Standing Order of 2009, or at minium, rule that this Circuit Court Standing Order cannot contravene the South Dakota venue statutes.

Dated this 19th day of June, 2015.

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CERTIFICATE OF SERVICE

The undersigned Attorney for Appellant, hereby certifies that on the 19th day of June, 2015, a true and correct copy of Appellant's Reply Brief, in the above-captioned matter, was e-mailed to:

Gregory J. Bernard
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and the original and two (2) copies of Appellant's Reply Brief were mailed by first class mail to Ms. Shirley Jameson-Fergel, Clerk of the Supreme Court, 500 East Capitol, Pierre, South Dakota 57501.

/s/ Charles Abourezk

## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A–66(b)(2), counsel for the Appellant does hereby submit the following:

The foregoing brief is 16 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word processor used to prepare this brief indicates there are a total of 19310 characters in the body of the brief. This Brief was prepared with WordPerfect X7 Microsoft Office Professional.

/s/ Charles Abourezk