

WEDNESDAY, OCTOBER 7, 2009
10:00 A.M.

NO. 2

#25162

DELLAS COLE and MARGIE COLE,
Plaintiffs and Appellants,

vs.

WELLMARK OF SOUTH DAKOTA, INC. and
DELLA TSCHETTER INSURANCE,
Defendants and Appellees.

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(FOR APPELLANT)

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(FOR APPELLEE DELLA TSCHETTER INS)

The Honorable David R. Gienapp
Third Judicial Circuit
Brookings County

(CIV 06-479)

STATEMENT OF ISSUES

I. SCOPE OF REVIEW AND DOCTRINES OF LAW INVOKED HEREIN

- (1) AMBIGUITY: *Binder v. General Am. Life Ins. Co.*, 282 N.W. 521, 523 (S.D. 1938)
- (2) APPARENT AUTHORITY / OSTENSIBLE AGENCY: *Hall Family Living Trust ex rel. Hall v. Mutual Service Life Ins. Co.*, 623 N.W.2d 32, 35 (N.D. 2001)
- (3) DUTY: *Minneapolis Threshing-Mach. Co. v. Darnall*, 83 N.W. 266, 267 (S.D. 1900)
- (4) DUTY: *Moore v. Kluthe & Lane Insurance Agency, Inc.*, 234 N.W.2d 260, 265 (S.D. 1975)

II. DO THE FACTS TAKEN IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS GIVE RISE TO ANY DUTY OR DUTIES?

The Circuit Court held in the negative that no duty existed.

- (1) *Grandpre v. Northwestern Nat. Life Ins. Co.*, 261 N.W.2d 804, 806-09 (S.D. 1977)
- (2) *Schliep v. Commercial Casualty Insurance Co.*, 254 N.W. 618, 620, 622 (Minn. 1934) (cited by *Miller, Infra.*)
- (3) *Usher v. Allstate Ins. Co.*, 218 N.W.2d 201, 204-6 (Minn. 1974) (cited by *Schliep, Supra.*)
- (4) *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841, 843 (S.D. 1990)

III. TORT AND EQUITY - ARE THERE TORTS AND EQUITABLE REMEDIES BASED ON THE DUTIES (ARGUMENT II) COGNIZABLE HEREIN TOGETHER WITH CONTRACT / IMPLIED CONTRACT?

The Circuit Court did not specifically address this point but found there were no torts or equitable remedies that were cognizable.

- (1) *French v. Dell Rapids Community Hosp., Inc.*, 432 N.W.2d 285, 287-88 (S.D., 1988)
- (2) *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841, 843 (S.D. 1990)
- (3) *Usher v. Allstate Ins. Co.*, 218 N.W.2d 201, 204-6 (Minn. 1974)